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BROWNFIELDS REDEVELOPMENT INITIATIVES: FEDERAL AND SELECTED STATE DEVELOPMENTS

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Introduction

"Brownfields" are defined generally as abandoned, idle or underutilized industrial or commercial properties, mostly in urban areas, where expansion or redevelopment is hindered due to the existence or suspicion of historical environmental contamination.

Various policies, regulations and laws have been evolving since the early 1990s, at both federal and state levels, to address the concerns of those seeking to invest in, finance and undertake such redevelopment projects, and to foster the recycling of older industrial sites rather than development of unsullied "greenfields."

This amalgam of programs, legislation and initiatives has accelerated under the general rubric of "Brownfields Redevelopment." The federal government, and a majority of states, have assembled Brownfields programs. These materials address the federal initiatives, and those of seven representative states: California, Massachusetts, New Jersey, New York, Oregon, Pennsylvania and Texas.

I. Federal Brownfields Initiatives

A. 2002 Superfund Law Amendments

- Until 2002, all of the components of the federal Brownfields program other than the Taxpayer Relief Act (see below) were based only on limited regulatory and policy initiatives, because Congress had failed to enact Superfund legislation that either authorized Brownfields incentives or provided the types of CERCLA liability protections critical to the success of many established state programs, several of which are summarized below.

Congress finally acted to address certain key Brownfield concepts in Title II of H.R. 2869, the Small Business Liability Relief and Brownfields Revitalization Act, signed into law on January 11, 2002 and enacted as Public Law 107-118.

- The Brownfields component of the 2002 legislation:

  a. codified EPA's existing Brownfield program by authorizing "revitalization funding" for grants and loans (see section B below),

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b. articulated a new exemption from CERCLA liability for "contiguous property owners" whose neighbors cause pollution that travels onto their properties (see section H below),

c. established another new exception from liability for the so-called "Bona Fide Prospective Purchaser" ("BFPP") who knowingly acquires contaminated property but who complies with certain requirements (see section D below),

d. created a new "windfall lien" that EPA may assert against a BFPP where the government has incurred uncollected response costs (see section D below),

e. further defined the extent of due diligence that a buyer must undertake in order to be entitled to the CERCLA "innocent purchaser" defense (see section C below), and

f. requires that where so requested by a state, EPA is to generally refrain from adding a property to the list of federal Superfund sites (known as the National Priority List or "NPL") where a party is voluntarily pursuing cleanup of the site under a state voluntary cleanup program.

B. Brownfields Economic Redevelopment Initiatives

- On an annual basis EPA awards a variety of project-specific grants and loans to encourage businesses and localities to redevelop brownfields, including assessment and cleanup grants, revolving loan fund grants, and job training programs.

- Assessment grants are awarded primarily to municipalities to inventory and characterize brownfields sites and to test cleanup and redevelopment models. The grants are typically up to $200,000, but up to $350,000 may be requested. The two-year projects are to identify creative and cost-effective means to clean up contaminated properties and restore them to productive use. Since the inception of the program, the EPA has awarded at least 1,895 assessment grants for a total of over $447.6 million.

- Cleanup grants of up to $200,000, over two years, are also available to eligible local governmental authorities seeking to clean up brownfield sites. No single entity may apply for cleanup grants at more than three sites. Cleanup grants are conditioned upon the grantee sharing twenty percent of the costs, which can be accomplished through contribution of money, labor, materials or services. So far, EPA has awarded 838 cleanup grants totaling $157.6 million.

- The Brownfields Revolving Loan Fund (RLF) allows communities to provide funds to public and private entities for Brownfields cleanups. Groups can apply for direct funds up to $1 million over five years. Sixty percent of the award must be used to capitalize a revolving loan. To date, the EPA has awarded 292 revolving loan fund grants totaling over $286.1 million.

- On March 20, 2009, EPA announced $211 million of funding under the American Recovery and Reinvestment Act ("Recovery Act"), $5 million of which EPA allocated to brownfields redevelopment to provide job training and facilitate job

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creation related to the assessment, remediation or preparation of brownfields sites for sustainable reuse. EPA undertook to award 10-12 cooperative agreements, of up to $500,000 each in value.

- On April 10, 2009, the EPA published a notice in the Federal Register announcing the availability of $40 million from the Recovery Act to supplement RLF capitalization grants previously awarded competitively under CERCLA Section 104(K)(3). EPA is to award the funds to the RLF grantees who demonstrate an ability to deliver programmatic results by making at least one loan or subgrant and who have effectively utilized existing available loan funds. Applications were due by May 1, 2009. There was no maximum amount of supplemental funding that a grantee could request. In selecting grantees, priority consideration is to be given to funding those grantees who demonstrate that they have shovel-ready projects that will expeditiously result in job creation and who can clearly demonstrate how they will track and measure their progress in creating the jobs associated with the loans or subgrants.

- On April 15, 2009, EPA announced an additional $600 million in new funding through the Recovery Act. This money is to be allocated for Superfund sites in order to accelerate cleanups in progress and to fund new projects. Three percent of these funds may be used for management and oversight purposes. In selecting which sites would receive Recovery Act funding, EPA has thus far looked to National Priorities List sites with under funded construction projects or projects that could benefit from additional funding.

- On May 8, 2009, EPA announced the availability of $111.9 million in brownfields cleanup funds from a combination of Recovery Act funding and EPA Brownfields general program funding. 389 grants were provided to 252 applicants in 46 states, 4 tribes, and 2 U.S. Territories, who were to share $37.3 million from the Recovery Act and $74.6 million from the EPA Brownfield program, as follows:

    a. 253 assessment grants: $66.8 million

    b. 116 cleanup grants: $22.5 million

    c. 20 revolving loan fund grants: $22.6 million

- On August 4, 2009 EPA announced the availability of $55 million in supplemental funding for brownfields cleanup initiatives, $42 million of which is Recovery Act funding.

- Also on August 4, 2009, EPA announced the availability of $6.8 million of Recovery Act funding allocated to brownfields cleanup job training programs, to provide up to $500,000 each to non-profit organizations and government entities in 14 communities and 8 states.

- On April 19, 2010, EPA announced the availability of $78.9 million in brownfields cleanup funds to be allocated among 304 grants and 252 applicants in 40 states, 4 tribes and one U.S. Territory, who were to share the funds as follows:

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a. 188 assessment grants: $42.56 million

b. 99 cleanup grants: $19.36 million

c. 17 revolving loan fund grants: $17 million

- On July 29, 2010, EPA announced an additional $16 million to be allocated to the Brownfields Program, providing supplemental funding to 27 states and local governments for cleanup activities, redevelopments projects and the creation of jobs for individuals living near brownfield sites.

- Job training pilot programs are funded by grants of up to $200,000, over two years, to local government authorities and community organizations. The grants are used to teach environmental cleanup job skills to individuals living in low-income areas near brownfields sites. The goal is for those who complete the program to work for environmental firms or organizations.

- On April 10, 2010, EPA announced the award of $2.4 million in job training grants to 12 governmental entities and non-profit organizations in 10 states: California, Louisiana, Massachusetts, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina and Washington. Since 1998, EPA has awarded over $33 million in brownfields job training grants, providing more than 5,300 individuals with training and placing 3,400 individuals in full-time employment in the environmental field.

- On July 29, 2010, EPA announced the award of $16 million in supplemental funding for cleanup efforts to communities representing 27 state or local governments.

- On October 15, 2010, EPA announced the award of $4 million in assistance to 23 communities, many in economically disadvantage areas, to develop area-wide plans for the reuse of brownfield properties.

- On June 6, 2011, EPA announced the award of more than $76 million in 214 grants to recipients in more than 40 states and three tribes through the Assessment, Revolving Loan Fund and Cleanup Grant Programs.

- On July 12, 2011, EPA provided $6.2 million in Environmental Workforce Development and Job Training grants to recruit, train and place local, unemployed, predominently low-income and minority, residents in environmentally-impacted communities. 21 communities received up to $300,000 each.

- On May 24, 2012, EPA announced the award of $69.3 million in grants to 245 grantees including tribes and communities in 39 states under the Assessment, Revolving Loan Fund, Cleanup and Revolving Loan Fund Supplemental grants.

- On May 30, 2012, EPA announced the award of $3.8 million in grants through new "Multi-Purpose" grants. The pilot grants are intended to help recipients overcome obstacles with conducting assessment and cleanup activities, and to help eliminate delays that can occur when moving from assessment to cleanup when funding is not secure.

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- On June 21, 2012, EPA announced the latest award of $3 million to 15 grantees through the Environmental Workforce Development and Job Training program.

- As of June 2012, the Environmental Workforce Development and Job Training program grants have resulted in 10,300 individuals completing training and approximately 7,300 individuals obtaining employment in the environmental field, with an average starting hourly wage of $14.12. From the inception of the program until June 2012, EPA has awarded approximately $38 million in grants under the program.

- Under H.R. 2361, signed into law on August 2, 2005 as P.L. 109-54, Congress provided that fiscal year 2006 Brownfield grants and loans could be awarded to parties who would qualify as BFPPs except that they had acquired contaminated property prior to enactment of the 2002 Superfund law amendments.

- Under H.R. 3, signed into law on August 10, 2005 as P.L. 109-59, Congress provided, as a general provision to brownfields revitalization funding, that brownfield grants and loans could be awarded to parties who would qualify as BFPPs except that they had acquired contaminated property prior to enactment of the 2002 Superfund law amendments.

- On October 28, 2005, EPA issued a notice (70 Fed. Reg. 62108) that loan grantees under the RLF could use those funds to provide discounted loans to certain other qualified parties (including states, local authorities and non-profits), as had been allowed under the Brownfield Cleanup Revolving Loan Fund (BCRLF) that pre-dated the 2002 Superfund law amendments.

- In addition, in December 2005, EPA announced that it would accept requests for Brownfield Revolving Loan Fund Grant supplemental funding (70 Fed. Reg. 72114). Eligible recipients must have: (1) made at least one loan or subgrant and significantly depleted existing loan or subgrant funds; (2) demonstrated the need for supplemental funding, including the numbers of sites and communities that may benefit from supplemental funding; (3) demonstrated the ability to administer and "revolve" the grant, and administer subgrants or loans; (4) demonstrated the ability to use the grant to address funding gaps for cleanup; and (5) community benefit from past and potential loans or subgrants**.** Since 2006, EPA has awarded 37 state and local governments supplemental grants, totaling over 12.7 million.

- Under CERCLA §128(a), added by the 2002 Superfund law amendments, Congress authorized an appropriation of $50 million to fund grants for state and tribal response programs. Since the inception of the program, EPA has awarded over $32 million in CERCLA §128(a) grants to more than 60 tribal nations. For example, in 2006, EPA announced two $300,000 grant opportunities for tribal nations, one to fund response programs focused on brownfields redevelopment, and one to fund assistance related to methamphetamine-contaminated brownfield sites.

- In the summer of 2008, pursuant to the 2002 Small Business Liability Relief and Brownfields Revitalization Act, EPA released the final fiscal year 2009 Brownfields Assessment, Revolving Loan Fund and Cleanup Grant ("ARC") Guidelines. Most

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notably, the changes in the ARC guidelines from previous years include: creating a separate guidance booklet for each grant type; creation of Assessment Coalitions which allow eligible entities of three or more to request up to $1 million for community-wide assessments; reorganization of the ranking criteria selections into four concise criteria; and new proposal requirements including completion of Phase II environmental assessment reports at time of Cleanup grant proposal submission, documentation of community notification and response to public comment for EPA Brownfields grant proposal submission, and inclusion of letters of support from all community-based organizations identified in the proposal. Final draft guidelines and Request for Proposals were issued in August 2008. Proposed guidelines for fiscal year 2011 were published in August 2010, with a deadline of October 15, 2010.

- In May 2008, EPA announced the availability of a grant for financial assistance to support a non-federal entity to be the primary non-federal sponsor of three National Brownfields Conferences over a five-year period, beginning with the November 2009 conference held in New Orleans. The "Brownfields 2009-2013 Annual Conference" provides training, research and technical assistance in communities to facilitate the inventory of brownfield sites, site assessments and remediation of brownfield sites, community involvement, and site preparation. The total estimated funding for the conference is $1.2 million, awarded as one grant to be funded incrementally over the five-year period. EPA capped the total funding for the fiscal year 2008 at $400,000, with the potential to award additional funds each year.

- In August 2008, EPA selected International City/County Management Association (ICMA) as the new non-federal co-sponsor for the National Brownfields Conferences.

- Also in 2008, EPA announced the establishment of the Brownfields Sustainability Pilot, for over $500,000 in technical assistance funding will be provided to 16 pilot projects. Each project was to receive between $20,000 and $50,000 to support activities such as the reuse and recycling of construction and demolition materials, green building and infrastructure design, energy efficiency, water conservation, renewable energy development, and native landscaping. EPA's goal was that these pilot projects demonstrate that these sustainability practices can be implemented by other communities across the country.

- In April 2009, EPA published a fact sheet entitled "EPA Brownfields Grants, CERCLA Liability, and All Appropriate Inquiries," primarily aimed at confirming that brownfield grant applicants must demonstrate that they qualify for liability protection, and that they have undertaken appropriate inquiry. This fact sheet provides an overview of the All Appropriate Inquiries rule and confirms that EPA recognizes two ASTM standards – ASTM E1527-05 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" and ASTM E2247-08 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property" – in addition to the standards and practices set forth at 40 CFR Part 312.

- In May 2010, EPA introduced the Brownfields Area-Wide Planning Pilot Program ("BF AWP Program"), which provides EPA grants and contract support for area-wide revitalization. The program is directed at brownfields-impacted areas such as

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neighborhoods, districts, city blocks or corridors. The program's focus is to facilitate community involvement in area-wide planning of brownfields assessment, cleanup and reuse of brownfields properties. Each participant may receive up to $175,000, which can be awarded through either grant funding, direct EPA contract support or a combination of both. The deadline for initial proposals was June 1, 2010.

- Twenty-three communities were selected for the 2010-2012 BF AWP Program. See http://www.epa.gov/oswer/docs/grants/epa-oswer-oblr-12-06.pdf.

C. <u>Innocent Purchaser Defense: Definition of All Appropriate Inquiry</u>

- When Congress amended the Superfund law in 1986, it articulated the general elements of due diligence that a purchaser must undertake to be entitled to raise the CERCLA liability defense commonly known as the "innocent purchaser" or "innocent landowner" defense.

- Congress did so under CERCLA §101(35)(B) by generally defining the "appropriate inquiry" that a buyer had to make prior to property acquisition to show that it had fulfilled its due diligence obligation.

- The 2002 Superfund amendments directed that by early 2004, EPA was to establish specific pre-acquisition due diligence standards and practices constituting "all appropriate inquiry" in the case of non-residential properties.

- Until that time, Congress established two sets of standards to be applied in determining appropriate inquiry:

  a. For properties purchased before May 31, 1997 (the date of issuance of the American Society for Testing and Materials ("ASTM") 1997 Phase I environmental site assessment guidelines), the 1986 general definition of appropriate inquiry was still to be applied.

  b. For properties purchased after that date, the ASTM 1997 guidelines were to constitute the minimum requirements of appropriate inquiry.

- As to residential properties, Congress has established that if a property inspection and title search reveal no basis for further investigation, a buyer has satisfied the "appropriate inquiry" requirement of §101(35)(B).

- On March 6, 2003, EPA gave notice (68 Fed. Reg. 10675) of its intent to negotiate proposed standards for conducting "all appropriate inquiry."

- On that date, EPA also issued interim guidance covering the innocent landowner defense, as well as the bona fide prospective purchaser and contiguous property owner exemptions discussed below. EPA refers to the memorandum as the "Common Elements" Guidance.

- In May 2003, EPA established an interim rule (40 C.F.R. §312) that allowed the use of either the ASTM 1997 guidelines, or the ASTM 2000 guidelines, for satisfying "all appropriate inquiry."

- On August 26, 2004, EPA proposed its rules, entitled "Standards and Practices for All Appropriate Inquiries" (69 Fed. Reg. 52542), and announced its intent to hold public meetings during a 60-day public comments period.

- On September 26, 2004, EPA extended the comment period to November 30, 2004.

- On November 1, 2005, EPA issued its final rule at 70 Fed. Reg. 66070.

- Highlights of the final rule:

  a. The rule applies to the innocent landowner defense, as well as to the bona fide prospective purchaser and contiguous property owner exemptions discussed below.

  b. The rule became effective November 1, 2006. Until then, compliance with either the final rule or the interim standards established by Congress satisfied the "all appropriate inquiry" requirements of CERCLA.

  c. Certain aspects of the due diligence tasks must be undertaken by an "environmental professional," generally speaking, a professional engineer, geologist, or similar remediation professional with specific experience in the field. The rule details the requisite qualifications.

  d. The inquiry may include certain information previously collected, but only where the prior inquiry was done for a party similarly seeking to establish a defense or exemption under the new rules, and only where the information was collected or updated within a certain time period (one year or six months, depending on the information).

  e. Information that has to be collected within six months of acquisition includes:

     1. interviews with past and present owners and operators;

     2. searches for recorded cleanup liens;

     3. visual inspections of the target property and adjoining properties; and

     4. certification by the environmental professional.

  f. Results of the professional's inquiry must be memorialized in a written report with an opinion as to whether conditions have been identified indicative of releases or threatened releases of a wide range of contaminants.

  g. The report must include a specific declaration as to the qualifications of the professional to issue the report.

  h. The party commissioning the report, and seeking liability protection, has its own responsibilities to provide certain information to the professional, including any specialized knowledge or experience of the party, the relationship of the contract

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price to the fair market value of the property were it clean, and any commonly known or reasonably ascertainable information about the property.

i. Interviews by the environmental professional must include current and former owners of the target site, and, if necessary, should include current and former facility managers and employees with relevant knowledge of on site practices. Where target properties are abandoned, interviews must include neighbors.

j. The search for historical documents is to cover the entire history of use or improvement of the target site, though the professional is given the discretion to exercise judgment as to how many years the search must cover. Governmental record reviews are compulsory.

k. The environmental professional is to gather information from varied sources in order to accomplish the responsibility of determining commonly known or reasonably ascertainable information, including current or former owners and operators of the site and surrounding properties, governmental authorities, and other appropriate sources.

- In November 2006, EPA issued two brief guidance documents on the appropriate inquiry process. The first, entitled "All Appropriate Inquiries Rule: Reporting Requirements and Suggestions on Report Content," sets forth general suggestions for format and content of reports that are prepared to satisfy the appropriate inquiry rule, and notes that the EPA's suggestions are generally` consistent with ASTM standard. The second, entitled "Assessing Contractor Capabilities for Streamlined Site Investigations," addresses the necessary qualifications of environmental professionals under the new rule.

- Effective March 23, 2009, EPA amended 40 CFR §312 to reference the ATSM E2247-08 "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process for Forestland or Rural Property." The rule permits parties purchasing large tracts of forested lands in excess of 120 acres, or large rural properties, to use E2247-08 as an alternative due diligence standard for meeting CERCLA "all appropriate inquiry" requirements.

- In April 2009, EPA published a fact sheet entitled "EPA Brownfields Grants, CERCLA Liability, and All Appropriate Inquiries," primarily aimed at confirming that brownfield grant applicants must demonstrate that they qualify for liability protection, and that they have undertaken appropriate inquiry. This fact sheet provides an overview of the All Appropriate Inquiries rule and confirms that EPA recognizes two ASTM standards – ASTM E1527-05 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" and ASTM E2247-08 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property" – in addition to the standards and practices set forth at 40 CFR Part 312.

- On March 17, 2010, EPA held a listening session on the All Appropriate Inquiries Final Rule as promulgated on November 1, 2005. The listening session solicited informal comments from parties affected by the rule to measure the success of the

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rule's implementation and for EPA to consider whether a formal comment period would be necessary in the future.

D. Bona Fide Prospective Purchasers and Windfall Liens

1. BFPP

- The 2002 Superfund amendments create a new exemption from CERCLA liability for prospective purchasers who undertake all appropriate due diligence inquiry and find contamination, but purchase property nonetheless after January 11, 2002. The exemption also extends to tenants of such purchasers.

- The exemption was created by adding a new definition (40) to CERCLA §101; namely, the "Bona Fide Prospective Purchaser" or "BFPP".

- Aside from undertaking appropriate inquiry, a purchaser must do the following to qualify as a protected BFPP:

  a. provide all legally required notices concerning the discovery of contamination;

  b. exercise appropriate care concerning the contamination to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental or natural resources exposure to any of the contamination;

  c. cooperate, assist and provide property access to anyone authorized to conduct a cleanup or natural resources restoration at the property;

  d. comply with, and avoid interference with, any land use restrictions or institutional controls established or required concerning the property; and

  e. cooperate with any information request or subpoena by the federal government.

- On March 6, 2003, EPA issued interim guidance on the criteria applicable to the BFPP exemption (the so-called "Common Elements" Guidance referenced above).

- On August 26, 2004, EPA proposed its rules on "Standards and Practices for All Appropriate Inquiries" (referenced above), applicable to the BFPP exemption; and on November 1, 2005, EPA issued its final rule (discussed above).

- In August 2005, Congress extended Brownfield loan and grant eligibility for fiscal year 2006 to parties who would qualify as BFPPs but for their property acquisition date, and then provided for further eligibility in subsequent years. (See Section B above.)

- On January 14, 2009, EPA released a memorandum to the Regions entitled "Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide

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Prospective Purchaser Definition in CERCLA § 101(40) to Tenants." The guidance outlines circumstances in which EPA will refrain from pursuing tenants with indicia of ownership or who are tenants of an owner that is or was a BFPP.

- In December, 2012, EPA released a memorandum to the Regions entitled "Revised Enforcement Guidance Regarding the Treatment of Tenant Under the CERCLA Bona Fide Prospective Purchaser Provision. The guidance supersedes the January 14, 2009 guidance. It reiterates that under CERCLA, a tenant may derive BFPP status from an owner who satisfies the BFPP. However the guidance also provides that where the owner loses its status through no fault of the tenant, EPA may exercise enforcement discretion to continue to treat the tenant as a BFPP if: (1) all disposal of hazardous substances occurred prior to lease execution; (2) the tenant provides legally required notices; (3) the tenant takes reasonable steps with respect to hazardous substance releases; (4) the tenant provides cooperation, assistance and access; (5) the tenant complies with land use restrictions and institutional controls; (6) the tenant complies with information requests and administrative subpoenas; (7) the tenant is not potentially liable for response costs at the facility or "affiliated" with any such person (other than through the lease with the owner); and (8) the tenant does not impede any response action or natural resource restoration. The December 2012 guidance also provides that EPA may treat a tenant as a BFPP even where the owner of the property *never* qualified for BFPP status, provided that the tenant undertook "appropriate inquiry prior to execution of a lease" and satisfies each of the eight criteria listed above

2. <u>Windfall Lien</u>

- The property of the BFPP is, however, subject to imposition of a lien by EPA for unrecovered response costs incurred by EPA at the site.

- The government can only impose the lien, called a "windfall lien," to the extent its response actions have increased the fair market value of the property, and the amount of the lien cannot exceed the increase in fair market value attributable to the government's actions.

- The lien arises when response costs are first incurred by the government, and continues until it is satisfied by sale or other means, or until the government recovers all of its response costs.

- Examples of situations where EPA indicates that it will generally not seek to perfect a windfall lien are:

  a. Where the BFPP acquires the property at fair market value after cleanup;

  b. Where EPA has already recouped adequate response costs from a responsible party;

  c. Where EPA's only expenditures are Brownfield grants or loans, or costs for preliminary assessments or site investigations;

d. Where a non-commercial purchaser will use the property for residential purposes, or when the land will be used for the creation or preservation of a public park, greenway or similar non-profit public use; and

e. Where there is a substantial likelihood that EPA will recover its costs from liable parties.

- In lieu of a windfall lien against the property, the government may, by agreement with the owner, either assert a lien on other property of the owner or accept an alternative form of financial assurance.

- The legislation does not afford the windfall lien priority status or articulate instructions for perfecting the lien.

- EPA 2003 guidance, entitled "Interim Enforcement Discretion Policy Concerning 'Windfall Liens,' Under Section 107(r) of CERCLA," outlines how EPA will exercise enforcement discretion, indicates circumstances where EPA will not pursue a lien, and discusses potential comfort letters and prospective purchasers agreements that may be available to BFPPs.

E. Prospective Purchaser Agreements

1. History of PPAs

- In 1989, EPA issued its initial guidance documenting its willingness to enter into prospective purchaser agreements ("PPAs") with purchasers of contaminated property, exchanging a covenant by EPA not to sue the purchaser under CERCLA in exchange for a purchaser's commitment to proceed with or pay for specific remedial activities. See 54 Fed. Reg. 34235 (Aug. 18, 1989).

- In 1995, EPA determined that it should broaden the circumstances in which it would enter such agreements, and consider accepting less direct benefits to the agency in return for greater benefits to the affected community, such as return of blighted property to productive use. See 60 Fed. Reg. 34792 (July 3, 1995).

- In October 1999, EPA issued a memorandum with updated guidance and revised model documents that helped clarify the definitions and threshold criteria established in 1995 (see below); and in January 2001 issued a further memorandum to assist regional attorneys and program staff in pursuing such agreements.

- Under the 2001 guidance, the following criteria were established to guide EPA staff in considering negotiation of a prospective purchaser agreement for a particular site:

  a. EPA has either completed actions, is in the midst of activities or is considering involvement at the site.

  b. Either EPA will receive a substantial direct benefit, or a reduced direct benefit will be combined with other benefit to the public.

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i. A substantial direct benefit is measured either in terms of cleanup work performed or funds contributed for the performance of cleanup work.

ii. Examples of indirect benefits to the community include measures that serve to substantially reduce the risk posed by the site, creation or retention of jobs, development of abandoned or blighted property, creation of conservation or recreation areas, or provision of community services (such as improved public transportation or infrastructure).

c. Operation or redevelopment of the site will not aggravate or contribute to existing contamination, or interfere with cleanup activities.

d. Operation or redevelopment will not pose a health risk to the community in general or to those who will be present at the site.

e. The prospective purchaser must establish its financial wherewithal to make good on its commitments.

- EPA is also to consider entering into such agreements with operators and lessees of contaminated properties.

- Under the guidance document, the public is to be afforded adequate opportunity to review and comment upon any anticipated PPAs.

- The federal government had completed approximately 160 PPAs from June 1989 through 2010.

- The number of PPAs completed by EPA increased dramatically following the 1995 revised guidance.

2. Impact of BFPP Status under the 2002 Legislation

- On May 31, 2002, EPA issued an initial guidance document entitled "Bona Fide Prospective Purchasers and the New Amendments to CERCLA."

- The guidance, which was to supplement rather than replace the earlier guidance documents, reflected EPA's view that in most instances, Congress's creation of the new BFPP status would now render PPAs unnecessary.

- The guidance noted that in more limited circumstances, the public interest would still be served by EPA entering into PPAs or other types of agreements, particularly where:

  a. a significant windfall lien may be involved and the buyer must resolve the lien prior to acquisition for financing or other reasons;

  b. the property is subject to current CERCLA litigation and the buyer justifiably fears involvement in the suit; or

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c. the potential public benefits -- to the local community, environmental justice and the like -- are still so significant as to justify the time and effort required in forging a PPA.

- In July 2003, EPA issued the more specific guidance document, "Interim Enforcement Discretion Policy Concerning 'Windfall' Liens Under Section 107(r) of CERCLA," discussed in section D.2 above.

- In November 2006, EPA issued a brief memorandum on its "Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser," attaching the new model document. The memorandum acknowledges and refers to the continued applicability of its May 2002 policy on the limited circumstances under which EPA will consider entering into a PPA with a BFPP, and specifies that the new model is intended to apply to the particular situation where a "significant environmental benefit will be derived… in terms of cleanup," where a BFPP "will perform removal work exceeding reasonable steps at a site of federal interest," and "the work required is complex or significant in extent." The memorandum also contains a model agreement that sets forth the terms of such a PPA.

3. Impact of EPA's ER3 Initiative

- Under EPA's 2004 Environmentally Responsible Redevelopment and Reuse Initiative ("ER3"), discussed below under Section L, EPA is now to consider offering PPAs to developers in certain circumstances where developers are agreeing to employ sustainable development practices.

F. Removal of Sites from CERCLIS

- Pursuant to a memorandum issued by EPA on February 7, 1995 (60 Fed. Reg. 16053), the agency had by that time removed approximately 27,000 sites from its Superfund tracking system list, commonly referred to as CERCLIS (the Comprehensive Environmental Response, Compensation, and Liability Information System). As of March 2013, EPA had reported that the number of sites removed from CERCLIS had increased to 36,425.

- CERCLIS was intended as the inventory of known or suspected contamination sites to be considered as potential Superfund sites. However, over the years, thousands of sites were added to the inventory based on the sketchiest of information.

- Listing on CERCLIS led in turn to presumptions in the real estate and lending community that the mere presence of a site on CERCLIS was evidence of a serious environmental risk.

- Sites removed from the list are those for which EPA has determined that there is "no further remedial action planned" ("NFRAP").

G. Lender Liability Protection

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- Notwithstanding the voiding of EPA's "Final Rule on Lender Liability under CERCLA," (57 Fed. Reg. 18344, April 29, 1992), EPA issued a policy on September 22, 1995, (60 Fed. Reg. 63517), establishing that EPA and DOJ would apply the provisions of the voided rule as guidance in government actions.

- EPA issued the guidance in the hope that lenders would be less hesitant to lend to owners or developers of known or suspected contamination sites.

- Thus, EPA and DOJ were not pursuing enforcement or litigation against lenders who were taking appropriate steps to remain within the safe harbors defined by the rule.

- A companion rule, EPA's UST Lender Liability Rule (40 C.F.R. 280.200-280.230), under the federal underground storage tank law, remained in effect.

- At the end of September 1996, Congress responded to the lending community's concerns by way of the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-462, which among other things amended the CERCLA secured creditor exemption. In language that tracked the invalidated EPA rule, Congress set forth the rules and benchmarks for lenders to follow in order to avoid falling within the ambit of CERCLA liability, including procedures to be followed in winding up and selling businesses and properties without incurring liability for pre-existing contamination.

- The Asset Conservation Act also provides that the CERCLA lender safe harbor provisions apply to the federal underground storage tank law as well. In so far as those provisions may be inconsistent with the UST Lender Liability Rule, the UST rule prevails (see section I, below).

- On June 30, 1997, EPA issued its "Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities."

- In the Policy, EPA specifically provides that:

    a. Given the similarity of the statutory amendment and the voided rule, EPA would treat the rule and its preamble as guidance in interpreting the amended secured creditor exemption; and

    b. The UST Lender Liability Rule remains in effect.

- In April 2007, EPA issued a "Brownfields Fact Sheet" on "CERCLA, Brownfields and Lender Liability." The document notes the continued effectiveness of the statutory lender liability protections, but indicates that lenders may wish "to further protect themselves from loss (due to decreases in the value of the property or collateral) by requiring that borrowers qualify for liability protections."

H. <u>Contaminated Aquifer Policy and the Contiguous Property Owner Exemption</u>

- Under CERCLA, property owners have often been targeted for cleanup of contaminated water on or under their properties. Even where contamination has emanated from off-site sources, owners have been burdened with lawsuits by third

parties and with enforcement actions by government authorities. In turn, this has impaired the owners' efforts to sell or finance their properties.

- On May 24, 1995, EPA issued a Superfund policy (60 Fed. Reg. 34790), establishing that EPA would not pursue property owners for contamination from off-site sources.

- In addition, where other parties are suing or threatening such a property owner, EPA has considered entering a de minimis settlement with the innocent owner, protecting the owner against lawsuits by third parties.

- The 2002 Superfund amendments addressed this problem by articulating an exemption from CERCLA liability for property owners whose neighbors cause pollution that travels onto their properties.

- However, in order to qualify for this exemption, the affected property owner must be able to establish, among other things, that:

  a. reasonable steps are taken to stop any continuing release, prevent threatened future release and limit exposure to the contamination;

  b. full cooperation and access are given to any party authorized to conduct a cleanup, and any required land use restrictions or institutional controls are honored; and

  c. appropriate due diligence was undertaken entitling the party to either the innocent purchaser defense or BFPP status.

- The amendments specify that where the contamination is entering the property solely by migration through groundwater, there is generally no requirement for the owner to investigate or clean up the groundwater contamination, although the owner must follow EPA's 1995 guidance as to exercising due care and avoiding acts which will lead to further migration of the contaminants.

- On March 6, 2003, EPA issued interim guidance on qualification for the contiguous property owner exemption (the "Common Elements Guidance" referenced above).

- On January 13, 2004, EPA issued interim enforcement discretion guidance concerning the contiguous property exemption. Among the points discussed are the property owner's need to establish that it did not cause, contribute or consent to the contamination; the fact that the property need not necessarily be contiguous to the source site in order to qualify for the exemption; EPA's position that former landowners may be eligible for the exemption; and that EPA may still apply its prior policies in particular cases where the policies are broader than the statutory exemption. The document also provides guidance as to appropriate circumstances in which the regions may consider issuing comfort letters to, or entering settlements with, contiguous property owners.

- On August 26, 2004, EPA issued its proposed rules on "Standards and Practices for All Appropriate Inquiry," applicable to the contiguous property owner exemption, and on November 1, 2005, EPA issued its final rule (discussed in Section C above).

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- On November 9, 2009, EPA published a Model CERCLA Section 107(q)(3) Contiguous Property Owner (CPO) Assurance Letter, along with a Memorandum on the subject to all of the EPA regions. EPA's seeks to establish consistency in the application of the Interim CPO Guidance published on March 6, 2003, consistent with the congressional authority conferred upon EPA to "issue an assurance that no enforcement action" will be initiated against a CPO.

- Pursuant to the Memorandum, EPA has the discretion to issue an Assurance Letter when:

    1. the CPO submits a written request for an Assurance Letter, along with an affidavit or other instrument attesting that it meets the eight statutory elements of CPO protection under CERCLA §107(q)(3), and

    2. EPA is or has been involved at the CPO's property and/or at the contiguous property by way of conducting a response action.

- Further, there is a two-step process for each region to follow when issuing the CPO Assurance Letter. First, the region must determine, based on the CPO's written request, whether the CPO meets the statutory requirements of §107(q)(3) and whether an Assurance Letter is appropriate under the circumstances. If the region determines that an Assurance Letter is appropriate, then the region must obtain approval from the Director of the Office of Site Remediation Enforcement (OSRE) by submitting a concurrence memo describing (1) the site background, as well as the location of the CPO's property in relation to the site; (2) how the CPO meets the statutory criteria as set forth in §107(q)(3); (3) why the Assurance letter is appropriate; (4) the scope of the Assurance Letter; (5) whether the Assurance Letter will deviate from the Model CPO Assurance Letter and, if so, how it will deviate; and (6) whether the OSRE should consult with the Department of Justice.

- Upon receiving approval from OSRE, the region may issue the final Assurance Letter without obtaining further approval, so long as the letter does not significantly deviate from the Model CPO Assurance Letter.

I. Underground Storage Tank Lender Liability Rule

- On September 7, 1995, EPA promulgated a rule, that provides lenders with a safe harbor from liability or financial responsibility requirements for underground storage tanks ("USTs") (60 Fed. Reg. 46711). EPA promulgated this rule because it feared that UST owners and operators would be unable to comply with environmental requirements if banks refused to give loans to UST owners due to the uncertainty of lender liability.

- A lender is eligible for exemption if:

    a. The lender holds an ownership interest in an UST, or in property on which a UST is located, in order to protect a security interest;

    b. The lender does not engage in petroleum production, refining and marketing; and

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c. The lender does not participate in the management or operation of the UST.

- The lender is also required to empty the UST within sixty days after foreclosure, and either temporarily or permanently close the UST unless there is a current operator at the site (other than the lender) who can be held responsible for compliance with UST regulatory compliance.

J. Cleanup Standards

- EPA has also issued policies to clarify cleanup standards:

  a. Soil Screening Guidance: Establishes site-specific soil cleanup levels, risk-assessment methodology and standards for identifying sites ripe for redevelopment. See 61 Fed. Reg. 27349 (May 31, 1996). In 2002, EPA issued a "Supplemental Guidance for Developing Soil Screening Levels for Superfund Sites" as a companion to the 1996 Guidance. Information on the Guidance is available at http://www.epa.gov/superfund/health/conmedia/soil/index.htm.

  b. Land Use Guidance: Provides information for considering anticipated future land uses in remedy selection decisions at Superfund sites. See 60 Fed. Reg. 29595 (June 5, 1995). In June 2001, EPA issued a document entitled "Reuse Assessments: A Tool to Implement the Superfund Land Use Directive," reaffirming the 1995 directive and extending its application to non-time critical removal actions. Information on the directives is available at http://www.epa.gov/superfund/policy/remedy/sfremedy/landuse.htm.

K. Taxpayer Relief Act

- On August 5, 1997, President Clinton signed the Taxpayer Relief Act, P.L. 105-34, to provide tax deductions for developers who revitalize contaminated industrial sites in economically distressed areas.

- Applicability of the law, originally restricted to cleanup expenditures through 2000, has been extended periodically to apply to expenditures in subsequent years. For example: H.R. 1308, signed into law on October 4, 2004 (P.L. 108-311), extended the applicability of the law to expenditures through December 31, 2005. In November 2005, Senate Bill 2020 – the Tax Relief Act of 2005 – passed the Senate. The bill would have extended applicability through 2006, but the legislation remained in Congress. On December 20, 2006, the Tax Relief and Health Care Act of 2006 (P.L. 109-432) was signed into law, extending applicability to expenditures through 2007, retroactive to December 31, 2005.

- The Emergency Economic Stabilization Act of 2008 renewed the brownfields tax incentive that permits a developer to fully deduct cleanup costs in the year they were incurred. This provision under the Taxpayer Relief Act of 1997 expired December 31, 2007. The stabilization Act extended the incentive through December 31, 2009. Subsequently, the incentive was extended through December 31, 2011.

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- Pursuant to the law, which amends section 198 of the Internal Revenue Code, a qualifying developer may elect to treat remediation costs as expenses deductible in the year incurred or paid, rather than as a capital improvement to the property.

- The 2006 extension also expanded the tax incentive by permitting the deduction of expenses incurred in the remediation of petroleum and related contaminants. Expenditures for remediation of petroleum products were ineligible under previous versions of the law.

- Qualified contaminated sites were originally defined as high poverty areas and nearby industrial/commercial redevelopment sites, empowerment zones and communities, and sites designated by EPA as Brownfields pilot projects. The 2000 amendment (P.L. 106-554) expanded eligible projects, providing that qualified sites are those other than properties on or proposed for EPA's National Priority List, where there has been a release or threatened release of hazardous substances.

- The burden is on the developer to obtain a statement from state regulators that the site qualifies as a "target."

- Where the cleanup expenses would have been capitalized but for the Relief Act reforms, they are recaptured as ordinary income upon sale of the redeveloped property.

L. Recent EPA Programs

- One Cleanup Program: In April 2003, EPA's Office of Solid Waste and Emergency Response implemented the program with the goal of better coordinating cleanups under federal, state and local waste cleanup programs. The program is to include:

  a. Area Wide Pilot Projects - To demonstrate cross-program coordination and consistency in cleaning up related sites.

  b. One Cleanup Program Council - Council of directors from cleanup programs around the nation.

  c. Cross-Program Task Force - To conduct further analysis of cleanup issues and support new policy guidance on groundwater cleanup, site assessment, and site stewardship.

  d. Federal Facilities Executive Leadership Policy - Steering committee of assistant administrators from federal agencies involved in cleanup programs.

  e. "Sites in my Community" Information Network and Linked Systems - EPA to encourage governmental authorities to develop compatible, linkable information systems concerning cleanups.

  f. Institutional Controls Tracking Network - To develop links between systems tracking institutional controls.

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g. Waste Sites Technologies Information System - To speed up and broaden exchange of scientific and technological information about contaminated sites and cleanups.

Note: See discussion of EPA Memorandum of Agreement with Pennsylvania DEP (below under Pennsylvania Brownfield Program) for an MOA consistent with the One Cleanup Program.

- Land Revitalization Agenda: In April 2003, EPA announced an initiative to focus and coordinate land reuse in the Brownfields, Superfund, RCRA and UST cleanup programs. Elements of the program include:

  a. Assessing potential for remediation leading to property reuse as green space or for other community needs, and development of a single, cross-program "measure of success" for land in these programs;

  b. Developing "public/private partnerships" to foster land reuse; and

  c. Integrating property cleanup programs with local "Smart Growth" initiatives.

- Smart Growth Project: In 2003, EPA also announced a "Smart Growth" plan to encourage pilot cleanup projects to integrate state and local initiatives on preserving open space and coordinating redevelopment with community needs. Nine showcase communities were selected and they each received $45,000 grants from EPA. Applicants had to establish that they were incorporating smart growth principles into their redevelopment projects.

- Environmentally Responsible Redevelopment and Reuse Initiative ("ER3"): The ER3 initiative is aimed at providing incentives to promote the practice of sustainable development, including, where necessary, incentives to developers to redevelop Brownfields sites using sustainable development practices. If a developer agrees to employ sustainable redevelopment principles, EPA may offer incentives -- such as prospective purchaser agreements, comfort status letters and green building supplemental projects -- that would not otherwise be considered necessary or appropriate.

  On April 22, 2005, EPA published a notice under the initiative (70 Fed. Reg.20901) that it is forming a network of governmental and non-governmental partners (such as non-profits, universities and trade associations) to promote sustainable development valuable to reuse and redevelopment efforts.

- Supplemental Environmental Projects ("SEPs"): In July 2004, EPA issued a memorandum concerning the applicability of its 1998 Supplemental Environmental Projects policy to Brownfield redevelopment projects. SEPs are environmental projects that environmental enforcement defendants or respondents may agree to undertake in lieu of monetary penalties. The 2004 memo specifies that among the projects that alleged violators may agree to undertake are those employing sustainable building techniques (so-called "green buildings") at nearby contaminated properties that are being cleaned up and redeveloped by other parties.

As examples, EPA notes that a company accused of air violations near a Brownfield redevelopment could buy energy efficient systems or low volatile emitting materials for the redeveloper, or a company accused of water violations could construct a superior stormwater management system for a redevelopment project.

EPA notes that the emphasis on such SEPs is to be supportive of the ER3 initiative described above.

- "Enforcement First" to Ensure Effective Institutional Controls at Superfund Sites: On March 17, 2006, EPA issued a memorandum alerting the required offices that its existing "enforcement first" policy should also explicitly apply to any actions required to ensure the implementation and effectiveness of institutional controls at federal Superfund sites. Institutional controls are used when unrestricted use of a property is not appropriate, typically due to residual contamination after cleanup, and include administrative and/or legal measures, such as deed notices, environmental covenants and use restrictions. The 2006 memorandum sets forth guidelines that the EPA should follow in ensuring enforcement of these controls. The guidelines range from cooperative efforts between EPA and responsible parties, through use of existing agreements and use of unilateral administrative orders.

M. Recent EPA Guidance and Studies

- In December 2007, EPA issued a case study report entitled "Mothballed Brownfields: Successful Approaches to Revitalization." The report describes four case studies of successful cleanup and redevelopment of sites where closed industrial facilities were sitting dormant and where the property owners had been unwilling or unable to engage in efforts to transfer the sites. The report is available at:
www.epa.gov/brownfields/pubs/Mothballed%20Brownfields%20Successfull%20Approaches.pdf

- In April 2008, EPA issued a report entitled "Shifting Gears: Driving Toward Auto Sector Property Revitalization." The report presents case studies of successful brownfield and redevelopment of former auto sector properties. The report is available at:
www.epa.gov/brownfields/policy/autosector.pdf

- EPA's Brownfields and Land Revitalization Technology Support Center released two primers in 2008:

  a. Brownfields Technology Primer: Vapor Intrusion Considerations for Redevelopment (March 2008). The report is available at:
  http://brownfieldstsc.org/pdfs/BTSC%20Vapor%20Intrusion%20Considerations%20for%20Redevelopment%20EPA%20542-R-08-001.pdf

  b. Green Remediation: Incorporating Sustainable Environmental Practices into Remediation of Contaminated Sites (April 2008). The report is available at:
  http://brownfieldsc.org/pdfs/green-remediation-primer.pdf

- On August 27, 2009, EPA's Office of Solid Waste and Emergency Response (OSWER) published "Principles for Greener Cleanups," which focuses on reducing

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the environmental footprint of remediation activities. Specifically, OSWER emphasizes the importance of completing environmental footprint assessments for a site-specific cleanup and recommends five concepts to consider when conducting the assessments or engaging in remediation activities:

a. Minimize total energy use and maximize use of renewable energy.

b. Minimize air pollutants and greenhouse gas emissions.

c. Minimize water use and impacts to water resources.

d. Reduce, Reuse and Recycle Material and Waste.

e. Protect Land and Ecosystems.

- In November, 2012, EPA published the Brownfields Grant Recipients' Road Map to Understanding Quality Assurance Project Plans to assist grant recipients complete site assessment projects more efficiently and effectively. The Road Map is available at: http://www.epa.gov/tio/download/misc/brownfieldsqapproadmap_nov2012.pdf

N. Federal Legislative Initiatives

Over the years, numerous federal legislative initiatives, including Superfund reform bills in the Senate and House, have proposed various brownfield development schemes and incentives. While few passed, the concepts in a number of initiatives were integrated in subsequent legislation and EPA programs.

Selected legislative initiative examples follow:

- 1996 Initiatives

  a. S.2028 -- Brownfields and Environmental Cleanup Act of 1996
  Sponsor: Senator Lautenberg
  To provide financial assistance, in the form of grants, to local and state governments to evaluate and develop environmental cleanup programs. The bill would also limit fiduciary liability and the liability of prospective purchasers, innocent landowners, and lending institutions that take title to contaminated property by exercise of their security interest in the property.

  b. S. 1911/H. 3747
  Senate Sponsor: Senator Mosley-Braun
  House Sponsor: Representative Rangel
  To amend the Internal Revenue Code to encourage economic development through creation of additional empowerment zones and enterprise communities. The bills would also encourage the cleanup of Brownfield sites by allowing environmental cleanup costs for such sites to be fully deductible in the year in which they were incurred, rather than capitalized and deducted over time.

  c. H. 3241 -- More Power for Empowerment Zones Act of 1996
  Sponsor: Representative Foglietta et al.

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To amend the Internal Revenue Code to allow the designation of additional empowerment zones and provide additional incentives for empowerment zones and enterprise communities.

d. S. 3214, 3093
Sponsor: Representative Franks
To amend CERCLA to provide loans for the environmental assessment and remediation of eligible Brownfield sites.

e. H. 2919 -- Brownfield Remediation and Economic Development Act of 1996.
Sponsor: Representative Quinn
To amend CERCLA to provide for the development and use of Brownfields and to establish lender liability laws.

f. H. 2846 -- Brownfields Redevelopment Act
Sponsor: Representative Coyne
To amend the Internal Revenue Code to allow a tax credit for the cleanup of certain contaminated industrial sites and to allow the use of tax-exempt redevelopment bonds for such cleanups.

g. H. 2742
Sponsor: Representative English
To set aside a portion of the funds available under CERCLA to be used to encourage the redevelopment of marginal Brownfield sites.

h. H. 2500
Sponsor: Representative Oxley
To amend CERCLA to require EPA to provide technical and other assistance to state to establish and expand voluntary response programs. Bill also proposes limited liability provisions for lenders, innocent landowners and prospective purchasers.

i. H. 2178
Sponsor: Representative Brown
To promote redevelopment of Brownfields by providing federal assistance, in the form of grants, for site characterization and assessment, and interest free loans for environmental remediation of Brownfield sites.

j. H. 1621 -- Brownfield Cleanup and Redevelopment Act
Sponsor: Representative Gregg
To require that the EPA establish a program under which states may be certified to operate voluntary environmental cleanup programs for low and medium priority sites.

- 1997 Initiatives

a. S. 235/H. 505
Senate Sponsor: Senator Mosley-Braun
House Sponsor: Representative Rangel
Reintroduction of S. 1911 and H. 3747 cited above: To amend the Internal Revenue Code to encourage economic development through creation of

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additional empowerment zones and enterprise communities. The bills would also encourage the cleanup of Brownfield sites by allowing environmental cleanup costs for such sites to be fully deductible in the year in which they were incurred, rather than capitalized and deducted over time.

b. H. 523 -- Brownfields Redevelopment Act
Sponsor: Representative Coyne
Reintroduction of H. 2846 cited above. To amend the Internal Revenue Code to allow a tax credit for the cleanup of certain contaminated industrial sites and to allow the use of tax exempt redevelopment bonds for such cleanups.

c. S. 18 -- Brownfields and Environmental Cleanup Act of 1997
Sponsor: Senator Lautenberg
To assist state and local governments in investigating and cleaning up Brownfields sites through a grant program for identifying appropriate redevelopment sites for site assessments, and for revolving loans, by way of appropriations of $25 million per year from 1998 through 2002. To encourage prospective purchaser investment by limiting future liability of Brownfields redevelopers.

- 1998 Initiatives

a. H. 3595 -- Superfund Improvement Act of 1998
Sponsor: Representative Manton
To establish EPA programs for providing grants to local governments to inventory and assess Brownfields sites, and to allow for capitalization of loan programs for Brownfield site cleanups by the local government or a private party.

b. H. 3627 -- Brownfield Community Empowerment Act
Sponsor: Representative Rush
Like H. 3595 above, would establish EPA programs for providing grants to local capitalization of loan programs for Brownfield site cleanups by the local government or a private party.

c. H. 4194/S.2168 -- Department of Veterans Affairs and Housing Urban Development and Independent Agencies Appropriations Act, 1999
House Sponsor: Representative Lewis
Senate Sponsor: Senator Bond
To appropriate funds to the EPA for brownfields redevelopment. Funds would only be available for grants to states, tribes, and local governments for site assessments, development of voluntary cleanup programs, and administrative costs. The grants would not cover actual cleanup costs.

d. H. 4094 -- Brownfield Redevelopment and Environmental Revitalization Act of 1998
Sponsor: Representative Franks
To amend the Internal Revenue Code to allow a 50% credit to taxpayers for cleanup of qualified sites. To establish Small Business Administration financing for local development companies to carry out Brownfields assessments and cleanups. To establish EPA grant programs similar to H. 3595 above.

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- 1999 Initiatives

   a. S.20 -- Brownfields and Environmental Cleanup Act of 1999
   Sponsor: Senator Lautenberg
   To assist states and local governments in assessing and remediating Brownfield sites, to direct EPA to establish programs that facilitate site assessments of Brownfields, to promote loan programs, to facilitate cleanups, and to encourage workforce development in areas adversely affected by contaminated properties.

   b. S. 1105 -- Superfund Litigation Reduction and Brownfield Cleanup Act of 1999
   Sponsor: Senator Baucus
   To establish liability protections for Brownfields redevelopers, and to assist states and local governments in assessing and remediating Brownfields by authorizing funding for Brownfield cleanups.

   c. H. 1391 -- Brownfields Reuse and Real Estate Development Act
   Sponsor: Representative Regula
   To require EPA to establish a program under which states could be certified to carry out voluntary environmental cleanup programs, and to provide liability protections to promote redevelopment projects.

   d. S.1408 -- Small Business Brownfields Redevelopment Act of 1999
   Sponsor: Senator Jeffords
   To amend the Small Business Investment Act to promote Brownfields remediation by authorizing a loan fund to finance projects that assist qualified small businesses in carrying out site assessment and cleanup activities at Brownfield sites.

   e. H. 1537 -- Brownfields Remediation and Economic Development Act of 1999
   Sponsor: Representative Quinn
   To establish a program under which the federal government, in cooperation with state and local entities, would undertake Brownfields remediation projects in order to return them to productive use while conserving prime open space.

   f. H. 1630 -- Brownfields Clean-Up Act
   Sponsor: Representative Coyne
   A bill to permanently extend the deductibility of remediation costs allowed by the Taxpayer Relief Act of 1997 (outlined above).

   g. H. 1750 -- Community Revitalization and Brownfield Cleanup Act of 1999
   Sponsor: Representative Towns
   To spur Brownfield redevelopment projects, to assist local governments in assessing and remediating Brownfield sites, and to encourage state voluntary response programs for remediating such sites by addressing liability concerns of developers and current owners of Brownfield properties.

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- 2000 Initiatives

  a. H. 3579 -- To amend the Internal Revenue Code to expand incentives for brownfields cleanups.
  Sponsor: Representative Andrews
  To amend the Internal Revenue Code in order to provide that where states or local governmental authorities issue bonds to finance brownfields cleanup, bondholders would be allowed a federal tax credit.

  b. S. 2334 -- To extend expensing of remediation costs under the Internal Revenue Code.
  Sponsor: Senator Chafee
  To amend the Internal Revenue Code to extend through 2007 the deductibility of remediation costs as expenses as currently allowed by the Taxpayer Relief Act of 1997 (outlined above), and to expand targeted redevelopment areas.

  c. S. 2590 -- Brownfield Revitalization Act of 2000
  Sponsor: Senator Voinovich
  To promote brownfields cleanups by establishing grant programs for site assessments and response actions to brownfields sites, and by barring EPA enforcement or cleanup actions where owner has cleaned up to state standards; to protect neighbors from liability due to migration of contamination from other properties; to protect innocent purchasers against liability for site cleanup.

  d. S. 2700 -- Brownfield Revitalization and Environmental Restoration Act of 2000
  Sponsor: Senator Chafee
  To revise liability scheme to provide protection to innocent owners and prospective purchasers; to provide grants to encourage redevelopment; to clarify due diligence requirements; to relieve neighbors of potential liability for migration of contamination from discharger's property; to place restrictions on EPA enforcement action authority.\

  e. H. 4923 -- Community Renewal and New Market Act of 2000
  Sponsor: Representative Watts
  To amend the Internal Revenue Code to provide for tax incentives for redevelopment in distressed communities, including extension of the deadline for deductibility of remediation costs allowed by the Taxpayer Relief Act of 1997.

- 2001 Initiatives

  a. S.350 -- Brownfields Revitalization and Environmental Restoration Act of 2001.
  Sponsor: Senator Chafee
  To provide grants and loans for brownfield redevelopment; to clarify the due diligence steps that a party must take to qualify for the CERCLA innocent purchaser defense; to exempt innocent neighbors from CERCLA liability due to contamination migrating onto their properties from off-site; to defer NPL listing of a site that is being addressed pursuant to a state-monitored voluntary cleanup.

  b. H. 1831/S. 1064 -- Small Business Liability Protection Act
  House Sponsor: Representative Gillmor
  Senate Sponsor: Senator Bond

To exempt from CERCLA liability at NPL sites so called "de micromis" contributors (those who have disposed of only minor amounts of hazardous materials at facilities targeted for cleanup); to exempt from CERCLA liability at municipal solid waste NPL sites those who are residential property owners/operators or small businesses; to allow parties with inability or limited ability to pay response costs to seek "de minimis" settlements.

c. S. 1078 -- Brownfields Economic Development Act of 2001
Sponsor: Senator Levin
To amend the Housing and Community Development Act to provide grants for redevelopment of brownfield sites.

d. S. 1079 -- Brownfield Site Redevelopment Assistance Act of 2001
Sponsor: Senator Levin
To amend the Public Works and Economic Development Act to provide planning assistance and grants for projects that promote the redevelopment, restoration and economic recovery of brownfield sites

e. S. 1082 -- To amend the Internal Revenue Code to expand expensing of environmental remediation costs
Sponsor: Senator Torricelli
To permanently extend the deductibility of remediation costs allowed by the Taxpayer Relief Act of 1997 as amended (see above); to strike the provision of the Taxpayer Relief Act that provides for the deduction to be recaptured as ordinary income upon sale of subject property.

- 2002 Initiatives

a. H.R. 4894 -- Brownfield Site Redevelopment Assistance Act of 2002
Sponsor: Representative Quinn
To promote brownfield site development through targeted assistance for projects geared toward redevelopment, restoration and economic recovery of brownfield sites; to promote "eco-industrial" development; to provide grants for brownfield site redevelopment; to provide community assistance for brownfield projects.

b. H.R. 2264 -- To amend the Internal Revenue Code to expand the expensing of environmental remediation costs
Sponsor: Representative Weller
To permanently extend the deductibility of remediation costs allowed by the Taxpayer Relief Act of 1997 as amended (see above); to expand the definition of applicable hazardous substances to include toxic substances, extremely hazardous substances, asbestos, oil, pesticides, radon and lead-based paint; to strike the provision of the Taxpayer Relief Act that provides for the deduction to be recaptured as ordinary income upon sale of subject property.

c. H.R. 3170 -- To amend the IRC to expand the incentives for the environmental cleanup of certain contaminated industrial sites designated as brownfields
Sponsor: Representative Andrews
To promote funding of brownfield redevelopment by recognizing a class of bonds to be known as "Qualified Brownfields Cleanup Bonds," and to afford tax credits to holders of such bonds.

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- 2003 Initiatives

  a. H.R. 402 - Brownfield Cleanup Enhancement Act of 2003
  Sponsor: Representative Andrews
  To amend the Internal Revenue Code to promote issuance and acquisition of brownfield cleanup bonds affording tax credits to holders of such bonds.

  b. H.R. 1334/S. 645 - Brownfield Redevelopment Assistance Act of 2003
  Sponsor: Representative Quinn
  To authorize the Secretary of Commerce to provide grants for projects to alleviate or prevent conditions of excessive unemployment, underemployment, blight and infrastructure deterioration associated with brownfield sites. The bill is nearly identical to last year's H.R. 4894 [see above], also sponsored by Rep. Quinn.

  c. H.R. 239 - Brownfields Redevelopment Enhancement Act
  Sponsor: Representative Miller
  To authorize the Secretary of Housing and Urban Development to make grants to eligible entities to assist in environmental cleanup and economic development of brownfield sites including mine scarred land; would also make community development block grants available for brownfields related cleanup.

- 2004 Initiatives

  a. H.R. 3892 - Brownfield Redevelopment Reserve Act
  Sponsor: Representative Hart
  To encourage businesses to establish remediation reserves, by amending the Internal Revenue Code to allow annual income tax deductions for certain sums paid into the reserve each year.

  b. H.R. 4480 - Brownfield Revitalization Act of 2004
  Sponsor: Representative Turner
  Would amend the Internal Revenue Code to allow deductibility of up to 50% of remediation costs incurred by a qualifying business cleaning up a qualifying property under the auspices of a state development agency that has approved such a credit; would limit federal cleanup liability of qualifying business, even if business is a Superfund PRP, if business assumes at least 25% of the cleanup costs.

  c. H.R. 4520 - To amend the Internal Revenue Code
  Sponsor: Representative Thomas
  Among other things, would extend the deductibility of remediation costs allowed by the Taxpayer Relief Act to costs incurred through 2005.

- 2005 Initiatives

  a. H.R. 280 - Brownfields Redevelopment Enhancement Act
  Sponsor: Representative Miller
  To facilitate the provision of assistance by the Department of Housing and Urban Development ("HUD") for the cleanup and economic redevelopment of brownfields. The bill would remove the requirement that communities pledge

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community development block grant funds as collateral when receiving a brownfields redevelopment grant from HUD.

b. H.R. 336 - Brownfields Improvement Act of 2005
Sponsor: Representative Lynch
To amend the Public Works and Economic Development Act of 1965 to provide assistance to communities for the redevelopment of brownfields sites. The bill authorizes grants through the Public Works and Economic Development Act for the redevelopment of brownfield sites in situations where such redevelopment would alleviate or prevent excessive unemployment, underemployment, blight, and infrastructure deterioration.

c. H.R. 1237 - Brownfield Redevelopment Assistance Act of 2005
Sponsor: Representative Hart
To amend the Public Works and Economic Development Act of 1965 to provide assistance to communities for the redevelopment of brownfield sites. Identical to H.R. 336 (discussed above), but does not include affordable housing among the types of brownfields redevelopment projects that would qualify for a grant. Bill also has a lower annual grant appropriation than H.R. 336.

d. H.R. 1680 - Brownfield Cleanup Enhancement Act of 2005
Sponsor: Representative Andrews
To amend the Internal Revenue Code of 1986 to expand the incentives for the environmental cleanup of certain contaminated industrial sites designated as brownfields. The bill would allow a tax credit to holders of qualified brownfields cleanup bonds.

e. S.2020 – Bill for reconciliation of fiscal 2006 budget
Sponsor: Senator Grassley
Among other things, would extend the deductibility of remediation costs allowed by the Taxpayer Relief Act to costs incurred through 2006.

f. H.R. 4297 – Bill for reconciliation of fiscal 2006 budget
Sponsor: Representative Thomas
Among other things, provided for exempting from taxation a settlement fund or escrow account created to resolve EPA claims under CERCLA.

Signed into law on May 17, 2006 as P.L. 109-222.

g. H.R. 3451 – To amend the Internal Revenue Code
Sponsor: Representative Hart
Would amend the Internal Revenue Code to provide for use of redevelopment bonds for environmental remediation. The bill would allow a qualifying taxpayer to deduct interest on bond financing for certain remedial activities at qualifying brownfield sites.

h. H.R. 4480 – America's Brownfield Cleanup Act
Sponsor: Representative Turner
Similar to tax deductibility provisions in Rep. Turner's 2004 proposal H.B. 4480, this bill would allow environmental remediation tax credits for qualified cleanup

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and reconstruction expenditures in a given tax year, and would provide for recapture of credits where projects are not completed.

- 2006 Initiatives

    a. S.B. 3509 – America's Brownfield Cleanup Act
    Sponsor: Senator Voinovich
    Would amend the Internal Revenue Code as set forth in 2005 H.R. 4480 above, allowing environmental remediation tax credits.

    b. S.B. 3620 – Brownfields Redevelopment Enhancement Act
    Sponsor: Senator Levin
    Would facilitate HUD grants in a manner similar to that set out in 2005 H.R. 280 described above.

    c. H.R. 5970 – Estate Tax and Extension of Tax Relief Act of 2006
    Sponsor: Representative Thomas
    Among other things, would extend the deductibility of remediation costs allowed by the Taxpayer Relief Act to costs incurred through 2007.

- 2007 Initiatives

    a. H.R. 43 – Brownfields Housing and Community Renewal Development Act
    Sponsor: Representative Velazquez
    Would establish a grant program in the Department of Housing and Community Development to assist in redevelopment of brownfield sites and structures there. Projects would be required to provide benefits to low and moderate income communities, increase affordable housing, address imminent threats, or provide open space.

    b. H.R. 644 – Brownfields Redevelopment Enhancement Act
    Sponsor: Representative Miller
    Would facilitate HUD grants in a manner similar to that set forth in 2005 H.R. 280 and 2006 S.B. 3620 described above.

    c. H.R. 3080 – America's Brownfield Cleanup Act
    Sponsor: Representative Turner
    Would amend the Internal Revenue Code to provide to tax credits for environmental remediation, as set forth in 2005 H.R. 4480 and 2006 S.B. 3509 above.

- 2008 Initiatives

    a. H.R. 4196 – National Public Notification of Environmental Hazards Act of 2007
    Sponsor: Representative Smith
    Would amend CERCLA with goal of improving public notification and community relations concerning actions for the removal of environmental hazards.

    b. H.R. 3636 – Superfund Reinvestment Act of 2007
    Sponsor: Representative Blumenauer

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Would amend the Internal Revenue Code §§ 4611(e) and 59A(e) to extend the financing of the Superfund.

c. H.R. 3897 – Brownfields Redevelopment Promotion Act
Sponsor: Representative Donnelly
H.R. 3984 – Brownfield Redevelopment Tax Incentive Act of 2007
Sponsor: Representative Altmire
H.R. 3907 – Small Business Tax Relief Act of 2007
Sponsor: Representative Murphy
All would amend the Internal Revenue Code § 198 to permanently extend the federal income tax deduction for environmental remediation costs.

d. H.R. 5336 – Brownfields Reauthorization Act of 2008
Sponsor: Representative Johnson
Would amend CERCLA to authorize funding for brownfields revitalization activities and State response programs.

e. H.R. 5469 – To provide grants for the revitalization of waterfront brownfields
Sponsor: Representative Slaughter
Would provide grants for the revitalization of waterfront brownfields.

f. S. 2223 – Habitat and Land Conservation Act of 2007
Sponsor: Senator Baucus
Would also amend the Internal Revenue Code § 198 to extend the federal income tax deduction for environmental remediation costs, but only until December 31, 2010.

- 2009 Initiatives

a. H.R. 1724 – America's Brownfield Cleanup Act 2009
Sponsor: Representative Turner
Would amend the Internal Revenue Code to provide tax credits for environmental remediations as set forth in 2007. H.R. 3080, 2005 H.R. 4480 and 2006 S.B. 3509 above.

b. H.R. 3052
Sponsor: Representative Capuano
Would protect service station dealers from any response costs or damages resulting from a release or threatened release of recycled oil, so long as the service dealer has complied with all laws and regulations governing disposal of the oil.

c. S. 1462 – American Clean Energy Leadership At of 2009
Sponsor: Senator Bingaman
Would require EPA to identify brownfield sites that are appropriate for renewable energy development. Would also require EPA to submit proposals to Congress for federal policies or incentives that would encourage renewable energy production at brownfield sites.

d. H.R. 3260 – Brownfields Remediation Permanent Tax Incentive Act
Sponsor: Representative McDermott

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Would amend the Internal Revenue Code to make the expensing of environmental remediation costs permanent law.

e. H.R. 3518 – Waterfront Brownfields Revitalization Act
Sponsor: Representative Slaughter
Would amend CERCLA §104(k) to require EPA to establish a grant program for grants of up to $500,000 for remediation of waterfront brownfields sites, including design and implementation of water quality improvements, green infrastructure, remediation and management of sediments and flood damage prevention associated with brownfields remediation and reuse. Would appropriate $220 million for each fiscal year from 2010 through 2014.

f. H.R. 4188 – Brownfield Cleanup Enhancement Act
Sponsor: Representative Sestak
Would amend CERCLA §104(k)(12) to authorize appropriation of $350 million for fiscal year 2010, with appropriation increasing by $50 million every year until fiscal year 2015, at which time it would remain at $600 million for every subsequent year. Would also increase funding to state response programs under CERCLA §128(a)(3).

- 2010 Initiatives

a. S. 3329 – Cleanfields Act
Sponsor: Senator Lautenberg
Would amend Section 610 of the Public Utility Regulatory Policies Act of 1978 to include brownfield site generation facilities; namely, facilities that generate renewable electricity and occupy a brownfield site. Would also provide triple renewable energy credits for the generation of energy from brownfield site generation facilities.

b. S. 3374 – Cleanfields Investment Act
Sponsor: Senator Lautenberg
Would establish a grant program for the revitalization of brownfield sites for the purpose of locating renewable electricity generation facilities or renewable energy manufacturing facilities on brownfield sites.

c. H.R. 5310 – Brownfields Reauthorization Act of 2010
Sponsor: Representative Pallone
Would amend portions of CERCLA that relate to the funding limit for direct remediation, indirect costs and eligibility for brownfields funding for sites acquired prior to January 11, 2002. Would also create two new grant programs: (1) the Multi-Purpose Grant Program and (2) the Program for Sustainable Reuse and Alternative Energy on Brownfield Sites.

d. S. 3576
Sponsor: Senator Klobuchar
Would amend the Public Utility Regulatory Policies Act of 1978 by providing standards for renewable electricity and energy efficiency. Would also provide for issuance of double renewable energy credits to generators of electric energy that use renewable energy and are located on brownfield sites.

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e. H.R. 5134 – Groundwork USA Trust Act of 2010
   Sponsor: Rep. Tsongas
   Would establish the Groundwork USA Trust program, under which grants of up to $400,000 per year would be awarded to non-profit environmental organizations to facilitate the inventorying and remediation brownfield sites.

- 2011 Initiatives

a. H.R. 1931 – Groundwork USA Trust Act of 2011
   Sponsor: Rep. Tsongas,
   Would establish the Groundwork USA Trust program, under which grants of up to $400,000 per year would be awarded to non-profit environmental organizations to facilitate the inventorying and remediation brownfield sites.

- 2012 Initiatives

a. H.R. 6405/S. 3549 Waterfront Brownfields Revitalization Act
   Sponsor: Rep. Slaughter and Senator Gillibrand
   Would amend CERCLA to provide grants of up to $500,000 each for the reuse planning, site characterization, assessnent or remediation of waterfront brownfield sites. Would appropriate $220 million for the program for each of the fiscal years 2013 through 2017.

II. California Brownfields Program

The Carpenter-Presley-Tanner Hazardous Substance Account Act ("California Superfund Act"), Cal. Health & Safety Code § 25300 et seq. [Originally enacted in 1981; portions renumbered in 1985; portions repealed in 1984, 1987, 1988, 1989, 1990, 1993, 1994, and 1997; portions repealed and enacted in 1999; amended in 2000, 2001, 2002, 2003, 2004, 2005, and 2006; portions made inoperative in 2006; portions repealed in 2006; amended in 2007; portions repealed and amended in 2012].

Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000 et seq. [Enacted in 1969; § 13304, regarding authority to order or perform remedial action, last amended in 2003; § 13304.2, regarding assessment of human health risks at brownfields sites, added in 2007; portions amended in 2009; portions amended in 2012].

Polanco Redevelopment Act, Cal. Health & Safety Code §§ 33459 – 33459.8 [Enacted in 1990; amended in 1991, 1995, 1996, 1998, 2002, 2003; sections repealed in 1992 and 2002].

Voluntary Cleanup Program, administered by Department of Toxic Substances Control ("DTSC"), established 1993. Official Policy and Procedure, EO-95-006-PP, "Managing Voluntary Site Mitigation Projects (The Voluntary Cleanup Program)," was issued September 25, 1995.

Site Cleanup Program ("SCP") (formerly known as the Spills, Leaks, Investigation and Cleanup Program, administered by the State Water Resources Control Board ("State Board") and the Regional Water Quality Control Boards ("Regional Boards"). Implemented pursuant to State Board Resolution No. 92-49, "Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code Section 13304," amended April 21, 1994 and October 2, 1996.

California Land Reuse and Revitalization Act of 2004 ("Brownfields Statute"), Cal. Health & Safety Code § 25395.60 et seq. [Enacted in 2004; amended in 2005, 2006 and 2009 and 2012].

California Land Environmental Restoration and Reuse Act ("CLERRA"), Cal. Health & Safety Code § 25401 et seq. [Enacted in 2001; amended 2004, 2005 and 2006; repealed in 2012].

Expedited Remedial Action Reform Act of 1994, Cal. Health & Safety Code § 25396 et seq. [Enacted in 1994; amended in 1995, 1996 and 2009; repealed in 2012].

Private Site Management, Cal. Health & Safety Code § 25395.1 et seq. [Enacted in 1999; amended in 2002 and 2009; repealed in 2012].
Cal. Code Regs. tit. 22, § 69000 et seq. [Adopted in 2003].

Lender Liability Protection, Cal. Health & Safety Code § 25548 et seq. [Enacted in 1996**;** amended in 1997 and 1998].

Cleanup Loans and Environmental Assistance to Neighborhoods Program, Cal. Health & Safety Code § 25395.20 et seq. [Enacted in 2000; amended in 2001, 2002, and 2004].
Cal. Code Regs. tit. 22 § 68200 et seq. [Adopted in 2001; amended in 2002 and 2009].

Financial Assurance and Insurance for Redevelopment, Cal. Health & Safety Code § 25395.40 et seq. [Enacted in 2001; amended in 2002 and 2004].

California Recycle Underutilized Sites Program, **("CALReUSE")**, Cal. Health & Safety Code §§ 44501, 44502, 44507, 44520, 44525, 44526, 44537.5, 44548, 44559, 44559.1, 44559.2 [Enacted in 2000; amended in 2001, 2002 and 2006].
Cal. Code Regs. tit. 4, § 8090 et seq. [Adopted in 2001; portions amended in 2001 and 2002; portions amended and adopted in 2008].

Site Designation, Cal. Health & Safety Code §§ 25260 – 25268 [Enacted in 1993; amended in 1994, 1996, 2000, 2001 and 2002].

Housing and Emergency Shelter Trust Fund Act, Cal. Health & Safety Code §§ 53540 – 53558 [Enacted in 2006; operative upon successful vote on Proposition 1C in state general election, approved on November 7, 2006; amended in 2007 and 2009].

Revolving Loan Fund (RLF) Cal. Health & Safety Code §§25395.35-36 [Adopted in 2008].

Memorandum of Agreement Among DTSC, the State Board, the Regional Boards, and California Environmental Protection Agency ("Cal/EPA") for the Oversight of Investigation and Cleanup Activities at Brownfield Sites: March 1, 2005.

Ownership of Property over Contaminated Groundwater, DTSC Management Memo #90-11: December 7, 1990.

Approval of a Partial Site Cleanup, DTSC Management Memo #92-4: April 23, 1992.

Prospective Purchaser Policy, DTSC Document No. EO-96-005-PP: dated June 25, 1996, effective July 1, 1996.

Guidance Memo Regarding Brownfields: Prospective Purchaser Agreements and Agreements with Current Owners for Cleanup of Polluted Property, Guidance Memo from the State Board to the Regional Boards: July 9, 1996.

1. Legislative Purpose

- To clean up sites where there is real or perceived contamination in order to benefit local communities and the state as a whole through redevelopment, job creation, economic revitalization, and productive use of land.

2. Eligibility of Sites and Parties

- Most sites are eligible for the state's voluntary cleanup program ("VCP"), other than state or federal superfund or military sites, or sites at which contamination has resulted solely from a leaking underground storage tank.

- Eligible parties for the VCP include owners of contaminated properties, developers, and state and local agencies.

- To be eligible for liability protections under the California Land Reuse and Revitalization Act of 2004 (the "Brownfields Statute"), the party cannot be responsible for the contamination at the site and the owner must have made "all appropriate inquiries," as defined by U.S. Environmental Protection Agency.

- Eligible sites under the Brownfields Statute must be located in an "urban infill area," cannot be a state or federal superfund site, and cannot be a petroleum contaminated underground storage tank site.

- "Infill area" is defined as "a vacant or underutilized lot of land within an urban area that has been previously developed or that is surrounded by parcels that are or have been previously developed."

- From its enactment in 2001 until 2012, when the statute was repealed, the California Land Environmental Restoration and Reuse Act ("CLERRA") empowered local governing bodies to delegate authority to certain local agencies to conduct brownfields remediation under particular circumstances. However, the program was not put to use, and was repealed with the support of the Department of Toxic Substances Control ("DTSC")

- Under the Polanco Redevelopment Act, local redevelopment agencies are authorized to conduct brownfields remediation under certain circumstances.

3. Memorandum of Agreement Among the State Environmental Regulators

- The California Environmental Protection Agency ("Cal/EPA"), DTSC, and the Regional Water Quality Control Boards ("Regional Boards") all have regulatory jurisdiction over, and authority to oversee, brownfields redevelopment within the state.

- A memorandum of agreement ("MOA") among those regulators, as well as the State Water Resources Control Board ("State Board"), was executed in March 2005 and concerns "the oversight of investigation and cleanup activities at brownfields sites."

- Primary purposes of the MOA are to facilitate better coordination among the agencies with authority to implement the brownfields program, to avoid duplication of effort and promote consistency and predictability, and address the "double jeopardy" concerns of brownfields redevelopers as to the concurrent jurisdiction of multiple agencies over the same property.

- Pursuant to the MOA, potential brownfields redevelopers submit a Request for Oversight of a Brownfield Site to one of the regulatory agencies. Based on the information set forth in the request, the agency that receives the request will determine whether DTSC or a Regional Board will provide oversight of the brownfields cleanup.

- The MOA also required the agencies involved to develop a uniform site assessment tool to assist in the evaluation of environmental and health risks at brownfield sites. On June 25, 2007, the agencies published the Uniform Site Assessment Tools ("Tools"), the articulated objectives of which are to provide uniform minimum criteria for evaluating site investigations, promote efficient use of resources for oversight, encourage efficient and timely site investigations, and create a consistent and fair approach to site investigations. The Tools consist of a generalized conceptual site model, a generalized summary of the investigation process, a site assessment checklist, and a table of relevant documents.

4. Process

A. VCP Process

- Under the VCP, established in 1993 as DTSC's method of administering brownfields cleanups, volunteers submit an application to DTSC, providing details about site conditions, proposed land use, and potential community concerns.

- Upon approval of the VCP application by DTSC, the applicant will meet with DTSC to negotiate an agreement that sets forth the scope of work to be performed at the site, including estimated oversight costs and a cleanup schedule.

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- The VCP agreement reserves the right for DTSC to take enforcement action if it determines that the site poses a serious threat and proper action is not being taken by the applicant.

- Once the VCP agreement has been signed and the applicant has made advance payment, work at the site may commence.

- Remediation performed under the VCP is conducted in accordance with the California Superfund Act.

- DTSC will issue a certification of completion for remediation that is completed under VCP oversight. For sites that DTSC determines require no further action based on initial sampling results, a No Further Action letter is issued.

B. Site Cleanup Program (SCP) (formerly Spills, Leaks, Investigations and Cleanup ("SLIC") Program

- Voluntary cleanups that are performed with Regional Board oversight are administered under the SCP program, unless the site is an underground storage tank site.

- Volunteers enter into an agreement with a Regional Board that requires the volunteer to reimburse the Regional Board for oversight costs.

- Pursuant to the procedures set forth in State Board Resolution No. 92-49, "Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code Section 13304," cleanups are generally conducted in a sequence consisting of preparation of a preliminary site assessment, soil and water investigation, and proposal for cleanup action, followed by implementation of a cleanup action, and subsequent monitoring.

- Following proper implementation of a cleanup plan, the Regional Board will issue a certificate of completion. If the Regional Board determines that no further action is necessary based on the results of the soil and water investigation, a No Further Action letter is issued.

- State Board Resolution No. 92-49 provides for the use of institutional and engineering controls, including "containment zones," which are specific groundwater areas where the Regional Board permits levels of contamination to remain if the Regional Board determines that "it is unreasonable to remediate to the level that achieves water quality objectives."

C. Brownfields Statute Process

- Parties interested in qualifying for liability protection by performing a cleanup under the Brownfields Statute must submit an application to Cal/EPA.

- Cal/EPA will review the application to determine whether the site is eligible and whether the applicant meets the conditions of a bona fide purchaser, innocent land owner, or contiguous property owner.

- In addition, Cal/EPA will determine which state agency will have oversight over the cleanup.

- If an applicant wishes to seek liability protection under the Brownfields Statute, the party must enter into an agreement with the designated oversight agency that requires the performance of a site assessment. If the agency determines, upon review of the site assessment, that a response action is necessary to prevent an "unreasonable risk," the agency will require the applicant to perform such response action.

- The site assessment plan must evaluate: (1) whether a hazardous materials release occurred at the site or is likely to occur; (2) whether a release or threat of release poses an unreasonable risk to human health and safety, and must include: (1) information about the type of hazardous materials; (2) adequate information about the site, including foreseeable land uses; and (3) information about groundwater, if the release impacted groundwater.

- Once the site assessment plan is approved, the applicant must perform the assessment and submit the findings to the oversight agency. Based on this report, the agency will determine whether a response action is necessary at the site.

- If the agency finds that there is no unreasonable risk or that the level of hazardous materials is safe for unrestricted use, the agency will make a finding of "no further action."

- If a remedial action is necessary, a response plan must be prepared that contains the following elements

    a. Provisions for adequate public notification;

    b. Identification of the release that is the subject of the response plan;

    c. Identification of the proposed remedy and future land uses;

    d. Description of activities to control any endangerment that may occur during the implementation of the remedial action;

    e. Description of any land use control that will be implemented;

    f. Description of how non-hazardous wastes will be managed during the remedial action;

    g. Plans for removal of sources of contamination, such as containment or storage vessels, contaminated soil and free product;

    h. Provisions for the oversight agency to require further response actions when other hazardous substances are discovered during implementation of the remedial action; and

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i. Any other information that the agency requires.

- Public notification of the response plan must include all of the following:

    a. Thirty days advance public notice in a fact sheet format in English and other languages commonly spoken in the area;

    b. Access to the proposed response plan at local repositories and at the agency office;

    c. Procedures for providing the opportunity to comment on the proposed response plan;

    d. If a public meeting is requested, the agency must hold a public meeting in the area to receive comments; and

    e. The agency's consideration of comments prior to taking action on the response plan.

- Thirty days before taking action on the proposed response plan, the agency must:

    a. Notify all other appropriate governmental entities and local agencies regarding the proposed response plan;

    b. Place a newspaper notice regarding the proposed response plan; and

    c. Post notice of the proposed response plan at the site.

- Pursuant to 2006 amendments to the Brownfields Statute, the agency must consider environmental justice issues when reviewing a proposed response plan.

- Within sixty days of receipt of the proposed response plan, the agency must make a written determination that the proposed response plan constitutes "appropriate care," as discussed below.

- The agency has discretion to make a finding of no further action where hazardous materials present at the site are suitable for the intended future use, based on foreseeable use and zoning. If the agency makes such a finding, the agency will require the applicant to record appropriate land use restrictions.

- Such land use controls must be recorded in the office of the county recorder in each county in which a portion of the site is located.

- A certificate of completion will be issued to the applicant upon successful completion of this process.

- Senate Bill 143, signed into law on October 11, 2009, extends the repeal date of the statute to January 1, 2017. The bill also permits prospective purchasers who qualify as bona fide purchasers to enter into agreements with DTSC for liability protection upon acquisition of the site.

D. Polanco Redevelopment Act Process

- The Polanco Redevelopment Act, enacted in 1990, authorizes redevelopment agencies to conduct remediation of brownfield properties in redevelopment areas.

- Under the Act, a redevelopment agency may conduct remediation of a property, even if it does not own the property, under any of the following circumstances:

  a. No responsible party has been identified for the property;

  b. A responsible party has been notified by a governmental authority and has been given 60 days to respond and propose a remedial action plan and has not agreed to do so within an additional 60 days;

  c. A responsible party has agreed to prepare and implement a remedial action plan, but has failed to do so; or

  d. The redevelopment agency determines that conditions at the property require immediate action.

- The redevelopment agency must have their remedial action plan approved by DTSC or the Regional Board and must reimburse such agency for all oversight costs.

E. CLERRA Process

- Enacted in 2001, the California Land Environmental Restoration and Reuse Act ("CLERRA") empowered cities and counties to direct and conduct brownfield cleanups in areas outside of redevelopment areas. However, the program was not put to use, and was repealed in 2012 with the support of DTSC.

- If a city or county elected to implement CLERRA, it had to adopt an implementing ordinance designating a local agency as responsible for implementing the provisions of CLERRA.

- Pursuant to CLERRA, the designated local agency would have to issue notices to the owner or operator of a property requiring that information be submitted to the agency that was potentially relevant in determining whether or not there had been a release of hazardous substances at the site. The notice could be issued in the following circumstances:

  a. Hazardous materials were used, handled, stored, treated, transported or disposed of on the property;

  b. Current or former owners of the property engaged in activities described in (a) above;

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c. Information obtained from current or former owners or operators of a property, employees or community members provided a reasonable basis for belief that activities described in (a) above had occurred at the property;

d. Visual or physical evidence provided a reasonable belief that hazardous materials may have been released at the property; or

e. There was other reasonable evidence that hazardous materials had been released at the property.

- If the designated local agency determined, based on the information provided pursuant to a notice described above, that a property was or would potentially be affected by a release of hazardous materials, the agency could issue a notice ordering that a Phase I Environmental Site Assessment be performed.

- Based on the findings of the Phase I, the local agency could issue a notice ordering the preparation of a preliminary endangerment assessment.

- Based on the findings of the preliminary endangerment assessment, the local agency could issue a notice ordering that a site investigation and remedial action be performed.

- If the owner or operator of a property that required a remedial action refused to submit a remediation plan or did not comply with the schedule for conducting a site investigation and remedial action, the local agency could initiate a remedial action if the governing body approved the action by resolution.

- In the local agency chose to perform the remedial action, it would have had to comply with public notice requirements, including mailing a fact sheet to interested parties, including all property owners within 500 feet of the site boundary. In addition, the local agency would have to publish a newspaper notice, post notice at the site, and mail a notice to the members of the site designation committee. The local agency would also have to respond to written comments from the public and hold a community meeting to gather public comments.

- If a local agency implemented a remedial action, it could recover its costs in the same manner in which cost recovery is permitted under CERCLA, the federal Superfund law.

5. Remediation Standards/Cleanup Alternatives

- In order to be eligible for liability protections under the Brownfields Statute discussed below, the site must be remediated to a level that "exercises appropriate care" and is protective of public heath and the environment, pursuant to the California Superfund Act and the Water Code.

- In addition, all remedial action plans must be no less stringent than those established in the federal National Contingency Plan.

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- State Board Resolution No. 92-49 requires that cleanups conducted under the SLIC Program achieve background groundwater quality or "the best water quality which is reasonable" if background levels cannot be attained.

- While screening levels are utilized in the investigation process, there are no specific statutory or regulatory cleanup criteria. Therefore, cleanup criteria goals for individual sites are set forth in the approved remediation document.

- 2008 amendments to the Porter-Cologne Water Quality Control Act authorize the state or regional water board to require a person conducting cleanup, abatement, or other remedial action at a brownfield site to assess the potential human health or ecological risks associated with the discharge of regulated contaminants into the state's waters. These water assessment requirements apply to sites that are issued cleanup or abatement orders after January 1, 2008, but the state or regional boards also have the authority to require that sites subject to prior orders also undertake such an assessment.

- In situations where the surface and subsurface soils have been remediated, but groundwater contamination remediation has not yet been completed, DTSC will allow development to commence under its Partial Site Cleanup policy, contained in Management Memo #92-4.

- Partial site cleanup is only available to entities, such as developers and lending institutions, when the remaining groundwater contamination does not pose a threat to surface development. Partial site cleanup requires a certification letter from a regional administrator of DTSC.

- The Expedited Remedial Action Program ("ERAP") was a pilot program administered by DTSC until it was repealed on June 27, 2012. The program was designed to test alternative cleanup methods by providing incentives to responsible parties to speed up remediation work. The incentives included a streamlined remediation process and a covenant not to sue. From inception in 1995, through repeal in 2012, nineteen sites were accepted into ERAP. Sites that were selected prior to June 27, 2012 are still subject to the program.

- The Private Site Management ("PSM") program, established in 1995, provided for private site managers to conduct aspects of assessment, remedial and removal actions with limited DTSC oversight. The PSM program was intended to be used for "low risk" brownfields sites. However, despite significant public outreach, the program was not used. Like CLERRA and ERAP, it was repealed in 2012.

- To be eligible for the PSM program, a site had to meet the following criteria:

  a. no further significant environmental damage or human exposure could occur while the response action was in progress;

  b. the site could not be adjacent to, or be used for, "sensitive land uses," which included residential, school, day care or hospital uses; and

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c. the release at the site could not have affected groundwater and there could be no enforcement order or agreement issued for the site.

6. Liability Exemption for Eligible Persons

A. Liability Protections under the Brownfields Statute

- Under the Brownfields Statute, provisions are made for bona fide purchaser, innocent landowner, and contiguous property owner liability protections that derive from the similarly designated protection under the federal Superfund law discussed above.

- A bona fide purchaser is a person, or tenant of a person, who acquires ownership of a site on or after January 1, 2005, upon which all releases of hazardous materials occurred prior to acquisition of the site. In addition, the person must not be potentially liable for a release at the site or affiliated with any person who is potentially liable.

- An innocent landowner is a person who owns a site, but did not cause or contribute to a release at the site. To qualify as an innocent landowner, the person must: (1) have made all appropriate inquiries at the time of acquisition and had no reason to know of the release; or (2) have acquired the property by inheritance or bequest; or (3) be a government entity that acquired the property through escheat, eminent domain, tax lien, or other involuntary acquisition; or (4) qualify for a CERCLA § 107(b) defense.

- A contiguous property owner is a person who owns a site that is adjacent to a contaminated site that is not owned by the person. To qualify as a contiguous property, the person must not have caused, contributed, or consented to the release and must not be potentially liable for the release at issue or affiliated with any person who is potentially liable. In addition, at the time of acquisition of the property, the person must have made "all appropriate inquiries" and had no reason to know of the release at the site.

- In addition to the requirements set forth above, there are also required common elements that must be met in order to qualify as a bona fide purchaser, innocent landowner, or contiguous property owner. To satisfy these elements, the party must:

  a. have made all appropriate inquiries prior to acquisition of the site;

  b. exercise appropriate care with respect to the release of hazardous materials;

  c. cooperate with persons conducting response actions by providing assistance and access to the site;

  d. comply with land use controls established pursuant to a response plan;

  e. comply with all information requests or subpoenas regarding the release of hazardous materials; and

f. comply with all federal and state notice and reporting requirements.

- For purposes of these three liability protections, passive migration is not considered a "release."

- Qualifying bona fide purchasers, innocent landowners, and contiguous property are entitled to the following liability protections:

  a. immunity from claims by a person, other than an agency, for response costs or damages related to the hazardous materials release at the site; and

  b. immunity from agency action requiring the performance of a response action.

- These liability protections begin when the applicant enters into an agreement with the agency, and continues unless the party is notified by the agency in writing that they have deviated from the agreement or the agreement is terminated prior to an agency finding of no further action.

- The agency may attach a lien on the property in the amount of unrecovered response costs. The lien is a "windfall lien" and, therefore, cannot exceed the amount of the difference in fair market value of the property attributable to the remedial action.

- 2006 legislation created the "bona fide ground tenant," a new class of persons who may qualify for liability protections similar to those available for bona fide purchasers, innocent landowners, and contiguous property owners.

- A bona fide ground tenant must acquire a non-fee interest in real property after January 1, 2007, which can be in the form of a ground lease for at least 25 years, an easement for at least 25 years, or some other legal means of access and control for at least 25 years, subject to agency approval.

- In addition, bona fide ground tenants must enter into an agreement with DTSC and a third party, whereby the third party (the site owner, a redevelopment agency, or a county) will be responsible for conducting site assessment and remediation at the site. The third party must dedicate some form of revenue stream to ensure that the remediation is completed.

B. <u>Liability Protection under the Polanco Redevelopment Act</u>

- Upon successful completion of the remedial action, the redevelopment agency is not liable under any state or local law with respect to the release addressed in the remedial action plan. This immunity from liability extends to:

  a. Employees or agents of the redevelopment agency;

  b. Any person who enters into an agreement with the redevelopment agency to redevelop property, if such agreement requires the person to acquire or remediate property;

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c. Any subsequent purchaser of a property subject to an agreement described in (b) above; and

d. Any person who provides financing to a person specified in (b) or (c) above.

C. Liability Protection under CLERRA

- While CLERRA provided liability protections, it was among the laws repealed by the state in 2012. The liability protections that were available are nonetheless set forth below.

- If a local agency implemented and completed a site investigation and remedial action, and had such completion approved in writing by the oversight agency, the local agency would not be liable under any state or local law with respect to the release of hazardous materials addressed in the remediation plan.

- The liability protection described above would have extended to the following entities:

a. Employees or agents of the redevelopment agency;

b. Any person who entered into an agreement with the redevelopment agency to redevelop property, if such agreement required the person to remediate the acquired property;

c. Any subsequent purchaser of a property subject to an agreement described in (b) above; and

d. Any person who provided financing to a person specified in (b) or (c) above.

7. Prospective Purchaser Policy

- As certificates of completion and No Further Action letters do not contain covenants not to sue, DTSC and Regional Boards offer liability protection to prospective purchasers through the negotiation of a prospective purchaser agreement ("PPA").

- Following the enactment of the Brownfields Statute, PPAs are generally used for sites that do not meet the "infill area" eligibility criteria under the Brownfields Statute.

- An "infill area" is defined as "a vacant or underutilized lot of land within an urban area that has been previously developed or that is surrounded by parcels that are or have been previously developed."

- To be eligible for a PPA, the following criteria must be met:

a. the prospective purchaser did not contribute to or exacerbate the contamination at the site;

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b. the prospective purchaser's actions at the site will not cause health risks for persons on the site;

c. the prospective purchaser is not a responsible party;

d. the prospective purchaser cooperates with response actions by allowing access to the site and not interfering with the remedial action;

e. unauthorized disposal does not occur at the site; and

f. there are other solvent responsible parties who are willing to perform the remediation work.

- In order to qualify for a PPA, the prospective purchaser must be able to demonstrate that the project will benefit the public through creation of jobs, an increase in tax base, and benefits to disadvantaged populations.

- Prospective purchasers who enter into PPAs will receive a covenant not sue providing immunity against enforcement actions for existing contamination, as well as contribution protection on third party claims.

- DTSC will consider entering into a PPA with a BFP if it will result in substantial benefit to the state, the remediation would not otherwise be conducted, and the prospective purchaser meets all eligibility criteria.

- Pursuant to a 1996 guidance memorandum, the Regional Boards have adopted DTSC's policy regarding prospective purchaser agreements. The memorandum also makes provision for the issuance of a "comfort letter," which does not include a covenant not to sue.

8. Liability Protection for Owners of Property over Contaminated Groundwater

- In addition to the contiguous property owner liability exemption discussed above, DTSC has a policy, contained in Management Memo #90-11, of not pursuing cost recovery or enforcement actions against parties that are responsible parties solely because of ownership of a parcel that is over contaminated groundwater.

- If the property owner contributed to the release or, through activities, causes the release to spread significantly, the owner will not be protected by this policy.

- Two specific instances in which this policy applies are: (1) ownership of residential property over contaminated groundwater; and (2) ownership of land or wells by a water company that extracts water from a contaminated aquifer.

9. Lender Liability Protection

- By statute, lenders are not liable for remedial actions, fines, penalties, or damages relating to releases of hazardous materials at sites where lenders hold or act upon security interests, provided they follow required procedures.

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- Sites at which lenders will not be liable include: (1) property in which the lender owns an interest solely to protect a security interest; (2) property that the lender acquired through foreclosure; and (3) property owned, leased, possessed, or used by a person to whom the lender has issued a loan in which the lender holds no security interest.

- Lender liability protection is lost in any of the following circumstances:

  a. following foreclosure, the lender does not sell, re-lease, or otherwise divest itself of the property in a reasonably expeditious manner;

  b. following foreclosure, the lender fails to comply with disclosure laws;

  c. if the lender is reckless and negligent, contributing to the hazardous materials release;

  d. if the lender conducts a voluntary cleanup without notifying the state;

  e. if the lender is liable for conduct on the property other than in its capacity as a lender;

  f. if the lending arrangement was structured to avoid liability relating to the hazardous substance release;

  g. if the lender is both a beneficiary and fiduciary with respect to the same fiduciary estate, or if the lender receives benefits that exceed customary or reasonable compensation for administration of the property;

  h. to the extent of any actual benefit realized upon disposition of property acquired through foreclosure as a result of a remedial action undertaken by another person;

  i. if, prior to foreclosure, the lender participated in management activities at the site;

  j. if the lender contributes to the release;

  k. if the lender made the loan for the property solely for investment purposes; or

  l. if, following foreclosure, the lender rejects or outbids an offer of fair consideration for the property.

10. <u>Liability Protection for Responsible Parties through Site Designation</u>

- Responsible parties who agree to undertake a remedial action may request that a single state agency be designated as their lead oversight agency through the Site Designation process.

- To request site designation, a party must submit an application to the Site Designation Committee, which is composed of the Secretary of Cal/EPA, the

Director of DTSC, the Chairperson of the State Board, the Director of the Fish and Game Department, the Director of the Office of Environmental Health Hazard Assessment, and the Chairperson of the Air Resources Board.

- A public hearing on the application is held and then the committee determines which state agency is best suited to serve as the lead agency. The committee can choose to not appoint a lead agency.

- The Site Designation process is not often used in brownfields redevelopment, as designation of an oversight agency usually occurs under the terms of the inter-agency MOA discussed above.

- Once a certificate of completion is issued for a site, the party who received a site designation will be protected from future enforcement actions by any other state agency, relating to the release at the site.

11. California Recycle Underutilized Sites Program ("CALReUSE")

- The CALReUSE program is overseen by the California Pollution Control Financing Authority ("CPCFA"). CALReUSE consists of two programs: the CALReUSE Assessment Program and the CALReUSE Remediation Program.

- The CALReUSE Assessment Program provides forgivable loans for site assessment, technical assistance, remedial action plans, and site access at brownfields properties.

- Loan amounts under the CALReUSE Site Assessment program were increased in 2008. The loans are not to exceed $300,000 generally per site and $500,000 for sites that are reutilized to create housing, and the loans require a 25 percent match. The maximum loan term is 36 months. The interest rate on site assessment loans is the six month London Interbank Offered Rate (LIBOR) at the time, but not less than two percent, and is fixed for the terms of the loans.

- CALReUSE Site Assessment loans are to be used in the pre-development phase to encourage hesitant developers to acquire contaminated properties. A CALReUSE Site Assessment loan can be used to pay for a site assessment, which will be used to inform potential developers of approximately how much remediation at a site will cost.

- The Assessment Program prioritizes projects located in distressed communities and requires that projects meet "readiness" criteria, that applicants have proven track records and that loans be made to projects that are unlikely to go forward without funding.

- Selection of projects and approval of loans is done by CALReUSE staff in conjunction with local government strategic partners.

- In February 2008, emergency amendments to the CALReUSE regulations were adopted that amended the Site Assessment Program and created the CALReUSE Remediation Program (See "2008 Legislative Initiatives" below). The Remediation Program is funded through the Housing and Emergency Shelter Trust Fund Act of

2006.

- Grants and loans provided under the Remediation Program are a minimum of $50,000 and a maximum of $5,000,000 per project.

- The CALReUSE Remediation Program finances brownfield cleanups that promote infill residential and mixed-use redevelopment Grants and loans are available to eligible projects for up to $5 million. Unlike the Site Remediation Program, the end-use of the site must have a housing component and at least 15% of the project must create affordable housing. Additionally, the site must be in a defined infill area, and the project must be consistent with regional and local land use plans to be eligible for funding. Like the Site Remediation Program, "Strategic Partners" assist in administering the program, but the CPCFA retains the final decision-making authority for approving grants and loans.

- In awarding Remediation Program grants and loans, CPCFA weighs the availability of program funds, the public benefits of the project, the geographic distribution of projects, and the status of the project with respect to the National Priorities List ("NPL"). The "public benefits" of a project include the readiness to proceed, whether the project is in a economically distressed community, the degree to which the project includes affordable housing and the project's use of green building methods.

- Sites that are either not listed on the NPL, or are on the NPL but where no responsible party, has been identified are accorded "first priorty." Sites listed on the NPL, for which a responsible party has been identified, are accorded "second priority."

- In 2002, CPCFA partnered with the cities of Oakland, Emeryville, and the San Diego City Development Corporation, supplying $2.3 million in funding. These three entities renewed their contracts with CPCFA in 2006.

- In 2003, CPCFA partnered with a private sector organization, California Environmental Redevelopment Fund ("CERF")/California Center for Land Recycling ("CCLR"). CPCFA gave $1 million in funding to the partner to distribute statewide. An additional $2 million was allocated to the organization in 2004. CERF discontinued participation in the program in 2007. CCLR renewed its contract with CPCFA in 2006.

- In 2006, CPCFA partnered with the cities of Bakersfield and Berkeley, with $500,000 allocated to Bakersfield and $400,000 allocated to Berkeley.

- In 2007, CPCFA partnered with six "Strategic Partners": one statewide entity and five local governments. The funding was allocated as follows: CCLR received $2 million; City of Oakland and San Diego Redevelopment Authority both received $1 million; City of Bakersfield received $500,000; City of Berkeley received $450,000; and Emeryville Redevelopment Authority received $150,000.

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- Projects will not receive funding until the cleanup plan is approved by an oversight agency.

- Overall, as of June 30, 2012, the CPCFA has awarded over $59 million to 73 projects in the Remediation and Assessment Programs. Detailed information on CALReUSE projects is available in the 2011 - 2012 California Recycle Underutilized Sites Program 2011-2012 Annual Report available at http://www.treasurer.ca.gov/cpcfa/calreuse/annualreport/2011.pdf

12. Targeted Site Investigation Program

- The Targeted Site Investigation Program ("TSI"), funded through a $1.5 million U.S. EPA grant, provides for DTSC to perform site investigations at no cost to the owner. A total of $550,000 is available for annual distribution to selected grant applicants.

- Using the information gathered during the site investigation, the owner can determine how best to reuse the property.

- The be eligible for the TSI program, a site must meet the following criteria:

  a. the site must be a brownfields site under the U.S. EPA definition;

  b. the site must be owned by a public agency or a non-profit organization (or be an abandoned site of special interest to either of these entities);

  c. the site must not be federally owned, be on the National Priorities List, or be subject to any enforcement action;

  d. the site must be accessible so that DTSC or Cal/EPA can conduct the site investigation;

  e. contract costs cannot exceed $200,000;

  f. the site must have the support of a local development agency, usually evidenced through a letter of support; and

  g. the site cannot have received a TSI grant within the same fiscal year.

- In 2005, seven sites were awarded TSIs. The sites were located in the cities of Antioch, Duarte, Fairfield, Lynwood, Redding, San Diego, and Pacoima. In 2006, DTSC announced that six sites had been selected for the TSI program. The sites are located in Tulare, Oakland, National City, Mount Shasta, Los Angeles, and Chowchilla.

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13. Cleanup Loans and Environmental Assistance to Neighborhoods Program

- The Cleanup Loans and Environmental Assistance to Neighborhoods ("CLEAN") Program was established in 2000, to provide financial assistance to developers, businesses, schools and local governments to help expedite the redevelopment of contaminated properties.

- There are two types of loans available through the CLEAN program: the Investigating Site Contamination Program ("ISCP") and the CLEAN program.

- ISCP offers low interest loans, in amounts up to $100,000, to conduct preliminary assessments.

- The CLEAN program offers low-interest loans for cleanup or removal activities, in amounts up to $2.5 million. CLEAN loans are only available for projects that benefit the public in some way.

- During the initial loan period, six of eighteen applications were approved and funded, for a total of $5.2 million.

14. Financial Assurance and Insurance for Redevelopment

- The Financial Assurance and Insurance for Redevelopment ("FAIR") program was modeled after the Massachusetts Brownfields Redevelopment Access to Capital program (discussed below) and was developed to lower the cost of environment insurance to encourage the cleanup of contaminated properties. However, since enactment the FAIR program has not received the necessary funding to implement its goals.

- Through FAIR, Cal/EPA would provide pre-negotiated policies to property owners.

- Three different types of insurance would be available through FAIR: (1) pollution legal liability insurance; (2) cost overrun insurance; and (3) secured creditor insurance.

- FAIR would also offer subsidies to help defray the cost of insurance premiums. Property owners who purchase insurance through FAIR would be eligible for subsidies of up to fifty percent of the cost of premiums.

- According to Cal/EPA, in 2005 AIG Environmental was provisionally selected as the carrier for the FAIR program. However, due to the lack of funding, there is no carrier for the program.

15. Housing and Emergency Shelter Trust Fund Act of 2006

- The Housing and Emergency Shelter Trust Fund Act of 2006 was enacted to fund several housing-related programs. Funding is provided through proceeds from the sale of bonds under the Housing and Emergency Shelter Trust Fund of 2006.

- The act authorizes the issuance of bonds in the amount of $2.85 billion pursuant to the State General Obligation Bond Law, $850 million of which shall be deposited in the Regional Planning, Housing, and Infill Incentive Account.

- Money from this account will be used for a variety of purposes including brownfield cleanup that promotes infill housing development and other related infill development.

- The Housing and Emergency Trust Fund Act became operative upon the public approving Proposition 1C during the November 7, 2006 state general election.

- In 2007, the Act was amended and the Infill Incentive Grant Program of 2007 was established. This grant requires the Department of Housing and Community Development to administer a competitive grant program to allocate the funds of the Regional Planning, Housing, and Infill Incentive Account. The amendments also establish the funding for the CPCFA's administration of the CALReUSE Brownfields program.

- On August 5, 2009, A.B. 767 was signed into law, amending §53545 of the Trust Fund Act to provide $850 million to the Regional Planning, Housing and Infill Incentive Account for, among other things, brownfield cleanup that promotes infill housing development and other related infill development consistent with regional and local plans.

16. Revolving Loan Fund (RLF)

- In 2008, the Revolving Loan fund was created in response to the 2002 Revitalization Act amendments to CERCLA which made loan and grant funds available to state brownfield revitalization programs.

- EPA granted $3 million for RLF funding to the Department of Toxic Substances Control (DTSC) in connection with DTSC's partnership with the City of Los Angeles and the San Francisco Redevelopment Agency known as California's Urban and Rural Brownfields Coalition (CURB). Under the RLF, loans are available to eligible parties that control or have access to a brownfield site in the amount of $200,000 to $900,000 per site. States, political subdivisions, U.S. territories, Indian tribes and non-profit organizations are eligible for subgrants up to $200,000 per site.

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17. Green Remediation

- In December 2009, the DTSC published an Interim Advisory for Green Remediation, providing project managers and remediating parties with concepts for reducing the environmental footprint of a cleanup action. The Advisory also provides a green remediation evaluation matrix (GREM) to aid parties in assessing the environmental, social and economic impacts of their cleanups. The advisory applies to every phase of a cleanup action, including site investigation, remedial design and selection, implementation, long-term monitoring, operation and maintenance and closure.

- Currently, there are no statutory or regulatory guidelines in California for the implementation of green remediation. However, the Advisory suggests that the State's green remediation policy may be largely influenced by in the future by policies, guidance or regulations produced by EPA and ASTM.

- The only incentive that is currently in place for green remediation is a rebate offered by the California Public Utilities Commission for self-generated electricity from renewable energy systems under 5 MW in capacity.

- The Interim Advisory discusses the need for more incentives, including loans, grants, contract incentives, fast-track permitting and reduced permit costs.

18. Orphan Site Cleanup Fund (OSCF)

- The OSCF is a new financial assistance program that was established in January 2009 to provide financial assistance for the cleanup of brownfield sites contaminated by leaking petroleum underground storage tanks where there is no financially responsible party.

- OSCF regulations became effective in October 2009 and can be accessed at [http://www.swrcb.ca.gov/water_issues/programs/ustcf/oscf.shtml].

- As a result of the American Recovery and Reinvestment Bill of 2009 (ARRA), the California Water Resources Control Board received nearly $16 million from the EPA Leaking Underground Storage Tank (LUST) Trust Fund. The State Water Board will allocate a portion of these funds to the OSCF program.

19. Infill Infrastructure Grant Program (IIG)

- IIG was established by SB 86 in 2007 and is administered by the Department of Housing and Community Development (DHCD). The program is intended to assist in the new construction and rehabilitation of infrastructure that supports higher-density affordable and mixed-income housing in infill areas. Grant funding ranges from $500,000 to $20 million for eligible infill projects.

- Eligible parties include developers and localities, public housing authorities or redevelopment agencies that join the developer's application.

- On January 30, 2009, the DHCD announced the availability of approximately $197 million in funding for IIG. This funding was provided under the Housing and Emergency Shelter Trust Fund Act of 2006.

- Also on January 30, 2009, DHCD published revised IIG Program Guidelines, which can be accessed at: [http://www.hcd.ca.gov/fa/iig/Full_IIG_Guidelines_013009.pdf].

20. 2007 Legislative Initiatives

Assembly Bill 274 – Introduced February 9, 2007

- Bill would create a brownfield tax credit against both personal and corporate income tax.

- The credit would be applicable to small business operators and would be equal to the amount of costs paid or incurred for cleanup of a brownfield property during the taxable year.

- To qualify for the credit, the applicant must receive written certification from DTSC attesting to the fact that the remedial action at the site was satisfactorily completed.

- A.B 274 died in the Committee on Revenue and Taxation on January 31, 2008.

Assembly Bill 422 – Introduced February 16, 2007

- Bill requires that the California Superfund Act require that exposure assessments that are prepared in conjunction with a response action include estimates of the maximum exposure to volatile organic compounds that may enter existing or proposed on-site structures and cause exposure through accumulation in indoor air.

- A.B. 274 was signed into law on October 13, 2007, as Chapter 597.

21. 2008 Legislative Initiatives

Assembly Bill 2729 – Introduced February 22, 2008

- Bill would amend the California Superfund Act by providing that if the estimated cost of the removal action is less than $2 million (rather than the current $1 million figure), the DTSC or regional board would not be required to prepare a remedial action plan. Also, while notice to the local community must currently be given where removal actions are planned and are projected to cost less than $1 million, legislation would also increase this to $2 million.

- Under § 25390 of the Act, AB 2729 would add the definitions of "project proponent" and "responsible party."

- Finally, AB 2729 would also amend §25390.3 by adding new subdivision (e). If an appropriation is made from the Toxic Substances Control Account to the Orphan

Share Reimbursement Trust Fund, those monies shall only be expended for purposes of paying claims for reimbursement filed by project proponents.

- Bill enacted as Chapter 644, Statutes of 2008.

Assembly Bill 3077 – Introduced March 13, 2008

- Bill would amend the California Land Reuse and Revitalization Act of 2004 by adding Cal. Health and Safety Code §25395.33. This section would authorize the DTSC to administer and implement a loan or grant program consistent the federal Small Business Liability Relief and Brownfields Revitalization Act and using only federal grant funds, if available.

22. 2009/2010 Legislative Initiatives

Assembly Bill 738

- Bill would authorize DTSC to implement a loan or grant program for brownfield cleanup that is consistent with the federal regulations implementing the Small Business Liability Relief and Brownfields Revitalization Act.

Assembly Bill 83

- Introduced on September 10, 2009, AB 83 would appropriate funds from the Regional Planning, Housing and Infill Incentive Account to the California Pollution Control Financing Authority for purposes of providing loans and grants under the CALReUSE program.

23. 2011/2012 Legislative Initiatives

Senate Bill 494

- Introduced on February 17, 2011, SB-494 would transfer oversign of remediation of perchloroethylene to the Regional Water Boards.

Assembly Bill 1207

- Introduced on February 18, 2011, Assembly Bill No. 1207 would provide that the 10-year statute of limitations applicable to actions against developers, architects, surveyors or other professional involved in the construction of improvements to real property is inapplicable to actions arising from hazardous substances or contaminants.

Senate Bill 1335

- In February 1, 2012, California officially dissolved over 400 redevelopment agencies statewide and designated successor agencies to manage redevelopment projects underway. See. http://www.dof.ca.gov/redevelopment/. Introduced on February 24, 2012, Senate Bill No. 1335 would allow successor agencies to retain property that

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was being remediated by the redevelopment agency to continue remediation before disposing of the property.

Senate Bill 1018

- Introduced on Februray 6, 2012. Senate Bill No. 1018 was signed into law on June 27, 2012. Among other things, it repealed the Private Site Manager Program; California Expedited Remedial Action Program; the California Land Environmental Restoration and Reuse Act and the Hazardous Substance Cleanup Arbitration Panel. (See discussion in materials above).

Chapter 181, Statutes of 2012

- Signed into law on August 17, 2012, Chapter 181 requires local health officers to file liens against properties found to be contaminated by the manufacture of methamphetamine to secure costs incurred by the local health officer in investigating the property.

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III. Massachusetts Brownfields Program

An Act Relative to Environmental Cleanup and Promoting the Redevelopment of Contaminated Property, 1998 Mass. Acts ch. 206 ("the Brownfield Act") [Enacted in 1998, amending Mass. Gen. Laws ch. 21E].
Massachusetts Oil and Hazardous Material Release Prevention and Response Act, Mass. Gen. Laws ch. 21E ("Chapter 21E") [Enacted in 1983, amended in 1983, 1985, 1986, 1987, 1990, 1991, 1992, 1993, 1994, 1996, 1997, 1998, 2001, 2002, 2003, 2004, 2008, 2011 and 2012].
Massachusetts Contingency Plan ("MCP"), 310 Mass. Code Regs. 40.000 et. seq. [Enacted in 1988; last amended in 2007 and 2009].
Brownfields Covenant Not to Sue, Mass. Gen. Laws. ch. 21E, § 3A(j)(3) [Enacted in 1998, pursuant to the Brownfields Act; amended in 2003]; 940 Mass. Code Regs. 23.00 et seq. [amended in 2008].
Brownfields Redevelopment Fund, Mass. Gen. Laws ch. 23G, § 29A [Enacted in 1998, pursuant to the Brownfields Act; amended in 1999 and 2006].
Brownfields Redevelopment Access to Capital Fund, Mass. Gen. Laws ch. 23A, §§ 60-61 [Enacted in 1998, pursuant to the Brownfields Act; § 60 amended in 2003].
Brownfields Tax Credit, Mass. Gen. Laws ch. 62, § 6(j) [Enacted in 1998, pursuant to the Brownfields Act; amended in 2000, 2003, 2006 and 2010]; Mass. Gen. Laws ch. 63, § 38Q [Enacted in 1998, pursuant to Brownfields Act; amended in 2000, 2003, 2006, 2008 and 2010].

1. Legislative Purpose

- To promptly ensure environmental cleanup and to promote the redevelopment of contaminated property.

2. Eligibility of Sites and Parties

- Any property owners, including those deemed responsible for contamination under state law, may seek to negotiate liability protections from the state in return for completing cleanups of eligible contaminated sites.

- Current and prospective owners, whose liability for cleanup would be based solely on ownership following contamination events (referred to by the Brownfield Act as "eligible persons"), are entitled to wide-ranging protections from liability based on committing to and following through on cleanups of contaminated sites.

- For sites where eligible persons and others are seeking to negotiate liability protections including Covenants Not to Sue, state must give priority to properties in economically distressed areas.

3. Process

- All owners and operators undertaking response actions must notify the Massachusetts Department of Environmental Protection ("DEP") of releases and secure all necessary permits and approvals prior to commencing work.

- Parties engaging in a response action at a site must engage an environmental consultant that is a Licensed Site Professional ("LSP") to oversee the cleanup.

- The DEP may use a consent order to set deadlines and requirements for a response action at a site. A consent order can include such details as contribution protection, site access, and cost recovery, among other items.

- To provide incentives to encourage voluntary cleanups, DEP is empowered to negotiate with parties including those responsible for contamination under Chapter 21E who do not qualify as "eligible persons."

- Those negotiations may include agreements by the state to enter Covenants Not to Sue and third party liability protection, as discussed below.

4. Remediation Standards/Cleanup Alternatives

- Site investigations and cleanups are performed in accordance with Chapter 21E and the DEP technical requirements set forth in the Massachusetts Contingency Plan ("MCP").

- Brownfields sites must be remediated to the same standards as all other properties in the MCP system.

- Parties proceeding with a response action under the MCP must strive to attain a "permanent solution" resulting in achievement of remediation to a level of "No Significant Risk” ("NSR").

- NSR is a level of control for each contaminant to the point that it does not present a significant risk of damage to health, safety or environment during the foreseeable future, taking into account anticipated future use of the site and its environs.

- If feasible, permanent solutions must reduce the level of hazardous substances to background levels.

- Where DEP is convinced that a permanent solution cannot be feasibly obtained, one or more "temporary solutions" may be implemented. However, DEP is to require permanent solutions whenever they would be more cost-effective.

- Examples of temporary solutions include containment of contaminants, and provision of alternate water supplies.

- Response actions must be conducted in accordance with Response Action Performance Standard ("RAPS"), as defined by the MCP. RAPS must include consideration of EPA and DEP policies, use of up-to-date methods, technology, and equipment, and methods of investigation that are scientifically defensible.

- An LSP may, at his or her discretion, propose dispensing with any of the activities prescribed by the MCP if the LSP determines that the activity is unnecessary for the particular property. The LSP must use RAPS in making such a determination and must also provide a technical justification to DEP.

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- The MCP uses Tier Classifications to categorize sites. The classification is based primarily upon the MCP Numerical Ranking System and an LSP Tier Classification Opinion.

- Tier I sites are to reach a Response Action Outcome ("RAO") within five years of the issuance of the Tier I permit. Tier II sites are to reach an RAO within five years of the initial Tier classification.

- 2008 amendments to the MCP create a process to re-establish deadlines for response actions for parties who are required to or intend to conduct response actions at a Tier I or II site but who have not previously filed a Tier I permit application or Tier II classification submittal.

- MCP allows for certain projects, including public redevelopment of brownfields, to be designated as "Special Projects." When a project is given Special Project Designation, DEP is authorized to extend the Tier Classification deadlines.

- Initially, eligibility for Special Project Designation was limited to projects undertaken by governmental bodies.

- In 2006, MCP amendments broadened eligibility for Special Project Designation to include projects undertaken by property owners or operators who did not cause or contribute to the release. Such private parties must demonstrate community support by submitting a letter from the municipality describing the public benefits. Municipalities are limited in the number of private projects they may support.

- The MCP provides for Risk Characterizations (using both a chemical-specific approach, and a cumulative risk approach) that are utilized to evaluate the need for remedial actions.

- There are three categories of groundwater standards that are based on identification of groundwater use, potential or designation.

- There are three categories of soil standards based on land use, ranging from the S-1 category where soil is or may be used for agricultural use, a child's frequency or intensity use is considered high, or an adult's frequency and intensity of use is considered high; to S-3, where human use and intensity are low and the soil is isolated from any receptor.

- Chapter 21E and the MCP call for activity and use limitations (that is, institutional and engineering controls - including covenants, notices and use restrictions - to be employed where contaminants are to remain above the strictest state standards.

- Institutional controls include Grants of Environmental Restriction, and Notices of Activity and Use Limitation.

5. <u>Liability Exemption for Eligible Persons</u>

- Current or prospective owners who did not own or operate the property at the time of contamination, and who did not cause or contribute to the contamination ("eligible

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persons"), are, by statute, exempt from specific categories of liability once they complete remedial actions that achieve and maintain a permanent solution.

- Statutory liability protection covers action by the state and third parties for response costs, contribution, and property damage, under Chapter 21E and common law, except for contract claims.

- To qualify for the liability protection, the eligible person must:

  a. comply with all notice requirements of Chapter 21E and the MCP;

  b. allow access to the site for DEP or others to perform response and remedial actions;

  c. respond to information requests in a reasonably timely manner;

  d. conduct all response action at the site in accordance with Chapter 21E and the MCP; and

  e. negotiate settlement of response costs incurred by the state at the site. (In settling response costs, DEP is to take into account economic benefits of the redevelopment project and ability to pay.)

- If an eligible person transfers the property before the permanent solution is in place, the eligible person will be exempt from liability once the new owner finishes the response action, so long as the new owner conducts the response actions in accordance with Chapter 21E and the MCP.

- Owners and operators of properties where permanent solutions have been achieved and maintained, and where activity and use limitations ("AULs") have been properly implemented during their period of ownership and operation, are exempt from liability to the state or third parties for contribution, response action costs for property damage under Chapter 21E, or for property damage under common law, where subsequent property owners or operators - or others - act in violation of, or inconsistent with, the terms of the AUL.

- Liability protection extends to subsequent owners, so long as they maintain the site to DEP standards.

- Liability protections are also available for certain tenants, redevelopment authorities, governmental bodies, and charitable trusts.

6. <u>Covenant Not to Sue</u>

- Pursuant to the Brownfields Act, the state may, at its sole discretion, negotiate a Brownfields Covenant Not to Sue ("BCNS") with owners or prospective purchasers of contaminated property, under the following circumstances:

  a. the brownfield redevelopment project will result in economic or physical revitalization in the community, through such benefits as creation of new jobs,

creation of affordable housing, historic preservation, creation of open space or other public benefits;

b. a permanent remedy is to be achieved and maintained at the site, unless the party seeking the BCNS is an eligible person, who can demonstrate that it is not feasible to achieve a permanent solution at the site and thus a temporary solution will be achieved; and

c. a description of the proposed use of the site, as well as the resulting public benefits, is submitted in the form of a development plan.

- The BCNS protects the party from liability for contribution, response costs or property damage under Chapter 21E and common law, as to the state and third parties that were notified of an opportunity to join the BCNS. Pursuant to 2008 regulatory amendments, a BCNS may also cover natural resource damage claims if the applicant so requests and the State Secretary of Energy and Environmental Affairs agrees to become a signatory.

- The BCNS program is to be flexible and allows the Attorney General latitude in adjusting the liability protections of each agreement to the particular party and circumstances, including a determination as to when liability protection will vest. 2008 regulatory amendments deleted the limitation that liability relief could not vest at a site where only a temporary solution would be achieved unless an LSP had issued an opinion that a permanent solution was not feasible.

- BCNS agreements are to be negotiated in the following order of descending priority: (1) properties within the fifteen cities with the highest poverty rates; (2) properties in those municipalities which are considered economically distressed areas (see Brownfields Redevelopment Fund section below); and (3) properties in all other municipalities.

- 2008 regulatory amendments integrate public notice requirements, specify public comment and other rights of affected third parties who comment, and refine the BCNS process.

7. <u>Downgradient Property Owner Liability Protection</u>

- The Brownfields Act added a liability exemption and a liability defense for downgradient property owners whose properties have become contaminated due to migration of groundwater or surface water from upgradient sources.

- The following requirements must be satisfied for a downgradient property owner to qualify for the liability exemption:

  a. the hazardous substances that contaminated the property were released from a known upgradient or upstream source;

  b. the downgradient property owner does not currently own or operate, and has never owned or operated, the property that is the source of the contamination;

c. the downgradient property owner gives proper notice to DEP; and

d. the downgradient property owner provides access to DEP or others to perform remedial actions, makes efforts to prevent exposure, does not interfere with remedial actions at the site, and does not exacerbate the contamination at the site.

- If the contamination at the downgradient property is the result of groundwater or surface water migration from an unknown source, the owner has a defense to liability, rather than an exemption.

- Downgradient property owner status provides an exemption or defense against state and private claims for contribution, response costs, and property damage, under both Chapter 21E and common law.

8. <u>Lender Liability Protection</u>

- Under the Brownfields Act, secured lenders are not deemed liable as owners or operators, so long as the following conditions are met:

  a. the lender did not cause or contribute to the release at the site;

  b. the lender did not compel the owner/borrower to act in such a way that that has caused a hazardous substances release; and

  c. upon acquiring a property, the lender must:

    i. notify DEP if a hazardous substance release is discovered, provide DEP with access to the property for remedial action, and make efforts to prevent exposure to the hazardous substances;

    ii. undertake any response actions which it chooses to perform in accordance with Chapter 21E and the MCP; and

    iii. make diligent efforts to divest itself of the property.

- In the instance of a public foreclosure auction following foreclosure by the lender, the lender must notify DEP and all prospective bidders if it has knowledge of a hazardous substance release on the foreclosed property.

- The Brownfields Act amended pre-existing Chapter 21E lender liability protections by removing a provision that limited the effective period of the liability protection to five years after the secured lender acquired ownership of the property.

9. <u>Brownfields Redevelopment Access to Capital ("BRAC")</u>

- The Brownfields Act created the BRAC program, the goal of which is to provide subsidized environmental insurance to businesses and governmental bodies involved in the purchase, cleanup, or redevelopment of brownfields properties.

- BRAC assistance is also available to lenders financing such brownfields projects.

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- BRAC offers a premium subsidy available to eligible parties through the BRAC Fund.

- In order to be eligible for the premium subsidy, a party must obtain a "qualifying loan" for a brownfields site within the state.

- A qualifying loan is defined as a conventional loan secured for the purpose of purchasing or redeveloping a brownfields property, performing assessment, containment, or removal of contamination at a brownfields site, or for purchasing environmental insurance through the BRAC program.

- Currently, the premium subsidy is set at 50% of the premium, up to a maximum of $50,000. Certain public, quasi-public and non-profit entities may obtain subsidies of up to $150,000.

- To apply for the BRAC program, parties must submit an Application for BRAC Program Insurance, as well as site assessments prepared by an LSP, to AIG/Chartis, XL, ACE, Zurich, Great American, Chubb or Berkley, the insurance carriers selected by the commonwealth to provide BRAC insurance.

- Over 394 properties have been cleaned up with assistance from the program. So far, $1.5 billion has been spent on insurance purchase through the program, for projects on which over $9.8 billion have been committed by developers, with cleanups valued at nearly $241 million.

10. Brownfields Redevelopment Fund ("BRF")

- The BRF is administered by MassDevelopment and provides grants and low-interest loans to properties in Economically Distressed Areas ("EDAs") for the purpose of funding site assessment and cleanup. EDAs include all Economic Target Areas (ETAs) and areas that meet the criteria for ETA designation but have not been formally designated as ETAs. Former manufactured gas plant sites also qualify for the program.

- To be eligible for BRF funds, the applicant must be an "eligible person" (as described above in the "Liability Protection" section), the site must be located in an EDA, and the project must expect to produce significant economic benefits for the public, such as creation of new jobs, and economic revitalization. Further eligibility requirements include:

    a. for financing of environmental cleanups, BRF funds must be necessary in order to make the project financially feasible;

    b. the applicant must be liable solely as an owner or operator, must not have caused or contributed to the release at the site, must not have owned the site when the release occurred, must not have any family or business relationship with another PRP for the site; and

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c. the applicant must not have any outstanding enforcement actions concerning other properties within the state, unless the applicant has entered into an agreement with DEP or the Attorney General to resolve any such action.

- Grants are available only to municipalities, redevelopment agencies, economic development and industrial corporations, and community development corporations.

- In evaluating an application for BRF funding, MassDevelopment is to consider among other things, the level of unemployment and poverty in the EDA, the adequacy of the proposed response action, and the benefits to the community.

- Maximum BRF loan and grant amounts are $100,000 per project for site assessment, and $500,000 per project for cleanup. 30% of all BRF loans and grants are to be allocated to site assessments.

- A "priority project," where a municipality has dedicated substantial funding and the site has been designated as a priority project by the MassDevelopment, is eligible for a maximum of $2 million in funding from the BRF.

- In order to receive a grant from the BRF, the applicant must contribute 20% of the amount of the grant requested.

- House Bill 5057, introduced on June 14, 2006 and signed in part on June 24, 2006, appropriated $30 million for the BRF, with $1.2 million of that sum directed to a pilot program of up to $350,000 per project of grants earmarked for asbestos and lead paint abatement.

- As of June 30, 2012, the BRF had provided $65,053,520 at 566 sites in 106 cities and towns.

11. Brownfields Tax Credit

- Under the Brownfields Act, corporations, limited liability companies and nonprofit organizations that pursue, achieve and maintain permanent solutions, for properties they own or operate within economically distressed areas, may seek a tax credit against response costs incurred. Pursuant to 2008 House Bill 4904, signed into law on July 2, 2008 as Ch. 173, eligibility for the tax credit will be limited to "business corporations" commencing January 1, 2009. (See 2008 Legislative Initiatives below.)

- At present, a taxpayer or nonprofit organization is eligible for a tax credit for up to 50% of response and removal costs incurred between August 1, 1998 and January 1, 2014, once cleanup is completed in accordance with Chapter 21E and the MCP.

- If the remedy at the site includes an AUL, the tax credit is 25% of the net response and removal costs incurred between August 1, 1998 and January 1, 2014. A credit of 50% is available when the remedy at the site does not include an AUL.

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- To be eligible for the tax credit, the applicant must be an "eligible person" under Chapter 21E, must own or lease the subject property for business purposes, and cannot be subject to any enforcement actions under Chapter 21E.

- If the party fails to maintain the permanent solution before sale of the property or termination of the lease, a portion of the tax credit will be due as additional taxes that year.

- Net response and removal costs are defined as monies expended by the taxpayer in pursuing a permanent solution or remedy at the subject property.

- No tax credit is allowed for the amount of funding received from the BRAC program or the BRF.

- 2006 amendments make the brownfields tax credit assignable and transferable to other eligible taxpayers or nonprofits.

- The tax credit may be carried forward for up to five years.

12. Brownfield Support Teams ("BST") Initiative

- In May 2008, a multi-agency effort entitled "Brownfield Support Teams" was established to target key undeveloped brownfield properties. The initiative calls for financial assistance from MassDevelopment; site inspection, review and approval assistance from DEP; technical assistance from the Executive Office of Housing and Economic Development; and assistance on liability protection from the Attorney General's Office.

- The Teams are to work with communities to target site-specific and project-specific redevelopment issues.

- By July 2008, five pilot sites had been targeted for Support Teams assistance including: Chapman Valve/Crane Co.; South Worchester Industrial Park; Fisherville Mill; City Pier; and Ted's for Tires.

- From the inception of the BST initiative to late 2012, DEP and MassDevelopment had secured more than $18 million in assessment and cleanup funding. Additionally, DEP received a $1 million EPA coalition assessment grant, as well as $2 million in federal stimulus funding through a Leaking Underground Storage Tank (LUST) grant from EPA.

- On September 21, 2010, Lieutenant Governor Murray announced the second round of the Brownfields Support Team Initiative and designated six additional sites to be added to the program. The sites are in Gardner, Somerville, Chelmsford, Attleboro and Brockton.

- On November 29, 2012, Lieutenant Governor Murray announced the third round of the Brownfields Support Team Initiative and designated five additional sites to be

added to the program. The sites are in Amesbury, Hyde Park/Boston, Fitchburg, Ludlow Mills, and New Bedford.

13. 2007 Legislative Initiatives

- Legislative initiatives in 2007, including Senate Bill 134 and House Bill 856, would have expanded the liability protections under Chapter 21E to include natural resource damages, and in S.B. 134, personal injury as well. S.B. 134 would also have conferred the liability protection upon the applicant once that party achieves eligibility under the Brownfield Act, in which case the party would lose the protection it achieves, within five years of either elimination of all substantial hazards or a permanent solution.

- S.B. 134 would also have eliminated the responsibility of the eligible party to settle response costs incurred by the state.

- In April 2008, the bills were accompanied by orders authorizing the House Committee on Community Development and Small Business to make an investigation and to study the bills.

14 2008 Legislative Initiatives

- House Bill 4904, signed into law on July 2, 2008, as Ch. 173 of the Acts of 2008, limits the tax credit eligibility under the Brownfield Act to "business corporations" effective for tax years beginning on or after January 1, 2009. The term "business corporation" replaces the phrase "a domestic or foreign corporation or limited liability company or non-profit corporation."

- House Bill 1767, originally introduced on January 11, 2007, would have added a new section to Mass. Gen. Laws ch. 79, providing that where a brownfield site is taken by eminent domain, the original owner of the land is to be responsible for environmental cleanup and site assessment at the parcel. In March 2008, the House Committee on the Judiciary was authorized to study the bill.

15. 2009 Legislative Initiatives

- House Bill 848, introduced on January 16, 2009, would extend liability protection to any agency or authority of the commonwealth or public utility which "owns, holds title to, possesses an easement in, or maintains any property interest in, a right of way" at a site where the commonwealth incurred response costs. As of April 5, 2010, H.B. 848 was in the Ways and Means Committee.

- Also introduced on January 16, Senate Bill 386 and House Bill 818 proposed to insert a definition of "permanent solution" into § 2 of Chapter 21E. S.B. 386 and H.B. 8181 were amended to extend the reporting deadline to June 15, 2010. The bills are in the Joint Committee on Environment, Natural Resources and Agriculture.

- Also introduced on January 16, Senate Bill 398 which would have imposed stricter notice requirements on a lessor who knows of a release or threat of release of

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hazardous material. Besides immediately notifying the department, the lessor would have to notify all existing affected or potentially affected tenants in writing, as well as disclose the incident in writing to any prospective tenant before entering a lease or rental agreement.

16. <u>2010 Legislative Initiatives</u>

- Senate Bill 2485, introduced on June 18, 2010, would require that wherever feasible, a permanent solution include measures designed to reduce contaminant concentrations to background levels.

17. <u>2011/2012 Legislative Initiatives</u>

- Senate Bill 588, introduced January 19, 2011, would, among other things, create a commission to study the opportunity to increase availability of low-income housing by prioritizing redevelopment of Brownfields.

- House Bill 1382, introduced on January 20, 2011, would provide that owners of brownfields properties taken by eminent domain would remain responsible for clean-up costs following the taking.

18. <u>2013/2014 Legislative Initiatives</u>

- House Bill 1677, introduced on January 16, 2013, would provide that owners of brownfields properties taken by eminent domain would remain responsible for clean-up costs following the taking.

- House Bill 2515, introduced on January 17, 2013, would extend the Brownfields Tax Credit from 2014 until 2018.

IV. New Jersey Brownfields Program

Brownfield and Contaminated Site Remediation Act (the "Brownfield Law"), N.J. Stat. Ann. §58:10B-1 et seq. [Enacted in 1997; amended in 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009 (2009 amendments pursuant to the Site Remediation Reform Act, enacted May 7, 2009) and 2010; amending and supplanting the Hazardous Discharge Site Remediation Act, N.J. Stat. Ann. §58:10B-1 et seq. [Enacted in 1993].

Remediation Alternatives, N.J. Stat. Ann. §58:10B-12 to -13 [Enacted in 1993; amended in 1997, 2004, 2009 and 2010 (2009 amendments pursuant to the Site Remediation Reform Act)].

Hazardous Discharge Site Remediation Fund, N.J. Stat. Ann. §58:10B-4 to -11 [Enacted in 1993; amended in 2007, 2009 (2009 amendments pursuant to the Site Remediation Reform Act) and 2010].

Site Remediation Reform Act, **("SRRA")** N.J. Stat. Ann. §58:10C-1 et seq. [Enacted in 2009; amended in 2010].

Spill Compensation and Control Act, **(the "Spill Act")** N.J. Stat. Ann. §58:10-23.11 et seq. [Enacted in 1976; amended in 2007 and 2009 (2009 amendments pursuant to the Site Remediation Reform Act)].

Innocent Purchaser Defense, N.J. Stat. Ann. §58:10-23.11g [Amended in 1993, 1997, 2001, 2003, 2005 and 2009 (2009 amendments pursuant to the Site Remediation Reform Act)].

Lender Liability Protection, N.J. Stat. Ann. §58:10-23.11g(4)-(9) [Amended in 1993 and 1997].

Voluntary Cleanup Program, N.J. Admin. Code tit. 7, §26C-3.1 et seq. [Adopted in 1993; readopted with amendments in 1997; amended in 1999, 2003 and 2006; repealed 2009 pursuant to SRRA].

Technical Requirements, N.J. Admin. Code tit. 7, §26E-1.1 et seq. [Adopted in 1993; amended in 1997 and 1999; readopted with amendments, repeals and new rules in 2003; amended in 2005 and 2008; amended in 2009 by special adoption of interim rules implementing SRRA; readopted in 2011; amended in 2012 by adoption of Final Rules implementing SRRA, effective May 7, 2012].

Administrative Remediation Requirements ("ARRCS" rule), N.J. Admin. Code tit. 7, §26C-1.1 et seq. [Adopted in 1993; readopted with amendments in 1997; amended in 1999; readopted with amendments in 2003; amended in 2006 (pursuant to Grace Period Law, N.J.S.A. §13:1D-125 et seq., for correcting compliance deficiencies under ISRA and other DEP programs), 2007 and 2008; amended in 2009 by special adoption of interim rules implementing SRRA; readopted in 2011; amended in 2012 by adoption of Final Rules implementing SRRA, effective May 7, 2012].

Soil Remediation Standards, N.J. Admin Code tit. 7. §26D-1.1 et seq. (40 N.J.R. 3187(a), June 2, 2008) [Replacing prior DEP Guidance Document for the Remediation of Contaminated Soils, November 18, 1998; soil cleanup criteria appendix last revised on May 12, 1999; draft soil remediation standards first announced by DEP on July 19, 2004, subsequent new soil remediation standards then proposed on May 7, 2007, final soil remediation standards adopted on June 2, 2008; amended in 2009 by special adoption of interim rules implementing SRRA; readopted in 2011; amended in 2012 by adoption of Final Rules implementing SRRA, effective May 7, 2012]; Soil Remediation Standard Guidance Documents issued June 2008; DEP Guidance Document for the development of site-specific Impact for Groundwater Soil Remediation Standards (December 2008); DEP Guidance Document for the phase-in of new petroleum hydrocarbon protocol (November 12, 2009, last updated August 9, 2010); DEP Guidance Document for the Chromium Soil Cleanup Criteria (September 2008, revised April, 2010); Presumptive and Alternative Remedy Guidance Document (July 2011)

Groundwater Quality Standards, N.J. Admin. Code tit. 7, §9C-1.1 et seq. [Adopted in 1978; repealed and new rules adopted in 1993; readopted and recodified (as N.J. Admin. Code tit. 7, §9C) with amendments in 2005, 2007 and 2008; special adopted amendments in 2009 pursuant to

SRRA]; DEP Memorandum of February 5, 1997 on Safe Drinking Water Act changes and the impact on standards; DEP November 1998 Guidance on Classification Exception Areas; DEP Guidance Document on Interim Specific and Generic Groundwater Quality Criteria (last revised December 20, 2002); DEP Memorandum of February 1, 2006 on "Sheen" Remediation Policy Initiative.

NJDEP Vapor Intrusion Guidance, Drafted in June 2005; finalized in October 2005; updated screening level tables, and new volatile organic airsampling methodology, issued in March 2007, new guidance issued in January 2013.

Environmental Opportunity Zone Act, N.J. Stat. Ann. §54:4-3.150 et seq. [Enacted in 1996; amended in 1997].

Historic Pesticide Contamination Task Force Findings and Recommendations, March 1999; Historic Pesticide Sites Case Processing guidance issued on May 22, 2006.

Alternative Fill Protocol Guidance, June 2008; updated December 29, 2011.

1. Legislative Purpose

- To return abandoned or underutilized contaminated properties to viable productive uses, to thus help stimulate economic growth in urban areas, and to foster cost-efficient remedial alternatives while at the same time ensuring protection of human health and the environment.

2. Eligibility of Sites and Parties

- All sites and parties, notwithstanding whether those parties are responsible for contamination, are eligible to employ the alternative remedial mechanisms available under New Jersey law and regulations, to reduce cleanup costs while protecting health and the environment.

- Prior to the 2009 enactment of the Site Remediation Reform Act ("SRRA"), the Voluntary Cleanup Program ("VCP") was available for all properties other than those already deemed environmental priorities by the state. The VCP was repealed by the enactment of SRRA.

- SRRA supplanted the VCP. Now the Brownfield law, SRRA and the Spill Act provide the framework for New Jersey brownfield projects.

- Funding by way of loans and grants are also available to particular parties described below.

3. Application Process

- Historically the state agency, the Department of Environmental Protection ("DEP"), employed administrative consent orders to oversee cleanup of contaminated sites. The consent orders, however, did not allow DEP flexibility to oversee the remediation of lower priority sites. DEP subsequently instituted the VCP to foster investigation and cleanup of properties outside an enforcement setting.

- The VCP allowed responsible parties, developers, governmental instrumentalities, and others to work with DEP to remediate contaminated sites in a timely manner. The basis of the VCP was the Memorandum of Agreement ("MOA"), which allowed

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a party to voluntarily proceed with DEP oversight to investigate and clean up a contaminated site.

- Under the new Licensed Site Remediation Professional ("LSRP") program established by DEP pursuant to the Site Remediation Reform Act ("SRRA"), parties who voluntarily undertake site remediations will proceed under the oversight of an LSRP rather than under an MOA with DEP, unless one of the exceptions apply pursuant to which DEP maintains or takes on direct oversight under SRRA.

4. Voluntary Agreements under the Pre-SRRA/LSRP Program

- The MOA was a non-binding agreement between the party electing to perform the work and DEP that set forth the ground rules for the activities to be performed at the subject site and for DEP's oversight of those activities.

- The MOA provided that:

  a. The party performing the activities would provide DEP with investigation data developed during the activities;

  b. The party would pay all DEP oversight costs; and

  c. The site was not already a priority cleanup site or already subject to remedial activities under laws such as ISRA.

- A party that entered into an MOA with DEP proceeded to investigate or clean up a site, or a portion of a site, without posting financial security and without being penalized for not completing the site cleanup.

- Before entering into an MOA, a party first completed an application detailing proposed activities, requested DEP oversight of those activities and established a schedule for the work to be performed at the site.

- DEP reviewed MOA applications for completeness and responded within a month as to any deficiencies in the application. Once the application was complete, the MOA was prepared.

- 2002 amendments specified that DEP oversight fees may only include indirect costs where the applicant was a liable party under New Jersey law. Innocent purchasers involved in Brownfield redevelopment projects could only be charged for direct DEP costs related to oversight of the cleanup.

- 2003 amendments to the MOA process allowed the DEP to unilaterally terminate the MOA if cleanup fell more than six months behind schedule, if the parties did not pay for oversight costs, or if the department scheduled the site for publicly funded remediation.

- In August 2006, DEP adopted rules covering grace periods accorded parties under DEP oversight, including volunteers under MOAs. The rules were amended in 2008.

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- As to volunteers, the rules specified the circumstances in which DEP may terminate MOAs due to non-compliance. As to others, notices of deficiency could lead to significant penalties and enforcement actions.

5. Cleanups under the LSRP Program

- Under SRRA, the Brownfields program and the Spill Act were amended to provide that LSRP-certified work is deemed equivalent to that overseen and approved by DEP. SRRA provided that the LSRP program be phased in beginning in 2009. During the SRRA phase-in period, all parties who initiated remediation after November 3, 2009 were required to hire LSRPs to oversee remediation. Parties who initiated remediation before November 3, 2009 had the option to continue under traditional DEP oversight or of hiring an LSRP. Beginning on May 7, 2012, the phase-in period ended and all parties conducting remediation must proceed under the LSRP program, irrespective of when they initiated remediation.

- Thus, after May 7, 2012, except in the narrow set of circumstances in which DEP takes direct oversight of a cleanup project, volunteers may no longer enter MOAs with DEP, but rather must proceed with submissions to DEP through an LSRP.

- This includes work undertaken to achieve the liability protections, including "innocent purchaser" protections, of the Spill Act that insulate qualifying parties against liability to the state and third parties.

- As to the liability protections that apply to parties such as Brownfield developers who knowingly buy contaminated sites but clean them up to DEP standards:

  a. Response Action Outcomes ("RAOs") from LSRPs are acknowledged as the equivalent of a DEP No Further Action letter ("NFA");

  b. the responsibility to commence remediation of a discharge within 30 days after acquisition, pursuant to a DEP oversight document executed prior to closing, is modified to provide that after enactment of SRRA, the party seeking the protections is instead to:

     i. notify DEP of the acquisition by the date of closing; and then

     ii. proceed with remediation pursuant to the new LSRP program.

- The Spill Act's private party statutory cause of action, allowing parties who clean up a discharge to pursue others for contribution, is amended as follows:

  a. The contribution protection provision is amended to protect parties who receive an RAO from Spill Act claims by third parties for contribution concerning matters addressed in an RAO; and

  b. The right to pursue treble damages from third parties in particular circumstances is expanded to include cases not only where a contribution plaintiff is remediating a site under a DEP oversight document, but also where plaintiffs are cleaning up under the LSRP program.

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- Developers seeking to recoup cleanup costs under the state's Brownfield Site Remediation Fund (see below) need no longer enter a Memorandum of Agreement or other oversight document with DEP provided they are proceeding under the LSRP program.

6. Remediation Standards/Cleanup Alternatives

- Use of institutional controls (such as deed notices) and engineering controls (such as capping) allow alternatives to expensive cleanups in many settings.

- The party performing cleanup may: (a) clean up to unrestricted use standards, where no engineering or institutional controls are required; (b) clean up to limited restricted use standards, where only institutional controls, and not engineering controls, are required; or (c) clean up to restricted use standards, where both engineering and institutional controls are required to meet the established health risk or environmental standards.

- SRRA requires that for any remediations started a year after the May 7, 2009 enactment of the reform law where: (1) new construction is proposed for residential, child care or school use; or (2) there will be a change of use to residential, child care or school purposes, or to any other purpose involving use by a sensitive population (such as residences, schools, child care facilities, parks and playgrounds); DEP must require the use of:

  a. an unrestricted use remedial action;

  b. a presumptive remedy; or

  c. an alternative remedy that is pre-approved by DEP.

- On July 22, 2011, DEP published the Presumptive and Alternative Remedy Technical Guidance outlining the requirements for unrestricted use remedies, specific presumptive remedies, or an alternate remedy that is pre-approved by DEP.

- Presumptive remedies consist of engineering and institutional controls divided into the major components listed below. The presumptive remedy that must be used varies based on the projected use of the site and the contaminants present. The Guidance includes a table which sets forth the presumptive remedy that must be used in different scenarios. Presumptive remedies consist of:

  a. a physical barrier consisting of a durable surface material or a clean fill layer;

  b. a buffer layer consisting of another layer that provides added protection in the event of breaches of the physical barrier; and

  c. a visible demarcation that provides a warning to those conducting intrusive activities.

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- Alternative Remedies. A party conducting remediation may use an alternative remedy if the party can demonstrate to DEP that use of the presumptive remedies would be impractical due to site conditions or that an alternative remedy would be equally protective.

- For schools, child care centers and residential properties, the following are also required by the Guidance:

  a. Any free or residual product must be removed and/or treated in accordance with previously existing technical requirements.

  b. The impact to groundwater and surface water pathways must be addressed for all contaminants, except for historic fill, in accordance with previously existing technical requirements.

  c. All backfill and fill material must meet the most stringent soil remediation standards and must be sampled at a frequency to be provided in DEP's revised or final guidance document.

  d. Any contaminated soil that exceeds acute exposure levels must be excavated or treated to a depth of 10 feet, either by excavation or treatment.

  e. For sites where new construction is proposed, the developer must install a vapor barrier and passive subslab depressurization system that is capable of conversion into an active system.

- Under SRRA, DEP may authorize a party undertaking a remediation to divide the site into separate areas of concern and to employ different remedial actions for each area that are consistent with the planned future use of the property.

- Under SRRA, construction of single family homes, schools and day care centers is prohibited on landfills where engineering controls are required for management of landfill gas or leachate.

- SRRA empowers DEP to disapprove selection of a remedial action that would render the property unusable for future redevelopment or for recreational use.

- DEP may also require treatment or removal of contamination that would pose an acute health or safety hazard upon failure of an engineering control.

- In addition to categories of soil cleanup standards based on use, DEP may also consider "risk based" corrective actions, allowing for even further flexibility.

- While there is a legislatively-declared preference for unrestricted use and limited restricted use remedial actions over restricted use actions, except as set forth above, DEP may not disapprove a restricted use action so long as the proposal meets the health risk standards established by law. The choice is that of the person performing the cleanup, except in cases to which presumptive remedies apply.

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- Draft soil remediation standards were proposed in 2004, and in May 2007 a new rule proposal was published setting forth soil remediation standards, 39 N.J.R. 1574(a) (May 7, 2007). In June 2008, following public comment, new soil remediation standards were adopted and codified at N.J.A.C. § 7:26D (40 N.J.R. 3187(a), June 2, 2008).

- On August 1, 2012, DEP published the Technical Guidance for Site Investigation of Soil, Remedial Investigation of Soil, and Remedial Action Verification Sampling for Soil. The Technical Guidance supersedes previous DEP guidance issued on this topic.

- The new rule continues DEP's methodology as to two categories of standards: residential direct contact and non-residential direct contact. However, DEP did not adopt the proposed numerical soil remediation standards for the third of the categories, impact to groundwater, indicating instead that further study is necessary.

- A series of new guidance documents was developed and issued in June 2008 to help remediating parties with the new soil remediation standards.

- DEP will continue to require minimum impact to groundwater soil remediation standards on a site-by-site basis, using health-based groundwater quality criterion. A specific guidance document for groundwater impact standards was published in June 2008.

- A number of the new soil remediation standards differ from the 1999 informal standards by more than an order of magnitude. The new standards also include additional contaminants that were not regulated under prior guidance. If either of these situations applies to a site that has been issued a No Further Action Letter, DEP has the authority to re-open a case and require further remediation notwithstanding prior approvals. A guidance document for order of magnitude evaluations was published in June 2008 and updated in August 2009.

- The soil remediation standards under the informal 1999 guidance may be applied to sites where remedial action workplans and remedial action reports are compliant with the Technical Requirements for Site Remediation and were received by DEP by December 2, 2008. However, if the standard for a particular contaminant has been made more stringent by at least an order of magnitude or has not been previously regulated, the new remediation standards will apply.

- In 2004, DEP temporarily suspended the issuance of NFAs to sites with chromium contamination. However, on February 8, 2007, DEP announced that the moratorium on issuance of NFAs was lifted after the DEP Chromium Workgroup concluded that the 1998 chromium cleanup criteria promulgated by DEP was based on sound science. Although the new soil remediation standards (codified at N.J.A.C. 7:26D-1.1 et seq.) do not address trivalent and hexavalent chromium, soil cleanup criteria for chromium are still set forth in the Chromium Soil Cleanup Criteria guidance document issued September 2008, revised April 2010.

- DEP also evaluated ways to address concerns over the potential impact of contaminants on indoor air quality.

- In January 2013, DEP issued a revised Vapor Intrusion Technical Guidance, intended for “use in the evaluation of the VI pathway” primarily at sites contaminated by volatile organic compounds. The Guidance lists the triggers that necessitate VI investigation, the scope of investigation required if triggers are present, and mitigation methods to be employed if contamination is found.

- In June 2008, DEP issued Alternative Fill Protocol (“AFP”) guidance for the Site Remediation Program regarding the beneficial use of contaminated soil and non-soil materials. The guidance was updated on December 29, 2011. While the guidance provides alternative choices for fill at appropriate remediation sites, the remediating party must still adhere to the DEP mandate that prohibits exacerbating conditions of contaminated sites.

- Use of groundwater "classification exception areas" permits a flexible, relaxed approach to certain aquifer contamination problems, such as allowing for natural attenuation over time rather than requiring an expensive cleanup system.

- DEP developed technical regulations to address contaminated historic fill. On October 20, 2011 DEP issued the Historic Fill Material and Diffuse Anthropogenic Pollutants Technical Guidance. The guidance sets forth methods use to identify historic fill material -- defined as contaminated material deposited to raise the topographic elevation of a site -- and procedures to remediate contamination. Irrespective of when the placement of fill occurred, there is a rebuttable presumption that DEP may not require cleanup or treatment to meet health risk or environmental standards. Instead, the emphasis is on engineering or institutional controls such as capping or a recorded document memorializing restrictions on future use.

- Such institutional or engineering control alternatives are also available in other contexts where cost, time and effectiveness do not justify standard procedures.

- DEP may not require cleanup beyond natural background levels, may not require cleanup of contamination originating off-site, and may not require that groundwater leaving a targeted site be cleaner than the water entering the property.

- Once DEP approves or an LSRP certifies a cleanup plan, DEP may not later impose a tougher benchmark unless its cleanup standards have grown stricter by at least an order of magnitude. As noted above, the recently promulgated soil remediation standards could lead to triggers of a re-opener where the remedy does not control exposure to the new remediation standard. Where engineering or institutional controls continue to be protective, notwithstanding a stricter remediation standard, no additional remediation should be necessary. See also the sections below on Covenants Not to Sue and Liability Protection.

- Once remediation has been completed at a site under LSRP oversight, an LSRP will issue a Response Action Outcome (“RAO”) confirming the completion of remedial activities.

- Under SRRA, DEP is to inspect all documents and information from LSRPs upon receipt, and may conduct additional review if it determines that: (1) the LSRP has not fulfilled its responsibilities under SRRA; (2) deficiencies, errors or omissions will result in the inability to determine whether the remedy will be protective of health, safety or the environment; or (3) the remediation will not be protective.

- DEP is to perform additional review of documents or performance of the remediation if:

  a. the contamination poses a significant detriment to health, safety or the environment based on a receptor evaluation, or the site is in the highest category of the new ranking system (see below);

  b. contamination may affect a child care center, school or other sensitive population;

  c. the site is located in a low-income community of color that has a higher density of contamination sites and discharges, with potential for increased environmental and health impacts, than other communities; or

  d. state grants or loans are being used for remediation of a site or area of concern.

- DEP may elect to perform additional review of documents or performance of the remediation if:

  a. a site is in a designated Brownfield Development Area or other economic development priority area;

  b. remediation is subject to federal oversight;

  c. the person responsible for conducting the remediation, or LSRP, has been out of compliance with SRRA or its rules or regulations;

  d. a site has impacted a natural resource;

  e. an oversight document, administrative order or Remediation Agreement is in effect for the site that requires DEP review and approval of submissions;

  f. there is substantial public interest in the site;

  g. use of alternative or site specific remediation standards have been proposed for the site;

  h. remediation requires issuance of a permit by DEP;

  i. use of a site is changing from any use to residential or mixed use;

  j. submission may not be in compliance with any rules or regulations applicable to site remediation; or

  k. remediation may not be protective of health, safety or the environment.

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- In any event, DEP is to perform additional review of a minimum of 10% of all documents submitted annually by LSRPs.

- DEP is empowered to invalidate an RAO if:

  a. DEP determines that the remedial action is not protective of public safety, health or the environment; or

  b. a presumptive remedy (see below) has not been implemented pursuant to SRRA, unless DEP determines that the remedial action is as protective of public safety, health and the environment as the presumptive remedy.

- DEP may not audit an RAO more than 3 years after it has been filed by the LSRP, unless:

  a. undiscovered contamination is found on the site;

  b. the Board conducts an investigation of the LSRP; or

  c. the LSRP's license has been suspended or revoked by the Board.

- In 2003, DEP instituted a Technical Review Panel to conduct dispute resolution between the regulated community and DEP, and created an Office of Accountability to track and penalize non-compliance on certain investigation and cleanup projects. This process has been affected by the Grace Period Rules and the compliance procedures specified there.

- Brownfield Law revisions in 2006 and 2008 require that parties undertaking cleanups provide notice to municipalities, county health departments, and local health agencies, at least every two years starting prior to the commencement of the cleanup, describing the activities to take place, including site health and safety plans, and offering to provide the cleanup plan and periodic updates and status reports. If requested, the plan and reports must be provided.

- In 2008, new "public outreach" rules became effective. The public outreach rules are designed to assure that local communities are aware of remediation projects in their areas. The rules require, among other things, that parties who undertake remedial investigations or activities provide specific prior notifications and information to nearby property owners and tenants, either by way of a sign stating that there is an investigation/cleanup in progress and providing the telephone number of the person responsible for conducting the remediation, or by way of notification letters (with copies to local officials and DEP) as to the nature and source of the contamination and the intended investigatory or cleanup activities. If the DEP requires additional public outreach, the person responsible for conducting the remediation may be required to provide a forum for community response and interaction. The rules also require prompt notification of neighbors and the community as to discovery of off-site migration of contaminants, unless the off-site migration is limited to the soil of one adjacent property, in which case only that property owner and any tenants there must be notified. If only historic fill is affected, no notice is required.

- In January 2010, DEP updated its public notification and outreach guidance documents as well as the general newspaper ad template for notification of environmental investigation and cleanup. The ad template and guidance documents may be accessed at:
  [http://www.nj.gov/dep/srp/guidance/public notification/].

- The ARRCS have been amended to incorporate the public notification and outreach amendments.

- In November 2009, a new variance process was added to the Technical Requirements, allowing a party to vary from certain technical requirements and site remediation guidance referenced in those sections unless expressly prohibited by DEP. No pre-approval from DEP is necessary. Rather, in the succeeding remedial phase report, the remediating party must state the regulatory citation or guidance name and version number for the specific requirement not met, a description of how the remedial action deviated from the requirement or guidance and the rationale for such variance. There remain certain requirements from which parties may not deviate, including DEP's notification requirements, regulatory timeframes, permit requirements and the requirement to comply with applicable remediation standards.

7. <u>Mandatory Timeframes</u>

- SRRA directs DEP to establish mandatory timeframes, and where necessary expedited timeframes, for every stage of an environmental investigation and cleanup, including preliminary assessments, site investigations, remedial investigations and remedial actions.

- In establishing the timeframes, DEP was directed to take into account factors including potential health and safety impacts, ongoing commercial or industrial operations at the site, whether there are any discharges to groundwater or surface water, and the complexity of the site.

- The timeframes apply whether direct oversight is by DEP or an LSRP, and are set forth in the ARRCS rule and in the Technical Requirements.

- DEP must grant timeframe extensions where:

  a. DEP has delayed in reviewing or granting a permit, provided the permit application was timely and complete;

  b. the State has delayed in providing funding, provided the funding application was timely and complete; or

  c. DEP has delayed in issuing an approval or permit for long-term operation, maintenance and monitoring of an engineering control, provided the request for approval was complete.

- DEP may grant timeframe extensions where:

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a. there has been a delay in obtaining access to a property, and notwithstanding good faith efforts to obtain access it has not been granted, and the person conducting the remediation has been compelled to commence an access lawsuit in Superior Court;

b. the delay has been caused by circumstance out of the person's control, such as fire, flood, riot or strike; or

c. other site-specific circumstances warrant an extension as determined by DEP.

8. Liability Protection/Innocent Purchaser Defense

- The Spill Act imposes strict cleanup liability on the discharger of hazardous substances and on anyone "in any way responsible," a term interpreted by the state Supreme Court as including the property owner at the time of the discharge.

- In September 1993, the New Jersey legislature established an “innocent purchaser” defense to Spill Act liability for those who undertake appropriate due diligence before acquisition of property, and do not discover contamination.

- The 1997 Brownfield Law clarifies the due diligence requirements of purchasers. Those who acquired property after September 14, 1993, and after a discharge, but who failed to undertake diligent inquiry, were now deemed to be "responsible" for the discharge.

- The Brownfield Law also expanded innocent purchaser protection to those who knowingly acquire contaminated sites, offering them protection from Spill Act or common law claims by the state or third parties, so long as they have discovered the contamination through their due diligence, and have either:

  a. relied on a DEP No Further Action letter (or, pursuant to SRRA, an LSRP’s Response Action Outcome) for a cleanup completed prior to the acquisition; or

  b. cleaned up the site, or received DEP cleanup plan approval.

- Additionally, new liability protection was also extended to buyers who acquired tainted sites after January 6, 1998 (the effective date of the Brownfield Law). Such buyers are not liable for cleanup costs or any type of damages, to anyone other than the government, under any statute or civil common law, provided they:

  a. acquire the property after the discharge and are not responsible for it;

  b. notify DEP as soon as they discover the discharge;

  c. enter into an oversight document with DEP prior to acquisition and

  d. commence the cleanup within 30 days after acquisition, and complete the cleanup in a timely manner.

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- As to the responsibility described immediately above to commence remediation within 30 days of acquisition pursuant to a DEP oversight document executed prior to closing, SRRA modifies those requirements by providing that after enactment of SRRA, the party seeking the liability protections is instead to:

  a. notify DEP of the acquisition by the date of closing; and then

  b. proceed with remediation pursuant to the new LSRP program.

- In June 2001, the legislature further refined the Spill Act innocent purchaser defense, providing that, as to those who acquired property prior to September 14, 1993, liability for pre-existing contamination would not attach so long as such parties could establish that they:

  a. acquired the property after the discharge and were not the dischargers;

  b. had no reason to know of the contamination, based on all appropriate inquiry of ownership and operational history of property based upon good and customary standards of due diligence; and

  c. gave notice of the contamination to DEP upon actual discovery of the problem.

- Pre-September 1993 purchasers who qualify for the innocent purchaser defense are protected against statutory and civil liability to the state or others for cleanup costs or other damages.

- Pursuant to the 2001 legislation, Spill Act innocent purchasers were also accorded protection against liability for natural resource damages ("NRDs").

- In 2005, by way of A.2444, further legislation specified the elements required for a party to be protected against NRD liability; namely:

  a. the party acquired the site after the discharge of the hazardous substance that caused the damage to natural resources (and after January 6, 1998, the effective date of the Brownfield law);

  b. the party is not one who can be deemed responsible for the discharge or the substance, and is not a corporate successor to the discharger or otherwise responsible person; and

  c. the party did not, by way of contract, expressly assume liability for natural resource damages using the term of art "natural resource damages."

- In June 2003, the legislature passed A.2585, which clarifies that innocent purchaser/redeveloper liability protection includes subsequent discovery of contamination that emanated from the site. The bill was subsequently signed into law, and became effective January 9, 2004.

- In 2005, A.2444 further defined innocent purchaser/redeveloper liability concerning contaminated groundwater that has migrated from the purchaser's acquired property.

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Under the 2005 provisions, an owner of contaminated property who purchased the site on or after January 6, 1998, is not liable for cleanup or removal of hazardous substances that have migrated from the site, provided:

a. the site was acquired after the discharge of the substance that migrated from the property;

b. the owner is not one who can be deemed responsible for the discharge or the substance, and is not a corporate successor to the discharger or otherwise responsible person;

c. through a remedial investigation, the person can show that contamination of the nearby property originated from more than one source;

d. through a remedial investigation, the person can show that remedial action at the nearby property is not necessary to protect public health and the environmental; and

e. the person has not, by way of contract, voluntarily assumed liability for contamination that has migrated from the owner's property.

9. <u>Covenants Not to Sue</u>

- Under the Brownfield Law to date, any No Further Action letter issued by DEP has been accompanied by a case-specific DEP Covenant Not to Sue.

- SRRA changes that procedure, providing instead that once an LSRP issues an RAO to the person responsible for conducting the remediation, that person is deemed, by operation of law, to have received a Covenant Not to Sue from the State of New Jersey.

- SRRA initially provided that once licenses are issued to LSRPs, DEP will no longer issue Covenants Not to Sue, except that DEP may issue such a Covenant in conjunction with an NFA concerning an unregulated heating oil tank.

- Under a legislative amendment signed into law on January 17, 2010, the Covenant Not to Sue will also apply by operation of law where responsible persons receive No Further Action Letters from DEP.

- The Covenant releases the person who undertook the remediation from civil liability to the State to perform further cleanup or for natural resource damage, loss or restoration, in areas of concern addressed in the No Further Action letter or the Response Action Outcome, as the case may be. (The 2001 amendatory legislation required that the Covenant release that person from liability for natural resource damages. The 2005 legislation expanded this provision to specify that the protection extends to restoration of natural resources as well as damages.)

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- The Covenant protects:

  a. the person who undertook the cleanup;

  b. subsequent owners of the property;

  c. subsequent tenants of the property; and

  d. subsequent operators at the property.

- The Covenant will not protect dischargers, or those deemed "responsible" parties under the Spill Act, including those responsible solely due to property ownership, unless those parties can establish their innocence.

- The Covenant does not apply to any new discharge occurring after the issuance of the No Further Action letter or Response Action Outcome, as the case may be.

- The Covenant will require the recipient, or any subsequent owner, tenant, or operator, to monitor and maintain any engineering or institutional controls, and to submit a biennial certification that the controls are being properly maintained and continue to be protective.

- Under SRRA, where an LSRP issues an RAO, the Covenant is deemed to provide by operation of law that:

  a. the Covenant is revoked if the engineering or institutional controls are not being maintained or are no longer in place (see below);

  b. where the remediation involves use of engineering controls, the person benefiting from the use of the engineering controls may not make a claim against the State's Spill Fund or Sanitary Landfill Facility Contingency Fund ("Landfill Fund") for costs or damages concerning the property or its cleanup; and

  c. where the remediation involves use of an institutional control only, claims against the Spill Fund or the Landfill Fund are not barred if DEP orders additional remediation after a validly-issued RAO, except that the Covenant is deemed to bar such a claim if DEP orders additional remediation in order to remove the institutional control.

- If DEP finds that the property no longer meets the conditions of the RAO, it must provide notice to the person responsible for maintaining compliance with the RAO, and may allow a reasonable period of time for that person to achieve compliance with the RAO terms.

- If the party fails to come into compliance in the required period of time, or if DEP does not allow such a period of time, then the Covenant Not to Sue is deemed to be revoked by operation of law.

- Where a Covenant Not to Sue is revoked, liability for further remediation does not apply retroactively to a party for whom the Covenant remained effective during its ownership, tenancy or operation.

10. Remediation Funding Sources

- The universe of parties who must establish cleanup remediation-funding sources has not been expanded by SRRA.

- SRRA carves out specific new exemptions for: (1) governmental entities; (2) parties remediating primary or secondary residences; (3) owners and operators of licensed child care facilities and parties cleaning up such sites; and (4) parties cleaning up public or private schools or charter schools.

- In matters under the direct oversight of an LSRP:

  a. the LSRP, rather than DEP, is to determine the amount of the remediation-funding sources;

  b. when the remediation estimate decreases, the party maintaining the remediation-funding sources may submit written documentation to DEP certified by the LSRP as to the applicable decrease, may decrease the funding source upon submission of the LSRP certification, and may use the released source to pay for the actual remediation costs; and

  c. for ISRA cases, the remediation-funding sources are to be established within 14 days of the LSRP certifying a Remedial Action Workplan, or upon the LSRP's submission of a Remediation Certification.

- In matters under the direct oversight of DEP, the remediation-funding sources are to be established upon the party becoming subject to DEP oversight, and the only permitted form of remediation-funding sources is a Remediation Trust Fund.

- In matters under LSRP oversight, parties may still use a Remediation Trust Fund, an environmental insurance policy, a line of credit (though only one regulated pursuant to New Jersey or federal law) or a self-guaranty (but see the new conditions below), and may now also use a letter of credit from a New Jersey- or federally-regulated financial institution, which letter of credit will have to conform to a model document to be established by DEP.

- In order to self-guaranty, documentation submitted to DEP will now have to include audited financial statements in which the auditor expresses an unqualified opinion that covers the statements of income and expenses, and balance sheet or similar statements of assets and liabilities, already required by law.

- A Remediation Funding Source surcharge of 1% annually applies to trust funds, insurance policies, lines of credit and letters of credit.

- Those exempt from remediation-funding sources (such as those who voluntarily entered an MOA with DEP to remediate property) remain exempt so long as they meet the mandatory timeframes of SRRA.

11. Permitting Program for Institutional and Engineering Controls

- SRRA directs DEP to establish a permitting program for operation, maintenance and inspection of institutional and engineering controls and the submission of biennial certifications.

- DEP is authorized to issue a permit, permit by rule, or general permit.

- DEP is authorized to require that a person issued a permit establish and maintain insurance, financial assurance or another financial instrument to guarantee the availability of funding to operate, maintain and inspect the engineering controls required for a remedial action, for the period over which the controls are required.

- Parties maintaining such funding sources may petition DEP annually to decrease the amount of funding.

- DEP may also charge application and annual administrative fees.

- Parties exempted from the financial assurance requirements are:

  a. government entities not otherwise liable for cleanup under the Spill Act;

  b. parties who acquired contaminated property prior to enactment of SRRA and who undertake a remediation of the property;

  c. parties who undertake a remediation at their primary or secondary residence;

  d. owners or operators of licensed child care centers who perform remediation of their sites;

  e. persons responsible for conducting remediation at a public, private or charter school; or

  f. owners or operators of small businesses conducting remediation.

12. Ranking system

- The Spill Act already required DEP to keep a master list for the cleanup of hazardous discharge sites, and to rank the sites in the order in which DEP intended to clean them up.

- SRRA revises the requirement by directing DEP to maintain a database of all known hazardous discharge sites, cases and areas of concern in the State, and, within one year of enactment of the reform law, to establish a new ranking system based upon:

a. the level of risk to public health, safety or the environment;

b. the length of time each site has been undergoing remediation;

c. the economic impact of the contaminated site on the municipality and on surrounding properties; and

d. other factors deemed relevant by DEP.

- The database is to include information identifying the location of each site, the status of remediation, the contaminants of concern, and the existence of any engineering or institutional controls; and is to be available to the public on the DEP website.

- As noted above in section 4 of the SRRA overview, DEP may elect to maintain and/or take on direct oversight of sites that rank in the highest priority category of the new ranking system.

13. <u>LSRP Notification Responsibilities to DEP</u>

- Until now, it has been the responsibility of a property owner or operator – and not third parties such as environmental consultants – to report knowledge of spills, discharges, or evidence of contamination to DEP, except as to spills or discharges from regulated underground storage tank systems.

- Under SRRA, LSRPs will now have affirmative obligations to report knowledge of contamination to DEP in a variety of settings.

- When an LSRP identifies a condition that meets the new standard of an "immediate environmental concern," the LSRP must immediately report the condition to the DEP hotline and to the person responsible for conducting the remediation.

- "Immediate environmental concern" is defined as a condition at a contaminated site where:

  a. a potable water well is found to have contamination in excess of DEP groundwater standards;

  b. there is a confirmed toxic or harmful indoor air quality condition, with unacceptable human health exposure, due to vapor intrusion of contaminants; or demonstrated physical damage to essential underground services due to such vapor migration;

  c. there is confirmed contamination of a nature that could result in acute human health exposure in the event of dermal contact, ingestion or inhalation of the contamination; or

  d. any other condition that poses an immediate threat to the environment or to the public health and safety.

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- When an LSRP obtains specific knowledge that a discharge has occurred on a contaminated site for which the LSRP is responsible, the LSRP must report the condition to the DEP hotline and to the person responsible for conducting the remediation; except that the reporting requirement does not apply where the discharge may be caused by historic fill material.

- When an LSRP learns of an action or decision by a client that deviates from the LSRP's Remedial Action Workplan or other report, the LSRP must promptly notify DEP and the client, in writing, of the deviation.

- When an LSRP learns of material information subsequent to submission of a report to DEP, which would materially change the report, the LSRP must promptly notify DEP and the client of the information.

- When an LSRP learns, before issuance of an RAO, of material information concerning a report submitted by a prior LSRP, which information was not disclosed in a prior report, the LSRP must promptly notify DEP and the client.

- Other than as required by law and as to information in the public domain, an LSRP may not reveal information obtained in a professional capacity without the prior consent of the client, provided the client has advised the LSRP in writing that the information is confidential.

- The LSRP's reporting obligations survive discharge by the client.

- SRRA protects LSRPs against retaliation actions that result from the LSRP properly exercising its duties of disclosure, reporting, providing information on violations of law, or refusing to engage in activities and practices that the LSRP believes illegal or incompatible with the mandate of public policy concerning protection of human health or the environment.

- While due diligence activities are exempted from the circumstances under which LSRPs must be engaged, there is no exception to the reporting obligation that otherwise applies to an LSRP no matter whether the LSRP is engaged by the person responsible for conducting the remediation; namely, the obligation to report identification of an immediate environmental concern.

14. <u>Lender Liability Protection</u>

- Under the state's lender liability and fiduciary safe harbor law:

    a. lenders may investigate and police collateral without incurring environmental liability for cleanup;

    b. lenders may foreclose on contaminated collateral without incurring liability for prior environmental contamination, so long as specific safe harbor rules are followed;

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c. lenders may transfer personal property of borrowers under security interests without triggering ISRA; and

d. trustees and other fiduciaries are exempt from liability arising from environmental obligations of trusts and estates.

- Lender liability protection has been expanded by the Brownfield Law to protect secured lenders from liability for cleanup of discharges from underground storage tanks.

- If a lender acquires property through foreclosure, the lender's protection from liability for underground storage tanks is maintained after foreclosure so long as the tanks are being operated by someone other than the lender. This includes, for example, gas stations which remain in operation by a tenant following foreclosure on the property.

- If no operator exists, then the lender, in order to maintain post-foreclosure protection, must:

  a. empty all tanks within 60 days of foreclosure or subsequent discovery;

  b. ensure that vent lines are open, and cap and secure all other lines; and

  c. temporarily or permanently close the tank.

- An underground storage tank is considered temporarily closed if a lender installs or continues to operate and maintain corrosion protection, and reports any suspected releases to DEP.

- A site investigation of a temporarily closed tank is required after a year of closure if the tank is not in compliance with the latest underground storage tank upgrade regulations.

- These requirements to obtain tank lender liability protection are in addition to the existing requirements for lender protection under the Spill Act.

15. Hazardous Discharge Site Remediation Fund

- The Hazardous Discharge Site Remediation Fund ("HDSRF") is a loan and grant program for a range of eligible parties including those who voluntarily undertake cleanups, municipalities, counties and redevelopment entities.

- Substantial grants are available to municipalities, counties and redevelopment entities for investigation and cleanup of properties. Matching grants are also available to these parties for qualifying remedial activities at properties to be devoted to recreation and conservation purposes, or for affordable housing.

- Grants are also available to others who can establish that they acquired property pre-ECRA and that they were not themselves the dischargers of contaminants. Grants to these parties are for up to 50% of remediation costs, with a maximum grant sum of $1 million.

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- Pursuant to the Brownfield law, additional grants are available to cover 25% of remediation costs up to a maximum grant of $250,000, where the applicant is either:

  a. implementing a permanent remedy (unrestricted or limited restricted use cleanups; those that do not employ engineering controls); or

  b. employing an innovative technology as part of the cleanup.

- While an applicant need not establish innocence or pre-ECRA acquisition to be eligible for a 25% grant program, it cannot have a net worth of more than $2 million.

- Loans are not conditioned upon establishing innocence. Financial hardship must be established.

- HDSRF conditions grants and loans on subrogation to DEP of specific rights of the recipient to recover remediation costs from certain third parties.

- SRRA specifically adds insurance carriers as targets against whom claims must be subrogated to DEP.

- SRRA also provides that the State's Economic Development Authority ("EDA") may not award grants and loans to parties who relinquish, impair or waive rights of recovery against insurance carriers, dischargers, or persons in any way responsible for a hazardous substance.

- The legislature appropriated an initial sum of $45 million for the fund, with an additional $5 million available to DEP where responsible parties default on their cleanup obligations.

- Due to the number of grants and loans made under the program, the fund was exhausted. To cure this problem, the legislature passed S.696, providing $40 million in additional funds. The legislation was signed into law on May 7, 2003.

- In April 2004, the Governor signed S.853 into law, transferring $45.8 million from the state's underground storage tank fund to the HDSRF, specifically earmarked for use by municipalities. In 2005, the law was repealed pursuant to 2005 N.J. Laws ch. 358, signed into law on January 12, 2006.

- In 2006, the legislature specified that governmental entities, exercising redevelopment powers under state law, could receive grants for up to 100% of the costs of certain investigations, in addition to previously-existing eligibility for cleanup grants.

- In 2007, the legislature removed the law's 70% cap on the amount of annual HDSRF distributions that could be accorded to grants as opposed to loans.

- Where the state provides grants to government authorities that do not have any ownership interest in the property being remediated, the grant constitutes a debt of the property owner.

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- In such a case, the state may file a first priority "super" lien against the property, except in the case of residential properties of six dwellings or less, where the lien does not take priority over prior liens. (See "Transaction-Triggered Environmental Laws," section V. "Lien and "Super" Lien Laws" above).

- Should the grantee governmental entity subsequently take title to the property, the lien is to be removed.

- On January 17, 2010, A. 4341 was signed into law, amending N.J.S.A. §§58:10B-5 and 58:10B-6 to authorize an increase in grant funding to eligible parties who acquire contaminated property for the purpose of redeveloping the property for renewable energy generation. Specifically, the law authorizes matching grants of up to $5 million per year from the Hazardous Discharge Site Remediation Fund for up to 75% of the cost of the remedial action for the projects. Previously, this funding was only available for parties who acquired contaminated property for the purpose of redeveloping the property for recreation and conservation uses or for affordable housing.

- Also signed into law on January 17, 2010, A. 4342 amends N.J.S.A. §58:10B-6 to require that an applicant for an innocent party grant not only acquire the property by December 31, 1983, but also continue to own the property until the EDA approves the grant.

- On July 15, 2010, the New Jersey Supreme Court ruled in TAC Associates v. New Jersey Dept. of Env. Prot., et al., 202 N.J. 533 (2010) that an applicant for an Innocent Party Grant must own the property at the time it submits the application. In TAC, the applicant had owned the subject property from the mid-1970s until January 2004 and was not responsible for the discharge at the property, but was denied eligibility by DEP because it applied for the grant over four years after selling the property. The Court relied upon the statutory language in N.J.S.A. 58:10B-5, which provides that grants may be awarded to "persons who own real property" where there has been a discharge. The Court was further persuaded by the Legislature's amendment of HDSRF by A.4342 discussed directly above.

- As of March 2013, DEP advises that it is not currently accepting new applications due to a decline in revenues generated by the Corporate Business Tax.

16. Brownfield Site Reimbursement Fund

- A reimbursement program fund was created by the Brownfield Law to reimburse up to 75% of remediation costs to developers who enter into "Redevelopment Agreements" with the state.

- The Director of the Division of Business Assistance, Marketing and International Trade (formerly the Commissioner of Commerce and Economic Development) and the State Treasurer have broad discretion to enter into a Redevelopment Agreement, but must consider the following factors:

    a. the economic feasibility of the project;

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b. the economic and social distress in the project area;

c. the project's advancement of state, regional and local development strategies;

d. the extent to which the viability of the redevelopment project requires fund reimbursement;

e. the degree to which the project promotes economic development; and

f. the likelihood that the project will generate new state tax revenues greater than the reimbursement.

- To date, the law has required that remediation must be conducted under an MOA with DEP, entered into after consummation of the Redevelopment Agreement.

- However, developers seeking to recoup cleanup costs under the state's Brownfield Site Remediation Fund will no longer enter a Memorandum of Agreement or other oversight document with DEP provided they are proceeding under the LSRP program.

- Reimbursement payments are keyed into achievement by the developer of specific milestones in the development project, namely the occupancy of the project and the State's realization of tax revenues.

- Redevelopment Agreements are not available to developers who are deemed liable parties under the Spill Act.

- 2002 proposed Senate legislation would have increased allowable reimbursement up to 100% of remediation costs, including DEP oversight fees, and would have allowed for expansion of the universe of taxes subject to reimbursement. The bill would also have authorized remediation loans from the EDA to developers, who could have established their ability to repay through tax reimbursements under a Redevelopment Agreement. S.1714 was introduced and referred to the Senate Environment Committee on June 27, 2002. It died at the end of the legislative session.

- Substitute legislation A.2585, was enacted in 2003 but did not effect the changes proposed in 2002.

- S. 2851, introduced in December 2005 and signed into law on January 12, 2006 as 2005 N.J. Laws ch. 360, also allows the state to enter into Redevelopment Agreements with developers who commenced projects prior to the 1997 Brownfield Law, but who have encountered extraordinary, unanticipated cleanup costs at sites within particular, designated areas under New Jersey’s Development and Redevelopment Plan. Further anticipated costs must exceed $10 million, and only future costs may be reimbursed.

- S. 1980, signed into law as Pub. L. 2008, c. 27, effective July 1, 2008, abolishes the New Jersey Commerce Commission as a corporate body and transfers all of its functions, powers and duties, except as otherwise provided in the act, to the newly

established Division of Business Assistance, Marketing, and International Trade within the NJ Economic Development Authority. Prior to this legislation, the Commissioner of Commerce and Economic Development, along with the State Treasurer, was responsible for entering into Redevelopment Agreements with developers.

17. Environmental Opportunity Zone Act

- The Environmental Opportunity Zone Act was signed into law on January 10, 1996 to foster Brownfields redevelopment. It was amended by the 1997 Brownfields law to expand the use of property tax abatements to offset cleanup costs.

- Municipalities are given the authority to create "Environmental Opportunity Zones" where local property tax incentives may be provided for a ten-year period to developers of contaminated property within the designated area, or for up to fifteen years if engineering controls such as soil and pavement caps are not used in the cleanup.

- To obtain the property tax advantage, a developer must enter into an MOA or an administrative consent order with the DEP, committing to clean up the site in compliance with DEP standards, to redevelop it and then to use the property for the redeveloped commercial, industrial, residential or other productive purpose through the period for which the tax exemption has been granted.

- During the tax abatement period, the amount of taxes due is calculated based on the assessed value of the property in its contaminated, unimproved state.

- The party electing to redevelop the site must also enter into a financial agreement with the municipality, providing for annual reduced payments over the abatement period in lieu of property taxes that would otherwise have been due, to the extent that the difference between the reduced sum and the otherwise due amount is spent in the form of remediation costs, including cleanup, direct and indirect legal, administrative, capital and engineering costs.

- Payments may be computed so that in the first year no tax is paid, in the second year at least ten percent of the tax due is paid, in the third year at least twenty percent is paid, and so on, up to the tenth year. Then the exemption expires and the full amount of assessed real property taxes must be paid taking into account the value of the property in its remediated state.

- Where the property tax exemption is extended beyond ten years because the developer is cleaning up to unrestricted or limited restricted use standards, the municipality may create an alternative property tax schedule.

- Developers are also exempt from establishing a financial assurance for the cleanup, and are eligible to apply for state financial assistance.

18. Acceleration of Brownfield Cleanup and Reuse

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- In October 2002, Executive Order No. 38 had mandated further reform to the brownfield programs in New Jersey, with the goals of reducing regulatory uncertainty, reconciling business and regulatory time frames, promoting "Smart Growth," expanding potential uses for brownfields, and assuring that responsible parties do not leave their sites idle rather than proceeding with cleanup.

- The order had also directed DEP to establish a program allowing for the use of "pre-qualified" consultants to perform certain investigations required of developers in order to expedite brownfields projects.

- In line with the order, DEP implemented a number of policies and procedures, including:

  a. An Office of Brownfield Reuse was renamed in 2008 as the Brownfield Remediation and Reuse Element, under the Site Remediation Program, responsible for informing interested parties about the programs and for assisting on particular projects.

  b. DEP determined that it would not assert liability for natural resource damages or restoration against non-liable brownfields developers. (DEP's position was formalized in Policy Directive 2003-07, issued on September 24, 2003, concerning Natural Resource Damages. See also the legislative developments discussed above).

  c. DEP determined that No Further Action Letters for soils will be issued when soil remediation is complete, but groundwater contamination remains.

  d. Under the “Cleanup Star” program, DEP had established a list of pre-qualified consultant professionals to oversee remedial work that can be accomplished with minimal oversight. This option is available only for sites with relatively low risks and for less complex cleanups.

  e. A technical review panel comprised of senior DEP staff was established to expedite final cleanup decisions when remediation has been delayed due to disagreements between developers and DEP case managers.

- These initiatives were supplanted by SRRA.

19. <u>Brownfields Development Area Initiative</u>

- In 2003, DEP also instituted a Brownfields Development Area ("BDA") initiative to foster DEP coordination with selected communities affected by brownfields. The goal is to design, coordinate and implement remediation and reuse plans affecting multiple sites in close proximity.

- The BDA initiative is meant to provide a redevelopment framework to urban communities with properties which have not attracted adequate private development due to location and degree of contamination. Municipalities designated as BDA are eligible to receive up to $5 million per year from DEP’s HDSRF for investigation

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and remediation. The program does not affect or limit use of other remediation programs.

- The initiative is overseen by the Brownfield Remediation and Reuse Element (formerly the Office of Brownfield Reuse). The initial four pilot programs were established in Elizabeth, Camden and Trenton. Through 2009, BDAs were added in Asbury Park, Bayonne, Belmar, Bellmawr, Cartaret, Gloucester City, Haddon, Harrison, Hillside, Irvington, Jersey City, Kearny, Keyport, Lodi, Milltown, Neptune, Newark, Orange, Palmyra, Paterson, Pennsauken, Perth Amboy, Plainfield, Rahway, Salem City, Sayreville, Somerville, West Orange and Woodbridge. The Hillside, Irvington and Camden projects have been terminated. There are currently thirty-one active BDAs in New Jersey.

- DEP solicits applications on an annual basis.

20. 2010 Legislative Initiatives

A1688

- Would supplement the Brownfield Law to authorize a municipality to request, and DEP to order additional remediation of an industrial solid waste landfill site in an area in need of redevelopment, that has been remediated with engineering controls or to non-residential standards. DEP could order additional remediation even if the site has been remediated according to the rules and regulations of the Brownfield Law and an NFA has been issued for the site. Parties who do not have a defense under the Spill Act could be subject to additional remedial requirements.

A2310

- Would narrow the scope of the public notification required in N.J.S.A. 58:10B-24.3 and require that the person responsible for conducting the remediation notify only those property owners located within 200 feet of any area of concern rather than 200 feet from the entire contaminated site.

A2508

- Would create a new Environmental Science Review Board to review proposed regulations with the articulated goal of striking a balance between protecting the environment and promoting economic growth and redevelopment.

A3167/S2278

- Introduced on September 16, 2010, A3167/S2278 would authorize DEP to issue a zero interest loan under the Hazardous Discharge Site Remediation Fund to a municipality, county or development entity for up to 25% of the total costs of remedial action in a brownfield development area for a term not to exceed 40 years.

21. 2011 Legislative Initiatives

A3638/S2622

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- Introduced on January 6, 2011, A3638/S2622 would authorize disbursement from the Hazardous Discharge Site Remediation Fund in the form of financial assistance to any person, or a grant to a municipality, county or redevelopment entity, for transportation of low-level radioactive waste to appropriate disposal facilities.

A3654/S691

- Introduced on January 6, 2011, A3654/S691 would amend the Brownfield Law to provide that any person responsible for remediating a contaminated site need only provide written notice to local property owners and tenants who reside within 200 feet of an area of concern within a contaminated site.

22. 2012 Legislative Initiatives

A2251/S1283

- February 2, 2012 reintroduction of A3638/S2622 introduced in 2011 (see discussion above)

A2338

- February 6, 2012 reintroduction of A3654 introducted in 2011 (see discussion above).

A2395/S1246

- February 6, 2012 reintroduction of A3167 introduced in 2011 (see discussion above).

A2545

- Introduced on February 21, 2012, A2545 would authorize DEP to require measures to reduce concentration of historic pesticides at sites undergoing remediation.

A2964

- Introduced on May 21, 2012, A2964 would authorize any person certified to service underground storage tanks under the Water Pollution Control Act to perform remediation services on sites with underground storage tanks.

A3543

- Introduced on December 6, 2012, A3543 would require DEP to adopt rules establishing procedures and standards for the assessment and remediation of sites contaminated by the manufacture of methamphetamine.

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V. New York Brownfields Program

New York Brownfield Legislation, A.9120 [signed into law on October 7, 2003 as 2003 N.Y. Laws ch. 1].

Brownfield Cleanup Program (the "BCP"), N.Y. Envt'l. Conserv. Law, Article 27, Title 14, §27-1401 et seq. [Enacted in 2003; amended in 2004, 2005, 2006 and 2008].

Regulations: 6 NYCRR Part 375: Environmental Remediation Programs [amending and supplanting New York's General Remedial Program Requirements, 6 NYCRR Part 375, including Subparts 375-3 (Brownfield Cleanup Program), 375-4 (Environmental Restoration Program), and 375-6 (Remedial Program Soil Cleanup Objectives); draft proposed on November 2005, 46 N.Y. Reg. 5; redraft proposed on June 14, 2006, 28 N.Y. Reg. 22 and 25; approved by state Environmental Board on October 25, 2006; adopted on November 29, 2006, effective December 14, 2006, 27 N.Y. Reg. 157.]

Draft Guidance: Draft Brownfield Cleanup Program Guide [May 2004; revised in March 2005].

Brownfield Cleanup Program Applications and Agreements [DEC Program Policy DER-32, issued June 22, 2010.]

Technical Support Document on development of soil cleanup objectives proposed in draft regulations [Revised public review draft in June 2006; finalized in September 2006].

Technical Guidance: Technical Guidance for Site Investigation & Remediation DER-10 [draft guidance published in December 2002; final DEC Program Policy DER-10 issued May 3, 2010]; CP-51 Soil Cleanup Objectives, Technical and Administrative Guidance Memorandum ("TAGM") 4046 (January 1994; subsequently reviewed by DEC, resulting in November 4, 2009 issuance of draft DEC Policy on Soil Cleanup Guidance; final Guidance issued on October 21, 2010); Spill Technology and Remediation Series ("STARS") Memo #1 (last revised in August 2002; superseded by new regulations and November 4, 2009 draft Policy on Soil Cleanup Guidance); Technical and Operational Guidance Series (1.1.1) on groundwater standards (Reissued in June 1998).

Guidance under former Voluntary Cleanup Program, administrative program commenced in May 1994 by N.Y. Department of Environmental Conservation ("DEC") and now supplanted by BCP: DEC Program Memorandum, Voluntary Cleanup Program [March 1997; draft revised guidance published in May 2002].

Technical Assistance Grant (TAG) Guidance Handbook for community groups [DEC Program Policy DER-14, issued on March 27, 2006].

Strategy for Evaluating Soil Vapor Intrusions at Remedial Sites in New York [DEC Program Policy DER-13, issued on October 18, 2006].

Presumptive/Proven Remedial Techniques [DEC Program Policy DER-15, issued on February 27, 2007].

Making Changes to Selected Remedies [DEC Program Policy DER-2, issued on May 4, 1998; revised on April 1, 2008].

Citizen Participation Handbook for Remedial Programs [DEC Program Policy DER-23, issued January 21, 2010.]

Green Remediation [DEC Program Policy DER-31, draft issued March 17, 2010; final policy issued August 11, 2010, effective September 17, 2010].

Environmental Easements, N.Y. Envtl. Conserv. Law, Article 71, Title 36, §71-3601 et seq. [Enacted in 2003; amended in 2004 and 2006].

Brownfield Redevelopment Tax Credit, N.Y. Tax Law, §21 [Enacted in 2003; amended in 2004, 2006 and 2008].

Brownfield Real Property Tax Credit, N.Y. Tax Law §22 [Enacted in 2003; amended in 2004 and 2006 and 2010].

Environmental Remediation Insurance Tax Credit, N.Y. Tax Law §23 [Enacted in 2003; amended in 2004]; N.Y. Insurance Law §3447 [Enacted in 2003; amended in 2004 and 2011]. Regulations: 11 NYCRR §75.0 et seq. [Adopted in 2007].

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Environmental Restoration Projects, N.Y. Envtl. Conserv. Law, Article 56, Title 5, §56-0501 et seq. [Enacted in 1996; amended in 1997, 2003 and 2004].
Regulations: 6 NYCRR Part 375-4 [Adopted in 1998; amended in 2001 and 2006].

Groundwater Protection Act, N.Y. Envtl. Conserv. Law, Article 15, Title 31, §15-3101 et seq. [Enacted in 2003].

DEC Guidance on Vapor Intrusion, Draft issued in November 2004, final guidance issued in October 2006.

Clean Water/Clean Air Bond Act of 1996, Environmental Restoration Project State Assistance Program: N.Y. Envtl. Conserv. Law, Article 56, Title 5, §56-0501-0511 [Enacted in 1996; amended in 1997, 1999, 2003 and 2004].

Regulations: 6 NYCRR Subpart 375-4, Environmental Restoration Projects [Adopted in 1998; amended in 2001 and 2006].

Guidance Documents: DEC Program Policy, Environmental Restoration Projects [December 1997; last amended in 2002]; DEC Procedures Handbook, Environmental Restoration Projects [December 1997; last amended in 2004].

State Assistance for Brownfield Opportunity Areas, N.Y. Gen. Mun. Law Article 18-C, §970-r [Enacted in 2003; amended in 2004, 2007 and 2008].

New York City Brownfield and Community Revitalization Act, 2009 N.Y.C. local Law No. 27, N.Y.C. Admin. Code §24-901 et seq. [Enacted 2009; amended in 2010].

1. Legislative/Regulatory Purpose

- As to the Brownfield Cleanup Program ("BCP"): To encourage and enhance private-party cleanup and redevelopment of contaminated property to return sites to productive use, and to reduce development pressure on "greenfields." The new program supplants the Voluntary Cleanup Program ("VCP"), which has been administered by DEC since 1994 without the benefit of statutory authority. The VCP program is being phased out. No new applications are being accepted into the VCP, but those who did not transition to the BCP will continue on the VCP track. (But see proposed regulations for Remediation Stipulation Program, discussed below in section 11.)

- As to the Bond Act/State Assistance Program: To assist municipalities in cleaning up municipally-owned contaminated sites by providing public funding, regulatory guidance and protections against liability.

2. Eligibility of Sites and Parties

- For BCP:

  a. Eligible parties are:

    - Volunteers, defined as all applicants under the BCP other than "participants" (see immediately below), including parties whose liability arises solely out of ownership or operation of a site following contamination events, and who take reasonable steps to prevent continuing or future releases or harm. Volunteers have limited obligations under the BCP concerning off-site contamination, and obtain the broadest post-cleanup protections from the state.

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- Participants, defined as applicants responsible for contamination due to ownership of a site at the time of contamination, or otherwise liable under statutory or common law. Participants have broader investigation and cleanup requirements, and obtain narrower post cleanup protections from the state.

b. Eligible sites are properties, the redevelopment of which are complicated by contamination, other than those already deemed environmental priorities by the state (such as those listed in the state's registry of inactive hazardous waste disposal sites), those already subject to enforcement actions by the state, those on the federal National Priority List under CERCLA, or those permitted under RCRA.

- For former VCP:

  a. All parties, including those deemed responsible under law for cleanup of contamination.

  b. Sites other than those already deemed environmental priorities by the state, or those already subject to enforcement actions by environmental authorities.

- For Bond Act/State Assistance Program:

  a. Municipalities (defined to include counties and Indian nations and tribes) that own contaminated sites, so long as the municipality is not liable for cleanup for any reason other than mere ownership.

  b. Sites other than those already deemed environmental priorities by the State.

3. <u>BCP Application Process</u>

- To participate in the BCP, the applicant -- whether volunteer or participant -- must submit a written application to DEC, which may, at the applicant's option, include a proposed site investigation or a final report describing an investigation undertaken pursuant to BCP protocol.

- DEC encourages those interested in proceeding to first participate in a pre-application meeting, in order that DEC and the parties may first discuss the overall program, the applicants' intentions, and means to streamline the process.

- Upon receipt of an application, DEC must notify the administrator of the state's Environmental Protection and Spill Compensation Fund, to determine whether the applicant has been deemed a responsible party for petroleum contamination at or emanating from the subject site, for which there is an existing claim against the party under the state's Navigation Law. The administrator must respond to DEC and the applicant within 30 days.

- Within 10 days of an application, DEC must notify the applicant whether the application is complete. If it is incomplete, DEC must notify the applicant in writing as to further information required.

- Following receipt of additional information from applicant, DEC has 10 days to make a written determination on completeness of the application.

- Once the application is complete, DEC must proceed with a 30 day public notice and comment period, including notice to local governmental authorities and site residents.

- DEC is to use its best efforts to approve or deny the application within 45 days of the application being deemed complete.

- DEC must reject an application if:

  a. any information in DEC control establishes that the site does not meet the requirements of a Brownfield site under the BCP;

  b. there is an action or proceeding against the applicant concerning the site, pursuant to which the state or federal government is seeking an investigation, cleanup or penalties concerning contamination there; or

  c. the Spill Fund administrator confirms that there is an existing claim against the applicant due to a petroleum discharge at the site.

  d. there is already an order, against the person requesting participation, requiring investigation, removal or remediation of contamination relating to the site.

- DEC has the discretion to reject an application if it deems that the public interest would not be served by permitting the applicant to proceed. Factors to be considered include:

  a. any violations of environmental laws by the applicant;

  b. any falsifying or concealing of material facts by the applicant in proceedings before DEC;

  c. whether the applicant is an individual with a substantial interest in, or senior management position in, an entity which has been denied a DEC permit due to certain acts or failures to act.

- In 2006, New York trial courts upheld DEC eligibility determinations in two cases in which developers challenged DEC's denial of their BCP applications. In both instances, DEC had determined that the levels of contamination at the sites were not sufficiently high to consider the redevelopment of the properties to be complicated by the presence of contamination. In contrast, in 2007 a New York trial court reportedly rejected the validity of a developer's BCP application. These conflicting court decisions, among other things, brought about a call for legislative clarification of BCP eligibility requirements. However, BCP reform legislation passed in 2008 did not clarify BCP eligibility.

- On April 23, 2008, Governor Patterson signed into law Senate Budget Bill 6807 as Chapter 57 of the 2008 Laws of N.Y., which enacted a 90-day moratorium for new

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applications for the BCP. This moratorium followed on the heels of strong concern about the overall effectiveness of the BCP, uncertainty about eligibility for the program, and criticisms surrounding the remediation and redevelopment tax credit program. The moratorium, which was set to expire on July 23, 2008, was repealed by S.B. 8717, signed into law on July 21, 2008.

- On June 22, 2010, DEC issued DER-32: Brownfield Cleanup Program Applications and Agreements. This Program Policy, which became effective on July 30, 2010, provides guidance on the application process for Brownfield Site Cleanup Agreements, including the general terms and conditions of BCAs and the procedure for amending or terminating a BCA.

4. Brownfield Site Cleanup Agreement

- The Brownfield Site Cleanup Agreement ("BCA") between the applicant and DEC must include:

  a. a description of the boundaries of the property subject to the BCA;

  b. a requirement that the applicant pay DEC oversight costs, and, in the case of responsible party participants, may also include a requirement that the applicant provide up to a $50,000 Technical Assistance Grant to a non-profit community group representing the interests of the community affected by the site (in which case the grant is an offset against DEC oversight costs);

  c. a dispute resolution procedure;

  d. an indemnification by the applicant holding the state harmless from claims concerning the BCA (except for claims arising from gross negligence or intentional misconduct);

  e. the right of DEC to terminate the BCA due to the applicant's breach of its terms;

  f. a provision stating that DEC may exempt the applicant from requirements for state or local permits for activities needed to implement programs for investigation and/or remediation under the BCA;

  g. a statement by DEC that the applicant will not be considered an operator of the site solely due to execution or implementation of the BCA;

  h. a requirement that the applicant proceed with investigation and/or remediation pursuant to one or more DEC-approved work plans;

  i. a requirement that the applicant prepare and implement a citizen participation plan assuring public and community involvement in the BCP process; and

  j. a waiver by the applicant effective upon execution of the BCA, of any rights to make a claim against the state's Spill Fund.

5. Citizen Participation

- Pursuant to the BCP, DEC is to encourage public participation in specific Brownfield projects, particularly on the community level.

- The public is permitted to provide comments concerning a Brownfield project at any point in the process.

- Aside from the public notice of the applicant's request to proceed with a BCA and the applicant's development of a citizen participation plan (both noted above), the BCP specifically provides that the public is to be given the opportunity to comment on specific investigation and remediation plans submitted by the applicant prior to DEC's issuance of responses to the applicant. The public is also entitled to notice and specific information prior to DEC's final determinations on proper completion of cleanup, prior to commencement of construction, and within 10 days after issuing a final approval involving institutional and engineering controls.

- DEC must also hold public hearings in certain circumstances.

- Among those to be notified of a particular project, or submissions during the course of the project, are local community members and others who have requested to be placed on the specific brownfield site contact list.

- Under the state's Superfund Program and BCP, eligible citizen groups may apply for grants of up to $50,000 per site to obtain independent technical assistance from a qualified environmental professional.

- The assistance is to help the community understand the nature and extent of contamination at the site, and to develop input on the investigation and remediation of the site.

- DEC issued its Technical Assistance Grant Guidance Handbook as DER Program Policy DER-14 on March 27, 2006.

- On January 21, 2010, DEC issued DER-23: Citizen Participation Handbook for Remedial Programs, providing guidance to DEC, DER and the public on satisfying the Citizen Participation (CP) requirements set forth in the various environmental remediation programs, including the BCP. This Program Policy replaces the June 1998 DER guidance document entitled "Citizen Participation in New York's Hazardous Waste Site Remediation Program: A Guidebook."

- The current handbook includes a table setting forth the BCP CP requirements and timelines and provides that in some cases, DER may determine that additional CP activities are necessary to supplement the CP minimum requirements. The Program Policy further provides protocols for the preparation and distribution of fact sheets.

6. <u>Investigation and Remediation Requirements and Standards/Cleanup Alternatives</u>

- Work plan requirements under the BCP are in two stages: Remedial investigation work plans, and remedial work plans.

- Remedial investigation work plans:

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a. Volunteers must provide for investigation and characterization of the nature and extent of contamination within the boundaries of the site, and must also prepare a qualitative exposure assessment to analyze the nature and size of the population currently exposed of reasonably expected to be exposed to contaminants present at or emanating from the site.

b. Participants must also fully characterize the nature and extent of contamination that has emanated from the site.

c. Once the plan is approved, the applicant conducts investigation.

d. Final Remedial Investigation Report sets forth data together with interpretations and conclusions, and must state whether remediation is necessary. In order to do so, applicants must undertake an analysis of remedial alternatives (discussed further below) unless the site already meets the strictest DEC standards.

e. If the Remedial Investigation Report is approved, DEC sends a Remedial Investigation Approval letter. If DEC determines no remediation is required, the Applicant is eligible for a Certificate of Completion. If remediation is required, the approval letter sets forth a list of Remedial Action Objectives.

- Remedial work plans:

  a. Applicants must provide for remediation of contamination within the boundaries of the site.

  b. Participants must also provide a remedial program for contamination that has emanated from the site.

- DEC is to use best efforts to respond to work plans within 45 days of submission, or within 15 days after the close of public comment periods, whichever is later.

- Where DEC has determined that a site poses a significant threat to the environment, and the applicant is a volunteer, DEC must -- within six months -- bring an action against any known responsible parties other than the volunteer Where such actions cannot be brought, or the actions do not result in initiation of remedial activities by responsible parties, then within a year of completion of the enforcement action or the volunteer's remedial program (whichever is later), DEC must use best efforts to commence remediation of off-site contamination.

- DEC has adopted three sets of generic contaminant-specific soil remediation action objectives ("DEC soil standards") based on the anticipated use of Brownfield sites: unrestricted, commercial and industrial.

- Four-track approach to remedial actions:

  a. Under the BCP, DEC has adopted four risk-based approaches dependent on the anticipated use of particular Brownfield sites.

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b. Track 1: Cleanup to unrestricted use standards -- based on the strictest of DEC soil standards -- without long-term employment of institutional or engineering controls, except that volunteers who commit to complete cleanups that include bulk reduction of groundwater contamination may qualify for Track 1 if the only institutional or engineering controls concern remaining groundwater contaminants after the groundwater cleanup has run its effective course.

c. Track 2: Cleanup to one of the DEC soil standards without the use of institutional or engineering controls for remaining soil contaminants, but otherwise allowing institutional or engineering controls.

d. Track 3: Achievement of the same goal as Track 2, but through use of site-specific data to determine the cleanup objective.

e. Track 4: Cleanup to levels that will be protective of the site's intended residential, commercial or industrial use, with restrictions and with reliance on long-term engineering or institutional controls. Site-specific cleanup objectives may be established, but only with the concurrence of DEC that any remaining contaminants that present a cancer risk of more than 1 in a million, or a non-cancer hazard risk of greater than 1, meet objectives that are protective of human health and the environment without requiring institutional or engineering controls.

- The legislation declares a preference for complete contaminant source removal or treatment, but also recognizes that containment, elimination of exposure, and treatment or management of the source, may also be considered in lessening degrees of preference based on feasibility.

- Work plans must include remedial alternatives. For Track 1 cleanups, one alternative must be proposed. For all other tracks, at least two alternatives must be proposed, one of which must be designed to achieve a Track 1 cleanup. Generally, unless DEC has determined the site a significant threat to the environment, the applicant selects the remedy. However, for other than Track 1 cleanups, DEC does have the discretion to select the remedy in certain circumstances.

- Under Tracks 2, 3 and 4, groundwater use can be either restricted or unrestricted.

- Proposed institutional and engineering controls must be spelled out in detail in the remedial work plan, and must include, among other things;

a. an evaluation of the reliability and viability of long-term costs, implementation, operation, maintenance and monitoring; and

b. where required by DEC, financial assurance to ensure long-term operation, maintenance and monitoring;

- Where institutional or engineering controls are employed, the site owner will be obligated to submit an annual report to DEC, prepared by a qualified environmental professional, confirming the effectiveness and continued viability of the controls and allowing access to the property for continued maintenance of controls. Every five

years, the owner must also certify that assumptions made in the qualitative exposure assessment of offsite contamination remain valid.

- If anyone acting with the authority of DEC obtains a sample from a BCP site, they must supply the owner of the site with a receipt and a sample identical to that being removed from the site. If a sample is analyzed, results must be promptly given to the owner. When all such sampling and remediation activities are completed, DEC assures removal of all equipment and the return of the ground surface to the condition that it was in prior to the sampling activities.

7. <u>Certificates of Completion</u>

- Once DEC reviews and approves a final engineering report confirming successful completion of pre-approved remedial activities -- including certification that any restrictions, engineering or institutional controls are in place and contained in a duly recorded environmental easement (see below); and that any required financial assurances are in place -- DEC issues a written Certificate of Completion confirming completion of the project.

- Responsible parties will not receive a certificate of completion until any outstanding Spill Fund claims have been resolved.

- Certificates of Completion may be transferred to successors or assigns upon transfer or sale of the brownfield site.

- Certificates of Completion may be modified or revoked if:

  a. the applicant fails to comply with the BCA or the work plan;

  b. misrepresentations by the applicant are later identified; or

  c. DEC later determines there is "good cause."

- A notice of certification of completion must be recorded and indexed with the county recording officer within thirty days either of the issuance of the certificate (if the applicant is the property owner), or within thirty days of acquiring title (if the applicant is the prospective purchaser).

- Following issuance of a Certificate of Completion, parties intending to change the use of a Brownfield site must provide 60 days prior notice to DEC.

  a. Definition of "change in use" includes transfer of title to all or part of the site, erection of any structure there, or any activity likely to increase human exposure to contaminants.

  b. If DEC determines that the change of use is prohibited, it must so notify the party within 45 days of receipt of the notice.

8. <u>BCP Limitation of Liability</u>

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- Once DEC issues the Certificate of Completion, and subject to the reopeners set forth below, the applicant has no further liability to the state, by statute or common law, for the contamination that was the subject of the BCA, except that participants are not released from any natural resource damages that may be available under law.

- Where a responsible party has settled claims by the state in conjunction with a remedial project under the BCP, the settlement also provides that party with contribution protection against claims by third parties concerning matters addressed in the settlement. The protection does not apply to personal injury claims.

- The liability limitation runs with the land, extending to the applicant's successors and assigns provided those parties are not responsible for the contamination that has been remediated.

- However, DEC reserves its right to require the applicant to pursue further investigation or remediation if:

  a. the state determines that the remedy is no longer protective of human health or the environment;

  b. a change in environmental standards or criteria render the remedy no longer protective of human health or the environment;

  c. the state determines that the applicant is failing to comply with continuing obligations, or has falsely obtained the certificate;

  d. a change in use at the site requires further action;

  e. following issuance of the Certificate of Completion, the applicant fails to make substantial progress toward completion of its proposed development within five years, or in a reasonable period of time.

- Change in use will not be grounds for requiring further actions by an applicant who remediated to unrestricted use standards under Track 1.

- The legislation gives DEC the authority to periodically inspect each brownfield site to ensure that the use of the property complies with the terms and conditions of the BCA.

9. <u>Technical Guidance for Investigation and Remediation</u>

- Pending the 2006 adoption of new technical standards by DEC, pre-existing guidance documents were being used. (See section 11 below on regulations.)

- DEC guidance and draft guidance that had been considered under the former VCP program have included the following:

  a. Soil cleanup guidance under Technical and Administrative Guidance Memorandum (TAGM) HWR-94-4046. (Superseded by policy documents, see below.)

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b. Spill Technology and Remediation Series ("STARS") Memo #1. (Now superseded by regulations and guidance. See below.)

c. Technical Guidance for Site Investigation & Remediation (Draft DER-10), published December 2002 by DEC's Division of Environmental Remediation under the VCP program. (See below as to revised DER-10 issued in compliance with BCP legislation and the 2006 requirements.)

d. Technical and Operational Guidance Series (1.1.1) on groundwater standards.

- In addition, in May 2004, the DEC Division of Environmental Remediation published its Draft Brownfield Cleanup Program Guide, covering the new BCP process from pre-application meeting through final DEC sign-offs and the citizen participation process. In March 2005, DEC amended the Draft Brownfield Cleanup Program Guide by incorporating new eligibility guidelines, and by indicating that the revised document would be published as final guidance. On October 21, 2010, the DEC issued CP-51 / Soil Cleanup Guidance.

- The reform legislation also provides that within three years (that is, by October 2006) DEC was to develop and publish a strategy for addressing long-term remediation of groundwater. However, the document is still under development.

- In November 2006, DEC adopted final regulations for remediation programs, including Subpart 375-6, setting forth soil cleanup objectives.

- DEC had also issued a draft technical support document on development of the soil cleanup objectives (revised public review draft, June 2006), which was subsequently finalized in September 2006.

- 2009 and 2010 developments on policies and procedures for site investigations and remediations include:

a. Soil cleanup guidance:

On November 4, 2009, DEC published a draft Policy on Soil Cleanup Guidance, the comment period for which ended on December 15, 2009. The policy establishes the procedures for DEC's selection of the soil cleanup levels for each DEC remedial program, including the BCP, Environmental Restoration Program (ERP) and RCRA Corrective Action Program. The policy also supplants TAGM, STARS and the "Petroleum Site Inactivation and Closure Memorandum" dated February 23, 1998. On October 21, 2010, the DEC issued CP-51 / Soil Cleanup Guidance.

Once the nature and extent of soil contamination at a site is fully evaluated, the applicable soil cleanup levels will be based upon one, or a combination of, four approaches established by DEC. Generally, the four approaches are: (1) an Unrestricted Use Soil Cleanup Objective ("SCO") as set forth in 6 NYCRR 375-6.8(a); (2) Restricted Use SCO as set forth in 6 NYCRR 375-6.8(b); (3) limited site-specific modifications to SCO's based on site-specific information; and (4)

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site-specific SCO where the remediating party proposes site-specific cleanup levels or approaches for soil that remain protective of public health and the environment and are based on a detailed site evaluation.

In addition to considering site-specific information when determining the applicable soil cleanup levels, DEC will consider the specific remedial program under which the site is being remediated. Specifically, with respect to the BCP, the soil cleanup levels will correspond with the four-track approach to remedial actions.

b. Site investigation and remediation guidance:

On May 3, 2010, DEC published DER-10, the Technical Guidance for Site Investigation and Remediation, which is comparable to New Jersey's Technical Requirements for Site Remediation ("Tech Regs"). The DEC guidance and NJ Tech Regs are similarly organized and set forth minimum requirements for site investigation and remediation. The policy summary for DER-10 emphasizes that the Technical Guidance represents only minimum requirements and that DER maintains the authority to require additional investigation and remediation based upon site-specific conditions.

On August 11, 2010, DEC published the Green Remediation Program Policy, which establishes a preference for sustainable remediation. The guidance applies to all phases of site cleanup.

10. Environmental Easements

- As part of the 2003 legislation implementing the BCP, the legislature added a specific title setting out the elements to be required in institutional controls where remedial projects leave residual contamination subject to use restrictions or engineering controls.
- In such cases, the state requires that an environmental easement, held by the state, be created.
- The easement names the state as the grantee, contains a detailed description of any use restrictions and engineering controls, and includes an agreement to incorporate the easement in any leases, licenses or other instruments granting a right to use the property that may be affected by the easement.
- The easement, which runs with the land, must be recorded in the county where the site is located.
- DEC was directed to promulgate regulations establishing standards and procedures for environmental easements. It is also to include a copy of every environmental easement in a database, and to make the database readily searchable.
- The regulations for environmental easements are set forth in 6 NYCRR subpart 375-1.8(h). The database of environmental easements is available through the DEC website.

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11. DEC Regulations

- In November 2005, DEC published draft regulations covering the BCP as well as other aspects of its remedial programs. A revised draft was published on June 14, 2006 following public comment, and then proceeded through a second comment period. See 28 N.Y. Reg. 22 and 25.

- Final regulations were adopted in November 2006, 28, N.Y. Reg. 15, except for Subpart 375-5 (see below).

- Subpart 375-3 of the regulations covers the BCP, and closely follows the BCP legislation.

- Subpart 375-5 would have implemented a new Remediation Stipulation Program to allow volunteers to enter a "remediation stipulation agreement" with DEC to investigate and remediate contaminated sites that do not qualify for the BCP, under a process similar to the BCP. In response to comments on the proposed draft regulations, Subpart 375-5 was not adopted, and is proceeding under a separate rulemaking process.

- Subpart 375-6 sets out contaminant-specific, and use-specific, soil cleanup objectives applicable to the entire DEC Remedial Program, including the BCP.

- DEC had also issued a draft technical support document on the development of the soil cleanup objectives (revised public review draft, June 2006), which was finalized in September 2006.

- In 2008, the New York trial courts decided two cases in which the 2006 DEC regulations implementing the BCP were challenged. One case was decided in favor of the DEC, upholding certain regulations under 6 NYCRR 375-6 as rational, while the other case upheld in part and struck down in part specific provisions of DEC's regulations under NYCRR 375-1 and 375-2.

12. Brownfield Tax Credits and Waivers

- The 2003 legislation added three new types of tax credits for those remediating sites under the BCP (N.Y. Tax Law §§ 21-23). Taxpayers who are parties to a BCA become eligible for the credits upon issuance of Certificates of Completion. The credits became effective for taxable years beginning on April 1, 2005 and currently cover BCAs concerning which Certificates of Completion are obtained no later than December 31, 2005.

- On April 23, 2008, as part of the Governor's budget bill, the legislature placed a 90-day moratorium on the acceptance or rejection of new participants into the BCP. The moratorium was enacted to give lawmakers time to amend the BCP tax credit laws in response to criticism that, by lumping together the credits for remediation and redevelopment, some companies use most of their money on redevelopment rather than remediation, defeating the main purpose of the tax credits. The moratorium, set

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to expire on July 23, 2008, was repealed by S.B. 8717, signed into law on July 21, 2008.

- 2008 legislation amended sections of the BCP Brownfields Redevelopment Tax credit components, in response to such criticism. These amendments apply to any taxpayer approved for participation in the BCP after June 23, 2008.

    a. Brownfield Redevelopment Tax Credit

        i. Participants accepted into the BCP prior to June 23, 2008:

            (a) Parties are allowed state income tax credits of 10% for individual taxpayers and 12% for corporate taxpayers to offset certain costs incurred under the BCP, including site preparation costs, certain tangible property costs, and on-site groundwater remediation expenditures, subject to further potential increases as follows. Credits are increased by 2% if property is cleaned up to unrestricted use standards under Track 1, and are further increased by 8% if property is located in an Environmental Zone ("EN-Zone"), which is a designated high-poverty area, or an area containing both high poverty and a high unemployment rate. These one-time tax credits may be taken over a period of 5 or 10 years depending on the type of expenditure.

            (b) In June 2007, the Governor sent Program Bill #35 to the legislature for consideration. The bill, which had not been introduced prior to the legislature's summer adjournment, would further increase available tax credits based on the level of cleanup achieved and the liability status of the applicant, subject to monetary caps.

        ii. Participants accepted into the BCP after June 23, 2008:

            (a) The maximum amount of the site preparation tax credit and on-site groundwater contamination credit is increased and is calculated as follows, based on the level of soil remediation:

                1. 50 % for unrestricted use;

                2. 40% for residential use (28% for Track Four);

                3. 33% for commercial use (25% for Track Four); and

                4. 27% for industrial use (22% for Track Four).

            (b) The tangible property credit is capped to the lesser of $35 million or 3 times the cost of cleanup and other site preparation costs. However, if the site is to be used primarily for a "manufacturing activity," as defined, the cap is raised to $45 million or 6 times the cost of cleanup and other site preparations.

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(c) The 2008 legislation also clarified that the "benefits and burdens" of Certificates of Completion for the tangible property credit component are fully transferable to successors or assigns upon transfer or sale in interest in the property with the land.

(d) For the taxable years beginning on or after April 1, 2005, any "double dipping" of tax credits is explicitly prohibited. Only one taxpayer will be allowed to claim tangible property credits at any one site under the BCP. This includes excluding the costs of the property with respect to which another taxpayer received a redevelopment tax credit when calculating the tangible property credit.

b. Brownfield Real Property Tax Credit

i. Property tax credits are also available based on the degree to which the developer's cleanup and redevelopment can be shown to have resulted in an increase of full time employment at a BCP site. Credits are determined by a calculation based on the resulting employment at the site.

c. Environmental Remediation Insurance Credit

i. To offset premiums paid by the applicant for acquisition of environmental remediation insurance for the BCP site, a one-time tax credit will be allowed in the amount of $30,000 or 50% of the premium, whichever is less.

ii. 2005 legislation allows governing bodies of tax districts to cancel any interest, penalties or other real property charges for properties that are subject to a BCA, entered into by a volunteer, so long as any affected municipality consents to the cancellation. Failure to secure a Certificate of Completion or revocation of a certificate, are grounds for revocation of such waivers of interest, penalties or charges.

iii. 2007 regulations provide guidance to insurers regarding minimum standards for an environmental insurance policy form so as to allow the insurer to certify to the Department of Taxation and Finance that the policy qualifies for the tax credit.

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13. Oversight and Reporting Requirements

- In 2008, BCP reform legislation created the Brownfields Advisory Board and established new oversight and reporting requirements.

- New York Brownfields Advisory Board

  a. The Brownfields Advisory Board ("Board") serves as a working forum for concerns, ideas and recommendations relating to the BCP and the BOA (collectively, "Brownfields Programs").

  b. The Board requests information from state agencies, monitor and review the implementation of the Brownfields Programs and to review and evaluate the appropriate state and industry contributions to the Brownfields Programs. Based on this information, the Board is to annually report to the Governor and Legislature on its findings and recommendations regarding the Brownfields Programs and the availability of funding and resources.

  c. The Board consists of fifteen members including the DEC Commissioner, the Health Commissioner, the Economic Development Commissioner, the Taxation and Finance Commissioner, and the Secretary of State (or their designees). The remaining ten members are appointed by the Governor, with restrictions, and shall serve for terms of three years, without compensation. The DEC Commissioner shall serve as Chairperson of the Board. The Board will meet at least twice a year.

- Environmental Remediation Annual Report

  a. This annual report, prepared by the DEC Commissioner and the Taxation and Finance Commissioner, contains information regarding the BCP for the preceding fiscal year and includes:

     i. The number of requests for BCP participation received by DEC;

     ii. The number of remedial investigations commenced, and the number completed;

     iii. The length of time from the date DEC received a participation request to the date the Commissioner issued the Certificate of Completion, for each request that resulted in a certification of completion;

     iv. The total number of Certificates of Completion issues; and

     v. Owner relevant information.

  b. According to the 2009/2010 Environmental Remediation Annual Report, 31 applications were made to the BCP during the 2009/2010 fiscal year. As of March 31, 2010, 459 applications had been made to the BCP, 320 sites had been accepted, and 68 sites had been completed and received their Certificates of Completion (COC) since the inception of the program.

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c. Pursuant to the 2009/2010 report, the average BCP participant was receiving a COC within 2.8 years of completing the BCP application.

d. The 2011/2012 report provides that 39 applications were received in fiscal year 2011-2012 and that 537 applications had been received to that point in the BCP program. Of the 537 applications, 391 were approved. DEC reports that through fiscal year 2011/2012, DEC had issued 112 Certificates of Completion in BCP matters.

- Brownfield Credit Report

  a. The Brownfield Credit Report is an annual report published by January 31 each year by the NYS Department of Taxation and Finance and contains the following information about tax credits claimed under N.Y. Tax Law §§21-23:

     i. the name of each taxpayer claming a credit;

     ii. the amount of each credit earned by each taxpayer;

     iii. information identifying the projects for which a certificate of completion was issued and a credit was claimed;

     iv. the number of credits by each credit type and the amount of such credits granted, claimed and earned on a brownfield site, DEC Regional, and statewide basis; and

     v. any other information or statistical information deemed useful for analysis of the effects of the program.

- Brownfield Redevelopment Report

  a. The Brownfield Redevelopment Report is an annual report submitted to the DEC, by a developer and his/her lessees for eleven years following the execution of a brownfield site cleanup agreement. The report shall include the actual amounts (or estimates if actual amounts are not available to the developer) of the state and local taxes generated by the site, reflective of the businesses and employees operating at the site. The report shall also include any real property taxes paid on or on behalf of such site.

14. <u>Bond Act/State Assistance Program</u>

- Allows municipalities to apply for grants from the $200 million Environmental Restoration Project Fund established under the 1996 Clean Water/Clean Air Bond Act.

- State's share of restoration project may be up to 90% of eligible costs, for remediation at the subject property, and up to 100% for remediation outside the site boundaries, with certain reimbursement obligations in the event disposition of remediated property exceeds municipality's costs.

- Remediation process, including application, submission of plans and state oversight, is similar to the former VCP process and the new BCP procedures described above. Institutional and engineering controls must comport with BCP requirements.

- Regulations for program were amended with adoption of DEC's new Environmental Remediation Program regulations in November 2006, and are codified at 6 NYCRR Part 375-4.

- Limitation of Liability: The Bond Act provides the following protections:

  a. Once the cleanup project is successfully concluded, and so long as institutional and engineering controls are properly maintained, the municipality, successors, tenants and lenders are protected against liability to the state for statutory or common law claims, and are protected against liability to third parties for statutory claims, concerning the pre-existing contamination. However, parties seeking the benefit of the liability protection carry the burden of proof in establishing that any such cause of action is attributable solely to the pre-existing contamination.

  b. The state will indemnify, defend and hold such parties harmless from any common law actions concerning the pre-existing contamination.

- In May 2006, DEC announced that to that date, over $105 million in Clean Water/Clean Air Bond Act funding had been committed for 201 brownfield project investigations and cleanups.

- In the course of 2007, DEC had announced a total of over $15 million in grants to counties throughout the state for site investigation and remediation.

- As of March 31, 2010, 246 sites had been accepted to the program. Of those sites, 43 were cleaned up or given no further action status. At that point, the entire $200 million granted by the Bond Act was allocated, and further applications were on hold subject to further funding.

- As of January 2013, new applications were still not being accepted due to lack of funding.

15. <u>Brownfield Opportunity Areas Program</u>

- Under the 2003 reforms, the legislature also created the Brownfield Opportunity Areas ("BOA") Program, pursuant to which DEC, in consultation with the Secretary of State, provides funding of up to 90% of the costs of local governmental authorities, community boards, and non-profit community organizations for studies including environmental site assessments.

- In 2008, oversight of the BOA was transferred from DEC to the Department of State, although DEC continues to provide technical assistance to the Department of State and to grantees.

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- The goal of the BOA program is to identify areas ripe for Brownfield redevelopment.

- Funding preferences are based on factors such as cooperation among municipalities, community boards, and community organizations; concentrations of Brownfield sites; economic distress; and economic development opportunities.

- Funding and technical assistance are determined based on a nomination and selection procedure.

- According to the New York State Division of Coastal Resources, there are currently over 50 projects in progress under the BOA program.

- In fiscal year 2008-2009, 14 applications were received and awaiting approval as of March 31, 2009. The total grant award at this time was $16.4 million; pending grant application total over $6.6 million.

- In September 2008, DEC published the application for the BOA program, which was soon followed by a guidance document for applicants. Additionally, in October 2008, the Department of State announced an availability of funding for the BOA program and solicited applications.

16. <u>Green Remediation</u>

- On August 18, 2010, DEC announced its program policy on Green Remediation, DER-31, which became effective on September 17, 2010.

- DER-31 sets forth green remediation concepts and techniques and directs DEC and remediating parties to consider, implement and document such concepts and techniques throughout every stage of the site cleanup process, including the investigation phase.

- The guidance sets forth five green remediation techniques that remediating parties must consider and try to incorporate in their cleanups where practical:

  a. Use of renewable energy and/or the purchase of renewable energy credits (RECs).

  b. Reduction in vehicle idling by shutting off all vehicles that have not been in use for more than 5 minutes.

  c. Design cover systems so that they may have alternate uses such as habitat and passive recreation use), require minimal maintenance and allow for infiltration of storm water.

  d. Beneficially reuse materials that would otherwise be treated as waste, such as crushed clean concrete as base or fill.

  e. Use of Ultra Low Sulfur Diesel.

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- DEC is to consider sustainability when evaluating a party's proposed remedy. Remediating parties are to consider and discuss sustainability and/or green remediation techniques in their proposals to DEC. Discussions are to include the green remediation techniques considered and any qualitative or quantitative sustainability information generated in support of a remedy selection.

- The requirement to consider and discuss sustainability and green remediation techniques will also extends to any report submitted to DEC during any stage of the site investigation and cleanup process. Final engineering reports are to discuss the green remediation practices/technologies employed throughout every stage of the site investigation and cleanup.

17. New York City Local Brownfield Cleanup Program ("NYC BCP")

- In April 2007, Mayor Bloomberg announced PlaNYC, a blueprint designed to manage city growth and development in an environmentally sound manner. This plan emphasizes, among other things, the importance of contaminated site cleanup and redevelopment.

- PlaNYC identified 11 major brownfield initiatives, including the creation of the Mayor's Office of Environmental Remediation ("OER") to oversee city brownfield programs.

- In May 2009, Mayor Bloomberg signed the New York City Brownfield and Community Revitalization Act (the "Act"), vesting OER with the authority to create and operate the Local BCP. The Act amended Title 24 of the New York City Administrative Code to include a new Chapter 9 entitled "New York City Local Brownfield Cleanup Law."

- The NYC BCP was developed to address gaps in the State's BCP, particularly as to historic fill sites excluded from the state program.

- The NYC BCP establish rules that set forth the requirements for remedial reports and remedial action work plans, as well as rules that encourage citizen participation and provide notice to affected communities.

- In May 2010, OER published for formal public comment a draft Memorandum of Agreement between DEC and OER. The MOA provides for coordination between the two agencies for the oversight of the investigation and remediation of contaminated sites in New York City. The MOA would provide liability protection to developers who are admitted to the New York City LBCP from DEC.

18. 1999-2000 Legislative Proposals

- A-496

The Environmental Opportunity Zone Act, originally introduced by Assemblyman Destito as A-4375 in 1997, was reintroduced by the Assemblyman on January 6, 1999. It most recently passed the Assembly on June 14, 2000 but did not pass the Senate.

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Similar to New Jersey's statute of the same name, it would have authorized municipalities to designate environmental opportunity zones in order that Brownfields redevelopment be encouraged through property tax abatements, and through covenants not to sue for the developer and its lenders.

- S-7296/A-10408

The Brownfield Redevelopment Act was introduced by Assemblyman Lopez on March 28, 2000 and by Senator Marcellino on April 3, 2000, and reached each house's Environmental Conservation Committee.

Would have created land-use opportunity areas; would have established a brownfield site assessment, acquisition and remediation assistance program; would have created property tax exemptions for particular properties held for purpose of cleanup; would have allowed tax credits for brownfields redevelopment; would have provided for liability protection to those who complete voluntary cleanups; would have created technical advisory panel to develop new cleanup standards and procedures.

- S-8108

S-8108, including the Voluntary Remediation Act, was introduced by Senator Marcellino on June 10, 2000.

Would have created the Voluntary Remediation Act to foster cleanup and re-use of contaminated properties; would protect volunteers from future cleanup liability by way of state covenants not to sue; would create innocent purchaser protection and a lender safe harbor against environmental liability; would create a brownfield remediation tax credit.

19. 2001-2002 Legislative Proposals

Among the bills proposed in New York in the 2001-2002 sessions were the following:

- S-7686 -- Governor Pataki's Superfund Reform Bill

The bill, a broad ranging Superfund reform proposal introduced by Senator Marcellino at the request of the Governor, includes brownfield initiatives such as codification and funding of the state's Voluntary Cleanup Program, tax credit incentives for brownfield cleanup and redevelopment, liability limitations -- including state covenants not to sue -- for those who clean up and redevelop brownfields, and technical and financial assistance to municipalities and non-profit groups to plan brownfield redevelopment.

The bill was supported by the Mayors' Association, the Association of Counties and the Association of Towns.

- A-9265

The Brownfield Site Remediation Act, introduced by Assemblyman Brodsky, would have created incentives for cleanup and redevelopment of brownfield sites, including tax credits, environmental opportunity zones similar to the New Jersey model in which property tax abatements could be afforded to those willing to cleanup and redevelop sites,

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and grants to municipalities and local organizations to identify appropriate cleanup and redevelopment sites.

- A-9203

The bill, introduced by Assemblyman Lopez, would have created a brownfield site assessment, acquisition and remediation assistance program, including grants and loans for identification, planning and redevelopment activities at brownfield sites.

- S-7745

A bill, introduced by Senator Marcellino, to create a comprehensive Brownfield Program including liability protections, codification of a voluntary cleanup program, cleanup standards, funding, program eligibility, and provisions regarding change of use.

20. <u>2003 Legislative Proposals</u>

- A-9120/S-5702

In 2003, Governor Pataki reintroduced the Superfund reform proposal, described under section 15 above (S-7896). On June 20, 2003, the Governor, the Assembly Speaker and the Senate Majority Leader reached consensus on the legislation. The Senate and the Assembly passed two different versions, just hours before the legislature officially adjourned for the summer. When the legislature reconvened in the Autumn, the legislation was reconsidered, the differences reconciled, and A. 9120 was passed. The Governor signed it into law on October 7, 2003 as the State's new Brownfield Cleanup Program.

See the detailed description above.

21. <u>2004-2005 Legislative Proposals</u>

Among the bills proposed in New York in the 2004-2005 sessions were the following:

- A-1908

A-1908, introduced by Assemblyman Charlie Nesbitt on January 21, 2005 encouraged the use of brownfield properties for the siting of the major electrical generating facilities.

- A-3773

A-3773, introduced by Assemblyman Vito J. Lopez on February 4, 2005, would have given preference to brownfield sites that have secured a certificate of completion, in regard to funding from the state Division of Housing and Community Renewal.

- A-4634

A-4634, introduced by Assemblyman Steve Englebright on February 14, 2005, would have restricted industrial development agency financing of industrial or commercial projects to areas on or near brownfield sites.

- S-2771

S-2771, introduced by Senator Joseph E. Robach on February 25, 2005, would have made provisions for the state to act as parens patriae to recover a municipality's share of expenditures related to environmental restoration projects.

22. 2007 Legislative Proposals

- A-6402/S-1285

These identical bills introduced by Assemblyman Hoyt on March 7, 2007, and Senator Johnson on January 18, 2007, respectively, would have restricted industrial development agency financing of industrial or commercial projects to areas on or near brownfield sites. (See also A-4634 under 2004-2005 Legislative Proposals above). The bill would have also granted economic development zone equivalent area treatment to brownfields projects, when financed by industrial or urban development agencies. The bills were last referred to the Committee on Local Governments and were not passed before the legislative session ended.

- A-8344/S-5768

These identical bills, introduced by Assemblyman Schimminger on May 11, 2007, and Senator Stachowski on May 8, 2007, respectively, would have included asbestos as a contaminant for the purposes of making brownfield site determinations. The bills were last referred to the Committee on Environmental Conservation and were not passed before the end of the legislative session.

23. 2008 Legislative Proposals

- S-8717

S-8717, introduced by Senator Marcellino on June 24, 2007, amends various provisions of the BCP, including the Brownfields Remediation Tax Credits ad the Brownfield Opportunity Area program. The bill also creates the Brownfields Advisory Board and establishes new reporting requirements under the BCP. The bill was signed into law as Chapter 390 of the Laws of 2008 on July 21, 2008.

See the detailed description above.

24. 2009 Legislative Proposals

- A-7998

A- 7998, introduced on May 1, 2009, would amend § 21 of the Tax Law placing a $35 million cap on the tangible property credit component available to successful litigants previously denied participation in the brownfield cleanup program. Reintroduced in 2010 as A-9377

- A-1160

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Introduced on January 7, 2009, A-1160 would amend the Environmental Conservation Law ("ECL") and General Municipal Law to include within the definition of "Brownfield site" historic fill contamination. The bill would also add "Mixed Historic Fill" as a newly defined term.

- A-2364/S-7127

Introduced on January 15, 2009, A-2364 would provide former brownfield sites with preferences with respect to the Division of Housing and Community Renewal unified funding rounds. This bill was signed into law on July 7, 2010 (L.2010, c. 353).

- A-2501

Introduced on January 16, 2009, A-2501 would extend the Brownfield Redevelopment Tax Credit to cooperatives and condominiums.

- A-6418/S-1976

Introduced on March 3, 2009, A-6418 would add asbestos as one of the contaminants to be considered for funding eligibility under the BCP.

25. 2010 Legislative Proposals

- A-9377/S-4204.

Introduced on January 6, 2010, this bill would amend § 21 of the Tax Law by allowing parties to whom DEC denied participation in the brownfield cleanup program, but successfully challenge DEC's determination in court, to claim the Brownfield Tax Credit to certain maximum amounts.

- A-11435

Introduced on June 14, 2010, this bill would amend the ECL, Brownfield Redevelopment Tax Credit and Brownfield Real Property Tax Credit, among other laws. The bill would amend the definition of a brownfield site to include any site with contamination that exceeds applicable cleanup standards or where contamination is likely to be present due to prior commercial or industrial use. The bill would also amend the ECL to extend the time in which the owner of an inactive hazardous waste site must execute an easement to memorialize obligations from 60 to 180 days.

26. 2011 Legislative Proposals

- A-1006

Introduced on January 5, 2011, this bill would amend the BCP by, among other things, allowing landlords to be treated as "Volunteers" in certain circumstances and allowing sites with vapor mitigation systems to qualify for Track 1 status.

- A-2324

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Introduced on January 18, 2011, this bill would provide that the brownfield redevelopment tax credit would be reduced in the event that the subject site is owned by, or acquired by a taxpayer from, a municipality that is already a Volunteer under the BCA applicable to the site.

- A-2857

Introduced on January 20, 2011, this bill would extend the brownfield tax credit to cooperatives and condominiums and clarify that the tangible property tax credit is not earned until the Certificate of Completion is issued.

- A-3496/S-3112

Introduced on January 25, 2011, this bill would cap tax credits available for the redevelopment of brownfield sites where DEC had denied the request to participate in the DEC, but where the denial was overturned in court.

- S-2696

Introduced on January 28, 2011, this bill would, among other things (i) establish terms that would have to be accepted by an applicant who is accepted into the BCP; (ii) require BCP participants who are seeking a tax credit to provide additional information to BCP; (iii) provide increased tax credits to program applicants for green buildings and for sites located in Environmental Opportunity Zones or Brownfield Opportunity Areas; and (iv) establish the Brownfields Shovel-Ready Program, providing the Empire State Development Corporation the power to purchase contaminated property and finance redevelopment.

- A-5554/S-4229

Introduced on February 23, 2011, this bill would authorize Suffolk County to sell or dispose of tax liens for less than the outstanding tax due on parcels identified as brownfields.

- S-5228

Introduced on May 3, 2011, this bill would enact the Uniform Environmental Convenants Act governing the establishment of institutional controls.

27. 2012 Legislative Proposals

- A-8817

Introduced on January 4, 2012, this bill would amend the administrative code of New York City to afford developers who receive a Certificate of Completion from New York City the same liability protections as those available under the BCP.

- A-9747/S-5424

Introduced on March 29, 2012, this bill would allow any county in New York to sell or dispose of tax liens for less than the outstanding tax due on parcels identified as brownfields.

- A-10385

Introduced on May 24, 2012, this bill would require the NYS Department of Taxation to publish a supplemental brownfield credit report for 2005, 2006 and 2007.

- S-6316

Introduced on January 25, 2012, this bill would enhance incentives available to aid in cleanup of sites in Brownfield Opportunity Areas; provide grants to non-profits at any site within a Brownfield Opportunity Area; require reporting of data regarding sites in the Brownfield Opportunity Area Program and provide that Volunteers would not be liable for costs incurred by DEC in negotiating BCAs for sites in Brownfield Opportunity Areas

- S-6942

Under current law each of the allowable Brownfield Redevelopment Tax Credit and Brownfield Real Property Tax Credit increase by 8% if the subject site is located within an "environmental zone" and was subject to a brownfield site cleanup agreement entered into prior to September 1, 2010. This bill would eliminate the requirement that the site be subject to a brownfield site cleanup agreement entered into prior to September 1, 2010. The bill would also increase the cap on the amount of Envronmental Remediation Insurance Tax Credit (discussed above) from $30,000 to $90,000.

- S-7368

Introduced on May 2, 2012, this bill would extend the cutoff date for the Brownfield Redevelopment Tax Credit, the Brownfield Real Property Tax Credit and Envronmental Remediation Insurance Tax Credit (discussed above). Under current law, these tax credits are available only with respect to sites that have received a Certificate of Completion no later than March 15, 2015. S-7368 would extend this date to March 15, 2030.

28. 2013 Legislative Proposals

- A-164

Introduced on January 9, 2013, A-164 would extend the liability protection of developers who enroll in New York City's brownfield cleanup program. Under current law, developers receive liability protection pursuant to a Memorandum of Agreement between DEC and NYC. A-164 would give such developers the same liability protection enjoyed by those participating in the state BCP.

- A-892

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Introduced on January 9, 2013, this bill would require the NYS Dept. of Tax and Finance to publish reports on brownfield tax credits for the years 2005, 2006 and 2007. Under existing law, such reporting began in 2008.

- A-2438

Introduced on January 15, 2013, this bill would cap the tax credits available for the redevelopment of brownfield sites where a request for participation in the BCP was denied by DEC, but where the denial was then overturned in court.

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VI. Oregon Brownfields Program

Environmental Cleanup Law, Or. Rev. Stat. §465.200 et seq., including §§465.315, .325 & .327 [Enacted in 1995; amended in 1999, 2003, 2005 and 2007].
Hazardous Substance Remedial Action Rules, Or. Admin. R. 340-122-0010 et seq. (last amended March 2006).
Brownfields Redevelopment Fund, Or. Rev. Stat., §§285A.185 and 188, and 285B.139 [Enacted 1997; amended in 2001, 2005 and 2007 and 2009; §285B.139 repealed in 2007].
Oregon Coalition Brownfields Program, Or. Rev. Stat. §§285A.190 and .192 [Enacted in 2005; amended in 2009].
Rules: Lender and Fiduciary Liability Protection, Or. Admin. R. 340-122-0120, -0140 (1992).
Guidance for Use of Probabilistic Analysis in Human Health Risk Assessments, issued January 1998, updated November 1998, selected pages updated March 1999.
Guidance on Deterministic Human Health Risk Assessments, issued December 1998, updated May 2000.
Prospective Purchaser Program Guidance, initially issued November 1997, superseded by a new guidance document issued December 2011.
Final Guidance for Use of Institutional Controls, issued April 1998.
Contaminated Aquifer Policy, issued May 2004.
Guidance for Evaluating Residual Pesticides on Lands Formerly Used for Agricultural Purposes, issued January 2006.
Guidance on Risk-Based Decision Making for the Remediation of Petroleum-Contaminated Sites, issued September 2003.
Quality Assurance Project Plan for DEQ Brownfield Investigations (DEQ-04-LQ-004-QAPP), issued March 2004.
Guidance for Assessing and Remediating of Vapor Intrusion in Buildings, issued March 2010.

1. Legislative Purpose

- To enhance the cleanup of contaminated industrial sites and to recycle these sites into new industrial, commercial or urban housing sites.

2. Eligibility of Sites and Parties

- Any prospective purchaser of contaminated property that is not itself responsible for the pollution is eligible to enter into an agreement with the state agency, the Department of Environmental Quality ("DEQ"), to remediate the property and obtain protections from future liability. Governmental and non-profit entities are included as eligible applicants.

3. Application Process

- DEQ may enter a Prospective Purchaser Agreement with a buyer provided:

  a. the party is not liable under Oregon law as a responsible party for the contamination at the property;

  b. remedial action is necessary at the property to protect human health or the environment;

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c. the buyer's proposed redevelopment or reuse of the facility will not contribute to or exacerbate existing contamination, increase health risks or interfere with remedial measures necessary at the property; and

d. a substantial public benefit will result from the agreement.

- Examples of substantial public benefit set forth in the statute include:

  a. substantial resources brought to bear to facilitate remedial measures at the property;

  b. commitment by the buyer to perform substantial remedial measures at the property;

  c. productive reuse of a vacant or abandoned industrial or commercial facility; and

  d. development of a property by a governmental entity or nonprofit organization to address an important public purpose.

- The buyer must agree to pay a $2,500 deposit, and to reimburse DEQ all oversight costs. A signed "Cost Recovery Letter Agreement" must be submitted with the $2,500 deposit.

4. <u>Prospective Purchaser Agreement ("PPA")</u>

- There are three types of PPAs: Administrative Consent Orders, Administrative Agreement and Consent Judgments.

  a. An Administrative Agreement PPA releases a purchaser's liability to the state for environmental cleanups under state laws to the extent described in Section 5 below, but does not protect against legal actions by third parties.

  b. A Consent Order PPA releases a purchaser's liability to the state for environmental cleanups under state laws to the extent described in Section 5 below, and protects against certain actions by third parties.

  c. A Consent Judgment PPA provides the same benefits as a Consent Order PPA but is signed by the court in the county where the property is located.

- The agreement is to include:

  a. a commitment by the buyer to undertake the measures constituting a substantial public benefit;

  b. a commitment by the buyer to perform any remedial measures required by the agreement under DEQ's oversight;

  c. a waiver by the buyer of any claim or cause of action against the state concerning contamination existing as of the date of acquisition of the property;

d. a grant of an irrevocable right of entry to the DEQ for purposes of the agreement or for remedial measures authorized by the agreement;

e. a reservation of rights as to entities that are not parties to the agreement; and

f. a legal description of the property.

- Pursuant to the 21st Annual Environmental Cleanup Report issued in January 2010, DEQ had negotiated 100 PPAs since the legislature's approval of PPAs in 1995.

5. Limitation of Liability

- Subject to the satisfactory performance of its obligations under the prospective purchaser agreement, the buyer is protected against liability to the state for any contamination existing as of the date of acquisition. The burden is left to the buyer to prove that any release occurred before the date of acquisition.

- This protection does not affect the buyer's liability for claims arising from:

  a. release of a hazardous substance at the facility after the date of acquisition of ownership or operation;

  b. contribution to or exacerbation of a release of a hazardous substance;

  c. interference or failure to cooperate with the DEQ;

  d. failure to exercise due care or take reasonable precautions with respect to any hazardous substance at the property; and

  e. violation by the buyer of federal, state or local law.

- The prospective purchaser agreement is to be recorded in the real property records in the county where the property is located.

- The benefits and burdens of the agreement run with the land, but the release from liability applies only to parties not otherwise responsible under Oregon law for prior discharges at the property who assume the terms of the agreement.

6. Remediation Standards/Cleanup Alternatives

- In determining whether remedial actions assure protection of health and the environment, DEQ is to apply the following tests:

  a. that acceptable risk levels have been met for exposure to contaminants; and

  b. that an acceptable risk assessment has been completed in accordance with Oregon law.

- Acceptable remedial actions are those that:

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a. eliminate or reduce the toxicity, mobility or volume of hazardous substances;

b. result in excavation and off-site disposal;

c. contain or otherwise limit contaminants through engineering controls;

d. employ institutional controls; or

e. comprise any other method of protection or combination of the above methods.

- DEQ's evaluation is to include factors such as future land use, effectiveness of the remedy, short and long term risk and relative costs.

7. Voluntary Cleanup Pathway

- DEQ has formalized two sets of procedures for its voluntary cleanup program. The first is known as the Voluntary Cleanup Pathway; the second, as the Independent Cleanup Pathway.

- The Voluntary Cleanup Pathway is available for any site, whether it is of low, medium or high environmental priority or concern.

- The pathway involves DEQ oversight throughout the investigation and cleanup process, including DEQ involvement in selection of the remedial action.

8. Independent Cleanup Pathway

- The Independent Cleanup Pathway ("ICP") is available for sites of low to medium priority.

- A low or medium concern site is automatically eligible for the ICP if it meets five screening criteria: (1) there is no free-phase product in groundwater; (2) there is no contamination of existing drinking water sources; (3) there is no contaminant migration beyond the property boundary; (4) it is not within 1000 feet of a "sensitive environment;" and (5) contaminant odors are not present in buildings, manholes or confined spaces.

- Benefits of the program include reduced DEQ oversight and thus lower cost, greater flexibility in investigations and cleanups, DEQ guidance on report content and technical issues, and an alternate dispute resolution process where issues are contested.

- The risk associated with the ICP is the possibility that DEQ may decline to issue a no further action letter ("NFA") following cleanup if the department is not satisfied that the risks posed by the contamination have been properly addressed.

- To help parties reduce this risk, DEQ offers Site-Specific Technical Consultation, which provides guidance to ICP parties at critical points in the cleanup process.

9. Brownfields Redevelopment Funds

- In 1997, the legislature added funding provisions for Brownfields assessments pursuant to H.B. 3724, §§ 3 and 4, Or. Rev. Stat. §285A.188 and Oregon Laws. Ch. 688 §15.

- 1997 legislation provided two loan mechanisms for funding environmental evaluations of brownfields properties:

  a. One for loans to interested innocent-party redevelopers so long as the state Economic Development Department finds the project deserving of support based on factors such as need and probability of success; and

  b. A second for loans to businesses in distressed areas.

- In 2001, amendments expanded the fund to a loan and grant program with allowance for use of funds not only to evaluate but also to plan for and undertake site remediation.

- Eligible recipients under the amended law now also include municipalities and non-profit organizations.

- In making grants to municipalities, DEQ is to give priority to those who establish a substantial public benefit and who provide matching funds from loans.

- In making grants to non-governmental entities, DEQ must require that the project is for a substantial public benefit, and that matching funds are being provided by way of loans.

- 2005 amendments allow for Brownfields Redevelopment Fund monies to be used to pay for administrative costs of environmental action, as well as to satisfy contracts that are entered into to ensure proper performance of environmental reviews. Under the Oregon Coalition Brownfields Cleanup Program, created by 2005 legislation, the state may provide grants, loans and other assistance to aid owners of eligible brownfields properties with their cleanup activities. Funded by the Oregon Coalition Brownfields Cleanup Fund, the assistance may include direct purchase of goods or services by the state for the benefit of the brownfields cleanup.

- 2007 amendments increased the maximum amount of funds from the Brownfields Redevelopment Fund that can be allocated to responsible parties from 40 percent to 60 percent of the fund every two years.

10. Task Force and Legislative Initiative

- Pursuant to requirements under the law, the State Economic Development Department established a task force to work with other state and local agencies and the private sector to explore funding strategies and financial incentives to facilitate voluntary recycling and productive use of contaminated industrial and commercial property within urban areas. As required by the legislative, the task force completed a report with its findings in May 1997, recommending establishment of a program coordinator, a loan and grant program and other funding mechanisms.

- The Task Force also proposed legislation establishing tax credits and property tax exemptions similar to New Jersey's Environmental Opportunity Zone Act (see Section IV.II above).

- As a result, H.B. 3724 was introduced in May 1997, calling for a Brownfields loan fund, as well as property tax abatements of up to ten years for parties undertaking Brownfields remediation and development. An amended version of the bill, maintaining the funding enhancements but deleting the tax abatement provisions, was then substituted for the original proposal. The substituted version, signed into law in 1997, contained the provisions summarized in section 9 above.

11. <u>Rural and Economically Distressed Site Assessment Initiative</u>

- Initiative established in 2003 aimed at helping rural and economically distressed communities perform assessments at brownfield sites.

- In its first year, the Initiative was awarded two $200,000 EPA Brownfields grants, one for sites contaminated with petroleum and one for those contaminated with other hazardous substances. DEQ used the funding to perform assessments at four hazardous substance-contaminated sites and nine low-risk petroleum-contaminated sites.

- DEQ applied for the same two EPA grants in November 2004. In May 2005, EPA announced that the Initiative had received one $200,000 grant for DEQ to conduct site assessments at four petroleum-contaminated properties.

- In 2006, DEQ submitted a grant request to re-fund the Initiative, but was not successful in obtaining a grant.

12. <u>Contaminated Aquifer Policy</u>

- In May 2004, DEQ issued its Contaminated Aquifer Policy guidance document.

- The document sets forth DEQ's policy that it will not take any enforcement actions against a property owner based only on the presence of contaminated groundwater that has come to be located at that property as a result of subsurface migration from sources outside the property, provided the owner does not exacerbate or contribute to the contamination.

- Given issuance of its policy, DEQ does not provide individual letters to impacted owners indicating non-liability in a particular matter.

13. <u>Guidance on Evaluating Residual Pesticides</u>

- In January 2006, Oregon DEQ issued its "Guidance for Evaluating Residual Pesticides on Lands Formerly Used for Agricultural Purposes."

- The purpose of the document is to guide DEQ staff; as well as developers, consultants and planners; in assessing the nature and extent of possible pesticide

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contamination at agricultural lands that may be – or already have been – redeveloped for residential, commercial, industrial or educational purposes.

- DEQ recommends – but does not require – environmental investigations at such properties, specifically including sampling, prior to development.

- The document specifies sampling strategies, appropriate analyses, analytical methods and detection limits.

- While the document does not specifically mandate submission of investigation results to the state, it does specifically note that the guidance is directed at DEQ staff "conducting or overseeing site assessments on former agricultural lands planned for non-agricultural development."

14. Additional Sources of Brownfields Funding

- Capital Access Program – Encourages lenders to make more commercial loans to small businesses by providing loan portfolio insurance for environmental action on brownfield redevelopment projects.

- Credit Enhancement Fund – Provides guarantees for working capital or fixed-asset bank loans to assist businesses in distressed areas or businesses that seek to clean up a brownfield site.

15. Site-Specific Assessment ("SSAs")

- Eligible parties may apply to DEQ for an SSA, performed by DEQ and funded by EPA. The goal is to develop detailed information on environmental conditions at a site and to provide recommendations and cost estimates for potential cleanup in order to remove environmental stigmas and encourage transfer or redevelopment.

- DEQ describes its role as advisory, and under the program neither it nor EPA is to pursue additional action with respect to the site so long as the SSA does not reveal an imminent threat to human health or the environment.

- Public entities, non-profit organizations and quasi-public organizations such as port authorities are eligible to apply for SSAs.

- Private entities are also eligible, provided they have a local government sponsor, and must negotiate with DEQ to develop the appropriate means of offsetting the costs of the SSA, such as by direct repayment or an agreement to discount the sale price of the property.

16. Guidance Documents

- On September 22, 2003, DEQ issued a guidance document entitled: "Risk-Based Decision Making for the Remediation of Petroleum-Contaminated Sites," which can be accessed at: [http://www.deq.state.or.us/lq/pubs/docs/RBDMGuidance.pdf].

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In September 2006 and March 2007, the guidance was expanded to include Risk-Based Concentrations for most of the hazardous substances addressed in DEQ's Cleanup Program. This guidance may be used for cleanup of petroleum releases from regulated Underground Storage Tanks (USTs) and releases of hazardous substances under the Hazardous Substance Remedial Action Rules.

- In March 2004, DEQ published a Quality Assurance Project Plan for DEQ Brownfield Investigations (DEQ-04-LQ-004-QAPP). The Plan can be accessed at: [http://www.deq.state.or.us/lq/pubs/docs/cu/QualityAssuranceProjectPlan Brownfields.pdf].

- On March 25, 2010, DEQ issued is final Guidance for Assessing and Remediation Vapor Intrusion in Buildings. DEQ's preferred path of investigation is to start with groundwater investigation, and if necessary to then proceed successively with soil gas investigation and then indoor air investigation. The final guidance documents can be accessed at: [http://www.deq.state.or.us/lq/pubs/docs/cu/VaporIntrusionGuidance.pdf]

- In December, 2011, DEQ issued its updated Prospective Purchase Program Guidance, which provides an overview of the Prospective Purchaser Program and replaces prior guidance issued November 20, 1997. The Guidance is available at: http://www.deq.state.or.us/lq/pubs/docs/cu/GuidanceProspectivePurchaserProgram.pdf

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VII. Pennsylvania Brownfields Program

Act 2 of 1995: **Land Recycling and Environmental Remediation Standards Act**, Pa. Stat. Ann. tit. 35, §6026.101 et seq. [Enacted in 1995, P.L. 4, No. 2 §101].

Act 3 of 1995: **Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act,** Pa. Stat. Ann. tit. 35, §6027.1 et seq. [Enacted in 1995, P.L. 33, No. 3 §1; amended in 2009].

Act 4 of 1995: **Industrial Sites Environmental Assessment Act,** Pa. Stat. Ann. tit. 35, §6028.1 et seq. [Enacted in 1995, P.L. 43 No. 4 §1; amended in 2000].

Opportunity Grant Program: Pa. Cons. Stat. Ann. tit. 12, §2101 et seq. [Enacted in 2004].

Infrastructure and Facilities Improvement Program: Pa. Cons. Stat. Ann. tit. 12, §3401 et seq. [Enacted in 2004; amended in 2004 and 2006]; Program Guidelines published June 2012.

Infrastructure Development Act. 73 P.S. §393.21 et seq. [Enacted in 1996; amended in 1998]. Program Guidelines published by DCED May 2008.

Pennsylvania Industrial Development Authority Act, 73 P.S. §301 et seq. [Enacted in 1956; amended in 1963, 1968, 1972 and 1988]. Program Guidelines published by DCED October 2009.

Keystone Opportunity Zone, Keystone Opportunity Expansion Zone and Keystone Opportunity Improvement Zone Act, Pa Cons. Stat. Ann. tit. 73, §820.101 et seq. [Enacted in 1998; amended and expanded in 2000; amended 2002, 2003 and 2008 and 2012]. Program Guidelines published by DCED February 2008.

Rules and Regulations for the Land Recycling Program: 25 Pa. Code Ch. 250 et seq.; [Adopted in 1997; amended twice in 2001; amended 2011].

Technical Guidance Manual for the Land Recycling Program (first issued December 1997, revised June 8, 2002; Vapor Intrusion Guidance added January 24, 2004; revised March 18, 2008).

Recommended Procedures for Addressing Pesticide Contamination on Agricultural Land Proposed for Development (April 4, 2005).

Guidance on Streamlining the Process for the One Cleanup Program pursuant to the PADEP/EPA MOA (MOA signed on April 21 2004; guidance issued in September 2005).

PENNVEST Brownfields Remediation Loan Program Guidelines [Adopted by PENNVEST Board of Directors on March 24, 2004; revised on April 17, 2007].

Industrial Sites Reuse Program Guidelines (February 2010).

Infrastructure and Facilities Improvement Program Guidelines (June 2012)

Keystone Opportunity Zone Program Guidelines (January 2013)

1. Legislative Purpose

- To encourage the private sector to recycle contaminated industrial and commercial property by providing incentives for redevelopment and limitation of liability of developers and their lenders, to thus preserve undeveloped and natural spaces and to promote redevelopment of enterprise zones that will revitalize urban areas.

2. Eligibility of Sites and Parties for Land Recycling Program

- Any person, whether a current or future owner, who wishes or is required to respond to a release at an industrial or commercial property, may comply with the Land Recycling Program and be eligible for future liability protection.

- For contaminated industrial properties where there is no responsible party with the financial wherewithal to clean up, or for land within state designated enterprise zones

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(together referred to as "Special Industrial Areas"), specific procedures, agreements and liability protections are available.

- In 2005, the state agency, the Department of Environmental Protection ("DEP") , issued clarification that agricultural and orchard land will not be accepted in the Program. Instead, DEP issued recommended procedures for developers to follow in dealing with pesticide contamination.

3. Application Process for Land Recycling Program

- A party wishing to clean up and redevelop a Special Industrial Area ("SIA") must first conduct a baseline remedial investigation based on a work plan approved by the DEP.

- The party must then provide a Notice of Intent to Remediate ("NIR") to the DEP, identifying the location of the site, contamination there and proposed remediation measures.

- Public notice must be made, and the NIR must also be provided to the municipality in which the site is located.

- If during the thirty day public and municipal comment period the municipality requests to be involved in the development of the remediation and reuse plans for the site, the developer must prepare a Public Involvement Program Plan ("Plan").

- The Plan is to comprise a proactive approach to involving the municipality in the remediation and reuse plans.

- DEP then reviews the environmental report within ninety days, and determines whether it adequately identifies the environmental hazards and risks posed by the site. Comments obtained as a result of the plans are also to be considered by the DEP.

- DEP and the developer then enter into a cleanup agreement.

4. Voluntary Agreement to Remediate an SIA/Liability Protection Generally

- The cleanup agreement between DEP and the developer is based on the remedial investigation report, and provides that:

  a. the developer will undertake a cleanup that will assure that any substantial risk to human health and the environment will be reduced to acceptable levels based on anticipated reuse of the property;

  b. the developer will only be responsible for remediation of immediate, direct or imminent threats to public health or the environment that will prevent the property from being occupied for its intended use.

  c. the developer or future occupant of the developed site will not be considered a responsible party under Pennsylvania cleanup liability laws;

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d. parties to the agreement will not be subject to citizen suits, other contribution actions brought by responsible persons not participating in the remediation of the property, or any actions brought by the DEP with respect to the property other than those which may be necessary to enforce all terms of the agreement;

e. the liability protection will not relieve the parties from any cleanup liability for contamination later caused on the property;

f. parties to the agreement with the DEP will not interfere with any subsequent remediation efforts by the DEP or others to deal with contamination identified in the environmental report so long as it does not disrupt the reuse of the property; and

g. deed notice requirements of Pennsylvania law must be followed, noting, for example, future use limitations due to disposal of hazardous wastes or hazardous substances at the site.

- Liability protection extends to successors and assigns, anyone who occupies or develops a site, a current owner or any other person who participated in the cleanup, or future owners of the site.

- Current owners who participate in cleanups are also entitled to liability protection, including protection from citizen's suits and contribution actions by other responsible parties.

5. Additional Liability Protection

- The program also provides specific statutory exemptions for the following parties:

- Any economic development agency that holds a legal or equitable interest in a property as security interest for the purpose of redevelopment or financing the cleanup of an industrial site will not be liable for contamination of the property so long as it does not cause or exacerbate a release. 2009 amendments specify that the protections extend to any nonprofit corporation created and controlled by a redevelopment authority to carry out its statutory purposes, and to agencies that hold indicia of ownership to secure funding for investigation, remediation or redevelopment of – or infrastructure improvements at – a property, for purposes including transfer to a third party after property rehabilitation.

- 2009 amendments specify that scope of liability protection to development agencies extends to claims for property damage, diminution in value, stigma, natural resource damage, economic loss, bodily injury or death.

- A lender who engages in activities involved in routine practices of commercial lending, such as providing financial services, holding security interests, workout practices, foreclosure or the recovery of funds from the sale of property, will not be liable to third parties for state-based claims unless the lender directly causes a release, willfully compels a borrower to cause a release, or directly exacerbates a release.

- Trustees or fiduciaries are not liable in their personal and individual capacities unless a release at a property occurs during the time they are providing fiduciary services, they had the express power and authority to control the property and they acted in such a way as constituted gross negligence and willful misconduct.

6. DEP/EPA Memorandum of Agreement: One Cleanup Program

- In April 2004, U.S. EPA entered into a Memorandum of Agreement ("MOA") with DEP certifying the state's Voluntary Cleanup Program.

- Under the MOA, EPA acknowledges that volunteers who clean up properties under the Pennsylvania program will not be pursued by EPA under CERCLA, or under certain provisions of RCRA and TSCA.

- The MOA specifically references the intention of EPA Region 3 and DEP to promote EPA's "One Cleanup Program" initiative discussed in the federal Brownfields program section above. It was the first such MOA.

- In September 2005, DEP issued guidance on a streamlined process to guide projects proceeding under the One Cleanup Program, including a description of three possible paths for an applicant to take, dependent primarily on the degree of contamination and extent to which the applicant may already be dealing with the EPA RCRA program.

7. Remediation Standards/Cleanup Alternatives

- In developing remediation plans, whether in SIA or elsewhere, the following alternatives are to be employed:

  a. achievement of background contaminant standards;

  b. achievement of statewide health standards adopted by the Environmental Quality Board; and

  c. use of site-specific standards that adequately reduce risks to health and environment based on intended future use of property.

- On November 24, 2001 DEP adopted new technical rules for the Land Recycling and Cleanup Program. The 2001 rules established groundwater medium-specific concentration standards for regulated organic substances, and articulated DEP policy allowing local governmental authorities to seek DEP area-wide certification of non-use aquifer status, thus leading to application of less stringent groundwater cleanup standards. The goal was to provide an incentive to brownfield developers.

- More recently, DEP proceeded through a rulemaking process under the Act 2 Land Recycling Program, with new rules anticipated by early 2011.

- It was anticipated that the new rules would incorporate formal adoption of certain EPA standards that DEP had been following on an informal basis (such as Superfund

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Risk Assessment Guidance in calculation of cleanup standards, and EPA's Health Advisory Levels and Maximum Contaminant Levels), as well as review of cleanup standards at least once every three years, and evaluation of vapor intrusion pathways for compliance with statewide health standards.

- On January 8, 2011, the Environmental Quality Board published the anticipated new rulemaking under Act 2, updating environmental remediation standards under the Land Recycling Program substantially in the form proposed. New cleanup standards for a significant number of regulated substances have been adopted and many existing remediation standards have either been raised or lowered to account for new toxicological information.

8. Industrial Site Cleanup Fund

- An Industrial Site Cleanup Fund was established to provide financial assistance in the form of grants or low interest loans to specified parties who did not cause or contribute to contamination of an industrial site and who propose to undertake a voluntary cleanup.

- Up to $2 million is to be provided annually for the fund.

- Grants or loans may be in an amount up to 75% of the costs incurred by an eligible applicant for completing an environmental study and implementing a cleanup plan.

- Grants may be made to political subdivisions or their instrumentalities or local economic development agencies if the applicant owns the site where the cleanup is to be conducted and is to oversee the cleanup.

- Low interest loans, to be lent at a rate not to exceed 2%, may be made to the following categories of applicants:

  a. local economic development agencies;

  b. political subdivisions or their instrumentalities; or

  c. other persons determined to be eligible by the Department of Commerce ("DOC").

- In determining priorities for financial assistance, the DOC is to take the following facts into consideration:

  a. the benefit of the remedy to public health, safety and the environment;

  b. the permanence of the remedy;

  c. the cost-effectiveness of the remedy in comparison with other alternatives;

  d. the financial conditions of the applicant;

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e. the financial or economic distress of the area in which the cleanup is being conducted; and

f. the potential for economic redevelopment.

- The DOC is to consult with the DEP when determining priorities for funding industrial site cleanups.

- The DOC has the power to set terms and conditions applicable to loans and grants, such as current market interest rates and the necessity to maintain the fund in a financially sound manner. Loans may be based upon the ability to repay some future revenue to be derived from the cleanup, by a mortgage or other collateral, or on any other fiscal matters the DOC deems appropriate.

9. Industrial Sites Environmental Assessment Fund

- Under Act 4 of 1995, an annual fund of up to $2 million was created to provide grants to municipalities, other local authorities, non-profit economic development agencies and similar instrumentalities for undertaking environmental assessments of industrial sites in distressed communities.

- Pursuant to the General Appropriations Act of 2006, $500,000 was allocated to the fund for the fiscal year ending June 30, 2007. In July 2007, $500,000 was again allocated to the fund, through House Bill 1286, for the fiscal year ending June 30, 2008.

- Act 4 also permits the Department of Community and Economic Development (the "DCED") to make performance-based loans to non-liable parties for projects related to voluntary remediation of brownfields sites.

- Funding for loans, which may be forgiven based on satisfaction of performance goals, comes from the Industrial Site Cleanup Fund discussed in section 8 above.

- Act 4 requires annual reports from the DCED to the General Assembly concerning grants and loans, including the details of performance-based loan agreements.

10. Brownfields Inventory Grant Program

- Under its Land Recycling Program, DEP has also instituted a Brownfields Inventory Grant ("BIG") Program. DEP provides grants to municipalities and economic development agencies to develop inventories of brownfield properties in their areas for inclusion on the "PA Site Finder."

11. Keystone Opportunity Zone, Keystone Opportunity Expansion Zone and Keystone Opportunity Improvement Zone Act

- The Pennsylvania Keystone Opportunity Zone Act was enacted on October 6, 1998, and amended and expanded in 2000, 2002, 2003 and 2008. The law is now known as the Keystone Opportunity Zone, Keystone Opportunity Expansion Zone and Keystone Opportunity Improvement Zone Act. The purpose of the legislation was to

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establish the Keystone Opportunity Zone ("KOZ") program to revive economically distressed urban and rural communities by providing tax relief incentives for investment in particular areas.

- The goal is to promote redevelopment through various types of state and local tax relief and coordination between public and private entities to restore long term economic viability to deteriorated areas.

- While the law does not specifically key tax relief into environmental cleanup expenditures, property tax and other relief may be available based on improvements to real property.

- The initial legislation required the DCEC to designate up to twelve "Keystone Opportunity Zones" of up to 5,000 acres each of blighted property, with zones to be comprised of up to twelve sub-zones. The December 2000 amendatory legislation broadened the program by allowing designation of up to twelve "Keystone Opportunity Expansion Zones" ("KOEZs") of up to 1,500 acres each, with up to eight expansion sub-zones each. The 2000 legislation also increased and extended available tax incentives.

- The law was amended again in December 2002. Among other things, the legislation allowed further expansion of KOEZ sub-zones based on application by local governmental authorities and extended the program for an additional five years, terminating on December 31, 2018.

- The 2002 amendments also allowed the governor to designate, by January 1, 2003, an unspecified number of "Keystone Opportunity Improvement Zones," comprising deteriorated property so designated by the governor, to be eligible for the same array of tax relief incentives available under the program. The governor selected eleven sites in seven counties.

- The 2003 amendments allowed a political subdivision to apply to DCED, by June 1, 2004, for approval of designation of the deteriorated property as an enhancement to a sub-zone or an expansion sub-zone.

- The 2003 amendments also expanded the requirements imposed on a business which relocates into a subzone, improvement subzone or expansion subzone in order to qualify for the exemption, deductions, abatement or credits that the Act provides. Among other things, a business entering a lease agreement must commit to a lease term that is at least as long as the duration of the subzone, improvement subzone or expansion subzone.

- The 2008 amendments (S.B. 1412, signed into law on July 10, 2008 as Act 79 of 2008; effective 60 days thereafter) provide for the extension of eligibility for tax relief to properties within designated zones that are unoccupied as of the effective date of Act 79, but which become occupied within specified periods of time following the expiration of the subject zone. In such a case, tax relief other than sales and use tax exemptions (such as property tax abatements) take effect only upon occupancy, and extension applications must be submitted by applicable 2008 or 2009 deadlines. The amendments also allow DCED to designate up to 15 additional

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expansion zones to be entitled to tax relief from January 2010 to December 2020, with applications for designation to be submitted by May 1, 2009. Applications for expansion of existing zones and subzones are also authorized.

- The 2012 amendments, (S.B. 1237, signed into law on February 14, 2012 as Act 16 of 2012) authorize the extension of tax exemptions, deductions, abatements and credits; create additional zones; expand existing zones; and repeal the KOZ program's sunset date of December 31, 2018.

- In February 2008, DCED published KOZ program guidelines.

- In January 2013, DCED published new KOZ program guidelines.

12. Opportunity Grant Program

- In 2004, the legislature created a new grant program to assist in certain projects that encourage job growth.

- Grants are available to municipalities, economic development entities, developers, manufacturers and others for a variety of purposes including environmental assessments and remedial projects.

- Applicants must commit $4 of private funding for every $1 of grant funds, and must also show the financial capability to satisfy the balance of necessary funding for the project.

- The program is administered by DCED, which is to create guidelines as to the amounts and uses of grants, as well as to eligibility for grants.

- Penalties are to be imposed when the applicant fails to follow through on commitments, including project completion and job creation goals.

- In February 2008, DCED published guidelines for the Opportunity Grant Program.

- As of March, 2013, DCED was advising that the Opportunity Grant Program is no longer active.

- A bill has been proposed to repeal the Opportunity Grant Program (see legislative initiatives below).

13. Infrastructure and Facilities Improvement Program ("IFIP")

- In 2004, the legislature created another new grant program, this one to provide multi-year grants to state and local development authorities seeking to issue debt for qualifying projects that will create jobs and tax revenues.

- DCED published new Program Guidelines in June 2012, supplanting the 2008 Guidelines.

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- Any of the following entities that have or will issue debt to pay for costs of an eligible property may apply for financial assistance:

  a. Industrial and commercial development authority;
  b. Municipal authority;
  c. Pennsylvania Economic Development Financing Authority (PEDFA);
  d. Pennsylvania Convention Center Authority;
  e. Sports and exhibition authority;
  f. Third-class country convention center authority; and
  g. Redevelopment authority

- Qualifying projects include improvement of infrastructures such as stormwater and wastewater systems, as well as remediation of sites where projects are to be built.

- Qualifying project users include industrial and retail enterprises, hospitals, convention centers and hotels.

- The application is made to DCED. Once DCED deems the application complete, it is then forwarded to the Office of the Budget and Department of Revenue for approval. The Office of the Budget determines the maximum annual amount of the IFIP grant, which is based on the annual debt service of project financing, and on the expected tax revenue generated from project activities.

- The DCED then, in its discretion, decides whether to award a grant, subject to the annual maximum approved by the Office of the Budget.

- Prior to issuing grant funds, DCED must enter an agreement with the applicant and the project user.

- For grants of longer than four years, it must be determined whether tax revenues in the fifth and succeeding years are anticipated to equal or exceed the grant amount for the previous year. If so, then the grant in succeeding years is to be in the same annual amount as previously granted. If not, then the grant in succeeding years is to be no less than the anticipated tax revenue, and no more than the amount of the original grant.

14. PENNVEST Brownfield Remediation Loan Program

- The Pennsylvania Infrastructure Investment Authority ("PENNVEST") established a new, low interest loan program in 2004, funded from the Clean Water State Revolving Loan Fund created to administer federal funds available to the state under the federal Clean Water Act.

- The loan program provides low interest loans to remediate sites that have been historically contaminated by industrial or commercial activity, and which pose a threat to local groundwater or surface water sources.

- The specified purpose of the financing initiative is to encourage cleanup and reuse of contaminated property under the Act 2 program.

- When the program was created, applicants were required to be local governmental authorities. Public entities could seek financing on behalf of a private party, so long as one of them has an ownership interest in the property to be remediated.

- In April 2007, the PENNVEST Board of Directors revised the eligibility for the program to allow private developers to apply directly for funding, provided the developer submits a sponsorship letter from the appropriate local government unit indicating endorsement of the project.

- When the program began in 2004, PENNVEST's goal was to set aside up to 30% of its yearly funding capacity from the federal government to implement the Brownfields initiative.

- Under the revised 2007 guidance, no special appropriation has been budgeted to fund brownfields loans. Rather, a "goal-oriented funding set-aside" will be developed each year for brownfields loans.

- Loans will be for terms up to 20 years. Funds would be disbursed as expenses are incurred over the life of the project.

- As of August 2008, the PENNVEST Board of Directors' approved over $29 million in low-interest loans and grants for 3 brownfields projects.

- In April 2010, PENNVEST approved $18.7 million in low interest loans and grants at two brownfield sites.

- As of January, 2013, PENNVEST had approved loans and grants for 15 brownfields projects.

- "Growing Greener Program Grants": PENNVEST also provides grant funds for drinking water, wastewater and storm water infrastructure projects under the state's multi-agency Growing Greener Program. Municipalities, authorities and private entities otherwise eligible under the PENNVEST program may be considered for such funds. DEP is also to review its Growing Greener grant applications and to refer to PENNVEST those that PADEP cannot accommodate.

15. <u>Brownfield Action Team</u>

- DEP implemented a new Brownfield Action Team ("BAT") program in 2004, geared toward prioritizing DEP attention and funding efforts where local governmental authorities indicate their support for particular Brownfield projects.

- Approved projects will be assigned to appropriate supervisors to coordinate and facilitate remediation, permitting and funding goals.

- Eligible applicants are local governmental authorities, though applications may be completed on behalf of the authorities by project principals, including property owners, investors, lenders, and their counsel.

- Applications must show significant support from the local community.

- In its first year of operation, BAT received 23 applications and approved 15 projects.

- As of August 2008, BAT had approved 33 projects in 22 counties since its inception.

16. Business in Our Sites ("BIOS") Program

- $300 million loan and grant pool available to local governmental authorities and redevelopment organizations, based on need and community support, for purposes including site acquisition, environmental assessment, remediation and demolition.

- This funding is to help develop "shovel-ready" sites to accommodate expanding businesses in the area.

- Loan repayment obligations to be tied to sale or lease of property following site preparation for redevelopment.

- Program was set to begin accepting applications by the end of 2004. The Commonwealth Financing Authority ("CFA"), the administering agency, indicated that Brownfield projects would be among those considered.

- Program guidelines were developed by DCED in May 2008.

- On August 2, 2011, the CFA announced that it would accept applications for approximately $25 million available under the Business in Our Sites Program. Applications were due October 31, 2011.

- On January 26, 2012, the CFA approved an additional $36.3 million in loans for the Business in Our Sites Program.

- Currently, the Program is accepting applications until June 28, 2013.

- As of December 2012, $326.1 million had been awarded to 73 projects under the Business in Our Sites Program.

17. Building PA Program

- $150 million loan fund to provide matching loans to developers who have secured equivalent amounts of financing from private lending sources, to assist in completing redevelopment projects.

- Loans are available to a wide variety of projects that advance the goals of the program, including projects that make use of a brownfield or mine scarred property.

- 50% of of the funds are earmarked for "underserved" areas.

- This program is jointly managed by the CFA and DCED. The DCED published program guidelines in May 2007, and again in December, 2012.

18. Low-Risk Sites Program

- To encourage voluntary participation in the Act 2 Land Recycling Program for low risk sites where private parties have been proceeding without DEP involvement or oversight, DEP has established expedited and simplified procedures for sites deemed of low environmental concern.

- Criteria to qualify for the program are:

  a. Must be less than 10,000 square feet of impacted soil above Statewide Health Standard ("SHS") for used aquifers, and site must then achieve SHS or site-specific standard.

  b. Groundwater cannot be impacted above residential SHS.

  c. All necessary public notice requirements must be satisfied.

  d. Reports must be certified and sealed by a state-licensed professional engineer or geologist who has attended an Act 2 workshop within the past 2 years.

- DEP will rely upon the work of the qualified professional and will issue a letter stating that the report has been approved in accordance with Act 2. However, the letter states that DEP has not performed an independent technical review of the report.

19. Infrastructure Development Program (IDP)

- This program provides grants and low-interest loan financing of up to $1.25 million for public and private infrastructure improvements.

- Eligible applicants include both public and private entities. Grant and loan funds may be used for various infrastructure improvements, including environmental remediation.

- Additionally, at former industrial sites that have not been operating for at least six months, and commercial sites that have been unused for at least a year, program funds may be used for the acquisition of land and buildings and the construction of new multi-tenant buildings.

- Private companies and developers must provide private matching funds, which investment must occur within 18 months following the approval of IDP funds for private company projects and within five years for private developer projects.

- Program requires that projects receiving IDP grants or loans create at least one new full-time job for every $25,000 of assistance received, or 10 new full-time jobs, whichever is greater. Alternatively, applicants may agree to retain the existing number of full-time jobs for at least five years.

- DCED issued program guidelines in May 2008

20. Pennsylvania Industrial Development Authority (PIDA) Financing

- This program provides low-interest loan financing through local nonprofit Industrial Development Corporations (IDCs) for land and building acquisition, construction and renovation. Eligible applicants include businesses that commit to creating and/or retaining jobs, as well as IDCs that commit to the development of industrial parks and multi-tenant facilities. Eligible businesses must also be engaged in specific activities, including manufacturing, industrial, agri-business, computer or clerical operation centers, office buildings used as national or regional headquarters and research and development facilities. Alternatively, the applicant must be a Keystone Innovation Zone (KIZ) company.

- Loan applications are submitted through an IDC. Loans may be granted for up to $2 million or $2.25 million for businesses located within particular locations including Brownfield Sites and Keystone Opportunity Zones, but may not account for more than 30-70% of the total project costs (depending on applicant and local unemployment rate.)

- Eligible costs covered by loans under the PIDA program include acquisition of land or a building, site preparation and testing and legal costs directly associated with the acquisition.

- DCED issued program guidelines in October 2009.

21. Industrial Sites Reuse Program (ISRP)

- This program provides grants and low-interest loans for the performance of environmental site assessments and remediation at former industrial sites. Grant and loan limit is $200,000 for site assessment, $1 million for remediation. Specifically, program funds cover Phase I, II and III Environmental Assessments and remediation of hazardous substances and nonhazardous waste or debris.

- Eligible parties include private real estate developers and investors, and other private companies.

- Eligible applicants must not have caused or contributed to the contamination, and eligible sites are those where industrial activity was conducted prior to July 18, 1995.

- Loan terms include interest rates of 2% and terms of up to five years for environmental assessments, and up to 15 years for remediation projects.

- There is a 25% matching requirement for both grants and loans provided under the ISRP.

- DCED issued program guidelines in February 2010.

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22. 2007 Legislative Initiatives

H.B. 710 – Amending Act 2 to include former mining sites

- Would extend applicability of Act 2 to certain previously mined sites, with pre-existing discharges, proposed for remining, reclaiming or redevelopment under the Surface Mining Conservation and Reclamation Act.
- Would deem such sites Special Industrial Areas under Act 2.
- Introduced March 9, 2007, and referred to House Committee on Environmental Resources and Energy, H.B. 710 died in committee.

H.B. 480 – Program for state-subsidized environmental insurance

- Would establish state-subsidized environmental insurance to stimulate brownfields development.
- State would solicit bids from insurance companies, and would select one to be the exclusive state-designated provider of environmental insurance.
- Selected insurer would then have to offer pre-negotiated package of insurance products to any brownfield owner, or any other person conducting response action under DEP oversight.
- Party conducting response action under DEP oversight at brownfield site could then apply for subsidy of up to 50% of insurance package, and up to 80% of self-insured retention of cost overrun insurance in package (up to a maximum of $500,000 for cost overrun insurance).
- State would have discretion to consider, among other things, business judgment of applicant, best interests of Commonwealth, and availability of reserved state funds.
- Introduced February 26, 2007, and referred to House Committee on Insurance, H.B.480 died in committee.

23. 2008 Legislative Initiatives

S.B. 1412 – an act amending the Keystone Opportunity Zone, Keystone Opportunity Expansion Zone and Keystone Opportunity Improvement Zone Act.

- Signed into law on July 10, 2008 as Act 79 of 2008. See section 11 above.

S.B. 1427/H.B. 2677 – An act amending the Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act.

- Would exempt from liability an economic development agency that holds an indicia of ownership in property in order to secure public funding for remediation, redevelopment, or rehabilitation at a contaminated site for, among other purposes, the post-rehabilitation transfer of the property to a third person.

- Would extend the scope of limited liability that generally exempts economic development agencies from liability unless the agency directly causes an immediate release or directly exacerbates a release of any regulated substance on or from the property.

- S.B 1427 was introduced on June 2, 2008, and referred to the Committee on Environmental Resources and Energy. H.B. 2677 was introduced on June 27, 2008, and referred to the Committee on Environmental Resources and Energy.

S.B. 1062 – Brownfields Redevelopment Act

- Would establish a Brownfields Site Reimbursement Fund similar to New Jersey's existing program, as a fund in the State Treasury to be utilized by the DEP for the purpose of reimbursing eligible developers up to 75% of their brownfield cleanup costs.

- Would authorize DEP to enter into redevelopment agreements provided it finds that state tax revenues to be realized from project will exceed amount to be reimbursed to developer.

- Percentage of payments to be made to develop would be keyed into occupancy rates of redevelopment project.

- Means of appropriating monies for state fund is not specified in current legislation. (New Jersey program is based on tax revenues generated by project.)

- Re-reported as amended on June 16, 2008 by the Senate Committee on Appropriations. Originally introduced on September 5, 2007, S.B. 1062 was referred to the Committee on Environmental Resources and Energy on June 25, 2008.

- On September 23, 2008, S.B. 1062 was re-referred to Appropriations. S.B. 1062 was replaced by S.B. 880, which was introduced on May 27, 2009 and contains the same provisions as 1062.

24. 2009-2010 Legislative Initiatives

House Bill 1489

- Introduced on May 13, 2009, House Bill 1489 would establish the Natural Gas Severance Tax, four percent of which would fund the State's Hazardous Sites Cleanup Fund, which helps fund the Land Recycling Program. On June 22, 2010, the bill was re-reported and then re-committed to Appropriations.

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House Bill 2399

- On May 25, 2010 the House passed bill number 2399, which would expand the BIOS Program by permitting the Commonwealth Financing authority to securitize repayments of existing BIOS loans and use repayment funds for future additional projects. On May 26, 2010, the bill was referred to the Senate Committee on Community, Economic and Recreational Development.

Senate Bill 1395

- Introduced on June 8, 2010, Senate Bill 1395 would create a brownfield job creation program, providing tax credits to entities that employ one or more employees at a brownfield site. Employers who, after January 1, 1990, intentionally or negligently caused or contributed to the contamination would not be eligible for this tax credit.

Senate Bill 1407

- Introduced on June 16, 2010, Senate Bill 1407 would establish the Commonwealth Loan Guarantee Program to provide loan guarantees to commercial lending institutions or other eligible entities that make loans to Pennsylvania-related companies. The Program would provide a maximum guarantee of $2,000,000 unless the loan involves a brownfield project that will result in significant new employment opportunities, in which case the maximum guarantee increases to $4,000,000.

Act 46

- On July 6, 2010, Act 46 was passed, providing automatic extensions of certain types of approvals, permits, decisions, agreements and other authorizations or decisions that were in effect, or issued, after December 31, 2008. The extension lasts under July 13, 2013 and is intended to provide relief to builders and developers who have been unable to proceed with redevelopment projects due to the economic downturn.

25. <u>2011-2012 Legislative Initiatives</u>

Senate Bill 1431

- Introduced on February 27, 2012, Senate Bill 1431 would require DEP to investigate potential contamination at a site where an industrial entity closes or significantly reduces operations.

House Bill 2278

- Introduced on March 26, 2012, House Bill 2278 would amend Act 2 by instructing the Environmental Quality Board to issue regulations pertaining to contaminants generated by hydraulic fracturing and requiring stricter remediation standards on residential properties where the contaminator is not the property owner.

Senate Bill 454

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- Introduced on February 7, 2011, Senate Bill 454 would enact the Environmental Insurance Program Act. The Act would allow the DEP to create a program subsidizing insurance premiums for any entity that has entered into an agreement with the DEP for the implementation of a remediation plan and whose lenders require the entity to purchase environmental insurance.

Senate Bill 1152

- Introduced on June 16, 2011, Senate Bill 1152 would repeal Pa. Cons. Stat. Ann. tit. 12, §2101 et seq., the legislation implementing the Opportunity Grant Program. S.B. No. 1152 would also create the "Pennsylvania First Program," which would provide reimbursement for, among other things, environmental remediation costs, to for-profit, not-for-profit and government entities who undertake projects that promote job creation.

S.B. No. 683

- Introduced on March 28, 2011, S.B. No 683 would increase the amount of the loan and grant pool available under the Business in Our Sites Program from $3 million to $3.75 million.

VIII. Texas Brownfields Program

A. TCEQ Voluntary Cleanup Program

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Voluntary Cleanup Program, Tex. Health & Safety Code, §361.601 et seq. [Enacted 1995; amended 1997].
Rules: Tex. Admin. Code tit. 30 §§333.1-.10 [Promulgated in 1996; amended and portions repealed in 1999.] Rule changes pursuant to Texas Risk Reduction Program ("TRRP"), Tex. Admin. Code tit. 30, Ch. 350, effective September 23, 1999; Tex. Admin. Code Tit. 30, §350.2(f). [Promulgated in 1999; amended in 2007].

Development Corporation Act, Texas Local Government Code, tit. 12, Ch. 501, §501.001 et seq. [Promulgated 2009; recodifying and supplanting **Development Corporation Act of 1979**; Tex. Rev. Civ. Stat. Ann. Art. 5190.6, §§2(4), 4A(t) and 4B(p), relevant sections amended in 1981, 1985, 1987, 1995, 1997, 1999, 2001 and 2003; repealed in 2009 by Acts 2007, H.B. 2278, Section 3.78]
Government Code, Tex. Gov't Code §2155.450 [Enacted in 2001; renumbered in 2003];
Tax Code, Tex. Tax Code §312.211(a) [Enacted in 1997; amended in 2001];
Water Code, Tex. Water Code §7.067(a) [Enacted in 1997; amended in 1999 and 2001].

County Programs for Cleanup and Economic Redevelopment of Brownfields, Tex. Health & Safety Code §361.901 et seq. [Enacted in 2005].

1. Legislative Purpose

- To provide incentives for remediation of property for future reuse by protecting developers and their lenders against liability, by providing a process by which voluntary cleanups can be completed in a timely and efficient manner, by providing municipal tax abatements for redevelopment in reinvestment areas, and by providing lender, fiduciary and innocent owner protections against liability.

2. Eligibility of Sites and Parties

- Any site is eligible for the state's Voluntary Cleanup Program ("VCP"), except for those portions of sites already subject to permits or orders of the state environmental agency, the Texas Commission on Environmental Quality ("TCEQ", formerly the Texas Natural Resources Conservation Commission, or "TNRCC").

- The agency may reject applications for sites that are already the subject of federal or state enforcement proceedings, or where enforcement actions are deemed necessary.

- Parties eligible for participation in the VCP are all those not already deemed responsible for cleanup under Texas law, and must enter into a voluntary cleanup with the TCEQ and agree to pay all costs of oversight of the cleanup.

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3. Application Process

- A party seeking to participate in the VCP must complete an application to the TCEQ including:

    a. background information;

    b. the applicant's financial capability to perform the voluntary cleanup;

    c. information on the site to be cleaned up;

    d. an environmental assessment of the site, including operational history, a description of the nature and extent of any actual or threatened releases at or contiguous to the site, information of the potential human exposure to contamination of the site; and

    e. an application fee of $1,000.

- The application must be submitted according to schedules set by the TCEQ.

- The TCEQ may reject the application if:

    a. an administrative, state or federal enforcement action is already pending concerning remediation at the site;

    b. a federal grant requires enforcement action at the site;

    c. the application is not complete or accurate; or

    d. the site is already subject to a TCEQ permit or order.

- If the application is rejected, for being incomplete or inaccurate, the TCEQ must also notify the applicant, explain the reasons for rejection, and refund half the applicant's fee, unless the applicant desires to resubmit the application. A person may resubmit an application once without an additional application fee, provided that it is resubmitted within 45 days after the initial rejection.

- The law specifically provides that a person who is not a responsible party does not become responsible merely by signing an application for the VCP.

4. Voluntary Cleanup Agreement

- Once the application is accepted, and before the TCEQ evaluates any plan or report detailing remediation goals and proposed methods of remediation, the applicant and the agency enter into a Voluntary Cleanup Agreement ("Agreement") that sets forth the terms and conditions of the evaluation of the reports and implementations of the work plans.

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- The Agreement must include:

  a. a provision that the TCEQ will recoup from the applicant all reasonable costs for its review, oversight and field activities incurred pursuant to the cleanup;

  b. a schedule for payment by the applicant of those costs, including costs of overhead, salaries, equipment, utilities and legal management and support costs of the TCEQ;

  c. a list of all laws to be complied with during the cleanup and technical standards to be applied;

  d. a description of and schedule for work plans and reports to be submitted to the TCEQ, assuring provision of all information necessary to verify that work contemplated by the Agreement will have been completed; and

  e. the technical standards to be applied in evaluating the work plans and reports.

- If an agreement is not reached within a month of negotiations, either party may withdraw. The TCEQ retains the application fee.

- The agency may not pursue enforcement actions concerning the existing contamination against the party complying with the Agreement.

- Where the Agreement is terminated prior to completion of cleanup, only those costs already incurred by the TCEQ are recoverable.

- If the applicant fails to pay the state's costs within a month after billing, the attorney general may bring an action to recover that sum together with reasonable legal expenses.

5. <u>Work Plans and Reports, and Alternative Cleanup Strategies</u>

- Once an agreement is entered, the applicant submits work plans and reports to the TCEQ pursuant to the requirements of the Texas Risk Reduction Program ("TRRP"), promulgated in 1999 as Tex. Admin. Code, tit. 30, ch. 350 (referred to as "30 TAC 350").

- The TCEQ reviews and evaluates plans for accuracy, quality and completeness.

- The new TRRP rule establishes uniform risk-based technical standards for response actions undertaken at affected properties under a number of TCEQ programs, including the VCP.

- Where the applicant establishes that the source of contamination is off-site, the applicant may address only the contamination at the site.

- Likewise, where contamination is present outside the site proposed for voluntary cleanup, but where that off-site property is owned by or under the control of the applicant, the applicant may limit its voluntary cleanup to the site.

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- Applicants proceeding under the VCP are excused from obtaining state or local permits that would otherwise be required for removal or remedial actions.

- Under the TRRP, applicants must conduct an "affected property assessment" considering the hydrogeology, physical and chemical properties of chemicals of concern, location of human and ecological receptors, and potential exposure pathways.

- Applicants must generally assess sites to residential standards, but where commercial or industrial use is planned, applicants must focus assessments on non-residential standards.

- Based on consideration of anticipated future land use and results of the risk assessment, TCEQ may approve plans that provide for alternatives to removal or remedy of all contamination, so long as the proposed actions will be completed in a manner that protects human health and the environment.

- Remedial alternatives include use of engineering and institutional controls, as well as monitored natural groundwater attenuation.

- In March 2010, TCEQ issued new Tier 1 protective concentration level (PCL) tables. The Tier 1 TRRP PCLs are the default cleanup standards in the TRRP and can be accessed at [http://www.tceq.state.tx.us/remediation/trrp/trrppcls.html

6. Notification Provisions

- When an affected property assessment includes sampling on property the applicant does not own (specifically, leased land and off-site property), the analytical results of those samples to be submitted to TCEQ must also be made available to the owner of that property.

- When analytical results in easement or franchise areas exceed TRRP Tier 1 human health protective concentration levels (a risk-based analysis to derive non-specific concentration levels), the results must be supplied to the current easement holders or franchisees.

- When an applicant submits other information to TCEQ which indicates that a potential contaminant on non-owned property likely exceeds the residential assessment level there, the applicant must make the information available to the owner and any easement holders and franchisees of that property.

- Where there is actual or probable contaminant exposure exceeding Tier 1 human health protective concentration levels, the applicant must:

  a. provide notice as soon as possible to those actually or probably exposed, to the property owner, and to TCEQ;

b. ensure that the notice indicates that detailed information is available regarding the sample results;

c. provide public notice for as long a actual or probable exposure exists; and

d. document to TCEQ that all required notices have been completed.

7. <u>Certificate of Completion</u>

- Once the TCEQ determines that no further actions are required to protect human health and the environment, the TCEQ must issue a Certificate of Completion.

- The Certificate of Completion

  a. acknowledges the protections from liability accorded to the developer and its lenders as described below;

  b. describes the proposed future land use; and

  c. includes a legal description of the site and the name of the site's owner at the time the application to participate in the VCP was filed.

- Where an applicant is satisfactorily maintaining any required physical controls, remediation systems or post-response actions, or where non-permanent institutional controls are utilized, TCEQ so certifies in a conditional Certificate.

- The TCEQ must file a copy of the Certificate of Completion in the real property records of the county in which the site is located.

- TCEQ may permit the applicant to file the Certificate of Completion on TCEQ's behalf.

8. <u>Limitation of Liability</u>

- Once a Certificate of Completion is issued, an applicant is released from all liability to the state for all cleanup of areas of the site covered by the Certificate, except for releases and consequences caused by that person.

- The release from liability will not apply to a person who changes the land use from that specified in the Certificate of Completion if the new use may result in increased risks to human health or the environment.

- The release is not effective if the Certificate is acquired by fraud, knowing failure to disclose material information or misrepresentation.

9. <u>Public Participation</u>

- The legislation provided that TCEQ could adopt rules on public participation in the agency's voluntary cleanup decisions. However, to date regulations have not included such participation.

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10. Coordination with EPA Region VI

- Under a May 1996 Memorandum of Agreement ("MOA") between EPA Region VI and the TCEQ, EPA agreed that it will not pursue owners or lenders protected by Certificates of Completion for prior contamination under CERCLA or RCRA.

- EPA did retain its right to pursue or resume enforcement based on emergencies or a party's breach of its agreement to complete a cleanup.

- As a result of certain provisions of the 1997 amendatory legislation discussed below, TCEQ had been negotiating revisions to the MOA with EPA. To date, a revised MOA has not been achieved. Thus, particular provisions of the amendatory legislation have not yet taken effect (see below).

11. County Brownfields Program

- 2005 legislation allows counties with populations of 250,000 or more to establish their own local brownfields program.

- A county brownfields program must include procedures to identify eligible sites, conduct assessments, prioritize and conduct remediation, perform post-remediation inspection, and guide property owners in applying for assistance. In addition, the county program must establish standards of eligibility for grants and loans, as well as eligibility to enter into a contract for remediation and inspection. The county program must also establish a standard for satisfactory completion of remediation.

- Counties are authorized to create a brownfield cleanup and economic redevelopment fund. Money from the fund may be used to pay for assessment, remediation, post-remediation inspection, loans to owners or licensed professional engineers, and administrative expenses.

- Property owners and contractors who undertake assessments, remediations or inspections under a county brownfields program receive substantial protections against liability for releases that occur during the assessment, remediation or assessment process (with exceptions in instances such as negligence or fraud).

- Once remediation is completed to applicable standards, the county is authorized to issue a certificate of completion for the site. The certificate must be filed in the county property records.

- The legislation also provides that the owner or subsequent owner of a property remediated under the program "is not liable for the costs of any additional assessment or remediation for environmental contamination that occurred before the issuance of the certificate." The law does not further specify the extent of the liability protection.

12. 1997 Legislation Affecting the Voluntary Cleanup Program

- S.B. 1596 [Enacted June 1997; effective September 1, 1997].

- H.B. 1239 [Enacted June 1997; effective September 1, 1997 except for Sections 2-4, which would have become effective upon TCEQ entering new MOA with EPA. According to TCEQ, this new MOA was never entered into by TECQ and EPA. As a result, those portions of the 1997 legislation that were contingent upon a new MOA are not effective].

  a. Sections requiring new MOA with EPA would have:

     - expanded properties eligible for participation in program to include sites or portions of sites subject to TCEQ permits or orders once permits/orders are dismissed;

     - expanded eligibility for release from liability to persons who acquire sites before September 1, 1995 (except for releases caused by such persons), so long as:

       (a) they did not operate the site before acquisition, and

       (b) another person that is a responsible party has successfully completed a voluntary cleanup of the site;

     - expanded certain information required in VCP applications.

  b. Municipal Property Tax Abatements:

     - municipalities are given the authority to create "re-investment zones" where property tax abatements may be provided for a period of up to four years to property owners who have completed voluntary cleanups. (Note: Original provision of the 1997 tax abatement law also required that it had to be established through appraisals that the property value was adversely affected by the contamination. The law was amended in 2001 by H.B. 1027 -- described below -- by removing this requirement.)

     - the abatement agreement may exempt from taxation up to 100% of the value of the property in the first year, up to 75% of the value of the property in the second year; up to 50% in the third year; and up to 25% in the final year.

     - the tax abatement agreement must limit the use of the subject property consistent with the purpose of encouraging redevelopment, and must provide for recapture of lost revenue if the property owner fails to make the agreed upon improvements.

     - deletes the original release/limitation of liability language pertaining to lenders [but see H.B. 2776 below, that creates lender and fiduciary safe harbors, and provides immunity from liability for innocent owners or operators].

     - S.B. 1002, introduced February 28, 2007 and pending in subcommittee, would allow municipalities to recoup tax revenues if property owner does not

provide full-time employees there, and their dependents, with a health benefit plan.

13. Innocent Owner/Operator Program (IOP)

- The IOP was created by TCEQ following adoption of the state's innocent owner/operator protection law (see H.B. 2776 described in Section 12 above), and provides liability protection to property owners or operators that can demonstrate that they did not cause or contribute to the contamination on their property, or that contamination migrated from an off-site source. Innocent parties under this program may apply for an Innocent Owner/Operator Certificate, which will be issued upon a showing of innocence based on soil and groundwater data. The IOC is not transferable to future owners or operators, but the application for the IOC may include prospective purchasers or operators. The most recent IOP Guidance from TCEQ was revised in April 2008 and may be accessed at: [http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/rg/rg-382.html/at_download/file].

- H.B 2776 [Enacted June 1997; effective September 1, 1997].

  - Lender Liability Safe Harbor: Provides lender protection from liability under state law that tracks federal safe harbor.

  - Fiduciary Safe Harbor: Limits fiduciary liability to assets held in fiduciary capacity, unless fiduciary negligence, gross negligence or willful misconduct causes or exacerbates release of contaminants.

  - Innocent Owner/Operator Protection: Provides state analog to CERCLA innocent owner protections, and provides procedure for innocent party to seek certification of that status from TCEQ.

- H.B. 2705 [Enacted June 1997; effective September 1, 1997].

  [Applicable only if the TCEQ enters into new MOA with EPA].

  - Like S.B. 1596/H.B. 1239 above, would have expanded eligibility for release from liability to persons who acquire sites before September 1, 1995 (except for releases caused by such persons), so long as:

    a. they did not operate the site before acquisition, and

    b. another person that is a responsible party has successfully completed a voluntary cleanup of the site;

  - Further specifies that a responsible party who completes a voluntary cleanup under a.ii. above (and who would thus not obtain a release) would remain liable to the state for any further pre-certificate contamination, but would not be liable for any contamination released at the site after the date of the certificate.

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14. Development Corporation Act

- H.B. 1027, enacted on June 11, 2001, effective September 1, 2001, expanded brownfields incentives through amendments to the state's Development Corporation Act, Government Code, Tax Code and Water Code.

- The Development Corporation Act (originally the Development Corporation Act of 1979) - the purpose of which was to spur economic development and to promote development of new and diversified enterprises and job training - has since been expanded to allow corporations to use the proceeds of sales and use taxes for cleanup of contaminated properties. Such use of tax proceeds must be authorized by the voters of the municipality where the property is located.

- The Government Code was amended to direct government agencies purchasing goods to give preference to goods produced at facilities where owners have received Certificates of Completion under the state's Voluntary Cleanup Program.

- The Tax Code provisions allowing municipal property tax abatements [see heading 12 above] were modified so that where municipalities are seeking to create reinvestment zones, they no longer need to establish through appraisals that property values of contaminated properties have been adversely affected.

- The Water Code was amended to allow the TCEQ to compromise or modify administrative penalties under the Code by having the respondent undertake or contribute to a supplemental environmental project for cleanup of contaminated property.

- A variety of legislation was passed in 2003 amending the Development Corporation Act of 1979. On June 20, 2003, the Texas legislature passed H.B. 2912 and 3075, and S.B. 275 and 972. Among other things, the legislation created the Texas Economic Development Bank which, to be responsible for administrative duties under the Act. The amendments also focus the use of the economic development sales tax on the creation or retention of primary jobs or those that generate wealth and bring new investments into the state.

- In 2009, the Development Corporation Act of 1979 was repealed, and the law recodified in the Texas Local Government Code as the "Development Corporation Act."

B. Railroad Commission Voluntary Cleanup Program

Railroad Commission Voluntary Cleanup Program, Natural Resources Code, Tit. 3, §91.651 et seq., [Enacted in 2001].
Rules: Tex. Admin. Code Tit. 16,§4.401 et seq. [Adopted in 2002].

1. Legislative Purpose

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- To provide a program similar to that of TCEQ's VCP, but for properties under the jurisdiction of the Railroad Commission of Texas ("Commission"). As with the TCEQ program, incentives provided to spur cleanup and redevelopment of contaminated properties include liability protection of redevelopers and their lenders.

2. Eligibility and Process

- Any contaminated site under Commission jurisdiction, other than one already subject to Commission order, is eligible.

- As with the TCEQ program, a party electing to participate in the Commission VCP must enter into a Voluntary Cleanup Agreement ("Agreement") and must agree to pay oversight costs to the Commission. There is a $1000 application fee.

- The Agreement must describe the work plan intended for submission to the Commission, the technical standards proposed for application to the project, and the intended future use of the site.

- After entering the Agreement, the party prepares and submits appropriate work plans and reports to the Commission.

- Depending on future land use, the Commission may approve plans and reports that do not call for removal or remediation of all contamination, so long as the cleanup is to be completed in a manner protective of human health and the environment and does not exacerbate or contribute to the contamination.

- Upon Commission approval, the applicant proceeds with the cleanup project.

3. Certification of Completion

- Once the Commission is satisfied that all necessary actions have been completed at the site, the Commission must issue a Certificate of Completion certifying successful finalization of the cleanup and specifying the liability protections afforded the applicant.

4. Limitation of Liability

- As the Certification of Completion must specify, a party who successfully completes a voluntary cleanup, and who is not otherwise liable due to pre-existing responsibility for the former conditions at the site, is released from all liability to the state for cleanup of areas of the site covered by the Certificate, except for releases and consequences caused by the party.

5. Brownfield Response Program

- In 2003, using funds from a Brownfield grant from U.S. EPA, the Commission created a Brownfield Response Program to assist local governmental authorities and community organizations to assess sites that have been impacted by oil and natural gas exploration and production.

- The Commission will provide funding for site assessments at qualified sites, to assist in targeting potential properties for cleanup and redevelopment.

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