Ohio's Voluntary Action Program: Solving Ohio's Toxic Waste Woes?

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After many years of failed federal environmental remediation programs, many states have enacted their own remediation legislation aimed at encouraging the redevelopment of polluted land. Ohio is among these states and has enacted its own statutory program that encourages voluntary participation by landowners and developers. Some commentators have viewed Ohio's innovative program as having great potential for success. However, in the pursuit of environmental remediation, the Ohio General Assembly should not be content to rest on its laurels. Many important lessons can be learned from a close look at what other states have accomplished with their own legislation.

I. INTRODUCTION

For years, the twenty-three-acre "Old Pen" site in downtown Columbus, Ohio sat idle and slowly deteriorated into an eyesore. In 1995, when no else wanted the site, the city of Columbus acquired it for one dollar from the state of Ohio.[1] Tests revealed that more than a century of industry employing inmate labor left behind chlorinated solvents, heavy metals, and lead.[2] Tunnels under the site contained pipes wrapped in asbestos.[3] Despite these problems, Columbus saw promise. With the help of Ohio's newly enacted voluntary toxic substance cleanup program came hope that the enormous site in the heart of downtown could be brought back to life. Today, that site is part of the future home of the $125 million Nationwide Arena and the National Hockey League's expansion team, the Columbus Blue Jackets.[4] The arena and team are expected to

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[1] *See* John Futty, *Pen Site Loaded with Chemicals City's Cost to Clean Up Mess May be in the Millions*, COLUMBUS DISPATCH, Feb. 15, 1997, at A1.

[2] *See id.* Such chemicals are expected to be found beneath an industrial site that has been in operation for over one-hundred years.

[3] *See id.*

[4] *See* Doug Caruso, *Parking Lot OK'd for Old Pen Site*, COLUMBUS DISPATCH, Mar. 4, 1998, at C1. Recently, the city of Columbus, Ohio agreed to sell 13.5 acres of the "Old Pen" site to Nationwide for $11.7 million. Columbus has already spent $7.4 million in cleanup and the agreement with Nationwide stated that the city would spend up to $2 million more in environmental remediation. The extra $2 million may be necessary to effectuate cleanup required to residential levels. Nationwide's revised Arena District plan locates upscale residential housing on the 13.5 acres. *See* Jim Woods, *City May Pay up to $2 Million More for Pen Changes*, COLUMBUS DISPATCH, Sept. 17, 1998, at A1.

reinvigorate development of the whole Scioto riverbank.[5] In all likelihood, without the new voluntary cleanup program, the site would have remained in a polluted state indefinitely. This is only one demonstration of the usefulness of Ohio's new environmental program at work.[6] The state's voluntary cleanup program has shown more promise in encouraging redevelopment over the past three years than federal programs have demonstrated in the past eighteen years.[7]

When compared to the federal government, states are naturally in a better position to evaluate their unique environmental situations and to encourage cleanup of toxic substances within their borders.[8] Furthermore, states may be more willing than the federal government to supply necessary funds or offer incentives in order to facilitate cleanup.[9] States are especially motivated because empty brownfields do not contribute to the tax base of the states' communities.[10]

Despite the potential role of the individual states, the federal government has largely monopolized toxic substance cleanup for the past eighteen years. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[11] the very statute aimed at remediating America's toxic waste woes,

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[5] Cleanup will not be cheap. In fact, cleanup has already cost over $7.4 million. *See* Woods, *supra* note 4, at A1. However, estimated economic benefits are high. *See* John Futty, *Old Pen Site Cleanup Put Out for Bids*, COLUMBUS DISPATCH, May 9, 1997, at C1.

[6] For other examples, see OHIO VOLUNTARY ACTION PROGRAM, ANNUAL REPORT (1997) <http://www.epa.ohio.gov/derr/vap/leg_report/> [hereinafter REPORT].

[7] For a complete discussion of these issues, see *infra* notes 31–45, 118 and accompanying text.

[8] *See* Andrea Lee Rimer, *Environmental Liability and the Brownfields Phenomenon: An Analysis of Federal Options for Redevelopment*, 10 TUL. ENVTL. L.J. 63, 106 (1996) (evaluating the efficacy of a federal voluntary program). Rimer explains:

> First, states are in the best position to evaluate their own needs and limitations. . . . The social, geographic, economic, and other differences across our country would not all be served by one uniform program. Individual state programs allow consideration of these different circumstances, and lead to experimentation to achieve the right balance of requirements and incentives.

Id.

[9] *See id.* at 106 ("[S]tates may be more willing than the federal government to make economic tradeoffs or accept more of the burdens of cleanup themselves, rather than forcing all of the costs on private parties.").

[10] For example, mayors of thirty-three cities estimated lost tax revenues of $131 million due to undeveloped brownfields. *See* TODD S. DAVIS & KEVIN D. MARGOLIS, *Defining the Brownfields Problem*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 3, 6 (Todd S. Davis et al. eds., 1997) [hereinafter BROWNFIELDS]. Without programs designed to reinvigorate brownfields in inner cities, industry will continue to move to greenfields—pristine land surrounding suburbs—and localities will continue to lose valuable property taxes critical to educate children and maintain infrastructures.

[11] *See* 42 U.S.C. §§ 9601–9675 (1994) (creating environmental enforcement mechanisms,

is now, ironically, viewed by many as substantially contributing to the problems it was intended to cure.[12]

No longer content to play a passive role, states have begun to reclaim the lead in toxic substance cleanup by instituting voluntary action programs (VAPs).[13] Generally, state VAPs are designed to encourage the redevelopment of brownfields[14] by providing either clear guidelines for remediation[15] or a predictable, efficient system to guide cleanup along with some form of liability protection for owners, potential purchasers, and lenders.[16]

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the "Superfund," and establishing a liability scheme).

[12] One author comments:

> One major factor contributing to the brownfields phenomenon has been the slow pace of Superfund cleanups. According to the Congressional Budget Office, the EPA and liable parties have completed cleanups at only 149 of the 1275 National Priorities List (NPL) sites at an average cost of about thirty million dollars each. Furthermore, the average federal cleanup takes nearly twelve years to complete.

Rimer, *supra* note 8, at 101 (footnote omitted); *see also* John A Chiappinelli, Comment, *The Right to a Clean and Safe Environment: A Case for A Constitutional Amendment Recognizing Public Rights in Common Resources*, 40 BUFF. L. REV. 567, 588–89 (1992) (explaining the high degree of frustration that exists among members of Congress regarding the slow pace of environmental agencies in protecting the environment).

[13] By January of 1998, thirty states had enacted statutes regarding remediation of contaminated property that involved "voluntary action" by an owner or operator, prospective purchaser, or municipality as an element. These state statutes differ dramatically in terms of design and effectiveness; however, these differences could simply be the result of state legislatures addressing the unique needs of developers in their respective states or geographic or other regional differences. Further, the state VAPs are such a recent phenomenon that their evolution is far from over. *See generally* BROWNFIELDS, *supra* note 10, at 287–681 (describing the statutory remediation scheme in Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin).

[14] Region 5 of the United States Environmental Protection Agency (USEPA) has defined a "brownfield" as "abandoned, idled or underused industrial and commercial sites where expansion or redevelopment is complicated by real or perceived environmental contamination that can add cost, time and uncertainty to a redevelopment project." USEPA REGION 5 OFFICE OF PUB. AFFAIRS, BASIC BROWNFIELDS FACT SHEET (1996), *reprinted in* BROWNFIELDS, *supra* note 10, at 5. Brownfields are typically located in urban areas that were once heavily industrialized. Their size may vary from less than an acre to hundreds of acres. *See id.*

[15] The Ohio Environmental Protection Agency (OEPA) defines "remedial action" as "[a]ctions taken at a property to treat, remove, transport for treatment or disposal, dispose of, contain, control, or control hazardous substances or petroleum, which are protective of the public health and safety and the environment and are consistent with a permanent remedy . . . ." REPORT, *supra* note 6.

[16] *See generally* BROWNFIELDS, *supra* note 10, at 287–681.

Ohio's VAP[17] has been widely regarded as one of the most innovative and comprehensive VAPs to date.[18] Ohio's VAP offers an array of benefits including: (1) uniform standards for cleanup that take into account actual human exposure, current and proposed uses of property, and uses of surrounding property;[19] (2) extensive delegation of cleanup responsibility to certified professionals;[20] (3) special variance provisions;[21] (4) voluntary entrance into the program;[22] (5) covenants not to sue;[23] (6) consolidated standards permits;[24] (7) immunities from liability;[25] and (8) extensive confidentiality provisions.[26]

Additionally, Ohio's VAP should completely pay for itself in the near future.[27] Ohio's VAP is designed to reinvigorate brownfields and protect the health and safety of the public while costing taxpayers absolutely nothing.[28]

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[17] *See* OHIO REV. CODE ANN. §§ 3746.01–3746.99 (West 1998). The corresponding administrative rules are located in OHIO ADMINISTRATIVE CODE §§ 3745-300-01 to 3745-300-99 (1996–1997). OEPA administrators have targeted 1,200 sites statewide that they hope will ultimately participate in the program. *See* Randall Edwards, *Governor Lauds State's Industrial Cleanup Program*, COLUMBUS DISPATCH, Oct. 16, 1997, at C4.

[18] *See* BROWNFIELDS, *supra* note 10, at 552 ("Ohio's Voluntary Action Program has been considered one of the most progressive and complete state voluntary cleanup programs."); R. Michael Sweeney, *Brownfields Restoration and Voluntary Cleanup Legislation*, 2 ENVTL. L. 101, 124 (1995) (suggesting that Ohio's VAP should serve as a model for states considering enacting voluntary remediation statutes). Note, not all authors express such a positive view of Ohio's VAP. *See* Elizabeth Glass Geltman, A COMPLETE GUIDE TO ENVIRONMENTAL AUDITS 484 (1997) ("Compliance with Ohio['s] [VAP] has been criticized as an overwhelming and burdensome task."). Features of other states' statutes enacted since Ohio's VAP do contain provisions similar to Ohio's, however, a careful evaluation of the differences in those states' statutes should serve as a starting point for reevaluation of Ohio's program. *See infra* notes 119–79 and accompanying text.

[19] *See* OHIO REV. CODE ANN. § 3746.07(A)(2) (West 1998).

[20] *See id.* § 3746.071.

[21] *See id.* § 3746.09.

[22] *See id.* § 3746.10.

[23] *See id.* § 3746.12.

[24] *See id.* § 3746.15.

[25] *See id.* § 3746.24 (regarding immunity of officers and employees, contractors working in connection with a voluntary cleanup, and state agencies and political subdivisions); *see also id.* § 3746.26 (regarding secured party liability).

[26] *See id.* § 3746.28.

[27] *See* REPORT, *supra* note 6 (stating that the goal of the program is to function entirely free from program fees). Fifty-five percent of revenues are generated by certified professional fees, thirty-one percent are generated by certified laboratory fees, eleven percent are generated by no further action letter fees, and three percent come from other sources. *See id.*

[28] In order to start Ohio's VAP program, the OEPA borrowed $2,803,274 from the Hazardous Waste Facility Management Account. The OEPA reports that revenues have been increasing steadily since the promulgation of the program rules in the middle of 1997. In 1995, revenues were $146,125.50, and expenses were $387,842.06. In 1996, revenues were

Despite the advantages of Ohio's VAP, some critics remain opposed to state regulation of cleanup of toxic substances.[29] Indeed, there remains room for improvement even in Ohio's model program. However, critics should not lose sight of the fact that states necessarily have the advantage when it comes to understanding their unique position and realizing the best methods of encouraging brownfields redevelopment.

In addition to evaluating the structure of Ohio's VAP, this Note analyzes how Ohio's VAP could be made more effective by evaluating innovative aspects of other states' VAPs. Part II.A briefly addresses CERCLA and other federal efforts to regulate and facilitate cleanup of toxic substances. Part II.B outlines the major provisions of Ohio's VAP and includes references to the recently promulgated Ohio Environmental Protection Agency (OEPA) rules.

Part III focuses on the innovative aspects of other states' VAPs and how other states' programs could benefit the evolution of Ohio's VAP. These recommendations include added liability protection, a more liberal statute of limitations, and new financial incentives to facilitate cleanup. This Note also suggests that because Ohio's VAP is largely "privatized," potential conflicts of interest problems must be closely monitored. Finally, consideration should be given to involving the public more completely in the VAP process. The analysis assumes that Ohio's VAP is a dynamic statute—constantly evolving and responding to changing circumstances and changing needs of the remediating community.[30]

II. TOXIC SUBSTANCE CLEANUP PROGRAMS

Long before Ohio's VAP, there was CERCLA. If CERCLA had been more effective or if Congress or the United States Environmental Protection Agency (USEPA) had responded to CERCLA's deficiencies sooner, there may have never been a need for state VAPs. However, Congress has done virtually nothing to make CERCLA more useful. Likewise, the USEPA failed to respond until 1994 when it created its new Pilot Program. No longer content to wait for effective federal programs to be developed, a number of states, including Ohio, began to work on their own toxic waste problems. In order to understand how Ohio's VAP is structured and operates, it is necessary to briefly evaluate the federal scheme of toxic waste cleanup.

$145,092.37, and expenses were $1,202,998.60. In 1997, revenues were $390,911.68, and expenses were $927,816.57. *See id.*

[29] *See* Rimer, *supra* note 8, at 106. Rimer points out that some critics feel that the states are moving too fast in promulgating VAPs and thereby putting public health and safety at risk. In her Article, Rimer discusses the efficacy of a federal VAP, which she mentions would almost certainly preempt state VAPs. *See id.*

[30] Most of the suggestions are legislative in nature but may be helpful to a practitioner in determining the overall value of the program in a particular factual situation.

A. *Summary of the Federal Government's Approach to Toxic Substance Cleanup*

Before 1980 and the adoption of CERCLA,[31] anyone interested in purchasing and potentially developing a former industrial site had little to fear. Environmental regulation had been largely left to the states and it usually took a rather egregious violation to arouse state environmental protection agency interest.[32] In 1980, however, in response to the Love Canal incident and due to a growing awareness of the massive number of contaminated sites across the United States, Congress enacted CERCLA.[33]

At the time, CERCLA appeared to be just what the doctor ordered. Its provisions were aimed at targeting the worst sites and ensuring their rapid remediation.[34] Inevitably, dreams of a quick fix to America's toxic hazard problem were dashed as a large amount of litigation begging interpretation of CERCLA's vague terms flooded the courts.[35]

The interpreting courts held that CERCLA imposed "strict, joint and several, and retroactive liability on [potentially responsible parties (PRPs)]."[36] These interpretations of CERCLA liability resulted in a chilling effect on the sale and

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[31] 42 U.S.C. §§ 9601–9675 (1994).

[32] The Resource Conservation and Recovery Act (RCRA), also known as the Solid Waste Disposal Act, 42 U.S.C. §§ 6901–6992k (1994), pre-dated CERCLA by four years. However, RCRA's provisions were directed primarily at regulating the management of hazardous wastes instead of hazardous substance cleanup. Although the fifty states obviously viewed environmental issues with varying degrees of seriousness, the federal government must have lost faith in the states after the Love Canal incident. Both the Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q (1994), and the Clean Water Act (CWA), 33 U.S.C. §§ 1251–1387 (1994), attempted to leave as much enforcement authority as possible with the states, but, in the end, Congress centralized enforcement and regulatory power with the USEPA. For a basic, yet comprehensive overview of the evolution of the CWA and CAA, see ROGER W. FINDLEY & DANIEL A. FARBER, CASES AND MATERIALS ON ENVIRONMENTAL LAW 253–364 (West Publishing Co. 4th ed. 1995).

[33] *See* Daniel Michel, *The CERCLA Paradox and Ohio's Response to the Brownfield Problem: Senate Bill 221*, 26 U. TOL. L. REV. 435, 438 (1995).

[34] *See supra* note 31 and accompanying text.

[35] *See* Michelle LeVeque, Note, *Rationales for Applying CERCLA Retroactively After* Landgraf v. USI Film Products*: Overcoming the Presumption Against Retroactivity*, 59 OHIO ST. L.J. 603, 604–05 n.8 (1998) (focusing on the retroactive application of CERCLA, but citing various cases addressing strict and joint and several liability); *see also* Michel, *supra* note 33, at 438–54 (summarizing court interpretations of the CERCLA liability scheme).

[36] LeVeque, *supra* note 35, at 604–05 n.8.

development of industrial properties.[37] Furthermore, once lenders discovered that they would not be immune from CERCLA, funds for the sale and development of former industrial properties nearly dried up completely.[38] The reality was that CERCLA was not fulfilling the promise of remediating America's toxic waste woes.[39]

Despite widespread frustration and Congressional inaction, not until 1994 did the USEPA respond by announcing the federal Brownfields Economic Redevelopment Initiative.[40] The main goals of the program were to reinvigorate cities in the Northeast and Midwest and to discourage development of tempting greenfields.[41] The USEPA's Brownfields initiative involved (1) the removal of 25,000 sites from the Superfund Site Tracking System, (2) a new statement of policy regarding lender liability and prospective purchaser agreements, and (3) pilot projects to assist with the development of new, sensible policies.[42]

The most interesting and hopeful aspect of the Brownfields initiative is the pilot program.[43] The pilot program targets cities with the most potential to benefit from remedial activities and then supplies funds to test new and innovative programs.[44] The pilot program offers grants of up to $200,000.[45] The grants, however, may not be used for the actual remediation. This pilot program is still in its infant stages.

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[37] *See* Michel, *supra* note 33, at 435 ("The measures employed by Congress, primarily through ... [CERCLA] ... have had a chilling effect on lenders."). Other issues have been identified as problematic in brownfields remediation. Some of the issues, both legal and practical, that have been identified by other commentators are: "1. ambiguous legal liability; 2. lack of concentrated expertise; 3. potentially substantial capital costs; 4. insufficient financing; 5. clouded federal, state, and local environmental and legal policies; 6. entrenched attitudes among regulators; 7. absence of a consistent redevelopment framework; 8. public opposition; 9. limited demand for redeveloped sites; and 10. competition from greenfields." BROWNFIELDS, *supra* note 10, at 9.

[38] *See* Michel, *supra* note 33, at 437–48 (discussing United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986), and the USEPA's selective enforcement rule, which was subsequently overruled in Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994)).

[39] Not everyone agrees that CERCLA has been a failure. *Compare* Michel, *supra* note 33, at 438–53 (outlining CERCLA's difficulties in detail), *with* Walter E. Mugdan, *The Facts Speak for Themselves: A Fundamentally Different Superfund Program*, A.L.I.-A.B.A. COURSE OF STUDY: ENVIRONMENTAL LAW 679 (1997) (arguing that CERCLA has been a success).

[40] *See* Announcement of Extension of Application Deadline for Brownfields Economic Redevelopment Initiative Pilots, 60 Fed. Reg. 9684 (1995), cited in Sweeney, *supra* note 18, at 116.

[41] *See* Sweeney, *supra* note 18, at 117.

[42] *See id.* at 117–19.

[43] *See generally* CHARLES BARTSCH & ELIZABETH COLLATON, BROWNFIELDS: CLEANING AND REUSING CONTAMINATED PROPERTIES 32–40 (1997).

[44] *See id.*

[45] *See id.* at 32.

B. *Ohio's Approach to Toxic Substance Cleanup*

In June of 1994, the Ohio General Assembly, realizing that the number of contaminated sites in Ohio had not diminished in any significant way since CERCLA, enacted Senate Bill 221, Ohio's Voluntary Action Program.[46] The accompanying administrative rules, however, were not finally promulgated until the middle of 1997.[47] The statute and accompanying rules set forth a comprehensive program aimed at quick, efficient, and effective remediation.

1. *How Ohio's VAP Works*

a. *"Phase I and Phase II Property Assessments"*

Once eligibility is established,[48] the volunteer may begin a "phase I property assessment."[49] The broad purpose of a phase I assessment is to determine if there is "any reason to believe" that there has been or presently is a release of hazardous

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[46] Codified at OHIO REV. CODE ANN. §§ 3746.01–3746.99 (West 1998).

[47] *See* OHIO ADMIN. CODE §§ 3745-300-01 to 3745-300-99 (1996 & Supp. 1996–1997).

[48] Ohio's VAP permits extensive participation. Generally, unless specifically exempted by the Ohio Revised Code, a site will be eligible for participation in the program. *See* § 3746.10:

> Except as otherwise provided in section 3746.02 of the Revised Code, any person may undertake a voluntary action under this chapter and rules adopted under it to identify and address potential sources of contamination by hazardous substances or petroleum of soil, sediments, surface water, or ground water on or underlying property and to establish that the property meets applicable standards.

§ 3746.10; *see also* § 3746.02 (included in the exemptions are properties precluded from participation by the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 (1994); the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6921 (1994); the Toxic Substances Control Act, 15 U.S.C. § 2601 (1994); the Comprehensive Environmental, Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 (1994); the Safe Drinking Water Act, 42 U.S.C. § 300(f) (1994); portions of property for which closure is required by OHIO REVISED CODE ANNOTATED § 3734; properties subject to remediation rules adopted under OHIO REVISED CODE ANNOTATED §§ 3737.88, 3737.882, 3737.889; properties subject to OHIO REVISED CODE ANNOTATED § 1509; and other properties where the director of environmental protection has issued enforcement orders under OHIO REVISED CODE ANNOTATED chapters 3704, 3734, and 6111).

In addition to meeting the statutorily imposed conditions for participation listed at section 3746.02 of the Ohio Revised Code, the volunteer should also consult Ohio's newly adopted administrative rules regarding eligibility for participation. *See* OHIO ADMIN. CODE § 3745-300-02 (1996 & Supp. 1996–1997).

[49] *See* OHIO ADMIN. CODE § 3745-300-06. The statutory authority for the adoption of rules regarding "phase I and II property assessments," generic numerical cleanup standards, standards for certified professionals and laboratories, and criteria for no further action letters may be found in OHIO REVISED CODE ANNOTATED § 3746.04.

waste or petroleum on the relevant property.[50] The volunteer must (1) perform a review of current and past uses of the property,[51] (2) review any environmental history or any hazardous substance or petroleum release history,[52] and (3) conclude a phase I property assessment report.[53] The volunteer must identify in the report all areas where hazardous substances "are or may be emanating from."[54] The results of a phase I property assessment may be used in support of a "no further action letter."[55] No further action letters are drafted by certified professionals and signify the end of a voluntary remediation. The OEPA may

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[50] *See* OHIO ADMIN. CODE § 3745-300-06(B). The assessment is also used to characterize the site for the program's purposes and to determine whether a "phase II property assessment will be necessary, and if so, what its scope should be." *Id.*

[51] *See id.* § 3745-300-06(D).

> The volunteer must, at a minimum, perform a review of the historic and current uses of the property, review the environmental history of the property, and review the property hazardous substance or petroleum release history, and must conduct a property inspection. Any current owner of a property upon which a voluntary action is being conducted must provide the volunteer any information known by that owner which may be relevant to determining whether any release of hazardous substances or petroleum has occurred on, underlying, or is emanating from the property. Any information that is determined not to be reasonably available, as defined in this chapter, must be identified and an explanation must be provided in the "Phase I Property Assessment" report as to why it was not reasonably available.

Id.

[52] *See id.*

[53] *See id.* § 3745-300-06(I)(1)–(2).

> The volunteer must complete a written "Phase I Property Assessment" report which, at a minimum, includes: (1) An introduction identifying: the property, including the legal description of the property; the date that the "Phase I Property Assessment" and the written report were completed; the name and job title of each person conducting the investigation; and a summary of the current and intended use of the property; (2) Conclusions regarding whether there is any reason to believe that a release of hazardous substances or petroleum has or may have occurred on, underlying, or emanating from the property, the report must identify the hazardous substances or petroleum which the "Phase II Property Assessment" will evaluate and the areas where these hazardous substances or petroleum are known or suspected to be present.

Id.

[54] *Id.* § 3745-300-06(F)(1). A volunteer may demonstrate that any release is *de minimis* by meeting the requirements of section 3745-300-06(G) of the Ohio Administrative Code. This provision states a release is *de minimis* if it does not exceed residential direct contact soil standards, is confined to a nine-square-foot area, and was not the result of disposal mismanagement. A "phase II property assessment" is not required if a release is found to be *de minimis* under this rule. *See id.* § 3745-300-06(G).

[55] *See infra* notes 79–82 and accompanying text.

grant covenants not to sue based on the information contained in the letter.[56]

A "phase II property assessment" must be conducted if the phase I property assessment reveals any information that "establishes any reason to believe that a release of hazardous substances or petroleum has or may have occurred on, underlying or is emanating from the property."[57] The purpose of a phase II property assessment is to ensure that the property meets any applicable standard or to determine whether remedial standards conducted according to administrative standards[58] "have or will" achieve applicable standards.[59] A phase II property assessment may only involve data collection and analysis.[60] The initial data collection and analysis, however, may indicate that further procedures will be necessary to meet the requirements of the phase II property assessment.[61] Additionally, a volunteer may be required to perform a variety of activities aimed at remediating groundwater contamination and protecting groundwater.[62] Finally, volunteers must complete a phase II property assessment written report.[63]

b. *Variances*

If a volunteer is granted a variance, he or she is permitted to ignore Ohio's generic numerical standards[64] and follow the varied standard approved by the

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[56] *See infra* notes 87–93 and accompanying text.

[57] OHIO ADMIN. CODE § 3745-300-06(A)(1). If the release is determined to be *de minimis* under section 3745-300-06(G) of the Ohio Administrative Code, the volunteer is not required to undertake a "phase II property assessment." *Id.*

[58] *See id.* § 3745-300-15 (regarding procedures for remediation).

[59] *Id.* § 3745-300-07(C).

[60] *See id.* § 3745-300-07(D).

[61] *See id.*

[62] *See id.* § 3745-300-07(D)(2)–(9) (requiring a volunteer, under the circumstances listed in the text, to identify existing or potential exposure pathways, protect groundwater, determine applicable standards as guided by sections 3745-300-08, -09, -10, and -15 of the Ohio Administrative Code, determine concentration of relevant chemicals in identified areas, determine ground water yield, classify groundwater, determine sources of groundwater contamination, and implement an appropriate remedy).

[63] *See id.* § 3745-300-07(J)(1)–(14) (requiring the final report to include at a minimum: (1) an introduction similar to that required in the phase I property assessment report; (2) summary of amendments to the phase I property assessment report; (3) statement of limitations and qualifications that impact the phase II assessment report; (4) a summary of data collection and results; (5) summary of rationale behind sampling and testing activities; (6) summary of determinations made; (7) summary of background determinations; (8) summary of any models used; (9) indication of whether the property met applicable standards and whether any remedial activity will be required; (10) description, date, source, and location of documents used in preparation of this report; (11) an appendix of supporting documentation; (12) copies of risk assessment reports; (13) property map indicating the location and concentration of any identified chemicals).

[64] Ohio's program is relatively unique in that the OEPA administrative rules specify

OEPA. Ohio has a liberal standard for granting variances to its generic numerical standards.[65] Persons entering the VAP may apply for a variance from applicable standards, if (1) it is technically infeasible to comply with applicable standards at the VAP site or (2) the costs of compliance with applicable standards substantially exceeds the economic benefits.[66] Likewise, a variance may be granted if the standards set forth in the variance application will improve the condition of the environment at the site and protect public health and safety,[67] or the standards set forth in the variance application "are necessary to promote, protect, preserve, or enhance employment opportunities or the reuse of the property."[68]

Once the director of environmental protection establishes that an application for a variance is complete, the director schedules a public meeting in the county in which the variance is requested.[69] The director is obligated to notify each adjacent landowner of the meeting by mail.[70] When deciding whether or not the variance is to be granted, the director is to consider advice of the property revitalization board[71] and comments received either in writing or at the public meeting.[72] After the meeting, the director of environmental protection either accepts or denies the

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acceptable background levels of certain toxic substances. *See id.* § 3745-300-08. If the volunteer encounters a toxic substance not covered by this section, he or she is guided by section 3745-300-09 of the Ohio Administrative Code.

[65] It should also be noted that variances from established standardized criteria are relatively costly. The current rules require the recipient of a variance to pay $18,500. *See id.* § 3745-300-03(C)(9). Of course, the variance could save significant expenditures on remediation that may not really be necessary to protect the public's health and safety. The deft volunteer should always investigate whether a variance might be feasibly granted in any specific situation.

[66] *See* OHIO REV. CODE ANN. § 3746.09(A)(1)(a)–(b) (West 1998). "Technical infeasibility" occurs when "available technology for remediating hazardous substance(s) or petroleum, or both, at the affected property will not achieve applicable standards." OHIO ADMIN. CODE § 3745-300-12(E)(1) (1996 & Supp. 1996–1997). Note the Ohio Revised Code and administrative rules do not supply any further explanation of the cost-benefit analysis.

[67] *See* OHIO REV. CODE ANN. § 3746.09(A)(2) (West 1998).

[68] *Id.* § 3746.09(A)(3).

[69] *See id.* § 3746.09(B)(2).

[70] *See* OHIO ADMIN. CODE § 3745-300-12(H)(2) (1996 & Supp. 1996–1997). Further, the applicant or a representative of the applicant and a representative of the OEPA are required to attend the meeting. *See id.* § 3745-300-12(K)(1)–(2).

[71] The board is created pursuant to chapter 3746 of the Ohio Revised Code. The board is to meet bimonthly to advise the director regarding the issuance or denial of variances, develop a clearinghouse to disseminate information regarding financial incentives available to volunteers, and draft an annual report regarding proposals for administrative or legislative changes regarding available financial incentives. *See* OHIO REV. CODE ANN. § 3746.08(A)–(C) (West 1998).

[72] *See* OHIO ADMIN. CODE § 3745-300-12(L)(1)–(3) (1996 & Supp. 1996–1997).

application.[73] Any granted variance should state alternative, applicable standards with specificity.[74]

c. *Certified Professionals' Role and No Further Action Letters*

Unlike many other states' programs,[75] Ohio's VAP provides for extensive involvement of certified professionals.[76] Certified professionals[77] carry out phase I and phase II property assessments, and draft variance applications and no further action letters. Obviously, the most important part of the certified professional's job is to ensure that public health and safety is protected and that volunteers are in compliance with applicable standards.[78]

However, the most important function that the certified professional serves, in the eyes of most volunteers, is drafting the letter of no further action upon which the director of environmental protection may predicate a covenant not to sue.[79] No further action letters may be issued if, after completing a phase I property assessment, the certified professional determines that there is "no reason to believe" any hazardous substances or petroleum has been or may be released, or the certified professional determines that any release of hazardous substance or petroleum is *de minimis*.[80] No further action letters may also be issued if, after

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[73] *See id.* § 3745-300-12(O) (explaining a variance will be denied if it is not technically infeasible to comply with applicable standards, the costs of complying with the applicable standards do not outweigh the economic benefits, the variance alternative standards are not adequate to protect public health and safety, or the alternative standards do not affect employment opportunities in any manner).

[74] *See id.* § 3745-300-12(N). The director is not limited by the alternative, applicable standards set forth in the variance application, but may impose different standards that are necessary to protect the public's health and safety. *See id.*

[75] Most states' programs are designed in a manner in which the state environmental protection agency is involved in the earliest stages of voluntary action. For examples, consult BROWNFIELDS, *supra* note 10, at 287–681.

[76] *See generally* OHIO REV. CODE ANN. § 3746.071 (West 1998).

[77] In order to become certified a person must have earned at least a bachelor's degree in "biology, chemistry, environmental science, geology, hydrology, toxicology, public health," or hazardous waste management subdisciplines, "appropriate areas of engineering," or other director approved curriculum; possess eight years of professional experience (three related to project management or supervision), "possess professional competence and knowledge," and have good moral character. *See* OHIO ADMIN. CODE § 3745-300-05(B) (1996 & Supp. 1996–1997).

[78] *See id.* § 3745-300-05(F)(2)(a) ("A certified professional must hold paramount the public health, safety, welfare, and the environment in the performance of his professional services."). *See generally id.* § 3745-300-05(F) (detailing the certified professional's standards of conduct and highlighting that the certified professional is primarily responsible for ensuring the public aims of Ohio's VAP are served).

[79] *See* OHIO REV. CODE ANN. § 3746.12 (West 1998).

[80] *See* OHIO ADMIN. CODE § 3745-300-13(A)(1)–(2) (1996 & Supp. 1996–1997).

completing a phase II property assessment, the certified professional determines that concentrations of chemicals on the property do not exceed applicable standards, or that applicable standards have been or will be met through remediation.[81] The volunteer has ultimate authority to decide whether the no further action letter will be submitted to the director of environmental protection.[82]

d. *Audits and Covenants Not to Sue*

The director of environmental protection is under a mandatory duty to conduct audits of at least 25% of no further action letters involving remedial activities and 25% of letters involving no remedial action.[83] The audits are designed to ensure that properties on which remedial activities were performed meet applicable standards, that certified professionals and certified laboratories possess the qualifications for certification,[84] and that the certified professional and certified laboratory have issued a no further action letter that is consistent with applicable remediation standards.[85] Ohio's administrative rules require the director of environmental protection to randomly select those sites that will be audited in any given year.[86]

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[81] *See id.* § 3745-300-13(A)(3)–(4).

[82] *See id.* § 3745-300-13(G)(1).

[83] *See* OHIO REV. CODE ANN. § 3746.17(B) (West 1998).

[84] *See supra* notes 77–78 and accompanying text.

[85] *See* OHIO ADMIN. CODE § 3745-300-13(A)(1)–(4) (1996 & Supp. 1996–1997).

[86] *See id.* § 3745-300-14(D). Note that there are several situations where the director is required by statute to audit a site. These sites consist of what is known as a "mandatory audit pool" that includes no further action letters produced by professionals certified under interim rules, laboratory analyses performed by laboratories certified under the interim rules, letters that the director believes to be submitted fraudulently, letters issued by a certified professional whose certification was subsequently revoked, letters issued that contain analyses performed by a laboratories whose certification has subsequently been revoked, or letters that were the basis for a covenant not to sue which were subsequently revoked. *See id.* § 3745-300-14(A)(4)(a)–(f).

There is also a "priority audit pool" that applies to letters based on property specific risk assessments or engineering controls or institutional controls which restrict the use of the property. *See id.* § 3745-300-14(A)(5)(a)–(b).

The administrative rules distinguish between a "tier I audit" and a "tier II audit." Tier I audits require a review of documents pertaining to no further action letters "held or produced" by certified professionals, volunteers, current owners, or certified laboratories. Tier II audits require a "physical inspection and investigation" of property. Such "inspection and investigation" includes the taking of soil, surface water, air, sediment, or groundwater samples. *See id.* § 3745-300-14(A)(7)–(8). Tier II audits are carried out if tier I documents are "inadequate to substantiate the no further action letter, or if the director has a reasonable belief that the no further action letter has been based on fraudulent or inaccurate information or documentation." *Id.* § 3745-300-14(H)(2)(a). The director may also perform tier II audits on any site selected randomly for a tier I audit. *See id.* § 3745-300-14(H)(2)(b).

On the basis of a no further action letter that may or may not have been audited, the director of environmental protection may grant a covenant not to sue.[87] A covenant not to sue acts to release the volunteer from any liability to the state[88] for any further investigation or remediation of hazardous substances or petroleum releases when the property has undergone a phase I property assessment or a phase II property assessment.[89]

The director must deny the issuance of a covenant not to sue if: (1) the no further action letter does not comply with the statutory scheme or administrative rules regarding appropriate form and content; (2) the director believes that public health and safety is not protected by the remedy described in the no further action letter; or (3) the no further action letter was submitted fraudulently.[90] In the absence of any one of these three problems, the director "shall" issue a covenant not to sue.[91]

The covenant not to sue cannot act to release the volunteer from liability to the state for damages to natural resources for which the state may have a claim under CERCLA.[92] There are also special provisions regarding the issuance of covenants not to sue when the volunteer has elected to use engineering controls as part of the remediation.[93]

The institutional controls discussed above are explained in Ohio Revised Code section 3746.05. Basically, applicable standards may be achieved on a property through the use of controls that restrict access to or use of property, or applicable standards may be achieved through the use of engineering controls that mitigate the release of or contain hazardous substances or petroleum. *See* OHIO REV. CODE ANN. § 3746.05 (West 1998).

87 *See generally* OHIO REV. CODE ANN. § 3746.12 (West 1998).

88 Note that a covenant not to sue issued under the statute *does not* release the individual from liability to third parties or the federal government.

89 *See* OHIO REV. CODE ANN. § 3746.12(A)(1) (West 1998).

90 *See id.* § 3746.12(C)(1)–(3).

91 *See id.* § 3746.12(A). It should be noted that the administrative rules provide no guidance to the OEPA regarding the content of a covenant not to sue.

The statute also addresses the issue of when the covenant will not be considered effective and circumstances under which the covenant may be revoked. *See id.* § 3746.12(B).

For any property that did not involve the use of institutional controls or for which the volunteer did not apply for a consolidated standards permit, the director "shall" issue a covenant not to sue "by issuance of an order as a final action" within thirty days of the receipt of the no further action letter and any necessary verification. *See id.* § 3746.13(A). If institutional controls were used or a consolidated standards permit was issued, the director "shall" issue the covenant not to sue within ninety days of the receipt of the no further action letter and any necessary verification. *See id.* § 3746.13(B).

92 *See id.* § 3746.12(A)(1)(b)–(c). The relevant CERCLA provision is located at 42 U.S.C. § 107(f) (1994) ("In the case of an injury to, destruction of, or loss of natural resources . . . liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, or controlled by, or appertaining to such State . . . .").

93 *See* OHIO REV. CODE ANN. § 3746.12(A)(2)(a)–(c) (West 1998). Some examples of

2. *Cost Recovery and Liability Protection*[94]

Typically, a volunteer will want to hold prior landowners or others who contributed to toxic waste problems responsible for their share of the cost of the cleanup. Owners and operators and any other person who "caused or contributed to a release of hazardous substances at or upon the property, [are] liable to the person who conducted the voluntary action for the costs of conducting the voluntary action."[95] If two or more persons have contributed to the release of hazardous substances or petroleum, each is liable for the release that they caused or contributed to.[96] When apportioning damages among liable parties, the court or the jury may consider equitable factors.[97]

Ohio's cost recovery statute is explicitly retroactive in application[98] and

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engineering controls are "fences, cap systems, cover systems, and landscaping." OHIO ADMIN. CODE § 3745-300-09(D)(2)(d) (Supp. 1997).

[94] Ohio's General Assembly also recognized that potential volunteers may be discouraged by the fact that any remediation may produce documents that could later be used against them for liability purposes. This recognition led to the establishment of section 3746.28 of the Ohio Revised Code which protects volunteers:

> [I]nformation, documents, reports, or data produced, or any samples collected as a result of entering into and participating in the voluntary action program... are not deemed admissible against the person undertaking the voluntary action, and are not discoverable, in any civil or administrative proceeding against the person undertaking the voluntary action.

OHIO REV. CODE ANN. § 3746.28(C) (West 1998). The rule does not apply to criminal proceedings or to violations of the Ohio VAP disclosure of information provision, which requires the disclosure of the names of those involved in a voluntary remediation and some other preliminary information.

[95] *Id.* § 3746.23(B). "Costs of conducting the voluntary action" include: identifying potential sources of contamination, investigating the nature and extent of any contamination, preparing a remedial plan, conducting remedial activities (including future costs of operating engineering controls), preparing and submitting a no further action letter, OEPA oversight costs, reasonable attorney's fees, and court costs associated with recovery of costs of conducting a voluntary action. Costs incurred to permit a higher use than the current or most recent use are not recoverable. *See id.* § 3746.23(A)(1)–(7).

[96] *See id.* § 3746.23(B).

[97] Section 3746.23(D) of the Ohio Revised Code provides:

> [T]he nature and amount of hazardous substances stored, treated, disposed of, used, and released by each person; the length of time that each person owned or operated the property; each person's history of compliance with applicable federal and state environmental laws and rules in the use and operation of the property; and any other factors that the jury or court considers to be appropriate.

Id. § 3746.23(D).

[98] *See id.* § 3746.23(E).

permits contractual apportionment of liability between potentially responsible parties.[99] However, cost recovery may not be made against (1) a person who neither caused nor contributed to a release of hazardous waste in any "material respect," (2) a landlord that lacked knowledge that a lessee was causing or contributing to a release of hazardous substances, (3) the state when it involuntarily acquired ownership, (4) the state when it voluntarily acquires ownership under Chapter 163 of the Ohio Revised Code, (5) an owner or operator responsible for a release of petroleum that ultimately mixed with hazardous substances when the petroleum release was dealt with in a voluntary action, (6) a holder in compliance covered by Ohio's secured party liability laws, or (7) a fiduciary or trustee covered by Ohio's fiduciary immunity laws.[100]

In order to encourage brownfield redevelopment, Ohio's VAP also provides extensive protections for persons holding a property to protect a security interest and for fiduciaries and trustees.[101] If a person is primarily holding "indicia of ownership" in a property "primarily to protect a security interest" and is not "participating in the management of a property," the person is not liable for the costs of conducting a voluntary action or the costs of investigating or remediating a release or threatened release of hazardous substances or petroleum at that site.[102] A fiduciary "who acquires ownership or control of property without having owned, operated, or participated in the management of the property" prior to acquiring such an interest is not liable for the costs of conducting a voluntary action or the costs of investigating or remediating a release or threatened release of hazardous substances or petroleum at that site.[103] The fiduciary must not have engaged in willful, wanton, or intentional tortious conduct that caused or contributed to the release of the hazardous substance or petroleum.[104] In addition, Ohio's legislature has provided important immunities from tort actions arising from cleanup activities that are in compliance with relevant laws and administrative rules as long as the conduct is not willful, wanton, or intentional.[105]

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[99] *See id.* § 3746.23(F). However, contractual apportionment of liability does not affect the parties' "rights, liabilities, or obligations" to the state with respect to the parties' contract. *Id.*

[100] *See id.* § 3746.23(G)(1)–(7).

[101] *See* §§ 3746.26–.27. States vary greatly in the degree of protection they extend to lenders and fiduciaries generally. The trend clearly seems to be in the direction of increased protection. However, several states with VAPs do not provide significant protection. For example, see Arkansas's statutory scheme, which provides no real significant liability protection. *See* ARK. CODE ANN. §§ 8-7-501–522 (Michie 1993 & Supp. 1997).

[102] *See* OHIO REV. CODE ANN. § 3746.26(A)(1) (West 1998). Unlike CERCLA, Ohio's VAP precisely defines "indicia of ownership" and "participation in management." *See id.* § 3746.26(B).

[103] *See id.* § 3746.27(A).

[104] *See id.* § 3746.27(A)(1).

[105] *See generally id.* § 3746.24 (setting forth the immunity rules).

3. *Financial Incentives*

The Ohio General Assembly has provided several types of financial incentives to encourage participation in its VAP and the redevelopment of brownfields.[106]

a. *Tax Exemptions*

Probably the most effective incentive is Ohio's comprehensive tax exemption program.[107] The director of environmental protection is to notify the tax commissioner when a covenant not to sue has been issued for a particular property.[108] The tax commissioner must grant exemptions for real property tax for "the increase in the assessed value of land [caused by remediation] constituting property that is described in the certification, and of the increase in the assessed value of improvements, buildings, fixtures, and structures situated on that land at the time the order is issued."[109] The tax exemption is granted to all properties that receive a covenant not to sue for 100% of the increased assessed values for a period of ten years.[110] Further, upon finding that a volunteer is qualified,[111] a county or municipality may enter into an agreement with the volunteer whereby the volunteer is required to invest 250%[112] of the "value . . . of the land, buildings, improvements, structures, and fixtures . . . to establish, expand, renovate, or occupy a facility and hire new employees, or preserve employment opportunities for existing employees"[113] in return for tax exemptions

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[106] *See generally* BROWNFIELDS, *supra* note 10, at 545–46 (explaining available incentives).

[107] The effectiveness of this incentive assumes that release from tax liability actually encourages brownfields redevelopment. There is not yet, and indeed may never be, any empirical evidence on this point.

[108] *See* OHIO REV. CODE ANN. § 5709.87(B) (West 1998).

[109] *Id.* § 5709.87(C).

[110] *See id.* If the covenant not to sue is ever revoked by the director of environmental protection, the owner of the property is liable for the amount of taxes that would have been charged against the property if not for the tax exemption. *See id.* § 5709.87(E). Section 5709.87(D) of the Ohio Revised Code states that the tax exemption is not affected by the sale or transfer of the property. The exemption continues until the ten year period expires. However, under the current language of the statute, innocent owners could be held liable for taxes accrued prior to the purchase when a covenant not to sue is revoked after purchase. *See id.* § 5709.87(D).

[111] A volunteer is "qualified" if he has demonstrated "financial responsibility and business experience to create and preserve employment opportunities at the project site and improve the economic climate of the county or municipal corporation." *Id.* § 5709.88(D).

[112] The percentage is determined from the taxable value of the land immediately prior to the agreement. *See id.*

[113] *Id.*

of up to 100% of the property for a period of up to ten years beyond the automatic ten year 100% exemption.[114]

b. *Other Financial Incentives*

In addition to tax exemptions, Ohio offers volunteers low-interest loans and limited grants to volunteers. The low-interest loans are only available through the water pollution control loan fund to volunteers whose remediation activities will improve water quality.[115] Under the Urban and Rural Initiative Grant Program,[116] limited funds are granted to assist in the development of sites in qualified areas. However, this grant program ended in 1999.[117]

III. ROOM FOR IMPROVEMENT

Despite the fact that Ohio's VAP has been a model statute to other states in some regards, there remains room for improvement.[118] Part A of this section evaluates incentives that Ohio does not currently offer but may want to consider supplying in order to increase volunteer involvement. Part B discuses some general methods, without increased participation as a goal, by which Ohio's VAP might be improved.

A. *Increasing Incentives for the Volunteer*

Cleanups can be extremely costly. These costs often deter potential

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[114] *See id.* § 5709.88(D)(1)–(2). The municipality may also agree to provide services or assistance that they are authorized to provide. *See id.* § 5709.88(D)(3).

[115] *See id.* §§ 6123.032, 6111.036.

[116] *See id.* §§ 122.19–.22. The Urban and Rural Initiative Grant Program set aside $20 million for the development of distressed areas, labor surplus areas, inner cities, and situational distress areas. The grants are available to counties, townships, municipal corporations, nonprofit economic development entities, community improvement organizations, and port authorities. *See id.* § 122.19. They are to be used for land acquisition, renovations, infrastructure improvements, and *voluntary action programs*. *See id.* § 122.20(A).

[117] *See id.* §§ 122.19–.22 (The repeal date was January 1, 1999).

[118] Ohio's program has achieved some level of success. As of February 1998, the OEPA announced on its web site that twelve no further action letters had been accepted and covenants not to sue had been issued (one issued in 1995, six issued in 1996, three issued in 1997, and two issued in 1998). Further, nineteen no further action letters were pending. Three sites receiving covenants not to sue estimate that the program has enabled them to provide approximately 565 new jobs. Three of the sites whose applications are pending estimate that the program will enable them to create approximately 772 new jobs. Information formerly found at <http://www.epa.ohio.gov/derr/vap/whatsnew/whatsnew.html>. While OEPA has not continued to maintain its chart of the VAP's success, volunteers should look at <http://www.epa.ohio.gov/derr/volume.html>.

volunteers. Incentives that decrease exposure to future liability, increase the likelihood of recovery from potentially responsible parties (PRPs—parties not participating in the cleanup that may also be liable for cleanup costs), and otherwise save the volunteer valuable resources will surely increase involvement beyond what it would be without such incentives.[119] The end result of increased participation is more jobs, a wider tax base, and an improved environment.

1. *Added Liability Protection*

a. *State Assistance in Obtaining Protection from Federal Liability*

The Ohio volunteer may obtain immunity from liability to the state by obtaining a covenant not to sue.[120] However, this immunity does not extend to potential federal Superfund liability. An individual could be in compliance with Ohio's VAP, yet still be subject to a federal action. In attempts to placate fears of federal liability, several states have negotiated memoranda of agreement (MOA) with the USEPA.[121] In these agreements, the USEPA typically states that it approves of the state VAP and does not plan or anticipate any federal action under Superfund law unless there are exceptional circumstances whereby the site poses an eminent threat or emergency situation.[122]

Ohio has not yet entered into an MOA with the USEPA although it is currently negotiating such an agreement.[123] Presently, volunteers might attempt to obtain a comfort letter from the USEPA[124] or enter into a prospective

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[119] Recall that CERCLA provides no such incentives.

[120] *See* OHIO REV. CODE ANN. § 3746.13 (West 1998). This immunity is not without qualification. For example, the state does not give up its right to pursue claims for natural resource damage under CERCLA. There are also strict provisions regarding immunity from state liability when engineering controls are used. *See id.* § 3746.12(A)(1)–(2).

[121] These states include Colorado, Illinois (1989 program), Indiana, Michigan, Minnesota, Missouri, Texas, and Wisconsin. *See* BROWNFIELDS, *supra* note 10, at 346, 394, 403, 468, 490–91.

[122] For some representative examples of memoranda of agreement, visit Fink Zausmer, *Brownfields* (last modified May 14, 1997) <http://www.lawsite.com/organization/BROWNFIELDS/illmemo>; Fink Zausmer, *Brownfields* (last modified May 14, 1997) <http://www.lawsite.com/organization/BROWNFIELDS/minmemo.html>; Fink Zausmer, *Brownfields* (last modified May 14, 1997) <http://www.lawsite.com/organization/BROWNFIELDS/ wismemo.html>.

[123] *See* BROWNFIELDS, *supra* note 10, at 544. In addition to negotiating with the OEPA, former Ohio governor George Voinovich indicated that state officials are lobbying Congress to gain approval of Ohio's VAP. *See* Randall Edwards, *Governor Lauds State's Industrial Cleanup Program*, COLUMBUS DISPATCH, Oct. 16, 1997, at C4.

[124] *See* Announcement and Publication of Guidance on Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792, 37,798 (1995); Policy on the Issuance of Comfort Letters, *United States*

purchaser agreement with the USEPA.[125] Obviously, transaction costs are high when each volunteer must separately approach the USEPA if he or she desires any assurance of freedom from Superfund liability. Such costs would be avoided if an MOA were finalized.[126]

Although it is difficult to state with any certainty why an MOA has not been finalized, several aspects of Ohio's VAP may be viewed as suspect by the USEPA. First, Ohio's confidentiality and privilege provision[127] is unlikely to survive USEPA scrutiny.[128] The USEPA has expressed dissatisfaction with such confidentiality provisions. It has even threatened to withdraw or refuse delegation of authority to enforce federal environmental statutes to states that have such privileges.[129] The USEPA maintains that, although a remediation or audit is voluntary, the information obtained should be admissible against the volunteer in criminal and civil proceedings.[130] The USEPA has taken the position that it is not to be bound by confidentiality provisions in federal enforcement actions.[131]

Second, the general structure of the Ohio program with its extensive delegation of authority to volunteers may be disfavored by the USEPA.[132]

Environmental Protection Agency (last modified Aug. 13, 1998) <http://www.epa.gov/swerosps/bf/html-doc/comfplcy.html>. A comfort letter is a statement from the USEPA that if the disclosed remediation is true, the USEPA is unlikely to take action.

[125] Prospective purchaser agreements were a part of the USEPA's 1995 Brownfields Action Agenda. These agreements are covenants not to sue issued by the federal government. The remediator is responsible for negotiating the agreement.

However, prospective purchaser agreements are of limited value to Ohio volunteers. They are only available to purchasers of NPL sites or sites where action has been taken or is anticipated by the USEPA. *See* U.S.E.P.A., BROWNFIELDS ACTION AGENDA 4–5 (1995), *cited in* Wendy E. Wagner, *Overview of Federal and State Law Governing Brownfields Cleanup*, *in* BROWNFIELDS, *supra* note 10, at 25–26. Prospective purchaser agreements may also provide inadequate protection against other potential plaintiffs such as state governments or third parties and against suits brought under the Resource Conservation and Recovery Act. Prospective purchaser agreements may not act to protect subsequent purchasers or lenders. *See id.* at 26; *see also* Fink Zausmer, *USEPA Model Agreement on Settlements with Prospective Purchasers of Contaminated Property* (last modified May 14, 1997) <http://www.lawsite.com/organization/BROWNFIELDS/epaagr. html>.

[126] Instead of each volunteer incurring the costs of contacting the USEPA and negotiating an agreement, an MOA would serve as a general assurance against federal action.

[127] *See* OHIO REV. CODE. ANN. § 3746.28 (West 1998); *supra* note 94. *See generally* Geltman, *supra* note 18, at 189–209 (discussing the common law audit privilege).

[128] *See generally* Brooks M. Beard, *The New Environmental Federalism: Can the EPA's Voluntary Audit Policy Survive?*, 17 VA. ENVTL. L.J. 1 (1997) (discussing tension between state law and USEPA policies designed to cleanup brownfields).

[129] *See id.* at 13 (explaining that such privileges lead to reduced enforcement capability).

[130] *See id.* at 2, 13–14.

[131] *See id.* at 6–12.

[132] This is simply a proposition based on the fact that states which have MOAs with the USEPA all have statutes that involve the state environmental protection agency at preliminary

Although it is unlikely that Ohio's General Assembly would soon change the general structure of Ohio's VAP to reduce the delegation of authority to volunteers, it may be that a redrafting or repealing of the confidentiality provision could placate the USEPA and ultimately assist in the completion of an MOA. The disadvantage of any such action would be that volunteers may be more discouraged by losing the privilege than by the possibility of federal action.

b. *Protection from Third Party Liability*

Not only are Ohio volunteers not protected from federal liability, but they are also vulnerable to third party liability.[133] Volunteers who have followed Ohio's generic toxic cleanup guidelines should be immune from tort suits related to the post-cleanup character of the property and tort claims arising during remediation, assuming the remediation is properly carried out.

If a statutory mechanism were in place to obviate potential third party liability, there would be added incentive for persons to volunteer under Ohio's plan. Such a statutory mechanism is in place in Missouri where volunteers are protected from third party civil suits aimed at collecting "clean-up costs, response costs or other legal or equitable damages, including costs of restitution."[134] This extended liability protection includes tort immunity for any tort occurring as a result of cleanup activities that are conducted within the ambit of the approved remedial plan.[135]

Missouri law requires that there be a public hearing before any covenant not to sue is granted by the department of natural resources.[136] This public hearing

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stages and extensively throughout the voluntary remedial action. *See generally* COLO. REV. STAT. §§ 25-16-301-310 (1997); 415 ILL. COMP. STAT. ANN. 5/58.3–58.12 (West 1997); IND. CODE §§ 13-25-5-1–23 (1996); 1996 MICH. LEGIS. SERV. 380–381, 383–384; MINN. STAT. §§ 115B.17–.20 (1996 & Supp. 1997); MO. REV. STAT. §§ 260.565–.575 (1994); TEX. HEALTH & SAFETY CODE ANN. §§ 361.601–.613 (West 1992 & Supp. 1998).

[133] *See* OHIO REV. CODE ANN. § 3746.12(A) (West 1998). Volunteers, certified professionals, state agencies, political subdivisions, and sundry others enjoy immunity from tort liability under section 3746.24 of the Ohio Revised Code. *See id.* § 3746.24(B)–(C).

[134] MO. ANN. STAT. § 447.714(3) (West Supp. 1998). The statute continues, "[s]uch immunity shall not apply to the failure to remediate hazardous substances in accordance with the voluntary remediation action site plan, statutes and regulations or the failure to operate the facility in compliance with applicable federal, state and local environmental statutes, regulations and ordinances." *Id.*

[135] *Id.*; *see also id.* § 447.712 (setting forth immunity for government agencies).

[136] *See id.* § 447.714(3)–(4). However, the goal of this public hearing is to "assess the effectiveness of the remedy for the intended use of the eligible project." *Id.* § 447.714(2), (4). In Missouri, the covenant itself does not act to release the volunteer from liability. The statute acts as the release while the covenant is just a mechanism that triggers the release.

As previously mentioned, the OEPA does not hold a public hearing before it grants a covenant not to sue. The appropriate time for public input is during the drafting of the standard rules.

protects third parties in that they will become aware of the remediation and may file a complaint before the covenant not to sue was issued, and the third party may attempt to block the issuance of a covenant not to sue. However, once the covenant is issued, volunteers enjoy the immunities from third party liability listed above. If Ohio's legislature were to incorporate immunity from third party liability into its VAP, public meetings would become a necessity in order to protect third party interests.

c. *Fund for Recovery of Orphan Share Associated Costs*

When Ohio created its VAP, it did not provide for the allocation of orphan share liability. Orphan share liability is liability for remediation costs that are allocated to responsible parties that are insolvent, unidentified, or cannot be located.[137]

The fact that there is no provision in Ohio's VAP allocating orphan share liability suggests that anyone volunteering to remediate a given property takes on responsibility for all costs except what might be recovered through the VAP cost recovery statute.[138] In some instances, orphan share liability could discourage a potential volunteer from participating in Ohio's program. Several states have specifically addressed the question of how to ensure that orphan shares do not act to discourage the volunteer.[139]

For example, California has a statutorily created state fund to absorb orphan share liability so that the volunteer is not unduly burdened or discouraged by the expense.[140] Of course, the California VAP operates quite differently from Ohio's statute. In California, the department of environmental protection must approve any remediation plan before it is put into action.[141] When approving the plan, the department of environmental protection is required to notify all responsible persons, the affected community, and the public of the department's final apportionment of liability.[142] At this time, the department must also indicate whether there are orphan shares and whether or not funds will be available from the trust fund to cover the orphan share liability.[143] The department apportions

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137 *See* CAL. HEALTH & SAFETY CODE § 25396(m) (West Supp. 1998).

138 The only fund created by Ohio's VAP was the VAP administration fund, which was created for the director to expend on implementation, administration, and enforcement of the VAP. *See* OHIO REV. CODE ANN. § 3746.16 (West 1995).

139 *See* ARIZ. REV. STAT. § 49-281(10) (1997) (defining "orphan share" as situations where identified, non-paying, responsible parties cease to exist, have entered into qualified business settlements, have entered into a settlement for less than its allocated share, or the director deems the share uncollectable).

140 *See* CAL. HEALTH & SAFETY CODE § 2398.2(b)(1)(B) (West Supp. 1992).

141 *See id.* § 25398.2(e).

142 *See id.* § 25398.8(a)(1).

143 *See id.* § 25398.8(a)(2); *see also id.* § 25396.6(c)(2).

liability after taking into consideration "equitable factors and fairness principles, including orphan shares."[144] This apportionment of liability is not subject to judicial review.[145]

Ohio's General Assembly should put into operation such a fund and a mechanism for volunteers to access that fund thereby removing a great disincentive to cleaning up Ohio's environment. Although the OEPA does not "approve" remediation plans in the same sense as California does, or have any role in allocating the liability of potentially responsible parties, the Ohio General Assembly could enact a statute that would permit the OEPA to approve funds to cover orphan share costs. Of course, the volunteer would have to produce a remediation plan and information regarding potential apportionment before undertaking any remediation. The enactment of such a provision, however, would decrease both the orphan share costs being carried by the volunteer and the costs in attempting to collect from each solvent potentially responsible party (PRP).

An additional problem regarding cost recovery under Ohio's VAP concerns the strict statute of limitations on recovery from PRPs.

2. *Statute of Limitations*

Ohio's VAP provides that a volunteer may not seek cost recovery from any PRP after three years from the date that the no further action letter was submitted to the director of environmental protection.[146] Such a strict statute of limitations only acts to protect the elusive PRP. Granted, there is a social interest in ensuring that individuals will not be exposed to liability indefinitely, but Ohio's limitation on cost recovery will only discourage potential volunteers from participating in cleanups where there will be difficulty identifying PRPs that may be liable for a significant portion of the remediation costs.

A more liberal approach would likely have the effect of encouraging wider participation in Ohio's VAP in situations such as the one described above. For example, Massachusetts's statute of limitations for recovery of response costs from PRPs is three years after (1) the date on which the plaintiff first discovers or should have discovered that the defendant was liable, (2) the date the plaintiff learns of a breach of an agreement worked out under Massachusetts's VAP dispute resolution procedures, (3) the date on which the plaintiff completes a response action, or (4) the date on which the plaintiff sends notice to the defendant pursuant to Massachusetts's VAP statute.[147] Ohio obviously could benefit by inserting a more liberal statute of limitations provision, comparable to Massachusetts's, in its VAP scheme. Such a provision should state that the statute

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144 *Id.* § 25398.8(b).

145 *See id.* § 25398.8(e).

146 *See* OHIO REV. CODE ANN. § 3746.23(C) (West 1998).

147 *See* MASS. GEN. LAWS ch. 21E, § 11A(2) (1996).

of limitations under Ohio's VAP would run three years from the date the no further action letter was submitted to the director of environmental protection or from the date on which the plaintiff first discovers or should have discovered that the defendant was liable—whichever occurs later.

3. *New Financial Incentives*

Financial incentives will ultimately determine the success of any state's VAP. Costs of any given cleanup are potentially high and, in order to convince developers to stay away from pristine land, cleanup incentives must be available. Currently, Ohio offers tax abatements, low-interest loans (if the remediation involves the improvement of groundwater), and limited grants.[148] When compared to other states' VAPs, Ohio's incentives are considered above average. Indeed, many state VAPs do not yet even offer financial incentives to volunteers.[149] Although Ohio's financial incentive package is well-developed, it would benefit by granting discretionary control over the disbursement of financial incentives to localities, adding a tax increment financing plan,[150] adding grant programs for private individuals and corporations, providing loans and loan guarantees, and adding use sales and use tax exemptions for pollution control equipment.

a. *Tax Increment Financing, Tax Abatements, and Localizing Control of Incentives*

Tax increment financing (TIF) is already available in many states.[151] TIF operates on the principle that future value stemming from brownfield improvement can be used to finance current projects.[152] Bonds are issued, and tax revenue created from the increased value of brownfield properties is used to redeem the bonds.[153] Typically, enabling legislation by the state permits local governmental bodies to create TIF authorities who establish a TIF policy for a given region or zone.[154]

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[148] *See supra* notes 106–17 and accompanying text.

[149] States without financial incentives are Arkansas, Colorado, Maine, Nebraska, New York, Oregon, Texas, Utah, and Washington. *See* BROWNFIELDS, *supra* note 10, at 303–04, 348–49, 426, 514, 535, 562, 603, 613, 646.

[150] While not addressing the issue of tax increment financing, George R. Farrah, ENVIRONMENTAL TAX HANDBOOK (1993), is an invaluable source in evaluating tax consequences of any given federal or state remediation.

[151] *See* BARTSCH & COLLATON, *supra* note 43, at 85; *see, e.g.*, MINN. STAT. ANN. § 469.175 (1996 & Supp. 1997).

[152] *See* MINN. STAT. ANN. § 469.175(1) (1996 & Supp. 1997).

[153] *See id.*

[154] *See* BARTSCH & COLLATON, *supra* note 43, at 85–87.

Amendments to the Ohio Revised Code, which involve a TIF plan would necessarily give more authority to local governmental bodies. Currently, any volunteer that is granted a covenant not to sue receives a ten-year tax abatement from the state, and a county or municipal government may enter into an agreement for ten years whereby the volunteer may continue to receive up to a 100% tax abatement.[155] Ohio's automatic tax abatement is unique among state VAPs.[156]

Ohio's General Assembly should give the authority to grant tax abatements or conduct a TIF plan to local governments. Some sites could be so attractive to developers that they may be willing to develop them with little or no financial incentives. Additional sites may only be remediated when tax abatements are available. Other sites may be developed more effectively under a TIF plan. Municipalities and county governments should be given complete discretion to negotiate a financial incentive package with potential volunteers or create standard plans that fit their communities' needs.

b. *Other Financial Incentives*

A system of grants would also encourage participation in Ohio's VAP.[157] At present, the Ohio remediator is left with few opportunities to obtain grants from the state.[158] Essentially, a grant system would perform the function of the orphan share fund described above for volunteers who are not liable for any part of the contamination.[159] Such grants could encourage small businesses to participate in the VAP by reducing financially burdensome orphan liability, which small businesses are usually unable to bear.

Further, Ohio's present system provides low-interest loans only for projects that improve the quality of groundwater.[160] Many lenders are reluctant to loan any funds to the brownfields remediator, so additional sources of loans are necessary to encourage participation in the VAP.[161] The state should be the lender. Of course, the state would be required to take on the risk of non-payment, but the advantage would be the overall improvement of the state's natural environment and potential encouragement for industry and business to move to

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155 *See* OHIO REV. CODE ANN. §§ 5709.87–.88(D) (West 1995).

156 Other states that use tax abatements as an incentive typically determine the value of the abatement (*e.g.*, how much tax is abated and for how long) on a case-by-case basis.

157 Some states only provide grants to municipalities. *See, e.g.*, PA. STAT. ANN. tit. 35, § 6026.702(c) (West 1998). Other states provide grants to private individuals who are remediating a site in cooperation with a municipal or county government. *See, e.g.*, MO. ANN. STAT. § 447.706(1) (West Supp. 1998).

158 *See supra* notes 116–17 and accompanying text.

159 *See supra* notes 139–45 and accompanying text.

160 *See supra* note 115 and accompanying text.

161 *See* BARTSCH & COLLATON, *supra* note 43, at 82.

Ohio. Several states have started revolving loan funds. Once the fund is initially established its resources are replenished by borrower repayment.[162] Often these funds are designed to assist target areas.[163]

The state should also provide loan guarantees to assure repayment to the private lender. Although a loan guarantee program would not resolve liability issues for lenders, it would provide assurance that the guaranteed portion would be fully repaid.[164] Loan guarantees are often seen as a viable alternative to loan programs because less agency expertise in lending practices is required.[165]

Ohio should add sales and use tax refunds for equipment purchased in connection with property remediation or for engineering control equipment. Nebraska has enacted a tax refund system such that any sales or use taxes paid for any air or water pollution control facility are fully refundable.[166] Such an incentive encourages volunteers to purchase pollution control equipment that they may otherwise not be able to afford.

Although Ohio's incentives go well beyond the benefits supplied to remediators in many other states, there is still room for improvement. More localized control over available incentives coupled with state resources for grants, loans, and guaranteed loans would be a better approach than the current distribution of power regarding the allocation of tax abatements.[167]

B. *A More Effective VAP*

1. *Potential Conflict of Interest Problems*

One of the most unique features of Ohio's VAP is its element of privatization. Volunteers deal with certified professionals instead of the OEPA.[168] The OEPA's role is limited to auditing sites, reviewing no further action letters, granting or denying covenants not to sue, and granting or denying variances. Conflicts of interest are bound to arise because the certified professional completely plans and guides the remediation process, yet is responsible to the

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[162] *See id.* at 83. *See, e.g.*, MO. ANN. STAT. § 447.710 (West Supp. 1998) (establishing a property reuse revolving fund that, in addition to direct loans, provides loan guarantees and grants).

[163] *See* BARTSCH & COLLATON, *supra* note 43, at 83.

[164] *See id.*

[165] *See id.*

[166] *See* NEB. REV. STAT. § 77-27, 150 (Supp. 1997) (tax refund subject to the approval of the tax commissioner and department of environmental quality).

[167] Many states have created "enterprise zones" or "industry zones" that are established by municipal or county governments. The zone authority often possesses wide power with regard to the allocation of financial assistance. Most brownfield developers negotiate their own deal with the authority. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 125.2654–.2657 (West 1997).

[168] *See supra* notes 48–93 and accompanying text.

OEPA to make sure that the volunteer meets Ohio's cleanup standards. Not only is the certified professional responsible to the OEPA, but he or she is responsible to the volunteer as well. In fact, nothing would stop a volunteer from firing a certified professional whom the volunteer felt was creating undue difficulties and making the VAP process too stringent. There are numerous provisions in the Ohio Revised Code and the administrative rules governing the conduct of certified professionals. The provisions are designed to discourage conflicts of interest, but whether or not these provisions will be effective remains to be seen.

Ohio's General Assembly and the OEPA have gone to great lengths to prevent outcomes in which a certified professional's judgment would be compromised.[169] The VAP statute states that, "[a] certified professional shall conscientiously avoid any conflict of interest with his employer or client."[170] The statute and administrative rules go even further, stating under what circumstances a certified professional must reveal a financial interest or an interest in property to be remediated to an employer[171] and client. Further, the health and safety of the public must always be the professional's highest obligation.[172]

Only five state programs have adopted VAPs that vest such authority in persons outside the state environmental protection agency.[173] The rest of the states with VAPs have elected to keep the state environmental protection agency in charge. Ohio's plan has the advantage of making remediation widely available because the agency is not overwhelmed with requests to oversee remediation projects. The risk for abuse, however, would seem greater when the regulatory agency is cut out of the picture so completely. The only other option would involve a complete overhaul of Ohio's VAP—an effort that surely will not be undertaken unless the problem is sufficiently manifested and creates a situation where the public's health and safety is no longer protected.[174]

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[169] *See generally* OHIO REV. CODE ANN. § 3746.071(B)–(D) (West 1998) (describing appropriate behavior for a certified professional); OHIO ADMIN. CODE § 3745-300-05(F) (1996 & Supp. 1997) (describing cases in which a certified professional's license may be revoked).

[170] OHIO REV. CODE ANN. § 3746.071(D)(1) (West 1998). Certified professionals who violate these standards of conduct risk loss of their license. In addition, any covenants not to sue based on that certified professional's no further action letter are subject to audit.

[171] *See id.* § 3746.071(D)(2); OHIO ADMIN. CODE § 3745-300-05(F)(3)(b)–(c) (1996 & Supp. 1997).

[172] *See* OHIO REV. CODE ANN. § 3746.071(B) (West 1998).

[173] *See* Randall Edwards, *Debate Goes on Over 'Brownfield' Cleanup Program*, COLUMBUS DISPATCH, Sept. 3, 1996, at A1.

[174] Excessive instances of fraud by certified professionals or laboratories may lead to a proposal for drastic change. The OEPA could react by revising the administrative rules to require more audits or could push the legislature to vest authority in it to intervene earlier in the remediation.

2. *Increasing Public Involvement*

In addition to the difficulties Ohio's VAP may encounter with conflicts of interest, there may also be problems with lack of public involvement. As soon as the OEPA announced its proposed rules under Ohio's VAP, the debate began among environmentalists, industrial representatives, and the OEPA concerning the adequacy of public involvement.[175] A close look at the administrative rules promulgated pursuant to Ohio's VAP indicates that environmentalists' concerns may never have been adequately addressed.

The present statute and rules only require the director of environmental protection to solicit comments from the public and hold a public hearing before a variance is granted.[176] Under Ohio's VAP, where there is no case-by-case review, no public meeting is necessary before a covenant not to sue is granted. If a volunteer has met the generic standards, then the covenant shall issue. Ohio's General Assembly likely wanted to avoid the expense and time of engaging in public hearings before the granting of a covenant not to sue.[177] Anyone who disputed cleanup standards had an opportunity to protest when the generic standards were being considered by the OEPA. Although the structure of Ohio's VAP may not lend itself to public involvement, one cannot assume that this is an adequate state of affairs.

At the very least, the General Assembly should adopt an optional "community relations plan."[178] The program would give volunteers an opportunity, if they chose to take it, to communicate with the public about the efficacy of their remediations and the purposes of the development. The level of participation could also be left up to the discretion of those opting in and might involve as little as flyers to neighbors or as much as a full-scale community meeting where the developer, not the OEPA, could solicit comments[179] from the public. Obviously, many developers have an interest in hearing the opinions of

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[175] *See generally* Randall Edwards, *EPA Extends 'Brownfields' Comment Period to Oct. 15*, COLUMBUS DISPATCH, Oct. 5, 1996, at C2; Edwards, *supra* note 173, at A1.

[176] *See supra* notes 64–74 and accompanying text; *see also* OHIO REV. CODE ANN. § 3746.09(C)–(E) (West 1998); OHIO ADMIN. CODE § 3745-300-12(H)–(K) (1996).

[177] Over time the public may demand stricter generic standards than those found in the current administrative rules. This would be an issue for the political process rather than an issue regarding the general structure of the OEPA's rules regarding brownfields. However, it might be advantageous for the OEPA to occasionally review the rules in a public forum and solicit comments regarding any necessary changes.

[178] 415 ILL. COMP. STAT. ANN. 5/58.7(h) (West 1997) (directing the Illinois department of environmental protection to develop guidance for the implementation of an optional community relations plan).

[179] Such comments could be on a broad range of issues (*e.g.*, proposed uses of the property and requests for more stringent cleanup of a particular substance). The organization cleaning up the site may use the opportunity to voluntarily notify the residents of the neighborhood about the details of the cleanup.

the members of the surrounding communities regarding their venture. Such a meeting may serve to assuage public concern where public concern is not justified. Further, public hearings would become a necessity in the event that control of financial incentives became more localized or volunteers were granted immunity from third party liability.

If financial incentives were to become more discretionary and authority to grant or deny them was given to municipalities, counties, or the like, public meetings would become necessary even before the remediation began.[180] Volunteers would want to establish early contact with the authority responsible for creating their incentive package. It would become critical to "sell" the community on the project and to point out the benefits of the remediation. The community could then engage in a cost-benefit analysis, taking into account the benefits of the remediation (*e.g.*, jobs, future tax base, cleaner environment) and the risks of encouraging the project (*e.g.*, likelihood of failure of the industry, small tax value for big nuisance value). Of course, if a volunteer had no interest in obtaining a financial incentives package, no public meeting would be necessary, but the volunteer would still be required to follow the generic guidelines set out in the Ohio Revised Code.

Likewise, public meetings would become a necessity if a covenant not to sue released the volunteer from liability to third parties. Third parties could not in good faith be barred from suing the remediator for tort injuries arising from the cleanup without the due process a public hearing would provide. In the 75% of the volunteer remediation cases that the OEPA does not audit, these hearings would become critical. The third party must be given the opportunity to challenge whether or not the volunteer has complied with the generic standards.

IV. CONCLUSION

States are better suited to fixing their environmental woes than the federal government. Each state legislature has unique knowledge of the needs of its own community and is able to assess "what it's worth" to its particular state to encourage remediation (*e.g.*, what incentives is it willing to offer). Ohio's General Assembly has taken the first step in cleaning up Ohio's brownfields problem by promulgating its VAP.

Despite the fact that Ohio's VAP is a model statute, other states have chosen to deviate from it in several significant ways. An analysis of these differences, as well as an analysis of the effect of these differences on participation, illuminates the different manners in which Ohio's program can be improved.[181] For instance,

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[180] Recall that under the current VAP, municipalities have the discretionary authority to grant up to a ten-year extension to the automatic tax abatement. Municipalities could begin using this authority to encourage more community involvement by volunteers.

[181] Statistical analysis of the effects of each states' VAP statutory elements on participation would prove useful in making decisions about amending Ohio's VAP.

Ohio's General Assembly should seriously consider adding liability protections and a more liberal statute of limitations regarding cost recovery from PRPs. There is also a wide variety of financial incentives being offered in other states that, if adopted as part of Ohio's program, could act to increase volunteer participation.

In the end, the ultimate goal of Ohio's VAP is to encourage voluntary participation in the remediation of sites that otherwise may remain as they are indefinitely. A sense of partnership and cooperation between the Ohio General Assembly, the OEPA, and participants is essential.