

**50-STATE SURVEY OF
PROTECTIONS AVAILABLE
FOR PURCHASERS OF
CONTAMINATED PROPERTY**

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Environmental Litigators

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INTRODUCTION

The Subcommittee of Women Environmental Litigators, one of the groups under the umbrella of the American Bar Association Litigation Section's Environmental Litigation Committee, initiated this 50-state survey to address a question that our members identified as one that frequently arises for environmental litigators and other attorneys who work on projects involving contaminated properties. The question we posed to each of the authors was: describe any statutory or regulatory provisions that your State has which are similar, or have a similar purpose, to the innocent landowner and/or bona fide purchaser protections found in CERCLA, 42 U.S.C. §§ 9601(35), (40). *See also* 40 C.F.R. Part 312. Examples of such State provisions could include, but may not be limited to, State CERCLA programs, innocent purchaser protections under other programs, or voluntary cleanup programs which would provide protection from state enforcement actions and/or third party lawsuits arising from the contamination. In order to further focus the discussion for the individual states, we excluded state environmental audit privileges, state programs that manage funds financed by taxes, surcharges or other fees for cleanups of petroleum tanks or dry cleaners, and environmental covenant statutes. Each of those topics could be, or have already been, addressed in its own 50-state survey.

We hope that you find this compilation of State law protections for purchasers of contaminated property useful in your practice. Individual State author information is provided as an appendix in alphabetical order by State. NOTE: Summaries reflect the authors' statements of the most significant laws and regulations as of May 2013 and are not legal advice to any person or entity. Users of this compilation should verify any changes to the laws since publication.

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Alabama

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The Alabama Department of Environmental Management (ADEM) oversees a Brownfield Redevelopment and Voluntary Cleanup Program (codified at ADEM Admin. Code. R. 335-15-1.01, *et seq.*) that provides incentives and under certain circumstances state aid for developers to clean up and reclaim contaminated properties. This program also provides protections for buyers of such properties, so long as certain pre-requisites are met.

Alabama has no generally applicable statutory equivalent to CERCLA's innocent purchaser or bona fide purchaser exemptions.

Brownfield Redevelopment and Voluntary Cleanup Program

ADEM maintains a record of brownfields sites throughout Alabama to promote redevelopment and reclamation of those sites. Existing EPA NPL or ADEM enforced cleanup sites are not eligible. A prospective developer may choose to purchase a brownfield site from the ADEM list, or may identify a previously unlisted, potentially contaminated site for ADEM approval. Once a site is determined to be eligible for the Brownfields Program, the developer may do a site assessment, and if necessary, create a remediation plan in coordination with ADEM. Voluntary cleanup plans approved by ADEM are subject to public participation and comment. *See* ADEM Admin. Code. R. 335-15-6-.01.

A major advantage of participation in the Brownfields Program is the liability protections for contamination occurring prior to purchase and cleanup if cleanup is completed with ADEM oversight. *See* ADEM Admin. Code. R. 335-15-4-.02. These liability protections extend to current and future owners of the site. Limitation of liability is not available for "responsible persons" (those responsible for contamination of the site) or close relatives or associates of responsible persons.

Alaska

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Alaskan Department of Environmental Conservation Spill Prevention and Response Statute

An Alaskan state statute offers a purchaser's defense similar to CERCLA's. Alaska generally imposes strict liability on landowners for releases of hazardous substances. *See generally* Alaska Stat. § 46.03.822(a)(2) (2013). But strict liability does not apply to a voluntary purchaser of property if a third party, such as the seller, has already contaminated the property with hazardous substances and the purchaser neither knew nor had reason to know of the contamination. *Id.* §§ 46.03.822(b)(1)(B), 46.03.822(c)(1).

To satisfy the criteria for that exemption from liability, the purchaser must undertake "all reasonable inquiries" – a phrase used in lieu of EPA's "all appropriate inquiries" – into the property's prior ownership and use. *Id.* § 46.03.822(d). Those "reasonable inquiries" should be made consistent with EPA's "all appropriate inquiries" guidance. "All reasonable inquiries" include an investigation into the property's ownership history. *Id.* The purchaser must also examine whether the previous owners used the property in keeping with good commercial and customary practices that minimize liability. *Id.*

The statute enumerates factors that Alaskan authorities use to determine whether a purchaser has made "all reasonable inquiries:" (1) the purchaser's "specialized knowledge or experience" (of lack of); (2) the property's value if it were uncontaminated in contrast to the purchase price actually paid; (3) generally known or reasonably discoverable information about the property; (4) any indications that the property is probably or obviously contaminated; and (5) whether an "appropriate inspection" would have uncovered contamination on the property. *Id.* The purchaser must also have exercised due care following the discovery of any hazardous substances and taken reasonable precautions against third-party acts or omissions related to any releases of hazardous substances. *See id.* §§ 46.03.822(b)(1)(B).

Voluntary Cleanup Programs Available to Alaskans

Alaska does not have its own state-based voluntary cleanup program, but Alaska receives Brownfield Program Assistance from the EPA. *See* U.S. EPA, EPA Brownfield Program Assistance to the State of Alaska (Feb. 2013), available at <http://www.dec.alaska.gov/spar/csp/docs/brownfields/AK%20Fact%20Sheet%20February%202015%202013.pdf> ("EPA provides funds to States and Tribes to develop or enhance their response program which includes building capacity for Voluntary Cleanup Programs (VCP), developing a brownfields inventory and public record, and conducting site assessments."). The Alaska Department of Environmental Conservation ("DEC") works with State and Tribal Response Programs that have received federal grants under Section 128 of CERCLA. *See* Alaska State & Tribal Response Program

Brownfield Handbook, Sec 2.1 Goals and Objectives of STRP Funding, 2 of 5 (Dec. 2012), available at <http://www.dec.alaska.gov/spar/csp/docs/brownfields/Brownfield%20Handbook%20E-Book%20December%202012.pdf>.

Arizona

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Residential Real Property

The Arizona Department of Environmental Quality (ADEQ) does not require owners of residential real property that is located in whole or in part in a state or federal superfund site to perform cleanup actions (or to pay for same) at such superfund sites. However, a residential real property owner whose own actions directly lead to a release or threatened release of hazardous substances may be held liable for cleanup of the affected property. Additionally, real property owners may be required to perform cleanup if the subject property is used for non-residential purposes. These policies are intended to protect parties involved in real estate transactions, including purchasers as well as lenders and title insurers.

Arizona Revised Statutes clarify the specific conditions required before liability is imposed upon a residential real property owner. A.R.S. 49-283 (B) states, in relevant part:

... a person that owns real property is not a responsible party if there is a release or threatened release of a hazardous substance from a facility in or on the property unless one or more of the following applies to that person:

1. Such was engaged in the business of generating, transporting, storing, treating or disposing of a hazardous substance at the facility or disposing of waste at the facility, or knowingly permitted others to engage in such a business at the facility.
2. Permitted any person to use the facility for disposal of a hazardous substance.
3. Knew or reasonably should have known that a hazardous substance was located in or on the facility at the time right, title or interest in the property was first acquired by the person and engaged in conduct by which he associated himself with the release. For the purpose of this paragraph, a written warranty, representation or undertaking, which is set forth in an instrument conveying any right, title or interest in the real property and which is executed by the person conveying the right, title or interest, or which is set forth in any memorandum of any such instrument executed for the purpose of recording, is admissible as evidence of whether the person acquiring any right, title or interest in the real property knew or reasonably should have known that a hazardous substance was located in or on the facility. For purposes of this paragraph, "associated himself with the release" means having actual knowledge of the release and taking action or failing to take action that the person is authorized to take and that increases the volume or toxicity of the hazardous substance that has been released.

4. Took action which significantly contributed to the release after he knew or reasonably should have known that a hazardous substance was located in or on the facility.

Any liability accruing as a result of the above does not apply to anyone who is not an owner of the subject real property, even if they had some right, title, or interest therein. Furthermore, an owner of residential real property is not liable for any release or threatened release caused by a public utility if such public utility holds an easement affecting the property. A.R.S. 49-283 (C). Additional exceptions to liability include any release or threat of release resulting from an act of God, an act or war, an act or omission of a third party, and other limited circumstances. *See* A.R.S. 49-283 (D).

Off-Site Migration

Under Arizona law, property owners are not responsible for contamination that is located on or beneath their property as a result only of migration from a different property. Pursuant to A.R.S. 49-283 (E), liability does not apply where a hazardous substance on or under a property “is present solely because it migrated from property that is not owned or occupied by that person and that person is not otherwise a responsible party....”

Prospective Purchaser Agreements

ADEQ has the authority under A.R.S. 49-285.01 to enter into Prospective Purchaser Agreements (PPAs) providing a written release and covenant not to sue for potential liability under the Water Quality Assurance Revolving Fund (WQARF), Arizona’s state superfund program, and for potential CERCLA liability to the State.

PPA eligibility requires that (1) the property be within a WQARF site or that ADEQ has sufficient information to determine the extent of contamination; (2) neither the property purchaser nor any affiliated party is responsible for the contamination; (3) the property purchaser’s use of the subject property will neither exacerbate existing contamination nor interfere with remedial efforts; and (4) the property purchaser provides a “substantial public benefit.” This last condition requires the purchaser to use the property in a way that goes beyond mere continued business use; for example, the purchaser must agree to remediate the property or to provide funding or other resources to facilitate remediation, reuse a vacant or abandoned industrial or commercial property, allow development on the property by the government or a nonprofit organization, or create a conservation or recreation area. Such public benefit, and any obligations to ADEQ or the EPA, must be completed before the release and covenant not to sue under a PPA become effective. ADEQ charges fees to cover its direct and indirect costs of drafting a PPA, which frequently run several thousand dollars, and include the cost of ADEQ staff time, notice publication, and court costs if the applicant requests a court-approved consent decree.

Settlement by Potentially Responsible Parties

Arizona permits potentially responsible parties (PRPs) three options for settlement of WQARF and CERCLA liability to the State.

1. Qualified Business Settlements (QBSs), pursuant to A.R.S. 49-292.01, allow eligible PRPS to settle all potential liability to the State under WQARF and §107 of CERCLA for known contamination at real property. The applicant is required to pay 10 percent of its average annual gross income for the two years prior to the year its application for a QBS was submitted; if paid in full within five years, the settlement amount is interest free, and is subject to an annual 6% interest payment if payment is not completed in five years.
2. Financial Hardship Settlements are available to those PRPs who demonstrate financial difficulty in paying the full amount of liability ADEQ has broad discretion to consent to such a settlement, and evaluates applicants based on various financial factors.
3. A.R.S. 49-292 grants ADEQ general settlement authority, under which a PRP may present ADEQ with an offer to settle any potential WQARF or CERCLA liability to the State. ADEQ considers a variety of factors under A.R.S. 49-282.06 and 49-285 (E) and (F) in determining whether to settle, and given ADEQ's broad discretion associated with this type of settlement, in practice it is the most frequently employed.

Arkansas

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Arkansas Remedial Action Trust Fund Act (RATFA)

The RATFA, found at Arkansas Code Annotated § 8-7-512, is Arkansas' analogue to CERCLA. RATFA assigns liability for remedial or removal costs to (1) owners and operators; (2) disposers; (3) generators; and (4) transporters. *Id.* at § 8-7-512(a). Liability protection is afforded to emergency responders, state employees, and state contractors. *Id.* at § 8-7-512(b)-(d).

Arkansas Brownfields Program (ABP)

The ABP, found at Arkansas Code Annotated §§ 8-7-1101 *et seq.*, establishes a process by which prospective purchasers may enter into an agreement with the Arkansas Department of Environmental Quality (“ADEQ”) to clean up abandoned, contaminated property and receive immunity for any fines or penalties assessed against any person responsible for the contamination. *Id.* at § 8-7-1104. The prospective purchaser must not be a responsible party, defined as a disposer, generator, or transporter of hazardous substances. *Id.* (incorporating § 8-7-512(a)(2)-(4)). In order for the site to be eligible, it must be an “abandoned site” on which “industrial, commercial, or agricultural activity occurred and for which no responsible person can reasonably be pursued for a remedial response” *Id.* at § 8-7-1102(a)(1). Prospective purchasers must perform a comprehensive site assessment, and if necessary, enter into an implementing agreement with ADEQ to perform cleanup, in order to take advantage of the ABP liability protections. *Id.* at § 8-7-1104(b)-(e). A property use restriction will be placed in the deed and prohibit subsequent owners from using the property in a manner inconsistent with the intended use described in the implementing agreement. *Id.* at § 8-7-1104(l), (n). Subsequent owners who are not responsible for the contamination may receive the liability protection provided by the ABP upon written notice to ADEQ. *Id.* at § 8-7-1104(m).

Arkansas Elective Site Cleanup Program (ESCP)

The ESCP allows motivated parties to pay for site investigation and cleanup. Participants submit a sampling and analysis plan to ADEQ, which should include a schedule of implementation. *See* ADEQ, “Elective Site Cleanup Agreement,” available at http://www.adeq.state.ar.us/hazwaste/branch_ie/pdfs/esca.pdf. Following implementation of the sampling and analysis plan and ADEQ's assessment and review thereof, participants submit a remedial plan to control or remediate the contamination on the property. *Id.* Upon ADEQ's approval of the remedial plan completion report, ADEQ will issue a “No Further Action Determination” letter to participants. *Id.* Although the ESCP does not provide a release of liability, it allows participants to address historic contamination while providing them greater control over the timing of the cleanup. *See id.*

California

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Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA)

The HSAA, found at Cal. Health & Safety Code §§25300 *et seq.*, is California's analogue to CERCLA. In defining those persons who are a "responsible party" or "liable person", the HSAA incorporates CERCLA's definition of covered persons set forth in §107(a) of CERCLA. Cal. Health & Safety Code §25323.5(a)(1). In addition, the HSAA adopts the defenses specified in CERCLA §§101(35) and 107(b), which includes the innocent purchaser defense.

California Land Use and Redevelopment Act of 2004 (CLRRA)

CLRRA, found at Cal. Health & Safety Code §§ 25395.60 *et seq.*, establishes a process in which a qualified bona fide purchaser (BFPs) may enter into an agreement with the California Department of Toxic Substances Control (DTSC) or one of the California Regional Water Quality Control Boards (RWQCB) to clean up contaminated property and receive immunity for certain hazardous materials response costs and other damages. *Id.* at § 25395.81. A BFP is a person purchasing the site that, among other things: establishes that all releases of hazardous material occurred before the person bought the property; is not affiliated with parties potentially responsible for releases at the site; made all appropriate inquiries (AAI) in accordance with 40 C.F.R. Part 312 and ASTM E1527-05 prior to purchasing the site; and exercises appropriate care with respect to existing or threatened releases at the site. *Id.* at §§ 25395.69, 25395.80. In order for the site to be eligible, it must be located in an urban infill area (i.e., a vacant or underutilized property in a populated area), must not be a state or federal Superfund site, and must not be solely impacted by petroleum releases from an underground storage tank. *Id.* at § 25395.79.2. Prospective purchasers must enter into an agreement with either the DTSC or RWQCB to perform a site assessment, and if necessary, cleanup, in order to take advantage of the CLRRA liability protections. *Id.* at § 25395.92. Once a CLRRA agreement has been established with respect to a given property, subsequent purchasers may also qualify for immunity if they meet qualifying conditions and continue to carry out the terms of the agreement. *Id.* at § 25395.98. This law sunsets on January 1, 2017. *See* Senate Bill 143 (2009).

Prospective Purchaser Agreements (PPAs)

Under certain circumstances, DTSC and the RWQCBs will enter into PPAs with developers to remove or lessen the liability associated with purchasing contaminated property. Criteria that the agencies use to evaluate whether to enter into a PPA for a specific property include, among other things: the prospective purchase is a bona fide prospective purchaser that is unaffiliated with parties potentially liable for contamination of the site; the prospective purchaser is willing to undertake remediation of the site and pay the agency's oversight costs; future activities at the site will not exacerbate existing contamination or create public health risks; and the project will

result in public benefits that would otherwise be unobtainable, such as environmental benefits, job creation, and/or increased tax revenues. In exchange, the DTSC or RWQCB will covenant not to sue the prospective purchaser for pre-existing contamination as long as certain remedial actions and other conditions are met. DTSC Guidance, “Prospective Purchaser Policy” (EO-96-005-PP, July 1, 1996), available at <http://www.dtsc.ca.gov/LawsRegsPolicies/Policies/SiteCleanup/upload/eo-96-005-pp.pdf>; DTSC Fact Sheet, “Prospective Purchaser Policy” (May 2001), available at http://www.dtsc.ca.gov/SiteCleanup/Brownfields/upload/FS_SMP_Prospective-Purchaser.pdf.

Voluntary Cleanup Program (VCP)

One of California’s oldest brownfields programs, the VCP was established by DTSC in 1993 and allows motivated parties who are willing to pay for site investigation and cleanup, as well as DTSC’s oversight costs, to move forward with the work at their own pace. This is a benefit to developers eager to get their project moving because DTSC prioritizes its oversight of site remediation based on the degree of threat to public health or the environment posed by site contamination, which means that lower threat sites likely have to wait in the queue for DTSC oversight and cannot commence remedial work until then. Some sites that are not eligible for the VCP, including listed Federal and State Superfund sites, military facilities, and facilities not under DTSC’s jurisdiction or oversight. Modest liability protection is provided under this program, in that project proponents do not have to admit to legal liability for remediation of a site as condition of entering into a VCP agreement. Moreover, parties that clean up contaminated sites under this program have greater control over the timing of the remedial work. DTSC Guidance, “The Voluntary Cleanup Program” (August 2008), available at http://www.dtsc.ca.gov/SiteCleanup/Brownfields/upload/BF_FS_VCP.pdf.

Unified Agency Review Program (AB 2061)

Purchasers of contaminated property should also be aware of AB 2061, which was developed to eliminate or minimize the duplication of efforts by various state and local agencies to clean up hazardous materials release sites. Cal. Health & Safety Code §§ 25260 *et seq.* Under this program, a current owner may request that a single regulatory agency be designated to oversee the investigation and remediation of the property (the administering agency). *Id.* at § 25262. After the owner completes the agreed-upon investigation and remediation, the administering agency will issue a certificate of completion, which will prohibit all state agencies from taking any action against the owner for hazardous materials released at the property, except under limited conditions. *Id.* at § 25264(c); *see also* California EPA Guidance, “Site Designation Process: Designation of an Administering Agency,” (January 2011), available at <http://calepa.ca.gov/Programs/SiteDesig/Guide/FactSheet.pdf>.

Polanco Redevelopment Act (Polanco Act)

Historically, California’s Polanco Act has been an effective and tool for redevelopment of contaminated sites located within the jurisdiction of a redevelopment agency. Cal. Health & Safety Code §§ 33459 *et seq.* The Polanco Act allows redevelopment agencies to take any action consistent with state law that the agency determines is necessary to remedy or remove a

release of hazardous substances from, on or under property within a redevelopment project area and recover from responsible parties costs incurred by the agency cleaning the property. *Id.* at § 33459.1. Most importantly for potential developers, once an environmental cleanup is completed, the Polanco Act provides immunity to redevelopment agencies and future property owners, developers and lenders, from future regulatory action related to the hazardous substances addressed as part of the cleanup. *Id.* at § 33459.3. It is important to note, however, that in 2010 the California legislature disestablished all redevelopment agencies in the state as a budget cutting measure, a move that was upheld by the California Supreme Court in *California Redevelopment Association, et al. v. Matosantos*, 53 Cal.4th 231 (2011). Because the Polanco Act tools and protections are only available to the remediation of property located in redevelopment project areas, and because redevelopment project areas require redevelopment agencies for creation and ongoing operation, it is unclear whether there remains an avenue for developers to access the Polanco Act immunity protections.

Colorado

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Colorado Voluntary Cleanup and Redevelopment Act (VCRA)

The VCRA, found at Colo. Rev. Stat. (C.R.S.) § 25-16-301 *et seq.*, encourages voluntary cleanups of contaminated property by providing persons interested in redeveloping existing industrial sites with a method of determining what the cleanup responsibilities will be when they plan the reuse of existing sites. The VCRA thus serves as the basis for Colorado's Voluntary Cleanup Program (VCUP), which has guided cleanup and remediation decisions since 1994.

Notably, the VCUP is a voluntary program that may only be initiated by the owner of the subject real property. C.R.S. § 25-16-303(3)(a). Some sites are not eligible for application and entry into the VCUP, including, but not limited to, properties that are listed or proposed for listing on the National Priorities List under CERCLA and properties that are subject to corrective action under the federal Resource Conservation and Recovery Act or under certain state orders or agreements. C.R.S. § 25-16-303(3)(b). Cleanup decisions are based on existing standards and the proposed use of the property, but the Colorado Department of Public Health and Environment (CDPHE) Hazardous Materials and Waste Management Division (Division) provides no construction or cleanup oversight. The actual cleanup and verification is the owner's responsibility. Cleanup in accordance with a VCUP-approved plan will result in a determination from CDPHE that no further action is required at the site. C.R.S. § 25-16-306(2).

In order to receive EPA's assurances that it will not take action under CERCLA (as specified in a CDPHE-EPA Memorandum of Agreement), the owner must submit a completion report as a new application for no further action so that the Division can review and concur that the VCUP-approved cleanup plan has been completed. Thus, the benefit of entry into the VCUP is that the VCUP can provide technical assistance related to site cleanup; approve cost-effective, risk-based cleanup plans; and provide relief from additional cleanup liability. The VCUP participant can obtain certainty that, as long as the land use remains the same, the cleanup is considered adequate by CDPHE for future use of the property. For additional information and guidance, please see CDPHE, "Voluntary Clean-Up Roadmap" (May 2008).

Connecticut

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Limitation On Liability For Innocent Landowners

Innocent landowners that hold or acquire an interest in property on which a spill or discharge has occurred receive a limited form of liability protection for State remedial costs. Conn. Gen. Stat. § 22a-452e. If the State incurs costs to remediate contaminated property owned by an innocent landowner, the innocent landowner is subject to liability, in the form of a lien on the property, up to the value of the property as uncontaminated.

A person can qualify as an innocent landowner if he/she owns the property when a spill or discharge occurs, or if he/she acquires the property after the spill or discharge occurs. If a person owns property *at the time* a spill or discharge, that person qualifies as an “innocent landowner” if the spill or discharge was caused solely by: an act of God; an act of war; or an act or omission of a third party (including a rail carrier) other than an employee, agent or lessee of the landowner or other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the landowner, unless there was a reasonably foreseeable threat of pollution or the landowner knew or had reason to know of the act or omission and failed to take reasonable steps to prevent the spill or discharge. A person who acquires property *after* a spill or discharge occurred is an “innocent purchaser” if he/she falls in to one of four categories: (1) the landowner does not know and has no reason to know of the spill or discharge, and inquires, consistent with good commercial or customary practices, into the previous uses of the property; (2) the landowner is a government entity; (3) the landowner acquires the interest in real estate by inheritance or bequest; or (4) the landowner acquires the interest in real estate as an executor or administrator of a decedent’s estate. Conn. Gen. Stat. § 22a-452d(1).

A person attempting to use this limitation of liability must prove that he/she is an innocent landowner by a preponderance of the evidence. The statute specifically provides that a court may consider any specialized knowledge or experience of the person, the amount paid for the property in comparison to the value of the property if it were not polluted, the obviousness of the spill or discharge, and the ability to detect such spill or discharge by appropriate inspection.

Limitation On Liability For Pollution Existing Prior To Ownership

Connecticut provides liability protection for property owners with regard to pollution that occurred or existed prior to acquisition of the property, provided that the owner is not liable for creating any other pollution or source of pollution on the property, the owner did not establish or create a condition that could create a source of pollution to the waters of the State; and the owner does not have a familial, contractual, or financial affiliation with the person responsible for the pollution. Conn. Gen. Stat. § 22a-133ee(a)(1)-(2). This liability protection is limited to costs or damages incurred by a person other than a state or the federal government.

In order to take advantage of this liability protection the owner must also investigate and remediate the property in accordance with the State's Remediation Standard Regulations, R.C.S.A. §§ 22a-133k-1 through 22a-133k-3 (RSRs). Both the investigation report and the final remedial action report must be approved by the Commissioner of the Department of Energy and Environmental Protection (DEEP). Conn. Gen. Stat. § 22a-133ee(a)(3).

Brownfield Remediation and Revitalization Program

Connecticut's Brownfield Remediation and Revitalization Program (BRRP) establishes a process for voluntary remediation of contaminated property. Conn. Gen. Stat. § 32-9mm. Bona fide prospective purchasers, innocent landowners, and contiguous property owners that did not contribute to the contamination may apply for admission into the BRRP. The definition of "bona fide prospective purchaser" closely follows the CERCLA definition. "Innocent purchaser" is defined as previously indicated in this section. Conn. Gen. Stat. § 32-9mm(1), (8).

If property is accepted into the BRRP, the applicant must investigate and remediate within the boundaries of the property in accordance with a specified schedule and under the oversight of a licensed environmental professional (LEP). When remediation is complete, the LEP must submit a remedial action report to the DEEP that includes a verification that the property has been remediated in accordance with the RSRs.

Upon acceptance into the BRRP, applicants receive liability protection from both the State and third parties for releases at or from the property, unless the applicant caused or exacerbated the contamination. The liability protection becomes permanent once the remediation is complete and the DEEP either: notifies the applicant that it will not audit the remedial action report and verification; any audit made by DEEP has been addressed; or the Commissioner of the DEEP fails to act on the remedial action report and verification within 180 days of submission.

The permanent liability protection afforded by the BRRP also extends to the immediate prior owner of the property, even if the prior owner would not have qualified for the program. Unlike the applicant, however, the prior owner retains liability for contamination that has migrated off-site. Future landowners who would have qualified for the BRRP can obtain the program's liability protections if they pay a \$10,000 fee.

Properties that have been accepted into the BRRP are exempt from the Connecticut Property Transfer Act, Conn. Gen. Stat. §§ 22a-134 *et seq.* (Transfer Act).

Abandoned Brownfield Cleanup Program

The Abandoned Brownfield Cleanup (ABC) Program is intended to encourage the purchase and strategic redevelopment of underused property in situations where the responsible party is no longer in existence or is otherwise unable to perform. Any person can apply to enter a property into the ABC Program if he/she did not establish or create a condition that could create a source of pollution to the waters of the State and is not affiliated with any person who has, and is not otherwise required to remediate the property. Conn. Gen. Stat. § 32-9ll.

If a property is accepted into the ABC Program, the applicant must enter into one of Connecticut's Voluntary Remediation Programs, Conn. Gen. Stat. § 22a-133x. The applicant must investigate and remediate within the boundaries of the property in accordance with a specified schedule and in accordance with the RSRs.

Upon acceptance into the ABC Program, the applicant receives liability protection from both the State and third parties for releases at or from the property, unless the applicant caused or negligently or recklessly exacerbated the condition. The applicant is further relieved of liability under a number of state statutes relating to contamination. Finally, the applicant is also eligible to receive a covenant not to sue pursuant to Conn. Gen. Stat. § 22a-133aa.

Like the BRRP, properties that have been accepted into the BRRP are exempt from the Transfer Act.

Covenant Not To Sue

Connecticut allows prospective purchasers and current owners to apply for a covenant not to sue, or an agreement that the DEEP releases the holder from all claims related to contamination emanating from the property resulting from a spill that occurred prior to the effective date of the covenant. In order to be eligible for a covenant not to sue, a person must demonstrate that he/she did not cause the contamination, he/she has no affiliation with the person who caused the contamination, he/she will redevelop the property for productive use or will continue productive use of the property, and that the property has or will be remediated in accordance with the RSRs. If remediation is not complete at the time the covenant is issued, the remedial plan will be incorporated into the covenant. *See* Conn. Gen. Stat. §§ 22a-133aa, 22a-133bb.

Delaware

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The Delaware Hazardous Substance Cleanup Act (HSCA), 7 Delaware Code, Chapter 91, is Delaware's counterpart to CERCLA. HSCA was passed by the General Assembly of the State of Delaware in July of 1990. The statute provides authority to the Delaware Department of Natural Resources and Environmental Control (DNREC) to, among other things, enforce cleanup of a facility at the expense of responsible parties. HSCA has been amended over the years to include the addition of the Voluntary Cleanup Program and Brownfields Development Program.

Brownfields Development Program

The Brownfields Development Program (BDP) was signed into law in 2004. The BDP encourages the cleanup and redevelopment of vacant, abandoned or underutilized properties which may be impaired. The term "brownfield" is defined in the statute as "any vacant, abandoned or underutilized real property the development or redevelopment of which may be hindered by the reasonably held belief that the real property may be environmentally contaminated." 7 Del. C. §9103(3). A party seeking to develop such a property under the BDP must negotiate a Brownfields Development Agreement (BDA) with DNREC to perform an investigation and, if necessary, a remedial action or remedy, for the purpose of addressing the risks posed by past releases of hazardous substances at the site. A BDA is only available to innocent parties with no affiliation with any other person that is liable for a release or imminent threat of release at the site. Entry into the BDP is contingent upon the site being a certified brownfield.

Liability Protection

The BDP offers liability protection, for existing contamination, to qualified brownfield developers provided that they enter into a BDA, and agree to clean up the contamination as specified in a plan approved by DNREC. The protection afforded by the BDP is transferable to the successors or assigns of the brownfields developer.

Certification of Completion of Remedy

Once the remedy is in place, the developer may request and receive a Certification of Completion of Remedy (COCR), which provides liability protection for the work performed pursuant the DNREC-approved plan and in accordance with the BDA, provided the requirements of the COCR are followed. The COCR may contain limitations or conditions including but not limited to operation and maintenance, and compliance monitoring. The statute provides that DNREC shall grant or deny an application for a COCR within 180 days of the application, with stated reasons. 7 Del. C. §9108.

Voluntary Cleanup Program

The Voluntary Cleanup Program (VCP) is available to parties who may be liable for the contamination of a property, but who wish to settle their liabilities with the State. As an example, a property owner may volunteer to clean up the site before DNREC orders performance of a cleanup under HSCA.

Participation in this program starts with admission into the VCP. This process requires, among other things, disclosure of details of any past investigations conducted at the site. Based on the information provided, DNREC will determine the eligibility of the site to be cleaned up under the VCP. If the site is determined to be eligible, a Voluntary Cleanup Agreement (VCA) is executed with DNREC, to allow the State to oversee the investigation and cleanup of the site. The VCA provides for payment of the State's oversight costs and may require a deposit. The VCA can, subject to certain conditions, be terminated at any time during the investigation and cleanup. DNREC can also terminate the agreement if it is determined that the owner is not making a good faith effort to comply with the terms of the VCA. Upon successful completion of all required activities, the performing party may apply to DNREC for issuance of a COCR.

Prospective Purchaser Agreement

HSCA includes a provision for a Prospective Purchaser Agreement (PPA) in instances where an innocent purchaser desires to acquire a distressed property without assumption of liability. 7 Del. C. §9105(c)(4) provides, in part, that a prospective purchaser whose potential liability is based solely on the purchaser's being considered to be an owner or operator of a facility, shall not be liable as long as the prospective purchaser, with or without the participation of the seller of the property, enters into a PPA.

The PPA must identify the parties responsible for completing a site investigation and any subsequent remediation. A prospective purchaser cannot be affiliated any potentially responsible person associated with the property. The PPA must also set forth the scope of and financial responsibility for the environmental work to be performed, and define the amount of assistance, if any, being provided by DNREC. The statute also contains requirements for a signatory's operations on the property, both as a prospective purchaser and as an owner.

Finally, the statute provides that upon issuance of a COCR with respect to the remedy at the site, the signatory to the PPA shall not be liable for a release addressed in the COCR, or for any future release attributable to conditions existing prior to the issuance of the COCR, provided the signatory does not interfere with the remedy.

District of Columbia

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Voluntary Remediation Action Program (VRAP)

In an effort to facilitate the remediation of petroleum-contaminated properties, the District of Columbia enacted the Voluntary Remediation Action Program (“VRAP”). Letter from Fionna Phill, *in* the VRAP Application Packet, *available at* <http://green.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/VRAP%20Application%20Package%20Web.pdf>. Pursuant to the VRAP, parties that are not responsible for an underground storage tank leak may clean up a site and obtain a no further action letter. D.C. Mun. regs. Tit. 20, § 6213. An applicant may not be the owner, operator, or a responsible party at the site. *Id.* § 6213.1. There is currently no application fee. Perhaps the most beneficial aspect of the VRAP is the limited liability it provides participants. Although a participant is liable for all remediation work performed at the site, a participant may “cease corrective action activities at the facility . . . prior to complete remediation of the facility” and generally incur no liability. *Id.* § 6213.6. The law surrounding this provision is currently developing, but it appears that so long as the participant did not make the environmental situation worse, gave notice, and stabilized the site. *Id.*

Voluntary Cleanup Program (VCP)

In 1999, the U.S. EPA and the District of Columbia Department of Health entered into an agreement to establish a Clean Land Program in the District of Columbia. VOLUNTARY CLEANUP AND LAND REDEVELOPMENT Homepage, <http://green.dc.gov/service/voluntary-cleanup-and-land-redevelopment> (last visited May 13, 2013). The VCP was enacted in 2001 with the intention of addressing some of the difficulties purchasers face when developing brownfield properties. D.C. Code. §§ 8-63301 - .08. Pursuant to the VCP, private parties that voluntarily clean up a contaminated property receive a certification that no further action is required at the property and, perhaps more importantly, that the District will not enforce later for known contaminants. *Id.* § 8-631.02(d)(3). Not all sites are eligible for the VCP, such as sites already subject to a federal cleanup order. *Id.* 8-631.02(5). The VCP differentiates between an innocent purchaser and a responsible person, in that if the site is not fully remediated, a responsible party remains strictly liable. *Id.* § 8-632.03. An applicant must submit information regarding the site, an environmental assessment, a proposed cleanup plan, and a fee. *Id.* §§ 8-633.02, .04. If the application is approved, the applicant submits a corrective action plan that is available for public comment. *Id.* § 8-633.03(a).

Environmental Policy Act

This Act was enacted in 1989 and requires the District of Columbia to examine the environmental impacts of construction and development projects prior to issuing a building permit. D.C. Code § 8-109.01. If the District of Columbia determines that there is an adverse

environmental impact that imminently and substantially endangers public health, safety, or welfare, the District of Columbia *must* disprove the project unless there are alternatives to avoid the danger. *Id.* § 8-109.04. There are three parts to the Environmental Policy Act: (1) developer submits an environmental intake form to the Department of Consumer and Regulatory Affairs when a permit application is submitted; (2) developer then submits an environmental impact screening form; and (3) if the District of Columbia decides that an environmental impact statement is required, the developer must submit one. D.C. Mun. Regs. Tit. 20, § 7201; D.C. Code § 8-109.03. Some projects are exempt from the Environmental Policy Act, including smaller projects. D.C. Code. § 8-109.02(2).

Florida

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Florida Liability and Defenses of Facilities

Section 376.308(1), Florida Statutes (F.S.), delineates which persons shall be liable to the FDEP for discharges or polluting conditions and provides several defenses to such liabilities. While some of the defenses resemble those found in §107(a) of CERCLA, there are some very distinct differences. Additionally, there are no statutory or rule processes or policies in Florida for persons claiming a defense under § 376.308, F.S., to enter into an agreement with the Florida Department Environmental Protection (FDEP) to officially establish immunity from liability, though, in practice, the FDEP has provided a few, limited comfort letters in the past.

Section 376.308(1)(c), F.S. is Florida's version of the innocent purchaser provision found in CERCLA. This section protects the purchaser of property contaminated only by petroleum or dry cleaning solvents from strict liability for the contamination if the purchaser acquired the property prior to July 1, 1992, or in the case of a dry cleaning facility or wholesale supply facility prior to July 1, 1994, if the purchaser can show that it (1) acquired title to the property contaminated by the activities of a previous owner, operator, or third party and (2) did not cause or contribute to the discharge at the property. A purchaser acquiring property after those dates must also demonstrate that it undertook all appropriate inquiry into previous ownership and use of the property in order to qualify as an innocent purchaser.

Section 376.308(2), F.S. applies to all types of contamination and provides protections if a party can plead and prove that the occurrence was solely the result of, or any combination of, acts of war, acts of government, acts of God, or an act or omission of a third party (the "third party defense"). The third party defense in § 376.308(2)(d), F.S., also requires, in part, that an act or omission of a third party may be protected as long as the party seeking protection exercised due care with respect to the pollutant concerned and took precautions against any foreseeable acts or omissions of any such third party. Recently, a District Court of Appeals decision considered the third party defense and found that a party could not knowingly purchase a contaminated party and claim the third party defense, thereby adding the element of all appropriate inquiry into evaluation of the defense. *See FT Investments, Inc. v. Florida Department of Environmental Protection*, 93 So.3d 369 (Fla. 1st DCA 2012).

Florida's lender protections provided in § 376.308(3), F.S. include defenses for lenders acting as trustees, personal representatives or other fiduciaries, those holding indicia of ownership primarily to protect a security interest, and those who held a security interest in the site and have foreclosed or acted to acquire title. These protections apply as long as the lender has not otherwise caused or contributed to the discharge or engaged in decision making or management control over site operations, particularly dealing with the storage, use or disposal of petroleum products.

Brownfields Cleanup Program

Florida has established the ***Brownfields Redevelopment Act*** (“BDA”) set forth more specifically in §§ 376.77-376.86, F.S. The BDA provides incentives to parties who voluntarily cleanup brownfield areas. Such incentives may include financial, regulatory, and technical assistance to persons and businesses involved in the redevelopment of the brownfield pursuant to this act. The person responsible for brownfield site rehabilitation is required to enter into a brownfield site rehabilitation agreement with the department or an approved local pollution control program if actual contamination exists at the brownfield site which outlines the requirements and timeframes for cleanup at the property.

Georgia

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. Under the Hazardous Site Reuse and Redevelopment Act, O.C.G.A. § 12-8-200 *et seq.*, (HSRA), Georgia's CERCLA statutory counterpart, prospective purchasers can receive limitations on liability for prior contamination at a property.

Qualification for Liability Limitation

- *Prospective Purchaser* includes anyone who applies for a limitation of liability within 30 days of acquiring title to a property with a preexisting release. O.C.G.A. § 12-8-202(b).
- *Actions* necessary to comply with the Brownfields program include:
 - Submission of a corrective action plan or certificate of completion;
 - Cleanup of soil and source material to risk reduction standards; and
 - Compliance status report submitted to the State.

O.C.G.A. § 12-8-207.

- *Exclusions* to the Prospective Purchaser protections prohibit participation in the Brownfields program if the applicant:
 - Contributed to the release of hazardous substances on the property;
 - Had any relationship to the party responsible for the release(s); or
 - Is in violation of Georgia Environmental Protection Division's enforcement authority.

O.C.G.A. § 12-8-206(a).

- *Future Title Holders* retain the liability limitation acquired by a qualifying previous purchaser. The benefit of the liability limitation runs with the land to future owners, so long as they are neither a previous owner nor a contributor to a release at the property. The transfer of the protection is automatic, and a qualifying purchaser no longer has to fully transfer the liability limitation to a future owner. O.C.G.A. § 12-8-208(c).

Hawaii

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Hawaii Environmental Response Law (HERL)

The HERL, found at Hawaii Revised Statute (HRS) § 128D-6, is Hawaii's analogue to CERCLA. In defining those persons who are a "responsible party" or "liable person", the HERL incorporates CERCLA's definition of covered persons as set forth in §107(a) of CERCLA. *See* HRS § 128D-6(a). In addition, the HERL adopts the defenses, including the innocent purchasers defense, specified in CERCLA §§ 101(35) and 107(b). *See* HRS §§128D-1, 128D-6.

Hawaii Voluntary Response Program (VRP)

The VRP provides a mechanism for prospective purchasers and developers of contaminated property to become exempt from liability for contamination they did not cause. The VRP program encompasses a wide range of site conditions, contamination, and property transactions and properties within the VRP receive priority attention from the state. Upon completion of the VRP, a property owner and/or purchaser receives a "letter of completion" of cleanup from the state which typically includes an exemption from future liability for the specific property and contaminants addressed in cleanup. *See* HRS § 128D-39. The letter of completion will be noted on the property deed and sent to the county agency that issues building permits. The exemption from future liability and other benefits or restrictions identified in the letter run with the land and apply to all future owners of the property. *See* HRS § 128D-39(d).

Some sites are not eligible for the VRP, including those (i) listed or proposed to be listed on the National Priorities List, (ii) for which an order or other enforcement action has been issued or entered under CERCLA and is still in effect, (iii) that have received a federal Letter of Interest from the U.S. Coast Guard, (iv) subject to corrective action under Subtitle C of RCRA or chapter 342J of HRS, or (v) posing an imminent and substantial threat to human health, the environment, or natural resources. *See* HRS § 128D-33.

An overview of the VRP may be accessed on the Hawaii Department of Health's website at <http://eha-web.doh.hawaii.gov/eha-cma/Leaders/HEER/site-assessment-and-cleanup-programs>.

Idaho

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Idaho operates a Voluntary Cleanup Program (VCP) enacted by the Idaho Land Remediation Act. Idaho Code §§ 39-7201 to 39-7211. The statute's purpose is to "provide for an expedited remediation process by eliminating the need for many adversarial enforcement actions and delays in remediation plan approvals." *Id.* at 7207. The VCP is open to current owners of contaminated property who did not cause or contribute to contamination or own the property at the time of the release. *Id.* at 39-7203(3). By conducting voluntary remediation under the oversight of the Department of Environmental Quality (DEQ), property owners can avoid liability for contamination and become eligible for a covenant not to sue. The VCP is not available, however, when the contamination constitutes and imminent and substantial threat or if remediation is already required under various other environmental statutes. *Id.* at 39-7204.

An initial application for participation in the VCP requires a Phase I Environmental Assessment of the contaminated property. Applicants must then prepare a Voluntary Remediation Work Plan which must be approved by DEQ and is open to public comment. DEQ provides ongoing oversight and assistance, for which it is reimbursed by the applicant (including an initial required deposit of \$2,500). Once remediation is accomplished to the agency's satisfaction, DEQ will issue a certificate of completion.

During implementation of an approved work plan, DEQ is prohibited from bringing any administrative or judicial action for liability against the property owner. *Id.* at 39-7207. After a certificate of completion is issued, the property owner may also apply for a covenant not to sue. Such a covenant covers all claims for environmental remediation under state law for release of substances that were the subject of the approved work plan. *Id.* However, a covenant will not cover conditions that were present at the site but unknown to DEQ, nor does it release liability for federal laws, unless provided for under federal law or agreed to by a federal agency. *Id.*

Illinois

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The primary source of statutory environmental law in Illinois is the Environmental Protection Act. 415 Ill. Comp. Stat. § 5/1 *et seq.* The Illinois Environmental Protection Agency (IEPA) and the Illinois Pollution Control Board (IPCB) are two separate and independent agencies that share responsibility for implementing the Act.

Illinois Superfund Program

Illinois analogue to CERCLA is found in the Illinois Environmental Protection Act located at 415 Ill. Comp. Stat. § 5/22.2. This statute imposes liability on owners and operators of facilities for costs incurred by the government to address a release or threatened release of hazardous substances. The Act limits the liability of financial institutions, real estate developers and innocent purchasers. 415 Ill. Comp. Stat. § 5/22.2(h)(2)(E). Financial institutions are only liable as an owner or operator of a facility of which it acquires ownership, operation, management or control through foreclosure or under the terms of a loan agreement, only if the financial institution takes possession of the facility, exercises actual, direct and continual managerial control in the operation of the facility, and if the exercise of control causes a release or substantial threat of a release of hazardous substance resulting in a removal or remedial action. *Id.*

The innocent purchaser defense is available in Illinois to those who have conducted all appropriate inquiries regarding the property. Purchasers are not liable for contamination if they can show they had no reason to know of the contamination. 415 Ill. Comp. Stat. § 5/22.2(j)(6)(B). Site assessments provide the purchaser with a rebuttable presumption against State claims and a conclusive presumption against third-party claims that the purchaser made the appropriate inquiries. 415 Ill. Comp. Stat. § 5/22.2(j)(6)(E)(i). Illinois requires that site assessments be performed by an “environmental professional” which IEPA defines differently than the definition used by ASTM. 415 Ill. Comp. Stat. § 5/22.2(j)(6)(E)(iii). In Illinois, the exercise of due diligence requirements only protects against government actions because there is no private cause of action under the State’s analog to CERCLA.

The Hazardous Waste Fund found in the Illinois Environmental Protection Act, may be used for preventive or corrective actions necessary or appropriate when there is a release or a substantial threat of the release of a hazardous substance or pesticide. 415 Ill. Comp. Stat. § 5/22.2(b)(4). The classes of responsible parties under Illinois’ hazardous substance liability statute are the same as under CERCLA. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a).

Illinois Brownfields/Voluntary Cleanup Program

In 1986, Illinois established a Voluntary Cleanup Program (VCP) which was codified in 1989. The VCP program was substantially amended in 1995 with the adoption of Title XVII of the Illinois Environmental Protection Act. 415 Ill. Comp. Stat. § 5/58 *et seq.* In 1997, the IPCB adopted regulations establishing the Site Remediation Program (SRP) constituting Illinois VCP. Ill. Admin. Code Tit. 35, Part 740. The IPCB regulations also established the Tiered Approach to Corrective Action Objectives (TACO) which set forth Illinois' cleanup standards. Ill. Admin. Code Tit. 35, Part 742.

Illinois VCP allows anyone, including municipalities, developers, and the owners or operators of the sites to be cleaned up, to participate in the program. 415 Ill. Comp. Stat. § 5/58.2. All sites are eligible for participation in the Illinois VCP unless they are expressly excluded. Excluded sites include: sites on the National Priorities List; solid or hazardous waste treatment, storage or disposal sites for which permits are required or those subject to closure under federal or state solid or hazardous waste laws; sites subject to federal or state underground storage tank (UST) laws; and sites where investigation or remedial action has been required by a federal court or EPA order. 415 Ill. Comp. Stat. § 5/58.1(a)(2)(i) to (iv). Some UST sites may be included in the VCP at the discretion of the IEPA. This typically occurs when a developer seeks to address a broader range of issues in addition to a UST release. In these cases, the developer is not eligible for reimbursement from the state UST Fund.

Upon completion of a voluntary cleanup, the IEPA issues a "no further remediation letter" stating that the participant has cleaned the site to state-approved standards. A no further remediation letter constitutes prima facie evidence that the site does not constitute a threat to human health and the environment and does not require further remediation under the Illinois Environmental Protection Act as long as the property continues to be used in accordance with the terms of the letter. 415 Ill. Comp. Stat. § 58.10(a); Ill. Admin. Code Tit. 35, § 740.610(a)(4). Developers must record the no further remediation letter within 45 days of receiving the letter. 415 Ill. Comp. Stat. § 58.8; Ill. Admin. Code Tit. 35, § 740.620.

In Illinois, liability is only imposed for costs incurred by the state or a unit of local government, and then only to the extent allowed under the state's proportionate share liability program. 415 Ill. Comp. Stat. § 5/58.9. Under the proportionate share liability system responsible persons cannot be held liable for more than their proportionate share of contamination and the proportionate share liability rules apply to claims seeking cleanup cost contribution against persons responsible for contamination, and to parties voluntarily seeking to allocate the costs of cleanup among themselves. Ill. Admin. Code Tit. 35, 741, Subparts B & C. These rules, however, do not apply to: cost recovery actions brought by the state for costs incurred before July 1, 1996; sites on the National Priorities List; sites subject to a federal court order or an order issued by EPA; a treatment, storage or disposal site subject to permitting requirements or corrective action requirements; and UST sites. Ill. Admin. Code Tit. 35, 741.105(f).

Indiana

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Purchaser Protections

The Indiana Hazardous Substances Response Trust Fund law, found at IC 13-25-4-1 *et seq.*, is Indiana's counterpart to CERCLA. Parties are liable to the state of Indiana in the same manner and to the same extent as CERCLA if they are liable under Section 107(a) of CERCLA. IC 13-25-4-8(a). Indiana also adopts the exceptions found in Sections 107(b), 107(q) and 107(r) of CERCLA, which includes the innocent purchaser defense. IC 13-25-4-8(b). Exceptions from liability also exist for lenders, secured and unsecured creditors, and fiduciaries, unless they participated in the management of the hazardous substance at the facility. IC 13-25-4-8(c). The liability and exemptions are clarified in the definitions of "lender," "owner," "operator," "participant," "participate in management," and other definitions found in IC 13-11-2, specifically 13-11-2-150 through 13-11-2-151.4.

Voluntary Cleanup

Under Indiana's Voluntary Remediation of Hazardous Substances and Petroleum Act, found at IC 13-25-5-1 *et seq.*, any owner/operator or prospective owner/operator may apply to the Voluntary Remediation Program (VRP) as long as a state or federal enforcement action concerning the proposed cleanup is not pending, a federal grant does not compel the Indiana Department of Environmental Management (IDEM) to take an enforcement action, or conditions do not pose an imminent or substantial threat to human health or the environment. A site where cleanup activity has been completed may be eligible if the applicant demonstrates that the cleanup satisfies the VRP's requirements and current cleanup criteria has been met.

When the IDEM determines that an application is eligible for the program, the applicant must enter into a voluntary remediation agreement with the IDEM and then submit a proposed voluntary remediation work plan, which will be evaluated by the IDEM and published for public comments for at least 30 days before approval or rejection. Once the voluntary remediation work plan is approved, the applicant is charged with implementation of the plan with IDEM oversight. When the IDEM determines that an applicant has successfully completed an approved voluntary remediation work plan, it issues a certificate of completion and the governor's office issues a covenant not to sue for any state law liability for matters addressed in the work plan. IC 13-25-5-16, 13-25-5-18. A person who implements or completes an approved voluntary remediation work plan is not liable for third party claims for contribution concerning matters addressed in the work plan or the certificate of completion. IC 13-25-5-20.

Indiana also has a Compliance and Technical Assistance Program (CTAP), which is statutorily mandated and authorized under Indiana law. IC 13-28-1, 13-28-3, and 13-28-5. CTAP is a non-regulatory program within the IDEM that provides free and confidential compliance assistance to

help Indiana businesses understand and meet their environmental responsibilities. CTAP does not issue fines, fees, or penalties and does not impose any obligations on its customers. CTAP keeps facility and operation information confidential unless a clear and immediate danger to public health or the environment exists or a customer consents to CTAP sharing the information.

Disclosure Requirements

The Indiana Responsible Property Transfer Law (RPTL) requires sellers to provide a form environmental disclosure document to all parties and lenders to a transaction at least 30 days before a covered property is conveyed, mortgaged, or leased on a long-term basis. IC 13-25-3-0.1 *et seq.* The term “covered property” is defined broadly and includes property on which underground storage tanks are located, is listed on the CERCLIS list, or is subject to reporting under Section 213 of the Emergency Planning and Community Right-to-know Act. IC 13-11-2-174. The RPTL If the disclosure document reveals any environmental defect in the property that was not previously known to the other party, the other party is relieved of its obligation to accept or finance the property. IC 13-25-3-3. Within 30 days after the transfer, the disclosure document must be recorded in the county recorder’s office and filed with the IDEM. Indiana real estate laws also requires a seller of residential real estate containing not more than four residential units to disclose contamination caused by the manufacture of a controlled substance on the property that has not been certified as decontaminated by an approved inspector. IC 32-21-5-7(2). It also requires the disclosure of “defects,” which are defined as “conditions that would have a significant adverse effect on the value of the property, that would significantly impair the health or safety of future occupants of the property, or that if not repaired, removed, or replaced would significantly shorten or adversely affect the expected normal life of the premises.” IC 32-21-5-4.

Purchaser Agreements

The IDEM does not use private purchaser agreements similar to those used by the EPA. Instead, IDEM relies on its Voluntary Remediation Program, Voluntary Audit Program, and Brownfields Program. Notably, while Indiana expressly recognizes the rights and effectiveness of private party agreements to indemnify, hold harmless, insure, or subrogate the costs of remediation or liability between themselves, Indiana law expressly provides that such agreements are not effective to transfer the liability to the state with respect to underground storage tanks or petroleum releases. IC 13-23-13-10, IC 13-24-1-5.

Brownfields Program

The Indiana Brownfields Program (IBP) was created by 2005 legislation (Senate Enrolled Act 578) that merged the brownfield financial and technical review programs into one program under the management of the Indiana Finance Authority (IFA). While it is not a regulatory program, the IBP is authorized by a statute that allows for the provision of services and the distribution of financial assistance for communities to assess and cleanup brownfield properties. IC 13-19-5. Indiana defines a brownfield as a property that is “abandoned or inactive, or may not be operated at its appropriate use, and on which expansion, redevelopment, or reuse is complicated because of the presence or potential presence of a hazardous substance, a contaminant, petroleum, or a petroleum product that poses a risk to human health and the environment.” IC 13-11-2-19.3. The

IPB uses Comfort Letters to attempt to eliminate liability concerns for stakeholders at sites whether either an enforcement discretion policy or an exemption from liability based in statute applies. The IPB uses Site Status Letters to address the potential for the IDEM to require cleanup based on comparing site conditions to objective, risk-based screening levels or to site-specific risk-based levels that provide the basis for remediation objectives.

Iowa

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A 1995 Iowa Supreme Court decision arguably provides the strongest protection to buyers of contaminated property in Iowa. The case, *Blue Chip Enterprises v. State of Iowa Department of Natural Resources*, held that prior or current owners of property can only be held liable for contamination on the property to the extent that they actively caused or contributed to the contamination. 528 N.W.2d 619, 624 (Iowa 1995). Thus, innocent purchasers of contaminated property are not liable for contamination or cleanup activities on the property. Innocent owners or buyers of contaminated property may still be held liable for costs of the investigation or assessment activities, but not remediation or monitoring. Although it is not clear whether *Blue Chip* applies to Iowa's leaking underground storage tank (LUST) sites because the laws covering them have a different legislative background than other contaminated sites, according to Iowa Department of Natural Resource's regulators, the Department treats all types of contaminated sites as being covered by *Blue Chip*.

Iowa Land Recycling Program (LRP)

The Iowa Land Recycling Program was enacted in 1997 and is administered by the Iowa Department of Natural Resources (DNR). It is contained in Iowa Code Chapter 455H and 567 Iowa Administrative Code 137 and creates a voluntary cleanup program for contaminated sites. Participation in the LRP program is not limited to contributors of contamination, but is open to innocent purchasers of contaminated property. See Iowa Department of Natural Resources, Iowa Land Recycling Program General Information (1999). The LRP seeks to incentivize better use of contaminated property and an easier transfer of property. To help support these goals, the LRP offers a "no further action" certification after successful completion of the program that bars future DNR action against a property in the program for that property and the targeted contamination. This certificate also protects new purchasers from additional DNR requirements to the extent that they would still be liable under *Blue Chip*. However, there are provisions for reopening a site and even revoking a no further action certificate if DNR determines that the institutional and technological controls in place on the property are ineffective and cannot be or are not corrected. See Iowa Code §§ 455H.301. Additionally, a no further action certification does not protect a buyer of contaminated property for the following: petroleum releases from underground storage tanks subject to regulation under the DNR's LUST program; a release of a hazardous substance occurring at the enrolled site after the issuance of a no further action letter; liability for any condition outside the affected area addressed; and properties on or proposed for inclusion into the National Priorities List. See Iowa Code §§ 455H.303; 455H.307; 455H.308. Most importantly, the LRP offers regulatory closure to contamination on a property that includes liability protection, and is the only method available in Iowa to do so.

Iowa's Code and Immunity from Third-Party Liability

Lastly, Iowa's code provides immunity from third-party liability related to property contaminated by a hazardous substance, hazardous waste, or regulated substance for innocent purchasers or landowners. *See* Iowa Code § 455B.752. The Code's immunity attaches to landowners who: (1) do not knowingly cause or permit a new or additional hazardous substance, hazardous waste, or regulated substance to arise on or from the acquired property that injures a third party or contaminates property owned or leased by a third party; (2) are not potentially responsible parties or affiliated with any potentially responsible party. *See id.*

Kansas

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Kansas Superfund

The Kansas counterpart to CERCLA is found at Kan. Stat. Ann. §§ 65-3452, *et seq.* Like CERCLA, the Kansas Superfund law establishes an environmental response fund that the state may use in carrying out remedial action at polluted sites. The Kansas Department of Health and Environment (KDHE) has broad power under this statute to take all actions necessary to effectuate a cleanup, issue cleanup and abatement orders, and recover cleanup costs from responsible parties. The Kansas Superfund Program provides state oversight of assessment and corrective action at sites on the EPA National Priorities List and sites under the EPA Superfund Removal Program through the Management Assistance Cooperative Agreement (MACA) and funding from EPA. Contaminated sites managed by the KDHE Assessment & Restoration Section are included in a large database called the Identified Sites List (ISL) database. A fact sheet for each ISL site can be found at http://www.kdheks.gov/remedial/isl_disclaimer.html.

Although liability under the Kansas statute attaches to “persons responsible” for the contamination, the term “responsible” is not defined. *See* KAN. STAT. ANN. §§ 65-3453(a)(3), 65-3455. Parties may argue that a greater degree of culpability or fault may be required to establish that a person is “responsible” under the Kansas program than would be necessary under CERCLA’s strict liability scheme. Unlike CERCLA, the Kansas Superfund law apparently does not establish a private right of action for non-governmental cost recovery or contribution. There are no specified landowner liability defenses in the Kansas statute.

Kansas Voluntary Cleanup and Property Redevelopment Program (VCPRP)

Kansas law provides for a voluntary cleanup program for “properties where investigation and remediation may be necessary to protect human health or the environment based upon the current or proposed future use or redevelopment of the property.” Kansas Voluntary Cleanup and Property Redevelopment Act, KAN. STAT. ANN. § 65-34,164 (1997). The Act established the VCPRP administered by KDHE’s Bureau of Environmental Remediation (BER). The VCPRP allows owners, developers, prospective purchasers, and other eligible parties to voluntarily address environmental issues associated with buying, selling, reusing, and/or redeveloping contaminated properties. “Voluntary Cleanup and Property Redevelopment Manual,” Kansas Department of Health and Environment, Bureau of Environmental Remediation (June 30, 2011), available at http://www.kdheks.gov/remedial/vcp/download/VCPRPManual_2011.pdf (VCPRP Guidance). Parties who perform successful cleanups of contaminated properties that are within established criteria will be granted a “No Further Action” determination by KDHE. Federal liability relief is provided through a Memorandum of Agreement between KDHE and EPA. “Superfund Memorandum of Agreement Between the Kansas Department of Health and Environment and the United States Environmental Protection Agency, Region VII, Voluntary

Cleanup and Property Redevelopment Program and State Cooperative Program” (March 2, 2001). The Act was passed in 1997 and implementing regulations were promulgated in 1998. KAN. STAT. ANN. 28-71-1 *et seq.* (1998).

While the Act provides that properties listed on the National Priorities list or proposed for listing are eligible, generally, the VCPRP not apply to NPL listed sites, or property that is the subject of an agreement with a city, state, or federal agency. KAN. STAT. ANN. § 65-34, 164(c)(1), (2)(B) (1997). Properties eligible for the VCPRP are considered low to moderate in priority that generally do not represent an immediate danger to human health or the environment. VCPRP Guidance at 1. Other eligible properties include: facilities which have or should have a permit pursuant to RCRA, oil and gas activities regulated by the Kansas Corporation Commission, property that presents an immediate and significant risk of harm to human health or the environment, or property that KDHE determines to be a substantial threat to public or private drinking water wells. KAN. STAT. ANN. § 65-34, 165 (1997).

KDHE Environmental Use Control (EUC) Program

The Kansas Environmental Use Control Program is the Kansas program that establishes institutional controls to restrict or prohibit human activities and property use in such a way as to prevent or reduce exposure to contamination. Through the Program, an environmental use control is voluntarily applied to a property by the landowner to assure adequate protection of public health and the environment from contamination on the property. The Kansas Environmental Use Control Act became state law on July 1, 2003, with regulations becoming effective on April 7, 2006. KAN. ADMIN. REGS. § 28-73-1, *et seq.* (2006).

The regulations were amended on January 30, 2009 to expand the program by redefining “eligible property” to include properties defined as “hazardous waste facilities” by Kan. Stat. Ann. § 65-3430(f) (1997). KAN. ADMIN. REGS. § 28-73-1(c), (d) (2009). This amendment provides more flexibility for KDHE to address contaminated properties across the State.

EUCs run with the property and are binding on the landowner and any subsequent owners, lessees, and other users of the property. KDHE will either request a one-time payment that will not exceed \$10,000 or a long-term care agreement will be negotiated with the property owner to provide the funding necessary to maintain the EUC. Landowners who want to participate must demonstrate financial assurance. “Procedure for Demonstrating Financial Assurance at Property with Environmental Use Controls,” The Kansas Department of Health and Environment, Bureau of Environmental Remediation (August 31, 2005), available at http://www.kdheks.gov/remedial/vcp/download/euc_financialassurance.pdf.

North Industrial Corridor Site Certificate of Release Program (Wichita, Kansas)

The North Industrial Corridor (NIC) site is an area of mixed industrial, commercial, residential, recreational and agricultural uses extending over more than 4000 acres in north-central Wichita, Kansas. Environmental site assessments led to the Site’s listing on the National Priorities List. In 1995, in order to facilitate redevelopment and to delist the Site from the NPL, the City of Wichita and KDHE finalized a settlement agreement making the City the party responsible for

conducting site-wide Remedial Investigation and Feasibility Study, developing a Remedial Design, and implementing a chosen remedial action.

The agreement also allowed the City to establish and implement a Certificate of Release Program to provide liability relief to innocent landowners. The Program provides that any owner or operator within the Site can obtain a “Certificate of Release” from the City if no hazardous substance or petroleum products were released or disposed of during the party’s ownership of the property or operation of the business. *City of Wichita v. Aero Holdings, Inc.*, 177 F.Supp.2d 1153, 1160 (D. Kan. 2000). The Certificate of Release forecloses the City and KDHE from suit to recover costs related to the Site’s cleanup and provides contribution protection to the holder in suits by others who may ultimately be held liable for cleanup costs. *Id.* at 1161. KDHE is a party to each Certificate of Release by operation of the City/KDHE Settlement Agreement. Applications to participate in the Certificate of Release Program are available at <http://www.wichita.gov/Government/Departments/PWU/EnvironmentDocuments/CERTIFICATE%20AND%20RELEASE%20APPLICATION%20FORM%20NORTH%20INDUSTRIAL%20CORRIDOR.pdf>.

Kentucky

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Kentucky Hazardous Waste Management Fund (KRS 224.46-580)

The Commonwealth of Kentucky established the Hazardous Waste Management Fund (HWMF) in order to run its statewide hazardous waste management programs, including Superfund and its various brownfield programs. All producers of hazardous waste in Kentucky are required to pay annual fees on a tonnage basis, and those fees go into the HWMF. KRS 224.46-580(7)-(8). Any fines assessed for failure to comply with fee requirements also go into the HWMF. *Id.* at 224.46-580(9)-(11).

Kentucky Superfund Law (KRS 224.01-400 et seq.)

Kentucky has its own Superfund Law designed to address sites that are not eligible for the federal Superfund program. The Superfund Law extends liability to (1) “any person possessing or controlling a hazardous substance, pollutant, or contaminant which is released to the environment,” or (2) “any person who caused a release to the environment of a hazardous substance, pollutant, or contaminant.” *Id.* at 224.01-400(18). The Superfund Law incorporates by reference the contribution rights and defenses and limitations to liability set forth in sections 101(35), 101(40), 107(a) to (d), 107(q) and (r), and 113(f) of CERCLA. *Id.* at 224.01-400(25). Kentucky Brownfield Redevelopment Fund and Brownfield Redevelopment Program (KRS 224.01-030, 224.01-415)

The Brownfield Redevelopment Program was designed to make brownfield properties more attractive to subsequent purchasers. Under the Program, if a party buys a property either (1) previously remediated, or (2) in the process of being remediated, and complies with the requirements of the program—including allowance of continued property access for remediation and monitoring, not contributing to any further contamination, and compliance with land use restrictions—that party is released from any further environmental liability related to the site. *Id.* at 224.01-415(2).

Kentucky No Further Remediation Letter Program (KRS 224.01-450 et seq.)

A public entity that undertakes the remediation of a contaminated site is eligible for a No Further Remediation Letter (NFRL). The Commonwealth or any county, city, urban-county government, charter government, or any subdivision of any of those entities is may participate in the NFRL program. *Id.* at 224.01-455(2). The participating public entity submits an application, together with a proposed remediation plan and description of the proposed remediation site for the approval of the Kentucky Department of Environmental Protection (DEP). *Id.* at 224.01-460. Once approved, the public entity undertakes remediation pursuant to its plan, and upon

satisfactory completion of the remediation, the public entity receives its NFRL, which precludes any further environmental liability related to prior releases at the site. *Id.* at 224.01-40(4).

Kentucky Voluntary Environmental Remediation Program (KRS 224.01-510 et seq.)

Like the NFRL, the Kentucky Voluntary Environmental Remediation Program (VERP) is designed to encourage the purchase and voluntary redevelopment of previously contaminated sites. Four types of sites are excluded from the VERP: (1) sites included on the EPA's National Priorities List; (2) hazardous waste treatment and storage facilities; (3) sites subject to state or federal enforcement actions; and (d) sites that present an environmental emergency as defined by the Kentucky Superfund Law (KRS 224.01-400). *Id.* at 224.01-514(2).

A party seeking to participate in the VERP must file an application, and follow a number of administrative steps in the process, including notice to local authorities and the public. *Id.* at 224.01-514. Upon acceptance of its application, the party then must negotiate a Voluntary Remediation Agreed Order (VRAO) with DEP outlining the scope of cleanup and other enumerated responsibilities of the parties. *Id.* at 224.01-518. After the VRAO is executed, the party must submit a site characterization report and corrective action plan, *id.* at 224.01-520, which itself must go through a notice and comment period before becoming final. *Id.* at 224.01-524. Once the approved corrective action plan is fully performed, the party submits a completion report to DEP for review. If DEP determines that no further action is required by the corrective action plan, the DEP issues the party an effective covenant not to sue (CNTS). *Id.* at 224.01-526(3)-(4). The CNTS precludes any further action against the party, with limited exceptions for things like fraud and criminal liability, as well as subsequent state law suits brought by any other party. *Id.* at 224.01-526(6)-(8).

Louisiana

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Voluntary Remediation Program

In 1995, the Louisiana legislature established the Voluntary Remediation Program (VRP) to incent developers to re-develop industrial brownfields by exempting such developers from environmental liability. Louisiana Revised Statute 30:2285.1(A) lays the groundwork, stating: “any person who is not otherwise a responsible person . . . shall not be liable . . . for the discharge or disposal or threatened discharge or disposal of the hazardous substance or waste if the person undertakes and completes a remedial action to remove or remedy discharges or disposals and threatened discharges or disposals of hazardous substances and wastes at an identified area of immovable property in accordance with a voluntary remedial action plan” The plan must be approved by the Louisiana Department of Environmental Quality (LDEQ), following public notice and opportunity for a public hearing, and must be preceded by a proper and thorough site investigation. La. R.S. 30: 2285.1; 2286.1.

Specific regulations in the Louisiana Administrative Code, title 33:VI, govern investigation and remediation of brownfields, and chapter 9 of title 33:VI specifically deals with the implementation of plans subject to the VRP. Chapter 9 also explains the types of properties that cannot be remediated under the VRP; the most significant of these categories is those properties that are already on the EPA’s National Priorities List.

The VRP offers immunity from liability even where only part of the property is remediated, so long as a “partial remedial action plan” is adopted and the proposed reuse of the property does not pose a significant threat to public health, safety, welfare and the environment. La. R.S. 2286.

The person who undertakes the approved remediation program is exempted from liability upon the LDEQ’s certification of completion. La. R.S. 30:2287.1. In addition, once the brownfield is remediated, there are additional people who benefit from the work performed by enjoying the same immunity from liability, including, among others, (1) owners of the identified property, if they were not responsible for any discharge or disposal or threatened discharge or disposal identified in the plan, (2) anyone who acquires or develops the property, and (3) with some exceptions, anyone who provided financing for the implementation or completion of the remediation plan. La. R.S. 30:2288.

The immunity from liability offered by the VRP is limited. As parts (C) and (D) of La. R.S. 30:2285.1 note, the VRP will not exempt anyone from liability “which he would otherwise have under any federal rule or regulation,” or “with respect to damage caused to third parties.” Consequently, federal enforcement actions and private suits for damages are, where applicable,

still a possibility even when the VRP has been fully complied with. In fact, the LDEQ and Region 6 of the EPA entered into a Memorandum of Agreement regarding the VRP, in which the EPA stated it did not plan to take any remedial actions under CERCLA at any site that has been remediated in compliance with the VRP, but still held open the possibility that it would begin enforcement actions under VRP properties under certain circumstances. Memorandum of Agreement between the Louisiana Department of Environmental Quality and Region 6 of the United States Environmental Protection Agency, October 13, 2004, at <http://www.deq.louisiana.gov/portal/Portals/0/RemediationServices/VRP/MOA.pdf>.

In addition, any person who is “otherwise a responsible person under Part I of this Chapter” (i.e., La. R.S. 30:2271 *et seq.*) is by definition excluded from the group of potential VRP beneficiaries. La. R.S. 30:2285.1(A). Under VRP, the landowner or person who merely has an interest in an immovable property is not a “responsible landowner” or a “responsible person” unless that person did some act described in La. R.S. 30:2252.2, which includes being engaged in the business of generating, transporting, or disposing hazardous waste; knowingly permitting someone to use the property for waste disposal or hazardous waste disposal; or knowing that the hazardous substance was on the property at the time the property was acquired. An “innocent” or “unknowing” landowner is not a “responsible” landowner.

Innocent Landowner and Other Defenses to Environmental Liability

The language of Louisiana's innocent landowner defense is similar to that found in the federal Superfund statutes. Per La. R.S. 2204.1, no landowner can be liability for removing – or for the cost of removing hazardous waste “which has been disposed of on his land by the act of a third party without his knowledge or reasonable belief thereof or consent or by a fortuitous event.” However, if the landowner was engaged in the “production, transportation, or disposal of solid or liquid waste with regard to the involvement of any specific property in any such operation,” this exemption from liability is inapplicable. The landowner will have the burden of proof that “by clear and convincing evidence,” he or she is exempt from liability under this section. For example, in *Perfect Equip. Corp. v. Louisiana Recycling, Inc.*, 26,986 (La. App. 2 Cir. 5/10/95), 655 So. 2d 698, 704 (1995), the state’s Second Circuit court of appeal determined that affidavits submitted on behalf of the landowner were not sufficient to meet this standard of proof, and summary judgment on the innocent landowner defense was denied.

La. R.S. 2277(4) provides a lack-of-knowledge-based defense to liability for owners of a pollution source or facility who acquired the property through “a giving in payment,” through a foreclosure proceeding, or by management of an estate or trust, subject to certain exceptions.

Finally, La. R.S. 30:2277 provides a defense for bona fide purchasers, where “liability for a release or threatened release is based solely on a bona fide prospective purchaser being considered to be an owner or operator of a facility, as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.” Bona fide purchaser is defined as it is in CERCLA. La. R.S. 30:2272; 42 U.S.C. 9601(40).

Property owners are otherwise *not* exempt from liability for clean-up of contaminated properties, as La. R.S. 30:2275 makes owners responsible for responding to demands from the LDEQ for

remediation. Moreover, a property owner who took ownership of the property subsequent to the disposal of hazardous waste on the property is liable to the state for the costs of remedial actions taken because of an actual or potential discharge which may present an imminent and substantial endangerment to health or the environment. La.R.S. 30:2276. Owners, however, are only responsible for their proportionate contribution to the remedial costs, and are not included among those parties who may be held liable in solido for the clean up of the site. La. R.S. 30:2276(C), (F).

Maine

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Uncontrolled Hazardous Substance Sites Program

The Maine Uncontrolled Hazardous Substance Sites Program (USP) is the state equivalent to the Federal Superfund Program. The Uncontrolled Hazardous Substance Sites Act (UHSS Act), 38 M.R.S. § 1361, *et seq.*, was enacted “for prompt and effective planning and implementation of plans to abate, clean up or mitigate threats posed or potentially posed by uncontrolled sites.” 38 M.R.S. § 1361. According to the Act’s purpose statement, the Act promotes a “paramount state interest” that “outweighs any burden, economic or otherwise.” *Id.* Under the UHSS Act, a Hazardous Substance is broadly defined to include any substance designated under Section 101 and 102 of CERCLA, toxic pollutants listed under the federal Clean Water Act, hazardous air pollutants listed under the federal Clean Air Act, Section 112, imminently hazardous chemical substances or mixtures under the federal Toxic Substances Control Act and waste oil. The UHSS Act’s definition of a “responsible party” is similar to CERCLA’s definition of covered persons set forth in §107(a) of CERCLA. 38 M.R.S. § 1361.

Innocent Purchaser Defense

The UHSS Act includes an innocent purchaser defense similar to the defense available under CERCLA. A person seeking innocent purchaser status must demonstrate by a preponderance of the evidence that that person exercised due care with respect to the site concerned. They must also show that he or she, at the time that he or she acquired the site, did not know and had no reason to know that any hazardous substance was disposed on, in or at the site. In order to show that he or she “did not know and had no reason to know” of any hazardous substances, he or she must undertake “all appropriate inquiry” as defined in the UHSS Act. 38 M.R.S. § 1367.

In 1993, the Maine Legislature added lender and fiduciary liability protections to the UHSS Act. According to 38 M.R.S. § 342-B(2), a person may not be deemed a responsible party under the UHSS Act if the person is a “fiduciary” or a “lender. . . , who without participating in management of a site, holds indicia of ownership primarily to protect a security interest in the site.” The terms lender and fiduciary are defined by the UHSS Act in section 1317.

Voluntary Response Action Program

Maine established a Voluntary Response Action Program (VRAP) in 1993. Applicants to the VRAP program must investigate and remediate a hazardous site in accordance with a Maine Department of Environmental Protection (MDEP)-approved response action plan in exchange for a “No Action Assurance” letter and a “Certificate of Completion.” 38 M.R.S. § 343-E.

Purchasers of contaminated property as well as other potentially responsible parties may enroll in the VRAP program. Department staff time for review and technical oversight of VRAP activities is assessed an hourly charge for actual direct and indirect costs. Applications to the VRAP program should include a detailed investigation report composed of:

- A determination of the presence or absence of private or public water supplies located within a 2500 feet radius of the subject property;
- A determination of the appropriate classification of the project in the VRAP Public Communication Decision Matrix. This document can be found at: <http://www.maine.gov/dep/spills/vrap/vrappcmatrix.html>;
- A current Phase I environmental site assessment, performed in accordance with the federal “All Appropriate Inquiry” rule or ASTM Standard Practice E1527-05;
- A map of the site location, clearly identifying the site;
- If the site involves petroleum contamination, the following will also be required with the application:
 - Workplans, budgets, and schedule for activities;
 - Actual or estimates of past costs associated with the investigation and cleanup of petroleum discharges at the property;
 - A recommendation for classification of the site following the January 1, 2009, “Procedural Guidelines for Establishing and Implementing Action Levels and Remediation Goals for the Remediation of Oil Contaminated Soil and Ground Water in Maine” available at <http://www.maine.gov/dep/spills/petroleum/index.html#gu>.

The foregoing list of application components and additional application details are found in a February 18, 2009 memorandum from MDEP available at, <http://www.maine.gov/dep/spills/vrap/appsub.html>.

Once the VRAP response action plan is approved, MDEP will issue a No Action Assurance letter. The No Action letter assures VRAP applicants that the MDEP will take no action against the party undertaking a voluntary response action plan. 38 M.R.S. § 343-E(9). Once the VRAP remedial action is completed to MDEP satisfaction, the agency will issue a Certificate of Completion. This certificate ensures the applicant will receive the liability protections enumerated in 38 M.R.S. § 343-E, including that the applicant “may not be deemed a responsible party” and may not be held responsible for third-party contribution claims. 38 M.R.S. § 343-E(1), (5).

Maryland

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“Responsible Persons” and Exclusions

Under Maryland’s state analog to CERCLA, contained in Md. Code Ann., Envir. §§ 7-201 *et seq.*, the definition of a “responsible person” is generally consistent with the amended federal definition set forth under CERCLA §§ 101(35), 107(a), and 107(b). Maryland also contains several statutory exclusions from the definition of “responsible person,” some of which are more specific and arguably broader than under CERCLA. *See* Md. Code Ann. Envir. § 7-201(t)(2) (“responsible person” does not include: a bona fide purchaser who satisfies all appropriate inquiries under CERCLA; a person who acquired contaminated property by inheritance or bequest; and certain secured parties and fiduciaries).

Voluntary Cleanup Program

The Maryland Voluntary Cleanup Program (“VCP”), Md. Code Ann., Envir., §§ 7-501 *et seq.*, was established in 1997 to encourage and accelerate the investigation and cleanup of contaminated properties. In 2004, the Maryland General Assembly passed the Brownfields Redevelopment Reform Act in response, at least in part to the 2003 federal CERCLA amendments. The Act expanded eligibility under the VCP and clarified the VCP’s existing liability protection provisions.

Any property that is “contaminated” or “perceived to be contaminated” by a hazardous substance or oil is eligible for acceptance into the VCP unless (1) it is on the National Priorities List, CERCLA § 105, (2) is subject to a pending state enforcement action, (3) is subject to a state controlled hazardous substances permit, Md. Code Ann., Envir., §§ 7-232 *et seq.*, or (4) was contaminated after October 1, 1997 and the VCP applicant is a “responsible person.” A property is eligible for acceptance into the VCP notwithstanding an active state enforcement action if (1) the VCP applicant is an “inculpable person” and the proposed cleanup plan (called a Response Action Plan or RAP) is “at least as protective of public health and the environment” as the requirements of “any active enforcement action.”

Liability protections under the VCP are distinguished based on the VCP applicant’s status as an “inculpable person” or “responsible person.” An “inculpable person” is a person that (1) has no ownership interest in the property and (2) has not “caused or contributed to contamination” at the property time it submits its application to the VCP. A “responsible person” is defined the same as the definition provided under CERCLA (i.e., the current owner of a contaminated site, the owner/operator of a site at the time of disposal, an arranger or a transporter of a hazardous substance to a site). As such, one of the main benefits of the VCP is that a prospective purchaser or investor can submit an application to obtain “inculpable person” status prior to purchasing the property with little risk.

Upon successful completion of the VCP (i.e., after obtaining a No Further Requirements Determination (NFRD) if a RAP is not required, or obtaining a Certificate of Completion (COC) if a RAP is required), a VCP applicant – whether designated as an inculpable person or responsible person - obtains liability protection from any future state enforcement action and any contribution action brought by a “responsible person.” Liability protections also extend to successors-in-interest of “inculpable persons” that successfully completed the VCP so long as they did not cause or contribute to the contamination at the property. Liability protections do not cover “new” contamination or the “exacerbation” of existing contamination at the property. Pursuant to a Memorandum of Agreement with the EPA, liability protections under the VCP also extend to federal enforcement actions unless EPA determines that the property may present an “imminent and substantial endangerment,” new contamination or information is discovered at the property or the NFRD or COC was obtained through fraud or material misrepresentation.

The main distinction between obtaining “inculpable person” and “responsible person” status under the VCP is the extent to which participation in the Program’s is “voluntary.” In most instances, an “inculpable person” is free to withdraw from the VCP at any time prior to completion. The one caveat is that an inculpable person may still be held liable for “new” contamination or the “exacerbation” of existing contamination at the property. A “responsible person,” on the other hand, is afforded no similar protections. Under the VCP, the state is authorized to “take any enforcement action” against a “responsible person” that withdraws from the Program.

Information about Maryland’s VCP, including links to guidance documents, cleanup standards for soil and groundwater, and a listing of VCP sites can be found at:
http://www.mde.state.md.us/programs/Land/MarylandBrownfieldVCP/MDVCPInformation/Pages/programs/landprograms/errp_brownfields/vcp_info/index.aspx

Massachusetts

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The Massachusetts Superfund Act

Massachusetts General Laws Chapter 21E (Ch. 21E), the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, is the state analogue to CERCLA. Unlike CERCLA, some of Ch. 21E's liability provisions extend to releases of oil and, in addition to owners/operators, arrangers and transporters, the Ch. 21E definition of liable persons includes "any person who caused or is legally responsible for a release or threat of release of oil or hazardous material from a vessel or a site" G.L. c. 21E, § 5(a)(5). Ch. 21E and its principal enabling regulation, the Massachusetts Contingency Plan (MCP), create a privatized cleanup system under which most site cleanup occurs under the direction and supervision of licensed hazardous waste site cleanup professionals known as Licensed Site Professionals or LSPs, with limited involvement by the Massachusetts Department of Environmental Protection (MassDEP). See G.L. c. 21A, §§ 19-19J.

Ch. 21E is the primary statute providing various protections for owners and purchasers of contaminated property, many added by the 1998 enactment of "An Act Relative to Environmental Cleanup and Promoting the Redevelopment of Contaminated Property," popularly known as the "Brownfields Act," which amended Ch. 21E in key respects.

Liability Relief

The Brownfields Act added §§ 5C and 5D, which introduced the status of "eligible person" to designate the owners or operators of a site where there has been a release and permanent cleanup of oil and hazardous material (OHM),¹ but who did not cause or contribute to the release and did not own or operate the site at the time of the release. If they meet certain requirements, such "eligible persons" (as defined in Ch. 21E, § 2) qualify for an exemption from liability to the Commonwealth of Massachusetts or to any person for claims for contribution, assessment and cleanup costs or property damage. There is no relief for personal injury or contract claims or for federal CERCLA-based liability.

In general, the liability exemption is granted to those eligible persons who cooperate with MassDEP; pay response action costs incurred by the Commonwealth (subject to negotiations taking into account future economic benefit and a person's ability to pay); and satisfy, as applicable, the unique conditions described below:

- *Eligible owners and operators.* Where contamination has affected only the soil, the site cleanup is required to extend only to the property line. Where contamination has reached groundwater, the cleanup must address any property to which the groundwater has migrated. A

¹ The statutory liability endpoint includes what is now called "remedy operation status," which means that any substantial hazard to public health or safety has been eliminated but there must be active operation and maintenance to achieve a permanent solution.

person who owns the property before a release is reported to MassDEP has the burden of proof if claiming the exemption. The liability exemption also extends to past owners who are “eligible persons” after a satisfactory cleanup is performed, and to future owners who maintain treatment systems or conditions imposed by an activity and use limitation (the state law term for certain types of institutional controls).

- *Eligible Tenants* (also defined under § 2) are exempt from liability provided that they acquire occupancy or control of the site after the release has been reported to MassDEP and did not cause or contribute to the release, again subject to certain conditions. A tenant which uses OHM similar to those which have been released has the burden to demonstrate that it did not contribute to the release.

- *Downgradient property owners* are exempt from liability where there is a known source of contamination that has migrated to their property in groundwater or surface water, provided they meet the same requirements as eligible tenants. When the source is unknown, a downgradient property owner has the burden to demonstrate that it did not contribute to the release.

The Brownfields Act also creates liability exemptions for certain parties that are often active participants in brownfields redevelopment, such as redevelopment authorities and secured lenders, subject to certain conditions. *See* Ch. 21E, § 2, Definition of Owner/Operator, clauses (c) and (f).

Covenants Not to Sue

The Brownfields Act provided incentives for voluntary cleanups. Under § 3A(j)(2), parties who settle with the Commonwealth through an administrative or judicially-approved settlement may receive an exemption from liability to others for contribution, cost recovery or equitable share for matters addressed in the settlement, provided that the settling party complies with certain notice requirements. Under § 3A(j)(3), the Attorney General may enter into covenants not to sue with current or prospective owners or operators of property if the proposed reuse will contribute to the economic or physical revitalization of the community and meets other specific criteria. The covenant also provides protection against liability, except contract liability, to third parties who had an opportunity to join in the covenant, to the extent and for the property addressed by the covenant. The Attorney General’s office discourages use of the Brownfields covenants for parties who are entitled to the liability protections described above. *See generally* <http://www.mass.gov/ago/doing-business-in-massachusetts/economic-development/brownfields-covenant-program/>; *see also* 940 Code of Massachusetts Regulations 23.00 (Attorney General’s Regulations for Brownfields Covenant Not to Sue Agreements).

Other Relevant Ch. 21E Provisions

Among other defenses for current owners or operators, under the second paragraph of § 5(b), an owner or operator who did not own or operate the site at the time of the release or threat of release in question and did not cause or contribute to such release or threat of release, is not liable to persons subject to liability under § 5(a)(2)-(5) and its liability to the Commonwealth is limited to the value of the property. Ch. 21E, § 5(c)(3), creates a third party defense similar to

CERCLA, § 107(b). In that instance, liability to the Commonwealth is limited to the value of the property following site closure, less the total amount of cleanup costs reasonably paid by such a person. Ch. 21E, § 5(d).

Michigan

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Part 201 of the Natural Resources and Environmental Protection Act (NREPA), found at MCL 324.20101 *et seq.*, is Michigan's counterpart to CERCLA. Part 201 applies only to property that meets the definition of being a "facility," which is defined as any property where soil or groundwater contamination is detected at concentrations above the generic residential cleanup criteria. MCL 324.20101(s). Owners and operators of a Facility are liable under Part 201 if they are responsible for an activity causing a release or a threat of release. MCL 324.20126(1). Part 201 contains an innocent purchaser defense similar to CERCLA; after June 5, 1995, purchasers and incoming operators of contaminated property can protect themselves from liability for past and current contamination existing at the time of purchase by conducting and disclosing to the Michigan Department of Environmental Quality (MDEQ) an administratively adequate Baseline Environmental Assessment (BEA). *Id.* Michigan law explicitly provides that a CERCLA-compliant All Appropriate Inquiry meets the criteria for a BEA. MCL 324.20101(c) and (f). The BEA must be conducted prior to or within 45 days of the date of purchase, occupancy, or foreclosure, and if the property is a Facility, the BEA must be submitted to the MDEQ within six months after purchase, occupancy, or foreclosure. *Id.* The BEA process involves an initial due diligence examination (commonly referred to as a Phase I Environmental Site Assessment, Phase I or ESA) to determine if a property is a Facility. If a property is confirmed to be a Facility, then the sampling must be conducted to determine the type, level, and extent of the contamination (commonly referred to as a Phase II). In recent years, the requirements for a Phase II have been revised to exclude the requirement that the contamination be delineated and reasonably defined so that, in the event of a subsequent release, there is a means of distinguishing the new release from the existing contamination. While this is no longer a requirement, though, many purchasers who anticipate engaging in similar activities as the prior operations (like gas stations) still delineate the existing contamination in the BEA.

Exceptions from Liability

In addition to the BEA process, Part 201 contains several other exceptions from liability. Owners or operators of residential property and residential condominium units are exempt from liability and the need to conduct a BEA if hazardous substance use at the property is consistent with normal residential use. MCL 423.20126(3)(f) and (l). Other persons exempt from liability under Part 201 are defined in MCL 324.20126(2)-(5) and include owners and lessees of severed subsurface mineral rights, persons who did not know and had no reason to know that the property was a Facility, commercial lessees, occupiers and operators of property for the purposes relating to a wind energy conversion system, a person who acquires a Facility as a result of the death of the prior owner or operator, and owners and operators of property onto which contamination has migrated. MCL 324.20126(2)-(5). Michigan also includes protection of lenders, excluding lenders from liability if they did not participate in the management of a Facility or strictly engages in lawful marshaling or liquidation of personal property. MCL

324.20126(4)(c) and (5). Two additional narrow defenses or exceptions to liability exist for acts of God and acts of war. MCL 324.20126(4)(d). Importantly, none of these exceptions exist for any person who is responsible for causing a release or threat of a release.

Cleanup Obligations and Benefits

A party responsible for a release may address it by cleaning up the property to the extent that it is no longer a Facility (where the contamination is below the generic residential cleanup criteria) or can utilize less stringent commercial cleanup criteria combined with land use or resource use restrictions. Once a responsible party addresses the release on a property, cleans up any contamination, and receives an approved “no further action report” from the MDEQ, that person no longer has liability for that release under Part 201. That person can, however, still be liable in the following circumstances: (1) for a release subsequent to the no further action report if the person is otherwise liable for that subsequent release, (2) if certain contamination was not addressed in the no further action report and the person is otherwise liable for that contamination, (3) if the owner or operator originally relies upon land or resource use restrictions and later desires to change those restrictions, (4) if additional monitoring or response activities are identified in the no further action report, and (5) if the remedial actions that were the basis for the no further action report fail to meet the identified performance objectives. MCL 324.20126(5)(e).

Voluntary Cleanup

In general, a liable person may undertake response and cleanup activities without first securing the MDEQ approval. MCL 324.20114(2) and 324.20114a(1). Prior approval is required if the response activity will be done under an administrative order, agreement, or judicial decree that requires prior departmental approval. MCL 324.20114(2). A non-liable person is generally free to voluntarily initiate and self-implement response activities at a Facility. MCL 324.20114a(1). Liable persons are *required* to initiate response activities, but they may still choose to self-implement those activities rather than to secure prior approval from the MDEQ. MCL 324.10114(1)(g) and 324.20114(1).

Continuing Obligations

Regardless of whether property owners are responsible or liable for the contamination under Part 201, they still have due care obligations under Part 201 to ensure that existing contamination does not cause unacceptable risks and to prevent exacerbation of the contamination. MCL 324.20107a. Specifically, section 20107a provides that a person who owns or operates a property he/she knows is a Facility shall comply with the following six requirements: (1) prevent exacerbation – cannot cause the migration of contamination beyond the property boundaries; (2) exercise due care by undertaking response activity necessary to mitigate unacceptable exposure to and allow for the intended use of the Facility in a manner that protects public health and safety; (3) take reasonable precautions against the reasonably foreseeable acts or omissions of a third party and the consequences that foreseeably could result from those acts or omissions; (4) provide reasonable cooperation, assistance, and access to the persons authorized to conduct response activities at the Facility – which may be subject to access described in a voluntary

agreement; (5) comply with land use or resource use restrictions; and (6) not impede the effectiveness or integrity of any land use or resource use restriction employed at the Facility. MCL 324.20107a(1). Owners and operators must document their compliance with all of these obligations in order to maintain their exemption from liability under Part 201. MCL 324.20107a(3) and the Michigan Administrative Code Rule 299.51003(5).

Disclosure Requirements

Michigan law prohibits an owner of real property with actual or constructive knowledge that the property is a Facility from transferring an interest in the property unless the owner provides written notice to the purchaser or transferee that the property is a Facility and discloses the general nature and extent of the release. MCL 324.20116(1). Additionally, a person may not transfer an interest in real property unless the person fully discloses any land-use restrictions that are implemented as part of remedial action. MCL 324.20116(3). To keep any exemption from liability, and owner or operator who conducted a BEA upon acquiring ownership or possession of a Facility must disclose that BEA to any direct purchaser or transferee of the Facility. MCL 324.20126(c)(ii).

Minnesota

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Minnesota Environmental Response and Liabilities Act (MERLA)

MERLA, enacted in 1983, is analogous to CERCLA. Under MERLA, the State of Minnesota provides guidance for the purchase of contaminated property. Liability protection under MERLA is described and defined in Id at § 115B.175 *et seq.* An owner or potential purchaser who was not responsible for or involved with the contaminated property until after the contamination occurred, or was not otherwise responsible, is not liable under MERLA. Under section 115B.175, subd. 1b, protection from liability is covered if the “release or threatened release” is not required to be removed or remediated according to approved voluntary response actions. In accordance with § 115B.175, subd. 6a, Minnesota provides liability protection under MERLA if the owner (responsible parties) voluntarily and cooperatively undertakes and completes response actions. Potential redevelopers of contaminated sites can also obtain support from the State of Minnesota through fee-based programs. The Voluntary Investigation and Cleanup (VIC) Program, Agricultural Voluntary Investigation & Cleanup (AgVIC) Program, and the Petroleum Brownfields Program are designed to assist with technical support, environmental oversight, and liability assurance letters to qualified redevelopers. The most beneficial aspects of participation in this program are that it allows potential purchasers to work cooperatively with the agencies administering the programs, and likely to minimize or even eliminate future liabilities for contaminated properties.

Voluntary Investigation and Cleanup (VIC) Program — The VIC Program replaced the second component (previously referred to as Property Transfer/Technical Assistance) of a two-part Property Transfer Program. The first component no longer exists. The VIC program is administered by remediation staff in the district offices of MPCA. The program is described as an opportunity for interested parties (landowners, lenders, and developers) to receive guidance for site investigations, as well as for MPCA to review the “adequacy and completeness of site investigations” and approve any cleanup plans. Overall, the program equips interested parties with the information needed to make beneficial decisions about the transfer and/or development of a polluted property. A series of guidance documents are available to interested parties to maneuver through the VIC Program. Parties not responsible for contamination of the identified property under MERLA §§ 115B.01 to 115B.18 may be eligible for protection from MERLA liability under the Land Recycling Act, Minn. Stat. § 115B.175, subd. 1. Information related to liability protection as part of the VIC Program is described in Guidance Document #3, Summary of Applicable Laws. An introduction of the VIC Program can be found at <http://www.pca.state.mn.us/index.php/view-document.html?gid=3326>. See also <http://www.pca.state.mn.us> for additional information.

The Agricultural Voluntary Investigation & Cleanup (AgVIC) Program is administered through the Minnesota Department Agriculture (MDA). The AgVIC Program provides services that

facilitate “rapid responses” for “property transfer” and other related activities at sites contaminated with agricultural chemicals. The AgVIC Program can also provide “binding written assurances” from MERLA liabilities. Additional information can be found at: <http://www.mda.state.mn.us/chemicals/spills/incidentresponse/agvic.aspx>

Petroleum Tank Release Cleanup Act (Minn. Stat. § 115C)

A responsible person is defined as a person “responsible for a release from a tank if the person is the owner or operator of the tank at any time during or after the release” Id at §115C. 021, subd. 1. However, an owner of a tank may be released from responsibility of a spill if the owner can show the following (Id at §115C. 021, subd. 2):

- (1) “the tank was in place but the owner did not know or have reason to know of its existence at the time the owner first acquired right, title, or interest in the tank; and
- (2) the owner did not by failure to report under section Minn. Stat. §115.061 or other action significantly contribute to the release after the owner knew or reasonably should have known of the existence of the tank.”

Under this statute, an owner cannot be exempt from liability by simply transferring rights, title, or interest in property (Minn. Stat. §115C. 04, subd. 2).

The voluntary Petroleum Brownfields Program (PBP) focuses on the investigation, cleanup, and closure of petroleum-tank release sites. By providing “technical support” and “liability assurance,” the administrators of the PBP are able to facilitate the transfer and development of a potentially contaminated petroleum site. The PBP also facilitates reimbursement of applicable investigation and cleanup expenses, in collaboration with the interested parties and the Minnesota Department of Commerce. Under the liability assurance component of the PBP, administrators can provide documentation (e.g., letters) releasing interested parties of future responsibilities for the contaminated property, as well as protection for future purchasers of the property. Future purchases are only protected under the PBP liability assurance if it is documented that they are not “responsible [for] or involved with the original release.” Additional information is available at: <http://www.pca.state.mn.us/index.php/view-document.html?gid=3055>; <http://www.pca.state.mn.us/index.php/waste/waste-and-cleanup/cleanup/petroleum-remediation-program/index.html>.

Mississippi

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Mississippi Brownfields Voluntary Cleanup and Redevelopment Act

The Mississippi Brownfields Voluntary Cleanup and Redevelopment Act, found at Mississippi Code, Annotated §§ 49-35-1 *et seq.*, establishes a process in which a buyer can become a “brownfield party” and may enter an agreement with the Mississippi Department of Environmental Quality (MDEQ) to conduct risk-based remediation of contaminated property (the “brownfields agreement site”) and receive immunity for additional cleanup and other costs that are not specified in the “brownfield agreement.” *Id.* at § 49-35-15(1). The liability protection extends also to current and future owners, developers and occupants, successors and lenders. *Id.* at § 49-35-15(2). A “brownfield party” can be anyone who wants to execute and implement a brownfield agreement, including (but not limited to), the record owner of the site, buyers or sellers for developing or redeveloping the site, local governments and others who want to promote the development or redevelopment of the site. *Id.* at § 49-35-5(c). In order for the property to be eligible for becoming a “brownfield agreement site,” the property use has to be limited by actual or perceived contamination, and may be subject to clean up under a state program or CERCLA, but cannot be sites that:

- USEPA has proposed for or placed on the National Priorities List² – however, the site can be a former NPL site that has been certified as cleaned up to the requirements of its Record of Decision (ROD);
- Have an order or enforcement action under CERCLA or RCRA § 3008(h), § 3013(a) or § 7003(c) in effect; or
- Are undergoing corrective action under RCRA § 3004(u), § 3004(v), or § 3008(h).

Id. at § 49-35-5(d).

Liability protection becomes effective when the brownfield agreement is executed unless one of the following occurs:

- The brownfield party provides false information or fails to disclose relevant environmental information
- New information becomes available indicating the existence of previously unknown contamination needing remediation
- Exposure conditions change and the risks to public health increase
- New information becomes available indicating that contaminant poses more risk to the public
- The brownfield party fails to file notices properly and in a timely manner

Id. at §§ 49-35-15(4 & 5).

² Parties interested in remediation of properties on the NPL may receive immunity through CERCLA provisions. *Id.* at §§ 49-35-51 *et seq.*

Upon completion of an agreement, the brownfield party can petition the Mississippi Commission on Environmental Quality (MCEQ) to issue an order and the Executive Director of MDEQ to issue a “no further action letter.” *Id.* at § 49-35-15(6). MCEQ can remove liability protection if the brownfield party or its agents does not comply with the brownfield agreement and can pursue civil penalties under § 49-17-43 of the Mississippi Air and Water Pollution Control Law. *Id.* at § 49-35-13.

Uncontrolled Site Evaluation Trust Fund

The Uncontrolled Site Evaluation Trust Fund, found at § 17-17-54, establishes a process to fund and expedite cleanup of contaminated sites. Motivated parties who are willing to pay for site investigation and cleanup, as well as MDEQ’s oversight costs, can apply to have their site receive expedited review under the Uncontrolled Site Voluntary Evaluation Program (VEP). Modest liability protection is provided under this program, in that project proponents do not have to admit to legal liability for remediation of a site as condition of entering into an agreed order. *See* VEP description on the MDEQ website:

http://www.deq.state.ms.us/MDEQ.nsf/page/GARD_home?OpenDocument

Missouri

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Missouri Superfund Law

The Missouri counterpart to CERCLA, passed in 1983, authorizes the establishment of emergency response activities in the state to respond to hazardous substance releases. *See* MO. REV. STAT. §§ 260.440-260.475 (2000). The law creates the Hazardous Waste Remedial Fund to finance the non-federal share of cleanups and pay for the costs of the investigation and assessment of potential hazardous waste sites. For those sites where there are no potentially responsible parties (PRPs), federal Superfund money finances the work which the Missouri Department of Natural Resources (MoDNR) matches by ten percent. “Missouri Superfund Law,” <http://www.dnr.mo.gov/env/hwp/sfund/sfundlaw.htm>.

The MoDNR created a Registry of Confirmed or Abandoned or Uncontrolled Hazardous Waste Disposal Sites across the state. MO. REV. STAT. § 260.440.1 (2000). The Registry was created to protect property buyers from unknowingly purchasing contaminated property. If a property is on the Registry, the status must be included on the title, and it will appear on a publicly available list. ENVIRONMENTAL ISSUES AND FEDERAL REGULATIONS AFFECTING REAL ESTATE § 1.49 (MoBar 2011). Notice regarding contamination must be provided by the seller to potential buyers “early in the negotiation process,” and it must be clear that the potential buyer may be assuming liability for remedial action. MO. REV. STAT. § 260.465.2 (2000). It is important to note that the Registry is not comprehensive and many eligible sites are not yet listed due to pending or ongoing investigations, cleanup negotiations or appeals. “Missouri Registry Annual Report,” <http://www.dnr.mo.gov/env/hwp/sfund/sfundregistry.htm>. There are no specified landowner liability defenses in the Missouri statute.

Cooperative Program

The Cooperative Program is offered to PRPs who are willing to cooperate with the state toward accomplishing a streamlined cleanup by deferring to state hazardous waste law authority, instead of the traditional Superfund process. Ideally, sites under the Cooperative Program will be cleaned up faster and at a lower cost to all parties. PRPs under this program must comply with strict timelines and penalties or will be deferred to the federal Superfund Program. <http://www.dnr.mo.gov/env/hwp/sfund/cooperative.htm>.

Brownfields/Voluntary Cleanup Program

Missouri owners of contaminated property can elect to participate in the Brownfields/Voluntary Cleanup Program (B/VCP). Applying for the program allows a landowner to obtain a Certificate of Completion or a No Further Action Letter (NFAL) from MoDNR. MO. REV. STAT. § 260.573 (2000). While the NFAL does not give a buyer or seller any release from liability on

environmental issues, it does give parties a reasonable level of confidence that property poses no significant risk for liability in the future.

The B/VCP is administered by the Hazardous Waste Program's Brownfields/Voluntary Cleanup Section which oversees voluntary cleanups for properties which are abandoned or underutilized because of contamination of hazardous substances. *See* MO. REV. STAT. §§ 260.565-260.575, (2000). The program aims to promote the selling, financing, and development of properties which might otherwise be left stagnant. To participate in the program, an applicant submits a form application to MoDNR with a fee. MoDNR must approve or deny the application within 90 days. If the applicant chooses to remediate the property, MoDNR will execute a site-specific oversight agreement for the cleanup.

Under the B/VCP program in Missouri, receipt of a NFAL does not act as a release from liability with respect to claims of third parties or the government, and it does not act as a covenant not to sue between the application and MoDNR. Rather, the applicant has relative assurance that, as long as no new negative environmental conditions are discovered and no subsequent releases of hazardous waste occur at the property, neither MoDNR nor the EPA should bring an action for additional assessment or remediation.

Montana

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Montana Comprehensive Environmental Cleanup and Responsibility Act (CECRA)

CECRA, found at Mont. Ann. Code (M.C.A.) § 75-10-715, includes protections from liability for certain owners of contaminated land. To qualify for innocent landowner status, an owner must (1) acquire the property after the disposal or placement of the hazardous substance and (2) must show that it did not know and had no reason to know of the release or threatened release at the time it acquired the property, that it acquired the property by inheritance or bequest, or that it is a governmental entity acquiring the property by escheat, lien foreclosure or other involuntary transfer or by exercise of eminent domain. M.C.A. § 75-10-715(6)(a)(i)- (iii). In addition, an innocent landowner must show that the release or threatened release was due to an act or omission of a third party other than its employee or agent or an entity whose act or omission occurred in connection with a contractual relationship with it. M.C.A. §§ 75-10-715(6)(b), 75-10-715(5)(c)(i) or (ii).

To establish that it had no reason to know of a release or threatened release, an owner must have undertaken at the time of acquisition “all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.” M.C.A. § 75-10-715(6)(c). Factors relevant to “all appropriate inquiry” include: any specialized knowledge or experience of the acquiring party; the relationship of the purchase price to the property’s value if uncontaminated; commonly known or reasonably ascertainable information about the property; the obviousness of the presence or likely presence of contamination on the property; and the ability to detect contamination by appropriate inspection. M.C.A. § 75-10-715(6)(c).

In addition, exclusions from liability under CECRA may be available to fiduciaries and holders of indicia of title solely to protect a security interest in the property. *See* M.C.A. § 75-10-715(9)-(11). To qualify for those exclusions, the fiduciary or holder of a security interest cannot have engaged in affirmative conduct relating to releases or exercised control over environmental compliance. Exclusion from liability may also be available for an owner who can show that the contamination at issue came to be located on its property solely as a result of subsurface migration in an aquifer from sources outside the property. M.C.A. § 75-10-715(7)(b). An owner who owns or occupies property of 20 acres or less for residential purposes and did not cause, contribute to, or exacerbate the contamination may also be able to obtain an exclusion. M.C.A. § 75-10-715(7)(c). To maintain its eligibility for these exclusions, the owner must cooperate with the Montana Department of Environmental Quality (MDEQ) including granting access and complying with and implementing all required institutional controls. M.C.A. § 75-10-715(7)(b)(iv) and (c)(iv).

Montana Voluntary Cleanup and Redevelopment Act (VCRA)

VCRA, found at M.C.A. § 75-10-730 *et seq.*, amended CECRA to establish a formalized process to permit and encourage voluntary cleanup of facilities where releases or threatened releases of hazardous substances exist. “Any person” (such as facility owners, operators, or prospective purchasers) may submit an application for approval of a voluntary cleanup plan (VCP) to MDEQ. M.C.A. § 75-10-733. Although VCRA provides that certain facilities are not eligible for participation in the cleanup program (e.g., a facility listed or proposed for listing on the National Priorities List (NPL), a facility otherwise regulated under Montana’s Hazardous Waste Act and implementing regulations), MDEQ retains the authority to accept and approve an application for a VCP for any facility (save NPL-listed or eligible facilities) where there has been a release or threatened release that may present an imminent and substantial endangerment to the public health, safety, or welfare. M.C.A. § 75-10-732.

VCRA is a useful tool for owners and potential owners of contaminated sites because VCRA provides interested persons with a method of determining what the cleanup responsibilities will be for reuse or redevelopment of existing facilities. Moreover, VCRA offers incentives to parties voluntarily performing facility cleanup. For example, if an applicant is diligently implementing an approved VCP, MDEQ may not, subject to limited exception, take remedial action against the applicant with regard to those hazardous substances addressed in the VCP. M.C.A. § 75-10-737. In addition, once a VCP has been successfully implemented and all costs paid, the applicant can petition MDEQ for closure and, if all closure conditions have been met, MDEQ will issue a closure letter for the facility or the portion of the facility addressed by the VCP. M.C.A. § 75-10-738. However, MDEQ does not currently have a memorandum of agreement with the U.S. EPA for its voluntary cleanup program and so enforcement at the federal level may still be possible. For additional information, please see MDEQ, “VCRA Application Guide” (2012), available at http://deq.mt.gov/StateSuperfund/VCRA_Guide/VCRAGuide.pdf.

Nebraska

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Voluntary Cleanup Program

Nebraska's Voluntary Cleanup Program was established by the Remedial Action Plan Monitoring Act, Nebraska Revised Statutes §§ 81-15,181 – 81-15,188 and endorsed by the EPA in 2006. *See* Memorandum of Agreement Between the Nebraska Department of Environmental Quality and Region 7 of the Environmental Protection Agency (Nov. 22, 2006). The Program allows property owners and buyers, facility owners, local governments, and any other interested parties who want to use this approach to clean up contaminated properties in exchange for a no further remedial action decision by the Nebraska Department of Environmental Quality (NDEQ). Participants in the Program who have paid all applicable fees, completed their cleanups, and met the provisions and objectives agreed to with NDEQ receive documentation from NDEQ that no further remedial action is required at the site related to the contamination for which the remedial action was conducted. *See* Nebraska Department of Environmental Quality, Introduction to Nebraska's Voluntary Cleanup Program, 1-1 (Oct. 2008).

Several types of contamination and/or sites are excluded from this program, including: sites that are subject to a planned or ongoing CERCLA removal action; sites that are listed or proposed for listing on the National Priorities List; sites that are subject to a unilateral administrative order, court order, administrative order on consent, or consent decree under CERCLA; sites that are subject to a unilateral administrative order, court order, administrative order on consent, consent decree, or permit under the Resource Conservation and Recovery Act (RCRA), Clean Water Act (CWA), Toxic Substances Control Act (TSCA), or Safe Drinking Water Act (SDWA); sites that are subject to corrective action under RCRA 3004(u) or 3008(h) to which a corrective action permit or order has been issued or modified requiring the implementation of corrective measures; land disposal units with closure notification submitted and closure plan or permit; sites that are subject to the jurisdiction, custody, or control of the federal government; sites with polychlorinated biphenyl (PCB) contamination subject to remediation under TSCA; sites which have received assistance from the Leaking Underground Storage Tank Program for a response activity. *See id.* at 1-5.

Orphan Tank Program

Nebraska's Petroleum Products and Hazardous Substances Storage and Handling Act allows buyers of property with leaking underground tanks to receive a release of liability for such tanks as long as the buyers do not actively use, control, or own the tanks or contaminating substance. Neb. Rev. Stat. § 81-15,119. Instead, the burden of the investigation and/or cleanup of the property is placed on the "owner or operator of the tank causing the release." Neb. Rev. Stat. § 81-15,124. If NDEQ requires investigation and/or cleanup of the site and a responsible party cannot be found, then the investigation and/or cleanup may be carried out by the Department

with money from the Petroleum Products and Hazardous Substances Storage and Handling Fund. *See id.* In this situation, the buyer of the property is only required to allow the state or its contractor to have access to the site at reasonable times for remediation. *See id.*

Title 200 Program

Owners or operators of petroleum storage tanks who incur costs during the investigation and remediation of petroleum releases may be eligible for reimbursement from Nebraska's Petroleum Release Remedial Action Reimbursement Fund. However, the Title 200 Program excludes from the definition of "owner" any "person who, without participating in the management of a tank and who otherwise is not engaged in petroleum production, refining and marketing . . . Acquires ownership of a tank or the property on or within which a tank is or was located." 200 Neb. Admin. Code 007.03. Accordingly, innocent purchasers of contaminated property with petroleum storage tanks will likely not be "owners" of petroleum storage tanks under Title 200, unless the purchaser somehow actively manages or otherwise utilizes the tanks.

Nevada

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Innocent Purchaser and Bona Fide Prospective Purchaser Protections

Nevada provides certain persons immunity from liability for response actions and cleanup at real property where a hazardous substance has been or may have been released, even if those persons are not participants in the voluntary cleanup program described below. Nev. Rev. Stat. (N.R.S.) § 459.930(1). Specifically, bona fide prospective purchasers and innocent landowners, as those terms are understood under CERCLA, who own real property that is contiguous to or otherwise similarly situated with respect to and is or may be contaminated by a release or threatened release of a hazardous substance from other real property are immune from liability, provided that they meet the requirements of CERCLA § 107(q)(1).

Note that innocent landowners and bona fide prospective purchasers are required to report: any CERCLA hazardous substances above reporting thresholds found on the property; petroleum products of such type and in such amount as may require reporting to the Nevada Division of Environmental Protection (NDEP); and any response or cleanup action that has been performed with respect to those substances at the affected property. N.R.S. § 459.930(2). In addition, if there are costs relating to a response action or cleanup that are incurred and unrecovered by the State of Nevada with respect to real property for which a bona fide prospective purchaser of the real property is not liable, the State of Nevada has a lien against that real property and may, with respect to those incurred and unrecovered costs and by agreement with the bona fide prospective purchaser of the real property, obtain from that bona fide prospective purchaser: a lien on any other real property owned by the bona fide prospective purchaser; or another form of assurance or payment that is satisfactory to NDEP. N.R.S. § 459.930(4).

Nevada Voluntary Cleanup Program (VCP or Program)

In 1999, Nevada established the VCP, also known as the “Program for Voluntary Cleanup of Hazardous Substances and Relief from Liability.” N.R.S. § 459.610 *et seq.* The VCP provides relief from liability to persons who undertake cleanups of contaminated properties under the oversight of NDEP.

The VCP permits any responsible party, or a prospective purchaser of an eligible property, to apply to participate in the Program. N.R.S. § 459.634. A “responsible party” is “a current or former owner or operator of a site or facility who caused or contributed to the release of a hazardous substance at the site or facility [or] a generator or transporter of a hazardous substance who caused or contributed to the release of the hazardous substance at a site or facility.” N.R.S. § 459.630. Generally, eligible properties are real property holdings located in Nevada, but do not include, for example, properties listed or proposed/eligible for listing on the National Priorities List or properties owned, managed, or controlled by a person or governmental entity

subject to a pending investigation or ongoing enforcement action by NDEP or under the federal Resource Conservation and Recovery Act. N.R.S. § 459.618.

The State of Nevada has established cleanup requirements for contaminated soil and groundwater. To obtain a no further action assurance under the VCP (e.g., a certificate of completion from NDEP), the owners or prospective purchasers of the property must remediate the property to those standards. The holder of a certificate of completion is not considered to be a responsible party with respect to releases addressed by the certificate that occurred on the property before the certificate was issued. However, the certificate of completion does not provide the owner or prospective purchaser of the property any legal relief from liability regarding site conditions discovered after the certificate is issued. N.R.S. § 459.640.

The relief from liability described above extends to future purchasers or lessees of the property or, subject to limited exception, to any person who acquires, merges with, or purchases substantially all of the assets of the holder of the certificate. N.R.S. § 459.644(1). Such relief continues even if the original holder is later found not to be released from liability (e.g., because the original holder obtained the certificate through fraud), provided that: (1) the subsequent owner or lessee purchased or leased the property in good faith for its fair market value; and (2) the actions of the original holder of the certificate cannot be attributed to the subsequent owner or lessee under another provision of law. N.R.S. § 459.644(2). Notably, if the original holder of a certificate of completion is a prospective purchaser, the relief from liability can extend to the seller of the property if certain statutory criteria are met. N.R.S. § 459.644(3).

New Hampshire

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Hazardous Waste Cleanup Fund (HWCF)

New Hampshire's Hazardous Waste Cleanup Fund, established by N.H. Rev. Stat. Ann. 147-B:1 *et seq.*, establishes the process by which the state Department of Environmental Services (DES) manages and acquires funds for cleanup of contaminated property. Parties are subject to strict liability for investigation and remediation costs incurred by DES if they: own or operate the facility; owned or operated a facility at the time of disposal; arranged for treatment or disposal; or accepted material for treatment or disposal. N.H. Rev. Stat. Ann. 147-B:10, I. While the categories of liable parties closely follow those in CERCLA, the wording used to define them differs slightly.

Exemptions from strict liability are analogous to those found in CERCLA. Specifically, strict liability does not attach where an otherwise potentially liable party can show that the contamination was caused by an act of God; an act of war; or an act or omission of a third party not an employee, agent or independent contractor of the defendant. N.H. Rev. Stat. Ann. 147-B:10-a, I. In order to use the third party defense, the defendant must establish by a preponderance of the evidence that he exercised due care with respect to the hazardous substance concerned and that he took precautions against foreseeable acts or omissions of third parties. N.H. Rev. Stat. Ann. 147-B:10-a, I(c).

The HWCF also provides an analog to the Innocent Landowner (ILO) defense. An owner or former owner of property shall not be held strictly liable for the treatment or cleanup of hazardous waste or hazardous materials discovered on his property if: he did not cause or materially contribute to the contamination; he reported the existence of the hazardous substance to the appropriate authorities within a reasonable time of discovery; and he "can prove that he had no knowledge or reason to know of the hazardous substance problem prior to his purchase of the property." In order to establish that the defendant had no reason to know, he must "have undertaken, at the time of acquisition, all appropriate inquiry [(AAD)] into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." N.H. Rev. Stat. Ann. 147-B:10-a, II. Owners and former owners are also excused from strict liability if the owner did not cause or materially contribute to the contamination and the contamination migrated onto the property from a source that (at the time of discovery) was offsite. N.H. Rev. Stat. Ann. 147-B:10-a, III.

Brownfields Program

New Hampshire's Brownfields Program, at N.H. Rev. Stat. Ann. 147-F:1 *et seq.* establishes a voluntary cleanup program and liability protections. The program is available to eligible persons at eligible properties. "Eligible person" means a person who either: is not a liable party for

purposes of the HWCF and is either a prospective purchaser of eligible property or holds a mortgage or other security interest in eligible property; or is a current owner of eligible property, whose liability for purposes of the HWCF is based solely on ownership status, and who did not cause or contribute to the contamination of the property. N.H. Rev. Stat. Ann. 147-F:4, I. “Eligible property” is any environmentally contaminated property unless: it is not in compliance with any corrective action order or other compliance order issued by the state or federal government, and the property “will not be brought into substantial compliance as a result of participation in the cleanup program”; or the property is eligible for cost reimbursement under the state petroleum cleanup program. N.H. Rev. Stat. Ann.147-F:4, II.

An eligible person may request the assistance of DES in overseeing the investigation and remediation of an eligible property, and is entitled to the liability protections and a covenant not to sue from the state Department of Justice upon approval of a remedial action plan for the property. N.H. Rev. Stat. Ann.147-F:5, I. Successor owners of eligible property may also receive a covenant not to sue. N.H. Rev. Stat. Ann.147-F:5, II.

Eligible persons receive liability protection during the site investigation phase before the covenant not to sue issues. Site investigation and pre-remedial activities do not trigger strict liability for remediation of pre-existing contamination under various environmental statutes. N.H. Rev. Stat. Ann.147-F:7, I. Eligible persons are not liable for any increased environmental harm caused by site investigation and pre-remedial activities unless attributable to the eligible person's negligent or reckless conduct, or unless the eligible person withdraws from the program without adequately stabilizing the property. N.H. Rev. Stat. Ann.147-F:7, II. An eligible person who has withdrawn from the program is not subject to strict liability as a site owner as long as the site has been adequately stabilized and the eligible person complies with other specified program requirements. N.H. Rev. Stat. Ann.147-F:7, III.

The covenant not to sue is voidable if the holder: (1) engages in activities at the property that are inconsistent or interfere with the approved remedial action plan; (2) withdraws from the program before completion of the remedial action plan and fails to stabilize the property; (3) violates any use restrictions imposed on the property; or (4) fails to comply with program requirements. The holder of the covenant is given a reasonable opportunity to cure noncompliance after notice by the department, but remains liable for any “ increased harm to human health and the environment caused by the noncompliance.” If the holder engages in a knowing violation of any use restriction the covenant shall be void without the opportunity to cure. Further, the covenant shall be void if it was obtained through fraud or misrepresentation. N.H. Rev. Stat. Ann. 147-F:6, III.

See also DES, Environmental Fact Sheet: New Hampshire’s Brownfields Covenant Program (2008) available at:

<http://des.nh.gov/organization/commissioner/pip/factsheets/rem/documents/rem-8.pdf>.

New Jersey

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New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.*, (Spill Act)

The Spill Act is New Jersey's equivalent of CERCLA. The Spill Act imposes liability on any person that discharges a hazardous substance or is in any way responsible for the discharge of a hazardous substance. N.J.S.A. 58:10-23.11f(b). An owner of property where there is a discharge of a hazardous substance is also liable under the Act. New Jersey courts, however, will not impose Spill Act liability on an owner who discovers contamination that results from the passive migration of hazardous substances already located in the soil or groundwater. *Atlantic City Utilities Authority v. Hunt*, 210 N.J. Super. 76 (App. Div. 1986). In addition, the Spill Act contains an "innocent purchaser" defense that provides protections for purchasers of contaminated property. To obtain protection under this defense, a purchaser must undertake "all appropriate inquiry" at the time of acquisition. For purchases occurring after 1993, this includes conducting a Preliminary Assessment, and, if warranted, a Site Investigation. If contamination is found, the purchaser must either conduct the cleanup prior to purchase or rely upon a valid Remedial Action Workplan and continued compliance with that Workplan. N.J.S.A. 58:10-23.11g.d.(2). For purchases prior to 1993, a purchaser must have conducted an inquiry based upon "generally accepted good and customary standards" at the time of purchase. N.J.S.A. 58:10-23.11g.d.(5).

Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1.3 (Brownfields Act)

The Brownfields Act is comprehensive legislation implemented to address commercial and industrial sites in New Jersey that are contaminated and are either underutilized or have been abandoned. The Act sets forth the degree of remediation required and provides financial incentives for addressing hazardous substances at these sites.

Site Remediation Reform Act, N.J.S.A. 58:10C-1 *et seq.* (SRRA)

The SRRA was adopted in New Jersey in 2009 and made sweeping changes to the way contaminated sites are remediated in New Jersey. As a result of the SRRA, all remediation of contaminated property in the New Jersey, no matter when the remediation was initiated, must proceed under the supervision of a Licensed Site Remediation Professional (LSRP) and the approval of the New Jersey Department of Environmental Protection (NJDEP) is no longer necessary. At the same time, the SRRA eliminated the voluntary cleanup program in New Jersey that was administered under a Memorandum of Agreement. Any remediation conducted in New Jersey must follow the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-5.3, and an LSRP is required to submit certain final documents to the NJDEP, which will be reviewed upon receipt. Once a remediation is complete, the LSRP issues a Response Action Outcome (RAO) for the property that certifies the site was cleaned up in accordance with New Jersey remediation

standards. N.J.A.C. 7:26C-6. The RAO is the equivalent of the No Further Action Letter that was issued by the NJDEP prior to the advent of the LSRP program. The RAO is limited by the scope of the remediation. A covenant not to sue accompanies an RAO without prejudice to any rights the NJDEP may have against a responsible party for Natural Resource Damages or any litigation or claim pending as of the date of the RAO. N.J.A.C. 7:26C-6.5. The NJDEP has the right to audit an RAO within three years of its issuance and may rescind an RAO if circumstances warrant. Moreover, the LSRP may be required to rescind its own RAO if it is found to no longer be protective of human health and the environment. N.J.A.C. 7:26C-6.4.

As part of its implementation, the SRRA set forth mandatory deadlines for completing key phases of remediation with a goal of accelerating the pace of cleanups in New Jersey. These deadlines are set forth in the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C-3.3. A fast approaching deadline is May 7, 2014. Before that date, a Remedial Investigation must be completed for any site where remedial requirements were triggered prior to May 7, 1999. If any of the mandatory deadlines are not met, the remediation is placed into direct oversight by the NJDEP, negating an entity's ability to control the remedial activities.

The SRRA amended the Brownfields Act, N.J.S.A. 58:10B-1.3, setting forth an affirmative obligation for any person "that has discharged a hazardous substance" to remediate that substance. The SRRA also amended the Brownfields Act, N.J.S.A. 58:10B-12(g)(5), to establish that an owner of real property is not obligated to remediate contamination when the contamination is coming onto its property from adjoining property owned or operated by another.

Pursuant to the SRRA, the NJDEP has set forth presumptive remedies for residential development, schools and childcare facilities. These remedies ensure that any such remediation is protective of human health and the environment. The NJDEP has also issued guidance documents to be used by the LSRPs when remediating sites. See www.nj.gov/dep/srp/guidance. The regulations implementing the SRRA have shifted many of the prescriptive requirements found in the Technical Regulations into guidance documents. The SRRA allows LSRPs to use professional judgment to apply technical requirements and guidance. The move of prescriptive requirements into guidance was in anticipation of the exercise of this professional judgment. An LSRPs use of guidance and professional judgment, however, should be sufficiently documented.

If the remediation requires engineering or institutional controls, the responsible party will have to obtain a Remedial Action Permit to ensure that such controls are being maintained and continue to adequately protect human health and the environment. N.J.A.C. 7:26C-7.1. As part of the Permit, parties are required to establish a financial assurance in an amount equal to or greater than the full cost to operate, maintain and inspect the engineering controls over the life of the permit.

Industrial Site Recovery Act, N.J.S.A. 13:1K et seq. (ISRA)

ISRA requires owners of industrial establishments to investigate and remediate sites prior to the transfer of ownership or when operations cease. See N.J.A.C. 7:26B-1 et seq. To comply with

ISRA, the LSRP must issue an RAO or certify and submit to the NJDEP a Remedial Action Workplan for the site, approval of this Workplan by the NJDEP is not required. A facility owner may transfer the facility prior to completion of all applicable requirements of ISRA if it enters into a Remediation Certification setting forth an estimate by an LSRP of the cost of the remediation, certifying that it will remediate the property, and establishing a remediation funding source in the amount of the estimated cost of the remediation. N.J.A.C. 7:26B-3.3(c).

New Mexico

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New Mexico Voluntary Remediation Act (VRA)

The VRA, found at New Mex. Stat. Ann. (N.M.S.A.) §§ 74-4G-1 *et seq.*, provides incentives for the voluntary assessment and remediation of contaminated property, with state oversight by the New Mexico Environment Department (NMED), by removing future liability of lenders and landowners. Specifically, the VRA authorizes NMED's Voluntary Remediation Program (VRP), which is available to those persons who own the contaminated site, operate a facility located on the site, are prospective owners of the site, or are prospective operators of a facility at the site. N.M.S.A. § 74-4G-5(A). Certain applications for voluntary remediation agreements will not be accepted by the VRP, including, but not limited to, situations where NMED determines that the contaminants at the site constitute an unreasonable threat to human health or the environment; an administrative or judicial state or federal enforcement action is pending that concerns remediation of the contamination described in the VRP application; or an agreement between NMED and EPA precludes the site from being addressed under the VRA, etc. N.M.S.A. § 74-4G-5(D).

Benefits of entry into the VRP are that VRP participants receive an enforcement shield from NMED while in the program and, once remediation has been completed in accordance with the approved remediation agreement, a certificate of completion to show that the site meets applicable standards. N.M.S.A. §§ 74-4G-6(C), -7. Further, prospective purchasers, new property owners, or operators who did not contribute to the contamination at the site can receive a Covenant Not to Sue from NMED upon successful completion of their voluntary remediation agreement, such covenant releasing them from any direct liability, including future liability for claims based upon the contamination covered by the remediation agreement and over which NMED has authority. N.M.S.A. § 74-4G-8(A). Covenants Not to Sue are transferable with title to the site. N.M.S.A. § 74-4G-8(B). Although these covenants would not necessarily release a VRP participant from liability to the federal government for claims based on federal law, EPA and NMED have agreed, pursuant to a Memorandum of Agreement related to the VRA, that EPA will not generally bring a federal response action against a site or affected portion of a site that has been remediated in accordance with the VRA (*i.e.*, has received a certificate of completion from NMED).

Innocent Landowner and Bona Fide Prospective Purchaser Protections

NMED provides for innocent purchaser and bona fide prospective purchaser protections as part of the VRP by requiring that program applicants conduct a Phase I Environmental Site Assessment (Phase I ESA) on property being entered into the program. According to NMED, the Phase I ESA (required per New Mex. Admin. Code § 20.6.3.200(B)(3)) can be used to confirm that the use(s) of the property is consistent with the good commercial or customary

practice requirement needed for the “innocent landowner” defense under CERCLA. In addition, because the Phase I ESA can be used to meet the “all appropriate inquiry” requirement, the Phase I ESA submitted for a program property can be used to establish the “bona fide prospective purchaser” defense under CERCLA. Note that these defenses have not been codified in New Mexico statutes and rules; however, NMED’s guidance document related to entry of a property into the VRP references both defenses. *See* NMED, Phase I Environmental Site Assessment Buyer’s Guidance, available at <http://www.nmenv.state.nm.us/gwb/NMED-GWQB-PhaseIESABuyersGuide.htm>.

New York

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Title 13 of Environmental Conservation Law (ECL) Article 27 (State Superfund Law)

Referred to as the State Superfund Law, New York State's "Inactive Hazardous Waste Disposal Sites, found at the Environmental Conservation Law (ECL) Article 27, Title 13 *et seq.* preceded the enactment of CERCLA in 1979 then titled the Abandoned Sites Act. However, it was not until the 2003 amendments to the State Superfund where the primary CERCLA, as amended, liability exemptions and defenses, including what is referred to as the "innocent purchaser" protection were incorporated into the State Superfund Law. The 2003 amendments also established a statutory Brownfield Cleanup Program (BCP), found at ECL Article 27, Title 14 *et seq.*, which provides for a Voluntary Cleanup Program (VCP).

Affirmative Defenses, NY CLS ECL § 27-1323

Under the State Superfund Law, affirmative defenses mirror those defenses available under CERCLA -- acts of God, acts of war, and the "innocent purchaser." The "innocent purchaser" protections are defined as acts or omissions of a third party if the "innocent purchaser" can establish it carried out all appropriate inquires and took reasonable steps to prevent ongoing or future release and protected human, environmental and natural resource from exposure to contamination.

Title 14 Of ECL Article 27 (The BCP Act)

Voluntary Cleanup Program

The 2003 amendments of the State's Superfund Law codified the New York State Department of Environmental Protection (NYSDEC) administratively-created VCP under the BCP Act. Eligible sites including those on that State Inactive Hazardous Waste Site List, the Federal Superfund sites -- the National Priorities List sites, or sites subject to enforcement action, participate in the Program by application and NYSDEC acceptance.

New York's VCP distinguishes between a "Volunteer" who did not contribute or cause the contamination but is a subsequent owner and responsible parties referred to as "Participants." NY CLS ECL § 27-1405(1)(b). A Volunteer must have carried out the same inquires and taken the same reasonable steps as required for affirmative defenses detailed in NY CLS ECL § 27-1323. *Id.*

Participants are required to both investigate and clean up all contamination on the site. In addition, participants are responsible for cleaning up contamination that has emanated from the site. In contrast, Volunteers are not responsible for the cleanup of contamination that has

emanated from the site, but must evaluate such contamination. Notably, the Volunteer need only perform a quantitative exposure assessment rather than a full investigation and characterization of the nature and extent of emanating contamination. NY CLS ECL § 27-1411(1). If the off-site contamination emanating from the subject property poses a significant threat, the NYSDEC will bring an enforcement action against potentially responsible parties. NY CLS ECL § 27-1411(5); *see also* NY CLS ECL § 15-3109 (discussing offsite groundwater remediation). Where an enforcement action cannot be brought, the NYSDEC will take on the remediation using moneys from the hazardous waste remedial fund or the New York environmental protection and spill compensation fund. NY CLS ECL § 27-1411(5)

If a certificate of completion is issued for a brownfield site neither the volunteer nor participant shall be liable to the state for any cause of action arising from the contamination on the site or emanating therefrom that was the subject of the cleanup agreement. NY CLS ECL § 27-1421(1). However, liability limitation is not extended to additional required investigation or remediation under specific circumstances including a change of use after issuance of the certificate of completion. This exclusion of the change of use from liability limitation is only applicable to Participants while Volunteers who have achieved the unrestricted use criteria are not subject to this exclusion. NY CLS ECL § 27-1421(2).

Lastly, Volunteers who have entered into a brownfield site cleanup agreement are exempt in whole or in part from interest, penalties or other tax charges, by any tax district, on the subject property.

The New York Navigation Law Article 12 (Oil Spill Act)

The comprehensive amendments in 2003 also applied to the Oil Spill Act to broaden available defenses against claims for discharges of petroleum to include a third party defense. The Oil Spill Law stipulates liability and cleanup of oils spills on both land and water within New York State. Statutory defenses provided in the Oil Spill act are similar to that of the State Superfund law, which in turn largely tracks the CERCLA defenses. Specifically, the third party defense applies if a defendant proves it “exercised due care with respect to the petroleum concerned,” and “took precautions against the acts or omissions of any such third party and the consequences of those acts or omissions.” NY CLS Nav §181(4).

The New York City Local Brownfield Cleanup Program (LBCP)

Mirroring the State Superfund Law, the LBCP distinguishes between Participants and Volunteers, 43 RCNY 1402, and states that “[r]esponsibility for off-site contamination is determined by the enrollee’s status.” 43 RCNY 1407.

North Carolina

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North Carolina Brownfields Program

Set forth at N.C.G.S. §§ 130A-310.30 – 130A-310.40, the Brownfields Property Reuse Act of 1997 establishes the process by which a "prospective developer" can enter into a brownfields agreement with the state agency to address, as set forth in the agreement, the contamination associated with property. In return, the prospective developer is provided a covenant not to sue and contribution protection "for remediation of areas of contaminants identified in the brownfields agreement." §§130A-310.33(a) and 130A-310.37(a)(5)-(6). The liability protections extend to future owners, developers, occupants, successors, assigns, or lenders to the extent they are not excluded as potentially responsible. Of note, among other limits on the liability protections provided under the act, (1) if one violates the land use restrictions under a brownfields agreement, he/she loses the protections and is responsible for remediation to current standards; (2) if new information indicates the existence of additional contamination, the brownfields agreement must be amended to address such (otherwise the liability protections are no longer available); (3) if the level of risk to public health or the environment becomes unacceptable due to changes in exposure conditions, the agency can seek additional remedial work; and (4) if the agency obtains new information about a contaminant that raises the risk to public health or the environment beyond "an acceptable range and in a manner or to a degree not anticipated," the agency can seek additional remedial work. § 130A-310.33(c).

To qualify under the North Carolina Brownfields Program, one must satisfy the definition of a "prospective developer," which is defined as "any person with a bona fide, demonstrable desire to either buy or sell a brownfields property for the purpose of developing or redeveloping that brownfields property and who did not cause or contribute to the contamination at the brownfields property." § 130A-310.31(b)(10). The prospective developer (and any parent, subsidiary, or other affiliate) must also be in substantial compliance with any other brownfields agreement or similar agreement and federal and state laws, regulations, and rules governing protection of the environment. § 130A-310.32(a). Since the language is not limited to purchasers, a current owner that satisfies the above requirements can also seek to enter into a brownfields agreement.

As for the property, qualifying properties cannot be on the National Priorities List under CERCLA and are limited to those defined as a brownfields property or site. §§ 130A-310.31(b)(3) and 130A-310.37(c). Under the definition for brownfields property, the North Carolina Brownfields Program is limited to those situations involving abandoned, idled, or underused property at which expansion or redevelopment is hindered by actual environmental contamination or the possibility of such and that is or may be subject to remediation under any state remedial program. Therefore, if one is simply attempting to clean up the property and/or continue the current operations, the brownfields program would not be available. *See* § 130A-310.37(c). Further, properties where the *only* contamination is from a UST system are not

eligible (but can be addressed under the program if other contaminants in addition to those from the UST system). § 130A-310.31(b)(3).

The provisions for a brownfields agreement are set forth in § 130A-310.32, and, although they do not specifically require that one satisfy the all appropriate inquiry standards under CERCLA, they do require specific information concerning the location and nature of the contamination. Further, the brownfields agreement shall, among other requirements, set forth the scope of work for the investigation/cleanup, the necessary access for both the party conducting the investigation/cleanup work and for the agency, and deed restrictions or other institutional controls. The act also provides for recovery of oversight costs by the agency, and the terms of the contract are subject to public participation. §§ 130A-310.34 and 130A-310.39.

North Carolina Inactive Hazardous Sites Program (Also Referenced as the Voluntary Cleanup Program)

For purchasers or properties that do not qualify, the available mechanism for cleanup is the North Carolina Inactive Hazardous Sites Program under the Inactive Hazardous Sites Response Act of 1987. N.C.G.S. §§ 130A-310 through 130A-310.13. Whereas the North Carolina Brownfields Program is primarily a redevelopment mechanism, the North Carolina Inactive Hazardous Sites Program is fundamentally a cleanup program. This program, however, does not provide the liability protections available under the North Carolina Brownfields Program. The only limit on exposure provided is a \$5 million limit on what one can be required to pay in implementing the voluntary remedial action (not including development of the remedial action) at a single disposal site. § 130A-310.9.

The Inactive Hazardous Sites Response Act also sets forth the defenses to liability generally available to a purchaser of contaminated property. Specifically, the act excludes from liability (1) innocent landowners who are a "bona fide purchase of the inactive hazardous substance or waste disposal site without knowledge or without a reasonable basis for knowing that hazardous substance or waste disposal had occurred"; (2) those whose ownership is "based on or derived from" a security interest in the property; and (3) the CERCLA innocent landowner defense – i.e. where the contamination was caused solely by "[a]n intentional act or omission of a third party (but this defense shall not be available if the act or omission is that of an employee or agent of the defendant, or if the act or omission occurs in connection with a contractual relationship with the defendant)." § 130A-310.7

North Dakota

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Limited Liability for Subsequent Owners of Property

North Dakota provides subsequent owners of contaminated property with relief from liability for existing hazardous waste or substances on the property if certain criteria are met. Specifically, if a person acquires (including through inheritance/bequest) property after the disposal/placement of the contaminants on that property and, at the time, that person “did not know and had no reason to know” of such contamination, then that person will not be liable for any hazardous waste or substance on the property. N.D. Cen. Code (N.D.C.) § 23-20.3-11(1). To establish that the subsequent owner had no reason to know of the contamination, that person must have undertaken all appropriate inquiry into the previous ownership and uses of the property prior to acquisition of the same. N.D.C. § 23-20.3-11(2). A rebuttable presumption that all appropriate inquiry has been made can be established by showing that, immediately before or at the time of acquisition, the subsequent owner performed an investigation of the property, conducted by an environmental professional, to determine or discover the presence of contaminants. N.D.C. § 23-20.3-11(3).

North Dakota Regulatory Assurance Process

North Dakota does not have a formalized voluntary cleanup process. However, the North Dakota Century Code establishes a process for working with the North Dakota Department of Health (NDDOH) to qualify for a site-specific responsibility exemption (e.g., a no further action letter) or a letter of regulatory assurance. N.D.C. § 23-20.3-03.1.

“Regulatory assurance” means an assurance issued by NDDOH concerning enforcement relating to existing contamination based on compliance with stated conditions. A regulatory assurance is not voidable. A “responsibility exemption” means a partial or complete exemption from responsibility for remediation or further action on a contaminated property based on compliance with the conditions identified in a letter of no further remediation or a letter of no further action. A responsibility exemption is voidable only against a person that violates an institutional control or a condition of the letter or that is responsible for a new or additional release on the property. Generally, a responsible party who caused the contamination will not be eligible for a responsibility exemption; however, a subsequent property owner would be eligible to apply.

NDDOH issues such regulatory assurance/responsibility exemption letters in order to provide owners, operators, and lenders with liability protection and exemptions from responsibility for environmental remediation under applicable North Dakota law. An application for such letters must be made by the business entity or individual that owns or is purchasing the property and whose name will be on the deed as the legal owner. For additional information on this process, please see NDDOH’s guidance document entitled “Qualification for Responsibility

Exemption/Regulatory Assurance Pursuant to North Dakota Century Code,” available at [http://www.ndhealth.gov/wm/Publications/QualificationForResponsibilityExemptionRegulatory Assurance.pdf](http://www.ndhealth.gov/wm/Publications/QualificationForResponsibilityExemptionRegulatoryAssurance.pdf).

Ohio

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Ohio's Voluntary Action Program (VAP) provides state law protection for purchasers of contaminated property. The VAP provides protection from state enforcement actions and, depending on the track followed, federal enforcement actions. However, the VAP does not provide protection from third-party lawsuits arising from the contamination. Ohio's VAP was created in 1994 to give entities (i.e., volunteers) a way to investigate possible environmental contamination, clean it up if necessary, and receive a promise that no more cleanup is needed. Two VAP tracks are available: 1) the Classic VAP Track, and 2) the Resource Conservation and Recovery Act (RCRA) and Memorandum of Agreement (MOA) VAP Track.

Classic VAP Track

The Classic VAP Track is governed by specific standards developed by Ohio EPA (ORC § 3746 and OAC § 3745-300). When cleanup requirements are met, a no-further-action (NFA) letter is prepared by a certified professional with elements outlined in ORC § 3746.11 and OAC § 3745-300-13. If the NFA letter is acceptable, the director of Ohio EPA issues a covenant not to sue (CNS), which protects the property owner or operator and future owners from being legally responsible to the State of Ohio for further investigation and cleanup. This protection applies only when the property is used and maintained in the same manner as when the covenant was issued. Properties that are not eligible for participation in the Classic VAP Track include National Priorities List (NPL) sites; properties subject to federal or state corrective actions, federal enforcement, or an enforcement letter; and underground petroleum storage tank systems.

RCRA and MOA VAP Track

Effective in 2007, the RCRA and VAP MOA Track covers both sites that fall under CERCLA and sites that are subject to RCRA corrective actions. The RCRA and VAP MOA Track contains the same elements and follows the same standards as the Classic VAP Track (ORC § 3746 and OAC § 3745-300). The primary differences between the two tracks are that investigation and cleanup activities of RCRA and MOA VAP Track projects are overseen by Ohio EPA from the beginning of the voluntary action, and there are opportunities for public involvement (e.g., public comment periods, document repository). In addition to an NFA letter and CNS from Ohio EPA, completion of the RCRA and VAP MOA Track provides that U.S. EPA will not seek additional cleanup work for the site.

Oklahoma

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Oklahoma Brownfields Voluntary Redevelopment Act (OBVRA)

The OBVRA, found at Oklahoma Statute Title 27A, § 2-15-101 *et seq.*, establishes a process by which property owners, lenders, lessees, successors, and assigns can limit liability through agreements with the Oklahoma Department of Environmental Quality (ODEQ) to remediate abandoned, idled or underused industrial or commercial property. OKLA. STAT. tit. 27A, §§ 2-15-102, 2-15-104. The OBVRA participant may have been responsible for the pollution, as long as the participant is not under a corrective action order or agreement with the United States Environmental Protection Agency. *Id.* at § 2-15-104(D)(1); *Id.* at § 2-15-108(C)(3). However, only parties that are innocent landowners, contiguous property owners, or bona fide prospective purchasers may apply for Revolving Loan Funds to fund certain brownfield cleanup activities. OKLA. ADMIN. CODE § 252:221-7-3, 7-6. Prospective participants must submit a proposal to ODEQ that includes a site characterization, current and proposed property uses, risk evaluation, and remediation alternatives. OKLA. STAT. tit. 27A, § 2-15-105(B). If it is willing to accept the proposal, ODEQ may enter into a consent order with the participant. *Id.* at § 2-15-106(C). ODEQ will issue a Certificate of No Action Necessary to participants who do not need to conduct remediation, and a Certificate of Completion to participants who finished required remediation. *Id.* at § 2-15-106(G), (H). Both the Certificate of No Action Necessary and Certificate of Completion protect the participant(s) from administrative action and liability. *Id.*; *Id.* at § 2-15-108. Within 30 days of receipt of the Certificate of No Action Necessary or Certificate of Completion, a land use disclosure must be filed with the county clerk in the county in which the site is located. *Id.* at § 2-15-107(A).

Voluntary Cleanup Program (VCP)

Oklahoma has a voluntary cleanup program that essentially follows an applicable or relevant and appropriate approach (ARAR). The program does not have any specific rules or regulations. ODEQ considers existing state and federal law, regulations, and guidance documents, to determine if they are ARAR. A participant in the Voluntary Cleanup Program may elect to enter the Brownfield Program by notifying the Brownfield Program in writing and meeting the requirements of the OBVRA. OKLA. ADMIN. CODE § 252:221-1-6.

Oregon

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Prospective Purchaser Statute—ORS 465.327

Under this Oregon statute, a prospective purchaser may pursue an administrative agreement or, following public comment, a judicial consent judgment or an administrative consent order. The prospective purchaser agreement must be negotiated and finalized before the property is purchased. Parties must meet all conditions described in this statute including:

- No current liability under ORS 465.255 “for an existing release of hazardous substance at the facility,” ORS 466.640 “for an existing spill or release of oil or hazardous material at a facility that is subject to ORS 465.200 to 465.545,” or 468B.310 “for the prior entry of oil into the waters of the state from a facility that is subject to ORS 465.200 to 465.545 and 468B.300 to 468B.500.”
- Necessity of removal or remedial action to protect human health or the environment.
- Proposed redevelopment or reuse that will not contribute to or exacerbate existing contamination, increase health risks, or interfere with necessary remedial measures.
- A “substantial public benefit will result from the agreement.”

As specified in the statute, the substantial public benefit includes, but is not limited to, several factors, including: “generation of substantial funding or other resources” to facilitate remedial measures, “a commitment to perform substantial remedial measures,” “productive reuse of a vacant or abandoned industrial or commercial facility,” or facility development by a governmental entity or nonprofit organization for an “important public purpose.”

The Oregon Department of Environmental Quality (DEQ) will evaluate the reasonably anticipated future land uses at and in the vicinity of the facility in consultation with local land use planning jurisdictions to determine whether or not to enter into a prospective purchaser agreement. In addition, the agreement will include any provisions that are deemed necessary by DEQ, such as the party’s commitment to meeting the conditions in the statute, performing remedial measures under DEQ oversight, “a waiver by the party of any claim or cause of action against the state of Oregon arising from contamination at the facility existing as of the date of acquisition of ownership or operation of the facility,” a grant of irrevocable right of entry to DEQ and its authorized representative related to the agreement, a “reservation of rights as to an entity not a party to the agreement,” and a legal property description.

DEQ's written release from potential liability is contingent upon the party meeting the obligations in the prospective purchaser agreement, and will be referenced to the time period before the date of acquisition of ownership or operation. However, the party shall bear the burden of proving that any release existed on the property prior to acquisition of ownership or operation. The release from liability will not affect liability for claims on or after the date of acquisition as described in the statute. Further, the release from potential liability is conditional on cooperation with DEQ or others conducting the remedial measures under DEQ oversight, exercising "due care" and taking "reasonable precautions" with respect to any hazardous substance at the facility, and not violating federal, state, or local laws.

Once executed, the prospective purchaser agreement is recorded in real property records at the county where the facility is located. As specified in the statute: "The benefits and burdens of the agreement, including the release from liability, shall run with the land, but the release from liability shall limit or otherwise affect the liability only of persons who are not potentially liable."

Additional information can be found in the statute (ORS 465.327) and in DEQ's Prospective Purchaser Program Guidance published in December 2011 (<http://www.deq.state.or.us/lq/pubs/docs/cu/GuidanceProspectivePurchaserProgram.pdf>). Other information, including example agreements can be found on DEQ's information page for the prospective purchaser agreements (<http://www.deq.state.or.us/lq/cu/ppa.htm>).

Voluntary Cleanup Program

A responsible party may join DEQ's Voluntary Cleanup Program (VCP) and conduct investigation and cleanup independently, which may be completed prior to property sale. When DEQ deems cleanup to be complete, DEQ will issue a no further action (NFA) letter or a conditional NFA as appropriate. Although the NFA does not release an owner or subsequent purchaser from liability, the NFA does document that based on knowledge at that time, cleanup has been completed to DEQ's satisfaction.

Defenses to Environmental Liability

In Oregon State, a purchaser of contaminated property may become liable for cleanup costs, if the contamination was known or should have been known to the party at the time of purchase. It is the purchaser's responsibility to conduct an appropriate environmental assessment. If contamination is discovered in an environmental assessment, the purchaser may become liable for contamination that occurred before the purchase (e.g., if contamination is discovered and no action is taken to address the liability). The purchaser must take steps to evaluate the environmental condition of the property (e.g., "all appropriate inquiry") and to address potential liability such as a prospective purchaser agreement negotiated prior to acquisition. In addition, ORS 465.255 and DEQ policy includes some defenses to liability that may pertain to purchasers:

- "Innocent purchaser" defense: Defense related to a party who did not know and reasonably should not have known of the contamination at the time of acquisition.

This defense requires that the party conducted “all appropriate inquiry”, and that an environmental assessment did not reveal contamination, as discussed above.

- “Security interest holder” defense: Defense that may protect lenders and others holding mortgages or trust deeds.
- “Off-Site Contaminant Migration Policy” defense (former Contaminated Aquifer Policy): Defense based on DEQ’s off-site contaminant migration policy based on property contamination that is solely a result of releases from other properties.

Potential liability can also be addressed by ensuring that the seller cleans up the property prior to purchase, and that the purchaser maintains all required deed restrictions, which may affect redevelopment/reuse plans.

DEQ also notes, “...even if a person qualifies for a defense to liability, a PPA, or relief under DEQ’s Contaminated Aquifer Policy, it does not mean that DEQ or someone else will clean up the property.” (<http://www.deq.state.or.us/lq/cu/ppa/liabilitymanagement.htm>).

Federal Liability

DEQ’s prospective purchaser agreement does not offer protection from federal liability. Therefore, if this is relevant, the prospective purchaser may need to negotiate a separate or joint agreement with the U.S. EPA if this option is available to the purchaser (i.e., the current Bona Fide Prospective Purchaser defense does not require a written agreement with EPA). If federal liability is a concern, investigation and cleanup should be conducted in compliance with the National Contingency Plan to preserve cost recovery options. Also, the all appropriate inquiry standard is much higher for the Comprehensive Environmental Response, Compensation and Liability Act of 1980 compared with DEQ’s cleanup law.

Pennsylvania

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Pennsylvania Act 2 Land Recycling Program (PA’s Voluntary Cleanup Program) (“Act 2”)

Pennsylvania’s Land Recycling and Environmental Remediation Standards Act (Act 2 of 1995), the Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act (Act 3 of 1995 as amended by Act 26 of 2009) and the Industrial Sites Assessment Act (Act 4 of 1995) collectively make up the Pennsylvania Land Recycling Program. 35 Pa. Stat. Ann. § 6026.101 *et seq.* The four main categories of the Act are to establish: 1) uniform cleanup standards; 2) liability relief from future cleanup requirements under state environmental statutes; 3) standardized reviews and time limits; and 4) development authority, lender and fiduciary liability protection and financial assistance. The implementing regulations are contained in Chapter 250 of the PA Code (Title 25), 25 Pa. Code §§ 250.1 -250.708.

The Land Recycling Program allows an owner or purchaser of a Brownfield site to choose any one or combination of cleanup standards to guide the remediation. However, Act 2 is not specific to Brownfield sites, and is also applicable to cleanup of existing industrial and commercial sites. By meeting one or a combination of the Background Standard, the Statewide Health Standard or the Site-Specific Standard, the remediator will receive liability relief under state statutes for the property. This includes protection to the remediator, as well as successors and assigns, and users or developers of the property, from liability under other Pennsylvania statutes, and includes a covenant not to sue from the Pennsylvania Department of Environmental Protection for present and future liability, contribution protection from third party actions under state statutes, and protection from citizen suits.

Pennsylvania’s related Act 3 and Act 4 provide additional Brownfields-related assistance. Act 3, “The Industrial Land Recycling Fund,” basically provides liability protection to lenders, fiduciaries, and economic development agencies who acquire title in connection with financing purposes. Act 4, the “Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act,” established an Industrial Sites Environmental Assessment Fund, which receives \$2,000,000 annually from the Hazardous Sites Cleanup Fund (established under the Pennsylvania Hazardous Sites Cleanup Act). This Fund is administered by the Pennsylvania Department of Commerce. Cities, municipalities, local authorities, nonprofit economic development agencies, and other similar agencies can receive grants from the Fund to conduct environmental assessments of industrial properties located within their jurisdiction, and which have been designated as “distressed communities” by the Department of Commerce.

Uniform Environmental Covenants Act

In Pennsylvania, on December 18, 2007, Act 68, the Uniform Environmental Covenants Act (UECA), was signed into law. 27 Pa. C.S. §§6501-6517. The Act provides a standardized

process for creating, documenting and ensuring the enforceability of site activity and property use limitations on contaminated sites. Environmental covenants under Act 68 are required whenever engineering or institutional controls are used to obtain an Act 2 remediation standard. The DEP has established a registry, the Pennsylvania Activity and Use Limitations (PA AUL) Registry, which is a map-based website that allows users to identify properties in the commonwealth where any type of Activity and Use Limitation (AUL) has been imposed and of which DEP has been informed. The site also contains electronic copies of the site-applicable environmental covenant, notice of environmental covenant or waiver. *See* <http://www.depgis.state.pa.us/pa-aul/>. The implementing regulations are contained in Chapter 253 of the PA Code (Title 25).

Hazardous Sites Cleanup Act

The Pennsylvania counterpart to CERCLA is the Hazardous Sites Cleanup Act (“HSCA”), 35 Pa. Stat. Ann. § 6020.101 *et seq.*, which was enacted to comprehensively address the problem of hazardous substance releases in PA, “whether or not these sites qualify for cleanup under CERCLA.” 35 P.S. § 6020.102(8). Section 6020.1101 of HSCA provides that “a release of hazardous substance or a violation of a provision, regulation, order or response approved by the department under this act shall constitute a public nuisance” and “[a]ny person allowing such a release or committing such a violation shall be liable for the response costs caused by the release or the violation.” *Id.* Section 6020.702 specifies the “Scope of liability” of persons found responsible under the act and provides that a “person who is responsible for a release or threatened release of a hazardous substance . . . is strictly liable” for five categories of “response costs and damages.” *Id.* In addition, a separate section of HSCA specifically authorizes an action for contribution. 35 Pa. Stat. Ann. § 6020.705(a).

The HSCA adopts parallel defenses to liability under CERCLA, including the innocent purchaser defense, lender liability defense and exceptions for residential properties and properties a government entity acquires through eminent domain purchase or condemnation. 35 Pa. Stat. Ann. § 6020.702(b).

Rhode Island

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Industrial Property Remediation and Reuse Act

The Rhode Island statute that provides innocent owners with protections similar to those in CERCLA is the Industrial Property Remediation and Reuse Act (the “Act”) found in R.I. Gen. Laws § 23-19.14. Under State law responsible parties are strictly, jointly and severally liable for the actual or threatened release of hazardous material at a site. However, the Act provides protections for certain innocent purchaser who made efforts to confirm that the property was not subject to any hazardous material and/or petroleum issues or the purchaser receives confirmation that remediation is in process or completed.

R.I. Gen. Laws § 23-19.14-7(2) provides protections to a bona fide purchaser who has received the following prior to the closing: (a) a remedial decision letter and approved remedial action is in progress in accordance with approved work schedules; (b) a letter of compliance confirming successful completion of an approved remedial action; and (c) an enforceable settlement agreement with the Rhode Island Department of Environmental Management.

In the case of property with previously unknown issues, pursuant to R.I. Gen. Laws § 23-19.14-7(4), to qualify as an innocent landowner a party must establish that the release or threat of release was caused by an unrelated party whose act or omission occurs in connection with a contractual relationship and provide evidence that: (i) the owner conducted proper due diligence prior to purchasing the property and exercised due care with respect to hazardous materials and/or petroleum; and (ii) necessary precautions were taken against foreseeable acts, or omissions of any third party.

South Carolina

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Hazardous Waste Management Act (HWMA)

The HWMA adopts CERCLA by reference, giving the state environmental agency power to implement and enforce the provisions of CERCLA as state law, including the cost recovery and protections provided therein. S.C. Code Ann. § 44-56-200. However, the HWMA only expressly references the innocent landowner defense. § 44-56-200(B)(2) Accordingly, although CERCLA and its subsequent amendments have been adopted by reference, some question may exist (and the courts have not addressed) whether the other defenses available under CERCLA, particularly the bona fide prospective purchaser (BFPP) defense, are available under the HWMA. However, as a matter of practice, the state environmental agency has administered those qualified for the BFPP protections (under federal law) under the Brownfields/Voluntary Cleanup Program, wherein a nonresponsible party can avail itself of similar protections to those afforded under CERCLA by entering into a voluntary cleanup contract (VCC). Essentially, use of the voluntary cleanup program for this purpose also allows the BFPP to identify, with the state's input, what constitutes due care as required under federal law and obtain some finality of that scope of work by defining the scope of work in the VCC.

Brownfields/Voluntary Cleanup Program

Set forth at S.C. Code Ann. §§ 44-56-710 through 44-56-760, the Brownfields/Voluntary Cleanup Program establishes the process by which a nonresponsible party can enter into a VCC with the state agency to address, as defined under the agreement, the contamination associated with property. In return, the party is provided a covenant not to sue, contribution protection, and third party liability protection. Specific to third party claims, beginning with the date of execution by the agency, "a nonresponsible party is not liable to any third party for contribution, equitable relief, or claims for damages arising from a release of contaminants, petroleum, or petroleum products that is the subject of a response action included in the nonresponsible party voluntary cleanup contract." § 44-56-750(H).

To qualify as a nonresponsible party, one must not be a responsible party as defined in the act (which is the same definition provided under CERCLA) or a parent, subsidiary of, or successor to a responsible party. § 44-56-720. The protections provided under the act include the nonresponsible party's signatories, parents, successors, assigns, and subsidiaries. § 44-56-740(A). Properties listed or proposed to be listed on the National Priority List under CERCLA and parties subject to a department order or permit for assessment and remediation for a site are not eligible for the program. This is the same program that governs voluntary cleanup efforts by responsible parties, in which case the party receives a covenant not to sue from the agency and can avail itself of the contribution protections provided under § 113(f)(2) of CERCLA.

The prerequisites and provisions for VCCs involving nonresponsible parties are set forth at § 44-56-750 (the requirements for responsible parties are set forth at § 44-56-740). Those prerequisites include, among other requirements, satisfaction of the all appropriate inquiry standards of CERCLA, certification that the party is an eligible nonresponsible party, and a demonstration of financial viability to satisfy the obligations under the agreement. The VCC shall, among other requirements, set forth the scope of work for the investigation/cleanup (including submission of a work plan), the necessary access for both the party conducting the investigation/cleanup work and for the agency, and deed restrictions or other institutional controls. The act also provides for recovery of oversight costs by the agency, and the terms of the VCC are subject to public participation. § 44-56-750.

South Dakota

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South Dakota Legal Protections for Purchasers of Contaminated Property

South Dakota does not have any specific provisions that are similar to the purchaser protections found in CERCLA. South Dakota law protects lenders who come into ownership of contaminated property by virtue of foreclosure, (*See* SDCL §34A-15-1, et seq.), but the law is silent about the treatment of purchasers of contaminated properties.

Tennessee

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The landowner liability protections under Tennessee law are similar to the defenses found in CERCLA and are provided in the Tennessee Hazardous Waste Management Act of 1983 (THWMA), Tenn. Code Ann. §§ 68-212-201 through 68-212-227.³

Purchaser Protections

Under the THWMA, a purchaser of property that is a “hazardous substance site” is not an “owner or operator” of such site, and thus not a “liable party” with respect to such site, if the purchaser can establish by a “preponderance of the evidence” that it:

- (i) acquired the title to the hazardous substance site after the disposal or placement of the hazardous substance at the site;
- (ii) did not know and had no reason to know that the hazardous substance at issue was disposed of at the site; and
- (iii) exercised due care with respect to the hazardous substance at issue.

Tenn. Code Ann. § 68-212-202(3), (4).

A purchaser must conduct “all appropriate inquiries” to establish that it “had no reason to know” of the hazardous substance at the site. Tenn. Code Ann. § 68-212-202(4)(F)(ii). The statute expressly states that ASTM standards 1528-E, 1527 E-1527 “or any successive replacement standard” that “appropriately concludes that no further investigation is required” establishes “all appropriate inquiry.” *Id.*

Brownfield Projects Voluntary Cleanup Oversight and Assistance Program

For sites with known contamination, Tennessee offers liability protection through its brownfield voluntary cleanup program. *See* Tenn. Code Ann. § 68-212-224. “[A]ny willing and able person” who did not generate, transport or release the “contamination that is to be addressed at the site” is eligible to enter a voluntary agreement or consent order with the Tennessee Department of Environment and Conservation (TDEC). Tenn. Code Ann. § 68-212-224(a)(1). To participate in the program, the person must provide information about the environmental conditions at the site and pay a fee. Tenn. Code Ann. § 68-212-224(a)(2), -224(b). Tennessee brownfield agreements must set forth the requirements for investigation, remediation, monitoring, maintenance and/or land use restrictions at the site, and can include provisions that:

³ In addition to the landowner protections described in this summary, holders of a security interest in contaminated property who did not participate in the management of the property have the liability protections provided by Tenn. Code Ann. §§ 68-212-401 through 68-212-407.

- apportion liability among responsible parties;
- limit the participant's liability to the obligations in the agreement;
- exempt the participant's liability under other statutes administered by TDEC; and/or
- extend liability protections to successors in interest or in title, contractors, developers, future owners, tenants, and lenders, fiduciaries or insurers who had no liability for the site prior to the voluntary agreement or consent order.

Tenn. Code Ann. § 68-212-224(a)(3), (5).

A Tennessee brownfield agreement removes liability to third parties that are provided notice and an opportunity to comment "for contribution regarding matters addressed in the voluntary agreement." Tenn. Code Ann. § 68-212-224(a)(6). Tennessee brownfield agreements are intended to constitute an approved administrative settlement under § 113(f) of CERCLA, and upon completion of the terms and conditions therein, TDEC will issue a letter stating that the obligations have been completed and "if appropriate, that no further action will be required of the participant." Tenn. Code Ann. § 68-212-224(a)(2), -224(g).

Texas
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Responsibility for Contaminated Property

Solid wastes are regulated by the Texas Commission on Environmental Quality (TCEQ) under the Texas Solid Waste Disposal Act, Tex. Health & Safety Code, Ch. 361 (SWDA). The SWDA makes all owners and operators of solid waste facilities, as well as generators and transporters of solid waste, responsible for the solid waste. *Id.* § 361.271. Although the definition of “solid waste” excludes waste materials resulting from oil and gas exploration, development, and production, it otherwise encompasses a broader range of materials than the “hazardous substances” that are regulated under CERCLA. *Id.* § 361.003. The SWDA provides defenses to liability for acts of God, acts of war, and acts or omissions of a third person. *Id.* § 361.275. It also includes lender liability protections similar to those available under CERCLA § 101(20)(E), such as an exclusion from the definition of owner or operator for a lender holding a security interest, who does not participate in the management of the solid waste facility. *Id.* § 361.702. Innocent owners and operators are immune from liability if their property is impacted by contamination migrating onto their property from an off-site source and the owner or operator did not cause or contribute to the release. *Id.* § 361.752.

Texas Voluntary Cleanup Programs

The Texas Voluntary Cleanup Program (VCP) offers an opportunity for non-responsible parties who did not cause or contribute to contamination on property, including future lenders and landowners, to qualify for a release from liability to the State of Texas for the cleanup of contamination present at a site at the time the VCP process is completed. Tex. Health & Safety Code, Ch. 361, Subch. S; 30 Tex. Admin. Code, Ch. 333. For a prospective purchaser to be eligible for the liability release, an application to the VCP must be filed before the purchaser takes title to the property.

The VCP’s liability release does not apply to any liability to the EPA or other third parties. However, Region 6 of the EPA has stated in a Memorandum of Understanding with the TCEQ, dated May 1, 1996, that the EPA will not plan or anticipate any federal action under CERCLA or RCRA for a site in compliance with the VCP, unless the EPA determines that “the site poses a threat to human health or the environment, an imminent and substantial endangerment or emergency situation, and as a result, Federal response actions are warranted.”

The VCP provides a streamlined administrative approach to restoring brownfield sites to productive use. VCP applicants must submit an assessment of the property and pay an application fee and all costs of State oversight. After completion of the work pursuant to an agreement with the TCEQ, which describes a schedule of actions necessary to achieve and confirm the cleanup, the applicant will receive a Certificate of Completion (COC) from the TCEQ, which states that all non-responsible parties are released from all liability to the State for

cleanup of areas covered by the COC. The TCEQ will issue a conditional COC where protective concentration levels are achieved through the use of physical controls, remediation systems, post-response action care, or institutional controls. COCs must be filed in the real property records in the county where the site is located to put future owners and lenders on notice of the liability release and any conditions of such release.

Texas Innocent Owner/Operator Program

As mentioned above, innocent owners and operators are immune from liability if their property is impacted by contamination migrating onto their property from an off-site source and the owner or operator did not cause or contribute to the release. Innocent owners and operators can have their immunity certified by the TCEQ under the Texas Innocent Owner/Operator Program (IOP). Tex. Health & Safety Code, Ch. 361, Subch. V. An applicant to the IOP must submit to the TCEQ a complete site investigation report, which demonstrates that the contamination results from a release or migration of contaminants from an off-site source, and the owner or operator did not cause or contribute to any source of contamination. Applicants must also pay a fee to cover the cost of TCEQ oversight. To be eligible for immunity, the owner or operator must also grant reasonable access to the property for investigative and remedial activities. Once the applicant has demonstrated that it qualifies for immunity under the IOP, the TCEQ will issue an Innocent Owner/Operator Certificate (IOC), which confirms the applicant's immunity. IOCs are issued only to applicants under the IOP and do not apply to future owners or operators. Future innocent owners and operators are eligible to enter the IOP and receive an IOC only after they become an owner or operator of the site.

Municipal Setting Designations Program

While not providing direct legal protections to purchaser of contaminated property, the Municipal Setting Designations (MSD) program helps facilitate the closure of contaminated sites. Tex. Health & Safety Code, Ch. 361, Subch. W. An MSD, particularly when combined with a VCP closure, can substantially reduce the costs and time necessary to achieve closure and bring more certainty and finality to the closure of a contaminated site. An MSD is only available to properties within cities or their extraterritorial jurisdiction, where the city has adopted an ordinance or restrictive covenant enforceable by the city, which prohibits the use of the groundwater for potable uses. By eliminating this exposure pathway, higher concentrations of contaminants can remain in the groundwater and still be protective of human health and safety. As a result, an MSD can eliminate many requirements for the investigation and removal of contaminants from groundwater.

An applicant for an MSD must file an application with the TCEQ and pay an application fee and notify affected, adjoining municipalities, municipal and retail public water utilities, and registered private water well owners near the MSD site. The applicant must follow local procedures to seek passage of the city ordinance or restrictive covenant prohibiting the potable use of the designated groundwater. Once the MSD ordinance or restrictive covenant has been adopted, it is delivered by the applicant to the TCEQ as part of a TCEQ MSD application. Once the TCEQ confirms the application meets all eligibility requirements, the TCEQ will then certify the MSD for the designated groundwater. Certification of the MSD can then allow for expedited

closure of the site, without the need to investigate and remediate groundwater to protect against potable uses.

Utah

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Hazardous Substances Mitigation Act (HSMA)

The HSMA, found at Utah Code § 19-6-300 *et seq.* is Utah’s analogue to CERCLA. The HSMA’s most notable difference from CERCLA is its explicit ban on joint and several liability in favor of a proportionate liability system. Liability is apportioned based on “equitable factors, including the quantity, mobility, persistence, and toxicity of hazardous materials contributed by a responsible party, and the comparative behavior of a responsible party in contributing to the release, relative to other responsible parties.” Utah Code § 19-6-310(2)(a). “Responsible party” is defined to include the current owner, as well as anyone who owned the property at the time hazardous materials were disposed of on the property or who arranged for or accepted hazardous materials at a facility, subject to certain exemptions. *See id.* at § 19-6-302(21). A distinction is made between landowners who purchased property before March 18, 1985 and those who purchased on or after that date. For acquisitions prior to that date, a lack of knowledge and participation in the release is a valid defense, while purchases after that date also require the making of “all appropriate inquiry...consistent with good commercial or customary practice at the time of the purchase” for a defense to exist. *Id.* at § 19-6-310(2)(b), (c). A broad exemption from liability also exists for those who property is “contaminated by migration from an offsite release,” unless such an owner “takes actions which exacerbate the release.” *Id.* at § 19-6-310(d).

While the HSMA incorporates the exemptions for “innocent landowner,” “bona fide prospective purchaser,” and “contiguous property owner” from CERCLA into its definitions section, these terms are only referenced in the HSMA with respect to written assurances, discussed below. Thus, care should be exercised in determining potential liability exposure under the HSMA relative to CERCLA.

Enforceable Written Assurances

The executive director of the Utah Department of Environmental Quality (DEQ) may issue enforceable written assurances to a “bona fide prospective purchaser, contiguous property owner, or innocent landowner” to shield such parties from an enforcement action under the HSMA. *Id.* at § 19-6-326. The identification of such parties is made by specific reference to the liability exemptions provided in CERCLA. *Id.* at 19-6-302. The issuance of enforceable written assurances is governed by administrative rules issued by DEQ. *See generally* Utah Admin. Code Rule R311-600. These rules make it clear that the “issuance of an enforceable written assurance is discretionary and requires a case by case evaluation.” *Id.* at § R311-600-3(a). Notably, the

⁴ This summary of Utah law is not intended to be comprehensive with respect to all facts and circumstances that may arise, and the subject matter and content of this summary may not reflect the position of the Utah Attorney General or the Office of the Utah Attorney General.

rules require that an application be made on a form provided by DEQ, and such a form is only available for bona fide prospective purchasers. *See* <http://www.superfund.utah.gov/vcpassuranceprogram.htm>. Thus, as a practical matter, innocent purchasers and contiguous property owners do not have a mechanism to obtain an enforceable written assurance. Bona fide prospective purchasers who can demonstrate either (1) there is no indication of a release or possibility of a release; (2) if a release is possible, it has been sufficiently characterized to demonstrate there is no reason to take action; (3) if there has been a release, it is being cleaned up with DEQ oversight and the applicant is sufficiently informed to take reasonable steps to ensure there is no unacceptable risk to human health or the environment; or (4) if a release is not being cleaned up, it has been sufficiently characterized to ensure there is no unacceptable risk to human health or the environment, may obtain an enforceable written assurance. Utah Admin. Code § R311-600-3. Also, in practice, the DEQ requires that an enforceable written assurance application be submitted early enough to allow the application to be processed before the applicant takes title to the property.

Voluntary Cleanup Program

The Utah Voluntary Cleanup Program (VCP) was created in 1997 to promote the voluntary cleanup of contaminated sites. *See* generally Utah Code § 19-8-101 *et seq.* The VCP is intended to encourage redevelopment of brown fields and other impacted sites by providing a streamlined cleanup program. Eligibility is broadly available except for facilities regulated under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, sites on the National Priorities List, and sites where an enforcement action is pending or exists. An applicant who completes a voluntary cleanup under the program will obtain a certificate of completion that provides a release from liability to the state for cleanup of property covered by the certificate. The release is applicable to applicants who were not responsible for the contamination at the time the applicant filed the VCP application. The release is also applicable to future owners and to future lenders. The release is subject to any limits on use that may be set forth in the certificate. Utah Code § 19-8-111. Changes from a use specified in a certificate of completion may occur, but will waive the release of liability “if the changed use or uses may reasonably be expected to result in increased risks to human health or the environment.” *Id.* at § 19-8-113.

Uniform Environmental Covenants Act

A complement to DEQ’s various environmental response projects, such as those conducted under Utah’s VCP and other programs, is the Utah Uniform Environmental Covenants Act (UECA). The UECA allows a seller, with the approval of the DEQ, to restrict the use of property through “environmental covenants” arising out of federal or state programs governing environmental remediation (e.g., CERCLA, HSMA, or VCP). Utah Code § 57-25-101 *et seq.* When properly obtained, an environmental control under UECA can be enforced by any party to the covenant, DEQ, anyone to whom the covenant expressly grants the power to enforce, or the municipality where the parcel is situated. *Id.* at § 57-25-111. The Environmental Institutional Control Act, *id.* at §19-10-101 *et seq.*, governs “environmental institutional controls” put in place from the time it was enacted on May 5, 2003 until the UECA was enacted in 2006. The UECA and Environmental Institutional Control Act have many similarities, with the most notable

difference being that the UECA provides for more potential enforcers of environmental covenants. *Cf. id.* at §§ 19-10-106 and 57-25-511.

Vermont

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Vermont Redevelopment of Contaminated Properties Program (RCPP)

The Brownfields Reuse and Environmental Liability Limitation Act (BRELLA), found at 10 V.S.A. §6641-§6656, provides a broad release from state liability in exchange for cleanup of a contaminated property. BRELLA established the RCPP, Vermont's voluntary cleanup program for brownfields. Participation in the RCPP is open to prospective purchasers and innocent current owners, provided that they did not cause or contribute to the contamination and are not affiliated with any entity that caused or contributed to the contamination. The RCPP allows owners and prospective purchasers of contaminated properties to obtain liability protection from state cleanup enforcement actions and contribution claims.

A qualifying brownfield site is any real property, the expansion, redevelopment, or reuse of which may be complicated by the release or threatened release of a hazardous material. Facilities that are already involved in a Federal or State remediation program or facilities where a release of polychlorinated biphenyls (PCBs) has occurred are ineligible. Nevertheless, a site meeting these criteria may still qualify for the RCPP if the State determines, on a site specific basis, that participation in the RCPP will promote the program's statutory objectives.

Application to the RCPP requires a nonrefundable fee of \$500 and must include the following regarding the property: (1) a preliminary environmental assessment; (2) a legal description; (3) a description of the physical characteristics; (4) the nature and extent of releases and threatened releases; (5) the risks to human health and the environment; (6) a description of the proposed redevelopment and use; (7) a certification of timely notice to the public providing a reasonable opportunity for public comment regarding the proposed redevelopment and use; and (8) a certification attesting that all known relevant information has been provided and that no person, including a principal, owner, director, affiliate, or subsidiary, who will benefit from the liability protection has had any previous connection to the property.

Applicants must develop and complete a corrective action plan approved by the State. Upon completing all activities required by the corrective action plan a completion report must be filed with the State. The report must include: a description of the activities performed, a description of any problems encountered, and certification by the applicant that the activities were performed in accordance with the corrective action plan. Once the State determines that the applicant has successfully completed the corrective action plan, and paid all fees and costs due under the RCPP, then a Certificate of Completion (COC) will be issued. The COC must contain a description of any land use restrictions or other conditions required by the corrective action plan, and be filed in the land records for any municipality in which the property is located. The COC puts into effect the RCPP's liability protection.

The liability protections granted through the RCPP will extend to future owners and will also provide protection from: more stringent cleanup standards that may become effective in the future; required cleanup of materials that were not regulated as hazardous materials until after the cleanup; and required cleanup of contamination that may be discovered in the future by sampling methods that were not standard at the time the cleanup plan was approved. The RCPP's liability protection is more extensive than the standard brownfield cleanup approach, because the RCPP resolves the issue of potentially open-ended cleanups. The COC eliminates reopening for: preexisting contamination that is discovered after the cleanup, pre-existing contamination that was not regulated as a hazardous waste at the time of the cleanup, and the establishment of more stringent cleanup standards post cleanup.

While owner-applicants are required to pay for the State's additional review and oversight costs of the site investigation and corrective action plan, prospective purchaser-applicants are exempt from paying such costs. In addition to the liability protections, other benefits of the RCPP include: access to grants and loans to cover cleanup costs; elimination of the adversarial nature of a "forced" regulatory cleanup; a comprehensive and collaborative approach to site investigation and cleanup; and sharing of the State agencies' expertise and knowledge of remediation approaches.

An applicant may withdraw from the RCPP program at any time. Prior to approval of a corrective action plan and granting of personal liability protection, an applicant must only submit a notice of intent to withdraw from the RCPP to the State, ensure the site is stabilized, and continue to comply with the general obligations of the RCPP. After approval of a corrective action plan and granting of personal liability protection, in addition to the aforementioned requirements, an applicant must also record a deed restriction on the property approved by the State, abstain from any activity at the property that is inconsistent or interferes with the approved corrective action plan, not violate any use restriction imposed on the property, and promptly report and address contamination caused or exacerbated by a negligent or reckless action during corrective action.

Virginia

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Assurances Against Liability

The VRP, Amnesty program and statutory limitations on liability are found at §§10.1-1237 of the Virginia Code, or the Brownfield Restoration and Land Renewal Act.

Voluntary Remediation Program

Virginia's Brownfield Restoration and Land Renewal Act, located at §10.1-1237 of the Virginia Code, is Virginia's analogue to CERCLA. Section 10.1231 of the Act contains the Voluntary Remediation Program (VRP), a non-enforcement cleanup program that draws participants under the oversight of the Department of Environmental Quality (DEQ or Agency) while providing them with a variety of assurances against liability.

The first assurance available to program participants is a Memorandum of Agreement (MOA) with the U.S. EPA under CERCLA. In January 2002, the VRP was added to the MOA, available on the EPA Brownfields and Land Revitalization website at http://www.epa.gov/brownfields/state_tribal/moas_mous/vamoa.pdf. The MOA provides a high level of assurance to participants that sites investigated or remediated according to VRP procedures will not be subjected to EPA action under CERCLA.

DEQ also offers two determinations that provide liability relief to participants in the VRP: a determination of eligibility prior to joining the program, and a Certificate of Satisfactory Completion of Remediation following cleanup. A determination of eligibility may be provided after DEQ has reviewed a potential participant's application, reviewed records, and determined that the site is eligible for the program because remediation has not already been mandated for the site by EPA, DEQ or a court. Guidance on the DEQ eligibility determination process is available on the DEQ website at <http://www.deq.state.va.us/Portals/0/DEQ/Land/RemediationPrograms/VoluntaryRemediationProgram/vrpeg.pdf>.

The Certification of Satisfactory Completion of Remediation is issued by the DEQ under Virginia Code § 10.1-1232(C). The Certification constitutes immunity to a State enforcement action and is transferable to future owners. Criteria for the issuing process are located at 9 Virginia Administrative Code (VAC) 20-160-110. Guidance is available online at <http://www.deq.state.va.us/Portals/0/DEQ/Land/RemediationPrograms/VoluntaryRemediationProgram/vrpcg.pdf>.

Statutory Limited Liability

Under §10.1-1234(B)-(D) of the Brownfield Act, certain persons who might otherwise be liable as owners of contaminated sites may obtain limited liability. Entities who meet the statutory criteria, including bona fide prospective purchasers (Subsection (B)), innocent landowners (Subsection (C)), and contiguous property owners (Subsection (D)) are shielded by the statute without any action by DEQ, though the Agency may issue Comfort Letters to address routine situations. However, Subsections B and C do not apply to sites subject to the Resource Conservation and Recovery Act (RCRA), such as sites containing landfills or underground storage tanks.

To obtain limited liability under this statute, the DEQ Director must exercise authority granted by §10.1-1234(A) to issue a Determination of Limited Liability, after considering the criteria listed in the applicable subsection. Determinations are made on a case-by-case basis. A determination may largely be substituted by a Comfort Letter issued by DEQ, which is available through a more timely process.

Additional statutory protection for innocent landowners is available at Virginia Code §§10.1-1406(A)(3) and (4), which provide exemptions for innocent landowners where hazardous substances were disposed of on a site. The exemption applies where the landowner did not know, and did not have a reason to know, of any unlawful disposal on the site prior to ownership. This exemption may apply when a private entity acquires a property by inheritance or bequest, or where a governmental entity acquires a property by escheat, eminent domain or condemnation.

Brownfield Amnesty Program

Under Code of Virginia §10.1-1233, the Brownfield Amnesty Program (BAP) provides immunity from administrative and civil penalties under state-level environmental laws where a landowner provides “voluntary disclosure” of potential or known contaminants on the site. “Voluntary disclosure” means that the owner (a) was not required by law, permit or order to make the disclosure; (b) adopts a plan to market the site for redevelopment or timely remediation; and (c) conducts a study to provide information about the site condition to prospective purchasers.

Washington

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In Washington State, prospective purchaser protections are provided in the Model Toxics Control Act (MTCA) through liability settlement in a prospective purchaser consent decree negotiated by the Washington State Department of Ecology (Ecology) and the Washington State Attorney General's office. MTCA's independent or voluntary cleanup program offers Ecology guidance to prospective purchasers and non-binding, advisory opinions related to site cleanup requirements. MTCA also provides defenses to liability under certain conditions.

Prospective Purchaser Consent Decrees

The Washington State cleanup law, MTCA, provides protections to prospective purchasers of contaminated property through a Prospective Purchaser Consent Decree as described in RCW 70.105D.040(5) and WAC 173-340-520. The prospective purchaser consent decree is negotiated with Ecology and the Washington State Attorney General's office, and allows the prospective purchaser to negotiate aspects of site investigation and cleanup thereby minimizing liabilities prior to purchasing the property. As outlined in the cleanup law and implementing rule, the Attorney General may agree to a settlement with a prospective purchaser "not currently liable for remedial action at the site" in accordance with the following provisions:

- The settlement will "yield substantial new resources to facilitate cleanup."
- The settlement will "expedite remedial action consistent with the rules."
- The planned redevelopment or reuse is not likely to contribute to an existing or threatened release, interfere with needed site remedial actions, or increase human health risks at or in the vicinity of the site.

The applicant must have a "legal commitment to purchase, redevelop, or reuse the site." It is recognized that Washington State has limited resources, and that Ecology and the Attorney General's office could not be available to participate in all contaminated property transactions. Therefore, these parties may prioritize settlements that are expected to provide a "substantial public benefit." Examples include reuse of vacant or abandoned industrial sites, or development by a government entity for an "important public purpose."

At this time, Ecology's participation in reviewing the prospective purchaser consent decree and providing oversight for implementation of the consent decree is provided through a prepayment agreement, which is contingent on Ecology and the Attorney General's office receiving authorization for staffing needs. The prepayment agreement must be executed following receipt of a notice accepting the prospective purchaser consent decree request, and before consent order negotiations can begin.

Prospective purchaser consent decrees provide a liability settlement with Ecology and the Attorney General's office, including a covenant not to sue, and provide protection from contribution claims. Liability protection may be extended to future site owners and other successors-in-interest in accordance with the specified conditions. However, prospective purchaser consent decrees are subject to reopeners, such as additional work that may be needed due to factors not known during execution of the consent decree. Detailed information regarding MTCA prospective purchaser consent decree requirements and policy is available at *Id.* at 173-340-520(1)(c), *Id.* at 70.105D.040(5), and Ecology's Toxic Cleanup Program Policies 520A (<http://www.ecy.wa.gov/programs/tcp/policies/pol520a.html>) and 550A (<http://www.ecy.wa.gov/programs/tcp/policies/pol550a.pdf>).

Prospective purchaser consent decrees have not been as popular in Washington as in other states such as Oregon (Ecology Publication No. 11-09-051A, Detailed Evaluation of Policy Recommendations, Brownfield Policy Plan, Appendix). This may be attributable to the potentially high transactional costs associated with requesting and negotiating the consent decree, limited agency staff to participate in this process, and the difficulty in interpreting and making the required demonstrations such as yielding "substantial new resources to facilitate cleanup." Recent House Bills have included proposed revisions to Washington State law and rules to promote a more attractive process for prospective purchasers, including House Bills HB 5201 and HB 5296. As an example, both of these bills include the option for prospective purchasers to enter into an agreed order rather than a consent decree. This agreement does not require participation by the Attorney General's office, thereby reducing costs and minimizing the negotiation schedule. However, in contrast to the consent decree, an agreed order does not include the protections of a covenant not to sue or protection from contribution claims.

Voluntary Cleanup Program

Prospective purchasers may join MTCA's Voluntary Cleanup Program (VCP) and request Ecology review and opinion regarding cleanup requirements. WAC 173-340-515 In this program, Ecology will provide informal advice and technical assistance related to MTCA upon request. This includes advisory opinions that may be useful to a prospective purchaser on whether or not planned or completed remedial actions meet the substantive requirements of MTCA, and if additional remedial action is needed to meet MTCA requirements. Ecology may also provide opinions regarding work prior to cleanup, such as investigation and the analysis of remedial alternatives. Ecology VCP response time is generally quick, and usually no longer than 90 days from receipt of a request for opinion. Under the VCP, costs are relatively low with payment only for requested services. Any party can join the VCP at any time, and may withdraw from the program at any time. A drawback of the VCP is that Ecology's opinion letters are advisory, not legally binding on Ecology. Ecology's opinion letters do not provide a liability settlement and do not protect against contribution claims. Additional information regarding the VCP is available at Ecology's website (<http://www.ecy.wa.gov/programs/tcp/vcp/vcpmain.htm>).

Defenses to MTCA Liability

Washington State cleanup law provides defenses to environmental cleanup liability under certain conditions. Three defenses that may apply to purchasers of contaminated property in Washington State include:

- Third party defense (RCW 70.105D.040(3)(a)(iii)): Defense related to an “act or omission of a third party” under the conditions set in the law.
- Innocent landowner defense (RCW 70.105D.040(3)(b)): Defense related to a “preponderance of the evidence” that at the time of acquisition, “the person had no knowledge or reason to know that any hazardous substance, the release or threatened release of which has resulted in or contributed to the need for remedial action, was released or disposed of on, in or at the facility” under the conditions (limitations) set forth in the law. One limitation is that “...the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial or customary practice in an effort to minimize liability.”
- Migrating groundwater plume defense (RCW 70.105D.020(17)): Defense related to hazardous substance impacts to a property “solely as a result of migration of the hazardous substance to the real property through the groundwater from a source off the property” under the conditions set forth in the law.

Each of these defenses is conditional on not contributing to or worsening impacts, and ensuring compliance with conditions that may be imposed by the State during investigation and cleanup, and following these activities.

Federal Liability

The MTCA prospective purchaser program does not offer protection from federal liability. Therefore, if this is relevant, the prospective purchaser may need to negotiate a separate or joint agreement with the U.S. EPA if this option is available to the purchaser (i.e., the current Bona Fide Prospective Purchaser defense does not require a written agreement with EPA). If federal liability is a concern, investigation and cleanup should be conducted in compliance with the National Contingency Plan to preserve cost recovery options. Also, the all appropriate inquiry standard is much higher for the Comprehensive Environmental Response, Compensation and Liability Act of 1980 compared with MTCA.

West Virginia

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West Virginia does not have its own Superfund Law, instead relying heavily on CERCLA to address hazardous waste regulation within the state. However, West Virginia has adopted certain measures to supplement CERCLA, including a brownfield statute and an emergency cleanup fund.

Voluntary Remediation and Redevelopment Act

The Voluntary Remediation and Redevelopment Act (VRRRA) is West Virginia's brownfield status, developed by the legislature to promote the reuse and repurposing of previously contaminated sites within the state by (a) establishing financial incentives to entice developers of brownfield sites; (b) establishing a program to facilitate voluntary remediation; and (c) establishing limitations on environmental liability for brownfield redevelopers. W. Va. Code § 22-22-1. Any contaminated site not already the subject of a CERCLA, RCRA, or other federal enforcement order is eligible to participate in the brownfield program. *Id.* at § 22-22-4. A developer who is a subsequent purchaser, who did not cause or contribute to the contamination at the site is also eligible to apply for a state remediation loan to help pay for cleanup of the site. *Id.* at § 22-22-5. To participate in the brownfield program, the developer must submit a remediation agreement for approval by the West Virginia Department of Environmental Protection (WVDEP), which remains in effect once approved until (a) remediation under the agreement is complete, or (b) the agreement is modified in writing by mutual consent of the state and the developer. *Id.* § 22-22-7. Upon completion of the agreed to remediation, the developer receives a "certificate of completion" from the WVDEP, which relieves the developer and all subsequent purchasers from liability to the state for any further clean up. *Id.* § 22-22-13.

Prospective Purchaser Agreements

There is currently no state authority or mechanism by which the WVDEP may enter into a prospective purchaser agreement (PPA) to limit environmental liability inherited by a bona fide prospective purchaser. Because West Virginia does not have its own superfund legislation, all such actions are governed by CERCLA and, therefore, the EPA. This means that all prospective purchasers in West Virginia may avail themselves of the prospective purchaser defense set forth in CERCLA, and may also seek a PPA from the EPA (West Virginia falls within Region III). However, PPAs are granted very infrequently in Region III, and the typical turnaround in Region III for PPAs is approximately six months.

Hazardous Waste Emergency Fund

The West Virginia State Legislature established the Hazardous Waste Emergency Fund (HWEF) to address the growing volume of hazardous waste being generated by the state, and the need for

quick response when events occurred that presented a threat to human health, safety or the environment. W. Va. Code § 22-19-1. Citing CERCLA's federal assistance program as an example, HWEF was designed as the state's funds-matching program. However, unlike CERCLA, the HWEF is only designed to address emergencies, and does not handle non-emergent releases or threatened releases. Under HWEF, generators of hazardous waste pay annual fees on a tonnage basis, and those funds are pooled for use in responding to hazardous waste emergencies. *Id.* at § 22-19-4. The WVDEP is responsible for maintaining a hazardous waste contingency plan to govern the use of the funds in addressing emergencies. *Id.* at § 22-19-6.

Wisconsin

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Wisconsin Spills Law

Wisconsin Statute § 292.11 requires a person who possesses or controls a hazardous substance discharged to the environment to take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of Wisconsin. In *State v. Chrysler Outboard Corp.*, 580 N.W.2d 203 (Wis. 1998), the Wisconsin Supreme Court held that the owner of a contaminated property has “possession and control” of the hazardous substances discharged on that property, within the meaning of § 292.11, and is responsible to take remedial action *regardless of whether that person caused the discharge*. The court reasoned that because the owner holds title to the property, the owner possesses the soils on the property and any contamination contained therein. Finally, the penalty provisions of the Wisconsin Spills Law apply in equal force against the owner of the property as well as the party that caused the contamination.

Voluntary Party Liability Exemption program (VPLE)

VPLE, found in Wisconsin Statute § 292.15 *et seq.*, establishes a process in which a prospective property purchaser can reduce the risk for latent environmental conditions if the purchaser is willing to complete a comprehensive investigation and remediation of contaminated property. This liability exemption only applies to releases of hazardous substances that occurred before the exemption is granted. Interested parties who meet the definition of a “voluntary party,” defined as any person or company who submits an application and pays all necessary fees, are eligible for this program. Importantly, a “voluntary party” can be the company that owned and operated a facility or it can be a new purchaser. Pursuant to § 292.15 (7), some properties with solid and hazardous waste sites are excluded from the VPLE process.

Wyoming

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Wyoming Innocent Owners Law

By statute, an innocent owner is not liable for investigation, monitoring, remediation, or other response action regarding contamination on its property. Wyo. Stat. § 35-11-1802(a). To qualify for this protection, a person must meet three criteria. First, it cannot have caused or contributed to the contamination. Wyo. Stat. § 35-11-1801(a). Second, it must be one of the following: (i) an owner of property contaminated from a source located on other property; (ii) an owner who can show a defense under section 107(b) of CERCLA; (iii) an owner who can show that, at the time it acquired the property, it did not know or should not have reasonably known about the contamination; (iv) a lender or fiduciary holding a security interest in land but not participating in management of the site at the time of release or migration of contaminants; or (v) a state or local government unit acquiring title through bankruptcy, tax delinquency, abandonment, or similar circumstances under which it acquires title as a sovereign. Wyo. Stat. § 35-11-1801(a)(i)-(v). Finally, the “innocent” owner must: grant access to the Wyoming Department of Environmental Quality (WDEQ) or its designees for investigation, monitoring, or remediation; comply with WDEQ requirements necessary to maintain state authorization to implement federal regulatory programs; comply with applicable engineering or institutional controls; and not use the property in a manner that exposes the public to harmful environmental conditions.

Certain land owners are expressly excluded from “innocent” owner status. They are: persons who knowingly transfer an interest in land to avoid liability for contamination (Wyo. Stat. § 35-11-1803(a)); persons who own or operate property subject to permitting or corrective action requirements of the Wyoming hazardous waste rules; and hazardous waste generators subject to corrective action requirements. Wyo. Stat. § 35-11-1801(b).

Wyoming Voluntary Remediation of Contaminated Sites Law

Wyoming’s Voluntary Remediation Program (VRP) was established in 2000 and provides a release from future environmental liability for any individual, business, or unit of government that conducts an environmental investigation and cleanup of a contaminated property in accordance with VRP requirements. Wyo. Stat. §§ 35-11-1601 *et seq.* Certain sites are excluded from the VRP, including a site for which remediation is not voluntary, a site that is listed on the National Priorities List, or other sites already managed under other WDEQ programs (e.g., commercial solid waste management facilities, underground and aboveground storage tanks, radioactive waste storage facilities, abandoned mine land sites, etc.).

Owners, operators, and prospective purchasers of most contaminated sites in Wyoming are eligible for the VRP. Notably, any broadly-defined “person” can apply to participate in the VRP.

Wyo. Stat. § 35-11-1603. However, the VRP does not grant people rights of access or other rights with respect to contaminated property and, thus, if a person applies to participate in the VRP for property that he/she does not own (e.g., for prospective purchasers of property), arrangements external to the VRP must be made to ensure access for completion of cleanup activities. All VRP applications must identify the owner or owners of the subject property and, if the application is not made by the property owner, explain the relationship of the applicant to the property owner and describe access provisions.

When WDEQ determines that the site does not require engineering or institutional controls or use restrictions to meet VRP standards, or when WDEQ determines that monitored natural attenuation over a reasonable period of time is appropriate and that no exposure to contaminated media is reasonably expected during the period of natural attenuation, WDEQ will, upon request, provide the owner or prospective purchaser with a no further action letter, subject to limited reopener or termination provisions. Wyo. Stat. § 35-11-1608. Pursuant to a 2002 Memorandum of Agreement related to the VRP, EPA will not generally bring a federal response action against a site or affected portion of a site that has been remediated in accordance with the VRP (*i.e.*, has received a no further action assurance from WDEQ).

For additional information on the VRP application and cleanup process, please see WDEQ, VRP Application Fact Sheet No. 3, available at http://deq.state.wy.us/volremedi/archive/downloads/Current%20Fact%20Sheets/FS_3.pdf.

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