A Call for Public Participation in State Voluntary Remediation Programs: Strategies for Promoting Public Involvement Opportunities in Virginia

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A CALL FOR PUBLIC PARTICIPATION IN STATE VOLUNTARY REMEDIATION PROGRAMS: STRATEGIES FOR PROMOTING PUBLIC INVOLVEMENT OPPORTUNITIES IN VIRGINIA

There is a growing environmental problem in the United States with contaminated property which is left abandoned or underused. These properties are commonly known as "brownfields." The type or extent of the contamination may vary from site to site. The types of waste could include hazardous, solid, or petroleum waste components; and the extent of the contamination may be minimal, severe, or even unknown. In 1995, the Congressional Office of Technology Assessment reported that the number of sites that currently remain contaminated are estimated to range from "tens of thousands to 450,000 sites."

In recent years, many states have begun to address this problem by enacting voluntary remediation programs. Unlike

1. See infra note 17.
2. OFFICE OF TECHNOLOGY ASSESSMENT, STATE OF THE STATES ON BROWNFIELDS 2 (1995) [hereinafter OTA].
enforcement-driven programs, these programs provide certain incentives based on realistic standards\(^4\) in order to encourage people to voluntarily remediate contaminated property.\(^5\) States offer a variety of public involvement opportunities in the administration of these programs.\(^6\) However, the opportunities for public participation are often either very limited, or within the total discretion of the agency or the participant.\(^7\)

At the federal level, the United States Environmental Protection Agency has recently initiated a "Brownfields Action Agenda" in an effort to "help communities revitalize idled or under-used industrial and commercial facilities where redevelopment is complicated by potential environmental contamination." UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, BROWNFIELDS ACTION AGENDA 1 (1995) [hereinafter BROWNFIELDS ACTION AGENDA]. As a part of this "Economic Redevelopment Initiative," the EPA will provide grants of up to $200,000 each "to fund at least fifty Brownfields pilots in 1995 and 1996 . . . to support creative two-year demonstrations of redevelopment solutions." Id. The city of Richmond, Virginia, was one of the original three cities selected to receive funding for this project. See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EPA BROWNFIELDS REDEVELOPMENT DEMONSTRATION PILOTS 1-2 (1995).

4. See infra notes 28-37 and accompanying text discussing the basic components of state voluntary remediation programs that provide incentives for participation.

5. Whether the remediation, or cleanup, of contaminated property is successful depends on the requirements of a state's particular program. However, common goals can be recognized in the states' definitions of remediation. Pennsylvania defines "cleanup or remediation" as meaning "[t]o clean up, mitigate, correct, abate, minimize, eliminate, control or prevent a release of a regulated substance into the environment in order to protect the present or future public health, safety, welfare or the environment, including preliminary actions to study or assess the release." 35 PA. CONS. STAT. ANN. § 6026.103 (1995). See infra part III.B on components of Pennsylvania's program.

Among other things, Indiana defines "remediation" as meaning "[a]ctions necessary to prevent, minimize, or mitigate damages to the public health or welfare or to the environment, which may otherwise result from a release or threat of a release." IND. CODE § 13-7-8.9-5(1) (1996). See infra part III.A on the components of Indiana's program.

6. Indiana's program provides opportunities for public comment, IND. CODE §13-7-8.9-15(b)(1), hearings, id. §13-7-8.9-15(b)(2), and the possibility for extensive notification and communications activities, see INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, INDIANA VOLUNTARY REMEDIATION PROGRAM RESOURCE GUIDE 41 (1995) [hereinafter IDEM RESOURCE GUIDE].

Under Pennsylvania's program, upon certain conditions the participant may be required to develop and implement a "public involvement plan" which shall "propose measures to involve the public in the development and review" of the relevant program reports that are to be submitted to the department. 35 PA. CONS. STAT. ANN. §6026.304(o) (1995).

7. For example, under Indiana's program, it is within the discretion of the commissioner of the Indiana Department of Environmental Management to decide whether a public hearing will be held "on the question of whether to approve or reject the
The purpose of this Article is to examine the deficiencies found in public participation provisions, and to provide realistic proposals concerning how public involvement opportunities can be improved in state voluntary remediation programs. A specific emphasis is placed on Virginia's new program and its administration as it presently exists on a case-by-case basis. An analysis of this program reveals that opportunities for public participation in its current administration are virtually non-existent. However, since the regulations for Virginia's voluntary remediation program have not yet been promulgated, there is still the opportunity for the public to become involved in the development of the “official” rules for this new program. Therefore, an analysis of other states’ programs is also conducted in an effort to assist with the development of effective public participation.

[proposed voluntary remediation] work plan.” Ind. Code §13-7-8.9-15(b). Indiana's guidance documents propose a list of community relations activities that the participant “may wish to undertake.” IDEM RESOURCE GUIDE, supra note 6, at 41 (emphasis added). Under Pennsylvania's program, a “public involvement plan” is only required for remediation pursuant to certain standards, and upon the condition that the municipality makes a request “to be involved in the remediation and reuse plans for the site.” 35 PA. CONS. STAT. ANN. § 6026.304(o).


9. Virginia's Voluntary Remediation legislation gives the Virginia Waste Management Board the authority to “administer a voluntary remediation program on a case-by-case basis,” consistent with the criteria set forth in the legislation, “prior to the promulgation of [the] regulations.” VA. CODE ANN. § 10.1-1429.1(B). As of January, 1996, the Virginia Department of Environmental Quality (DEQ) has already chosen to exercise this authority in at least four cases. The four signed “Voluntary Remediation Agreements” that currently exist between the DEQ and various participants include agreements with:

1) Charles Phillips, Phillip Furniture Refinishing, Morgan, Vermont at Treemont Property in Rockbridge County, Virginia (October 27, 1995).

2) American Annuity Group, Cincinnati, Ohio at facility in Hillsville, Virginia (November 6, 1995).

3) American Medical Laboratories, Chantilly, Virginia at facility in Fairfax, Virginia (November 14, 1995).


10. The legislation directs the Waste Management Board to promulgate regulations to be in effect by July 1, 1997. VA. CODE ANN. § 10.1-1429.1(B).

participation proposals, some of which the public may wish to promote for Virginia's new program during the upcoming rulemaking process.

Part I of this article explains the background of the recent trend in many states to enact voluntary remediation programs. Part II focuses on Virginia's new voluntary remediation program and the opportunities for public participation that are (and are not) available throughout the different phases of its administration. Part III explores the opportunities for public participation provided for in the Indiana and Pennsylvania programs. Finally, part IV consists of proposals for public participation provisions that should be incorporated into every state's voluntary remediation program.

I. BACKGROUND

Contaminated sites are left unaddressed for a variety of reasons. One such reason has to do with the type or extent of the contamination that is present at the site. Thus, the particular release of contamination at a site may not fall under the jurisdiction of the relevant state or federal law. For example, the remediation of hazardous waste sites by the federal government is based on a system of priorities under the authority of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), most commonly known as the "Superfund." The United States Environmental Protection Agency (EPA) determines which sites warrant the most immediate attention and pose the greatest risk of danger to human health and the environment, and places these sites on a National Priority List (NPL).

13. See 42 U.S.C. § 9605. Sites are placed on the NPL through the utilization of a "hazard ranking system," which takes into consideration factors such as "the quantity, toxicity, and concentration of hazardous substances" and the "potential for release . . . or potential exposure to human population and the environment" in determining the site's addition to the NPL. 42 U.S.C. § 9605(g)(2)(B).

The EPA also maintains a "Superfund Tracking System List," known as the Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS"), of 38,000 sites. Brownfields Action Agenda, supra note 3, at 1. One of the initiatives in the EPA's Brownfields Action Agenda was to remove
the states in which the sites are situated have control over their remediation. In response, states have addressed this duty to control waste management of “non-NPL” sites in a variety of ways, including the enactment of their own state superfund programs. However, many sites may still remain unaddressed even at the state level, depending on “the number of sites demanding attention and the level of available funds.”

Another related reason for contaminated sites remaining unaddressed is because these sites are currently being underused or have been abandoned. These sites are commonly known as “brownfields.” Brownfields are typically sites where there has been previous industrial or commercial activity where contamination was generated and left behind. These sites are

25,000 sites from this list “that EPA has already screened out of [the] active investigations category and assigned the designation ‘No Further Remedial Action Planned.’” Id. The purpose of this action was “to correct the market distortion that has made listing on CERCLIS an impediment to redevelopment.” Id.


Sites that do not meet the criteria for placement on the NPL or federal criteria for emergency removal of contamination, come under state control. For that reason legislation and hazardous waste cleanup programs have evolved at the state level to address the identification and cleanup of known or potentially contaminated [non-NPL] sites.

Id. at 2.

15. In a Congressional Office of Technology Assessment report, the “three most common approaches” that states use to address non-NPL sites are recognized as being “state superfund programs, property transfer laws, and voluntary programs.” Id. at 10. “State superfund programs were created to address sites not considered hazardous enough to be placed on the NPL, but that a state believes may warrant serious attention for remediation.” Id.

16. Id. at 12.

17. There is no single definition of what constitutes a “brownfield.” The Office of Technology Assessment has recently defined a brownfield as consisting of “land and/or buildings that are abandoned or underutilized where expansion or redevelopment is complicated, in part, because of the threat of known or potential contamination.” Id. at 1.

The Greenfields Group has identified “brownfields” as “valuable, industrial land remains contaminated, unused or abandoned . . . [that deny] communities the direct benefits of jobs and taxes, as well as complementary economic activity.” PROTECTING GREENFIELDS, supra note 3, at 1.

In delivering a speech in relation to the EPA’s recent Brownfields Action Agenda, EPA Administrator Carol Browner referred to “brownfields” as “the abandoned pieces of contaminated land that are a blight on our communities, a threat to our health, and a terrible obstacle to economic growth.” Carol M. Browner, Speech before the U.S. Conference of Mayors (January 26, 1995) [hereinafter Browner Speech].
usually located in urban areas, often situated in less prosperous economic zones. A brownfield can also be identified by distinguishing it from what is commonly known as a “greenfield.” Greenfields are uncontaminated properties “not previously used for industrial purposes . . . and include farmland or land previously zoned for residential, commercial or general use.”

The most prominent reason why the contamination at brownfields sites is left unaddressed is fear of potentially incurring harsh liabilities under the relevant state or federal laws. For example, liability under CERCLA is very far-reaching. Not only is the scope of “potentially responsible parties” very extensive, but persons can also face strict, joint and several liability for the entire cost of cleaning up a property under CERCLA. This means that regardless of fault, “each of the responsible parties at a CERCLA site is liable for the entire cost of the cleanup, so long as the harm each party caused is indivisible from harm that other responsible parties caused, which is routinely the case with commingled hazardous waste streams.”

18. Oftentimes brownfields are identified “with distressed urban areas, particularly central cities and inner suburbs that have had a longer legacy of industrial production.” OTA, supra note 2, at 4.
19. PROTECTING GREENFIELDS, supra note 3, at 1.
20. Many commentators have noted the irony involved with laws that were passed to benefit the environment, instead resulting in “contaminated properties sitting idle while more green land is developed.” Julia A. Solo, Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change, 43 BUFF L. REV. 285, 287 (1995). See also CHARLES W. POWERS, INSTITUTE FOR RESPONSIBLE MANAGEMENT, STATE BROWNFIELDS POLICY AND PRACTICE 1 (1995) (asking the question: “Could it be that the same environmental laws so successful in getting Americans—especially businesses—to reduce waste and recycle material might, paradoxically, also be impairing the recycling of urban communities?”).

Even EPA Administrator Carol Browner has recognized that “[i]t was never intended that the Superfund program would make the problem worse. But unfortunately Superfund has unintentionally become an obstacle to redevelopment.” Browner Speech, supra note 17.
21. See 42 U.S.C. § 9607 (1994). Not only can the present owner or operator of a facility be held liable for costs of cleanup under CERCLA, but so can past owners, those who arranged for the transport of the waste to a site, and persons who accepted the waste for the transport to a site. Id. § 9607(a).
22. See id. § 9607.
Even further, the degree of cleanup required under CERCLA is usually considered unfavorable, to say the least, because of the uncertainties involved in determining the applicable cleanup standards for a particular site. These uncertainties are due to the fact that “there are no national numerical standards for the cleanup of soil and groundwater contamination.” Instead, individual “risk assessment procedures” are utilized, which incorporate “all applicable or relevant and appropriate state environmental standards into federal CERCLA actions.” Therefore, it is very difficult to estimate the cleanup requirements that will be imposed, as well as the amount of time and expense that will be involved, in advance of the cleanup.

Thus, it is clear that in many situations it may become economically sensible for the owners of brownfields to abandon these sites rather than incur the liabilities of an expensive, time-consuming cleanup. Further, it becomes economically sensible for potential owners and developers to purchase property in greenfields for redevelopment activities rather than spending the time and money that is necessary to remediate contaminated property.

In recent years, many states have enacted new laws in order to encourage the remediation of these unaddressed contaminated sites. At least twenty-one states have done this by establishing state voluntary remediation programs. The purpose of these programs is to provide incentives for current owners or

24. Id. at 10,339 n.19.
25. Id. This degree of cleanup is commonly known as the “ARAR” requirement, since cleanup must meet “a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation.” 42 U.S.C. § 9621(d)(2)(A) (1994). Furthermore, remedial actions under CERCLA which involve the permanent reduction of the “volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants” are the “preferred” methods of remediation. Id. § 9621(b).
28. OTA, supra note 2, at 13; see supra note 3 (listing states with voluntary remediation programs).
potential purchasers to redevelop and put back to use property that has already been contaminated. The types of incentives that most states provide have several common characteristics. First, many states allow for more adaptable remedial solutions in the cleanup of the contaminated property. This process may entail a site-specific risk assessment that allows for the consideration of the future use of the site.

Therefore, the type of remediation that is required for a site may depend on whether the intended use after the remediation is for industrial, commercial, residential, or recreational purposes. Thus, remediation plans that are based on the actual risk of exposure to the contamination present at the site can avoid the application of universally strict cleanup standards for every remediation that occurs, potentially resulting in faster, less expensive cleanups.

29. The extensive “menu of options” provided for in state voluntary remediation programs may employ exposure assumptions and cleanup standards based on predetermined levels, future use-based levels (for example, industrial, commercial, or residential), and/or site-specific evaluations. This variation will result in the application of presumptive (for example, standardized) remedies favored by some states, approved or certified remedies, or tailored remedies based exclusively on an individual site.


31. See id.

32. For example, Pennsylvania’s “declaration of policy” states:

Cleanup plans should be based on the actual risk that contamination on the site may pose to public health and the environment, taking into account its current and future use and degree to which contamination can spread offsite and expose the public or the environment to risk, not on cleanup policies requiring every site in this Commonwealth to be returned to a pristine condition.

35 PA. CONS. STAT. ANN. § 6026.102(6) (1995) (emphasis added). Pennsylvania’s Department of Environmental Protection has also noted that “prior policies required that contaminated sites be restored to pristine conditions [using] a standard so rigorous that compliance was prohibitively expensive and virtually unattainable. These policies were impractical and contributed to the abandonment of thousands of industrial sites scattered throughout Pennsylvania.” DEPARTMENT OF ENVIRONMENTAL PROTECTION, COMMONWEALTH OF PENNSYLVANIA, A CITIZEN’S HANDBOOK TO PENNSYLVANIA’S LAND RECYCLING PROGRAM 1-2 (1995).
Second, most voluntary remediation programs contain some form of liability release as an incentive to the "participant." Liability releases come in a variety of forms and with a wide range of conditions. The most common forms of releases include "no further action" letters, a "covenant not to sue," or some other form of immunity from further state action upon the completion of the remediation. However, most of these releases contain some form of "re-opener," which may warrant further action upon the discovery of new information.

Finally, states may provide certain financial incentives for those who participate in voluntary remediation programs. Many states have established special funds or grant programs in order to assist the participants during certain stages of the remediation. Additionally, some states will guarantee the receipt of low-interest loans or special tax relief for those who voluntarily remediate contaminated property.

33. The "participant" is the person, usually an industry, who enters into the agreement with the appropriate state agency, in order to voluntarily remediate the property.

34. The Office of Technology Assessment categorizes three types of releases from "government interest in the condition of the site" as: 1) "covenants not to sue for any actions related to the site;" 2) "certificate of completion' (or partial completion) for a cleanup," and 3) "a letter of 'no further action' or interest in the site." OTA, supra note 2, at 17. See infra note 285 discussing liability releases involved in Indiana's program. See infra note 339 discussing liability releases involved in Pennsylvania's program.

35. In most cases involving liability releases, "there is no actual release from liability granted, but these assurances try to reduce the likelihood that any enforcement action would be pursued." OTA, supra note 2, at 17. Indiana's covenant not to sue is conditional since it may not apply to future liability for a condition or the extent of a condition that: (1) [w]as present on property that was involved in an approved and completed voluntary remediation work plan; and (2) [w]as not known to the commissioner of the Indiana Department of Environmental Management at the time the commissioner issued the certificate of completion.


36. Financial assistance may be provided for in various stages of a state's program including the "initial site assessment, cleanup, or redevelopment" stages, and "typically comes in the form of public grants, loans or loan guarantees, and tax incentives." OTA, supra, note 2, at 18.

37. Id. Pennsylvania's program establishes an "Industrial Sites Cleanup Fund" to provide financial assistance in the form of grants or low-interest loans "to persons who did not cause or contribute to the contamination on [the] property used for industrial activity on or before the effective date of this Act. . . ." 35 PA. CONS. STAT.
Encouraging the voluntary remediation of property is beneficial in a variety of ways. Not only are there incentives to remediate contaminated land that would otherwise likely remain unaddressed, but voluntary remediation also decreases the likelihood of development and expansion into greenfields. Further, the community that lives nearby the contaminated site may also benefit from remediation activities. In some circumstances, the contaminated property that remains unaddressed could pose an unknown threat to human health and the environment. Thus, any attempt to remediate the property may be better than nothing at all. Finally, the remediation of contaminated property could be economically beneficial to the surrounding community. This happens when jobs are created from the new industrial reuse of the property. The effect on a community could be an overall increase in its economic development, resulting in higher property values as well.

ANN. § 6026.702(b) (1995).

38. One of the purposes of Virginia's voluntary remediation program is “to encourage hazardous substance cleanups which might not otherwise take place.” DEPARTMENT OF ENVIRONMENTAL QUALITY, WASTE DIVISION, GUIDELINES FOR THE APPLICATION OF STATUTORY CRITERIA FOR VOLUNTARY REMEDIATION 1 (1995).

39. See supra note 27 and accompanying text.

40. “[The] threat to public health from brownfields contamination varies widely (and is unknown in some cases), depending on the nature and extent of contamination, the exposure patterns, and the use of the site and surrounding area.” OTA, supra note 2, at 4.

41. It can also be economically “sensible” for a developer to restore brownfields because the “infrastructure, such as sewers, roads and electricity, is already in place for developers.” Cara Jepsen, Retooling South Works, THE NEIGHBORHOOD WORKS, Feb.-Mar. 1995, at 17.

42. The Calumet Brownfield Issue Group (CBIG), “a coalition of labor, religious, community and environmental advocacy groups” from Indiana, has recently been focusing on the job opportunities involved in the redevelopment of brownfields:

     CBIG’s approach is multi-faceted: The appeal to labor unions is employment; the appeal to religious groups has been addressing social issues with alternatives to crime and gangs (i.e. jobs) as well as tapping into their already organized congregation base; the appeal to environmental groups is cleaning up and stopping long-term pollution of the Calumet region.


43. “When developers and manufacturers move to suburban sites because they say it’s cheaper, the effect is to further erode the urban tax base and city property values.” Jepsen, supra note 41, at 17. By attracting developers into existing communities, one effect may be to reverse this trend.
The effects that remediation activities may have on surrounding communities demonstrate one reason why the public should have an interest in the voluntary remediation of contaminated property. In some circumstances, the re-use of the property could result in increased industrial activities in the area. The community may not only have concerns about future employment opportunities, but also about the increased traffic and noise, and even additional polluting activities, that may result from this future use.

Thus, the surrounding community may be concerned with the decisions being made about the determination of the future use of the contaminated property. Determinations as to future use are based on assumptions that the property will remain suitable for a particular purpose. Concerns have been advanced that, in effect, this establishes “sacrifice zones” throughout the community. For example, when only industrial use is considered in the remediation of a property, this can “limit[] the future of a community by designating an area as industrial for perpetuity.”

Furthermore, whenever remediation standards are determined based upon risk assessment measures, the community should have the right to be informed of this risk, however small. It is the people who live in the surrounding community that will be “the most adversely affected parties and stand to lose the most if an inappropriate and unprotective remedy de-

44. One commentator illustrates some of the dangers involved in future use assumptions:

Proponents of a brownfield redevelopment strategy that advocates use-based cleanup standards should bear in mind that additional remediation might never occur, regardless of a change in use. A change in use might not take place for years or even decades. Proper mechanisms for enforcement of deed restrictions cannot be guaranteed, due to human error, unpredictable changes in government, and the common inefficiencies of bureaucracy. A change in use from industrial to residential, or to a school or playground could have serious results if cleanup procedures are not extremely protective from the outset.

Solo, supra note 20, at 309.


46. Id.
sign is selected and implemented." Therefore, even when the public is not given the right to participate in the actual selection of the remediation standards, there should be some obligation to involve the public since the remediation of property could affect the community in the years to come.

Thus, it is clear that the public should have some role in the voluntary remediation of contaminated property. The remaining question is what that role should be.

II. VIRGINIA’S VOLUNTARY REMEDIATION PROGRAM

In order to help alleviate the great number of contaminated sites that exist in the Commonwealth, Virginia lawmakers and the Department of Environmental Quality (DEQ) have made several recent efforts to encourage the voluntary remediation of contaminated property. Such efforts to administer and implement a voluntary remediation program in Virginia can be illustrated as a network of three phases. Each of these phases are examined in relation to the passage of Virginia’s new Voluntary Remediation legislation (the Act), which went into effect on July 1, 1995.

Phase One consists of the DEQ’s efforts to administer the voluntary remediation of contaminated property before the Act was actually passed. Phase Two relates to the current case-by-case administration of the voluntary remediation program under the Act. The administration of the voluntary remediation program during this phase is only on an interim basis, until the final regulations are promulgated. Phase Three of the voluntary remediation program will begin after the final regulations that implement this program are in place.

47. Id. at 1.
49. See infra part II.B (explaining Phase One administration).
50. See infra part II.C (discussing Phase Two administration).
51. "Prior to the promulgation of [the] regulations, the Board, through the Director, shall administer a voluntary remediation program on a case-by-case basis. . . .” Va. Code Ann. §§ 10.1-1429.1(B).
52. See infra part II.D (outlining the related rulemaking process).
The projected date of the initiation of this phase is July 1997.  

A. The DEQ’s Authority to Administer the Voluntary Remediation Program

The Virginia DEQ was created “to protect the environment of Virginia in order to promote the health and well-being of the Commonwealth’s citizens.” The DEQ is headed by a Director, and is composed of several divisions or Boards, one of which is the Virginia Waste Management Board (Board). The primary duty of the Board is to carry out the provisions in the Virginia Waste Management Act (VWMA). It is the duty of the DEQ to “implement all regulations as may be adopted by the ... Board” in the furtherance of this duty. The Board, and thus the DEQ, finds its general authority to administer the voluntary remediation of contaminated property through the VWMA, since the Board is granted the power to “supervise and control waste management activities in the Commonwealth.” Before the current Voluntary Remediation legislation was passed, the DEQ exercised its specific authority to administer the voluntary remediation of property pursuant to Part IV of Virginia’s Solid Waste Management Regulations (SWMR). However, once the Act went into effect on July 1, 1995, the legislation itself served as the framework for the Board’s specific authority to administer the voluntary remediation of contaminated property until the regulations are promulgated.

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56. Section 10.1-1183 of the Virginia Code creates the following agencies as a consolidation of the DEQ: the State Water Control Board, the Department of Air Pollution Control, the Department of Waste Management, and the Council on the Environment.
60. 9 Va. Admin. Code §§ 20-80-170 to -230 (1996). See infra part ILB on the DEQ’s administration of the voluntary remediation program pursuant to Part IV of the SWMR.
B. Virginia’s Past Efforts to Administer a Voluntary Remediation Program: Compliance Agreements

Prior to July 1, 1995, the DEQ administered the voluntary remediation of contaminated property pursuant to Part IV of the Virginia SWMR. These regulations govern the cleanup of “open dumps” and “unpermitted facilities” by establishing certain procedures and cleanup criteria to be followed in the remediation of these sites. In general, Part IV regulates releases that create a “substantial present or potential hazard to human health or the environment,” and does not apply to “hazardous waste management facilities regulated under the Virginia Hazardous Waste Management Regulations.”

The DEQ administered “Voluntary Corrective Actions” at sites by entering into “Compliance Agreements” with participants. Generally, these Compliance Agreements concern a part II.C on the current case-by-case administration of the voluntary remediation program.


64. An “open dump” is “a site on which any solid waste is placed, discharged, deposited, injected, dumped or spilled so as to create a nuisance or present a threat of a release of harmful substances into the environment or present a hazard to human health.” Va. Code Ann. § 10.1-1400 (Michie 1993).

65. An “unpermitted facility” is “[a]ny solid waste management facility receiving or having received waste without a permit, in violation of statutory requirements or these or predecessor state regulations . . . ” 9 Va. Admin. Code § 20-80-200(A).

66. Id. § 20-80-170(A)(1).

67. Id. § 20-80-170(B)(3).

company who owns a specific site and discovers contamination that "appears to be associated with past waste management and materials handling practices..."69 Prior to signing an agreement, the company participant has usually undertaken some type of preliminary site investigation and assessment, with some initiating interim activities and initial remediation steps.70

The Compliance Agreements follow the basic procedural and substantive guidelines of Part IV of the SWMR.71 Each Agreement specifies that either corrective actions or removal actions are necessary for the remediation of the site.72 Whichever remedial action is selected, whether it is a corrective or removal action, must conform with the requirements or scope of activities outlined in Part IV of the SWMR.73 Thus, if a corrective action is selected, a "Schedule of Compliance" is attached to the Agreement which sets out requirements for various activities, including: the remedial investigation study; a corrective measure study; reporting requirements; procedures for interim measures and modifications; and procedures for the selection, imple-
mentation and termination of the desired remedy. The Compliance Agreement specifically states the applicable regulatory section for which each activity must conform, pursuant to the SWMR. Likewise, if a removal action is considered appropriate, although Part IV of the SWMR does not require the participant to enter into a Compliance Agreement for removal actions, the participant may agree to do so. Such removal action must conform to the scope of the guidelines of activities that are set forth in the SWMR.

Each Compliance Agreement contains a section regarding the issuance of a “Certificate of Satisfactory Compliance,” which is issued to the participant when the DEQ determines that the participant has satisfactorily completed the remediation pursuant to the Compliance Agreement, in accordance with the solid waste laws of Virginia. The effect of the Certificate is to “foreclose any enforcement action” by the DEQ “with respect to the contamination” that was the subject of the remediation under the Compliance Agreement. Although the DEQ is not precluded “from seeking subsequent necessary remediation as authorized by law, with respect to contamination at the site prior to the issuance of a Certificate of Satisfactory Compliance,” the participant does receive a form of immunity from

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74. See Compliance Agreements, supra note 68, at App. A.
75. Specifically, all terms and conditions of Virginia Code sections 20-80-210 to 230 are to apply to these remedial activities “unless such terms and conditions conflict directly with this Compliance Agreement.” Compliance Agreements, supra note 68, § D. The relevant SWMR section is cited for each remedial activity specified in the agreement. See Compliance Agreements, supra note 68, at App. A.
76. See 9 VA. ADMIN. CODE § 20-80-210(B) (1996).
77. Portsmouth Agreement, supra note 68, § B(5).
78. See 9 VA. ADMIN. CODE SWMR, § 20-80-210(B)(7), (setting forth a list of removal activities deemed “appropriate” for different types of situations). The Portsmouth Agreement envisions a removal action plan which “generally meets the stipulations of § 4.4.B.7.h [now § 20-80-210(B)(7)(h)] of the SWMR. Portsmouth Agreement, supra note 68, § B(5).
79. Compliance Agreements and Portsmouth Agreement, supra note 68, § D.
80. Id. The Portsmouth Agreement clarifies that this is conditioned on the fact that “no further contamination of the site occurs once the terms of this agreement are met.” Portsmouth Agreement, supra note 68, § D.
81. ARC Cherokee, ARC CM Shop and Shorewood Agreements, supra note 68, § D. The SEI Agreement contains similar language, but does not contain the qualifier “with respect to the contamination on the site prior to the issuance of a Certificate.” SEI Agreement, supra note 68, § D. The language in the Portsmouth Agreement also
future enforcement actions subsequent to the issuance of the Certificate.

Thus, Part IV of the SWMR provided the regulatory framework for voluntary remediation activities that occurred prior to July 1, 1995. All workplans, corrective or removal actions and conditions for termination were administered pursuant to the framework of criteria, standards and guidelines presented in the existing SWMR.

C. Virginia's Present Voluntary Remediation Program

On March 25, 1995, Governor George Allen approved the Voluntary Remediation Act giving the DEQ authority to administer the voluntary remediation of property in Virginia. The legislation directs the Board to promulgate regulations consistent with the listed criteria, and the regulations must be in effect by July 1, 1997. The criteria set forth in the legislation relate to the determination of eligibility, the establishment of remediation standards, the establishment of procedures to "minimize delay and expense," the issuance of "certifications of satisfactory completion," procedures to "waive or expedite issuance" of any applicable permits, and procedures for the collection of fees.

1. Features of the Legislation: Eligibility, Remediation Standards, and Immunity

Persons covered, or those eligible to participate in the program, include those persons who "own, operate, have a security interest in or enter into a contract for the purchase of contaminated property." These persons may be eligible to voluntarily remediate property where releases of "hazardous substances, hazardous wastes, solid wastes or petroleum" have occurred.

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83. Id. § 10.1-1429.1(B).
84. Id. § 10.1-1429.1(A).
85. Id.
86. Id.
However, in order to be eligible to participate in this program, it must be demonstrated either that "remediation has not clearly been mandated" by other applicable federal or state law, or that the "jurisdiction of those statutes has been waived." 87

The legislation itself contains significant ambiguities concerning the DEQ's determination of eligibility. First, the legislation is not clear as to exactly what qualifies as property where "remediation has not clearly been mandated" by other state or federal law. 88 This apparent ambiguity suggests two possible interpretations. One interpretation is that persons are not eligible to participate in this program upon the discovery that remediation of the property should be under the jurisdiction of other state or federal law. However, a second interpretation would allow for voluntary remediation of property that would ordinarily fall under the jurisdiction of other federal or state cleanup laws. 89 This would occur when the state or federal government has not yet made a formal attempt to enforce any remediation activities at the site, or as long as persons are not presently in the process of remediating property pursuant to other applicable state or federal law. Even the members of the technical advisory committee, 90 whose duty it is to assist the DEQ in the development of the regulations for this program, are currently debating this issue concerning the meaning of the eligibility provision. 91

A second ambiguity apparently exists in the statute, because although participant eligibility depends on the demonstration that remediation has not clearly been mandated by other applicable state or federal law, the legislation also permits eligibility

87. Id. Specifically, "regulations shall apply where remediation has not clearly been mandated by" the EPA, the DEQ or a court pursuant to CERCLA, RCRA, the Virginia Waste Management Act, the State Water Control Law, or "other applicable statutory or common law, or where the jurisdiction of those statutes has been waived." Id.
88. See id.
89. See supra note 87 on other relevant federal or state laws that might apply.
90. See infra notes 277-278 and accompanying text on the creation of the technical advisory committee for Virginia's voluntary remediation program.
91. DEQ Policy Analyst, Kathy Frahm, concedes that the interpretation of the eligibility language is currently a highly debated issue at technical advisory committee meetings. Telephone Interview with Kathy Frahm, Policy Analyst, Department of Environmental Quality (Jan. 23, 1996).
where the "jurisdiction of those statutes has been waived."\textsuperscript{92} Therefore, it seems that the potential participant could negotiate with either the appropriate state or federal agency to obtain a jurisdictional waiver of the applicable law at issue in order to participate in this program.\textsuperscript{93} However, the legislation itself is not clear as to exactly under what conditions such jurisdiction could be waived.

As of now, the exact scope of contaminated properties that could be eligible for voluntary remediation under Virginia's program cannot be determined clearly. However, it is clear that this legislation leaves open the possibility that certain contaminated properties that would otherwise fall under the jurisdiction of other state or federal laws could instead qualify for remediation under this program.

The legislation also directs the Board to promulgate regulations which establish methodologies to determine "site specific risk-based remediation standards, which shall be no more stringent than applicable or appropriate federal standards for soil, groundwater and sediments."\textsuperscript{94} The Board is directed to consider certain factors pursuant to the establishment of remediation standards, including the scientific information regarding "the protection of public health and the environment," the future use of the property, the availability of remediation technology or controls, and "the natural background levels for hazardous constituents."\textsuperscript{95}

\textsuperscript{93} It is the opinion of the Supervisor of Solid Waste Enforcement at the DEQ that the waiver provision might allow the opportunity for the DEQ to implement a "negotiating strategy" with the potential participant, unless there is "no question or no debate" that the site falls under the relevant federal or state law. Interview with Steve Owens, Solid Waste Enforcement Supervisor, Department of Environmental Quality, in Richmond, Virginia (Jan. 23, 1996).
\textsuperscript{94} VA. CODE ANN. § 10.1-1429.1(A)(1).
\textsuperscript{95} Id. The factors listed are:

- Protection of public health and the environment; the future industrial, commercial, residential, or other use of the property to be remediated and of surrounding properties; reasonably available and effective remediation technology and analytical quantitation technology; the availability of institutional or engineering controls that are protective of human health or the environment; and natural background levels for hazardous constituents.

\textit{Id.}
Finally, and perhaps most significantly, is the provision that allows the voluntary participant to obtain immunity from further enforcement action upon the issuance of a "certification of satisfactory completion of remediation."\(^9\) Two circumstances that would warrant the issuance of this certification are when the participant "achieves applicable cleanup standards or where the Department determines that no further action is required."\(^9\) The issuance of the certification is based upon "then-present conditions and available information."\(^9\) The privilege granted to the voluntary participant upon the issuance of a certification of satisfactory completion of remediation is that the certification "shall constitute immunity to an enforcement action under this chapter, the State Water Control Law, Chapter 13 of this title, or other applicable law."\(^9\)

2. Case-by-Case Administration

The regulations that implement the new voluntary remediation program are not directed to be in effect until July 1, 1997.\(^10\) Therefore, the new legislation gives the Board the authority to administer a voluntary remediation program "on a case-by-case basis consistent with the criteria" set forth in the legislation prior to the promulgation of the actual regulations.\(^11\) Since July 1, 1995, the DEQ has taken advantage of this opportunity and has exercised its authority to administer the voluntary remediation program in at least four cases.\(^12\) As of January 1996, four Voluntary Remediation Agreements (VR Agreements) have been signed between the DEQ and various participants.\(^13\) The progress of the administration of this program has been so immediate that at least one of these par-

96. Id. § 10.1-1429.2.
97. Id. § 10.1-1429.1(A)(3).
98. Id.
99. Id. § 10.1-1429.2.
100. Id. § 10.1-1429.1(B).
101. Id.
102. See supra note 9 (listing the Voluntary Remediation Agreements signed between the DEQ and various participants).
103. Id.
Participants has already submitted its final report, and is now awaiting DEQ's approval for closure. 104

In order to administer these remedial activities prior to the promulgation of the official regulations, the DEQ has developed guidance documents to assist with the application of the statutory criteria for the implementation of the voluntary remediation program on a case-by-case basis. 105 The purpose of the guidance documents is to "standardize the procedure for review of information submitted to the Department of Environmental Quality by participants" in the voluntary remediation program. 106 While these guidelines are the result of the DEQ's "extensive internal review," "substantive modification [of the guidance documents] could result." 107

The basic components outlined in the VR Agreements, which follow the structure of the DEQ's guidance documents, correspond to the framework of criteria set forth in the voluntary remediation legislation. 108 The guidelines reveal "five basic elements that bring a site from entry to completion in the program: Certification of Eligibility; Voluntary Remediation Agreement; Registration Fee; Voluntary Remediation Report; and Certification of Remediation Completion." 109 A basic outline of these elements is presented to the participant in each VR Agreement. 110

The determination of eligibility is accomplished when the participant submits background information such as data on the "site location and history," the "regulatory history" of the site...
and the "nature of the contaminants of concern" found present at the site.\textsuperscript{111} The final determination of eligibility depends upon the Director's finding that the information provided by the participant is sufficient to show that the "remediation of the site has not been clearly mandated" by other relevant federal or state law.\textsuperscript{112} Additional language in the VR Agreements allows the Director to "rescind eligibility based on any finding by the Director that the site poses an imminent and substantial threat to human health or the environment."\textsuperscript{113} However, this language seems more discretionary than mandatory since nothing "precludes a determination by the Director to rescind" upon discovery of the above facts.\textsuperscript{114} The language does not clearly state that the Director \textit{shall} rescind upon such a finding.

The crux of these agreements concerns the participant's submission of a Voluntary Remediation Report (VR Report), which sets forth the basic requirements for remedy completion including a "Site Characterization" report, a "Remedial Action Work Plan" and a "Demonstration of Completion."\textsuperscript{5} Unlike the Voluntary Compliance Agreements entered into pursuant to Part IV of the SWMR,\textsuperscript{116} the VR Agreements do not cite to specific provisions of existing regulations according to which remedial actions shall be conducted. Instead, the VR Agreements direct the participant to formulate the VR Report based on a "proposed set of remedial standards."\textsuperscript{117} These standards, and the work plan to be implemented to achieve these standards, are based upon the criteria set forth in the Voluntary Remediation legislation.\textsuperscript{118} However, since the regulations have not yet been promulgated, there is not an "estab-

\textsuperscript{111} GUIDANCE DOCUMENTS, \textit{supra} note 105, at 5.
\textsuperscript{112} VR Agreements, \textit{supra} note 9, \S III; \textit{see supra} notes 88-93 and accompanying text (discussing the ambiguities involved in the determination of eligibility).
\textsuperscript{113} VR Agreements, \textit{supra} note 9, \S III.
\textsuperscript{114} \textit{Id.} (emphasis added).
\textsuperscript{115} \textit{See id.} \textit{\S VI}.
\textsuperscript{116} \textit{See supra} part II.B (discussing the administration of the voluntary remediation program pursuant to Part IV of the SWMR).
\textsuperscript{117} VR Agreements, \textit{supra} note 9, \textit{\S VI}.
\textsuperscript{118} The Waste Management Board is directed to administer the program, "prior to the promulgation of [the] regulations," "on a case-by-case basis consistent with the criteria set out in subsection A." \textit{VA. CODE ANN. \S 10.1-1429.1(B)} (Michie Cum. Supp. 1995); \textit{see supra} note 84 and accompanying text on the criteria in subsection A.
lished methodology for the determination of site-specific, risk-based remediation standards" for the implementation of this particular program on a case-by-case basis.\textsuperscript{119}

The solution by one participant\textsuperscript{120} in the program was to design the work plan to achieve remediation standards that were developed through a "fate and transport computer model" which assisted in the determination of the specific "risk-based closure criteria."\textsuperscript{121} The DEQ and the United States EPA sponsored the development of this model "for use by their staffs and the public in establishing site specific cleanup and closure standards based on the risk to human health and the environment caused by the contamination existing at the site."\textsuperscript{122} Any contamination that remains at the site subsequent to the participant's remedial action efforts must present an "acceptable risk to human health and the environment," based on the results of this model.\textsuperscript{123}

Once the participant demonstrates that it has attained the remediation standards proposed in the VR Report, through procedures such as providing "confirmational sampling results demonstrating that the established site specific remedial standards have been achieved,"\textsuperscript{124} the "Director or his designee may terminate [the] Agreement."\textsuperscript{125} At this point, the partici-

\textsuperscript{119} VA. CODE ANN. § 10.1-1429.1(A)(1).
\textsuperscript{120} This refers to the VR Report submitted by AML. See supra note 104. In June of 1995, "AML met with DEQ officials to discuss the results of assessment activities and potential remedial measures for the Fairfax facility. The DEQ outlined a voluntary remediation program for this case and requested that the basis for remediation be a function of risk to human health and the environment." AML Report, supra note 104, § 2.1, at 3.
\textsuperscript{121} AML Report, supra note 104, § 1.0, at 1.
\textsuperscript{122} VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, GUIDANCE DOCUMENT AND SUBMISSION PACKAGE FOR SITE REMEDIATION AND CLEANUP USING HEALTH BASED STANDARDS, Preface (1994) [hereinafter REAMS]. This computer model is known as the Risk Exposure and Analysis Modeling System (reams). Id.

One way that AML utilized the REAMS model to determine remediation standards was to enter specific information about the site and the type and extent of a certain contaminant, and simulate a release of that contaminant from the area of concern, such as a release into the ground water, in order to determine the "projected effects over a 30 year period." AML Report, supra note 104, § 2.2m, at 4-6.

\textsuperscript{123} AML Report, supra note 104, § 5.0, at 19.
\textsuperscript{124} VR Agreements, supra note 9, § VI.
\textsuperscript{125} Id. § XV.
pant may be issued a Certification of Satisfactory Completion of Remediation under the Agreement which insulates the participant from certain state enforcement action. A separate clause in the VR Agreements states that the Department is not precluded “from pursuing such other remedies, including enforcement action, as deemed appropriate,” in other circumstances except when the Certification of Satisfactory Completion of Remediation is issued. Thus, the participants who are involved in the case-by-case administration of the voluntary remediation program are entitled to receive the same privilege of immunity as provided for in the legislation before the actual regulations are promulgated.

3. Opportunities for Public Participation in Case-by-Case Administration

The Voluntary Remediation legislation itself does not provide any opportunities for public involvement in the case-by-case administration of the program. Nor do the guidance documents or internal manuals used by the DEQ to assist with the implementation of this program. Moreover, each of the signed VR Agreements, as well as the VR Report submitted by one of the participants, do not provide for any public involvement opportunities in conjunction with the remediation activities. Thus, there seems to be no clear and direct mandate that the public receive any notification, have the opportunity to comment, or even further, have the opportunity to participate in any type of hearing, whether formal or informal, on matters regarding case-by-case administration. Therefore, it is necessary to explore alternative “windows of opportunity” to discover any potential avenues for public involvement during this interim period.

126. Id.
128. VR Agreements, supra note 9, § XV.
129. See VA. CODE ANN. §§ 10.1-1429.1 to .3.
130. See GUIDANCE DOCUMENTS, supra note 105.
131. See VR Agreements, supra note 9.
132. See AML Report, supra note 104.
a. "Case Decisions" Under the Virginia Administrative Process Act

The case-by-case administration of the voluntary remediation program during this interim period, before the actual regulations are promulgated, could potentially be considered individual "case decisions" subject to certain administrative procedures under the Virginia Administrative Process Act (VAPA). Among other things, the VAPA defines a "case decision" as "any agency proceeding or determination that, under the laws or regulations at the time, a named party as a matter of past or present fact . . . may or may not be . . . in compliance with any existing requirement for obtaining or retaining a license or other right or benefit." The definition of an "agency action" includes an agency's case decision "which could be a basis for . . . the grant or denial of relief or of a license, right, or benefit by any agency or court." The Board's administration of the voluntary remediation program seems directly analogous to this context. If a participant agrees to remediate contaminated property in compliance with certain applicable standards, the Board will grant the participant a benefit—the right to immunity from further enforcement.

There are several factors that contribute to the difficulty of classifying the case-by-case administration of the voluntary remediation program as individual case decisions. One has to do with the many and various steps involved in remediating a site under the program. For example, not only is it necessary for the DEQ to make the initial decision as to the participant's eligibility, but there are intermediate decisions involved in the process that leads up to the ultimate decision of granting

135. Id. § 9-6.14:4(B).
137. The basic eligibility provision is found in Virginia Code section 10.1-1429.1(A). See supra notes 85-87 and accompanying text explaining eligibility requirements in the voluntary remediation program.
138. Intermediate decisions include determining the remediation standards and relevant work plan that will be appropriate for remedial activities at that particular site. See VR Agreements, supra note 9, § VI.
the participant a certification of satisfactory completion.\textsuperscript{139} Thus in effect, in the administration of this program, the agency may be involved in a whole conglomerate of case decisions for each individual participant.\textsuperscript{140}

The very nature of the voluntary remediation program itself contributes to the vagueness involved in classifying the present administration of the program as individual case decisions. One who elects to participate in this program does so voluntarily, since eligibility essentially depends upon a determination that "remediation has not clearly been mandated" by other applicable federal or state laws,\textsuperscript{141} whereas case decisions under the VAPA are usually concerned with the adjudicative functions of the agency where the agency acts to enforce the already existing law.\textsuperscript{142} However, the broad language that is used to define the scope of agency case decisions in the VAPA "can properly be interpreted to embrace a number of agency actions which neither the agency nor the citizen may, at first blush, understand to be a case decision."\textsuperscript{143} Therefore, it is worth exploring the opportunities that are, and are not, available for public participation if one elects to challenge the Board's actions as potential case decisions.

\textsuperscript{139} The Act allows the "issuance of certifications of satisfactory completion of remediation, based on then-present conditions and available information, where voluntary cleanup achieves applicable cleanup standards or where the Department determines that no further action is required." \textit{Va. Code Ann.} § 10.1-1429.1(A)(3).

\textsuperscript{140} When presented with the question of whether or not the case-by-case administration could be considered individual "case decisions" under the VAPA, it is the opinion of the Supervisor of Solid Waste Enforcement at the DEQ that both the signing of a VR Agreement and the issuance of a certification of satisfactory completion would each be a case decision. However, the status of the various intermediate decisions that the DEQ will make remains unclear. Interview with Steve Owens, \textit{supra} note 93.

\textsuperscript{141} \textit{Va. Code Ann.} § 10.1-1429.1(A). See \textit{supra} notes 88-93 and accompanying text discussing the ambiguities involved in the determination of eligibility.

\textsuperscript{142} \textit{See Virginia Continuing Legal Education, Virginia Administrative Law and Practice} § 1.5 (1992) [hereinafter CLE] (containing illustrations of an agency's legislative power versus an agency's adjudicative power). Whereas an agency's legislative power concerns the "explicit authority to make regulations," the adjudicative power of the agency concerns the agency's authority "to impose some form of legal consequence or sanction for violation of already legislated laws." \textit{Id.} (emphasis added); see also \textit{Va. Code Ann.} § 9-6.14:11 revisers' note (Michie Cum. Supp. 1995) (distinquishing the legislative functions of agencies from the judicial operations of agencies).

\textsuperscript{143} \textit{CLE, supra} note 142, \S\S 1-7 to 1-8.
Under the VAPA, agencies make case decisions based on facts presented to the agency through either "informal fact finding" procedures or through the use of "formal" trial-like procedures for "litigated issues." For example, it would be a case decision for the Air Pollution Control Board to either grant or deny the issuance of an air permit to a corporation that wishes to expand operations. However, issues of basic law and standing play a significant role in determining whether or not the corporation, as the "named party," has a right to demand a formal hearing on the matter if it cannot be disposed of at an informal level, and whether or not the corporation, or any other party, may appeal the board's final decision for judicial review of the matter.

144. VA. CODE ANN. § 9-6.14:11. "Conferences or consultation proceedings" between the individual party and the agency are the "main form[s]" of conducting informal fact finding proceedings. Id. revisers' note. These informal conferences will typically "be carried out around a conference table or in the office of an Agency Subordinate or a Hearing Officer." THE VIRGINIA BAR ASSOCIATION, THE VIRGINIA LAWYER: A BASIC PRACTICE HANDBOOK ch. 2.7 (1990) [hereinafter THE VIRGINIA LAWYER].

145. VA. CODE ANN. § 9-6.14:12. Case decisions made by agencies concerning "litigated issues" involve the "formal taking of evidence upon relevant fact issues . . . ." Id. This procedure is distinguished from informal fact finding procedures in that "this one deals with fact issues determined by agencies through a trial-like process." Id. revisers' note. Furthermore, the agency is only required to address litigated issues in this forum if the "basic laws provide expressly for decisions upon or after a hearing." Id. § 9-6.14:12(A); see infra note 157 on defining the "basic law."


147. See infra note 157 on defining the "basic law"; see also infra notes 158-60 and accompanying text on basic law issues in case decisions.

148. See infra notes 168-70 and accompanying text on issues of standing in case decisions.

149. A case decision involves any agency proceeding or determination that concerns whether a named party is in "violation of a law or regulation or in compliance with any existing requirement for obtaining or retaining a license or other right or benefit." VA. CODE ANN. § 9-6.14:4(D) (Michie 1993).

150. The agency may elect to conduct a formal evidentiary hearing if "informal procedures . . . have failed to dispose of a case by consent." Id. § 9-6.14:12(A) (Michie Cum. Supp. 1995).

151. See Citizens for Clean Air v. Virginia, 412 S.E.2d 715 (Va. Ct. App. 1991). In this case the court referred to the basic law the Air Pollution Control Law in order to determine that a citizen group did not have standing to appeal the Board's denial of a petition for a formal hearing on the issuance of an air permit to a corporation. Id. at 719. The court recognized that only an "owner aggrieved" would have standing to appeal the Board's decision on whether or not to grant or deny a permit. Id.
In either instance, whether an agency is proceeding on an informal or formal level, the VAPA provides for no formal publication requirements that would notify the public as to the initiation of the case decision proceeding. The only rights to notice in the context of case decisions involve the right of a named party to be notified of the case decision proceeding. Thus, in the voluntary remediation context, only the participant with whom the DEQ signed a voluntary remediation agreement would have the benefit of receiving notification of agency decisions concerning the remediation of the contaminated property. Even the agency's final case decision, or final order, is not required to be published to notify the public. Only the private parties need be served with the "terms of any final agency decision." In fact, there are even situations in which information relevant to the case proceeding can be withheld from review of the public.

152. See Va. Code Ann. § 9-6.14:11 (discussing notification rights of the parties to a case decision held pursuant to an informal fact finding procedure). Notification rights include the right of the "parties to the case . . . to have notice of any contrary fact basis or information in the possession of the agency which can be relied upon in making an adverse decision," id. § 9-6.14:11(A), and the right to receive notice if the agency is relying upon "public data, documents or information" in making the case decision. Id. § 9-6.14:11(B).

For notification rights of the parties to a case decision held pursuant to a formal hearing on litigated issues, see also id. § 9-6.14:12. Notification rights for formal hearings include the right to be given "reasonable notice of the time, place, and nature thereof, the basic law or laws under which the agency contemplates its possible exercise of authority, and the matters of fact and law asserted or questioned by the agency." Id. § 9-6.14:12(B). Although no prior notice is required for "applicants for licenses, rights, benefits, or renewals" since they have the "burden of approaching the agency," "they shall be similarly informed thereafter in the further course of the proceedings. . . ." Id.

153. In the voluntary remediation context, the analogy is constructed so as to correlate the named party in case decisions under the VAPA, with "persons who own, operate, have a security interest in or enter into a contract for the purchase of contaminated property," otherwise known as the potential participants. Va. Code Ann. § 10.1-1429.1(A) (Michie Cum. Supp. 1995).


155. Id. However, the "signed originals shall remain in the custody of the agency as public records . . . and shall be made available by the agency for public inspection or copying." Id.

156. The agency may exercise its discretion to withhold records from the public for information it deems confidential, or private in nature, or for information concerning trade secrets. Id.
Next, in the voluntary remediation context, even if the public somehow discovers that the DEQ is in the process of making a case decision, it is not clear that the public would have the right to submit comments for consideration as part of the agency record or even have the right to demand that a formal evidentiary hearing be held. This is because the VAPA gives deference to the "basic law" as to whether the agency is required to hold a formal hearing. Therefore, it is necessary to examine the Virginia Waste Management Act (VWMA), as the basic law, to determine whether or not the DEQ would be required to hold a formal hearing in the voluntary remediation context. The implementing provisions of the VWMA concerning the right to public hearings are not relevant to the voluntary remediation context. Further, the VWMA only entitles persons aggrieved to judicial review under the VAPA, and then only after a "final decision of the Board or Director under this chapter" has been made. Since the VWMA does not explicitly grant an affirmative right for persons to demand a formal

157. The VAPA defines "basic law" as the "provisions of the Constitution and statutes of the Commonwealth of Virginia authorizing an agency to make regulations or decide cases or containing procedural requirements therefor." VA. CODE ANN. § 9-6.14:4(C) (Michie 1993). Although the VAPA may serve as a "default" where the basic law does not otherwise provide, the VAPA does not "supersede or repeal additional procedural requirements in such basic laws." Id. § 9-6.14:3. The purpose of the VAPA is to "supplement the Basic Laws. . . . The requirements of the VAPA may conflict with existing procedures of the many Virginia Agencies that have been developed over years of practice. Unlike the Basic Law which is applicable to every Agency, the VAPA is generic in its applicability." THE VIRGINIA LAWYER, supra note 144 at ch. 2.2.

158. VA. CODE ANN. § 9-6.14:12(A) (Michie Cum. Supp. 1995). Although the agency must hold a formal hearing if the basic law requires, the agency may also exercise its discretion to hold a formal hearing "in any case to the extent that informal procedures . . . have not been had or have failed to dispose of a case by consent." Id.


160. The VWMA should be examined as a component of the basic law since the Waste Management Board is charged with administering the voluntary remediation program. VA. CODE ANN. §§ 10.1-1429.1 to -3 (Michie Cum. Supp. 1995); see supra part II.A on the basic authority to administer a voluntary remediation program.

161. See, e.g., Hazardous Waste Management Regulations, 9 VA. ADMIN. CODE § 20-60-70(B) (1996) (requiring all permits for hazardous waste management facilities to be subject to a public hearing); see also Solid Waste Management Regulations, 9 VA. ADMIN. CODE § 20-80-480(E)(5)(c) (requiring a public meeting to be held "in the vicinity of the proposed facility" before the owner or operator of certain solid waste management facilities initiates the construction of such facility).

162. VA. CODE ANN. § 10.1-1457 (Michie 1993).
hearing pursuant to case decisions, and since it only explicitly grants the right for aggrieved persons to seek judicial review, interested persons will not have the right to demand a formal hearing for case decisions involving the voluntary remediation of contaminated property.

Thus far, all potential case decisions have been made in the voluntary remediation program pursuant to informal fact-finding procedures, where the participant demonstrates its eligibility to participate in the program and later demonstrates completion of the remediation in order to receive the benefit of immunity. In fact, most agency case decisions under the VAPA are completed through informal conferences and consultations between the agency and the party to the case decision. However, due to the absence of public notification procedures and the limitations on rights to demand formal involvement in agency case decisions, it is unlikely that the public will be very active in the actual proceedings of these case decisions. In fact, it is unlikely the general public will even be cognizant that such voluntary remediation agreements are being devised. Therefore, the only recourse for any public involvement seems to be after the case decision has already been made: through the judicial review of case decisions under the VAPA.

However, even the opportunity to seek judicial review under the VAPA is limited, since one must first demonstrate that he or she is a “person aggrieved” by the unlawfulness of a case decision in order to have standing to contest any case decision made by the Board. Moreover, Virginia courts have consis-

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163. In fact, it seems that the participants have waived certain rights to review under the VAPA by a provision in the signed agreements which states that the parties “waive their rights to administrative and judicial review of the binding effect of the Agreement, and agree not to contest the jurisdiction of the Department to enter into this Agreement.” VR Agreements, supra note 9, § II.

164. See supra part II.C.2 (discussing the components of the case-by-case administration of the voluntary remediation program).


166. See supra notes 152-62 and accompanying text.


168. VA. CODE ANN. § 10.1-1457 (Michie 1993). Although the VAPA gives any “party aggrieved” the right to judicial review by claiming the unlawfulness of a case decision, id. § 9-6.14:16(A), since the VAPA gives deference to the basic law, id. § 9-6.14:3, the VWMA will determine standing and entitle any “person aggrieved” the right to
tently upheld a strict interpretation of the word "aggrieved." In order to have standing as an "aggrieved" person, not only must the grievance be substantial, but the Supreme Court of Virginia has held that one must demonstrate an "immediate, pecuniary and substantial interest in the litigation. .." 169 It is not enough that the "sole interest of the petitioner is to advance some perceived public right or to redress some anticipated public injury when the only wrong he has suffered is in common with other persons similarly situated." 170

The scope of reviewable issues for case decisions is also limited under the VAPA. It is the burden of the person initiating judicial review to demonstrate an "error of law" that results from the agency's action. 171 Furthermore, when the reviewable issue is whether or not there was "substantial evidence" to support the agency's findings of fact, 172 the VAPA directs the court to "take due account of the presumption of official regularity, the experience and specialized competence of the agency,

judicial review of a "final decision of the Board or Director under this chapter." Id. § 10.1-1457; see, e.g., Citizens for Clean Air v. Virginia, 412 S.E.2d 715, 718 (Va. Ct. App. 1991) (holding and affirming that "where there is a specific provision for standing in the basic law, such provision is controlling over the standardized court review in Code § 9-6.14:16" of the VAPA); Environmental Defense Fund v. Virginia State Water Control Bd., 404 S.E.2d 728, 732 (Va. Ct. App. 1991). 169. Virginia Beach Beautification Comm'n v. Board of Zoning, 344 S.E.2d 899, 902, (Va. 1986) (quoting Nicholas v. Lawrence, 171 S.E. 673, 674 (Va. 1933)); see also Trustees of Asbury United Methodist Church v. Taylor & Parrish, 452 S.E.2d 847, 851 (Va. 1995). For example, a direct interest in the litigation would include "a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally." Virginia Beach, 344 S.E.2d at 903. 170. Virginia Beach, 344 S.E.2d at 902. 171. VA. CODE ANN. § 9-6.14:17 (Michie 1993). The following issues are reviewable for the demonstration of an error of law:

(i) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiability of the evidential support for findings of fact. Id. 172. Id. § 9-6.14:17(iv). "Experience has indicated that most appeals are brought under . . . the substantiability of the evidential support for the findings of fact." CLE, supra note 142, at 1-21.
and the purposes of the basic law under which the agency has acted.\textsuperscript{173} If the agency's fact-finding occurred pursuant to a formal evidentiary hearing, the review is limited to the evidence in the agency record, and the court is limited to ascertaining the reasonableness of the agency's findings based on the record.\textsuperscript{174} If the agency's fact-finding occurred pursuant to an informal proceeding, which will presumably occur in most voluntary remediation case decisions,\textsuperscript{175} the court will review the files, records, and other supplemental information necessary to determine only whether the agency's result was "within the scope of the legal authority of the agency."\textsuperscript{176} Additional evidence will be prohibited\textsuperscript{177} unless the aggrieved person is claiming the agency disregarded fact-finding procedures in bad faith,\textsuperscript{178} which of course will involve a difficult burden of proof for the challenger.\textsuperscript{179} Even then, a reviewing court "may not use its review of an agency's procedures as a pretext for substituting its judgment for the agency's on the factual issues decided by the agency."\textsuperscript{180} Thus, the courts afford agencies a great deal of deference regarding the case decisions they make.

If an aggrieved person wants to challenge a case decision made by the DEQ regarding the voluntary remediation of a particular site during this interim period, it is not likely that the challenger will have much success. First, the Board has the jurisdiction and specific legal authority to administer the voluntary remediation program on a case-by-case basis.\textsuperscript{181} Further, an aggrieved person could not challenge the fact that public comment was not considered in the case decision, since the

\textsuperscript{173} VA. CODE ANN. § 9-6.14:17.
\textsuperscript{174} Id.
\textsuperscript{175} See supra notes 163-64 and accompanying text.
\textsuperscript{176} VA. CODE ANN. § 9-6.14:17.
\textsuperscript{177} Additional evidence is prohibited since the reviewing court does not have the authority under the VAPA to review agency actions which "encompass matters subject by law to a trial de novo in any court." Id. 9-6.14:15.
\textsuperscript{178} Courts may permit "allowable and necessary proofs in situations otherwise unavoidable as, for example, where bad faith is charged in substance or procedure—or . . . where administrative action is in point of fact alleged to be arbitrary, capricious, or otherwise contrary to law." Id. § 9-6.14:17 revisers' note.
\textsuperscript{179} See, e.g., State Bd. of Health v. Godfrey, 290 S.E.2d 875 (Va. 1982) (reviewing whether agency action was arbitrary and capricious).
\textsuperscript{180} Id. at 881.
legislation itself does not require the agency to consider public comment pursuant to the administration of the program on a case-by-case basis.\textsuperscript{182} Therefore, the DEQ does not make an error of law if it administers the program on a case-by-case basis, without seeking public involvement, as long as it is doing so consistent with the criteria set forth in the legislation.\textsuperscript{183} Second, the DEQ could easily present substantial evidence to support any case decision by revealing evidence of site eligibility in order to support the decision to enter the Agreement, or by showing evidence demonstrating the completion of the remediation in order to support the decision to grant the participant immunity.\textsuperscript{184} Third, any case decision under the administration of the Board will be afforded great deference by the reviewing court, since the management of solid and hazardous waste is certainly within the "experience and specialized competence"\textsuperscript{185} of the Board.\textsuperscript{185} Consequentially, many issues that the aggrieved person would want to challenge\textsuperscript{187} are typically not within the scope of judicial review for agency case decisions.

Therefore, classifying the case-by-case administration of the voluntary remediation program as agency case decisions does not provide much room for the public to become involved during this interim period. Ineffective notification procedures, restrictive standing requirements, the limited scope of judicial review and deference to the agency involved in this review, all provide barriers for public involvement in this case decision context. In an effort to discover other possible avenues for public participa-

\begin{itemize}
  \item \textsuperscript{182} Id. §§ 10.1-1429.1 to .3. Although one of the criteria for the Board to consider when establishing methodologies to determine remediation standards is the "surrounding properties," the Board is only directed to consider the "scientific information" regarding this factor. Id. § 10.1-1429.1(A)(1) (emphasis added).
  \item \textsuperscript{183} See id. § 10.1-1429.1(B).
  \item \textsuperscript{184} See supra part II.C.2 (outlining the components of the case-by-case administration of the voluntary remediation program).
  \item \textsuperscript{185} VA. CODE ANN. § 9-6.14:17; see supra note 173 and accompanying text on the special deference reviewing courts give to agencies.
  \item \textsuperscript{186} See supra part II.A (explaining the Waste Management Board's authority to administer the voluntary remediation program).
  \item \textsuperscript{187} Consider, for example, the fact that public involvement is not provided for in the plans for remediation or the fact that the agency is granting immunity to participants for completion of the remediation.
\end{itemize}
tion during the case-by-case administration of the program, the Virginia Freedom of Information Act is next explored.

b. Virginia Freedom of Information Act

Besides outlining the public's freedom of access to official records, the Virginia Freedom of Information Act (FOIA) also imposes certain requirements for meetings conducted by public bodies. The general rule is that all meetings conducted by public bodies shall be "public meetings." However, from the outset a difficulty arises with the attempt to classify the negotiation of a voluntary remediation agreement between a participant and the DEQ as a "public meeting" under the FOIA. In order to be classified as a meeting under the FOIA, there must be a representation of at least "three members . . . of any public body" convening for the purpose of "discuss[ing] or transact[ing] public business." The congregation need not be a formal assemblage, and may include "work sessions . . . whether or not votes are cast." Although any meeting conducted by three or more members of the Board in relation to the administration of the voluntary remediation program might

189. See id. § 2.1-343 (setting forth the general requirements concerning the publicity of meetings, the recording of minutes and voting).
190. Id. The FOIA sets out a list of exceptions, where a public body may conduct "executive or closed meetings." Id. § 2.1-344. These exceptions include issues more private in nature or those that should be private for security reasons, such as discussions regarding plans to protect "individuals providing information about crimes. . . ." Id. § 2.1-344(17). However, the remediation of contaminated property administered by the Waste Management Board does not fall under one of these limited exceptions. See id. § 2.1-344.
191. A "meeting" under the FOIA is defined in Virginia Code section 2.1-341. See infra notes 193-95 and accompanying text on the definition of a "public meeting" under the FOIA.
192. A "public body" includes any "board . . . of the Commonwealth," along with "any committees or subcommittees of the public body created to perform delegated functions of the public body or to advise the public body." VA. CODE ANN. § 2.1-341. The Waste Management Board of the DEQ would therefore be classified as a public body, since it was created to "carry out the purposes and provisions" of the VWMA. VA. CODE ANN. § 10.1-1402 (Michie 1993).
193. VA. CODE ANN. § 2.1-341.
194. Id.
be considered a “public meeting” under the FOIA, the very nature of the case-by-case administration of this program provides obstacles to invoking the FOIA mandates in this manner.

Many of the activities associated with the administration of the voluntary remediation program would not necessarily involve the initiation of public meetings between the participant and the members of the DEQ. For example, the participant is simply directed to submit the three components of the VR Report, which can be subsequently examined simultaneously for the demonstration of a satisfactory completion of the remediation. Thus, it is not necessary for public meetings to be held throughout the entire administration of each specific case in order for a participant to sufficiently demonstrate the completion of the remediation of a site for the issuance of a Certification of Satisfactory Completion of the Remediation.

Even if public meetings are held so as to invoke the FOIA mandates, the opportunities for public participation pursuant to these directives are still very limited. Not only must a person submit a request to receive personal notification of public meetings, but it is within the discretion of the public body whether or not to allow public comment at the meeting.

195. The FOIA defines a “meeting” as an assemblage of either three members of a public body or “a quorum, if less than three, of the constituent membership.” Id. Since the Virginia Waste Management Board consists of “seven Virginia residents appointed by the Governor,” Va. CODE ANN. § 10.1-1401(A), three members of the Board would be the requisite number to be considered a meeting under the FOIA.

196. The three components of the Voluntary Remediation Report consist of the Site Characterization, the Remedial Action Work Plan and the Demonstration of Completion. VR Agreements, supra note 9, § VI. See supra notes 115-19 and accompanying text on the requirements of the VR Report.

197. The participant will be issued a “Certification of Satisfactory Completion of Remediation” upon the determination that “the remediation activities have been completed in accordance with the terms and conditions of [the] Agreement and the requirements for remedy completion under the Voluntary Remediation Report have been met.” VR Agreements, supra note 9, § XV. See supra notes 124-28 and accompanying text on the issuance of a Certification of Satisfactory Completion of Remediation.


199. VA. CODE ANN. § 2.1-343 (Michie 1995). If one wishes to receive notification of public meetings “on a continual basis,” an annual written request is required. Id.

200. Id. § 2.1-343. The requirement that notice “shall state whether or not public comment will be received” applies to “public bodies of the Commonwealth on which
Further, even if the public body does exercise its discretion to allow public comments during meetings, "the approximate points during the meeting [where] public comment will be received" can be limited. Therefore, besides the requirement for "openness," little else in the FOIA provides for active opportunities for public involvement. This seems contrary to the "policy of [the] chapter" outlined in the FOIA, which is that "the affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government."

4. Implications of Administering the Voluntary Remediation Program on a Case-by-Case Basis

The public seems to be isolated from much of the case-by-case administration of the voluntary remediation program. Since the implementation of this program on a case-by-case basis primarily depends upon the utilization of unpromulgated rules and internal guidance documents, the program seems to lose some of its legitimacy when it excludes the public from comment and review. By contrast, the administration of the voluntary remediation program based upon publicly approved regulations might be "considered preferable" because "regulations are subject to public comment and external review. They have terms that are published and known, and have universal application. Finally, they are clearly presumed to have the force of law."

However, the complicated realities involved in the DEQ's administration of the voluntary remediation program should not be disregarded. It is important, even vital, that agencies have

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203. JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION, REVIEW OF VIRGINIA'S ADMINISTRATIVE PROCESS ACT 84 (1993) [hereinafter JLARC].
discretion in the administration of their programs, especially new programs involving the level of technical complexity that the voluntary remediation program requires. Agencies often depend on a certain amount of flexibility in the administration of their programs, since “it is not possible for agencies to anticipate every detail in every situation that may arise and promulgate regulatory language to address those details.”

A special situation also arises with the administration of the voluntary remediation program, since the remediation of contaminated property depends upon the development of “site-specific risk-based remediation standards.” Therefore, the content of each participant’s VR Report is likely to differ dramatically, since the appropriate remediation plan for each site will depend upon a variety of factors such as the type and extent of contamination, the potential exposure pathways at the site, the future use of the property and the surrounding properties, and so on.

Thus, it would be difficult, if not impossible, to promulgate regulations sufficient to address every potential property to be remediated pursuant to this program.

However, the technical complexity of the matter is no excuse for isolating the public from the administration of this program, which seems to be happening in the present case-by-case implementation. Since the legislation, agency guidelines, and the individual agreements do not make room for mandatory public involvement opportunities, alternative avenues have been explored in this Article. Yet, even if the present administration of this program could be broken down into individual case decisions subject to certain procedural requirements under the VAPA, opportunities for public participation via this route likewise have their deficiencies.

It is also possible that the case-by-case administration of the voluntary remediation program might not be considered individual agency case decisions at all. However, one consequence

204. Id. at 85.
206. See supra notes 115-23 and accompanying text (explaining the details of a Voluntary Remediation Report).
207. See supra notes 137-43 and accompanying text on the ambiguities involved in classifying the case-by-case administration of the voluntary remediation program as
of exempting the DEQ's administration from the case decision classification is that it becomes difficult to challenge any of the decisions made by the DEQ during this interim period. Since the voluntary remediation program is being administered with the utilization of guidance documents and other models, and since these internal policies have not yet been promulgated as regulations, these agency policies might be considered "de facto rules." Although a "de facto rule may be challenged by bringing a suit claiming the unlawfulness of a case decision," such de facto rules are not reviewable as alleged unlawful rules. This is because these internal policies were never actually promulgated and formally adopted as rules or regulations. Therefore, if the DEQ's actions are not considered case decisions under the VAPA, it is possible that many of the decisions made in the administration of the voluntary remediation program on a case-by-case basis will be within the complete discretion of the DEQ.

It is problematic to afford the DEQ with such a magnitude of discretion in the administration of this program because of the significant precedential effects that the agency's decision on a case-by-case basis will have on the future administration of the voluntary remediation program. The precedential effect of these decisions is likely to be especially severe since the present program contains many significant ambiguities. First, the exact scope of potential persons who may be eligible to participate in this program is still undetermined. Second, the exact methodologies to be used to determine the specific remediation standards for each case are also unsettled. Although the difficul-

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208. The regulations for the voluntary remediation program are not directed to be in effect until July 1, 1997. VA. CODE ANN. § 10.1-1429.1(B).
210. Id.
211. Id.
212. See supra notes 88-93 and accompanying text on the ambiguities involved in the determination of eligibility.
213. It is the duty of the Waste Management Board to promulgate regulations that will establish these "methodologies to determine site-specific risk-based remediation standards." VA. CODE ANN. § 10.1-1429.1(A)(1); see supra notes 119-23 and accompanying text on devices used during the interim period.
ty of establishing precise standards for every case has been acknowledged,\textsuperscript{214} even the basic framework of this program is subject to change until the regulations are promulgated.\textsuperscript{215} Thus, during this interim period, both the DEQ and the companies who participate in this program are essentially setting the standards for the future administration of the program. In fact, the VR Agreements allow the participant to present a "proposed set of remedial standards that are protective of human health and the environment; and a recommended remedial action to achieve the proposed standards."\textsuperscript{216} The only thing that does seem to be crystal clear about this present administration is the ability of the participants to receive immunity from further enforcement action by the DEQ upon the completion of the remediation in accordance with the proposed standards.\textsuperscript{217}

The fact that the remediation standards maybe are based on the "acceptable risk to human health and the environment"\textsuperscript{218} further illustrates the significance of including the public in these decision-making processes. Many assumptions are inherent in this risk analysis, such as conjectures about the future use of the immediate and surrounding properties.\textsuperscript{219} Further,
even the models that the DEQ currently endorses in the determination of the acceptable risk have recognizable limitations in accuracy.221

Even if the risk of exposure can be contained, and even if certain individual cases involve facilities that are not situated near residential neighborhoods, the precedential effect of these case decisions still provides a very pressing reason for affording the public the opportunity to become involved in this case-by-case administration. For example, internal decisions that are being made now to determine what types of remedial activities are necessary to demonstrate a satisfactory completion of a remediation will likely influence future case decisions that do involve sites that are situated near residential neighborhoods. This influence might be demonstrated in a variety of ways, such as providing a basis of comparison for remediation evaluations, it is often necessary to make assumptions based upon the limited data. Additionally, the passage of time may result in a change in the environmental characteristics at this site and surrounding properties.

Id. at 21.

220. The AML Report notes that: “One computer model sanctioned by the DEQ was developed by Old Dominion University and is referred to as the Risk Exposure and Analysis Modeling System (REAMS).” Id. at 6. See supra notes 120-23 and accompanying text on AML’s utilization of the REAMS model.

221. The AML Report states that: “The execution of the models herein were conducted using generally accepted practices. The model appears to have several input flaws, which are not easily corrected. One of the limitations of this model is that potential errors generated during the execution of a previous model are carried over into the next model and can be compounded.” AML Report, supra note 104, at 7.

The Report also recognizes that:

[T]his study was not intended to be a definitive investigation of contamination at the subject property. Although the scope of services for this investigation was limited and that exploratory borings, soil and groundwater sampling and analytical testing was undertaken, it is possible that currently unrecognized contamination may exist at the site and that the levels of this potential contamination may vary across the site.

Id. at 4.

222. The AML Report reveals that certain existing contaminants remaining at the site have “soil concentration levels [that are] several orders of magnitude less than Resource Conservation and Recovery Act (RCRA) Corrective Action minimum levels . . . ,” and certain chemicals in the ground water “are well below RCRA Corrective Action ground water clean-up levels . . . ,” as well as one concentration “below the Clean Water Act (CWA) Maximum Containment Levels (MCL) for drinking water. . . .” AML Report, supra note 104, App. C, at 5.

223. The AML VR Report reveals that the “area surrounding the site is comprised primarily of commercial properties.” Id. App. B, at 5.
activities at future sites. Thus, it is unrealistic to completely isolate each case decision from the influence that it will have on all subsequent case decisions.

The purpose of this section is not to attack the present models that the DEQ utilizes for the determination of remediation standards. In fact, the creation of these models does show a good faith attempt by agencies to generate a model that will provide "a consistent approach to developing cleanup goals" while taking specific risks to human health and the environment into consideration. These efforts are especially significant since the intent is to address the remediation of contaminated property that might not otherwise take place. Instead, the purpose of this section is to illustrate why public participation is important in the case-by-case administration of the voluntary remediation program, since ambiguous and unpromulgated rules can provide the basis for: (1) current remediation activities that may be eligible to receive immunity from further enforcement actions; and (2) the future regulations that will implement the voluntary remediation program. Without opportunities for public participation in the case-by-case administration of the program, the agency decisions "may be, or appear to be: based on narrow input and representative of the agency's interest; secretive and unknown to the public; selectively employed; and questionable in terms of their force."

D. Opportunities for Public Participation in Rulemaking

The DEQ will continue to administer the voluntary remediation program on a case-by-case basis, with the assistance of guidance documents and internal models, until the
official regulations have been promulgated to implement this program. The public does have a role, and will be given an opportunity to participate in the rulemaking process, which will affect the future administration of the voluntary remediation program.

Whenever an agency develops, amends or repeals regulations, there are certain public participation procedures that the agency must follow. Thus, when the Board acts to promulgate the regulations to implement the voluntary remediation program, the Board must proceed in accordance with the requirements set forth in both the VAPA and the DEQ's public participation guidelines (guidelines).

The first opportunity for public participation in rulemaking arises upon the publication of the Notice of Intended Regulatory Action (NOIRA). The purpose of the NOIRA is not only to "describe the subject matter and intent of the planned regulation," but also to invite specific comments from the public on the planned action. The public is given at least thirty days to comment on aspects of the proposal such as the costs, benefits, alternatives, and whether or not a "participatory approach" should be utilized in the development of any proposal. If

228. "Prior to the promulgation of [the] regulations, the Board, through the Director, shall administer a voluntary remediation program on a case-by-case basis consistent with the criteria" set forth in the legislation. VA. CODE ANN. § 10.1-1429.1(B).

229. "Any person" may also initiate the rulemaking process by petitioning the agency; however, the agency is only required to "provide a written response to such petition within 180 days," and it remains within the discretion of the agency whether or not to initiate rulemaking in response to these petitions. Virginia Waste Management Board, Public Participation Guidelines, 9 VA. ADMIN. CODE § 20-10-20(C) (1996).

230. The Solid Waste Management Board is directed to promulgate the regulations for the voluntary remediation program to be in effect by July 1, 1997. VA. CODE ANN. § 10.1-1429.1(B).


234. Id.

235. 9 VA. ADMIN. CODE § 20-10-30(D). However, if the agency has already independently elected to implement a participatory approach, or if "the approving agency
the agency receives at least five written responses during the comment period requesting the use of a participatory approach, then the agency will develop a method to include "representatives of the regulated community and the general public," such as the use of ad hoc groups or advisory committees, "in the formation and development of regulations for agency consideration." Finally, a public meeting is to be held during the comment period to provide a forum for the solicitation and submission of public comments, "unless the approving authority specifically authorizes the agency to proceed without holding a public meeting."

Although it appears that the public is given the opportunity to participate early in the rulemaking process, there are several deficiencies in the above approach. First, the agency is only required to publish the NOIRA in the Virginia Register of Regulations and through distribution to persons who are maintained on the agency's mailing list. Persons are placed on the agency's mailing list either at the agency's discretion, or upon their written request. This method of notification is insufficient because most of the general public is likely unaware of these opportunities or would find it too burdensome or confusing to uncover such information through an exploration of the Virginia Register of Regulations. Although the use of advisory committees and ad hoc groups appears to be an innovative approach to soliciting participation from the general public, this approach also has its drawbacks. Since it is unlikely that most of the general public will receive notification of the intended regulatory action, soliciting participation from the membership of such advisory panels has its limits. Moreover, even if interested persons do receive notification of the formation of an

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specifically authorizes the agency to proceed without using the participatory approach," id. § 20-10-30(C), then comments regarding its utilization do not apply. Id. § 20-10-30(D)(1)(h).
236. Id. § 20-10-30(C)(2).
237. Id. § 20-10-10(A).
238. Id. § 20-10-30(D)(2).
239. Id. § 20-10-30(E)(1).
240. Id. § 20-10-30(E)(2).
241. Id. § 20-10-30(A). It is within the discretion of the agency to remove any person from the list "when the mail is returned as undeliverable." Id.
advisory group, it is within the discretion of the director of the DEQ to determine the final membership of such panels or committees. Likewise, it is within the agency’s discretion to “begin drafting the proposed regulation prior to or during any opportunities it provides to the public to submit input.” The implication here is that the public may be excluded from the rulemaking process even before it officially begins.

Finally, even if the agency receives public comment subsequent to the NOIRA and utilizes a participatory approach in the drafting of the proposed regulation, the agency is only required to consider public input and consult with any advisory group. Therefore, not only may the agency proceed without adopting the comments of the public, but the agency is not even required to respond to the comments received subsequent to the publication of the NOIRA.

After the comment period has expired and the draft proposed regulation is approved by the Board, the agency will then publish a Notice of Public Comment (NOPC). The purpose of the NOPC is to provide more detailed information about the proposed regulation, including information concerning the estimated effects and specific impacts that the regulation may have on the regulated entity.

242. Id. § 20-1-1(A).
244. 9 VA. ADMIN. CODE § 20-10-30(F) (1996).
245. After the consideration of public input and consultation with the participatory group, the agency may “complete the draft proposed regulation and any supporting documentation required for review.” Id. The agency has a duty to summarize all of the “comments received in response to the NOIRA” and distribute this summary “to participants during the development of the draft regulation . . . [and] to the approving authority;” however, this is the extent of the agency’s “formal” obligation. Id. There is no requirement that the agency respond to, much less incorporate, the public’s comments into the draft proposed regulation. Id.
246. The public comment period, subsequent to the NOIRA, “shall be no less than 30 days after publication in The Virginia Register of Regulations.” Id. § 20-10-30(D)(3).
247. Id. § 20-10-3(G).
248. See id. § 20-10-30(H). Before the publication of the NOPC, the proposal will be delivered to the Department of Planning and Budget, where the preparation of an “economic impact analysis” will take place. VA. CODE ANN. § 9-6.14:7.1(G).
249. 9 VA. ADMIN. CODE § 20-10-30(J)(1)(b). In addition to its publication in the
crease public awareness, as compared to the NOIRA. The public has at least sixty days to comment on the proposed regulation, during which the agency will conduct an informal hearing to “afford persons an opportunity to submit views and data relative to regulations on which a decision of the board is pending.” The agency is required to hold a formal evidentiary hearing if: (1) “the basic law requires a formal hearing”; (2) “the agency elects to conduct a formal hearing;” (3) the Governor directs the agency to hold a formal hearing; or (4) “the agency receives requests for a public hearing from twenty-five persons or more.” However, even if a formal evidentiary hearing is conducted by the Board, the issues subject to review may be limited to “issues directly relevant to the legal validity of the proposed regulation” or to the demonstration of an “error of law.”

Virginia Register and the distribution of notice to those on the mailing list, the publication of the NOPC expands to “a newspaper of general circulation published at the state capital and such other newspapers as the agency may deem appropriate.”

250. See supra notes 239-41 and accompanying text on publication requirements for the NOIRA.

251. The public comment period, subsequent to the NOPC, “shall close no less than 60 days after publication of the NOPC in The Virginia Register of Regulations.” 9 VA. ADMIN. CODE § 20-10-30(I).

252. Id. § 20-10-10(A). The public participation guidelines require “at least one public hearing [to be] held in accordance with 9-6.14:7.1 of the Code of Virginia to receive comments on the proposed regulation.” Id. The guidelines define “public hearing” as an “informal proceeding, held in conjunction with the Notice of Public Comment and similar to that provided for in § 9-6.14:7.1.” Id. § 20-10-10(A). The VAPA, on the other hand, only defines “hearings” as the formal evidentiary proceedings, thereby distinguishing a “hearing” as a formal proceeding, different from all other “informational or factual inquiries of an informal nature.” VA. CODE ANN. § 9-6.14:4(E) (Michie 1993). However, the ambiguity is cleared since section 672-01-1:1(1)(A) of the guidelines specifically defines a “hearing” to be in relation to procedures under VAPA section 9-6.14:7.1, which only encompasses the informal fact finding procedures. Id. § 9-6.14:7.1 (Michie Cum. Supp. 1995).

253. VA. CODE ANN. § 9-6.14:8 (Michie 1993). See supra note 157 (defining the “basic law”). The VWMA only provides “persons aggrieved by a final decision of the Board or Director” the right to judicial review under the VAPA. Id. § 10.1-1457. Therefore, in the context of the voluntary remediation program, the basic law does not specifically require a formal hearing subsequent to the publication of the NOPC.

254. If the agency elects to conduct a formal hearing, the guidelines provide that it “shall be held in accordance with 9-6.14:8 of the Code of Virginia.” 9 VA. ADMIN. CODE § 20-10-30(H)(5).


256. Id.

257. Id. § 9-6.14:8 (Michie 1993).

258. Id. § 9-6.14:17. The issues subject to review for “evidentiary hearings” include
hearing would include a challenge to the agency's legal authority to promulgate the regulation.\textsuperscript{259} By contrast, a formal hearing would be an improper forum for the submission of individual views and arguments regarding the proposed regulation.\textsuperscript{263}

Subsequent to publication of the NOPC, the agency must summarize the comments received in response to the NOPC\textsuperscript{261} and provide a "response to the comments received."\textsuperscript{262} Both the agency summary and response are to be submitted to the approving authority and "after final action on the regulation by the approving authority, [are to be] made available, upon request, to interested persons."\textsuperscript{263} However, this section regarding the agency's duty to respond to public comments imposes no duty to incorporate the public comments received into the final regulation.\textsuperscript{264}

Finally, even after the final regulation is published,\textsuperscript{265} the VAPA affords the public certain checks and balances. For example, if any changes of "substantial impact" are reflected in the published version of the final regulation, the public has the

issues "outlined in section 9-6.14:17 of this chapter." Id. § 9-6.14:8. That section outlines reviewable issues under Article 4 which directs "the party complaining of [the] agency action to designate and demonstrate an error of law subject to review by the court." Id. § 9-6.14:17. See supra note 171 (listing issues that are reviewable for the demonstration of an error-of-law).

\textsuperscript{259} Id. § 9-6.14:17(ii).

\textsuperscript{260} See id. § 9-6.14:8 revisers' note (explaining the distinction between issues subject to review at an informal, informational hearing versus issues subject to review at a formal, evidentiary hearing).

\textsuperscript{261} By contrast, subsequent to the NOIRA, the agency only has the duty to summarize the comments received. 9 VA. ADMIN. CODE § 20-10-30(F).

\textsuperscript{262} Id. § 20-10-30(K).

\textsuperscript{263} Id.

\textsuperscript{264} See id.

\textsuperscript{265} Upon the publication of the final regulation in the Virginia Register of Regulations, "a thirty-day final adoption period for regulations shall commence. . . ." VA. CODE ANN. § 9-6.14:9.1(D) (Michie Cum. Supp. 1995). During the final adoption period, the regulation is subject to gubernatorial review and legislative review by each house of the General Assembly. Id. §§ 9-6.14:9.1 to .2 (Michie 1993 & Cum. Supp. 1995). The regulation becomes effective at the end of thirty days, unless the Governor or the General Assembly suspend the effective date. Id. § 9-6.14:9.3 (Michie Cum. Supp. 1995). The General Assembly, in concurrence with the Governor, can even elect to suspend the effective date until "the end of the next regular legislative session . . . ," at which time a bill can be passed to "nullify a portion, but not all of the regulation." Id. § 9-6.14:9.2(B) (Michie 1993).
opportunity to petition the agency to "suspend the regulatory process for thirty days to solicit additional comment" regarding the change.\textsuperscript{266} Again, however, the agency is not required to incorporate the public comments into the final regulations.\textsuperscript{267}

The public also has the opportunity to seek judicial review of the final regulation.\textsuperscript{268} However, judicial review of final regulations is fraught with the same limitations as judicial review of case decisions under the VAPA.\textsuperscript{269} Thus, the person who initiates judicial review of the agency's rulemaking would face similar difficulties regarding standing,\textsuperscript{270} issues available for review,\textsuperscript{271} and the standard of review.\textsuperscript{272}

In the context of the voluntary remediation program, it is important to understand the distinction between the rulemaking process and the case-by-case implementation of the program. The rulemaking process can be lengthy, and the regulations need not be in effect until July 1, 1997.\textsuperscript{273} The rulemaking process and the relevant provisions for public involvement are highlighted in order to demonstrate the opportunities that the public will have to influence the future law that will regulate the future administration of the voluntary remediation program. However, the opportunities for hearings and public comment in the rulemaking process do not provide

\begin{quote}
\textsuperscript{266} \textit{Id.} § 9-6.14:7.1(K) (Michie Cum. Supp. 1995). The agency \textit{shall} provide the suspension period for public comment "if the agency receives requests from at least twenty-five persons for an opportunity to submit oral and written comments on the changes to the regulation." \textit{Id.}

\textsuperscript{267} \textit{See id.}

\textsuperscript{268} \textit{See id.} §§ 9-6.14:15 to :19 (Michie 1993).

\textsuperscript{269} \textit{See supra} notes 167-80 and accompanying text on judicial review of case decisions under the VAPA.

\textsuperscript{270} Although the VAPA provides the opportunity for judicial review for "[a]ny person affected by and claiming the unlawfulness of any regulation," VA. CODE ANN. § 9-6.14:16(A), the VWMA provides the opportunity for judicial review for any "person aggrieved by a final decision of the Board or Director under this chapter." \textit{Id.} § 10.1-1457; \textit{see supra} notes 168-70 and accompanying text on issues of standing for judicial review of case decisions.

\textsuperscript{271} The burden is on the "party complaining of agency action to designate and demonstrate an error of law subject to review by the court." \textit{Id.} § 9-6.14:17; \textit{see supra} note 171 on issues that may demonstrate an error of law.

\textsuperscript{272} \textit{See supra} notes 172-80 and accompanying text on the standard of review and the deference courts give to agency action.

\end{quote}
the proper forums for discussion of the individual case-by-case administration of the program.\(^{274}\) This means that during this interim period, many contaminated sites are going to be remediated on a case-by-case basis, complete with a great deal of immunity protection, before the "publicly approved" regulations have been promulgated. Further, the legislation states that participants who enter into an agreement with the Department "prior to the promulgation of [the] regulations may elect to complete the cleanup in accordance with such an agreement or the regulations."\(^{275}\) This provision implies that those who participate in the case-by-case administration of the voluntary remediation program will be unaffected by the regulations that are promulgated for the future administration of this program.

E. Strategies for Promoting Public Involvement Opportunities in Virginia

The Virginia Waste Management Board recently published the NOIRA on February 19, 1996, beginning the "official" rulemaking process for the voluntary remediation program.\(^{276}\) However, prior to its publication, the DEQ exercised its discretion to form a technical advisory committee to assist with the drafting of these regulations.\(^{277}\) This group conducted a series of meetings both before and after the publication of the NOIRA.\(^{278}\) These meetings are advertised in the Virginia Register of Regulations as "Open Meetings" for the public to attend,\(^{279}\) although to assure formal consideration of public comments, the DEQ requests the written submission of comments.

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\(^{274}\) An interview with a member of the advisory committee confirms that there is no discussion of individual case decisions during the committee meetings; the purpose of the committee is to provide assistance with the drafting of the regulations. Telephone Interview with Patrick O'Hare, Member of Technical Advisory Committee for the Voluntary Remediation Program (Jan. 26, 1996).


\(^{277}\) See supra note 243 and accompanying text on the authority of the DEQ to exercise this discretion.

\(^{278}\) The technical advisory committee conducted at least three meetings prior to the publication of the NOIRA. Telephone Interview with Patrick O'Hare, supra note 274. Meetings conducted after the publication of the NOIRA were advertised to be held on March 1, 1996 and March 29, 1996. 12 Va. Regs. Reg. 1522 (Feb. 19, 1996).

It should also be noted that the DEQ has stated an intent to hold "at least one public hearing on this proposed action after it is published in the Virginia Register of Regulations."\textsuperscript{281}

Although many deficiencies have been demonstrated regarding the rulemaking process under the VAPA, such as the ineffectiveness of publication in the Virginia Register, by becoming aware of these deficiencies, one also becomes aware of the opportunities. The public must be involved as early as possible in the rulemaking process in order to maximize its opportunities to submit personal views, data and arguments on the subject of the rulemaking. It is only during the comment periods and through the informal hearings subsequent to the NOIRA and the NOPC that the solicitation of personal perspectives on the regulation is appropriate. Therefore, the time is not ripe to submit comments on the subject of the rulemaking, and prepare for additional upcoming comment periods and public hearings. Time is of the essence since every resolution or recommendation leading up to the agency's proposed rules might well impact the scope of the agency's final rules.

By taking full advantage of opportunities to participate in every possible forum during the rulemaking process, one could hope to generate widespread support for certain proposals. Although the public may not be able to change the case-by-case administration of the program now, the public does have the opportunity to affect the future administration of the program during this rulemaking process. This raises the next issue: What kind of public involvement opportunities should the public be supporting? Before advancing specific proposals for Virginia's voluntary remediation program, an examination of public involvement opportunities in Indiana and Pennsylvania will provide assistance in determining what should (or should not) be recommended.

\textsuperscript{280} Id. at 1375-76.  
\textsuperscript{281} Id.
III. OTHER STATES’ APPROACHES TO PUBLIC PARTICIPATION IN THE VOLUNTARY REMEDIATION OF PROPERTY

A significant number of states have developed programs to encourage the voluntary remediation of contaminated property. Like Virginia, many of these programs are very new or are still in the development stages. However, some state programs are more advanced at this time, and have even successfully completed the remediation of a great number of contaminated sites. Thus, examining how the public is involved in other states’ voluntary remediation programs will assist in the development of proposals for effective public participation under Virginia’s new program.

A. Indiana

Indiana’s “Voluntary Cleanup Program” was signed into law on February 26, 1992. This program specifically addresses the voluntary remediation of releases of hazardous substances and petroleum by owners or operators (or prospective owners or operators) of sites in Indiana. The Indiana program contains many of the common characteristics of other state voluntary remediation programs, including opportunities for flexible remedial activities and liability releases. However, the focus

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283. A person may not be eligible to participate in the program if the Indiana Department of Environmental Management (IDEM) rejects an application to participate, which may only occur “for one (1) or more of the following reasons: (1) A state or federal enforcement action that concerns the remediation ... is pending; (2) A federal grant requires enforcement action at the site; (3) The condition ... constitutes an imminent and substantial threat to human health or the environment; (4) The application is not complete.” Id. § 13-7-8.9-10(a)(1)-(4).
284. The IDEM cleanup process “provides both IDEM and participants with greater flexibility in developing remedial solutions.” INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, VOLUNTARY CLEANUP PROGRAM OVERVIEW (1993) [hereinafter IDEM Fact Sheet No. 1]. For example, participants may propose remedies for the cleanup of a site depending on the proposed cleanup levels selected from a “three-tiered framework for establishing cleanup levels.” INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, VOLUNTARY CLEANUP PROGRAM REMEDIATION WORK PLAN (1993). Tier I levels are established through a “site-specific background investigation;” Tier II levels are “derived from standard equations used in the federal Superfund and Resource
of this analysis is limited to the opportunities it provides for public participation.

Once a person is found eligible to participate in the Indiana program, the participant enters into a "voluntary remediation agreement" with the Indiana Department of Environmental Management (IDEM). The participant thereafter submits a proposed voluntary remediation work plan for evaluation and review by the IDEM. The work plan includes information regarding the "nature and extent" of the release, and a "proposed statement of work to accomplish the remediation" of the release. One component of the work plan also includes "plans concerning . . . community relations." The IDEM utilizes a "Resource Guide," to assist the participant in the formulation of the work plan, and as

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Conservation and Recovery Act (RCRA) corrective action programs; and Tier III levels are "based on a site-specific Risk Assessment performed by the site owner or operator." Id. The proposed cleanup levels may be different "for different contaminants or media at the same site." Id.

285. Upon completion of the remediation in accordance with the voluntary remediation work plan, the participant may be issued a "certificate of completion" which constitutes a "final agency action." IND. CODE § 13-7-8.9-17(a). Upon issuance of the certificate, "the governor shall also provide the person with a covenant not to sue" for any liability or claim, resulting from the release "that is the subject of the approved voluntary remediation work plan successfully conducted under this chapter." Id. § 13-7-8.9-18(a). However, a covenant not to sue issued under this section does not "release a person from liability to the federal government for claims based on federal law unless otherwise agreed or provided for under federal law." Id. § 13-7-8.9-18(d). These liability releases "are important to prospective purchasers of the property, and to prospective lenders where the property is being offered as collateral." IDEM Fact Sheet No. 1, supra note 283.

286. See supra note 283 and accompanying text on the determination of eligibility.

287. The participant may submit a proposed voluntary remediation work plan to the department before entering into a voluntary remediation agreement, but the evaluation of the work plan will occur after the agreement is signed. IND. CODE § 13-7-8.9-13(a); see also id. § 13-7-8.9-13 (regarding the basic components of the voluntary remediation agreement).

288. Id. § 13-7-8.9-12(a); see also id. § 13-7-8.9-14 (regarding the specific components of the review and evaluation of the participant's work plan).

289. Id. § 13-7-8.9-12(b)(1).

290. Id. § 13-7-8.9-12(b)(2); see also id. § 13-7-8.9-12 (giving the specific components of the proposed voluntary remediation work plan).

291. Id. § 13-7-8.9-12(b)(3)(D).

292. IDEM RESOURCE GUIDE, supra note 6.

293. The "proposed statement of work to accomplish the remediation [must be] in accordance with guidelines established by the department." IND. CODE § 13-7-8.9-12(b)(2).
a basis for the final review and evaluation of the participant’s work plan. The work plan is significant because once it is approved by the commissioner, it provides the foundation for future remedial activities and future community relations activities that must be performed in order for the participant to demonstrate a successful completion of the remediation.

Before a proposed work plan can be approved or rejected, the plan is subject to certain notification procedures. Not only must the "local government units located in the county affected" by the proposed work plan be notified, but a "notice requesting comments concerning the proposed voluntary remediation work plan" must be published. A copy of the plan must be placed "in at least one public library in [the] county affected," and the public must be given at least thirty days to comment on the plan. During this comment period, "interested persons" are given the opportunity to "submit written comments" and "request a public hearing" on the plan. Upon the receipt of only one written request, the commissioner may hold a public hearing "on the question of whether to approve or reject the work plan." Although it is within the discretion of the commissioner as to whether a public hearing will be held, the commissioner does have an affirmative duty to consider all written comments received when making the decision to approve or reject the work plan.

294. The IDEM evaluates and reviews the proposed voluntary remediation work plan "for quality, efficiency, and safety based on guidelines established by the department." Id. § 13-7-8.9-14(a)(3).

295. The commissioner of the IDEM either approves, modifies and approves, or rejects the proposed voluntary remediation work plan subsequent to receiving a recommendation formulated by departmental review and evaluation of the site and work plan. Id. § 13-7-8.9-15(a).

296. In order for a participant to receive a certificate of completion, the commissioner must determine that the participant "has successfully completed a voluntary remediation work plan approved under this chapter." Id. § 13-7-8.9-17(a).

297. Id. § 13-7-8.9-15(b).

298. Id.

299. Id. § 13-7-8.9-15(b)(1).

300. Id. § 13-7-8.9-15(b)(2).

301. Id. § 13-7-8.9-15(b).

302. Id. If a public hearing is held, the commissioner has a duty to consider all public testimony as well. Id.
The IDEM guidance documents set forth the requisite elements for the participant’s “community relations” portion of the work plan.\(^{303}\) However, since the requirements for community relations activities have been significantly revised since the guidelines were first developed in 1993,\(^{304}\) an analysis of the requirements for community relations activities pursuant to the original guidelines will be conducted to establish a basis for comparison.

The original guidance documents contain a “Community Relations Plan Outline” (CRP Outline) to assist the participants in formulating the community relations portion of their work plan.\(^{305}\) The CRP Outline was extracted directly from the EPA’s Community Relations Handbook.\(^{306}\) The purpose of the outline was to provide a “foundation for more comprehensive and effective activities” described in the EPA’s handbook.\(^{307}\)

When the participant develops a community relations plan pursuant to the CRP Outline, the final product should be a list of specific “community relations activities [that] will be conducted at the site,” along with a list of “additional techniques that might be used at the site as the response action proceeds.”\(^{308}\) The list of activities include the development of a mailing list,\(^{309}\) a schedule for public meetings,\(^{310}\) plans for the distribution of information to the public, and other activities as necessary.

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303. The Indiana Code does not reveal the particular components required in a participant’s community relations plan. See id. § 13-7-8.9-12(b)(3)(D). However, since the review and evaluation of the work plan is to be “based on guidelines established by the department,” it is therefore necessary to examine the guidance documents to determine the requirements for the community relations portion of the work plan. Id. § 13-7-8.9-14(a)(3).

304. See infra notes 331-32 and accompanying text (discussing the rationale for the revisions to the guidance documents).

305. See INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, COMMUNITY RELATIONS PLAN OUTLINE (1993) [hereinafter CRP OUTLINE]. The purpose of the CRP “is to identify clearly, at the outset, community relations activities that are required for the Voluntary Cleanup Program. . . . This plan, as others, are open for public comment prior to approval by the Commissioner.” INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, COMMUNITY RELATIONS PLAN FACT SHEET (1993) [hereinafter CRP FACT SHEET].

306. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EPA, COMMUNITY RELATIONS IN SUPERFUND: A HANDBOOK (1992) [hereinafter EPA HANDBOOK].

307. CRP FACT SHEET, supra note 305.

308. CRP OUTLINE, supra note 305, at 2.

309. See id. at 2 n.1. The CRP may include a “discussion of plans to develop [a] mailing list of affected residents; interested community groups; and local, state, and
tribution of informational bulletins,\textsuperscript{311} and descriptions of the types of media that will be used to communicate with the public.\textsuperscript{312} In addition, the CRP should contain an attached list of representatives the community members can contact regarding their "concerns on any aspect of the cleanup process."\textsuperscript{313} These requirements suggest the need for an investigation to ascertain the community's resources and available modes of communication. However, the participant's investigatory duties go even further under the CRP Outline, providing a unique aspect to the participant's community relations plan.

In order to plan the specific community relations activities, the participant is directed to conduct community-specific investigations into the particular community's background.\textsuperscript{314} There are three primary areas that the participant should evaluate when conducting specific inquiries into the community's background.\textsuperscript{315} First, a "Community Profile" should be constructed, which reveals the "economic and political structure of the community, and key community issues and interests."\textsuperscript{316} Second, the participant should track the "Chronology of Community Involvement" focusing on "how the community has reacted to the site in the past, actions taken by citizens, and attitudes toward government roles and responsibilities."\textsuperscript{317} Third, the participant should identify the "Key Community Concerns" relevant to "how the community regards the risks posed by the site or the

\textsuperscript{310} See CRP OUTLINE, supra note 305, at 1. The CRP may include discussion of plans to hold public informational meetings about the proposed remediation process; the format of meetings; and the proposed public meeting schedule and notification procedures. IDEM CHECKLIST, supra note 311, at 9.

\textsuperscript{311} The CRP may include "[d]iscussion of plans to prepare and distribute information bulletins regarding the remediation system" and a "[d]escription of the format and types of information included in the bulletins." IDEM CHECKLIST, supra note 309, at 9-10.

\textsuperscript{312} The CRP may include a "[d]escription of the types of media that will be used to inform the general public (newspaper, radio, etc.)" and a "[d]escription of the type of information that will be released to the media." Id. at 10.

\textsuperscript{313} CRP OUTLINE, supra note 305, at A.3.

\textsuperscript{314} See id. at 1-2.

\textsuperscript{315} Id. at 1.

\textsuperscript{316} Id.

\textsuperscript{317} Id.
remedial process used to address those risks." It is the duty of the participant to investigate all three areas through methods such as background reviews of agency files and local newspapers, along with personal interviews of key representatives in the community and local residents. It is important that this portion of the CRP focus on the "community's perception of the events and problems at the site rather than the technical history of the site." Thus, once community-specific information is discovered through background investigations, plans for community relations activities can be tailored to conform to the community's own key concerns, perceptions and levels of interest at the site.

In October 1995, the IDEM's guidelines regarding the participant's community relations efforts were significantly revised. The newly developed "Resource Guide" entails a list of community relations activities that the participant "may wish to undertake." The new guidelines include a list of activities that are similar to those suggested under the previous guidelines. However, the participant's duty to investigate into the community's specific background, in order to solicit the community's particular ideas and concerns in accordance with the CRP Outline, is omitted. While it may be practical for the participant to initiate an investigation in order to formulate certain community relations approaches, the participant's duty to discover the deeper, subjective community concerns and perceptions is absent. This leaves open the danger that

318. Id.
320. CRP OUTLINE, supra note 305, at 1.
321. The specific community relations plans "should follow directly and logically" from the investigation into the community background and from the "perceptions of the problems posed by the site." Id. at 2.
322. See infra notes 331-32 and accompanying text regarding the rationale for the revisions to the guidance documents.
323. IDEM RESOURCE GUIDE, supra note 6.
324. Id. at 41.
325. The list of activities includes plans regarding a mailing list, public meetings, information bulletins and media use. Id. at 41-42.
326. Id. at 41.
327. For example, the participant will have to discover who lives nearby the site in order to develop a "mailing list of affected residents." Id.
328. See id.; see also supra notes 314-21 and accompanying text (explaining the
community relations plans developed pursuant to the new guidelines will be much less detailed or community-specific than any CRP developed under the previous guidelines.

Although the previous CRP Outline was just that—an outline—at least it provided a framework for activities that the participant was expected to conduct in the formulation of a CRP. Further, the previous guidelines even stated that while the CRP Outline addressed the "minimum requirements, merely fulfilling these requirements will not necessarily result in adequate community relations efforts." By contrast, the present guidelines not only omit guidance on exactly how to plan these activities, but also provide the participant with the discretion to choose whether or not to undertake any of the suggested activities at all.

The rationale for the department's alteration of the CRP is that the new guidelines are now more specifically tailored to fit with Indiana's own voluntary cleanup program, based on two and one-half years of experience with its administration. Since the original guidance documents were formulated during the infancy of the program's existence, the IDEM utilized the EPA's CRP Outline as a framework for community relations activities until the program was better developed. Although this rationale seems justifiable, the metamorphosis of these guidelines suggests some dangers inherent in the IDEM's approach to community relations efforts.

Most significant is the fact that the specific components required for community relations activities are presented in the form of guidance documents. As illustrated, this format arguably leaves the agency with too much discretion to alter the

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329. CRP FACT SHEET, supra note 305.
330. Before revealing a list of suggested community relations activities, a provision in the Resource Guide states that: "Site owners may wish to undertake additional public notice activities, such as holding public meetings with neighborhood groups or mailing letters to adjacent residents. If any activities of this kind are planned, the proposed activities must be described, and a tentative schedule outlined." IDEM RESOURCE GUIDE, supra note 6, at 41 (emphasis added).
331. Telephone Interview with Carla Gill, Senior Environmental Manager, Indiana Department of Environmental Management (Jan. 24, 1996).
332. Id.
requirements of a CRP. Moreover, although the purpose of the alterations is to tailor the components of the work plan to fit Indiana's own cleanup program, the changes leave the public no minimal guarantee as to the components of the CRP in the event that future remediation projects do spark the interest of the public. Thus, the sole “fail-safe” measure becomes the opportunity for the public to comment on the proposed work plan provided for in the Indiana Code. This would give the public the opportunity to express any dissatisfaction it has with the participant's CRP and provide suggestions pertaining to specific community relations efforts. However, since there is no affirmative duty for the commissioner to incorporate any comments received into the CRP, this avenue is likewise deficient. And since it is within the commissioner's discretion to hold a public hearing on the work plan, there is no guarantee that any questions or concerns the public may have will be answered or addressed. Furthermore, a basic requirement to formulate a CRP would provide something substantive upon which the public can comment. Yet without this requirement, the public may not be aware of the issues involved or what community relations activities would be appropriate for a particular remediation project.

B. Pennsylvania

Pennsylvania's Governor Tom Ridge recently signed into law “The Land Recycling and Environmental Remediation Standards Act” (Act) on May 19, 1995. It too promotes the remediation

333. See supra notes 331-32 and accompanying text (discussing the rationale for the revisions to the guidance documents).
335. Although the commissioner must consider “all written comments and public testimony” on the proposed remediation work plan, this section is silent as to any duty for the commissioner to actually incorporate, much less respond, to the comments received from the public. Id. § 13-7-8.9-15.
336. Upon the receipt of at least one written request, “the commissioner may hold a public hearing . . . on the question of whether to approve or reject the work plan.” Id. § 13-7-8.9-15(b).
337. 35 PA. CONS. STAT. ANN. §§ 6026.101-6027.14 (1995). This Act became effective on July 18, 1995. In addition, two companion bills were signed into law. One provides for limitations on liability for “economic development agencies.” Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act, 35
of contaminated sites by offering a variety of incentives such as flexible remediation activities,\(^3\) liability releases\(^3\) and financial incentives.\(^3\) The remediation standards that are established in this Act apply to "any person who proposes or is required to respond to the release of a regulated substance at a site, and who wants to be eligible for cleanup liability protection."\(^4\) The Act establishes three basic remediation standards: a background standard;\(^4\) a statewide health standard;\(^4\) and a site-specific standard.\(^4\) The participant's public participation duties depend on the remediation standard that the participant chooses to attain.

When either a background standard\(^4\) or a statewide health standard\(^4\) is selected for the remediation of the property,

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\(^3\) PA. CONS. STAT. ANN. §§ 6027.1 to .14. Another establishes the "Industrial Sites Environmental Assessment Fund" to provide grants for assessments in "distressed communities." Industrial Sites Environmental Assessment Act, 35 PA. CONS. STAT. ANN. §§ 6028.1 to .5.

\(^4\) The participant may choose to "attain compliance with one or more of the following environmental standards when conducting remediation activities: (1) a background standard, (2) a statewide health standard, or (3) a site-specific standard." Id. § 6026.301.

\(^4\) Persons "demonstrating compliance with the environmental remediation standards . . . shall be relieved of further liability for the remediation of the site" under state laws "for any contamination identified in reports submitted to and approved by the department to demonstrate compliance with these standards and shall not be subject to citizen suits or other contribution actions brought by responsible persons." Id.

\(^4\) The Act establishes an "Industrial Sites Cleanup Fund" to provide financial assistance in the form of grants and low-interest loans to "persons who did not cause or contribute to the contamination on property used for industrial activity. . . ." Id. § 6028.702.

\(^4\) Id. § 6026.301(a).

\(^4\) Id. § 6026.302.

\(^4\) See id. § 6026.303.

\(^4\) See id. § 6026.304.

\(^4\) The "background" standard is defined as "the concentration of a regulated substance determined by appropriate statistical methods that is present at the site, but is not related to the release of regulated substances at the site." Id. § 6026.103. In other words, remediation in compliance with a background standard will "restore a site to its condition before the contamination occurred." PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND RECYCLABLE PROGRAM FACT SHEET 2 (1995) [hereinafter PDEP FACT SHEET 2].

\(^4\) The Act directs the Environmental Quality Board to establish statewide health standards for each environmental medium within one year. 35 PA. CONS. STAT. ANN. § 6026.104(a). However, "certain standards, such as MCLs [maximum containment levels], are [now] available for use under the statewide standard." PDEP FACT SHEET
there is no requirement that the participant develop public involvement opportunities in the remediation and reuse plans for the site.\textsuperscript{347} The only public involvement obligation the participant has is to publish a notice of intent to remediate (NIR) the site,\textsuperscript{348} followed by a notice of the attainment of the relevant standard after the remediation has been completed.\textsuperscript{349} The NIR contains information pertaining to the site, the contamination, "intended future use" of the site and the "proposed remediation measures,"\textsuperscript{350} and the notice of attainment must notify the public that a "final report demonstrating the attainment" of the proposed standard has been submitted to the department.\textsuperscript{351} While the notices must be published in the area newspaper,\textsuperscript{352} there are no requirements regarding public hearings, meetings, or even opportunities for the public to comment on the proposed remediation standards.\textsuperscript{353} Even further,
the participant is exempt from these minimal notice requirements if a final report demonstrating the attainment of either the background or statewide health standard is "submitted to the department within ninety days of the release."  

Plans for public involvement "potentially" become much more detailed when site-specific standards are selected for the remediation of property, or when the site qualifies as a "Special Industrial Area." In either case, in addition to the publication of the NIR in the area newspaper, a thirty day comment period follows during which the municipality has the opportunity to request the initiation of certain community involvement activities. If the municipality makes this request, then the participant must develop a "public involvement plan," which will involve the public in the "remediation and reuse plans for the site." Specifically, the plans should afford the public the opportunity to become involved not only in the development and review of the relevant work plans, but also in reports that the participant is required to submit in connection with the remediation of a site in accordance with one of these standards.

62 and accompanying text.  
354. 35 PA. CONS. STAT. ANN. §§ 6026.302(e)(4) (notice exemption for background standard), 6026.303(h)(4) (notice exemption for statewide health standard).  
355. The level of remediation required for a "site-specific standard" is based on a "site-specific risk assessment so that any substantial present or probable future risk to human health and the environment is eliminated or reduced to protective levels based upon the present or currently planned future use of the property." Id. § 6026.301(a)(3).  
356. A site qualifies as a "special industrial area" when there is "no financially viable responsible person to clean up contamination," or when the land is "located within [an] enterprise zone[ ]" designated by the Department of Community Affairs. Id. § 6026.305(a). In fact, the cleanup liabilities for persons undertaking remediation in a special industrial area are limited to the "remediation of any immediate, direct or imminent threats to public health or the environment." Id. § 6026.502(b)(1).  
357. See id. §§ 6026.304(n)(1)(i) (publication of the NIR for site-specific standard), 6026.304(c)(1) (publication of the NIR for special industrial areas).  
358. Id. §§ 6026.304(n)(1)(ii) (comment period for site-specific standard), 6026.305(c)(2) (comment period for special industrial areas).  
359. Id. §§ 6026.304(o) (request for community involvement for site-specific standard), 6026.305(c)(2) (request for community involvement for special industrial areas).  
360. If a site-specific standard is selected, the community involvement plan must include the public in the "development and review of the remedial investigation report, risk assessment report, cleanup plan and final report." Id. § 6026.304(o). If the participant is remediating a special industrial site, then the plans for public involve-
The Act sets forth a list of activities that the participant may wish to include in the development of such public involvement plans. The recommended activities include: more intensive notification efforts; meetings and consultation efforts with members of the community; the designation of a convenient place for document overview along with a single contact person to answer questions; and the actual formation of a community group for the solicitation of comments on the plans and reports.

Whenever each report or plan for remediation pursuant to a site-specific standard is submitted to the department, the participant must attach the public comments that were generated as a result of the public involvement plan, along with the participant's responses to these comments. The participant must then publish a summary of these reports and plans for remediation in the newspaper, thus providing notice that the...
participant has submitted them to the department. After the participant completes the remediation of the property in accordance with these reports and plans, the participant must publish a summary of the final report in the newspaper, providing notice that the final report demonstrating attainment has been submitted to the department.

Whenever a completed environmental report is submitted to the department in connection with the remediation of a special industrial site, the department must consider all comments received as a result of the public involvement plan. The consideration of public comments is necessary to assist the department in the determination of "whether the report adequately identifies the environmental hazards and risks posed by the site."

Pennsylvania's statute is commendable because it sets forth some innovative opportunities for public participation. In fact, the legislation even states that, in regard to the development of a public involvement plan, "persons undertaking remediation are encouraged to develop a proactive approach to working with the municipality in developing and implementing remediation and reuse plans." Further, all reports and notices "required to be submitted to implement the provisions of this act shall . . . include[] a plain language description of the information included in the report in order to enhance the opportunity for public involvement and understanding of the remediation process." However, even though the legislation itself, and not only the guidance documents, provide opportunities for public participation, the legislation is still replete with too

364. Id. § 6026.304(n)(2)(i).
365. Id.
366. See supra note 360 (discussing reporting requirements for special industrial sites).
367. 35 PA. CONS. STAT. ANN. § 6026.305(d).
368. Id.
369. Id. §§ 6026.304(n)(1)(ii) (site-specific involvement), 6026.305(c)(2) (special industrial site involvement).
370. Id. § 6026.301.
371. See supra notes 331-36 and accompanying text on the "dangers" that Indiana's original voluntary remediation program presented by providing for public involvement opportunities in guidance documents.
many potential "loopholes" through which any "real" public involvement could be limited.

First, the obligation for participants to develop public involvement plans will only arise upon the remediation of property pursuant to site-specific standards, or when the site is designated as a "special industrial area." Therefore, the opportunity for public involvement only arises in limited circumstances. One rationale for limiting public involvement to certain remedial efforts may be that remediation in accordance with a background level or a statewide health standard is based upon certain pre-determined cleanup levels, whereas remediation in accordance with a site-specific standard is "based on the contaminants, exposures and conditions unique to that site." Further, the developer of a special industrial site is only responsible for "remediation of any immediate, direct or imminent threats to public health or the environment . . . which would prevent the property from being occupied for its intended purpose." Thus, since the remediation of a special industrial site or remediation under a site-specific standard may potential-

372. See supra notes 345-68 and accompanying text and compare notice and review provisions pursuant to background standards and statewide health standards versus the notice and review provisions pursuant to site-specific standards and special industrial sites.

373. When the participant remediates pursuant to a background standard, the person must attain the "background for each regulated substance in each environmental medium." 35 PA. CONS. STAT. ANN. § 6026.302(a). Similarly, when the participant remediates pursuant to a statewide health standard, the person must attain the "Statewide health standards for regulated substances for each environmental medium." Id. § 6026.303(a).


375. 35 PA. CONS. STAT. ANN. § 6026.502(b)(1).
ly allow for more “flexibility,” the public is afforded a greater role in the determination of these standards.

However, even if the participant remediates the property pursuant to the less flexible standards, there might still be a role for the public to comment upon these remediation activities. For example, relevant comments could be solicited from the public regarding the information the participant presents in the NIR, such as the site description, the intended future use, and the actual remediation measures that will be used. However, the participant can essentially preclude the public from active oversight and participation in these procedures. Furthermore, many of the activities suggested in the development of a public involvement plan should be basic requirements of any program involving the remediation of contaminated property. For example, every program should include the designation of a “convenient location[] where documents related to remediation can be made available to the public,” and the designation of a “single contact person to whom community residents can ask questions.”

Second, even when the participant is remediating a special industrial site or pursuant to site-specific standards, the participant is not required to develop a public involvement plan unless the municipality makes a request “to be involved in the remediation and reuse plans for the site.” Thus, it is within the discretion of the municipality, whether the participant has

376. For example, in the attainment of either a background or statewide health standard, “institutional controls such as fencing and land use restrictions on a site” are prohibited. Id. §§ 6026.302(b)(4) (prohibition of institutional controls for background attainment), 6026.303(e)(3) (prohibition of institutional controls for statewide health standard attainment). However, a “combination of remediation activities” may be used for attainment of a site-specific standard, such as “treatment, removal, engineering or institutional controls and can include innovative or other demonstrated measures.” Id. § 6026.304(i). Similarly, redevelopers of special industrial sites may use methods of cleanup involving “treatment, storage, containment or control methods.” PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND RECYCLING PROGRAM FACT SHEET 7: SPECIAL INDUSTRIAL AREAS (1995).

377. Less flexible standards include background or statewide health standards.


379. Id. § 6026.304(o).

380. Id. §§ 6026.304(n)(1)(ii) (municipality request for site-specific standard), 6026.305(c)(2) (municipality request for special industrial sites).
this obligation. The danger here is that without a basic mandate for a pro-active approach to community involvement, the public might not even be aware that these remedial activities are being administered in the first place. Further, if the municipality does submit a request, the types of public involvement opportunities which will be provided are basically within the discretion of the participant. While the legislation provides a framework for public involvement activities, employment of these activities is discretionary, and the participant may include such measures, “depending on the site involved.”

There is no affirmative obligation for specific involvement activities that the participant must develop. Although this provides flexibility and efficiency, since different communities will exhibit different levels of interest, this structure fails to provide the public with minimal guarantees of certain, specific involvement opportunities.

Finally, even when public comments are received in conjunction with the development of a public involvement plan, there is no obligation that these comments be reflected in the final reports or plans. Although the participant has the duty to submit to the department all comments received, it is ultimately within the discretion of the department whether the plan or report contains any “deficiencies.”

IV. PUBLIC PARTICIPATION PROPOSALS FOR VOLUNTARY REMEDIATION PROGRAMS

When considering proposals for effective public participation provisions in voluntary remediation programs, it is important to

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381. Preceding the list of suggested activities is the statement: “Depending on the site involved, measures may include . . . ” Id. § 6026.304(o) (emphasis added).
382. See supra note 362 (listing of suggested activities in connection with a public involvement plan).
383. 35 PA. CONS. STAT. ANN. § 6026.304(o).
384. See id. §§ 6026.304(n)(2)(i) (duties of departmental review for site-specific standards), 6026.305(d) (duties of departmental review for special industrial sites).
385. Id. §§ 6026.304(n)(2)(i) (submittal of comments for site-specific standards), 6026.305(d) (submittal of comments for special industrial sites).
386. Id. §§ 6026.304(n)(2)(ii) (final departmental review for site-specific standards), 6026.305(d) (final departmental review for special industrial sites).
recognize that requirements which are too strong or burdensome to the participant could ultimately be detrimental to the community. Since the remediation of the contaminated property at issue is voluntary, the participant who has to continuously "bargain" with the public in order to proceed might be discouraged from initiating the cleanup of a site. The participant is encouraged to take part in the voluntary remediation program because of the possibilities for faster and less expensive cleanups, not by delays and potential lawsuits. Therefore, if the community shares the goal of encouraging the cleanup of contaminated properties that might not otherwise take place, it is important for any proposal to balance the ideal of broad public participation with realistic expectations of ultimate effectiveness.

The proposals advanced below address the minimum requirements that should be included in every state's voluntary remediation program. Proposals which might be considered too radical, such as community veto powers, are not included. Instead, these proposals primarily involve pro-active education and reciprocal communication. These recommendations are interrelated and incorporate the basic notion of the opportunity for personal choice. It is further noted that these proposals should be integrated into the particular state's law. It is not sufficient that opportunities for public participation be denoted in the state's guidance documents, to be modified at the agency's discretion.

A. Promoting Educational Opportunities

The cornerstone of every proposal that advocates effective public participation should be focused on the promotion of a well-informed community. A community that is unaware or ill-informed about facts, issues, and alternatives is effectively excluded from the process. A well-informed public is especially important in the voluntary remediation context, since it is the community's health and environment that are at stake. Therefore, the participant, along with the state agency administering the voluntary remediation program, should have certain mandatory duties that promote the dissemination of information to the community.
Many states provide the public with the opportunity to comment on issues surrounding the participant's plans to remediate a site. However, providing the public with this opportunity is futile if the public is unaware or does not understand all of the issues involved in the remediation process. Without opportunities for education, the community cannot participate fully and effectively during comment periods.

Virginia's Governor George Allen, in reference to the comment period during the agency rulemaking process, stated that "citizens with constructive comments have the opportunity to participate fully. . . ." Further, Governor Allen directed that agencies assure this opportunity for full participation by the "inclusion of changes suggested by reasonable, cogent, and persuasive comments." This is directly analogous to the concerns during any comment period, because only reasonable, cogent, and persuasive comments will be recognized.

Not only is education important to the public, but a proactive approach can benefit the participant as well. Any disparity "between agency and public perception of the nature of environmental risk and of environmental protection priorities" may engender public distrust and rejection of a redevelopment project, which could lead to active community opposition and even permanent delays for the participant. However, if the public

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387. See, e.g., IND. CODE § 13-7-8.9-15(b) (1996) (thirty day comment period following notice of proposed voluntary remediation work plan); 35 PA. CONS. STAT. ANN. § 6026.304(n)(1)(ii) (1995) (thirty day comment period following notice of intent to remediate).

388. The community's access to the decision-making process is valuable "only if those who were formerly excluded are capable of translating that access into thoughtful articulation of community concerns and meaningful suggestions for change. Thoughtful suggestions can only be advanced if the affected communities have the information necessary to ensure a full understanding of the problem." Gerald Torres, Environmental Burdens and Democratic Justice, 21 FORDHAM URB. L.J. 431, 455 (1994).


390. Id.


392. "Developers that have invested resources in redeveloping a brownfield must take care to maintain adequate lines of communication with community leaders to ensure that local dissatisfaction with the project does not result in additional layers of requirements that discourage development." Grayson and Palmer, supra note 23, at 10,340.
is educated about the precautionary measures involved in the remediation process and understands the implications of not remediating the site, the community becomes more likely to accept, and even support, the remediation activities. Further, once the public is adequately informed about the issues involved in the remediation process, the participant “will receive valuable information and comments from affected communities.”

The public must be adequately informed in order to make meaningful comments on the remediation plan. However, the participant should not carry this burden alone. Instead, the remediator should work in coordination with the state agency to promote education in the community. In fact, one of the purposes for the creation of the Virginia Department of Environmental Quality was to “provide increased opportunities for public education programs on environmental issues.” In order to do this, the DEQ has the general power to “initiate and supervise programs designed to educate citizens on ecology, pollution and its control, technology and its relationship to environmental problems.” Thus, the promotion of educational opportunities should not be the sole duty of the participant.

1. Promoting Awareness and Providing Opportunities

It is important for the participant to include a community relations plan (CRP) as a part of the proposed work plan when the participant publishes its initial notice of intent to remediate a site. As in Indiana, voluntary remediation laws should require that the proposed plans be available for public review in “at least one public library in a county affected by the work plan.” The participant should formulate the CRP through the same community-specific investigations and considerations.

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393. “Community involvement in brownfields initiatives is crucial so that local residents understand the environmental issues and the actions being taken to minimize or eliminate any potential risks.” Id.
394. Torres, supra note 90, at 455.
396. Id. § 10.1-1186(7).
that are recommended in the EPA's CRP outline. For example, the CRP should contain a list of community contacts and resources, and solid plans for community relations activities based upon the results of the investigations into the community's background. In addition, it is important that the CRP "designate a contact person . . . to respond to citizens' requests for information, answer their questions, and address their concerns on any aspect of the cleanup process." However, the CRP should contain more than just current plans for community relations activities. The CRP should also contain a list of every possible opportunity for public education.

It is proposed that this particular section of the CRP should be separated from the rest of the plan as a "List of Educational Opportunities." This section should include a specific, detailed list of issues that could be the subject of possible meetings or roundtable discussions. Issues on this list should include:

1) Contamination: What is the particular contaminant at the site, what are its characteristics, and what is the extent of the contamination?

2) Exposure Pathways: How are they identified and what are the resulting risks?

3) Communicating the Risk: How does the participant conduct risk assessments and what does this mean?

4) Controlling the Risk: How does the participant determine an "acceptable risk," and what would be a worst case scenario?

5) Developing a Work Plan: Why is the participant proposing this particular remedial action work plan and what will it entail?

398. EPA HANDBOOK, supra note 306, app. B, at B-1; see supra notes 308-21 and accompanying text on components of a CRP.


400. CRP OUTLINE, supra note 305, at A3; see supra notes 308-21 and accompanying text on components of a CRP.

401. The following questions were composed as a result of the review that was initiated on the components involved in the voluntary remediation programs of Virginia, Indiana and Pennsylvania. See EPA HANDBOOK, supra note 306, at ch. 9 (highlighting issues that are significant in communicating risk to the public).
6) Future Use: What will be the future use of the site and what opportunities does this prevent or provide?

7) Communicating the Alternatives: How would a different cleanup standard or work plan alter certain risks to the community, and what do these alternatives entail? (Including the alternative of taking no action).

8) Health and Safety Plans: How does the participant ensure the health and safety of the surrounding community both during and after the remediation?

9) Monitoring and Oversight: How are the participant's activities monitored during the remediation of the property?

10) Demonstration of Completion and Review: How does the participant ensure attainment of the remediation standard, and what is the review process?

This list is not exhaustive by any means. In fact, every procedure or issue that is relevant to the remediation of contaminated sites should be included on this list of possible educational opportunities. However, if a particular issue on the list is completely inapplicable to the remedial activities for a particular site, then the participant should state the reason it does not apply. This list does not reveal immediate commitments for the participant. Instead, the purpose of listing these opportunities at the time of the initial publication of the intent to remediate is to raise the community's awareness of the issues involved, and to suggest a variety of activities that the community might consider and request of the participant.

Although some of this information can be found in the work plan itself, it will likely be presented in a technically complex manner. It would be advisable to require the participant to prepare separate, readable fact sheets on each of these issues as well. At the bottom of each fact sheet, there should be the name of the appropriate contact person with a telephone number where this person can be reached. This would give the public the opportunity to exhaust all of the other possible sources of information before proceeding to the next step.
2. Providing the Opportunity for Choice

Every state should require at least thirty days for a public comment period subsequent to the publication of the notice of intent to remediate a site. This would give the public thirty days to review the proposed work plan, which should contain the CRP as well. During this review, the public would become aware of the issues involved through the simultaneous examination of the List of Educational Opportunities. The public would also have the opportunity to review fact sheets and communicate with the designated contact people regarding their unanswered questions. However, these efforts might not be enough to promote a well-informed public. The public may not be fully confident or satisfied with their own understanding of the materials. The public may be interested in learning more about these issues, but may not know what questions to ask. Therefore, the public should have the opportunity to participate in a structured learning environment with the participant and other community members. Besides the opportunity to learn directly from the participant, the members of the community can learn from each other as well by listening to other questions and concerns.

Therefore, during this comment period, if the participant receives at least five requests pertaining to any of the listed educational opportunities, it should be mandatory that the participant schedule at least one meeting to be held for the purpose of educating the public. The participant should not only have the duty of providing personal notice of the time, date and place of the meeting to the persons who submitted these requests, but also this information should be published in the local newspaper as well. During the meeting, if issues remain unresolved, and if at least five people request the opportunity for additional meetings, it should be the participant's duty to schedule a series of educational meetings. Notification of such additional meetings should also be published in the newspaper.

This is where coordination with the state agency may become essential. Although the participant should have the duty of coordinating the first meeting, if additional meetings are requested, then the state agency should provide some assistance.
The participant will have knowledge from the initial meeting about what issues concern the community and what questions remain unanswered. Thus, the participant should thereafter consult with the agency in order to formulate a cooperative plan for the additional series of educational meetings. Both the participant and the agency should pool together their resources in order to provide adequate responses to the public's inquiries.

Technical complexity of the issues should not relieve the participant or the agency from the responsibility to adequately inform the public. There are many strategies and techniques that the participant can use to reduce this complexity in a satisfactory manner for the community. For example, if the community was interested in risk assessment issues, the EPA's Community Relations Handbook details certain risk communication activities that provide "practical guidance on how to discuss technical issues with the public and address their concerns."402 Besides highlighting the issues that should be communicated to the public, such as the methods of risk determination and the uncertainties involved, this useful resource also illustrates specific communication techniques.403 For example, according to the EPA, one of the most effective strategies to help the public understand risk issues is known as "risk comparisons."404 By comparing the differences between the possible and future risks, it is more likely that the public's actual perception of the risk will be enhanced.405 Not only should the public have the right to know and understand these risks, but also open communication will benefit the participant because credibility and trust will increase, and the likelihood of future conflict will decrease.406

402. EPA HANDBOOK, supra note 306, at 83.
403. See id. at ch. 9.
404. Id. at 87.
405. Id. at 88.
406. See supra notes 391-94 and accompanying text on benefits of promoting educational opportunities.
B. Reciprocal Communication

During the comment period, the participant may receive comments in addition to the requests for public educational opportunities. Therefore, it is necessary to address the duties that the participant should have regarding the response to these comments.

Not only should the participant consider the comments received, but the participant should also have an obligation to respond to these comments as well. The response should contain either an explanation of how the work plan has been modified as a result of the comment, or an explanation of why the work plan was not modified as a result of the comment. At the end of the comment period, the participant should compile all of the comments and responses and place copies of these comments and responses in the local library for review. The participant’s initial notification that solicited these comments from the community should inform the public of this procedure.

C. Summary of Proposals

Each of these proposals should be incorporated into every state’s voluntary remediation program. By imposing a legal duty on the participant to provide educational opportunities and to engage in reciprocal communication, this will guarantee some minimal public involvement opportunities and reduce the possibility that agencies will exercise their discretion with “adaptable” guidance documents.

Imposing upon the participant an affirmative duty to provide and notify the community of educational opportunities will also reduce some of the discretion usually afforded to the participant in the realm of involvement obligations. For example, as illustrated in the Indiana and Pennsylvania programs, although the participant was provided with a list of possible involvement or relations activities, it remained basically within the participant’s discretion to decide exactly which activity would be initiated.407 However, the above proposals not only require the

407. See supra parts III.A (discussing Indiana’s public involvement opportunities,
participant to list specific opportunities that are available, but the public will actually be provided with some minimal guarantee that the participant will initiate a specific activity within the public’s discretion. Therefore, under these proposals the public has the opportunity to make a choice.

Additionally, these proposals promote public involvement in a non-threatening manner to the participant. There is no requirement that the public actually accept the workplans, or that the workplans even reflect the public’s concerns. However, these proposals do raise the public’s awareness of the issues involved in the first place, and give the public the opportunity to increase their understanding of these issues. This is important because only with an adequate understanding of the issues can the public be empowered to make constructive comments and well-informed decisions.

V. CONCLUSION

Voluntary remediation programs provide innovative ways to approach unaddressed problems at contaminated sites. However, the public should not be isolated from participation in the administration of these programs because it is their environment and their community that will be affected.

It could be months before the Notice of Public Comment for the voluntary remediation programs is published in Virginia. However, by promoting awareness now about how the system works and what public involvement opportunities are available, the public could have a substantial impact on how this program will be administered in the future. Awareness is key to any opportunity for public involvement. That is why education and communication serve as the foundation for the proposals in this article. Without awareness of the issues that surround the voluntary remediation of property, the public has no meaningful opportunity to become involved, even if such an opportunity

III.B (discussing Pennsylvania’s public involvement opportunities).

408. The opportunity for community involvement is within the discretion of the public since an educational meeting must be held upon the receipt of five requests from the public. See supra part IV.A.2.
existed. Without awareness, the public is necessarily isolated from the process.

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