BROWNFIELDS AND HOUSING: HOW ARE STATE VCPS ENCOURAGING RESIDENTIAL DEVELOPMENT?

by

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This report presents the findings of a brownfields survey conducted by the Northeast-Midwest Institute on behalf of the National Association of Homebuilders (NAHB). The homebuilding community has a growing interest in exploring previously used sites for residential use. Brownfields, while characteristic of antiquated land uses, are often situated in rapidly developing metropolitan areas, with access to infrastructure, transit, and commercial and recreational amenities. In spite of the complications from contamination stemming from previous uses, these locations present desirable development opportunities. Moreover, these opportunities are being addressed in the context of supportive state regulatory and financial program initiatives – notably, state voluntary cleanup programs (VCPs) – with increasing frequency.

In mid-1999, the Institute surveyed the states to determine the level of benefits they were enjoying through the redevelopment of brownfields – abandoned or underused industrial or commercial sites where contamination, or the perception that contamination exists, impeded the full reuse potential of these properties. That survey confirmed what case examples and project anecdotes had suggested – that residential reuse of brownfields was an increasingly viable option in many communities. Although survey responses showed that only a few states track specific types of brownfield investments (like housing), California pointed to 5,200 new housing units developed on brownfield sites.

Colorado attributed 2,855 new units to projects gaining approval through its VCP. Michigan has documented 1,400 new units at 11 different sites across the state.

Discussions with specific site owners, as well as with organizations like NAHB, indicated that VCPs – so successful in promoting industrial and commercial reuse by bringing finality and comfort to the cleanup and redevelopment process – could also promote residential development. This report is a first effort to get a grasp of these links, state by state.

Residential brownfields survey process. In late January 2000, we sent the following seven questions and an explanatory letter by e-mail to the brownfields coordinators in all 50 states. We made several follow-up calls to the survey recipients in order to track their progress and answer any questions that arose. Some 44 states have responded – all except Idaho, Nebraska, North Carolina, South Dakota, West Virginia, and Wyoming.

While administering the survey, we encountered some obstacles. Since this programmatic link is so new, many states simply are not tracking the type of information we requested, so data inconsistencies were common. Although most states did respond, some of them simply dispatched a question with a *Yes, No,* or *N/A*, when more information would have been helpful to characterize the precise nature of the state's efforts. Also, many states provided partial answers or skipped questions instead of asking for clarification.

That said, the survey unearthed a substantial body of knowledge in a new and increasingly important field. The replies reflected the complexity and significant variations that exist in state VCPs; they are nuanced and cover an enormous range. Consequently, this report maps out overall trends in the use and support of brownfields for residential development, and highlights the most interesting cases. A companion information table, **BROWNFIELDS, VCPS, AND HOUSING: STATE-OF-THE-STATE INFORMATION AND DATA**, captures the full detail of each state's specific brownfields situation as it relates to housing.

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1. DOES YOUR STATE HAVE A MEMORANDUM OF AGREEMENT WITH U.S. EPA?

A Memorandum of Agreement (MOA) is a "contract" negotiated and signed by a state's Voluntary Cleanup Program and its regional U.S. EPA office. The MOA eliminates the "dual master" problem by giving added weight and sense of finality to the state's VCP, as long as it meets certain EPA criteria. The MOA gives the state VCP

credibility and autonomy; EPA has stated, in agency guidance, that it will not investigate or "second guess" sites that have successfully completed the state's program unless there is a compelling reason to do so – like previously unknown contamination that presents an imminent threat to health and the environment. What an MOA can mean, in practice, is that brownfield redevelopers are more willing to undertake a site cleanup without fear of federal liability and EPA enforcement action.

Currently, ***14*** states have completed an MOA agreement. ***7*** states noted that they do not have an MOA in place yet, but that negotiations are underway.

STATES WITH AN MOA IN PLACE	
Colorado Delaware Florida Illinois Indiana Maryland Michigan	Minnesota Missouri New Mexico Oklahoma Rhode Island Texas Wisconsin
STATES WITH MOA NEGOTIATIONS UNDERWAY	
Arkansas Hawaii Iowa	Kansas Mississippi Ohio Virginia

2. AT WHAT POINT DOES THE STATE *REQUIRE* THAT THE SITE CLEANUP PLAN BECOME PUBLICLY AVAILABLE?

Public participation is a key aspect of the brownfield redevelopment process – especially for housing-type projects where stigma could affect marketing efforts and consumer acceptance. Therefore, we sought to identify the nature and extent of public involvement that states required.

The answers to this question covered a wide range, but state practices generally fall into two categories: some adopt an informal, variable policy towards public

notification and participation; others follow a more formal and defined process. According to the descriptions provided by program officials, states in the "INFORMAL/ VARIABLE" category typically make sure that all relevant site documents are available to the public upon request; often these states do not mention any public notice requirement. On the other hand, states with a "FORMAL/DEFINED" public participation process rely on mechanisms like public meetings, newspaper ads, comment periods, and advisory committees to notify the public of proposed cleanup remedies and plans, of impending cleanups – and often set out a timetable for all this.

INFORMAL/VARIABLE	FORMAL/DEFINED
Arizona	Alaska
Arkansas	California
Colorado	Connecticut
Georgia	Delaware
Illinois	Florida
Indiana	Hawaii
Iowa	Maryland
Kansas	Michigan
Kentucky	Missouri
Louisiana	New Hampshire
Maine	New Mexico
Massachusetts	New York
Minnesota	Ohio
Mississippi	Oklahoma
Montana	Rhode Island
Nevada	Tennessee
North Dakota	Utah
Oregon	Virginia
Pennsylvania	Wisconsin
South Carolina	Washington
Texas	
Vermont	

This categories notwithstanding, considerable variation exists within these two types of outreach efforts that may influence their practical application for housing projects. For example:

- Connecticut property owners must notify the public prior to beginning cleanup by two of the following three means – publishing a notice in the newspaper, erecting a "legible sign" at the site, and mailing a notice to each adjoining property owner.

- In Florida, once a brownfield site has been designated and a responsible party identified, either the local government or the PRP must form an advisory committee to review the plans and make recommendations.

- California requires VCP applicants to complete a "community profile," which is used to determine the level of public participation necessary for the specific site reuse, and the timetable for carrying it out.

- Iowa's land recycling program requires public notification only if an institutional or technological control is used at the site.

- In Mississippi, a notice is published in the local newspaper once the remediation plan has been approved, and cities, counties, local planning authorities, and adjacent property owners are notified of the proposed project activity. If cleanup calls for institutional controls, then a notice must be placed in the county land records, and all legal and equitable interest owners must give their consent.

- In Louisiana, site cleanup plans are made public when the state finishes its review of them, but before the plan is approved as final.

- In Oklahoma, companies place a public notice in the local newspaper after applying to the brownfield program, and again when the proposed plan is issued so that the public has a chance to review, comment, or hold a meeting.

- In Ohio, a notice is published in the newspaper after a cleanup occurs and a covenant-not-to-sue is issued; cleanups seeking variances from various standards or needing environmental permits require public input.

- Wisconsin puts any person requesting site-specific information on a list to receive updates concerning site cleanup action, and is experimenting with an e-mail process to do so.

3. DOES YOUR VCP PROVIDE THE APPLICANT A CHOICE OF CLEANUP STANDARDS? IS A RISK BASED CORRECTIVE ACTION (RBCA) PROCESS IN PLACE?

The standards issue is one of the most complex for prospective site users to deal with as they look at different state programs and their influence on housing activities. The extent to which adequate but flexible standards exists is important for any project – housing or other type – because of their potential to encourage innovative cleanup technologies or institutional controls that can help contain costs – sometimes saving hundreds of thousands of dollars. At the same time, these standards must be sufficient to address any environmental problems – and acceptable enough to remove any stigma that the contamination has generated at a site.

Most states have identified several tiers of standards – industrial, commercial, and residential (or "background"). In some cases, these tiers may be defined by the options they permit – for example, a choice of cleaning to background levels, to pre-determined remediation standards, or to site-specific cleanup standards. Numerous states have some form of "risk-based corrective action" (or RBCA) process in place.

But in spite of these broad commonalities, the "fine print" distinctions in various state program components or alternatives may have significant reverberations for prospective site reusers – who should seek technical and legal guidance if they decide to pursue them. That said, the following table summarizes state approaches to cleanup standards.

TIERED APPROACH OR SITE-SPECIFIC CHOICES	
Alaska Arizona Arkansas Colorado Connecticut Delaware Florida Georgia Hawaii Illinois Kansas Kentucky Maine	Maryland Mississippi Missouri Montana Nevada New Hampshire New Mexico New Jersey Pennsylvania Rhode Island South Carolina Utah Virginia Wisconsin
RISK-BASED (OR FORMAL RBCA) PROCESS IN PLACE	
California Delaware Florida Hawaii Illinois Indiana (pending) Kansas Louisiana Maine Maryland Massachusetts	Michigan Minnesota Mississippi Missouri New Hampshire New Mexico Ohio Oklahoma Texas Washington
SITE-SPECIFIC ONLY	
North Dakota New York Tennessee	
USES EPA-DEFINED STANDARDS	
Alabama Vermont	

4. PLEASE IDENTIFY THE BROWNFIELD INCENTIVES WHICH ARE MOST APPLICABLE TO RESIDENTIAL BUILDING USE.

This question proved to be the most problematic, and points out the need to better channel information on brownfield programs and opportunities to the home building community. ***15 of 44*** respondents wrote "N/A," or left the question blank. ***4*** states answered "none" or that it was unlikely for residential sites to receive incentives. The majority of respondents mentioned some state-level benefit linked to the technical/support side of the brownfield equation:

- ***9*** states listed some advantage from the types of cleanup standards or land use restrictions for the site, such as "use of risk-based standards," "no engineering or institutional controls," or "unrestricted land use."

- ***21*** states cited some aspect of their VCP that offers "basic comfort" or "finality" to developers – liability relief, No Further Action letters, sign-offs from the state, etc.

This question sought to find out if specific states had programs that have been or could be used for residential projects, such as financial and tax incentives, first-time home buyer programs for central cities, or tax abatements for distressed areas. Even though we've learned from our past VCP research that more than two dozen states do offer some type of financial or tax incentive applicable to a wide range of projects, only ***8*** states suggested that incentives were available for housing development:

- Michigan – brownfield redevelopment grants and revitalization loans are available for a range of brownfield activities, including housing; state-authorized brownfield redevelopment authorities may do a variety of site preparation activities, including demolition, supported through tax increment financing mechanisms.

- Illinois – from the financial side, encourages links of low-interest loans and remediation tax credits to brownfield projects; and from the technical perspective, links to incentives such as NFR letters that can ease the fears of capital sources.

- New Jersey – $10,000 matching grants are available to help cover the cost of remedial actions at sites where the intent is to clean them for unrestricted use, a natural fit with housing projects.

- Oregon – local housing authorities have targeted some of their state and federal financial assistance earmarked for construction of low income and senior housing units; some has been used in mixed-use developments.

- Wisconsin – several programs (brownfields grant program, tax increment finance, land recycling loan program for local governments, and the Brownfields Environmental Assessment Program, or BEAP) have been used at sites being converted into housing.

- Washington – independent cleanup actions, including those for housing, can apply for limited tax incentives.

- Maryland – "inculpable persons" can get low-interest loans, grants, and tax incentives via the state's Brownfield Revitalization Incentive Program.

- Delaware – reports that all incentives apply to any land use, including residential development; the state has other urban residential development programs, although these programs have not yet been utilized by brownfield sites.

5. DOES YOUR STATE VCP PROHIBIT ENTRY TO SITES WHERE PETROLEUM IS A SPECIFIC CONTAMINANT? OR ASBESTOS? OR LEAD-BASED PAINT? OR PCBS? PLEASE STATE OR ESTIMATE HOW MANY OR WHAT PERCENTAGE OF SITES HAVE FALLEN INTO EACH OF THESE CATEGORIES.

Federal brownfield program activities are often impeded by statutory restrictions regarding the types of contaminants eligible for assistance; for example, EPA brownfield pilot program resources typically can not be used when petroleum is chief contaminant. Most states, though, have taken a more comprehensive approach, addressinga variety of contaminants that are likely to be found at a site. Several of them have particular relevance to housing-related projects, especially at old sites formerly used for commercial purposes – lead-based paint and asbestos, for example. The extent to which this full range of contaminants can be addressed through the state VCP can help make sites more attractive for redevelopment into residential units.

The following chart captures states' replies to this question. Sites with those contaminants marked with a "✓" are allowed to be addressed through the VCP. Those marked with a "--" were not discussed by the respondent at all, and therefore cannot be classified. When the states provided an estimate on the number of sites in each category, those figures (both quantitative and qualitative) are provided. Six states noted that they

do not restrict sites from entering the VCP on the basis of contaminants: Connecticut, Louisiana, Michigan, New Mexico, Utah, and Washington.

ALLOWED SUBSTANCES

STATE	PETROLEUM	ASBESTOS	LEAD-BASED PAINT	PCBS
Alaska	✓ overwhelming majority		✓	✓
Arizona	✓ 17/40 active sites, 12/37 closed sites	✓ outdoor	--	✓ 4/37 closed sites
Arkansas	✓ mostly	✓ mostly	✓	✓
Colorado	✓ <10%	✓	✓	✓ <1%
California	✓	✓ conditional	✓ conditional	✓
Connecticut	✓	✓	✓	✓
Delaware	✓ conditional		✓	✓ most sites
Florida	✓	✓ conditional	✓ conditional	✓
Hawaii	✓	✓	✓	✓
Illinois	✓ estimates 1/3	✓ very few	✓ very few	✓ very few
Indiana	✓ 30%			✓ 5%
Iowa	✓ if non-UST 4/6 sites	--	--	--
Kansas	✓ 20%	✓	✓	✓
Kentucky	✓			✓
Maine	✓ approximately 50%	✓ approximately 5%	--	✓ approximately 5%
Maryland	✓ if not sole contaminant		✓ if not sole contaminant	✓
Massachusetts	--	--	not regulated	--
Michigan	✓ if non UST	✓	✓	✓
Minnesota	✓ if not sole contaminant	✓ if release to environment	✓ if release to environment	

Mississippi	✓ 40%	✓	✓	✓ 10%
Missouri	✓ at least ½ with some	✓ 15-20%	✓ 5-10%	✓ 5%
Montana	✓ 63%	✓ usually ineligible	✓ usually ineligible	--
Nevada	✓	✓	✓	✓
New Hampshire	✓ if not sole contaminant	✓ 3 sites	✓ 0 sites	✓ 2 sites
New Jersey	✓	✓	✓	✓
New Mexico	✓	✓ no sites yet	✓ no sites yet	✓ no sites yet
New York	✓	✓	✓	✓
North Dakota	✓ most common	✓	✓	✓
Ohio	✓ non UST	✓	✓	✓ after satisfying specific PCB obligations
Oklahoma	✓	✓	✓	✓
Oregon	✓ if non UST		✓	✓
Rhode Island	✓	✓	✓	✓
South Carolina		✓ no sites yet	✓ no sites yet	✓ 3/26 sites
Tennessee				
Texas	✓ 60%	✓ if in soil 1%	✓ if in soil 1%	--
Utah	✓ 8/22 sites that applied to program	✓ 1/22 sites that applied to program	✓	✓
Vermont	✓ if not sole contaminant	✓ no sites yet	✓ no sites yet	✓ no sites yet
Virginia	--	--	--	--
Washington	✓ 70-80%	✓	✓	✓
Wisconsin	✓ approx 50%	✓	✓	✓

How states grapple with multiple – and different and heretofore unconsidered – contaminants may have significant impacts on the ability of site owners to develop housing projects. The state of Arizona, for example, vividly pointed this out in their response, noting that pesticide contamination on former agricultural lands is becoming a

real issue affecting the cost of reuse – and the basic viability of these sites. More and more state VCPs will see agricultural brownfield sites at the edge of growing metropolitan areas, and how they deal with them will have important implications for state and regional affordable housing and "smart growth" efforts.

In addition to the 6 states who have not responded to the survey, Georgia did not address this question.

6. HOW ACTIVELY HAS EPA BEEN INVOLVED WITH YOUR STATE S VCP?

Virtually all of the states replied that U.S. EPA is not involved or only minimally active in monitoring the state's VCP. ***6*** states say that the EPA is not routinely involved with their VCP, but noted that the agency does provide funds and program support. The ***14*** states with MOAs typically provide the EPA with quarterly reports that include the number of sites that their VCP has addressed and completed. Delaware wrote that its MOA makes for a close, on-going working relationship with the EPA, and therefore the agency does not extensively monitor the VCP.

The remaining answers varied. For example:

- Arizona – EPA has actively monitored a few sites going through the VCP, to ensure progress, so that EPA would not have to initiate expanded site inspection.

- Iowa – the state asked EPA for comments during the VCP rule development process.

- Oklahoma – EPA partners with the state to help brownfield pilot cities, and provides targeted site assessments to some communities.

- Ohio- EPA has issued comfort letters when requested, an important complement to the state's privatized VCP approach.

- Pennsylvania- EPA is not actively involved in the VCP, but is working closely with the state on a large brownfield project with RCRA issues

7. HOW MANY SITES HAS YOUR STATE HAD TO RE-VISIT AFTER CLEAN-UP AND PARTICIPATION IN THE VCP WAS COMPLETE, AND WHAT WAS THE NATURE OF THE REVISITATION?

Finally, one of the most importnat issues to site reusers is finality; they want to know that, once they have gone through the VCP, they have really finished the regulatory review process. Therefore, an important component of the "finality" incentive offered by state VCPs is the question of reopeners – the circumstances under which the state or federal EPA returns to a site to deal with problems that the VCP did not address – ranging from misinformation to changing land uses to outright fraud. The survey indicated that state VCP efforts are purposefully well-structured and thorough, to avoid revisit situations; very few states reported significant reopeners.

The ***24*** states listed on the following chart replied to this question with an unequivocal "NONE."

NO SITES REVISITED TO DATE	
Alabama	Missouri
Alaska	Montana
Arizona	New Hampshire
Arkansas	New Mexico
Delaware	North Dakota
Florida	Oklahoma
Hawaii	Pennsylvania
Indiana	Tennessee
Kansas	Texas
Kentucky	Utah
Louisiana	Vermont
Maine	Virginia

Several states provided some detail about their re-opener process or situations. Specifically:

- Colorado – approximately 2 percent of the sites going through the VCP have had problems meeting their cleanup goals, which has necessitated changes to their voluntary cleanup plans.

- Connecticut – as noted: "Approximately ten sites, or half of the total audited sites, have been revisited for various reasons, including failure to monitor,

technical inconsistencies, and general failure to comply with the Remediation Standards."

- Illinois – mentioned one site that had been cleaned to an industrial standard that proposed a change in use to residential, so the state revisited the site to ensure compliance with the new use.

- Maryland – has not revisited any sites, but performs quarterly inspections of each site that has a sign-off.

- Minnesota – does not have a reopener number, but notes that it revisits sites only when new owners of a property request assurances that had been issued to a previous owner.

- Mississippi – revisited one site where previously unknown contamination was discovered that posed a significant threat to public health and the environment.

- New York – mentioned one site where additional contamination was discovered; this was subsequently addressed by a second voluntary agreement.

- Ohio- does not cite a number, but says that it audits at least 25% of CAP sites every year to ensure that cleanup standards are met.

- South Carolina – the state is contemplating revisiting a couple of sites where contamination may be more significant than previously thought.

- Wisconsin – has revisited 10 sites out of the 9,000 to which it has issued close-out letters.

The remaining states responded variously. A couple do not keep track of this information, or left the question blank. A few did say that site re-visitations have been rare, occurring only once or twice, due to changes in cleanup standards or land use.