The Voluntary Remediation and Redevelopment Act—West Virginia Restructures Environmental Liability

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I. INTRODUCTION — THE VOLUNTARY REMEDIATION PROGRAM

Throughout America, there is a heightened awareness of the potential represented by thousands of abandoned or under-utilized industrial sites. One of the primary reasons that these former industrial properties, referred to as

2 These sites, with their already existing infrastructure and access to transportation routes, should present an attractive alternative to the development of pristine land, particularly in a state such as West Virginia with its paucity of developable land.
“brownfields,” remain unproductive is concern over liability associated with actual or potential environmental contamination related to past operations. Potential purchasers, developers and lenders are often reluctant to invest in restoring these properties because of a fear that they will be held responsible for an expensive and endless remediation effort.

A number of the most contaminated sites are remediated under complex federal programs, but many brownfields with less pressing need for cleanup are left to be addressed, if at all, under state remediation laws. States, noting the loss of tax revenue represented by these properties, have begun to look for ways to encourage their reuse. A variety of state laws have been the result, but most contain two components that are considered crucial to brownfield cleanups. First, the law provides a mechanism for establishing clean up levels, thereby, eliminating the

3 Walter L. Sutton Jr., The View from EPA, in The Impact of Environmental Law on Real Estate and Other Commercial Transactions 621, 624 (ALI-ABA Course of Study, Oct. 10, 1996), available in Westlaw, SBI8 ALI-ABA 621 (“The present Superfund law . . . creates severe impediments to cleanup and redevelopment of contaminated property due to fear of liability on the part of lenders, real estate developers and investors.”).

4 Announcement and Publication of Guidance on Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,793 (1995) (“Because of the clear liability which attaches to landowners who acquire property with knowledge of contamination, the [EPA] has received numerous requests for covenants not to sue from prospective purchasers of contaminated property.”).


Releases of hazardous substances may be addressed under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); 42 U.S.C. §§ 9601-9675 (1994). Such response actions are generally limited to the most seriously contaminated sites.

6 West Virginia does not have a state counterpart to CERCLA. The state does, however, cooperate with the EPA in the implementation of the federal hazardous waste program. W. VA. CODE § 22-18-5(a) (1994). The state also has authority to order remediation of solid waste open dumps, a term that includes all unpermitted solid waste disposal sites. See W. VA. CODE §§ 22-15-10, -2(21), -15 (1994). In addition, corrective action for releases from underground storage tanks may be required. See W. VA. CODE § 22-17-14 (1994).
moving (or nonexistent) target that frequently characterized remediation standards.\textsuperscript{7} Second, states' laws attempt to provide some certainty to the process by warranting that remediation, once properly performed, would be final, with only limited exceptions.\textsuperscript{8}

The following is an exegesis of West Virginia's own brownfield legislation, the Voluntary Remediation and Redevelopment Act ("the Act").\textsuperscript{9} Some aspects of the voluntary remediation program\textsuperscript{10} are highly technical, such as the standards for remediation and risk assessment procedures. The Act calls for these issues to be addressed through rulemaking, where science and technical acumen can be given their due.\textsuperscript{11} Other portions of the Act reflect policy choices that fell within the legislature's purview. Several of those areas, such as the criteria for eligibility in the voluntary remediation program,\textsuperscript{12} determining what should be in a voluntary remediation program, and the structure and terms of the voluntary remediation program, are highly technical, such as the determination of the practical quantitation level (PQL) and related laboratory standards and practices.

\textsuperscript{7} See, e.g., OHIO REV. CODE ANN. § 3746.04(B)(1)-(B)(2) (Anderson 1995); 35 PA. CONS. STAT. §§ 6026.301-304 (1996). These code sections establish processes for setting remediation levels, generally as a ceiling on concentrations of pollutants that can be left at a site. In both states, the degree of contamination that can be left at the site may differ, depending on the future use of the site and/or a demonstration that higher residual levels of contamination are not harmful to the environment.

\textsuperscript{8} See OHIO REV. CODE ANN. § 3746.12 (Anderson 1995) (issuing a covenant not to sue that relieves the person performing the remediation from the obligation of performing further remediation in the future). See 35 PA. CONS. STAT. § 6026.501 (1996) (offering cleanup liability protection to the current or future owner of the site and subsequent owners, among others). Such agreements not to seek further redress against the remediators are subject to certain exceptions and are not binding on any federal agency. See, e.g., OHIO REV. CODE ANN. § 3746.12(B)(E) (Anderson 1995); PA. CONS. STAT. 6206.505 (1996).

\textsuperscript{9} W. VA. CODE §§ 22-22-1 to -21 (Supp. 1996). A different version of voluntary remediation legislation was introduced in 1995, and was passed in the Senate, but was not allowed by the leadership to come to a vote in the House of Delegates.

\textsuperscript{10} The term "voluntary remediation program" is used in this article to describe all activities undertaken pursuant to the Act. Some alternative provisions apply to brownfields, a term that describes a subset of voluntary remediation sites under the Act. The term brownfield is not used in the Act to describe all contaminated property, as it often is in other states. See infra part VII.

\textsuperscript{11} See, e.g., W. VA. CODE § 22-22-3(h) (Supp. 1996) (ordering the Director to promulgate rules that "[c]establish criteria to evaluate and approve methods for the measurement of contaminants using the practical quantitation level and related laboratory standards and practices to be used by certified laboratories").

\textsuperscript{12} W. VA. CODE § 22-22-4 (Supp. 1996).
remediation agreement, liability relief, rights of appeal, certificates of completion and land use covenants and the basis for reopening a completed voluntary remediation lend themselves more to legal analysis than scientific discussion, and are the subject of this Article.

II. SUMMARY OF THE ACT

Persons who are interested in restoring contaminated property and obtaining the benefits of the Act must perform a site assessment, or investigation of contamination at the site, and file an application with the Director, seeking permission to perform the remediation. After the Director accepts the application, the Director and the applicant negotiate an agreement specifying how to complete the work.

A licensed remediation specialist ("LRS") must conduct the site assessments and all voluntary remediations. The LRS, who is state certified, has an independent obligation to verify that work is done in accordance with state law and the remediation agreement.

Once a voluntary remediation is successfully completed, and a property meets applicable standards, either the Director or the LRS issues a certificate of completion, and the Act relieves the remediator of further liability to the state.

18 "Remediator" is used for purposes of this Article to describe the landowner, economic development authority, lessee, or other person who negotiates or enters into a voluntary remediation agreement. "Director" refers to the Director and employees of the West Virginia Division of Environmental Protection who may negotiate voluntary remediation agreements and oversee their implementations.
20 W. VA. CODE § 22-22-7(b) (Supp. 1996).
In certain situations, such as fraud or mistake, a remediator can be required to undertake additional site improvement.

"Brownfields" are properties that were abandoned or inactive at the time the Act went into effect (July 1, 1996) and that otherwise meet eligibility criteria. Such sites are generally treated in the same fashion as other voluntary remediations, but are eligible for state funds to help defray the cost of the cleanup, and are subject to broad public participation requirements.

III. ELIGIBILITY CRITERIA

Almost any site is eligible for the voluntary remediation program. The only properties that are excluded are those at which state or federal authorities have


26 W. VA. CODE § 22-22-5 (Supp. 1996) (setting forth an application process for brownfields that is largely the same as for other voluntary remediations).


28 Perhaps the greatest differences between brownfield remediations and other voluntary remediations are the requirement of a notice of intent to remediate and the enhanced public participation requirements. See W. VA. CODE § 22-22-17 (Supp. 1996).

29 A "site" is "any property or portion thereof which contains or may contain contaminants and is eligible for remediation as provided under this article." W. VA. CODE § 22-22-2(dd) (Supp. 1996). By including portions of property within the definition of a site, the Act allows property owners to distinguish between those parts of their property that are not eligible for remediation under the Act, and those that are. For example, a corrective action order may be addressed to a specific release; even if that release could not be remediated under the Act, other releases at the same facility could.

30 The West Virginia Code provides as follows:

Any site is eligible for participation in the voluntary remediation program, except those sites subject to a federal environmental protection agency unilateral enforcement order, under § 104 through § 106 of the "Comprehensive Environmental Response, Compensation and Liability Act," 94 Stat. 2779, 42 U.S.C. § 9601, as amended, or have been listed or proposed to be listed by the United States environmental protection agency on the priorities list of Title I of said act, or subject to a unilateral enforcement order under § 3008 and § 7003 of the "Resource Conservation Recovery Act" or any unilateral enforcement order for corrective action under this chapter: Provided, That the release which is subject to remediation was not created through gross negligence or willful misconduct.

mandated the cleanup, through issuance of a unilateral order, or those sites where the contamination at the property occurred through willful or grossly negligent action. These exceptions are rather narrowly drawn, which means that the universe of properties to which the Act applies is very broad. The following subheadings of this article set forth the categories of properties that are ineligible for remediation under the Act, and the text provides a brief explanation of each.

A. Sites Issued Unilateral Orders Under CERCLA Sections 104 Through 106

Both sections 104 and 106 of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") provide for issuance of orders to protect human health and the environment. Section 104 authorizes the United States Environmental Protection Agency ("EPA") to take any action consistent with the National Contingency Plan to protect human health and the environment if there is a release or threat of a release of a hazardous substance, pollutant or contaminant. Generally, EPA issues orders under section 104 in connection with

31 It is only unilateral orders that disqualify a site from the program. A unilateral order is "a written final order issued by a federal or state agency charged with enforcing environmental law, which compels the fulfillment of an obligation imposed by law, [sic] rule against a person without their voluntary consent." W. VA. CODE § 22-22-2(ee) (Supp. 1996).

A unilateral order must also be a final order. While the term "final order" is not defined in the Act, it would clearly not include an administrative action such as a notice of violation ("NOV"). NOVs are not final actions, as they require a response from the person who receives the NOV, and are followed by further agency action. Neither would a final order include any unilateral order that is on appeal, as that would conflict with established notions of finality.

32 W. VA. CODE § 22-22-4(a).


34 42 U.S.C. § 9604. The pertinent portion of this section reads as follows:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present any imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

a formal Superfund response action.\textsuperscript{35}

Under section 106, EPA can take action, including issuance of an order, as necessary to protect human health and the environment.\textsuperscript{36} The grant of authority is somewhat broader under section 106, placing no restrictions on the actions that EPA can take except that they meet the broad definition of “removal” actions.\textsuperscript{37} Section 106 addresses releases of hazardous substances at non-Superfund sites.\textsuperscript{38}

The broad grant of authority in sections 104 and 106 gives EPA great latitude to issue remediation orders and to negotiate cleanup agreements.\textsuperscript{39} EPA can negotiate orders under sections 104 and 106 as consent orders; i.e., a party agrees to the terms of the order before it is formally issued, and pledges not to contest it.\textsuperscript{40} The entry of such a consent order would not preclude the person who agrees to the order from participating in West Virginia’s voluntary remediation program because such an order is not a unilateral order.

Section 105 does not grant authority to the Administrator or any other person to issue orders; rather it is concerned with the manner of determining the propriety of including sites on the National Priorities List (“NPL”).\textsuperscript{41} Contaminated property that is placed on the NPL is the subject of a separate exclusion under the

\textsuperscript{35} 42 U.S.C. §9604. “Superfund” is the name frequently given to EPA’s responses to releases of hazardous substances under CERCLA.

\textsuperscript{36} 42 U.S.C. §9606. The United States Code provides that:

When the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.


\textsuperscript{37} 42 U.S.C. §9606.

\textsuperscript{38} Id.

\textsuperscript{39} Id.

\textsuperscript{40} Id.

\textsuperscript{41} 42 U.S.C. § 9605 (1994). The NPL is a list of the priority sites established by EPA contaminated by hazardous substances that must be remediated under CERCLA. Such sites are remediated pursuant to the National Contingency Plan, which sets the framework for removal of hazardous substances. 40 C.F.R. § 300 (1996).
Act.\textsuperscript{42}

**B. Sites Issued Unilateral Orders Under Sections 3008 and 7003 of RCRA**

Section 3008 if the Resource Conservation and Recovery Act ("RCRA") allows EPA to seek a penalty or require compliance from any person who has violated provisions of the federal hazardous waste program.\textsuperscript{43} Subsection (a) of section 3008 generally serves as a basis for forcing hazardous waste generators, transporters and disposers to comply with RCRA and its regulations.\textsuperscript{44} Subsection (h) of section 3008 provides the basis for requiring corrective action at interim status hazardous waste facilities.\textsuperscript{45}

The other section of RCRA under which unilateral orders could disqualify a property is section 7003.\textsuperscript{46} Section 7003 allows EPA to respond to threats caused by past or present waste disposal or handling. The danger posed by the waste must be "imminent and substantial," something more than mere technical noncompliance

\textsuperscript{42} See infra part III.C.

\textsuperscript{43} 42 U.S.C. § 6928 (1994). The United States Code states, in part:

Whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both.


\textsuperscript{45} 42 U.S.C. § 6928(h) (1994).

\textsuperscript{46} 42 U.S.C. § 6973 (1994). The United States Code provides as follows:

Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

\textit{Id.}
with a regulatory requirement.\textsuperscript{47} The Act states that a site is ineligible for the voluntary remediation program if EPA issues a final order under sections 3008 \textit{and} 7003.\textsuperscript{48} There is no requirement in RCRA that corrective action orders rely upon both statutory sections, and EPA does not generally do so. The use of the conjunctive appears to have been a clerical error, and it is probable that the West Virginia legislature intended to preclude a site from participation in the voluntary remediation program if it was subject to a unilateral enforcement order under \textit{either} section.

\textbf{C. Sites Listed on, or Proposed for, the National Priorities List}

CERCLA charges EPA with collecting information about contaminated sites and preparing a list of the worst sites, which are targeted for remediation.\textsuperscript{49} The most contaminated sites are placed on the NPL,\textsuperscript{50} and are ineligible for participation in the voluntary remediation program.\textsuperscript{51}

Sites that are proposed for the NPL are also ineligible for participation in the voluntary remediation program. Proposed NPL sites are a specific category of properties. Once a determination is made that a site should be included on the NPL, EPA issues a notice of proposed rulemaking in the \textit{Federal Register}.\textsuperscript{52} It is at that point that the site is "proposed to be listed" and the Act prohibits the site from being remediated.

Sites that are formally proposed for the NPL are distinguishable from other sites that could be remediated under CERCLA. Before sites are formally proposed...

\textsuperscript{47} "Imminent and substantial" risk of harm has been defined as a situation in which (1) there must be a population at risk, (2) the contaminants must be listed as a hazardous waste under RCRA, (3) the level of contaminants must be above levels that are considered acceptable by the State, and (4) there must be a pathway of exposure. Price v. United States Navy, 818 F. Supp. 1323, 1325 (S.D. Cal. 1992).

\textsuperscript{48} W. VA. CODE § 22-22-4(a).

\textsuperscript{49} 42 U.S.C. § 9605(a)(8)(B) (1994); see also 42 U.S.C. § 9606(c).

\textsuperscript{50} A site is eligible to be included on the NPL in three circumstances. First, it is the site of a release which scores sufficiently high on the Hazard Ranking System ("HRS"). Second, a state designates the site as its highest priority. Finally, the release satisfies all of the following criteria: 1) the Agency for Toxic Substances and Disease Registry has issued a health advisory recommending dissociation of individuals from the release; 2) EPA determines the release poses a significant threat to the public health; and 3) EPA anticipates that it will be more cost-effective to use its remedial authority than to use removal authority to respond to the release. 40 C.F.R. § 300.425(c) (1996).

\textsuperscript{51} W. VA. CODE § 22-22-4.

\textsuperscript{52} See 40 C.F.R. § 300.425(d) (1996) (setting forth procedures for adding a site to the NPL).
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for the NPL, EPA places the sites on the CERCLA Information Service ("CERCLIS") list. A site listed on the CERCLIS list undergoes a series of evaluations before EPA nominates the site for inclusion on the NPL. The listing of a site on the CERCLIS list does not disqualify that site from a voluntary remediation, because it does not constitute a proposal to list that site on the NPL. The designation is crucial, because the list of CERCLIS sites is much more extensive than the list of sites on, or proposed for, the NPL.

It should be noted that the Act also disqualifies properties that have been listed or proposed to be listed on the NPL. This could be interpreted as disqualifying a site that is no longer listed on the NPL, or, alternatively, the Act may only disqualify a site while it is listed or proposed for listing, so the site becomes eligible for the voluntary remediation program once it is no longer listed or proposed. Presumably, the West Virginia legislature intended the latter. Once EPA delists the site, there is no longer any need for EPA to maintain primacy at the site to control its cleanup. Therefore, the stigma of listing should not follow the project once it has been delisted, regardless of whether the site "has been" listed in the past. This interpretation would be consistent with the purposes of the Act, which includes "encourag[ing] voluntary redevelopment of contaminated or potentially contaminated sites." Allowing sites that were previously listed or proposed for listing on the NPL to qualify for the state voluntary action program, and thereby to obtain its benefits, such as liability relief, would encourage redevelopment and reuse of contaminated sites.

53 40 C.F.R. § 300.500 (1996) (stating that "CERCLIS contains the official inventory of CERCLA sites and supports EPA's site planning and tracking functions.").

54 According to agency procedures:
   At any time prior to listing a site on the NPL, the EPA may determine that no further action is necessary at the site under CERCLA. The site is then given a "No Further Response Action Planned" ("NFRAP") designation, or there may be a referral to a state agency. NFRAP sites will not be considered for proposal to the NPL unless further information is discovered which warrants such consideration.

55 See 40 C.F.R. § 300.425(d) (1996) (requiring publishing of a proposed rule in the Federal Register prior to inclusion on the NPL).


57 W. VA. CODE § 22-22-4(a).

58 W. VA. CODE § 22-22-1(c) (Supp. 1996).
D. Unilateral Enforcement Orders Under Corrective Action Provisions of State Statutes

Sites are ineligible for the voluntary remediation program to the extent that there is a "unilateral enforcement order for corrective action under this chapter." Although not defined in the Act, the term "corrective action," is presumably not limited to those corrective action provisions in chapter 22 of the West Virginia Code denominated as such. Consequently, the provisions of the West Virginia Solid Waste Management Act, which allow the Director to order a person to take "remedial action," probably would be considered "corrective action" for purposes of the Act, even though the term "corrective action" is not used.

Not all unilateral orders issued under color of an environmental statute would prevent a site from being the subject of a voluntary remediation because not all such orders involve "corrective action." For example, a unilateral enforcement order, requiring a site owner to perform corrective action due to a release of petroleum from an underground storage tank, might disqualify a site from the voluntary remediation program, but a unilateral order to cease a release of hazardous waste, would not. This distinction is crucial because it recognizes that the Director may take quick action to stop a discharge that endangers human health or the environment without disqualifying the site from the voluntary remediation

59 W. VA. CODE § 22-22-4(a) (referring to chapter 22 of the West Virginia Code, which contains the environmental statutes of the West Virginia Code).

60 The authority for ordering corrective action is in chapter 22 of the West Virginia Code. W. VA. CODE § 22-11-15 (1994) (allowing corrective action to be ordered when a person is polluting state waters without a permit); W. VA. CODE § 22-13-10 (1994) (allowing corrective action to be ordered where a person has not complied with the Natural Streams Preservation Act permit); W. VA. CODE § 22-16-15 (1994) (allowing corrective action to be ordered where landfill closure not properly done); W. VA. CODE § 22-17-14 (permitting owner of underground storage tank to be ordered to take corrective action and address effect of release); W. VA. CODE § 22-18-9 (1994) (stating that a corrective action order may be issued to certain permitted hazardous waste facilities until rule adopted by DEP). Some other sections of the Code refer to corrective action but do not authorize corrective action orders. See, e. g., W. VA. CODE §§ 22-15-17, -11-17, -17-2, -17-6, -17-13 (1994).


62 W. VA. CODE § 22-17-14(a) (1994). The Underground Storage Tank Act provides an example of the different forms that the Director's enforcement authority can take. W. VA. CODE §§ 22-17-1 to -23 (1994). Upon learning of a suspected release of oil or other pollutant from a tank, the Director generally issues a Notice to Comply, requiring tank investigation, in accordance with his information-gathering powers. W. VA. CODE § 22-17-13. While the director can compel collection of the requested information, the "Notice to Comply" is not an order and does not constitute corrective action.

program.

E. Releases Caused by Gross Negligence or Willful Misconduct

Contamination arising from releases that were caused by gross negligence or willful misconduct may not be addressed under the voluntary remediation program.64 The terms "gross negligence" and "willful misconduct" are not defined in the Act, and one may turn to the Supreme Court of Appeals of West Virginia for guidance. A review of the decisions of the Supreme Court of Appeals of West Virginia reveals that the court has often, but not always, equated the two terms.

It is clear that willful misconduct implies premeditation or knowledge that injury will result from the act.65 Deliberate and intentional violation of either a statute or safety regulation constitutes willful misconduct in the worker's compensation area.66 These cases are consistent with the Restatement (Second) of Torts, which equates willful misconduct and recklessness.67 A special note to section 500 of the Restatement, entitled "Reckless Disregard of Safety Defined," states that the conduct referred to in this section is often called "wanton and willful misconduct" in both statutes and judicial opinions.68

Gross negligence requires something more than ordinary negligence,69 and appears to require some degree of recklessness.70 The Supreme Court of Appeals

64 W. VA. CODE § 22-22-4(a).


67 RESTATEMENT (SECOND) OF TORTS § 500 (1965). The Restatement (Second) of Torts provides that:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of the facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id.

68 Id.


70 Several other jurisdictions have equated the terms gross negligence and willful misconduct. Jamieson v. Luce-Mackinac-Alger-Schoolcraft Dist. Health Dep't, 497 N.W.2d 551, 555 (Mich. Ct. App. 1992) (defining gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."); Denmark v. New York Tel. Co., 411 N.Y.S.2d 506, 511 (Civ. Ct. 1978) (holding the term gross negligence implies willful misconduct); Williamson v. McKenna,
of West Virginia expressly stated that “the phrase ‘reckless disregard of safety of others’. . . is synonymous with gross negligence” in Peak v. Ratliff. In State v. Vollmer, which involved the interpretation of the West Virginia negligent homicide statute regarding automobile accidents, the court found that gross negligence requires a showing of reckless disregard of safety, much more than a showing of simple negligence. Peak and Vollmer suggest that site contamination must arise from reckless behavior to be deemed to have been caused by gross negligence, and therefore disqualify sites from the voluntary remediation program.

In West Virginia, gross negligence has been distinguished from willful misconduct only in the area of worker’s compensation. The distinction between willful misconduct and gross negligence for the purposes of the Workers Compensation Act is that willful misconduct requires a higher degree of risk of physical harm.

The Act does not specify who is disqualified from remediating a site at which a release has occurred as a result of gross negligence or willful misconduct. The legislature may have intended to disqualify only the person who acted in a grossly negligent or willful fashion in causing the site contamination, or disqualification may extend to subsequent owners of property that was contaminated in such fashion. Given the intent of the Act, however, to encourage cleanups,
particularly at abandoned property,\textsuperscript{75} it is reasonable to interpret this language such that the person whose gross negligence or willful misconduct caused the release is prohibited from participating in the cleanup of the site under the voluntary remediation program. Releases that are caused by the willful misconduct of a third party, such as a former owner of a site, or those who illegally dump solid wastes on their neighbor’s land, should be remediable under the Act. To do otherwise is to punish the site owner or developer who did not contribute to the release, by denying such person (and society) the opportunity to reclaim the property and gain the benefits of the Act.

IV. THE VOLUNTARY REMEDIATION AGREEMENT

Under the Act every remediator must enter into a voluntary remediation agreement, even if no remediation will be undertaken.\textsuperscript{76} The agreement is the blueprint for all that leads up to the issuance of a certificate of completion and concomitant liability protection.\textsuperscript{77} The Act specifies the matters that must be addressed in the voluntary remediation agreement, but leaves the precise terms of the agreement to negotiations between the remediator and the Director.\textsuperscript{78} The Act seeks to expedite the negotiation process by specifying that if the agreement is not reached by the thirty-first day after the Director accepts the application, then either party may withdraw from negotiations and the agency is entitled to retain the application fee.\textsuperscript{79} To assure that the negotiations do not unnecessarily consume time and resources, the rules should establish the framework for voluntary remediation agreements but allow sufficient flexibility to accommodate a variety of situations.

Before entering into a voluntary remediation agreement, the remediator

\textsuperscript{75} W. Va. Code § 22-22-1(d) (Supp. 1996).

\textsuperscript{76} W. Va. Code § 22-22-4(b) (Supp. 1996). For example, if testing shows that the site already meets applicable standards, there will be no need for remediation. Nevertheless, a voluntary remediation agreement is required to participate in the voluntary remediation program, and to obtain the benefits of the Act. \textit{Id.} Where remediation is not required, the voluntary remediation agreement might substitute a description of the confirmation sampling that proves that applicable standards are being met, in lieu of a remediation plan.


\textsuperscript{78} W. Va. Code § 22-22-7(e) (Supp. 1996). While the Act establishes an initial period of 30 days following acceptance of the application within which to negotiate an agreement, the Act also allows the period of negotiation to be extended by mutual agreement of the parties. \textit{Id.}

\textsuperscript{79} \textit{Id.}
must perform a site assessment "of the actual or potential contaminants." The Act does not plainly state the extent of the site assessment, although it is logical to presume that the assessment must provide the Director sufficient information about the site to determine whether it is eligible for the program. This would ordinarily be something in the nature of a "Phase I" investigation.

Although some level of site assessment is required before negotiation of a voluntary remediation agreement can begin, a complete site assessment will usually be necessary before the full extent of contamination is known, and the parties can/could develop an appropriate remediation plan. Some remediators will prefer to perform a more extensive site investigation before filing an application, to fully characterize a site. Prior characterization allows a potential remediator to determine the likely extent of necessary clean up before bringing the situation to the Director's attention. Others will want to perform a more complete characterization after negotiating a voluntary remediation agreement with the Director so that the characterization may occur while the protections against enforcement action are in place. The Director may be willing to negotiate characterization activities in the remediation agreement, rather than require full characterization before the application in filed, because it allows the Director greater control over the type of investigation that takes place.

Once the applicant submits the preliminary information, including the site assessment, and the Director accepts the application, the remediator and the Director negotiate the voluntary remediation agreement. Chapter 22, article 22, section 7 of the West Virginia Code describes the mandatory components of the voluntary remediation agreement. The agreement must "provide for the services of a"

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80 The remediator must submit his "name, address, financial and technical capability to perform the voluntary remediation, a general description of the site, a site assessment of the actual or potential contaminants made by a licensed remediation specialist and all other information required by the director." W. VA. CODE § 22-22-4(b).

81 American Society for Testing and Materials ("ASTM") has developed a procedure for environmental investigations of real property. Under the ASTM guidance a "Phase I" investigation includes initial investigatory activities such as a walk through the property, conversations with employers and neighbors about past land uses, research of industrial or commercial activities at the site, and a review of agency records. Generally, sampling of the soil, surface water or groundwater at the site, does not occur during a Phase I investigation. American Society for Testing and Materials, ASTM Standards on Environmental Site Assessments for Commercial Real Estate (2d ed. 1994).

82 The protection alluded to is the prohibition of an enforcement action against a remediator who is in compliance with the law governing negotiation of voluntary remediation agreements. W. VA. CODE § 22-22-7.

83 W. VA. CODE § 22-22-7(a)-(c) (Supp. 1996).

84 W. VA. CODE § 22-22-7.
licensed remediation specialist” for supervising all work. The Director and the remediator must also agree on the manner in which the remediation will be carried out, including any work plan that is to be submitted to the Director, the final report that will verify that the work has been completed, and a listing of technical standards that will be applied in evaluating the work plans. All statutes and regulations that apply to the remediation must be identified. The remediator must also agree to provide for recovery by the Director all of the costs associated with reviewing and overseeing remediation activities.

While a voluntary remediation agreement must contain the outline of the work to be performed, the work plan itself is not due until after the voluntary remediation agreement is signed. Nothing in the Act, however, prohibits negotiating the work plan as part of the voluntary remediation agreement. It is anticipated that many remediators will prefer to negotiate the entire work plan up front as part of the voluntary remediation agreement, because it provides an opportunity to resolve disagreements that could affect the remediator’s decision whether to pursue a remediation. Plotting out the entire remediation effort is particularly important at this stage, because failure to reach an accord on a voluntary remediation agreement is appealable to the Environmental Quality Board.

Agreements can be modified with the written concurrence of both parties. Modification is likely to occur where the cleanup activities reveal an area of contamination that is greater than expected, or some other problem not anticipated in the work plan. Because the certificate of completion relates back to the remediation agreement, the remediator may want to modify the agreement to address

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85 W. VA. CODE § 22-22-7(b).

86 The Act does not define the term “work plan.” Remediation specialists generally use the term to refer to the report that describes the actions that will be undertaken to characterize, remediate or confirm remediation at a contaminated site.

87 W. VA. CODE § 22-22-7(c).

88 Id.

89 Id.

90 W. VA. CODE § 22-22-8 (Supp. 1996) (“After signing a voluntary remediation agreement, the person undertaking remediation shall prepare and submit the appropriate work plans and reports to the director.”).

91 As an alternative to an appeal to the Environmental Quality Board, the Act authorizes, but does not require, mediation efforts where a dispute arises over a voluntary remediation agreement. W. VA. CODE § 22-22-7(a).

92 W. VA. CODE § 22-22-7(d) (Supp. 1996).
the newly discovered area of contamination. The Act authorizes unilateral modification by the Director if necessary to prevent an imminent threat to the public.

The remediator (but not the Director) can terminate agreements at any time with fifteen days written notice. The Director is entitled to recover agency costs incurred up to that time, within thirty-one days. Termination would also cause a remediator to lose the protections against enforcement action.

As with any contract, the voluntary remediation agreement only binds the parties, the remediator and the Director. Subsequent purchasers of land at which remediation has been performed are not bound by the agreement, although there may be obligations (e.g. maintenance of clay caps or fences) that are contained in the land use covenant that a subsequent purchaser must accept to maintain liability protection. Furthermore, if a reopener applies, the agreement is reopened and liability protection will be lost by the remediator or subsequent owner, or both, unless satisfactorily renegotiated.

A certificate of completion can only be issued when "the property meets applicable standards and all work has been completed as contemplated in the voluntary remediation agreement." W. VA. CODE § 22-22-13(a) (Supp. 1996). The voluntary remediation agreement must provide for all work plans and reports needed to carry out the remediation. W. VA. CODE §§ 22-22-7(c), -8 (Supp. 1996). Consequently, significant changes in the remediation activities must be reflected in the voluntary remediation agreement for protection against enforcement actions or for a certificate of completion. See W. VA. CODE §§ 22-22-7, -13 (Supp. 1996).

Land-use covenants are filed in the same manner as deeds, and are to contain "all necessary deed restrictions." W. VA. CODE § 22-22-14(a) (Supp. 1996). It is not clear whether the conditions contained in the land use covenant must be met by each subsequent landowner of the encumbered property, or whether they can be disavowed by a subsequent owner. As a practical matter, landowners will presumably want to maintain the liability protection provided by the certificate of completion, and therefore will comply with the requirement of the land-use covenant. See infra part VIII for further discussion of land-use covenants.

Five situations exist in which the voluntary remediation agreement "will be reopened and revised to the extent necessary to return the site to its previously agreed to state of remediation or other appropriate standard." W. VA. CODE § 22-22-15. While this contemplates a renegotiation of the voluntary remediation agreement, there is no authority in the Act for compelling either the remediator
negotiate a revised agreement in the event a reopener applies, but presumably will do so to retain the protections that the voluntary remediation agreement and the certificate of completion provide.

V. LIABILITY FOR ENVIRONMENTAL CONTAMINATION

A. Types of Liability

Environmental contamination can result in civil and criminal liability and the sources of this liability can be found both in statutory and common law. Typically, a statute, which has as its purpose the protection of the environment, will make available civil sanctions for any violation and criminal sanctions for more egregious transgressions. Civil enforcement may include the payment of monetary penalties and the performance of specific tasks such as the restoration of the environment or the mitigation of harm done through corrective action. Criminal enforcement adds the sanction of possible imprisonment. Many environmental laws contain provisions that permit citizens to assume the position of the environmental agency to compel compliance.

In the area of common law liability, environmental contamination can give rise to a multitude of complaints. These may include claims of nuisance, trespass, negligence, strict liability and others in an ever-expanding list of possible causes of action. Perhaps the most significant aspect of the Act is its alteration of the

who negotiated the agreement or a subsequent landholder to enter into a revised agreement.


102 See, e.g., Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 (1994) (imposing civil penalties of up to $25,000 per day for each violation and criminal penalties which include imprisonment up to five years and fines up to $250,000).

103 Id.; see also 42 U.S.C. § 6928 (1994) (authorizing civil and criminal penalties and orders for corrective action by violators).


105 See, e.g., W. VA. CODE §§ 22-18-1 to -25 (1994). The Hazardous Waste Management Act allows "any person" to commence a civil action "against any person who is alleged to be in violation of any provision of this article or any condition of a permit issued or rules promulgated hereunder." W. VA. CODE § 22-18-1(a) (1994).

106 1A FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.03[3][a] (1996).
The centerpiece of this reconfiguration is Section 18, entitled "Environmental Liability Protection." The Act provides that "any person" who demonstrates compliance with applicable standards as established under the Act is "relieved from further liability for the remediation of the site under this chapter." The latter reference is to Chapter 22 of the West Virginia Code, which contains all of the environmental control statutes administered by the Director including inter alia, the Air Pollution Control Act, the Water Pollution Control Act, the Ground Water Protection Act, the Surface Coal Mining and Reclamation Act, the Solid Waste Management Act, the Hazardous Waste Management Act, and the Underground Storage Tank Act. Any remediation that satisfies the requirements of the Act will satisfy all remedial obligations under any of the other statutes administered by the Director.

Clearly, the relief provided by the Environmental Liability Protection Act does not constitute a wholesale exemption from the obligations imposed by these other statutes, and is limited to remediation requirements. In further support of this point, the Act provides that nothing "shall affect the duties . . . under other

109 W. VA. CODE § 22-22-18(a) (Supp. 1996) (referring to applicable standards to be promulgated pursuant to W. VA. CODE § 22-22-3 (Supp. 1996)).
112 W. VA. CODE §§ 22-12-1 to -14 (1994).
113 W. VA. CODE §§ 22-3-1 to -32 (1994).
116 W. VA. CODE §§ 22-17-1 to -23 (1994).
117 W. VA. CODE §§ 22-22-18(a).
statutes ... which may be applicable to persons conducting remediation of a site."

A second component of the relief from liability afforded by the Act, is the provision that "[c]ontamination identified in the remediation agreement" approved by Director "shall not be subject to citizen suits or contribution actions." This provision is somewhat awkward in that it protects the environmental condition as opposed to the person performing the remediation. Individuals, however, not environmental conditions are the subject of citizen suits and contribution actions. Therefore, under any reasonable interpretation, this language should protect the remediator as well as other persons identified in chapter 22, article 22, section 18 of the West Virginia Code. This protection would apply to those persons as long as the basis of the citizen suit or the contribution action was contamination addressed under the Act.

The third component of the Act's liability protection is the extension of the "protection from further remediation liability" to seven classes of persons. By referencing "this article," this language significantly expands remediation liability protection provided elsewhere in the Act. The protection afforded against enforcement actions, at least to the extent that the enforcement action would seek to require remediation, would be extended to the classes of persons listed.

118 W. VA. CODE § 22-22-21 (Supp. 1996). At first reading this section may seem inconsistent with the relief granted in chapter 22, article 22, section 18 of the West Virginia Code. However, application of the principle that a statute will be construed to make its meaning intelligible where a contrary construction would result in an inconsistency or absurdity, yields the interpretation that chapter 22, article 22, section 21 of the West Virginia Code applies the provisions of other statutes as they relate to remediation only to the extent they are not superseded directly or indirectly by other provisions of the Act. See 17 M.J., Statutes, § 54 (1994).

119 W. VA. CODE § 22-22-18(a).


121 See W. VA. CODE § 22-22-18(a)(1)-(7) (Supp. 1996); see also discussion infra part V.B.

122 Chapter 22, article 22 of the West Virginia Code provides liability protection in three sections other than chapter 22, article 22, section 18 of the West Virginia Code. W. VA. CODE § 22-22-7(f) (Supp. 1996); W. VA. CODE § 22-22-13(c) (Supp. 1996); W. VA. CODE § 22-22-14(a) (Supp. 1996).

123 The West Virginia Code reads as follows:

The division may not initiate an enforcement action against a person who is in compliance with this section [relating to voluntary remediation agreements] for the contamination that is the subject of the voluntary remediation agreement or for the activity that resulted in the contamination, unless there is an imminent threat to the public.

W. VA. CODE § 22-22-7(f).
B. Classes of Persons Protected

The Act lists seven classes of persons who are to receive the protection from further remediation liability and, as discussed above, from enforcement liability. These classes appear to overlap in a number of areas. Each of the seven categories is discussed below.

1. Current and Future Owners and Operators of the Site, Including Development Authorities and Fiduciaries Who Participated in the Remediation of the Site\textsuperscript{124}

Assuring protection to this category of persons is central to accomplishing the goal of encouraging voluntary remediation. Without some assurance that the transgressions of previous owners and operators of contaminated sites will not be binding upon their successors, potential successors are less likely to come forward. The terms “owner” and “operator” are defined in the Act.\textsuperscript{125}

2. A Person Who Develops or Otherwise Occupies the Site\textsuperscript{126}

To the extent they do not participate in remediation, this provision extends protection to developers of the site.\textsuperscript{127} What constitutes a developer is not defined by the Act but the term “development authority” is.\textsuperscript{128} Any other person who “occupies the site,” to the extent not covered as an owner or operator under the Act would be extended the same protection by this language. Given the broad definition of “owner,” only occupants with no possessory interest in the property would qualify under this subsection.

\textsuperscript{124} W. VA. CODE § 22-22-18(a)(1).

\textsuperscript{125} See W. VA. CODE § 22-22-2(r)-(s) (Supp. 1996).

\textsuperscript{126} W. VA. CODE § 22-22-18(a)(2).

\textsuperscript{127} Id. An overlap occurs with development authorities who participated in remediation of the site. See W. VA. CODE § 22-22-18(a)(1).

\textsuperscript{128} W. VA. CODE § 22-22-2(f) (Supp. 1996). Development authority is defined as “any authority as defined in article twelve, chapter seven . . . of [the West Virginia Code] or the state development office as defined in article two [§ 5B-2-1 et seq.], chapter five-b of the [West Virginia Code].” Id.
3. A Successor or Assign of Any Person to Whom the Liability Protection Applies

Neither of the terms "successor" nor "assign" is defined in the Act. "Successor" generally has the meaning of "one who succeeds or takes the place of another." In either case, with regard to formerly-owned property where a successor or assign acquires the rights of its predecessor or assignor, the successor or assign has an equal interest in acquiring the protection.

4. A Public Utility, as Defined in Section 2, Article 1, Chapter 24 of the West Virginia Code, and for the Purpose of this Article, a Utility Engaged in the Storage and Transportation of Natural Gas, to the Extent the Public Utility Performs Activities on the Site

This subsection cross-references the Public Utilities Act to incorporate the definition of "public utility" and expands that definition by including natural gas transportation and storage activities. The expanded definition is necessary because interstate natural gas transmission companies are not subject to the control of the West Virginia Public Service Commission and do not fall within the ambit of the Public Utilities Act.

It is important to include this category to clarify the liability of public utilities with regard to contamination that they did not create. To the extent that a public utility performs activities on property that it does not own, such as work on rights-of-ways, wherein environmental contamination is encountered, two scenarios could arise. First, the owner or operator of the property has already made the demonstration for compliance under the Act and this language allows the utility to

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130 Waurak & Co. v. Kaiser, 90 F.2d 694, 697 (7th Cir. 1937).

131 A DICTIONARY OF MODERN LEGAL USAGE 83 (Bryan A. Garner ed., 2d ed. 1995) (defining "assign" as "[O]ne to whom property rights or powers are transferred by another").


133 Chapter 22, article 1, section 2 of the West Virginia Code states, in part, as follows: Except where a different meaning clearly appears from the context the words "public utility" when used in this chapter shall mean and include any person or persons, or association of persons, however associated, whether incorporated or not, . . . which is, or shall hereafter be held to be, a public service. W. VA. CODE § 24-1-2 (1992).

take advantage of this fact and to obtain protection for its activities at the site. Second, where the utility chooses to participate in the program and to make the demonstration of compliance with applicable standards, the utility would directly receive the protection afforded in the Act.

5. A Remediation Contractor

The protection provided to the remediation contractor under chapter 22, article 22, section 18(a) of the West Virginia Code must be read in conjunction with the specific provisions relating to the liability of remediation contractors. Because of the threat of liability being imposed under CERCLA on remediation contractors, who frequently move contamination from one point to another, providing protection to members of this group who act in full compliance with a voluntary remediation agreement should help to ensure the availability of competent contractors to perform the work.

6. Licensed Remediation Specialist

The Act also enumerates the duties and potential responsibilities of licensed remediation specialists. Because LRSs have the predominant role in assuring that the site is properly remediated, protection from future liability is a necessary inducement to their participation in the program.

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135 W. VA. CODE § 22-22-18(a)(5).
136 See W. VA. CODE § 22-22-19.
137 See, e.g., Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988) (refusing to dismiss a claim against contractors and others engaged in the development of a contaminated site for residential housing on the grounds that their activities at the site possibly included the disposal of hazardous substances).
139 W. VA. CODE § 22-22-11.
140 See discussion supra Part II.

This language allows lending institutions to obtain the protections provided to others where a site has been remediated and compliance with the applicable standards has been demonstrated. Future liability protection for this group is also central to the Act's goal and is intended to address the legal uncertainties which have hampered redevelopment of contaminated properties. While paralleling the language of Act 3 of Pennsylvania's Land Recycling Act, the language of the Act deviates from its predecessor in two significant ways. First, the Act provides protection to the "lender or developer," while the Pennsylvania statute provides protection of this nature to lenders in a section separate from the provisions addressing the liability of economic development agencies. Under this structure, the Pennsylvania statute provides more detail regarding the nature of the protection that is being afforded each entity. Second, the West Virginia provision does not include provisions from the Pennsylvania statute which would disqualify lenders from protection under certain circumstances. This results in the West Virginia provision establishing greater protection for lenders than its Pennsylvania counterpart.

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143 W. VA. CODE § 22-22-18(a)(7).


146 The Pennsylvania provision reads as follows:

Scope of lender liability. A lender who engages in activities involved in the routine practices of commercial lending, including, but not limited to, the providing of financial services, holding of security interests, workout practices, foreclosure or the recovery of funds from the sale of property shall not be liable under the environmental acts or common law equivalents to the Department of Environmental Resources or to any other person by virtue of the fact that the lender engages in such commercial lending practice unless:

(1) the lender, its employees or agents directly cause an immediate release or directly exacerbate a release of regulated substances on or
C. Releases During Site Assessments

The Act addresses environmental liability protection with respect to site assessments only.\(^{147}\) It provides that a person shall not be considered responsible for a release or threatened release of contaminants "simply by virtue of conducting or having a site assessment conducted."\(^{148}\) A site assessment must be performed for any site to be covered by the Act.\(^{149}\) The results of the site assessment must be included in the application to participate in the voluntary remediation program.\(^{150}\) Despite the unqualified nature of the language used, the Act only serves to limit liability under state laws and federal laws enforced by state agencies, and would not be controlling on the issue of whether such person has responsibility for the release where a federal agency is undertaking enforcement.

The Act further states that it does not relieve a person of any liability "for failure to exercise due diligence in performing a site assessment."\(^{151}\) Thus, to the extent a person performing an assessment has a duty to exercise due diligence in that activity, whether by statute, contract or arising out of common law, the Act preserves this obligation.

D. Liability Relief During Remediation

While the voluntary remediation agreement is being negotiated and while the voluntary remediation is being carried out, the remediator receives significant liability protection.\(^{152}\) The Act provides that "[t]he division may not initiate an

\[\text{from the property; or}\]
\[\text{(2) the lender, its employees or agents knowingly and willfully}\]
\[\text{compelled the borrower to:}\]
\[\text{(i) do an action which caused an immediate release}\]
\[\text{of regulated substances; or}\]
\[\text{(ii) violate an environmental act.}\]

35 PA. STAT. ANN. tit. 35, § 6027.5(a).

\(^{147}\) W. VA. CODE § 22-22-18(b) (Supp. 1996).

\(^{148}\) Id.

\(^{149}\) The West Virginia Code requires each application to participate in the program to include, \textit{inter alia}, "a site assessment of the actual or potential contaminants made by a licensed remediation specialist." W. VA. CODE § 22-22-4(b) (Supp. 1996).

\(^{150}\) Id.

\(^{151}\) W. VA. CODE § 22-22-18(b).

\(^{152}\) See W. VA. CODE § 22-22-7(f).
enforcement action against a person who is in compliance with this section for the contamination that is the subject of the voluntary remediation agreement or for the activity that resulted in the contamination, unless there is an imminent threat to the public. It may be argued that “in compliance with this section” refers to those who are negotiating the agreement, as well as those who are remediating in accordance with the agreement or who have appealed the failure of the Director to enter into an agreement, as the Act is concerned with each of those activities.

The effect of this provision is to stay all agency enforcement action related to the event that caused the contamination, absent an imminent threat. This effectively restricts the application of all other state environmental statutes once the application is filed with the Director. To assure compliance with all applicable statutes, presumably the Director will include any otherwise applicable statutory remediation requirements (such as, for example, the corrective action requirements for underground storage tanks) in the voluntary agreement, or will not accept an application if compliance with a federal program would be prevented by the agreement. However, it is difficult to anticipate all eventualities, and it is likely that the applicability of some environmental requirement will not be discovered until the remediation has begun. In that event, some modification of the agreement may be necessary.

The application of this provision may be illustrated through a hypothetical remediation at an industrial plant where selenium has been found at concentrations that are higher than natural background, but below levels that would cause it to be classified as a hazardous waste. The property owner files an application to participate in the voluntary remediation program with the Director. The Director finds the applicant eligible to participate in the program and a

153 Id.

154 Id.

155 The term “imminent threat” is not defined in the Act. See supra note 47 for a definition of “imminent and substantial” under RCRA.

156 If the Director and remediator agree on a list of applicable statutes and regulations, the Director has no opportunity under the Act to insist on a revised list at some later time. The consent of the remediator to amend the agreement may be necessary in these circumstances. If, on the other hand, a significant new area or type of contamination is discovered at the site, the remediator will probably want to develop a remediation plan to address the newly-discovered contamination and incorporate it into the voluntary remediation agreement, so that it, too, can be covered in a certificate of completion. Otherwise, a certificate of completion would apply to all contaminated areas referred to in the voluntary remediation agreement and work plan. Finding a greater amount of contamination would not necessarily require a revision of the voluntary remediation agreement.

157 Selenium, a non-metallic element, is naturally-occurring in soil and, in certain compounds can be toxic. 2 VON NOSTRAND’S SCIENTIFIC ENCYCLOPEDIA (Douglas M. Considine ed., 8th ed. 1995).
voluntary remediation agreement is negotiated. In the course of the remediation, "hot spots" of contamination that exceed the hazardous waste criteria are discovered, and a former employee comes forward to state that he recalls hazardous waste being disposed at the site without a permit. This discovery does not prevent the remediator from complying with the cleanup standards of the voluntary remediation agreement, so there is no need to amend the voluntary remediation agreement. At this point, absent an imminent threat to the public, the Director may not take any enforcement action against the person who disposed the hazardous waste illegally. That would be "an enforcement action . . . for the activity that resulted in the contamination," which the Act prohibits. 158

VI. CHALLENGING THE DIRECTOR'S DECISIONS

The Act expressly provides a right to appeal the Director's decision to the Environmental Quality Board in two situations. 159 An applicant may appeal the Director's decision to reject an application to perform a voluntary remediation, 160 and an applicant may appeal the failure to reach an agreement with the Director on the terms of the voluntary remediation agreement. 161 In both situations, the standard of review is de novo with no deference given to the Director's decision. 162

From the standpoint of the person performing the remediation, the appeal to the Environmental Quality Board (and from there to the circuit court 163 ) allows

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158 W. VA. CODE § 22-22-7(f). The protection against enforcement could have important implications for the state. Certain programs, including the hazardous waste program, are delegated to the state by the federal government if the state has shown it can satisfy certain criteria. Among those criteria is adequate enforcement authority. In certain situations, the EPA may object to the restriction on the state's enforcement authority as provided in the Act.

159 The Environmental Quality Board is an administrative body that, among its duties, hears appeals from the Office of Waste Management and the Office of Water Resources. See, e.g., W. VA. CODE §§ 22-11-16, -21 (1994).

160 W. VA. CODE § 22-22-4(b).

161 W. VA. CODE § 22-22-7(e).

162 The Act does not expressly provide for de novo review; rather, the Act references the portion of the Code which addresses the establishment and composition of the Environmental Quality Board. W. VA. CODE § 22B-3-4 (Supp. 1996). The procedures to be followed in appeals before the Environmental Quality Board are found at chapter 22B, article 1, section 7 of the West Virginia Code, including the provision that appeals to the Board will be heard de novo. See W. VA. CODE § 22B-1-7(e) (1994).

163 Decisions of the Environmental Quality Board are appealed to circuit courts as provided in the West Virginia Code. W. VA. CODE § 22B-1-9 (1994).
an opportunity to challenge the Director for unreasonably withholding approval of an application, or for insisting on unreasonable terms in the remediation agreement.\textsuperscript{164} This puts the Director and the remediator on a more equal footing when negotiating the terms of the voluntary remediation agreement.

For other actions of the Director there is no express right of appeal to the Environmental Quality Board. It is reasonable to conclude, however, that the right of an appeal to the Environmental Quality Board would be available in situations where the parties disagree on the interpretation of the voluntary remediation agreement, because the interpretation of the agreement is intrinsically related to the negotiations over the terms of the voluntary remediation agreement in the first instance. If, for example, the Director would refuse to issue a certificate of completion following receipt of a final report on the grounds that the remediator did not comply with the sampling protocol specified in a work plan or the voluntary remediation agreement, the remediator may seek to challenge the Director’s action by arguing that the Director has not complied with the agreement.\textsuperscript{165} In this instance an appeal to the Environmental Quality Board would be appropriate in order to resolve the disagreement.

A remediator’s right of recourse is not limited to an appeal to the Environmental Quality Board. The Act states that the voluntary remediation agreement may “provide for alternate dispute resolutions between the parties to the agreement, including, but not limited to, arbitration or mediation of any disputes under this agreement.”\textsuperscript{166} However, the Act does not provide the method of mediation or arbitration and other details. Presumably, the remediator and the Director would negotiate these matters.

While a right of appeal can be found in the penumbra of chapter 22, article 22, section 7 of the West Virginia Code for actions related to the negotiation, interpretation and implementation of the voluntary remediation agreement, there are other actions by the Director for which appeal rights are less clear. For example, the Act does not expressly provide a right to appeal a decision to refuse to license someone as a remediation specialist. The LRS applicant could argue that licenses may not be denied without cause, and therefore the Director has a nondiscretionary duty to issue a license to any qualifying individual. Failure to issue the license would then be the subject of an action in mandamus. “The function of a writ of mandamus is to enforce the performance of official duties arising from the discharge

\textsuperscript{164} Presumably the right to appeal a decision by the Director not to agree to a voluntary remediation agreement would extend that right of appeal to refusals by the Director to amend the agreement. \textit{W. VA. CODE § 22-22-15.}

\textsuperscript{165} For a discussion of the Director’s obligation to issue a certificate of completion, see \textit{infra} part VIII.

\textsuperscript{166} \textit{W. VA. CODE § 22-22-7(c).}
of some public function, or imposed by statute."Absent a LRS having failed to comply with one of the statutory or regulatory requirements, the Act does not expressly give the Director the authority to withhold licensure. Accordingly, the LRS would arguably have satisfied the requirements for a writ of mandamus.

The same recourse to a petition for writ of mandamus would be true of other actions the Director is required to take. For example, once a remediation is complete, and the LRS issues a final report, there is no requirement that the Director issue a certificate of completion to the remediator. Nevertheless, unless the Director could identify some grounds for believing that the remediation had not been completed in accordance with the voluntary remediation agreement, it is difficult to see why a mandamus action would not lie for issuance of the certificate.

VII. REMEDIATING BROWNFIELDS

The Act creates a special class of remedial sites referred to as "brownfields." A brownfield is "any industrial or commercial property which is abandoned or not being actively used by the owner as of [July 1, 1996]." The procedures for remediating brownfields are almost identical to those for other voluntary remediation sites. The Act specifically provides that remediation of brownfields by economic development authorities and any person who did not contribute to contamination of the property is to be conducted in accordance with the Act and associated regulations. Both brownfield and non brownfield

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168 The elements of a writ of mandamus are (1) a clear legal right in the petitioner to the relief sought, (2) existence of a legal duty on the part of the respondent to do the act requested, and (3) no other adequate remedy. State ex rel. Frazier v. Meadows, 454 S.E.2d 65 (W. Va. 1994).

169 It may be argued that failure to issue the certificate once remediation has been accomplished in accordance with the voluntary remediation agreement is a violation of the agreement and for the reasons discussed elsewhere in this section should be appealable to the Environmental Quality Board.

170 W. VA. CODE § 22-22-2(b) (Supp. 1996). In most jurisdictions the term "brownfields" has come to signify any contaminated property.

171 Id. The remainder of the brownfields definition is redundant. It eliminates from the definition of brownfields those sites that are already disqualified from voluntary remediation under chapter 22, article 22, section 3 of the West Virginia Code.

172 W. VA. CODE § 22-22-5(a) (Supp. 1996). Note that the special brownfields provisions do not apply to those who contributed to contamination at the site, regardless of whether the contribution occurred as a result of "willful misconduct" or "gross negligence" as required by chapter 22, article 22, section 4(a) of the West Virginia Code. On the other hand, the disqualification from the voluntary remediation program provided by chapter 22, article 22, section 5 of the West Virginia Code is limited to the
properties are subject to the Act’s application procedures.\(^{173}\)

Brownfield owners are the beneficiaries of two favorable provisions in the Act. The first allows those who remediate a brownfield site, but who did not contribute to the contamination at the site, to qualify for state loans.\(^{174}\) The second benefit would allow the person undertaking the brownfield remediation to obtain all information about the site that is in the possession of the Director.\(^{175}\) It is arguable, however, that this same information would be available to anyone interested in a non-brownfield property by filing a request with the Director under the Freedom of Information Act.\(^{176}\)

A factor that is peculiar to performing a brownfield remediation is chapter 22, article 22, section 17 of the West Virginia Code, which provides that those remediating brownfields must develop a public involvement plan that allows the public to participate in the remediation and reuse plans for the site.\(^{177}\) While the public involvement provisions of chapter 22, article 22, section 17 of the West Virginia Code do not give the public the right to make brownfield remediation decisions for the remediator, this provision clearly contemplates an additional level of public scrutiny.

VIII. CERTIFICATES OF COMPLETION AND LAND USE COVENANTS

Completing the voluntary remediation should result in issuance of a person who caused the contamination; under chapter 22, article 22, section 5 of the West Virginia Code, it is not clear whether the site itself is ineligible, regardless of who subsequently owns it.

\(^{173}\) See supra part IV (discussing application requirements for voluntary remediation agreements).


\(^{175}\) W. VA. CODE § 22-22-5(c) (Supp. 1996).


\(^{177}\) The public participation requirements include a notice of intent to remediate the site that provides “a brief description of the location of the site, a listing of the contaminants involved and the proposed remediation measures.” W. VA. CODE § 22-22-17. This information is to be published in one of the DEP’s publications and in a newspaper of a general circulation, and is provided to municipal and county officials. Id. The public, county or municipality must be given 30 days to comment on the remediation, during which time they can request inclusion in the remediation and reuse plan development. Id. If such a request is made, the remediator must develop a public participation plan that meets the direction requirements. Id.
certificate of completion. The certificate provides a vehicle for documenting the liability protection that flows from successful remediation in accordance with its provisions. Each certificate of completion must include a provision "relieving a person who undertook the remediation and subsequent successors and assigns from all liability to the state as provided under this article . . . ." This language is consistent with the protections afforded in chapter 22, article 22, section 18(a) of the West Virginia Code.

The Act does not specify when the Director or LRS is to issue the certificate of completion. The receipt of a final report from the LRS, which shows that the property fulfills the requirements of both the voluntary remediation agreement and all applicable standards, appears to be a precondition to receipt of the certificate of completion. The certificate of completion is to be issued by the Director or, upon the Director's delegation, by a licensed remediation specialist "in limited circumstances, as specified by rule pursuant to this article." The Act provides no guidance as to when these "limited circumstances" occur.

The certificate of completion remains effective "as long as the property

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178 The West Virginia Code states that:

[The licensed remediation specialist shall issue a final report to the person undertaking the voluntary remediation when the property meets the applicable standards and all work has been completed as contemplated in the voluntary remediation agreement or the site assessment shows that all applicable standards are being met. Upon receipt of the final report, the person may seek a certificate of completion from the director.]

W. VA. CODE § 22-22-13(a).

179 The West Virginia Code states that a:

certificate of completion shall contain a provision relieving a person who undertook the remediation and subsequent successors and assigns from all liability to the state as provided under this article which shall remain effective as long as the property complies with the applicable standards in effect at the time the certificate of completion was issued.

W. VA. CODE § 22-22-13(c) (Supp. 1996).

180 Id.

181 See supra part V of this Article for a discussion of the liability protection afforded by chapter 22, article 22, section 18 of the West Virginia Code.

182 The Act states that "upon receipt of the final report, the person [undertaking the voluntary remediation] may seek a certificate of completion from the Director." W. VA. CODE § 22-22-13(a). Thus the remediator clearly has discretion of whether or not to seek the certificate, but having entered and completed the requirements of the voluntary remediation program there would be no reason not to secure the certificate.

183 W. VA. CODE § 22-22-13(b) (Supp. 1996).
complies with the applicable standards in effect at the time the certificate of completion was issued," but is subject to the reopener provisions.\(^{184}\)

Some remediations will not be completed without either institutional controls,\(^{185}\) such as restrictions on future land uses, or engineering controls,\(^ {186}\) such as maintenance of fences or ground covers. In that event, a land use covenant will be required before a certificate of completion can be issued. Land use covenants, as defined by the Act, place limits on the ways property may be used:

a document or deed restriction issued by the director on remediated sites which have attained and demonstrate continuing compliance with site-specific standards for any contaminants at the site. The covenant shall be recorded by deed in the office of the county clerk of the county wherein the site is situated. The document or covenant shall be included by any grantor or lessor in any deed or other instrument of conveyance or any lease or other instrument whereby real property is let for a period of one year or more, as more fully set forth in sections thirteen and fourteen of this article.\(^ {187}\)

As indicated in the foregoing passage, a land use covenant must be "recorded by deed" in the office of the county clerk. Presumably, the language of the covenant may be written into a deed conveying remediated property or the covenant document may be attached to the property deed.\(^ {188}\)

The Act gives the Director authority to prescribe by rule the criteria for recording land use covenants, so that they appear in the chain of title. The Act requires land use covenants if institutional or engineering controls are used to achieve remediation standards.\(^ {189}\) Thus, if a cap is used to cover areas of contamination, in order to avoid treating the soil to meet residential cleanup standards, a land use covenant specifying maintenance of that cap will be required.

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\(^{184}\) W. VA. CODE § 22-22-13(c) (Supp. 1996). "Applicable standards" is defined as "the remediation levels established in or pursuant to section 3 [§ 22-22-3] of this article." W. VA. CODE § 22-22-2(a) (Supp. 1996). For discussion of the reopener provisions, see infra part IX.


\(^{188}\) Provision is made for recordation of deeds and other written instruments in W. VA. CODE §§ 39-1-2, -2a (1982).

\(^{189}\) W. VA. CODE § 22-22-14(a).
before a final report can be issued.\textsuperscript{190} Similarly, a deed restriction forbidding residential development would be reflected in a land use covenant. However, if a site is cleaned to residential standards, there is no need for a land use covenant.\textsuperscript{191}

Both the certificate of completion and the land use covenant provide protection against "all liability to the state as provided under this article which shall remain effective as long as the property complies with the applicable standards in effect" when the certificate of completion or covenant is issued.\textsuperscript{192} However, only the certificate of completion is expressly made subject to the reopening provisions; the land use covenant is not.\textsuperscript{193}

\section*{IX. Reopeners}

The liability protection provided by the Act can be lost in certain circumstances.\textsuperscript{194} The section of the Act titled "Reopeners" provides five conditions which, when any one of them occurs, will trigger a reopening of the voluntary remediation agreement.\textsuperscript{195} These conditions are: (1) fraud in demonstrating attainment of a cleanup standard;\textsuperscript{196} (2) new information regarding an area of previously unknown contamination at this site;\textsuperscript{197} (3) new information showing a significant increase in risk at the site;\textsuperscript{198} (4) the failure of the remediation method to

\textsuperscript{190} A cap, consisting of clay, concrete, asphalt or other impervious surface may be placed over, under or around contaminated areas to prevent contact with the contamination at the site, and to prevent the contamination from migrating elsewhere.

\textsuperscript{191} Residential use requires the most stringent remediation because it presents the greatest opportunity for exposure to contamination. Persons are generally at home for longer periods than they are at work in an industrial setting, and homes provide greater opportunity for ingestion of contaminants by children, who are smaller and more likely to play in soil.

\textsuperscript{192} W. Va. Code §§ 22-22-13(c), -14(a).

\textsuperscript{193} \textit{Compare} W. Va. Code § 22-22-13(c) (conditioning validity of the certificate of completion on the nonoccurrence of the reopener conditions of chapter 22, article 22, section 15 of the West Virginia Code) \textit{with} W. Va. Code § 22-22-14(a) (excluding mention of chapter 22, article 22, section 15 of the West Virginia Code).

\textsuperscript{194} W. Va. Code §§ 22-22-13(c), -14(a).


achieve the cleanup standard specified, and (5) for releases that occurred after July 1, 1996, and the cleanup of the release relied upon institutional or engineering controls, if further treatment, removal or destruction becomes technically or economically practicable.

When any of these circumstances occur "the remediation agreement will be reopened and revised to the extent necessary to return the site to its previously agreed to state of remediation or other appropriate standard." The Act does not provide guidance regarding the implementation of the reopener provisions. It is possible, for example, that many years will have passed before a set of circumstances occur that trigger the reopener. The key to implementing this provision will be to determine which of the parties who receive the statutory protections through the issuance of the certificate of completion should be affected when one of the reopener events occur.

In a situation where there has been fraud in securing the agency approval in the first instance, the information which formed the basis for the issuance of the certificate was not true at the time the certificate was issued. Therefore, it seems logical under such circumstances that the certificate of completion should be void ab initio and all protections which apply upon issuance of this certificate should expire.

With respect to the other conditions for reopening, it is possible that all facts and assumptions underlying the certificate were true or believed to be true by both the remediator and the Director at the time of its issuance. When different facts arise at a later point and time, that were not known or controlled by the initial remediator, but which nevertheless reveal that the site is not "safe," it may be argued that further remediation should be required of anyone who, at that time or thereafter, seeks the protection of the certificate of completion. Such a subsequent event, however, should not invalidate the certificate as it would apply to any person entitled to its protections prior to that time. This approach would protect those who took all the required action at the time the certificate was issued, but would not allow persons with current contacts with the site to retain their protected status unless further remediation is undertaken. The rules to be issued under the Act are expected to provide guidance on how the reopener provisions are to be applied.


202 Id. Some site owners may not wish to perform the remediation necessary to meet applicable standards. In that event, presumably, they would exercise their right under chapter 22, article 22, section 9 of the West Virginia Code to terminate the agreement.
X. APPLICATION OF THE ACT TO MINING SITES

The Act applies to coal mining sites and related activities just as it does to other industrial facilities. Indeed, there are many areas, especially around coal preparation plants, that may resemble the types of voluntary remediation sites likely to be encountered at industrial facilities. These sites may be contaminated by overspray of antifreeze and oil, leakage of PCBs from electrical transformers, and releases of petroleum from vehicles and tanks. Other areas at a mining site may present different challenges. A mined site has the same materials present after reclamation as before (minus the coal, of course), but rearranged in a fashion that may result in discharge of water with high or low pH, and containing metals such as iron or manganese. In such situations, there are no contaminants to remove, and arguably no increase in the level of background contamination, but there may be a need for engineering controls or other activities to meet the voluntary remediation applicable standards.

One great difference between applying the Act to coal mining sites and applying it to other types of facilities is the Surface Mining Control and Reclamation Act (“SMCRA”) and the West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”). Both the state and federal programs require coal operators to post bonds at each mine site to cover reclamation costs in the event that the operator does not reclaim land after the coal is mined. There are other penalties that apply to operators who fail to satisfactorily reclaim mine sites, such as permit blockage. Consequently, the United States Office of Surface Mining and West

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203 Disturbance of the subsurface exposes rock and other material to the atmosphere and greater susceptibility to the leaching effects of water, resulting in discharges that are acid or base, depending on the type of rock at the site. For discussions of acid mine drainage and its treatment, see Ben Faulkner & Jeff Skousen, Effects of Land Reclamation and Passive Treatment Systems on Improving Water Quality, GREEN LANDS Q., Fall 1995, at 34-40.

204 Discharges of acidic mine water may be treated in an anoxic trench system, or may be limed. Iron and manganese can be precipitated in settling ponds or wetlands. Id. See Jeff Skousen et al., Overview of Acid Mine Drainage Treatment with Chemicals, GREEN LANDS Q., Fall 1996, at 36-45. Former mine areas may also be remined, with the recovery of additional coal providing funds for improved reclamation techniques that eliminate or reduce the negative consequences of mining.


208 W. VA. CODE § 22-3-18(c) (1994). “Permit blockage” refers to the practice of denying new permits to persons, or to entities controlled by those persons, who are in violation of SMCRA or WVSCMRA.
Virginia Office of Mines are already requiring mine owners to remediate their sites and are requiring financial assurance that such reclamation will be accomplished, a situation that does not exist for other industrial facilities.

Under these circumstances, it would seem that a site at which reclamation was completed to the satisfaction of the state and federal mining agencies would be an excellent candidate for a voluntary remediation agreement and certificate of completion. As noted above, the Act prohibits an enforcement action against "a person who is in compliance with this section for the contamination that is the subject of the voluntary remediation agreement or for the activity that resulted in the contamination, unless there is an imminent threat to the public." The mine site activities presumably would qualify as "contamination" under the Act because there has been a change in the physical, and perhaps biological, integrity of the soil. Therefore, the Act would seem to preclude an enforcement action under SMCRA as long as a voluntary remediation agreement was in place. The impact of such an impediment on the Director's federally-delegated authority to administer the SMCRA program is not yet known.

The Act will not supplant SMCRA or WVSCMRA as the defining statute for coal mine remediation. However, there is no reason it could not be a means of providing some additional liability protection after bonds are released from the site. In addition, the Act offers an opportunity to address pre-SMCRA abandoned mine sites and sites which have been left in an unreclaimed condition where bond forfeiture proceeds are insufficient to achieve complete restoration of the site to a suitable condition. Although the Director has an obligation to attend to such sites eventually, many are low priorities and may be left unclaimed for years if there

209 W. VA. CODE §22-22-7(f).

210 The West Virginia Code defines contamination as "any man made or man induced alteration of the chemical, physical or biological integrity of soils, sediments, air and surface water or groundwater resulting from activities regulated under this article, in excess of applicable standards in this chapter, including any hazardous substance, petroleum or natural gas." W. VA. CODE § 22-22-2 (Supp. 1996).

211 As with many other federal programs, responsibility for implementing the federal program for reclamation of abandoned mine lands may be delegated to states, subject to withdrawal of such delegation if the state program is not consistent with federal guidelines. 30 U.S.C. §1235(d) (1994). Among the requirements for state programs is adequate authority to enforce laws relating to mining and reclamation activities. See 30 C.F.R. § 731.14(g)(5) (1996).

212 Prior to adoption of SMCRA, strip mines were often left unreclaimed. Until funds are found to complete reclamation, many of such sites will continue to present environmental problems.

is no landowner action. Currently, some operators may be reluctant to reclaim such land without obtaining guarantees that they will not become responsible for the contamination that exists. In those situations, the Act may provide a context for deciding when remediation is completed, as well as some level of protection to the remediator.

XI. CONCLUSION

The Act provides the skeleton of the voluntary remediation program; the rules are the muscles and sinew necessary to make the program work. The Act sets an ambitious schedule of one year for developing all the rules needed to implement the program. Recognizing the difficulty of putting together a complex program, especially the technical standards, in such a short period of time, the Director convened a Steering Committee consisting of representatives of industry, government and environmental groups, and the general public, to develop an initial set of draft rules. The rules were proposed shortly before the 1997 Regular Session of the West Virginia Legislature convened.

The ultimate impact of West Virginia’s new voluntary remediation program must await the adoption of implementing rules and experience under the program. The Act contains the essential components for an effective program, including protection from liability, certainty in remediation cleanup standards and recognition of the concept of relative risk in developing those standards. With a cohesive set of rules and an aggressive posture by the Director in implementing the program consistent with the goals of the Act, West Virginia could be a leader in the country in voluntary remediation programs.

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214 As this Article was being printed, the 1997 West Virginia Legislature was taking up consideration of the voluntary action rules.