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State of Washington

APPENDIX

DETAILED EVALUATION OF POLICY RECOMMENDATIONS

BROWNFIELD POLICY PLAN

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APPENDIX
DETAILED EVALUATION OF POLICY RECOMMENDATIONS

BROWNFIELD POLICY PLAN

Prepared for
WASHINGTON STATE DEPARTMENT OF ECOLOGY
TOXICS CLEANUP PROGRAM
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Acronyms and Abbreviations

B&O	business and occupation
BDA	Brownfield Development Authority
BEA	baseline environmental assessment
BFPP	Bona Fide Prospective Purchaser
BRLF	Brownfield Revolving Loan Fund
CCLR	Center for Creative Land Recycling
Commerce	Washington State Department of Commerce
Ecology	Washington State Department of Ecology
ECOSS	Environmental Coalition of South Seattle
FTE	full-time employee
GASB	Government Accounting Standards Board
GMA	Growth Management Act
IDD	Industrial Development District
LIFT	Local Infrastructure Financing Tool
LRF	Local Revitalization Financing
LSRP	Licensed Site Remediation Professional
MTCA	Model Toxics Control Act
NFA	No Further Action letter
PDA	Public Development Authority
PFCT	Publicly Funded Cleanup Trust
PPA	prospective purchaser agreement
RCRA	Resource Conservation and Recovery Act
RCW	Revised Code of Washington
SEPA	State Environmental Policy Act
TIF	tax increment financing
USEPA	U.S. Environmental Protection Agency
VCP	voluntary cleanup program
WAC	Washington Administrative Code

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1 INTRODUCTION

This appendix provides detailed analysis of the policy tools developed in the Washington State Brownfield Policy Plan effort. The purpose of these analyses is to provide greater depth of discussion of key issues and guidance for developing statutory, regulatory, or policy frameworks for implementation. The order of the policy tools in this appendix mirrors the order in which they are described in Section 3 of the Washington State Brownfield Policy Recommendations report. The analysis of each policy recommendation contains the following elements

Brownfield Challenge Addressed—Refers to the challenges to brownfield cleanup and redevelopment identified in Section 2 of the Brownfield Policy Recommendations report. The primary challenges are:

- Linking cleanup and redevelopment
- Cost of contamination investigation and cleanup
- Potential liability for contamination/risk management
- Length of the regulatory cleanup process / backlog of cleanup sites
- Impacts of area-wide contamination

Construct of the Tool—Explains the rationale for the policy tool and description of how it could operate. For some policy tools, there are a number of options for how they could be implemented. The analysis includes an assessment of these options and review of models from other states, when available.

Benefits of the Tool—Highlights the potential positive outcomes from implementation of the policy recommendation

Financial and Administrative Implications—Provides a qualitative assessment of the likely impacts to state resources associated with implementation of the policy recommendation. Note the assessments of implications are based on the long-term, on-going implementation of the policy recommendation. It is recognized that the process of changing a current state law or administrative rule requires significant dedication of staff time and resources in the short-term.

Relationship to Other Policy Options—Describes how one policy tool relates to other recommendations. Some of the policy tools are mutually supportive. Some provide multiple options to address one set of challenges, so that adoption of one policy tool may reduce the need to adopt another.

Implementation Steps—Briefly outlines the major steps to adoption of the policy tool.

2 CODIFICATION OF BROWNFIELD DEFINITION

Amend both the Model Toxics Control Act (MTCA) and the Growth Management Act (GMA) to include a statutory definition of "brownfield."

2.1 Brownfield Challenges Addressed

- Linking cleanup and redevelopment

2.2 Construct of Tool

The term brownfield is not defined in Washington State law or administrative rule. Cleanup and redevelopment of brownfields requires a multi-faceted approach to address environmental, economic, and community issues. Without a codified definition of brownfields, the land use and cleanup laws, state transportation, housing, funding and other programs do not have a common understanding to coordinate responses that move these sites forward. It is fundamentally important for state elected officials and agency staff to have a single working definition of brownfields as a foundation for articulating the unique aspects of properties and for developing focused policy.

The working definition for a brownfield developed by Washington State Department of Ecology (Ecology) staff is "abandoned, underutilized, or vacant real property where environmental, economic, and social reuse objectives are hindered by environmental contamination." This definition expands on the U.S. Environmental Protection Agency (USEPA) definition by recognizing the social as well as environmental and economic aspects of the brownfield problem. The working definition recognizes that the public interest in brownfields is not limited just to cleaning up contamination and resolving environmental liability. The definition frames brownfields in the context of reuse potential and forging partnerships, as well as of cleanup.

2.3 Benefits of Tool

- Provides both conceptual clarity and a basis for targeting financial and technical assistance to these properties where a range of issues inhibits reuse.
- Creates a common vocabulary for multiple state agencies, local government and the private sector to support an approach that

leverages the financial resources and energy of redevelopment to achieve cleanup.

- Articulates the state policy on the opportunities of property redevelopment to achieve sustainable development goals.
- Does not create any financial or administrative obligations that would negatively impact the state.
- Supports many of the other brownfield policy recommendations.
- Signals that Washington State is a leader in brownfield redevelopment policy; this will attract developers across the nation.

2.4 Financial and Administrative Implications

No additional financial or administrative obligations would be placed upon Ecology by implementing this action.

2.5 Relationship to Other Policy Options

The brownfield definition potentially relates to all of the other policy options. They all can reference the definition and use it to focus the application of the policy tools.

2.6 Implementation Steps

1. Incorporate the term brownfield into the definition sections of the Model Toxics Control Act (MTCA) Administrative Code [WAC] 173-340-200) and Growth Management Act (GMA) (RCW 36.70A.030) by amendment.

3 STRENGTHEN BROWNFIELD CONNECTION TO GROWTH MANAGEMENT ACT

The policy recommendation is to revise GMA to include brownfields as part of the goal statements and as optional components of comprehensive plans. There are a number of local government planning tools that could be used to increase the market potential for brownfields, such as inventorying and prioritizing brownfield properties, targeting economic development efforts to these neighborhoods, and providing regulatory flexibility on identified properties.

3.1 Brownfield Challenges Addressed

- Linking cleanup and redevelopment

3.2 Construct of Tool

MTCA currently includes a growth management argument as one of four purposes for the statute. Significantly, MTCA's fourth policy goal proclaims an underlying redevelopment emphasis, and highlights the following (RCW 70.105D.010):

> …it is in the public's interest to efficiently use our finite land base, to integrate our land use planning policies with our clean-up policies, and to clean up and reuse contaminated industrial properties in order to minimize industrial development pressures on undeveloped land and to make clean land available for future social use.

Washington State is a national leader in statewide urban growth management. Brownfield redevelopment addresses all the substantive goals of GMA, and yet the statute does not explicitly recognize the problem of brownfields. In addition, brownfields are often clustered, because of zoning, and thus lend themselves to multisite, community planning efforts. Furthermore, community planning efforts aim to incorporate physical, social, and environmental factors in the process, and thus are capable of addressing the multifaceted nature of brownfields. This recommendation reinforces the linkage between growth management and brownfield cleanup and redevelopment.

There are several GMA tools that could be used to strengthen the connection between growth management and brownfield cleanup and redevelopment, including:

- State Environmental Policy Act (SEPA) planned action ordinances. Local governments can use this tool to promote brownfield redevelopment by conducting SEPA review for one or multiple sites to expedite later permitting of new development.

- Incorporation of brownfields in environmental and economic elements of comprehensive plans. Local governments in counties that are required to fully plan under GMA must prepare comprehensive plans with a number of required elements. The economic development and environmental elements are strongly related to brownfields and this issue could be expressly addressed as an optional or required component in either or both sections. The incorporation of brownfields in comprehensive plans gives local government the opportunity to assess the impact of brownfields to the local economy, community, and environment and develop strategies to expedite cleanup and redevelopment.

- Local governments could be given direction and authority to inventory potential brownfield properties in their jurisdiction and provide incentives for sites on the list. Listing a property on the brownfield inventory could be required or voluntary. If required, then all properties meeting the brownfield definition would be included. A voluntary inventory would give eligible property owners the option of being listed or not. A voluntary approach is recommended for local governments in order to make the effort more acceptable for property owners. A number of incentives could be provided to properties on the brownfield inventory to both overcome property owner reluctance and add market value to promote cleanup and redevelopment. Incentives could include:

  - Amending capital facilities plans to focus infrastructure improvements to support brownfield redevelopment.

  - Establishing regulatory flexibility such as streamlined permitting, development standard exemptions, or density bonuses that could be available to identified brownfield properties where found necessary and appropriate and where normal entitlement processes such as rezoning or general regulatory reform would not be appropriate for the city as a whole.

  - Allowing property tax abatements for redevelopment projects on properties identified in a brownfield inventory

It is important to emphasize that incorporating the brownfield inventory in the comprehensive planning process lays the foundation for special treatment of these properties as a group based on public benefit derived from

addressing community-wide economic impacts and threats to human health and the environment. These inventories could be funded through Integrated Planning Grants (See Section 4).

3.3 Benefits of Tool

- Supports GMA goals of encouraging development in urban areas; reducing sprawl; promoting economic development within the capacities of the state's natural resources, public services, and public facilities; and protecting the environment.
- Empowers local governments to promote brownfield redevelopment as a key element of community and economic planning.
- Provides tools that add value to properties identified as brownfields, which may offset owner concerns about documenting potential contamination.
- Provides a stronger foundation for local land use policy and planning around brownfields.
- Provides tools that add value to properties identified as brownfields, which may offset owner concerns about documenting potential contamination.
- Improves knowledge of scale and distribution of brownfield properties in the state through local inventories.

3.4 Financial and Administrative Implications

If an obligation is placed on local governments to develop land use policy around brownfields, there will be a need for guidance from Ecology and the Washington State Department of Commerce (Commerce) as to how that policy should be framed and what it could include. Ecology and Commerce could work together to develop such guidance and make staff available to assist local governments in addressing brownfields in their comprehensive plan updates.

3.5 Relationship to Other Policy Options

Brownfield Definition—This policy tool would rely on the definition to provide focus and clarity.

Brownfield Development Authorities (BDAs)—The work of BDAs could be authorized through requirements to include brownfields in comprehensive plan updates.

3.6 Implementation Steps

1. Ecology work with Commerce to identify brownfields as a priority area for providing SEPA planned action funds.
2. Consider including language explicitly encouraging redevelopment of brownfields in GMA goals (1) Urban Growth or (10) Environment (RCW 36.70A.020).
3. Consider including language explicitly reference brownfields in the definition of "urban growth" (RCW 36.70A.030 (18)).
4. Consider including redevelopment of brownfield properties as an optional or required component of the economic development element of a comprehensive plan (RCW 36.70A.070 (7)). Once included, empower local government to offer regulatory flexibility in brownfield redevelopment efforts when warranted and necessary.
5. Consider amending GMA to include a provision allowing local governments to conduct brownfield inventories and to provide certain incentives to encourage cleanup and redevelopment of listed properties.
6. Ecology and Commerce jointly prepare a guidance document for brownfield planning components of a comprehensive plan, conducting brownfield inventories, and providing regulatory incentives to promote brownfield redevelopment.

4 INTEGRATED PLANNING GRANTS

Transition the Integrated Planning Grant from a pilot project to a permanent program. Rename the program "Brownfield Integrated Planning Grant."

4.1 Brownfield Challenges Addressed

- Linking cleanup and redevelopment
- Impacts of area-wide contamination
- Risk management, by providing funding for due diligence studies

4.2 Description of Tool

Integrated Planning Grants are a pilot initiative that provides up to $200,000 with no match requirement, which allows local governments to conduct due diligence and create a well-developed strategy for cleanup and redevelopment before investing local funds. The grants provide an opportunity to plan for adaptive reuse of a property that integrates economic development, environmental cleanup and restoration, and community benefit. The grant name could be changed to emphasize and clarify that these funds are available for brownfield properties. A common definition of brownfields should be codified to support that grant name change.

Public involvement is a key component of all of these grant-funded activities. Since redevelopment of a property is inherently connected to its context, the planning effort can address community-wide revitalization needs. Integrated Planning Grants are an element of the Remedial Action Grant program, which distributes funds from the Local Toxics Control Account to local governments to conduct cleanup actions. Priority and preference are given to local governments that have not previously received a Remedial Action Grant or that meet the disadvantaged communities' criteria.

Integrated brownfield plans establish a vision for future use that energizes the redevelopment effort and drives the cleanup process. Integrated plans outline a strategy to solve multiple problems that stem from contamination. The plan may address habitat restoration, recreational opportunities, and infrastructure development as part of the overall cleanup process. The plan would also include funding strategies that leverage multiple grant and loan opportunities to carry a project through to completion.

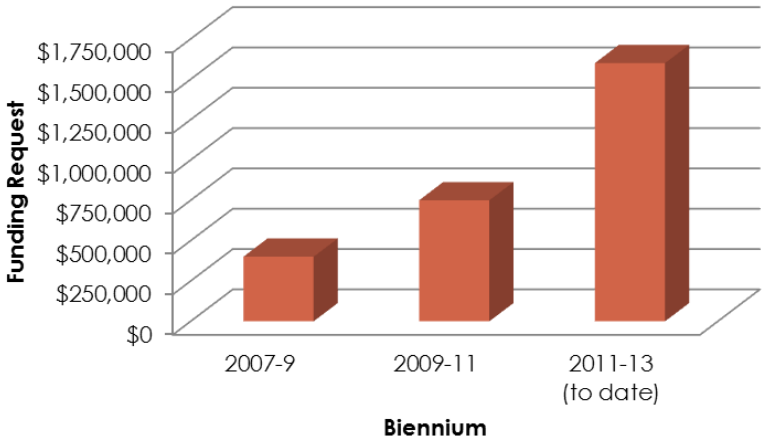
The Integrated Planning Grant allows communities to apply funds traditionally used solely for cleanup to also plan for redevelopment of brownfields properties. The planning process establishes a vision for community development, based on economic analysis, community input, and physical assessment of property. The process empowers communities to turn environmental liabilities into assets.

Under the pilot phase of the Integrated Planning Grant Program, total funding was distributed to the following groups of activities:

- Planning—34 percent
- Environmental site characterization—38 percent
- Land use and regulatory analysis—18 percent
- Economic and fiscal analysis—2 percent
- Administrative cost—9 percent

The number of local governments applying for these grants has steadily increased since it was initiated (See Figure 4-1). As of June 2011, eight communities have submitted applications for a total funding request of $1.6 million this year alone. These numbers are likely to continue to grow as the program matures.

Figure 4-1. Demand for Integrated Planning Grants



4.3 Benefits of Tool

- Provides 100 percent funding for preliminary planning that integrates cleanup with redevelopment. This early coordination improves the chances for successful project completion.
- Strengthens the connection between economic, community, and environmental benefits of brownfield cleanup and redevelopment.
- Provides resources to smaller communities that otherwise would lack the capacity to take on important cleanup and redevelopment projects.
- Creates greater opportunity for partnerships among private property owners and local, state, and federal governments.
- Extends Ecology's programs and services beyond meeting regulatory requirements.

4.4 Financial and Administrative Implications

This grant program is already established under the Remedial Action Grant administrative rules. The grants are administered by Ecology staff under the same procedures as other Remedial Action Grants.

These grants would be issued from the total amount appropriated for Remedial Action Grants for a given biennium. It would not increase financial obligations on the state, but rather would improve an existing grant program. Projected funding allocation is approximately $3,000,000 per biennium. Increasing interest in this grant program may merit increased funding in the future. Current staffing capacity is not sufficient to expand program.

4.5 Relationship to Other Policy Options

Strengthen Brownfield Connection to GMA—Provides local governments with resources to conduct land use planning around brownfields.

Small Town and Rural Grant Set-Aside—Integrated Planning Grant review criteria give priority to small communities and governments that have not previously received Remedial Action Grants.

BDAs—Integrated Planning Grants provide a funding source that could support the planning or project-specific efforts of BDAs.

4.6 Implementation Steps

1. Amend Remedial Action Grant administrative rule (WAC 173-322) to establish Integrated Planning Grants as a permanent program and change the name to "Brownfield Integrated Planning Grant."

5 BROWNFIELD DEVELOPMENT AUTHORITIES

Brownfield Development Authorities (BDA) are envisioned as public corporations that borrow many of the best provisions of existing state-authorized special purpose public corporations with the mission of remediating and redeveloping contaminated properties in a designated area. This creates the statutory and regulatory structure to allow local government(s) to address multi-site or single site brownfield projects in the context of an overall economic development strategy.

5.1 Brownfield Challenges Addressed

- Linking cleanup and redevelopment
- Impacts of area-wide contamination

5.2 Construct of Tool

In many communities there are multiple brownfields in one localized area or in several small sites scattered around the town. These sites may be underutilized and receive no active remediation for many years because:

- Each smaller site is too small to justify resources required for remediation.
- The collection of localized sites has mixed pollution caused by a variety of uses and users, thereby complicating liability allocation and precluding any individual responsible party from taking action.
- There is a collection of unused sites (or for that matter, one large site) that suffers from contamination as well as a lack of infrastructure appropriate for a potential reuse.
- There are often recalcitrant property owners who may avoid cleanup liabilities or who are otherwise unengaged in redevelopment planning.

In each of these types of situations, an area-wide approach is needed. Local BDAs could be established to plan and implement area-wide or large site cleanup and redevelopment efforts. The BDA concept builds on existing successful Washington State models, including Public Development Authorities (PDAs) and Industrial Development Districts (IDDs) as well as the Community Development Act and the Interlocal Cooperation Act.

Dedicated funding streams, enhanced use of tax increment financing (TIF), and liability protections could be linked to designated areas to support implementation of revitalization plans. BDAs could integrate established Washington legal concepts, including:

- The authority of governments to join together for a particular purpose under the Interlocal Cooperation Act (Chapter 39.34 RCW).

- The authority to redevelop property under both the Community Renewal Law (Chapter 35.81 RCW) and the IDD statute (Chapter 53.25).

- The planning and formation concepts under the Regional Fire Protection Service Authorities (Chapter 52.26).

- Financing using the Local Infrastructure Financing Tool (LIFT) Program (Chapter 39.102 RCW) and the local improvement districts found in the IDD statute (Chapter 53.25).

- The ability of local governments to access Remedial Action Grants from MTCA (Chapter 70.105D RCW).

BDAs would have the same powers as existing PDAs and IDDs, including the ability to establish special assessment districts and eminent domain, and the ability to convey private lands and cancel back taxes. While BDAs would be closely aligned with and could evolve from PDAs and IDD's, BDAs could be granted at least four legal authorities that other development authorities do not have:

- A liability exemption in actions related to acquiring and managing contaminated property

- The ability to access privately-held brownfields for the purpose of performing an environmental site investigation

- A statutory right to extend cleanup schedules adopted in consent decrees relative to the use of MTCA funds for cleanup of publicly-owned sites

- Sites in BDA areas would automatically qualify for the tax incentives recommended in Section 8 of this report.

Additionally, BDA areas could be the initial focus (and trial run) areas for progressive policies that could later be implemented statewide. For example,

enhanced liability protections (See Section 3) and/or licensed site remediation professional programs (See Section 19) could be piloted in BDA areas.

The work of the BDA is organized around five major steps. Each of these steps involves a public process and opportunities for community input.

1. Designate a redevelopment district, based on findings of blight and contamination.
2. Establish goals for the redevelopment district and craft a plan for the structure and governance of the BDA.
3. Draft a redevelopment plan for the district through an open public process that engages property owners, local government, and other stakeholders. The redevelopment plan should incorporate analysis of environmental, economic, and community factors.
4. Inventory, prioritize, and conduct environmental assessments on brownfield properties in the district.
5. Invest in infrastructure improvements, local land use regulatory updates, and marketing efforts to implement the community and economic development plan.

Organization—Once created, the BDA would be a legally independent entity from the local governments that formed the authority. However, the BDA would be subject to the Public Records Act and the Open Meetings Act. The decision making authority will be vested in a board of directors composed of some or all of the elected officials who created the authority.

The BDA could qualify as a tax exempt "supporting organization" of a government, thereby creating the opportunity for contributions from individuals or from other tax exempt organizations.

Liability Protections—BDAs will have protection from "owner" and "operator" liability. BDAs will be able to provide liability protection to successors-in-interest for known contamination where the use of the property is consistent with the redevelopment plan.

Funding—Funding could be provided by a combination of available Ecology and USEPA grants and loans, local economic development funding, loans from the creating governments, and ultimately proceeds from the sale of remediated and redeveloped property. Various loans could be secured by deeds of trust against brownfield properties acquired by the BDA.

Cleanup and site preparation of privately-owned properties could be financed through loans with repayment sources that would include private party commitments and TIF. Relatively minor modifications of Washington's current TIF authorities could result in more productive tools for BDAs to borrow funds to acquire property and perform cleanup/site preparation, with repayment from pledged tax increments (See Section 13).

5.3 Benefits of Tool

- Addresses impacts from area-wide contamination, encouraging local governments to undertake multi-site and complex brownfield projects.

- Establishes one local agency that can gather technical resources and provide a single point of contact for multiple brownfield sites to increase the cost effectiveness of achieving cleanup and redevelopment.

- Establishes cleanup and redevelopment priorities and actions on local community-based planning.

- Provides liability protections for local governments and innocent purchasers to allow them to take ownership of brownfields with minimal risk exposure.

- Provides a mechanism to protect the balance sheet of local governments by eliminating liabilities that would otherwise fall under GASB Statement Number 49, Accounting and Financial Reporting for Pollution Remediation Obligations.

- Supports urban infill redevelopment and environmental cleanup.

- Positions local governments to work effectively with the private sector to return brownfield sites to productive use.

5.4 Financial and Administrative Implications

Beyond the legislative resources to establish the statutory framework for BDAs, this policy creates no financial obligations on the state beyond the current dedication of revenues allocated to environmental remediation. Efficiencies will be created by providing one local government agency to interact with Ecology. The BDAs would likely increase the demand for Remedial Action Grant funds.

5.5 Relationship to Other Policy Options

Tax Increment Financing—amendments to the existing TIF statutes could emphasize and support the creation of BDAs.

Liability Protection Extension—the designated BDA districts provide a focus to target liability relief in a way that meets the goals of the local community and supports economic development. BDAs should be given the broadest possible liability protections.

Area-Wide Groundwater Grant—the BDA would be an appropriate local entity to lead efforts to address area-wide groundwater contamination issues.

Debt Issuance—the debt issuance recommendations include considering an expanded role for MTCA funds as a borrowing source for local governments and BDAs for financing brownfield cleanups and site preparation.

5.6 Implementation Steps

1. Introduce legislative amendment to the Interlocal Cooperation Act (Chapter 39.34 RCW), Community Renewal Law (Chapter 35.81 RCW), and MTCA (Chapter 70.105D RCW) to allow creation of BDAs and to provide the requisite liability protection and access to Ecology grant funding.
2. Develop criteria for designating a redevelopment area and administrative requirements for the establishment and operation of a BDA.
3. Establish a funding mechanism to support BDA planning and implementation.
4. Amend existing Local Revitalization Financing (LRF) and LIFT legislation to incorporate BDAs.

6 BROADEN SITE PRIORITIZATION FRAMEWORK

Amend the existing system of site prioritization for Ecology and the Attorney General's Office to provide greater weight to economic and community factors.

6.1 Brownfield Challenges Addressed

- Linking cleanup and redevelopment.
- Diversity of sites.

6.2 Description of Tool

MTCA requires that Washington contaminated sites be ranked based on risk to human health and the environment (RCW 70.105D.030 (2)(b) and (3); WAC 173-340-330). The hazard ranking system guides the allocation of limited Ecology and Attorney General's Office resources. The Washington ranking method rates a contaminated site on a scale of 1 to 5, where a score of 1 represents the highest level of risk and 5 the lowest. Current guidance does provide that Ecology can consider other factors such as the availability of funds, readiness to proceed, cost of cleanup, public concern, and the cooperation of the responsible party. For example, in determining whether to enter into a prospective purchaser consent decree (PPCD), Ecology and the Attorney General's Office consider hazard ranking of a site as well as public benefit such as redevelopment of vacant property (RCW 70.105D.040(5)).

There is anecdotal evidence of developers requesting access to the liability protections of the formal cleanup process and being turned away because the site is not a high enough environmental risk. Without support from the agency, prospective developers may be unable to obtain financing and walk away from a brownfield leaving the site in its current blighted condition. This too often results in missed opportunities to leverage market forces to achieve cleanup goals, as brownfield redevelopment deals can fall apart because of administrative delays or unresponsiveness. Current guidance does provide that Ecology can consider other factors beyond hazard ranking such as the availability of funds, readiness to proceed, cost of cleanup, public concern, and the cooperation of the responsible parties.

The framework for prioritizing sites could more explicitly include and more heavily weight other balancing factors. The triple-bottom-line approach of sustainable development provides an applicable model for evaluating the

environmental, economic, and community impacts of a project. Ecology has developed the *Economic & Fiscal Impact Model for Brownfields Property Reuse* that could be applied to quantitatively estimate a site's potential economic benefits. Local government land use, economic development, and open space plans can also be used to indicate a site's alignment with community goals.

6.3 Benefits of Tool

- Alignment of interest between responsible parties and communities seeking redevelopment of a contaminated site. That alignment results in the leveraging of resources in a timely fashion.

- Reduces transactional costs and allows the cleanup to proceed in concert with economic forces, resulting in realizing environmental protection in pace with the market.

6.4 Financial and Administrative Implications

The proposed policy changes would result in a cultural shift in the Toxics Cleanup Program from focusing exclusively on cleanups to a more holistic view of the redevelopment side of brownfields. This may require a realignment of expertise or increasing Ecology's capacity to evaluate the economic potential of a brownfield project.

6.5 Relationship to Other Policy Options

Codification of Brownfield Definition—Supports the broader criteria for prioritization.

Strengthening Brownfield Connection to GMA—Provides Ecology staff with authority and flexibility to respond to priorities identified by local communities, in addition to hazard rankings.

Prospective Purchaser Agreement Improvements—Supports prioritization of sites to be eligible to enter into prospective purchaser agreements.

Integrated Planning Grants—Supports the objectives of the IPGs.

Brownfield Development Authorities—provides additional policy guidance to support BDAs' local efforts.

6.6 Implementation Steps

1. Amend RCW 70.105D to more strongly emphasize community and economic site ranking factors.
2. Develop guidance for evaluating economic and community impacts of a site.
3. Amend WAC 173-340 to include additional site ranking factors.

7 THIRD-PARTY BROWNFIELD OUTREACH PROGRAM

Establish a partnership or contract with a university or nonprofit organization to provide outreach, education, and preliminary strategic support to private and public parties to conduct brownfield cleanup and redevelopment.

7.1 Brownfield Challenges Addressed

- Linking cleanup and redevelopment
- Diversity of sites
- Risk management

7.2 Description of Tool

Most state environmental agencies currently include a brownfield program in their contaminated-site cleanup programs. Third-party organizations are differentiated primarily by the fact that they are not part of a regulatory agency. These organizations provide information and support to local communities and property owners. They typically act as liaisons between communities and the regulatory agencies and provide guidance to project proponents. They are different from professional consulting firms in that they do not provide technical services such as environmental analysis or legal support and do not assume any liability exposure.

Ecology has engaged in an extensive evaluation of different outreach models. The third-party approach was favored because it places less demand on state staff resources while providing a neutral third-party liaison between the regulators and the regulated. Ecology has conducted an analysis of establishing such an organization through the Brownfield Outreach and Extension project conducted jointly with the Tacoma-Pierce County Health Department in 2010.

One of the primary advantages of a third-party organization is that it provides a nonthreatening, low-cost or free source of information to owners of potentially contaminated property. Property owners are typically reluctant to engage a regulatory agency for fear of bringing attention to a potential legal or financial liability. A third-party organization can assist owners and communities in understanding the cleanup and redevelopment process, how to manage risk, and how to access resources. Ecology and brownfield

stakeholders have developed a comprehensive Guidebook to Leveraging Brownfield Redevelopment that concisely provides this information in one volume. By providing these services at low or no cost, they also remove the barrier represented by the cost of hiring consultants or attorneys.

Models of these third-party organizations exist in several states, including Washington. The services provided by these organizations can be grouped into three categories: general education, project-specific support, and policy analysis.

Structure of the Third-Party Organization—There are a number of options for structuring and funding a third-party brownfield organization. The structure of the organization has important implications regarding how it could be funded. The structure also affects the issue of scale: where on the spectrum from local to statewide the organization would operate. A small-scale organization has the benefit of local knowledge but is likely to be limited in capacity. An organization that operates at a regional or statewide scale would provide efficiencies but would have fewer local connections.

The staffing needs of a potential third-party brownfield organization can be based on review of similar existing organizations throughout the country. In most cases, the staff of these organizations is small, with one to three full-time employees. The expertise in these organizations includes one or more of the following skill sets:

- Environmental science
- Economic development
- Grant writing
- Public outreach

The capacity of the third-party organization can be expanded through partnerships and contracts with outside service providers. For example, in King County's brownfield program, the county staff is supported by a nonprofit organization, Environmental Coalition of South Seattle (ECOSS), as well as a private consultant. ECOSS provides guidance to clients and third-party review of technical documents. The consultant conducts the technical environmental site assessments on properties. Both ECOSS and the consultant are under contract and paid through a USEPA assessment grant awarded to King County.

7.3 Benefits of Tool

- Provides expertise to communities and private landowners as they take the first steps in brownfield redevelopment

- Creates an entity that is readily approachable with no regulatory authority or financial conflicts that potentially cause concern with potentially liable parties.
- Provides additional educational and technical resources to private and public parties interested in brownfield projects.
- Creates potential to engage more diverse funding sources, such as private foundation and federal grants, to promote brownfield redevelopment.

7.4 Financial and Administrative Implications

This policy tool creates few long-term administrative obligations for the state. The third-party brownfield outreach program would be responsible for its own management. The state would need to commit staff resources in the short term to support establishing the organization. After the organization is functional, it should expand the capacity of Ecology's outreach efforts.

There are several models for the state's role in financing the third-party brownfield outreach program including:

- Commit funds over several years to establish the organization, then reduce or eliminate funding.
- Contract with the organization to provide outreach services on an annual or biannual basis.
- Provide no guarantee of funding, but allow organization to compete for grant funding.

7.5 Relationship to Other Policy Options

Small Community/Rural Grant Set-Aside—the outreach program would focus primarily on small communities with limited resources. Establishing dedicated funding for these communities would complement the efforts of the outreach program.

7.6 Implementation Steps

1. Decide on organizational structure for outreach program: nonprofit, academic center, or regional quasi-governmental organization.
2. Develop partnership between Ecology and existing entity to establish program.

3. Develop funding plan for outreach program, including sources of grant support such as USEPA.
4. Align or obtain funding commitments to establish the outreach program
5. Hire staff for organization.
6. Develop and implement short-term plan for operations.

8 TAX INCENTIVES

Washington State should consider two linked proposals that would offer property tax relief and a sales tax exemption targeted to priority brownfield areas and sites.

8.1 Brownfield Challenges Addressed

- Cost of contamination investigation and cleanup
- Limited financial incentives for private investment

8.2 Construct of Tool

Background—Washington State's major taxes are the business and occupation (B&O) tax, the sales/use tax, and the property tax. Most of the currently available tax incentives, such as exemptions, credits, and deductions, focus on these types of taxes.

Local governmental entities are not exempt from sales and use tax but are usually exempt from B&O tax and property tax. In general, the tax burden associated with government projects is usually borne by the third-party vendors and contractors who sell products or render services to governmental entities. These vendors and contractors must pay B&O tax on their gross receipts and collect sales tax. Thus, local governments seeking to reduce their tax burden typically pursue tax incentives that benefit third-party vendors and contractors.

From 1998 to 2003, Washington State provided a sales and use tax exemption and a reduced B&O tax rate for environmental remedial actions. This exemption ended in 2003, based on a sunset provision in the legislation. The exemption translated into a reduction of cleanup and site assessment costs on the order of 8 percent. Several key lessons were learned from these historical tax exemptions[1][2]:

- Between 100 and 250 sites used the exemption annually, with an increasing number applying in the final years (with the increase likely based on greater knowledge of the program).

[1] Memorandum. Subject: MTCA environmental remedial action tax exemption. To J. Pendowski, Department of Ecology, from P. Kmet, Department of Ecology. Lacey, Washington. November 7 2002.

[2] Bill Analysis. (SB 5386 Relating to environmental remediation) to V. Van Ness, Department of Ecology and J. Pendowski, Department of Ecology, from P. Kmet, Department of Ecology. Lacey, Washington. January 19, 2007.

- The sales and use tax exemption stretched MTCA grant dollars by reducing the costs of cleanup. Ecology has estimated that the exemptions resulted in $2.7 million per year in savings for Remedial Action Grant funded cleanups and $6 million in savings on cleanup actions conducted under contract by the agency.
- Ecology research shows that the tax abatements did not appear to significantly increase the number or pace of cleanups. However, they apparently accelerated some cleanups and may have contributed to more thorough cleanups because of the effective reduction in costs.
- The B&O tax credit was captured primarily by consultants and contractors and was not fully passed on to local governments, property owners, or potentially liable parties.
- A sizeable number of sites submitted proposals only for Phase I environmental site assessments, which are often required for non-brownfield sites.

The Department of Revenue estimated an annual loss of revenue to the state general fund of $3.5 million for the sales and use tax exemption and $0.3 million for the B&O tax reduction[3].

Property Taxes—Property taxes are administered by local governments but the state can authorize local governments to abate or credit property taxes. There are at least two existing tax abatement programs designed to encourage redevelopment:

Multi-Family Residential Exemption

- Provides for tax exemptions from 8 to 12 years for qualifying residential development, renovation of buildings for residential use and for construction of units for low to moderate income households.(RCW 84.14.020)
- The exemption is applicable to only those cities and towns within counties that are required (or choose) to plan under GMA. (RCW 84.14.007).
- The stated purpose of the exemption is to help achieve the GMA goals of urban infill. (RCW 84.14.05)

[3] Bill Analysis. (SB 5386 Relating to environmental remediation) to V. Van Ness, Department of Ecology and J. Pendowski, Department of Ecology, from P. Kmet, Department of Ecology. Lacey, Washington. January 19, 2007.

- To qualify, the residential development must be of minimum size (four units) and be located within a "targeted residential area" as determined by the city. (RCW 84.14.020)

Section 84.26 Renovation of Historic Property

- Provides similar property tax relief for renovation of historic structures.
- The structure must be registered within the National Historic registry or within a local ordinance approved by the Secretary of the Interior. (RCW 84.26.020).
- The eligible costs are exempt from taxation for a period of ten years (RCW 84.26.060).

Other States with Income Tax Credits—Washington State does not have a corporate income tax; however, the following summary of state brownfield income tax credit programs is offered for comparison. There are 13 states that offer some form of state tax credit for cleanup and redevelopment of brownfield sites. Of these, the majority (eight) are credits for some percentage of site assessment and cleanup costs (ranging from 25 to 75 percent). One state (Missouri) adds demolition expenditures as an eligible cost. Four states offer credits for redevelopment costs (over and above site assessment and remediation), with a range of 12 to 30 percent of eligible costs. Most of the more generous redevelopment credits are "needs tested," whereas most of the cleanup credits are "by right." About half of the credits are available only in certain distressed or targeted areas.[4]

One takeaway from this is that the lowest of these credits is 25 percent of cleanup and site assessment costs. Thus, the conventional wisdom in these states is that it takes at least a 25 percent credit to have an impact, whereas the State of Washington's program was approximately 8 percent of cleanup costs.

Other States with Sales and Use Tax Credits or Exemptions—There are at least four states that have variations on sales and use tax credits or exemptions for brownfield redevelopment:

- Florida—State sales tax credit on building materials used for the construction of a redevelopment project (e.g., housing or mixed-use project) located in urban high-crime area, enterprise and empowerment zones, Front Porch Communities, and designated brownfields or urban infill area. The redevelopment must be a housing project or mixed-use project that includes 20 percent

[4] Source: http://www.nemw.org/images/State%20Brownfields%20Tax%20Credit%20Chart%2010-09.pdf.

affordable housing. The exemption may be received by the owner through a refund of previously paid taxes by applying to the Department of Revenue and providing the required information within six months after the project is substantially completed.[5]

- New Jersey—Under the Brownfields and Contaminated Site Remediation Program, the state offers a post-development reimbursement of 75 percent of cleanup costs, based on an accounting of taxes generated by the redevelopment project. There are eight state taxes that may be counted, but the driver is usually the retail sales taxes. The developer must enter into a redevelopment agreement with the state; there is no financial limitation on the total amount to be recovered.[6]

- The post-development timing of the credit raises a question as to whether the program is effective for the not-unusual circumstances where site work and the vertical development are accomplished by different entities.

- Illinois—In Rivers Edge Redevelopment Initiative zones investments are eligible for tax credits and exemptions to support remediation and redevelopment efforts that will lead to economic revitalization. Once a zone is designated, companies or developers in the zone would be eligible for an exemption from sales tax on building materials and an environmental remediation income tax credit for certain cleanup costs, among other tax incentives.[7]

- Oklahoma—There is an exemption from state sales tax for equipment used in environmental remediation.

Other States with Property Tax Abatements and Credits[8]—Property taxes are usually local government taxes, but state laws (at least in non-home-rule states) determine whether local governments can abate or credit property taxes. The following states have adopted enabling legislation for brownfield-related property tax abatements and credits:

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[5] See http://dor.myflorida.com/dor/tips/tip00a01-23.html.

[6] See http://www.njeda.com/web/Aspx_pg/Templates/Npic_Text.aspx?Doc_Id=876&menuid=1258&topid=718&levelid=6&midid=1175.

[7] See http://www.commerce.state.il.us/dceo/Bureaus/Business_Development/Tax+Assistance/riversedge.htm.

[8] The source for this section, unless otherwise footnoted, is USEPA, "Financing Brownfields, State Program Highlights," available at: http://www.epa.gov/brownfields/partners/finan_brownfields_epa_print.pdf.

- Arizona—The state authorizes a local property tax reduction of up to the total costs of activities needed to address the brownfield conditions.[9]

- Kentucky—The state offers tax abatements and credits to bona fide prospective purchasers (BFPPs) of properties that complete the state's voluntary environmental remediation program. Eligible prospective purchasers are those meeting the federal requirements for BFPP status. For qualified new owners, state and local property tax rates on a remediated brownfield property are reduced. For three years following the cleanup, the property will not be subject to local ad valorem property taxes. The state ad valorem property tax rate will be reduced from 31.5 cents per $100 of assessed value to 1.5 cents. Properties eligible for property tax abatements must have been purchased after January 1, 2005.

- Maryland—Properties entered into the state voluntary cleanup program (VCP) by an "Inculpable Person" (Maryland's definition of an innocent purchaser) are eligible to receive a real property tax credit. For five years after cleanup, VCP-eligible brownfield sites can receive a real property tax credit between 50 and 70 percent of the new increment of taxes for five years. Properties located in any of the state's 28 designated enterprise zones may take advantage of the tax credit for up to ten years.

- Missouri—There are state job and investment income tax credits for businesses locating on a brownfield site, but the credits are limited to sites where the locality has offered at least 50 percent property tax abatement for ten to 25 years.

- New York—The state's property tax credit for brownfield projects is available for ten consecutive years, beginning when a certificate of cleanup completion is issued. The credit is for 25 percent of the eligible real property taxes imposed on the site, multiplied by the "employment number factor"—a percentage based on the number of people employed by the taxpayer or his lessee. If the entire qualified site is located in an environmental zone, the percentage for purposes of calculating the credit increases from 25 to 100 percent. There is no limit on the total amount of this credit allowed for a qualified site, which is determined by multiplying $10,000 by the number of employees at the site. Taxpayers also eligible to claim other state real property tax credits must make an irrevocable choice between the two.

[9] See http://www.azdeq.gov/environ/waste/cleanup/brownfields.html.

- North Carolina—The state has adopted an advantageous treatment of improvements to brownfield properties, easing into their fully appraised value after their cleanup and redeployment. An owner of land is entitled to a sliding-scale partial exclusion of value for the first five taxable years after completion of improvements, conditioned on reaching a brownfield agreement with the North Carolina Department of Environment and Natural Resources. The property taxes credit begins at 90 percent of the incremental increase in year one and ends after year five, which is pegged at a 10 percent credit of the incremental increase. These tax incentives are transferable.

- Texas—The state offers state property tax incentives to encourage brownfield cleanup and reuse through ad valorem property tax abatements. Municipal or county taxing authorities can provide property tax relief for the redevelopment of brownfield properties that are located in a state-designated reinvestment zone and have been cleaned up through the VCP. To be eligible, the property must: 1) be located in a reinvestment zone; 2) not be part of an improvement project financed by tax increment bonds; and 3) have received a Voluntary Cleanup Certificate of Completion from the Texas VCP. Localities or counties must enter into a tax abatement agreement with the brownfield property owner. Once that agreement is reached, the owner is entitled to a five-year credit that eases into full taxes, similar to North Carolina.[10]

Recommendation for Washington

The state should consider two linked proposals that would offer property tax relief and a sales tax exemption targeted to priority brownfield areas and sites. This would create a state-local partnership to incent brownfield redevelopment, as follows:

1. **Brownfield property tax credit**—Allow local governments, at their option, to abate incremental increases in property taxes related to making real property improvements on brownfield sites. Local governments would designate areas or specific sites that are eligible for the program.

    a. Tax Abatement Amount—The incremental increase in property taxes should be abated at 80 percent of the increment for five years and then lowered by 20 percent annually with full taxes in year nine. Additionally, consider a longer more aggressive incentive for properties

[10] See http://www.tceq.state.tx.us/remediation/bsa/bsa.html.

where existing buildings are being renovated but seismic compliance requirements escalate costs.

b. Geographic Eligibility—Properties within BDA areas should be automatically eligible. Additionally, localities may designate other redevelopment districts (authorized by other statutes) or may designate specific sites as eligible such as those on a brownfield inventory (see Section 3). Local governments may adopt additional criteria for the designation of individual sites.

2. **Sales and Use Tax Exemption**—Reestablish the environmental remediation sales and use tax exemption program, but link it to the property tax abatement program. Consideration should also be given to strengthening the incentive through an expanded definition of activities that are tax exempt. Consider the following specific elements:

   a. Geographic Eligibility—Sites receiving the brownfield property tax credit;

   b. Eligible Costs—Include site assessment and cleanup costs, as before and also consider:

      i. building cleanup (asbestos and lead paint), AND

      ii. Certain demolition and site prep activities

      iii. OR building materials for the redevelopment project (see the Florida program, above)

   The latter option (iii) would be the most aggressive and beneficial version, but may produce unacceptable fiscal impacts.

   c. Taxes Encompassed—Include sales and use taxes, but not the B&O tax, since it seemed to have little impact during the previous tax exemption program.

8.3 Benefits of Tool

- Promotes cleanup and redevelopment without drawing down the MTCA fund, as it provides an additional source of earned revenues to grantees from developments that pay local taxes or that increase the value of property if it is sold.
- Provides a financial incentive for private investment in brownfields during a down economic cycle.
- Stretches Remedial Action Grant dollars by reducing the costs of cleanup. Based on Ecology analysis of the previous tax incentive,

the agency would save an estimated $6 million per year in state and local sales taxes on contracted cleanup and $2.7 million Encourage parties to undertake cleanup projects more aggressively if their chances of development success are enhanced.

8.4 Financial and Administrative Implications

The former program was assessed as having a fiscal cost to the State Treasury of $3.5 million annually[11]. It can be assumed that, generally, the fiscal impact of the proposed program will be less than that, because:

- It could be geographically restricted to BDAs and other designated redevelopment areas.
- Phase I site assessments would not be eligible.
- Although it is recommended that broader activities be included, this broader list could be restricted to long-term vacant properties, which are likely a drain on the Treasury and would be unlikely to produce ANY revenue absent the incentive.

The impact on Ecology is the staff time involved in certifying eligibility; however, Ecology's analysis of the former program indicated that the savings to Ecology-funded cleanups considerably outweighed the extra cost of administering the program.

8.5 Relationship to Other Policy Options

BDAs—The tax incentive could be targeted so that it is available only in designated brownfield redevelopment districts or other identified enterprise zones or renewal areas.

8.6 Implementation Steps

1. Conduct further analysis of structure of tax incentives. There are number of changes proposed relative to the former program and the proposal would benefit from consultation with stakeholders. There are also mechanical issues that require review by the Department of Revenue. For example, the intent is for the developer, rather than the consultants and engineers, to benefit, and the Department of Revenue may be able to define how to structure the program to meet that objective.

[11] Bill Analysis. (SB 5386 Relating to environmental remediation) to V. Van Ness, Department of Ecology and J. Pendowski, Department of Ecology, from P. Kmet, Department of Ecology. Lacey, Washington. January 19, 2007.

2. Explore options to structure the tax incentive to increase the positive impact. The recommendations above suggest inclusion of certain demolition and site preparation activities as a way to make the program more effective. An alternative approach (similar to Florida's) would be to make building materials for the redevelopment of an eligible site exempt from sales and use tax. That option would increase both the benefit and the cost of the program.

3. Conduct financial analysis of potential impacts on state budget from the proposed tax incentive package.

4. Refine tax incentive concept into a statutory proposal.

9 SMALL TOWN AND RURAL GRANT SET-ASIDE

Target a certain percentage of Remedial Action Grants for small towns and rural counties.

9.1 Brownfield Challenges Addressed

- Diversity of sites

9.2 Construct of Tool

In Washington State, many rural areas and townships confront the challenge of brownfields without adequate administrative and financial resources to conduct the necessary studies or hire appropriate consultants to engage in cleanup and redevelopment. And yet, in small towns, brownfields can cause disproportionate blight, often hindering a town's overall ability to attract economic activities. Rural counties and small towns, often in depressed economic areas, face the dilemma of being unable to generate a return on investment to attract developers or lenders, yet have a heightened need to cleanup and revitalize the sites.

Because of their limited resources, it can be difficult for small communities to compete effectively for Remedial Action Grants. Designating a set percentage or amount of grant funds for small towns and rural areas would both expand resources for those communities and create a greater emphasis on brownfield outreach to those areas.

A rural county set-aside could be established based on one of three methods:

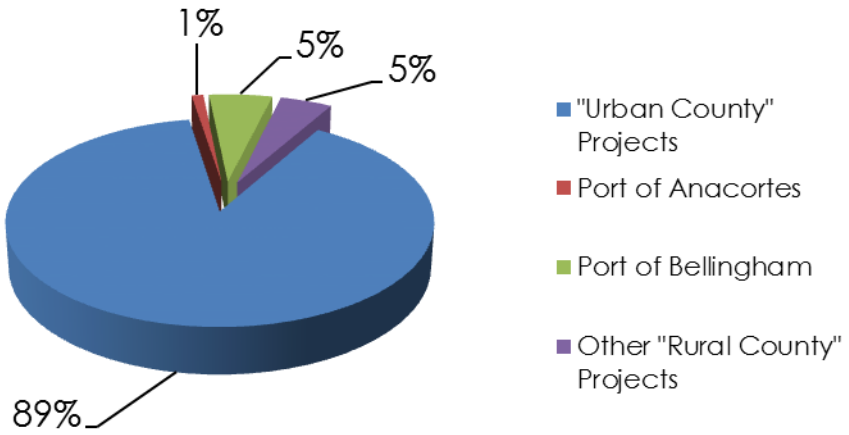
- Dedicate a set percentage of Local Toxics Control Account funds for rural areas as a portion of the total allocation (example: 10 percent of Remedial Action Grants for rural counties).
- Dedicate a set amount of funds for rural areas that does not change with fluctuations in the Local Toxics Control Account (example: $5 million in rural grants each biennium).
- Set a target number of grants to award to rural areas regardless of the monetary amount (example: ten rural county grants each biennium).

Rural counties are defined by Washington State as those with a population density of fewer than 100 persons per square mile or an area smaller than 225 square miles, as determined by the Office of Financial Management (RCW

43.160.020). Based on these criteria, all the counties in Washington except for Clark, King, Kitsap, Pierce, Snohomish, Spokane, and Thurston are considered rural. The state Community Economic Revitalization Board targets grants to rural communities and applies the Office of Financial Management definition and also includes a number of small towns within the larger, urban counties.

Based on this definition, approximately 29 percent of Remedial Action Grants were awarded to communities in rural counties from 2000 to 2009. Large-scale waterfront cleanup projects in Anacortes and Bellingham represent a large portion of those grants. If those two communities are excluded, the portion of grants awarded to rural communities drops to approximately 10 percent. Forecasts for the next ten years indicate that the share to rural counties will decline to approximately 5 percent of all Remedial Action Grants (see Figure 9-1). Based on the magnitude of these waterfront projects, Ecology should consider using a modified version of the Office of Financial Management rural county definition for the purposes of this grant set-aside policy.

Figure 9-1. Grant Distribution to Rural Counties Forecasted for 2011-2021



9.3 Benefits of Tool

- Dedicates resources to small communities that have limited resources to undertake brownfield projects.
- Demonstrates the state's commitment to the economic vitality of small communities and rural counties of the state.
- Enhances the equitable distribution of Remedial Action Grants across the state.

9.4 Financial and Administrative Implications

These grants would be issued from the total amount appropriated for Remedial Action Grants for a given biennium. It would not increase financial obligations on the state, but it would increase competition for these resources.

The grants to rural counties and small towns would be administered by Ecology staff under the same procedures as for other Remedial Action Grants. However, Ecology may need to dedicate more time than usual to administering these grants to compensate for the limited staff resources of the local governments.

9.5 Relationship to Other Policy Options

Publicly Funded Cleanup Trusts (PFCTs)—even a small brownfield project could represent a proportionally large amount of the budget of a local government agency in a rural county. PFCTs could be a vehicle to keep the balance sheets of these agencies healthy while they undertake a project. Placing the funds in a trust at the beginning of a project greatly reduces the risk for small communities assuming a large financial liability.

9.6 Implementation Steps

1. Decide on the most appropriate method for setting a funding level for small towns and rural counties.
2. Consider applying the grant set aside as a trial for a period of time as internal Ecology policy to test the concept.
3. Modify Remedial Action Grant administrative rule guidance on allocation of funds (WAC 173-322-040(7)) to include set-aside provisions for rural counties and small communities.

10 REFORM GRANT REIMBURSEMENT FOR VOLUNTARY CLEANUPS

Reform the payment policy for local governments that conduct voluntary cleanups to allow reimbursement for expenses on a monthly basis rather than after completion of the project. This would apply to local governments that demonstrate a clear commitment to completing the cleanup such as Integrated Planning Grant recipients.

10.1 Brownfield Challenges Addressed

- Cost of contamination investigation and cleanup
- Diversity of sites

10.2 Construct of Tool

Local governments that undertake cleanup of a contaminated site through a voluntary action (not under an agreed order or consent decree) are eligible to receive Independent Remedial Action Grants from the state. These grants typically provide reimbursement for 50 percent of eligible expenses (up to $400,000) related to the cleanup. However, the local government can apply for the grant only after the cleanup has been completed and has received approval from Ecology through issuance of a No Further Action letter (NFA).

It can be a challenge for local jurisdictions to carry the costs over the entire period of investigation and cleanup, which has been estimated at four years under the VCP.[12]

Changes to the current grant policy could allow for local governments to receive reimbursement payments on a monthly basis during the cleanup process. This would be the same procedure for reimbursement for governments that undertake cleanup under an agreed order or consent decree and receive an Oversight Remedial Action Grant.

The eligibility requirements (WAC 173-322-080(2)) and application process (WAC 173-322-080(3) for Independent Remedial Action Grants could be amended as follows:

[12] Means, J. Brownfields redevelopment in Washington State: evaluating legal mechanism performance in the brownfield context. Master's thesis, Evergreen College. 2008.

- Eligibility Requirement—change requirement that applicant must have completed remedial action to state that applicant must enter the VCP or have developed a cleanup action plan for a contaminated property. Add a requirement that local government provide documentation of commitment by elected officials to complete the cleanup action. Documentation could include a council resolution or adoption of an annual budget that sets asides funds for the cleanup.
- Application Process—change requirement to provide an NFA, to provide proof of enrollment in a VCP, or to provide a cleanup action plan.

These revised requirements would provide the state with assurance that the local government is committed to completing the cleanup and provides a mechanism for Ecology to review plans to ensure that they meet MTCA requirements and guidelines.

10.3 Benefits of Tool

- Provides resources in a timely manner to support local governments that are voluntarily taking on the risk of cleanup.
- Removes a financial barrier to local governments.
- Would likely reduce the workload for Ecology's formal site manager staff, because local governments taking on cleanup projects in the future would be more likely to use the VCP.

10.4 Financial and Administrative Implications

These grants would be issued from the total amount appropriated for Remedial Action Grants for a given biennium. It would not increase financial obligations on the state, but would likely lead to an increased demand and shift the distribution between Independent and Oversight Remedial Action Grants. Independent Remedial Action Grants accounted for less than 2 percent of all Remedial Action Grant funds from 2005 to 2009.

The Independent Remedial Action Grant is an existing program administered by Ecology. The changes will not significantly alter the management or administration of the program. Therefore, the administrative implications are considered to be minimal and insignificant.

10.5 Relationship to Other Policy Options

PFCTs—even a small brownfield project could represent a proportionally large amount of the budget of a local government agency in a rural county. PFCTs could be a vehicle to keep the balance sheets of these agencies healthy while they undertake a project. Placing the funds in a trust at the beginning of a project greatly reduces the burden of seeking reimbursement payments and assuming a large liability on financial accounts.

10.6 Implementation Steps

1. Modify Independent Remedial Action Grant administrative rule policy (WAC 173-322-080) to remove requirements that cleanups be completed before being eligible to receive grant funds. Include provisions to ensure that communities will complete cleanups and comply with MTCA.

11 IMPROVEMENTS TO BROWNFIELD REVOLVING LOAN FUND

Commerce and Ecology should work with USEPA to implement improvements to increase the use and effectiveness of the state's Brownfield Revolving Loan Fund (BRLF).

11.1 Brownfield Challenges Addressed

- Cost of contamination investigation and cleanup
- Limited financial incentives for private investment

11.2 Construct of Tool

The BRLF is one of the few public financial tools available to private parties in Washington State. For public projects, the BRLF also can provide critical matching funds for Remedial Action Grants, making full cleanup funding possible. It provides below-prime interest rate loans to finance direct cleanup actions, public participation, and environmental insurance. Expenses that are not eligible for BRLF include site investigation, long-term monitoring, or redevelopment activities. Loan interest rates currently range from 1 to 3 percent; the payback term is typically five years. The BRLF is capitalized by funds from the USEPA and is managed by Commerce in a coalition with Ecology, King County, and the cities of Seattle, Spokane, and Tacoma. The current capitalization of the BRLF is approximately $2.2 million. Because of the structure of the BRLF, its capital can be increased only by federal, not state, funds. In its ten-year history, the BRLF has issued six loans, totaling approximately $4.7 million.

Commerce, Ecology, and USEPA are currently reviewing the effectiveness of the BRLF and developing recommendations to address challenges that have contributed to the limited utilization of the fund. Challenges that have been identified include:

- Dependence on King County Coalition Partner to identify and qualify projects.
- Lack of understanding as to who has project selection and approval authority.
- Grants to local governments are very limited by lack of supplemental funding.

- Lack of visibility and marketing of the fund.
- Inadequate staffing for marketing, application assistance, approval, and oversight.
- Overly burdensome application process that requires submittal of a large information package that includes: environmental studies, redevelopment plan, financial statements for borrower, and VCP application.
- Five-year term can be prohibitive for repayment of a large loan.
- Requirements and restrictions on the use of loan funds. Many of these constraints are related to the use of federal funds, including:
  - Technical documents such as the quality assurance project plan must be reviewed and approved by USEPA.
  - Borrower must prepare and implement a community involvement plan (which is not required under the state VCP).
  - Borrowers must comply with the federal Endangered Species Act and the National Historic Preservation Act, since there is a nexus of federal funding.

While the fund restrictions would require changes to federal policy, there are a number of reforms the state could implement to improve the utility of the BRLF.

- The state can invest in promoting the BRLF to increase its market profile. Promotion of the fund should focus on outreach to private developers, lenders, environmental professionals, and internally to Ecology and Commerce staff
- The application process can be streamlined by developing a phased system more similar to private lending in which borrowers can provide financial and eligibility information to receive indication of approval for a credit limit before providing more documentation. Application and process guidance materials should be updated and clarified to make them easier to use.

11.3 Benefits of Tool

- Improves the effectiveness of an existing program that is capitalized by federal funds.
- Provides financial tools available to both private and public sectors.

- Potentially provides matching funds to Ecology Remedial Action Grants
- Builds partnership between Ecology and Commerce, increasing capacity to support both the cleanup and development of brownfields.

11.4 Financial and Administrative Implications

Ecology provides one full-time staff member as project coordinator for the BRLF. The policy recommendations require an increase in staffing resources to support development and roll-out of marketing effort and application process improvements, as well as site manager coordination.

The policy recommendations would increase the investment of state resources in the BRLF, but would potentially improve the value and utilization of federal dollars to promote brownfield cleanup in Washington State.

11.5 Relationship to Other Policy Options

The improvements to the BRLF complement and support other policy options directed at incenting private investment in brownfield cleanup, including:

- Prospective Purchaser Agreement reform—Provides complementary financial incentive to the liability protections of prospective purchaser agreements available to public or private sector parties.
- Tax incentives—Provides and additional financial incentive that is complementary to proposed tax incentives and together improve the financial feasibility of brownfield projects.

11.6 Implementation Steps

1. Develop a marketing plan for the BRLF *(currently under development by Ecology and Commerce).*
2. Develop promotional materials *(currently under way).*
3. Conduct outreach, including presentations to targeted industry groups and meetings with individual developers, local governments, and lenders *(currently under way).*
4. Develop phased application process.

12 DEBT ISSUANCE

A portion of the anticipated MTCA revenue could be used to support a stream of debt payments. The bond proceeds could be dedicated to specifically identified remediation projects. In November 2008, Ecology submitted a proposal to the governor and legislature to establish a $100 million bond to augment the Remedial Action Grant program. The proposal was not supported by the governor or legislature in the enacted 2009–2011 budget.

12.1 Brownfield Challenges Addressed

- Demand for Remedial Action Grants exceeds capacity.
- Multiple contaminated sites in a community.

12.2 Construct of Tool

The state could issue the debt to provide additional capital funds to undertake more cleanup work, or local governments could use MTCA funds to backstop local governments' debt issuance and help support their financial participation in project funding. With greater capitalization, MTCA also has the potential to support local governments that would provide loans and loan guarantees to private parties undertaking cleanup and site preparation on brownfield sites.

The state has the authority to issue bonds backed by the MTCA revenues. That is, the state could borrow the funds up front and use the MTCA revenue streams to make debt service payments on the bonds. By securitizing these revenues, the state itself has the ability to fund larger projects over multiple years, or it can use the funds to provide grants or loans to local governments to assist them in paying for the costs of remediation.

For example, assuming that the state receives $25 million per year in MTCA revenue for the next 25 years, it could generate bond proceeds of approximately $350 million today by selling double-barreled general obligation bonds backed by a pledge of both the general obligation of the state and the full MTCA revenue stream. With this amount of money, the state would be able to commit revenues to jurisdictions, allowing them to begin working on projects at today's costs with the certainty that funds would be available to complete the project. Over time, inflation will make projects more expensive, likely at a rate that is higher than the rate of debt service on bonds.

State Government Borrowing

If the state is the initiator of the securitization of MTCA revenues, a financing mechanism will be required that will not create a "debt" of the state within constitutional or statutory debt limits. This could be accomplished through financing contracts, a revenue obligation, or a third-party arrangement (e.g., an independently created authority).

The state is currently approaching the constitutional limits of its debt capacity. As part of its capital planning process, projects are identified and budgeted for in advance of needing the actual funds. The projected pinch point will occur first in 2013 when maximum annual debt service will equal 9 percent of the state's calculated general fund revenue. This debt service projection actually contemplates future capital budgets that are well below what is included in the current biennial budget, so debt capacity is likely to be very limited for a number of years.

The state could seek a constitutional amendment allowing for an exemption to the debt limit for the issuance of bonds backed by the MTCA revenue stream. Precedent exists for such an amendment, as shown by the exemption allowed for bonds secured by the Motor Vehicle Fuel Taxes, which are imposed pursuant to RCW 82.36 and 82.38. Voters approved the constitutional amendment in 1972. While these are general obligations of the state, they are not subject to the 9 percent debt limitation.

Outside of the constitutional debt limit, the state legislature may provide for the issuance of revenue bonds backed by MTCA without regard to the state's debt limit. However, revenue bonds generally require covenants and limitations that may make this type of borrowing less financially attractive (e.g., result in fewer net available proceeds or bear interest at higher rates than general obligation debt). These covenants would include debt service coverage, a debt service reserve fund, and perhaps a revenue stabilization fund. The statutory authorization for the issuance of revenue bonds would identify the revenues to be pledged and authorize those revenues to be pledged for debt service. The strongest pledge commits all MTCA revenues first for debt service and second to the replenishment of reserves (if necessary), before revenues are used for any other purpose.

Local Government Borrowing

If the initiator of the securitization of MTCA revenues is local, the issuer may be an individual governmental entity, a group of entities, or a public corporation In order to encourage investment in locally issued bonds secured by a revenue stream from the state, investors need to have a reasonable certainty that the revenue stream will continue throughout the life of the bonds. Accordingly, a modification of state law would be required in order to

permit local governments to pledge these revenues for the payment of short-term and long-term locally issued bonds. This would protect these revenues from appropriation risk.

There are several methodologies available to securitize the revenue stream:

- Short-Term Borrowing

  A program could be established by the state that would be modeled after the federal Garvee bond program. In this program, a particular project is approved by the federal government in order to receive payments for eligible debt-related costs. Once a project is selected for bond financing, the project is submitted to the responsible officer for approval as an advance construction project. The advance construction designation will ensure that the project follows established procedures and will preserve the eligibility to reimburse debt-related costs with future federal aid funds. Debt service schedules are established, submitted, and approved at the federal level. By complying with these processes, a share of debt service is identified as the federal share and, subject to appropriation, will be paid and disbursed to the state during the life of the approved bond issue.

  Another option is for the state to issue an investment letter. The terms of the investment letter provide a level of commitment of future funding by the state sufficient to give local banks the confidence to provide interim financing for projects.

- Long-Term Borrowing

  State statutes provide local governments the authority to borrow money based on anticipated grant revenues provided by the state. The establishment of revenue bond authority, specifically authorizing a local government to pledge MTCA revenues, could assist in developing this financing tool. Local governments should be given express statutory authority to issue revenue and general obligation bonds in order to accomplish all aspects of environmental remediation. Some components of these projects may not constitute capital expenditures eligible for tax-exempt financing. Ultimately, the cost of borrowing will be directly related to the strength of the assurance the state can provide that the grant revenues will be available to make timely payments on principal and interest on bonds.

- Pooled Borrowing

  Similar to a BDA, local governments have the ability to come together and pool their resources to support projects that will benefit multiple jurisdictions. Pooled borrowing can expand debt capacity by combining debt capacity of multiple jurisdictions. Pooled borrowing also can expand and strengthen the pledge of revenues by combining revenue commitments of multiple jurisdictions. Express authority to pool debt capacity and borrowing authority for these purposes would be helpful in managing this financing tool. Pooled borrowing is accomplished through the use of existing tools available to local governments, including the Interlocal Cooperation Act (RCW 39.34) and public development corporations (RCW 35.21.730 et seq.).

A parallel proposal that could work well with the BDA recommendation (See Section 5) is to provide loans for these authorities to acquire brownfield sites and conduct site preparation activities. BDAs could repay the loans from land sale proceeds or through Washington State's existing TIF authorities. MTCA provides Ecology with the authority to issue loans as well as grants from the Local Toxics Control Account, although few loans have actually been executed.

12.3 Benefits of Tool

- Increases the capacity of state grant funding in particular to address large capital projects such as the Duwamish River cleanup.
- Amortizes the cost of cleanups over a longer period of time than the current grant funding model.
- Assists grantees in bridging short-term cash flow needs, as they must first pay for cleanup activities and then seek reimbursement from the MTCA program.
- Assists grantees in borrowing longer term to fund projects relying on MTCA funds, and provides a borrowing source for brownfield TIF projects.

12.4 Financial and Administrative Implications

Commits state resources otherwise available for other uses within and outside of the MTCA fund. State-issued bonds could reduce overall state bonding capacity.

12.5 Relationship to Other Policy Options

BDAs—Provides a substantial revenue source to support the work of BDAs through grants, loans, or loan guarantees.

TIF—Provides an alternative to bond market financing with more favorable terms.

Improve the Brownfields Revolving Loan Fund—Increased use of MTCA loans could establish a state-capitalized loan fund that complements the existing federally capitalized BRLF.

12.6 Implementation Steps

1. Decide on a preferred option for securitizing MTCA revenues through either state government or local government borrowing.
2. Conduct financial analysis of borrowing power of the preferred option and implications for state or local debt capacity.
3. Adopt statutory or regulatory changes as needed for implementation of the preferred alternative.

13 TAX INCREMENT FINANCING

Improve the existing TIF-related statutes in Washington State to pay for cleanups, much like infrastructure improvements, relying on the future increased property value to pay back the cleanup costs through the marginal tax increase.

13.1 Brownfield Challenges Addressed

- Cost of contamination investigation and cleanup.
- Demand for grants exceeds capacity.
- Community-wide approach

13.2 Construct of Tool

TIF permits municipalities to invest in public infrastructure to attract the growth needed to pay for the infrastructure as follows: A municipality issues bonds to finance public infrastructure intended to stimulate private development in a particular area, which in turn generates "incremental" property taxes to repay the bonds.

TIF is a widely used tool that encourages early investment of future value into an asset. In other words, it allows for investment in infrastructure today, based on a property's anticipated increase in value due to that investment in the future. In a growing number of states, TIF is used to pay for cleanups, much like infrastructure improvements, relying on the future increased property value to pay back the cleanup costs through the marginal tax increase. It could be used, as well, in the more traditional way of helping grantees cover infrastructure costs that are necessary to attract private investment and raise a property's market value, all of which encourages grantees to pursue cleanups.

In Washington State, traditional TIF tools have been found unconstitutional and efforts to amend the State Constitution to accommodate TIF have failed. In response to these legal difficulties, several modified forms of TIF have been developed in Washington State. While less effective than traditional programs, they could provide good incentives to encourage cleanup. Those programs include LIFT, LRF, and Chapter 39 Agreements between local governments. While the continued efforts to implement "true" TIF in Washington State are beyond the scope of this study, there are specific improvements to the existing tools that can make them more robust and

effective in facilitating cleanup and redevelopment of brownfields. These include expansion of eligible expenditures and adjusting the base tax value of properties.

- Establish brownfield redevelopment as a statutory purpose for each of the quasi-TIF authorities and add "promotion of brownfield redevelopment" and "implement a brownfield area plan" to the criteria used in ranking competitive applications.
- Expand the definition of eligible expenditures to include remediation and site preparation costs. These should include site investigation, cleanup planning, cleanup implementation, and building demolition or deconstruction. The LIFT statute defines "public improvements" and limits the definition to infrastructure, without including environmental remediation (RCW 39.102.020(20)(a)). The LRF statute defines a "public improvement" to include "environmental remediation" (RCW 39.104.020(16)(a)(vi)). Moreover, "public improvement" also includes expenditure for the purpose of providing environmental analysis (RCW 39.104.020(16)(b)(i)).
- Reduce the base tax value that is frozen for the duration of the TIF period by the cost of cleanup. By reducing the initial value, the incremental increase that can be applied to redevelopment becomes greater. This policy has been adopted in Minnesota and also in Wisconsin, where the base value for publicly owned properties may be calculated as zero.
- Eliminate any obstacles to using pay-as-you-go mechanisms for brownfield projects (e.g. the LRF program links state revenues to general obligation bonds and cannot be used for pay-as-you-go).
- Strengthen the "opt in and opt out" mechanisms for taxing authorities. For example, under LRF, taxing authorities must affirmatively opt out to avoid diversion of property taxes and sales and use taxes. Under LIFT, an interlocal agreement is required before taxes can be diverted. LIFT could be amended to adopt the LRF opt out language for brownfield sites.
- Examine other financing mechanisms for potential tie-ins with brownfield TIF financing. For example:
  - Clarify that the BRLF can use TIF as a repayment source.
  - Explore whether Remedial Action Grants can be used as a partial guarantee or credit enhancement for a TIF loan that includes a brownfield cleanup.

- If MTCA revenues are used to create a larger fund through debt issuance, a portion of those funds could create a loan source for brownfield cleanups, including those using TIF as a repayment source.

13.3 Benefits of Tool

- Like tax abatements, TIF tools incent grantees to pursue cleanups, but in a more direct way because they can actually capture the real marginal tax increase created by remediation and redevelopment of underutilized contaminated sites. Those funds can be invested in the cleanup or other site needs such as infrastructure.
- TIF does not increase taxes on private development; it simply captures and focuses the increase on a specified use for a defined period and then the tax stream begins to flow again at higher levels.
- Other taxing agencies that would forgo a relatively smaller tax increase from the subject property recognize significant long-term tax benefits in the future as a compromised site is put back on the tax rolls and, in most cases, with a greatly enhanced value.
- Taxing authorities can be assured that they are not forgoing any revenue because it is very unlikely that brownfield TIF projects would proceed absent the TIF. Hence the TIF is a revenue producer, particularly in the long run after diverted revenues pay off the TIF obligation. (This assumes that TIF funds are granted only after a rigorous "but-for" test.)
- TIF can fill a current gap in that Washington State offers little assistance to private brownfield development.

13.4 Financial and Administrative Implications

The policy recommendations apply to existing programs and would not significantly affect the expenditure of funds through the programs or the staffing levels needed to implement them at the state level.

13.5 Relationship to Other Policy Options

BDAs—TIF programs can be important financing mechanisms to support implementation of redevelopment plans developed by BDAs.

Integrated Planning Grants—TIF programs can also support implementation of plans developed by local governments with funding from Integrated Planning Grants to clean up and redevelop brownfields.

Debt Issuance—If MTCA dedicated revenues are used to generate a larger pot of funds through debt issuance, those funds could potentially be used for a revolving loan fund and TIF could be a repayment source for cleanups.

13.6 Implementation Steps

1. Amend the LIFT and LRF statutes to expand the definition of eligible expenditures.
2. Amend the LIFT and LRF statutes to revise the calculation of base property tax value for contaminated and publicly owned properties.

14 PROSPECTIVE PURCHASER AGREEMENT IMPROVEMENTS

Reform prospective purchaser agreement (PPA) policy to promote greater application of this tool.

14.1 Brownfield Challenges Addressed

- Risk management
- Promoting private investment in brownfields

14.2 Construct of Tool

An innocent party interested in acquiring and developing a contaminated property can enter into a prospective purchaser consent decree, which can settle liability with the state and protect the party from contribution claims at the state level before purchase (RCW 70.105D.040(5)). Prospective purchaser consent decrees are available only to parties that are not liable for contamination on the subject property. The consent decree provides certainty to the prospective purchaser with a legal settlement of liability with the state and protection from third-party contribution claims. In exchange, the prospective purchaser signs a legally binding agreement to implement a cleanup plan for the site, provide access for oversight, and provide significant public benefits. The purpose of a prospective purchaser consent decree is to "promote the cleanup and reuse of vacant or abandoned commercial or industrial contaminated property" (RCW 70.105D.040(5)(b)). Ecology supervises the cleanup, and there is public involvement in cleanup decisions. An NFA is issued when the cleanup is completed. At the state level, the prospective purchaser consent decree, which includes a covenant not to sue, is the gold standard of liability protections.

The state law and administrative rules for prospective purchaser consent decrees list three primary factors to determine a project's eligibility (RCW 70.105D.040(5)(a)).

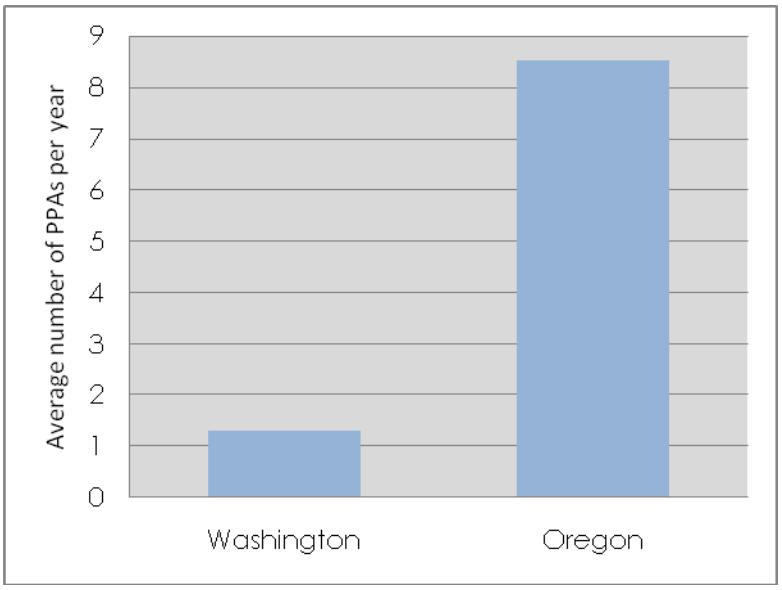
- Settlement will yield substantial new resources to facilitate cleanup
- Settlement will expedite remedial action
- Redevelopment of the property is not likely to contribute to existing contamination, interfere with conducting remedial actions, or increase public health risks.

Prioritization for use of prospective purchaser consent decree is given to projects that can demonstrate substantial public benefit (RCW 70.105D.040(5)(b)).

Through the history of the use of prospective purchaser consent decrees in the state there has been debate over the eligibility criteria and prioritization factors. The statute does not clearly define "substantial new resources" or "substantial public benefit." The decision whether to allow a party to enter into a prospective purchaser consent decree is left to the discretion of Ecology and the Attorney General's office.

As of 2010, Ecology has executed 21 prospective purchaser consent decrees. By comparison, Oregon's Department of Environmental Quality had negotiated 128 PPAs between 1995 and 2010.[13]

Figure 14-1. PPAs Negotiated per Year in Washington and Oregon



The existing statutory language provides the state with a clear framework and authority to enter into prospective purchaser consent decrees. Template prospective purchaser consent decrees have been drafted to expedite their use. Agency staff and professionals in the brownfield sector generally consider the Washington State program to be prohibitively difficult to use. The concerns are based on three factors:

- Interpretation of the public benefit standard by staff is exceedingly high.

[13] Landman, C. Oregon Department of Environmental Quality. Personal communication. May 25, 2011.

- Limited availability of staff resources to process prospective purchaser consent decrees results in projects being turned away from this option.
- Prioritization of which projects are allowed to proceed with a prospective purchaser consent decree focuses too heavily on environmental risk and does not adequately account for economic and community benefits.

Three fundamental reforms are proposed to increase the effectiveness and use of this tool in Washington State:

1. Elevate prospective purchaser consent decrees as a priority for the dedication of staff resources at Ecology and the Attorney General's Office. Use MTCA funds and prepayment agreements with prospective purchasers to cover additional legal and technical expertise needed to meet the demands of the program. The policies currently in place for the prospective purchaser consent decree regarding criteria for application could remain, but the interpretation of those criteria should be made more favorable to applicants.

2. Amend the MTCA statute to make the eligibility criteria to enter into a Prospective Purchaser Consent Decree objective rather than subjective standards. This would allow administrative appeal of Ecology and the Attorney General's decision whether to allow a project to enter into a PPCD.

3. Create a Prospective Purchaser Agreed Order that can be negotiated as an administrative action by Ecology without review of the Attorney General's Office. As with existing agreed orders that are available to potentially liable parties, this tool defines the scope and schedule of remedial actions and provides certainty that the state will not sue while the agreement is in effect if the party complies with its terms. The agreed order would not provide liability settlement with the state or protection from third-party contribution claims.

Additionally the eligibility criteria that a party bring 'substantial new resources to facilitate cleanup' should be interpreted in administrative rule or statute to include the financial resources of financial and state grants, along with in-kind services, to ensure that local governments can utilize this program as well as private parties.

14.3 Benefits of Tool

- Improves a tool that leverages the financial resources generated in real estate transactions to accomplish cleanup.
- PPAs are a powerful tool to promote private investment in brownfields by providing certainty regarding cleanup liability at the beginning of the project.
- Public benefits of PPAs include leveraging greater private resources to effect cleanup, create jobs, increase tax revenue, and enhance the environment.
- Negates a major obstacle to completing brownfield redevelopment projects by innocent purchasers by defining the scope of liability.
- Prospective Purchaser Agreed Orders would allow more brownfield projects to be implemented in the state without increasing demands on the Attorney General's Office.

14.4 Financial and Administrative Implications

Parties seeking to enter into a PPA are required to pay for staff resources needed to process the agreement. It should be possible to manage this program so that it pays for itself and represents no additional financial demands on the state.

If Ecology staff are authorized to draft Prospective Purchaser Agreed Orders, additional training will be required to support that effort. A Prospective Purchaser Agreed Order coordinator could be appointed to work on these agreements across the state, or in each region a number of staff could be trained and authorized to work on these projects.

The Attorney General's Office could also be engaged to prepare one or more Prospective Purchaser Agreed Order templates that would be used by Ecology staff.

14.5 Relationship to Other Policy Options

The PPA complements existing risk management tools provided by the state, including the VCP, by providing liability-based incentives for private investment in brownfields.

14.6 Implementation Steps

1. Provide policy-level direction that prioritizes and encourages use of existing prospective purchaser consent decree authority.
2. Develop statutory language to support objective rather than subjective eligibility criteria and an administrative appeal process.
3. Develop statutory language to provide authority for Ecology to enter into Prospective Purchaser Agreed Orders.
4. Develop Prospective Purchaser Agreed Order templates.

15 INCREASED LIABILITY PROTECTIONS

Washington State should encourage developers, other innocent purchasers, and local governments to invest in contaminated properties by strengthening liability protections.

15.1 Brownfield Challenges Addressed

- Risk Management

15.2 Construct of Tool

Liability issues are often ranked near the top of concerns when developers and other professionals are asked about the various impediments to brownfield redevelopment.14,15,16 The Washington State brownfield program has been characterized as a "first generation brownfields program with some second generation attributes."17 Washington's cleanup program is essentially a somewhat modified version of the federal Superfund model, which is commonly regarded as an obstacle to brownfield redevelopment.

15.2.1 Liability Protections for Public Agencies

Public agencies play a critical role in addressing mothballed or vacant brownfield sites, especially those that are critical to community revitalization, but currently lack private-sector interest. Washington State's liability framework fails to consider the potential benefit of brownfield acquisition and redevelopment activities made on behalf of the public interest. Washington's liability protections for public agencies are weak compared to those of other states. MTCA grants "involuntary acquisition" protections (RCW 70.105D.020(17)), but these protections are useful primarily in tax foreclosure actions, not voluntary purchase or eminent domain. Additionally, the Washington statute does not reflect the third-party defense available to

[14] U.S. Conference of Mayors. Recycling America's land: a national report on brownfields redevelopment. Vols. I-IX. 1993–2010.

[15] Wernstedt, K., L. Heberle, A. Alberini, and P. Meyer. The brownfields phenomenon: much ado about something or the timing of the shrewd? Resources for the future. http://www.rff.org/rff/Documents/RFF-DP-04-46.pdf. 2004.

[16] Wernstedt, K., P. B. Meyer, A. Alberini, and L. Heberle. Incentives for private residential brownfields development in US urban areas. Journal of Environmental Planning and Management 49(1):101-119. 2006.

[17] Washington State Department of Ecology 2009. Linking toxics cleanup and redevelopment across the states: lessons for Washington State. Prepared by University of Washington. Department of Ecology publication number 09-09-043. 2009.

public agencies in the federal CERCLA (Section 101(35)(A)(ii)), which grants modest protections relative to eminent domain acquisitions.

Concern related to potential liability deters local governments from taking action to acquire, clean up, and redevelop brownfield sites. Related concerns for local governments include the following:

- Liability issues deter use of MTCA funding for cleanup of publicly owned sites because localities are accepting multiyear cleanup liabilities, while MTCA funds cannot be committed beyond the current biennium.
- Government Accounting Standards Board Statement No. 49 (GASB 49) compels a government to include the full cost of cleanup in its financial reporting if it is a potentially liable party under Washington State law. In some cases these cleanup liabilities have negatively impacted the credit ratings of localities.
- Liability status is a hindrance to the use of USEPA brownfield grant funding because the federal agency is barred from using funds to benefit a potentially liable party.

15.2.2 Innocent Purchaser Liability Protections for Private Parties

The current Washington State liability structure discourages potential investment by innocent private and public parties alike because:

- Innocent purchasers are statutorily classified as potentially liable parties after they become owners of contaminated properties. Under the strict, joint, and several liability framework, they become liable for 100 percent of the costs of remediation, including potential third-party damages.
- The NFA available through the VCP is frequently conditional and is subject to withdrawal at any time by Ecology. It does not provide legal liability settlement.
- The prospective purchaser consent decrees available through the Attorney General's Office are infrequently used and do not fulfill the potential of this tool. This program does not allow withdrawal rights, so parties commit to completing the cleanup even if the financing or feasibility of the redevelopment project fails.
- The formal cleanup program can lead to a consent decree that contains a covenant not to sue and protection from third-party claims. Since prospective purchaser consent decrees are rarely

employed, innocent purchasers must put themselves as risk by becoming potentially liable parties to become eligible to seek settlement with the state.

15.2.3 Forms of Liability Protection

There are numerous choices for establishing liability protections to encourage brownfield redevelopment. A survey and analysis of state liability policies prepared by the Center for Creative Land Recycling (CCLR)[18] concluded that there are 46 states that offer some form of liability protection and there are 46 different approaches that were adopted in order to achieve the objective. The following is a discussion of these issues.

Strict-Joint-Several vs. Causation-Based Liability—Nine states have adopted causation-based or proportional liability models that fundamentally deviate from the strict-joint-several liability framework. Obviously, an altered liability scheme takes the innocent purchaser out of the picture and solves much of the liability problem. While there is merit in this approach, the State of Washington has a fairly ingrained "polluter pays" ethic, and changes to the basic liability structure are unlikely to succeed. Therefore, this analysis concentrates on other options for the innocent purchaser.

Self-Administering Liability Protections vs. State-Sanctioned Protections—Some states rely on a definition of an innocent purchaser that is self-administering, i.e., the law outlines certain criteria and if the party in question meets the criteria, the presumption is that it has liability protection. For example, seven states have adopted the federal bona fide prospective purchaser (BFPP) protections, which is a self-administering liability defense conditioned on meeting certain criteria, including "all appropriate inquiry" and "appropriate care." Other states use the "state-sanctioned" liability approach, relying on state letters to implement or confer liability protections.

Quite a few states have some combination of these two options, that is, any innocent party can follow certain due diligence and due care procedures, creating a liability defense. Those seeking a higher level of protection may apply for a state covenant not to sue.

Affirmative Defense vs. Exemption—An affirmative defense or third-party defense to cleanup liability is indicated by language such as "the proponent may establish by the preponderance of evidence.…" An affirmative defense is usually conditioned on meeting certain due diligence and due care requirements. An "exemption" is a clearer statement that certain persons are exceptions to the definition of "owner" or "operator."

[18] CCLR.2007. Liability relief: a survey of state brownfield programs and recommendations for a progressive California approach. Unpublished; cited with permission.

The CCLR analysis is favorable to states that have self-administering liability protections, even if only an affirmative defense, because they are automatic and do not slow down the process. However, the report dates to 2007 and does not account for the recent decision in *Ashley II of Charleston, LLC vs. PCS Nitrogen*. That decision sets a high bar for compliance with the due diligence and due care requirements connected to the BFPP defense.[19]

Strength and Finality of the Liability Release—These issues determine the general framework for state liability protections. Whether that liability release has the desired effect on private-sector investment depends largely on the timing of the release; the degree of finality; and the comprehensiveness of the coverage relative to different categories of potential lawsuits. Table 15-1 categorizes these factors.

Table 15-1. Strength and Finality of State Liability Protections for Innocent Parties

Provision	Weak protections		Strong Protections[20]	
Transferability	The release is not transferable.		The release "runs with the land" and benefits future owners. *(most states)*	
Reopeners	There are broad reopeners, including for new discovery of contamination and changing cleanup standards.		Reopeners are narrow and apply to new discovery and changing standards only if there is an "imminent threat." New discovery reopens to the responsible party. *(eight states)*	
Timing of the liability protection/release	The release is available only at completion of the cleanup.		Liability protections cover the site assessment and cleanup phases. *(22 states)*	
Withdrawal rights	The proponent has responsibility for completing the cleanup.		Proponent may withdraw from the program and be responsible only for stabilizing the site. *(number of states unclear)*	
Coverage beyond liability to the state	Covers only liability to the state.	Also covers contribution actions by responsible parties. *(21 states)*	Additionally, covers actions brought under common law. *(6 states)*[21]	Additionally, covers third-party actions: property damage, diminution of value, and toxic tort. *(4 states)*[22]

[19] Edwards, A. No good deed goes unpunished: the CERCLA BFPP defense in the wake of Ashley II. http://www.hklaw.com/id24660/PublicationId3059/ReturnId31/contentid55370. 2011.

[20] The CCLR report (2007) is the source for the information about which states have any given approach, unless other sources are cited.

[21] CCLR, Liability relief; Paull, E. State liability reforms for third party/toxic tort liability protection—a conversation starter. http://redevelopmenteconomics.com/yahoo_site_admin/assets/docs/State_Reforms_for_Third-Party-Toxic_Tort_Liability_Protection.38183034.pdf. n.d. See this document for a discussion of the interpretation of what is meant by liability protections under common law.

[22] CCLR, Liability relief; Paull, State liability reforms.

15.2.4 Models from Other States

The following discussion centers on specific states that have key elements that Washington may want to consider.

Michigan: Self-Administering Liability Protections[23]—Michigan provides a model for a self-administering liability protection with standards that are clearer and more protective than BFPP standards. The state provides liability protection to innocent purchasers, based on a site assessment to establish preexisting contamination:

- Baseline Environmental Assessment (BEA)—When a contaminated property changes hands, the BEA is used to gather information so that existing contamination can be distinguished from any that might occur after a new owner or operator acquires the property. Note that the proponent has an incentive to conduct a thorough site assessment in order to accurately establish preexisting contamination.
- Timing—The BEA must be performed before or no more than 45 days after the date of purchase, foreclosure, or change in ownership or operation, whichever occurs first;
- Disclosure—The results of the BEA must be provided to the Michigan Department of Environmental Quality and subsequent purchasers and lessee operators.
- Due Care Responsibilities—Purchasers need only take actions sufficient to ensure that their use of the property: 1) does not allow an unacceptable exposure to contamination, 2) does not worsen the contamination, and 3) protects against the reasonably foreseeable actions of third parties such as contractors or trespassers.

Note that, consistent with the voluntary nature of the program, the "due care" responsibilities do not necessarily require cleanup. The Michigan provisions appear to fall into the "exemption" category, not the "affirmative defense" category.

Maryland: State-Sanctioned Liability Protections, Withdrawal Rights, and Reopeners[24]—In order to establish liability protections for preexisting contamination, Maryland issues an "Inculpable Person" letter. The letter is issued if the state receives the innocent purchaser's application for Inculpable

[23] See http://www.ohioenvironmentallawblog.com/uploads/file/Clean%20Michigan%20Initiative%20Brochure.pdf.

[24] Maryland Environment Article, Title 7 Hazardous Materials and Hazardous Substances; Subtitle 5. Voluntary Cleanup Program. http://www.michie.com/maryland/lpext.dll?f=templates&fn=main-h.htm&2.0.

Person status before it takes possession of the property and "if the successor in interest does not have a prior ownership interest in the eligible property and, other than by virtue of ownership of the eligible property, is not otherwise a responsible person at the eligible property." The following elements are incorporated in order to fully implement the liability protections:

- Withdrawal Rights—The Inculpable Person has withdrawal rights except that the person must "stabilize and secure the eligible property to the satisfaction of the Department to ensure protection of the public health and the environment."
- Reopeners—The Certificate of Completion confers liability protections following the completion of the response action plan. The reopeners for the certificate are narrowly defined. The state may reopen any liability release for imminent threat, failure to comply with long-term maintenance and monitoring responsibilities or other conditions, or if the Certificate of Completion was obtained by fraud or misrepresentation. However, the reopener for "previously undiscovered contamination" reopens only to the Responsible Person.

Massachusetts and California: Property Damage and Common Law Protections—The Massachusetts 1998 brownfield reforms provided liability protections for innocent parties (those that did not own the property at the time of the contamination), and the liability protection extends to property damage claims. Liability protection granted by the Commonwealth confers protection "from claims by third parties for contribution, response action costs and property damage under (statute)… and property damage under common law."[25]

California's brownfield/voluntary cleanup statute adds a reference to liability protection under "common law." The definition of common law refers to "contribution, nuisance, trespass, and equitable indemnity."[26]

South Carolina and Connecticut: Toxic Tort and Third Party Liability Protections—A 2005 amendment offers broad third-party liability protection. The protection is offered at the point of execution of a cleanup contract with a non-responsible party, and the protections also extend to "non-responsible party's lenders, signatories, parents, subsidiaries, and successors" that are connected to the site, as follows:

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[25] See http://www.mass.gov/dep/cleanup/bfhdout2.htm.

[26] Note that "common law" protections are referenced in a number of state laws without a definition of what is meant by the term. While some have speculated that common law protections cover toxic tort, the author has been advised by environmental attorneys that legislative history would have to be reviewed before any determination is made. For the California law, see http://www.nga.org/cda/files/0412BROWNFIELDSLAW.pdf.

Section 44-56-750 of the 1976 Code, SECTION 1:

> (H)(1) A non-responsible party is not liable to any third-party for contribution, equitable relief, or claims for damages arising from a release of contaminants which is the subject of a response action included in the non-responsible party voluntary cleanup contract provided for in this section.[27] (emphasis added)

In Connecticut, Public Act No. 05-90 makes legislative intent abundantly clear from the title, *An Act Concerning Third-Party Liability for Contaminated Property*.

> Section 1. (a). No owner of real property shall be liable for any costs or damages to any person other than this state, any other state or the federal government, with respect to any pollution or source of pollution on or emanating from such owner's real property that occurred or existed prior to such owner taking title to such property, provided:
>
> (1) The owner did not (cause or exacerbate the pollution)
> (2) The owner is not affiliated with any person responsible for such pollution… and
> (3) The Commissioner of Environmental Protection has approved in writing: (A) An investigation report …; and (B) a final remedial action report…[28] (emphasis added)

Officials in both states have confirmed legislative intent to confer broad third-party and toxic tort protections. Georgia also offers comprehensive third-party liability protections.

Georgia and Connecticut: Groundwater Provisions—Some states have provisions that limit liability for area groundwater contamination or groundwater contamination that has migrated off site. From the CCLR report:

> A good example of this approach is Georgia's Reuse Act. Under this provision a prospective purchaser's obligations vis-à-vis groundwater extend only to conducting a thorough assessment for the purpose of establishing a baseline of the groundwater conditions at the time of purchase. The purchaser's actual cleanup obligations extend only to soil and source materials, but not to groundwater. The statute exempts the prospective purchaser from "liable for any preexisting releases to groundwater associated with the qualifying property," hence the need for the assessment to determine the extent of the preexisting releases.[29]

In Connecticut:

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[27] S.C. Code Ann. § 44-56-750 (2005): http://www.epa.gov/region4/brownfieldstoolkit/state/southcarolina.pdf.
[28] See http://www.cga.ct.gov/2005/ACT/PA/2005PA-00090-R00SB-00795-PA.htm.
[29] O.C.G.A. 12-8-207(a).

> An eligible person who holds title to an eligible property designated to be in the abandoned brownfields cleanup program shall not be responsible for investigating or remediating any pollution or source of pollution that has emanated from such property prior to such person taking title to such property.[30]

Pennsylvania and New Jersey: Particular Protections for Public Agencies and Economic Development Entities—Pennsylvania's Act 3 (1995, amended in 2009)[31] involves the broadest possible liability exemption relative to both governmental enforcement actions and third-party claims. Public agencies and "economic development agencies" engaged in property acquisition for redevelopment purposes are expressly protected:

> An economic development agency[32] that holds an indicia of ownership in property as a security interest for the purpose of developing or redeveloping the property or to finance an economic development or redevelopment… shall not be liable under the environmental acts to the department or to any other person in accordance with…
>
> a. Scope of limited liability:
>
> 1. An economic development agency shall not be liable in an action by the department as a responsible person unless the economic development agency…directly cause an immediate release or directly exacerbate a release…" (emphasis added).
>
> 2. An economic development agency, its officers, agents, …and employees shall not be liable, including, but limited to: for property damages, diminution of property value, stigma damages, natural resource damages, economic loss, bodily injury or death related to any regulated substances, currently or previously released from the property in any action by a person alleging liability of any kind pursuant to the environmental acts, unless the economic development agency, its officers … directly cause an immediate release or directly exacerbate a release.… (emphasis added)

There is no explicit due care requirement for public agencies that meet the above definitions in the Pennsylvania law.

Wisconsin grants public agencies protections similar to those of Pennsylvania, including "civil immunity" meant to confer toxic tort protection, but there is a due care requirement.

New Jersey's statute is representative of a number of states that broaden the definition of protected activities (beyond "involuntary acquisitions"), but do

[30] See http://www.cga.ct.gov/2011/TOB/H/2011HB-06526-R00-HB.htm.
[31] See http://redevelopmenteconomics.com/yahoo_site_admin/assets/docs/PA_Act_3_-_Public_agency_liability_protections_Amended_2009.27264132.pdf.
[32] The definition of "economic development agencies" includes local government.

not go as far as Pennsylvania in the third-party/toxic tort area. New Jersey's Brownfield and Contaminated Site Remediation Act of 1998 included reforms that give local public agencies broad protections for acquisitions carried out for redevelopment purposes. Protections also extend to common law. An excerpt follows:

> Any federal, state, or local governmental entity which acquires ownership of real property through bankruptcy, tax delinquency, … eminent domain in which the governmental entity involuntarily acquires title by virtue of its function as a sovereign, or where the governmental entity acquires property by any means for the purpose of promoting redevelopment of the property, shall not be liable … pursuant to common law, to the State, or to any other person for any discharge which occurred or began prior to that ownership"[33] (emphasis added).

Geographically-Limited Liability Release Option—If Washington State determines that a statewide liability release, applicable to any brownfield site, is infeasible, consideration should be given to granting liability releases in special areas designated by local governments such as BDA districts, enterprise zones, or identified urban renewal areas. The research for this project has not produced any comparable policy in other states, although there are some interesting variations in liability protections for certain targeted geographic areas or targeted sites:

- Connecticut limits responsibility for off-site migration of contaminated groundwater if the site qualifies as a long-term vacant "abandoned brownfield."
- Massachusetts grants expanded common law protections for properties that achieve a permanent cleanup or remedy, or projects located in certain distressed areas and meeting certain job, affordable housing, or preservation criteria.

15.2.5 Recommendation for State of Washington

1. Local governments and quasi-public economic development authorities that acquire contaminated property for redevelopment purposes should be granted protective liability exemptions.

   The State of Washington could mimic the New Jersey public agency liability provisions that grant protections (including common law actions) for local government acquisition activities undertaken for "the purpose of redevelopment of the property." There should be specific references to coverage of quasi-public redevelopment entities, such as BDAs. Due care obligations

[33] NJ PL 1997, chapter 278 (S39), page 39.

should protect against imminent threat (or "unacceptable exposure"), but should be less onerous than the BFPP due care obligations.

The broader Pennsylvania public agency liability protections (including toxic tort and third-party protections) have merit and deserve consideration as a more expansive alternative to the New Jersey language.

An important issue to consider is that eligibility for Oversight Remedial Action Grants, requires that a local government be a liable party (WAC 173-322-070(2)). For local governments to receive both the liability protection and access to this financial assistance, amendments to the Remedial Action Grant Rule would be needed.

2. Innocent purchaser protections for private parties

   The state should create a self-administering liability exemption for innocent purchasers, which requires a BEA as the primary criterion for gaining the protections. An alternative policy would be adoption of the federal BFPP protections. This provides a weaker affirmative defense and is less demanding in the level of site assessment, but requires more for "appropriate care" of the property. In either case, it is important to establish liability protections that are available during the cleanup phase of development, not just after a completed response action.

3. Liability release within the framework of a voluntary program

   The fact that there is no liability release available through a voluntary program places the state well behind the curve nationally and distances it from the "third generation" model. The fact that 46 states have adopted some form of liability relief connected to VCPs is testament to the priority that liability relief deserves in the spectrum of tools that might be considered as mechanisms to accelerate brownfield development.

   The recommendation for a liability release should involve several elements.

   First, there should be a self-administering liability exemption, based on the Michigan model, which requires a BEA as the primary criterion for gaining the protections. Note that the due care requirements in Michigan do not mandate cleanups unless conditions represent "an unacceptable exposure to

contamination" (or, using the Maryland terminology, represent an "imminent threat"). An alternative would be adoption of the federal BFPP language. BFPP is a weaker affirmative defense and is less demanding on the site assessment side but more demanding in "appropriate care." In either case, it is important to establish liability protections that are available during the cleanup phase of development, not just after a completed response action.

Second, the state should also offer, through the VCP, a covenant not to sue. The covenant should be available as extra protection for those needing a higher level of comfort during the cleanup process (relative to the self-administering liability defense) and should allow withdrawal rights. The covenant should confer contribution protection. The release should be fully transferable, and reopeners should be narrow.

Third, if the state adopts an LSRP program (see Section 19) the practitioner should be empowered to grant a limited liability release, subject to state audit, based on the completion of a cleanup. At a minimum, this release should apply to all properties cleaned up to an unrestricted use standard and should confer contribution protection. The release should be fully transferable, but reopeners might be broader than the covenant not to sue.

The state should also consider measures that would strengthen the liability release:

a. Consider liability release language that goes beyond liability to the state, encompassing liability under common law and third-party protection in the areas of property damage, diminution of value, and toxic tort. The state may want to grant the most protective liability releases only in BDA areas for projects that implement a BDA plan.

b. Consider measures to limit liability for area-wide groundwater contamination and groundwater that has migrated off site. Again, this policy could be restricted to BDA areas.

If the State of Washington determines that a statewide liability release, applicable to any brownfield site, is infeasible, consideration should be given to granting liability releases in BDA areas for projects that implement BDA plans. The same parameters apply—the release should be available while the site is in the assessment/cleanup phase, should be fully transferable, should include withdrawal rights, and should protect against contribution actions by responsible persons.

15.3 Benefits of Tool

- Encourages innocent parties, including national developers, to invest in brownfield sites with resulting benefits to smart growth, sustainable development, and community revitalization.
- Local governments will be more aggressive in acquiring, cleaning up, and preparing land for redevelopment, taking on the more difficult sites that the private sector ignores.
- Reduces the risk involved in brownfield projects and will go a long way to leveling the playing field between brownfields and undeveloped greenfields.

15.4 Financial and Administrative Implications

Administration of liability protections lies primarily with the property owners and should not create significant financial or administrative obligations for the state. A liability release through the VCP may require involvement of the Attorney General's Office unless a statutory provision was crafted to authorize Ecology to provide a limited form of liability protection. A fundamental challenge for this proposal is to develop an efficient mechanism for providing the liability release that conforms to the expedited voluntary cleanup process.

15.5 Relationship to Other Policy Options

- PPA Improvements—Adoption of stronger liability protections reduces the need for reform of the existing PPCD program by providing alternative mechanisms to reduce the risk incurred by innocent purchasers of brownfields.
- Transactional Sequencing—Liability protections for public agencies address the same risk concerns for local government as transactional sequencing (see Section 17). Both tools strengthen the hand of local government to implement brownfield redevelopment plans.

15.6 Implementation Steps

The proposals outlined in this section are statutory in nature. Note that a series of conforming amendments would be needed, but the specifics are largely dependent on which options the state would choose to pursue.

1. Resolve key issues related to liability protections.

a. Are the liability protections a self-administering policy or a state-sanctioned process?

b. Are the liability protections an "exemption" or an "affirmative defense?"

c. What is the strength and finality of the release, as defined by transferability, withdrawal rights, reopeners, and coverage of third-party and common law actions?

d. Should liability protections be provided only to public agencies or to private as well?

2. Explore potential for limited liability release through VCP.

    a. Can a meaningful but limited liability release be crafted that can be administered by Ecology without requiring Attorney General Office involvement?

3. Craft appropriate statutory proposal.

16 PUBLICLY FUNDED CLEANUP TRUSTS

Establish Publicly Funded Cleanup Trusts (PFCT) to hold the total project grant amount for remedial actions for individual projects.

16.1 Challenges Addressed

- Risk management.
- Financial uncertainty of undertaking a cleanup project with Remedial Action Grant funds across multiple biennia.

16.2 Construct of Tool

Approximately 63 percent of cleanup projects in Ecology's 10 Year Remedial Action Grant Financing Plan will extend across multiple biennia. Each of these local government grantees will face the risk of entering into a legal agreement that requires them to conduct an environmental cleanup with no formal certainty that they will receive state funding beyond the current budget biennium.

A common approach in the private sector to address the transactional issues relating to predictability and certainty is to establish a transaction-specific trust. A trust is a legal arrangement whereby control over assets is transferred to a person or organization (the trustee) for the benefit of someone else (the beneficiary). That concept could be applied to publicly funded cleanups with the creation of PFCTs. A PFCT could be established by Ecology for projects to hold and receive grant funds. Since trust documents are extremely flexible, Ecology could establish a PFCT that holds the total funds necessary for a project.

Ecology or a third party designated by Ecology could act as the trustee. The funds would be dispersed to the local government under rules similar to grant disbursement rules except that the funds are obligated in the trust and cannot be used for other purposes without violating the terms of the PFCT. In some situations it could make sense to place grant funds in a trust that would provide funding for multiple projects for one local government. In such a situation a local government would be encouraged to approach environmental liabilities in an area-wide and comprehensive manner. Multiple sites in an area could be evaluated and a phased strategy developed to address all sites over a course of years. Likewise, Ecology could commit to a funding strategy for the PFCT that would ensure that the funds would be available to undertake all projects. Local governments could form a development

authority and cost effectively hire employees and assemble a consultant and legal team to deal with all sites.

The third-party entity could be a nonprofit trustee formed under the provisions of the Interlocal Cooperation Act (RCW 39.34) to oversee disbursement of the funds. To allow the PFCT, a legislative change to either RCW 39.34.030 and/or a change to RCW 70.105D would be necessary. The creation of a trust keeps the grant funds under the control of Ecology through the designated trustee.

If properly drafted, PFCTs could satisfy the requirements of GASB 49 and allow local governments to book the grants that offset environmental liabilities and prevent the concern that by agreeing to take on a cleanup project, a municipality could appear financially insolvent.

16.3 Benefits of Tool

- A trust is a very flexible tool that can be designed to meet specific needs of individual projects.
- By placing all the grant funds needed for a project into the trust, the local government is provided the certainty that the funds will remain available as needed and cannot be re-appropriated by the state.
- If properly drafted, PFCTs could satisfy the requirements of GASB 49 and allow local governments to book the grants that offset environmental liabilities and prevent the concern that, by agreeing to take on a cleanup project, a municipality could appear financially insolvent.

16.4 Financial and Administrative Implications

PFCTs would require staff time to establish. This could be minimized over time by creating template trust agreements. The oversight of appropriate management of the trusts would be similar to the current level of effort for grants management. The trustees would be required to submit regular documentation to the state, demonstrating that funds are being appropriately management and disbursed.

Beyond the staff resources to establish and oversee PFCTs, this policy creates no financial obligations on the state beyond the current dedication of revenues allocated to the Local Toxics Control Account.

16.5 Relationship to Other Policy Options

BDAs—trusts could be established to fund area-wide cleanup and redevelopment efforts led by PDAs with a focus on brownfields

Transactional Sequencing—both of these policy tools address the temporal financial risk incurred by local governments that use Remedial Action Grants to fund multiple-year cleanup efforts.

Increased Liability Protections—both PFCTs and liability protections address the GASB 49 problem of accounting for environmental liabilities.

16.6 Implementation Steps

1. Introduce a legislative amendment to RCW 39.34.030 and/or change RCW 70.105D to allow Ecology to create PFCTs to disburse Remedial Action Grant awards.

17 TRANSACTIONAL SEQUENCING

Amend administrative rules to allow local governments to take title to contaminated property, sign an agreed order or consent decree, and/or sign a Remedial Action Grant agreement at one closing event.

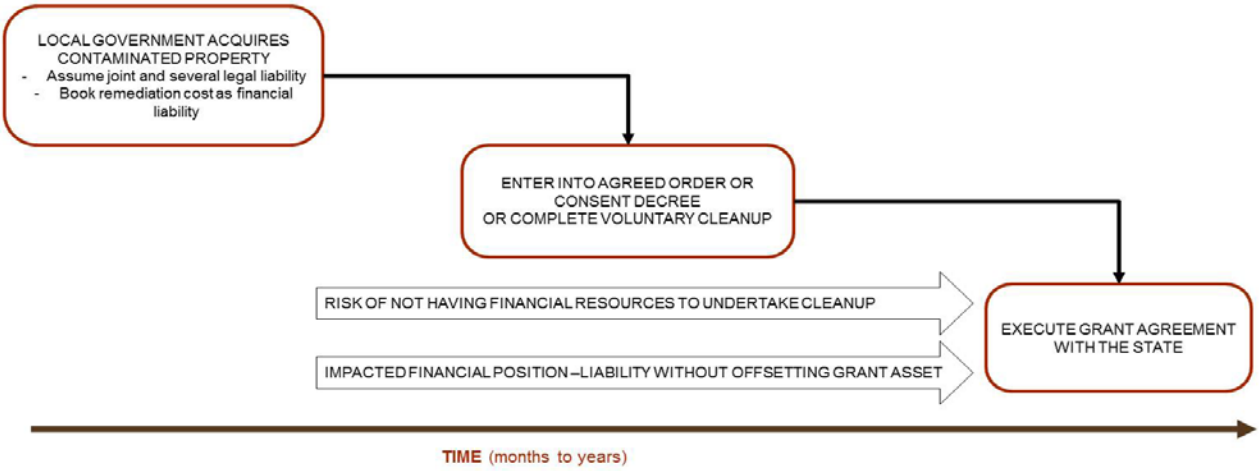
17.1 Challenges Addressed

- Potential liability for contamination impacts
- Uncertainty in funding
- Risk management

Local governments often acquire brownfield properties as part of economic development or community revitalization efforts. When a local government acquires a contaminated property, it assumes joint and several liability under MTCA. Local governments are eligible to apply for Remedial Action Grants funded by the MTCA tax on hazardous substances to offset the environmental liability. However, they are eligible to apply for the grant only after they have taken title to the property and entered into a formal agreed order or consent decree with the state on the scope and schedule of remediation action or actually completed the cleanup and received an NFA. The current sequencing of the application process creates a temporal window of risk exposure and erodes the financial stability of local governments (see Figure 17-1). This risk exposure can be large enough relative to a local government's financial capacity to make them decide against undertaking a brownfield cleanup project.

Risk Exposure—The local government assumes legal liability for the full extent of environmental cleanup under the joint and several liability framework immediately upon taking title. The state will accept an application for a grant only after the local government has acquired the property and either enters into a legally binding agreed order or consent decree or completes a voluntary cleanup action. Under this scenario, the local government assumes 100 percent of the legal liability, without any formal assurance of state financial assistance. The track record of Ecology has been excellent in providing grants to local governments, but with the economic recession and state budget constraints, there is less certainty in the legislative appropriation of the entire MTCA fund.

Figure 17-1. Temporal Risk in Current Grant Application Process



Financial Implications—Current accounting standards under the GASB 49 require that a local government reflect a known expected environmental remediation cost as a current liability in its financial reports. GASB 33 precludes a municipal government from recognizing an amount of any grant that has not been collected during the financial statement reporting period. This precludes inclusion of the amount of pending grants not yet collected and any promise of future biennium grants. The net effect of these accounting standards is that when a local government acquires a contaminated property, its financial balance sheet can include a large liability with no offsetting asset from a grant. This has the potential to negatively affect the ability of the local government to borrow funds.

17.2 Construct of Tool

Create a universal closing event in which the local jurisdiction assumes title to the property, executes an agreed order or consent decree, and signs a grant agreement with the state at one sitting. This closing event requires that the needed documents are prepared and authorized before the local government actually assumes liability for the property.

Amend the administrative code for agreed orders, consent decrees, and Remedial Action Grants to explicitly allow Ecology to enter into negotiations with local governments and process these agreements before acquisition of a contaminated property. The amendment could explicitly authorize Ecology to simultaneously execute necessary documents and actions through a universal closing event.

The local government could be required to provide Ecology with a resolution from its elected council to acquire the property as an assurance that it will undertake the project.

Alternatively, the state could provide a liability exemption to local governments when they acquire contaminated property for the purposes of cleanup and redevelopment (See Section 15). The states of New Jersey, Maryland, Pennsylvania, and Wisconsin all provide liability exemptions for local governments when they acquire property for the purpose of redevelopment.

17.3 Benefits of Tool

- Reduces the uncertainty associated with assuming responsibility for a cleanup site or initiating remedial actions.
- Provides great financial benefit to grantees without expending additional funds.
- Encourages local governments to take on abandoned or vacant brownfields by reducing risk associated with cleanup liability.

17.4 Financial and Administrative Implications

There is currently a lack of resources to review and process agreed orders and consent decrees as well as grant documents. This backlog would have to be addressed both within Ecology and at the Attorney General's Office to provide the resources to conduct the closing events envisioned in this policy recommendation. These policy changes do not create significant new financial obligation on the Remedial Action Grant funds, but may lead to increased demand. It would be necessary to address resource allocation issues to implement this policy effectively, but those challenges exist regardless of this recommended change.

17.5 Relationship to Other Policy Options

PFCTs—Transaction sequencing in combination with PFCTs would allow the irrevocable commitment to funding eligible loans and grants to local governments when they assume liability connected with the acquisition of a contaminated site. This combination is particularly important for small agencies that lack financial resources to effectively absorb liabilities on their balance sheets.

BDAs—Establishing the universal closing event or the public agency liability exemption for redevelopment purposes would provide important risk reduction tools that would facilitate the work of BDAs. The public agency

liability exemption could potentially be limited to acquisition of property in designated redevelopment areas.

Increased Liability Protections—Both of these tools allow local governments to minimize the risk of taking on brownfield redevelopment projects and strengthens their financial position.

17.6 Implementation Steps

1. Establish an accepted demonstration of level of commitment from a local government to support dedication of Ecology and Attorney General Office staff to preparing for a universal closing event.
2. Amend administrative codes related to agreed orders (WAC 173-340-530), consent decrees (WAC 173-340-520), and Remedial Action Grants (WAC 173-322-070(2) and WAC 173-322-080(2)) to allow the state to enter into negotiations and process applications before a local government takes title and becomes a liable party or completes a voluntary cleanup.
3. Amend MTCA to provide a liability exemption for local governments when they acquire contaminated property for the purpose of redevelopment (RCW 70.105D.040).

18 ENVIRONMENTAL INSURANCE

Ecology could contract with a sole source provider in the state for a negotiated discounted premium or set up an umbrella policy.

18.1 Challenges Addressed

- Cost of contamination investigation and cleanup
- Managing financial liability

18.2 Construct of Tool

Environmental insurance programs are increasingly in use across the nation as cleanups have become more complex and as regulations have increased standards and driven uncertainty into the assumptions of a cleanup project. The state legislature approved an amendment to the state's statutes that allows the use of MTCA funds for environmental insurance. To date, Ecology has not directly participated in an insurance solution. A limited number of local governments, including the Port of Bellingham and the Port of Anacortes, have purchased policies, but not with funds from state grants.

The use of insurance is a complex proposition on the one hand, but offers an elegant solution on the other. Applications and available products are varied. Unlike more standard insurance products in the market, environmental policies can be customized to meet the needs of a particular application or otherwise standardized for consistent application to commonly occurring cleanup conditions and can reduce the transactional costs associated with their implementation.

Several types of environmental insurance products address pollution risks associated with specific sites and the remediation of those pollutants. These risks include unexpected cleanup requirements, cost overruns on planned remediation projects, and third-party liabilities (for example, bodily injury/property damage claims). These insurance products can also incorporate or combine with different funding mechanisms for financing the expected remediation costs. The most common environmental insurance products are cost cap and environmental impairment liability policies. Cost cap policies are designed to pay for unanticipated remediation project costs that exceed original project estimates. The availability of cost cap policies in the market is currently limited. These policies are typically most cost effective for cleanups that cost over $10 million. Establishing a statewide pool could make these policies more feasible for smaller individual projects.

Environmental impairment liability insurance typically protects the insured against pollution-related losses associated with previously unknown conditions, including cleanup costs and third-party property damage or bodily injury claims.

Currently, proponents of individual projects can obtain environmental insurance policies through the market. The cost of environmental insurance is an eligible expense under both USEPA and Ecology cleanup grant programs. The state could play a role in improving the accessibility of environmental insurance and/or decreasing its costs. Washington State could follow the Massachusetts model and provide a subsidy for environmental insurance premiums for qualified projects. An alternative model is Wisconsin, where the state negotiated an agreement with an insurer that provides a discount on premiums.

A key element of the structure if cost cap coverage is included for multiple sites would be to have a master policy holder through which all premium payments and claims administration would flow.

18.3 Benefits of Tool

- Reduces transactional costs of environmental insurance and makes it more user-friendly.
- The protections of an insurance program in place can entice potentially responsible parties to be more willing to address contamination issues.
- Environmental impairment liability coverage on a site to be redeveloped after cleanup can create additional real estate value to drive projects forward.
- Cost cap policies eliminate cost creep and protect MTCA funds awarded through Remedial Action Grants.
- The risk of unknown and unanticipated liabilities is reduced or eliminated.

18.4 Financial and Administrative Implications

Ecology would need to dedicate staff time and resources to establishing and managing a statewide environmental insurance program. Alternatively, the state could contract with private firms that set up the instruments, similar to the Energy Services Companies program established through Commerce.

Beyond the staff resources, the environmental insurance could impact state finances in both positive and negative ways. If the state subsidized

environmental insurance premiums, that would commit a certain amount of MTCA funds. Increasing the availability and application of cost cap insurance would control the use of MTCA funds to pay for cost overruns on grant-funded projects, creating a cost savings over time.

18.5 Relationship to Other Policy Options

PFCTs—both PFCTs and environmental insurance minimize grantees' risks of entering into long-term cleanups and relying on budget allocations across biennia to finance cleanup liabilities.

18.6 Implementation Steps

1. Conduct an exploratory workshop with nationwide brokers and insurers to define the parameters and possibilities of coverage pooling and standardized policy terms.
2. Explore the creation of a statewide insurance pool, structured similar to the Energy Service Company program at the Department of Commerce that pools market opportunities and reduces transactional costs for individual communities seeking insurance coverage.

19 LICENSED SITE REMEDIATION PROFESSIONAL PROGRAM

Establish an LSRP program to: 1) ensure that cleanups are managed by qualified professionals; 2) devolve cleanup authority for low- and medium-risk sites to qualified professionals; and 3) grant a liability release to innocent parties that cleanup sites using licensed professionals, contingent on state review of cleanup results.

19.1 Challenges Addressed

- **Length of the Cleanup Process**—The average amount of time that projects take to get through the current Washington State programs is approximately four to five years (see Table 19-1).[34]

Table 19-1. Time Cycle for Cleanup Process

Regulatory Pathway:	Number of Months
Voluntary Cleanup Program—typical site	51
Formal Program-typical brownfield site	61

While these averages are affected by the motivation of liable parties, it is clear that the cleanup process takes too long relative to the typical time frame requirements of real estate developers or businesses. Presumably the state embraces the objective of "leveling the playing field" between brownfield and greenfield development; these time frames clearly work against that objective and serve to push real estate investment to undeveloped sites that have fewer complications.

- **Backlog of Cleanup Sites**—There are approximately 2,000 known contaminated sites in Washington awaiting cleanup.35 Approximately 100 more sites come into the system each year than are completed. With little likelihood of expanding budgets or personnel, the projection is that the backlog (and the time frames for review) is going to get worse, not better.

[34] Means, J. Brownfields redevelopment in Washington State: evaluating legal mechanism performance in the brownfield context. Master's thesis, Evergreen College. 2008.

[35] Ecology data. Current as of April 2011.

Additionally, since this number reflects cleanup sites that have been reported to the state rather than a proactive inventory of sites, the true scale of the backlog may be much larger.

19.2 Construct of Tool

The sheer number of contaminated properties and the length of the cleanup process, especially through the formal pathway, are major challenges to brownfield redevelopment in Washington State. In response to these same challenges, several states have created systems giving licensed professionals authority to certify cleanups and decrease the role of the state in the administrative process. These programs are proving to be effective in increasing the number of cleanups conducted, decreasing the length of the cleanup process, and providing effective remedial actions.

The three primary elements (and an optional fourth element) of LSRP programs are described below. These represent the common elements of LSRP programs in Ohio, Massachusetts, Connecticut, and New Jersey:

- Establish a licensing program to ensure that cleanups are managed by qualified professionals.
- Devolve cleanup authority for low- and medium-risk sites to licensed professionals. The experience of other states is that the vast majority of site assessments and cleanups are conducted by LSRPs.
- Grant a liability release to innocent parties that remediate sites using licensed professionals, contingent on state review of cleanup results.
- Establish mandatory reporting of known contamination. An optional element adopted by two states (New Jersey and Massachusetts) is mandatory reporting and cleanup of known contamination. When property owners become aware of contamination, they are required to notify the state and hire an LSRP.

There is some variation in how states have implemented LSRP programs. The major factors are reviewed below and are followed by a set of recommendations for Washington State.

19.2.1 Licensing Program

All of the states that have adopted the LSRP approach, except Michigan, have established a licensing board and have detailed qualifications in the areas of education (including continuing education), experience, and written

tests. The licensing boards adopt strict ethics requirements for LSRPs. The licensing board in New Jersey is additionally required to audit the individual LSRPs (the state audits the cleanup sites, and the licensing board audits the LSRPs.)

19.2.2 Level of State Oversight

The first fork in the road is the level of state oversight during the cleanup process. Three states (New Jersey, Connecticut, and Massachusetts) use "milestone review," while two states (Ohio and, just recently added, Michigan[36]) provide "final review." The primary difference is that under the milestone review model, the LSRP submits all significant documents to the state for review at key steps through the cleanup process. The state receives, screens, and audits cleanup records and has the option of interjecting its judgment within a prescribed time frame. The final review programs make these intermediate steps optional. The proponent may complete a cleanup, then submit documentation to the state and request a liability release.

The differences in the two systems have impacts at the following four steps of the cleanup process:

1. Planning for site assessment
2. Conducting site assessment and reporting the findings
3. Developing the remedial action plan
4. Implementing the remedial action and reporting the result

The final review states (Ohio and Michigan) allow and encourage steps 1 through 3 to be undertaken independently. The advantages in this approach are: efficiency of time and the ability to withdraw from a project without creating a public record or any liability that might pertain to that record.

In the milestone review states (Massachusetts, Connecticut, and New Jersey), each step involves reporting to the state and giving the state the option of intervening within a prescribed time frame. These states have generally developed screening procedures to review these reports and flag sites that might justify greater state involvement. This may involve criteria (such as risk to drinking water or use of a risk-based approach) or it may be more open-ended. Connecticut, for example, recently changed its program to allow the environmental agency commissioner to intervene and require state review based broadly on its judgment relative to risk to public health and the environment.

[36] The Michigan program is very new; regulations have not been established, so it is not fully described here.

19.2.3 Site Eligibility

- In each of the five cited states, the intent and the practice are to guide the vast majority of site assessments and cleanups to LSRPs. Massachusetts defines a set of "high risk sites" that are excluded, but less than 1 percent of the sites in its program have that classification. New Jersey directs essentially all sites under any cleanup authority to use LSRPs. Note that, because these programs use the milestone review model, the state can essentially determine the degree to which it is going to be involved in any given site throughout the cleanup process.
- In Ohio and Connecticut, sites in Resource Conservation and Recovery Act (RCRA) corrective action and sites under any consent order are ineligible for the LSRP program. Ohio also excludes petroleum cleanups, an issue that has caused delay and consternation in the state development community. New Jersey encourages RCRA sites (unless USEPA-led), as well as consent order sites, to use LSRP.

19.2.4 Liability Release

All of the LSRP programs lead to a liability release of some sort. There are many variations that Washington may find instructive; therefore this report adds detail, as follows:

New Jersey—Sites using the LSRP program are automatically eligible for a covenant not to sue. The statute reads:

> After a licensed site remediation professional issues a response action outcome to the person responsible for conducting the remediation, the person shall be deemed, by operation of law, to have received a covenant not to sue with respect to the real property upon which the remediation has been conducted.[37]

The covenant not to sue covers all civil liability to the state and natural resource damages. The covenant not to sue is transferable but is subject to revocation within three years, based on state audits.

The LSRP program commits parties to mandatory time frames without withdrawal rights.

Connecticut—There are two liability releases, both termed "covenant not to sue," one conferred by the LSRP and the other through an extra level of state

[37] See http://www.njlandlaw.com/archives/473.

review.38 Both provide state liability release and third-party liability contribution protection. The one issued by the LSRP is not transferable and has more reopeners. The one issued by the state runs with the land and has fewer reopeners. The covenant not to sue issued by the commissioner is linked to a fee equivalent to 3 percent of the value of the property, although there are exceptions if the property is classified as an "abandoned brownfield site."

Innocent purchasers in the Connecticut VCP may withdraw from a cleanup in midstream and have no liability.

Massachusetts–-There are two tiers of liability protections. There is an automatic liability release connected to completion of an LSRP cleanup, but it is more like an "affirmative defense" than an exemption. It does run with the land and includes contribution protection, as well as property damage claims under common law. It is available only at the conclusion of a certified cleanup. For those seeking a higher level of protection (or protection during the cleanup), there is a covenant not to sue available, involving an additional level of state review, with state Attorney General Office involvement. Only approximately 25 of these have been executed in the almost 20-year history of the program.

Ohio—A covenant not to sue is available to parties using the LSRP program, but state review is required. Most parties do seek this protection. Private parties interviewed for this report complained that the state's fees for the covenant not to sue (minimum $10,000) were too high and discouraged involvement in the program.

19.2.5 Cleanup Audits

Although each state described here offers a liability release connected to an LSRP cleanup, the liability release is not ironclad until the auditing period has elapsed. The state audits a percentage (usually 10 to 25 percent) of the completed cleanups. One state (Massachusetts) requires the state to audit all sites that rely on institutional and engineering controls. Connecticut and New Jersey both allow audits during a period up to three years following the filing of a completed cleanup. Connecticut's program was recently amended to establish this time frame, which was previously open-ended and led to many complaints related to the lack of finality. Ohio's program allows for an audit up to one year after the covenant not to sue is issued. Feedback from private sector interests indicates that the three year window for audits in New Jersey and Connecticut is too long and leaves projects in legal limbo.

[38] Section 22a-133v of the Connecticut General Statutes.

19.2.6 Mandatory Reporting of Known Contamination

An optional element adopted by two states (New Jersey and Massachusetts) is mandatory reporting and cleanup of known contamination. When property owners become aware of contamination, they are required to notify the state and hire an LSRP. In New Jersey this is termed an "affirmative obligation" on the part of the property owner to address cleanup.

In Connecticut, the parallel trigger is the Transfer Act, which requires one of the parties to the sale of certain types of contaminated properties to certify to the state at the time of the transfer that it will be responsible for investigating and remediating the property.

These reporting and disclosure requirements are clearly driving potentially responsible entities into the LSRP programs. However, a disadvantage is that the LSRP system works best when the proponent is motivated by a desire to redevelop the land, in contrast to those who are motivated only by the wish to avoid an enforcement action. The LSRP is more often caught in conflicting objectives and loyalties when there is a link to disclosure.

19.2.7 Recommendations for Washington

- **Licensing Program**—Establish a state licensing board to certify (and decertify) LSRPs, based on objective criteria in the areas of education (including continuing education), experience, written tests, and adherence to a code of ethics.
- **Milestone Review versus Final Review**—While there are advantages to the final review model, the milestone review model is more realistic and should provide significant benefit to the State of Washington. The corollary is that the state should have the latitude to intervene based on the broad need to protect public health and the environment.
- **Site Eligibility**—Under the milestone review model, assuming that the state is given latitude to determine its level of involvement, there is little reason to define a set of high-risk sites or certain regulatory regimes that should be excluded from LSRP. However, in order to set expectations, the state should define a set of circumstances in which applicants should anticipate greater state involvement.
- **Liability Release**—If the cleanup meets unrestricted-use standards, then liability release should be automatic, based solely on the LSRP certification, not on an extra layer of state review. If

the cleanup is to a restricted-use standard, there should be a state review, but within a short time frame (such as 60 days). The liability release should protect against state enforcement action (under all relevant authorities), third party contribution suits and claims brought under common law. The release should be fully transferable and should run with the land.

The State of Washington should also consider a more general change in the liability structure such that innocent parties that enter into the LSRP cleanup program are not considered liable simply because they own contaminated land. This change would, in effect, protect the volunteer during the site assessment and cleanup process in advance of the final covenant not to sue. The innocent party should have withdrawal rights, also without incurring liability. The corollary to this is that any mandatory time frames for cleanup should apply to persons who are true responsible persons, not innocent volunteers.

A modest step in this direction would be to adopt the federal BFPP protections for parties in the LSRP program. Because BFPP protections establish an affirmative defense to liability at an earlier point in the process (after establishing "all appropriate inquiry"), the state may be able to motivate potential participants who may be reluctant to enter the program because of liability that might be incurred while the site is being assessed and cleaned up.

- **Cleanup Audits**—The state should audit at least 15 percent of LSRP sites. The audits should be conducted within one year of a completed cleanup.

19.3 Benefits of Tool

- Reducing the backlog of cases and accelerating the pace of cleanup. States with LSRP programs have seen a dramatic increase in the number of sites cleaned up. All of the states interviewed for this analysis indicated that LSRP allows them to keep ahead of the curve—that sites resolved exceed new sites coming into the system. Each also indicated a vastly increased volume of cleanups because caseloads were able to expand without bureaucratic constraints. For example:
  - Massachusetts reported that 30,000 sites were remediated through the LSRP program from 1993 to 2008, compared to 500 sites it had cleaned up under its more traditional

program.[39] Its pace of cleanups increased tenfold, from about 200 per year to 2,000 per year.

  - Connecticut reports that its pace of cleanups increased at least fivefold, from about 100 annually to between 500 and 1,000 annually.

  - New Jersey (still in the middle of implementation of its LSRP program) reported that, after losing ground for ten years (more new sites coming in than old sites being resolved), its case close-out rate is finally exceeding its new-case rate. It is also interesting to note that approximately 400 cases per month are voluntarily switching from the old regime to the LSRP program.

- Shortened review times for site cleanups. As noted above, the Washington State time frames for sites average from four to five years for typical cases. The following represents the opinions of many public agency staff and private-sector representatives interviewed for this report:

  - "The LSRP setup allows the proponent to go as fast as they want to go, rather than being dependent on the bureaucracy."

  - "Under LSRP, brownfield sites come close to being on a level playing field with greenfields."

  - "Finally, brownfields in our state can march to the time frames of private real estate development."

- In Massachusetts, the average time cycle for sites undergoing cleanup through the LSRP system is one year, with 75 percent of sites getting through in less than one year. In Connecticut and Ohio, the time frame for typical cases (excluding groundwater contamination) is about two years, with "motivated parties" generally completing the process in one year.

- In New Jersey, the number of "simple cases" where they were able to gain "rapid closure" increased fourfold in just 15 months while the LSRP program was still being implemented.[40] An attorney in New Jersey said that the changes "make a world of difference to brownfields developers." He said that typical

[39] Testimony of Massachusetts Department of Environmental Protection Assistant Commissioner Janine Commerford to the NJ Senate Environment Meeting on NJ SB 1897 A Bill to establish a Licensed Site Professionals program, held on May 19, 2008. Accessed at NJ Legislature Web page: http://www.njleg.state.nj.us/MEDIA/OLS_MEDIA_PLAYER.HTM?wma=!{A}http://rmserver.njleg.state.nj.us/internet/2008/SEN/0519-0100PM-1.wma. Note: Massachusetts includes resolution of emergency spills in its numbers.

[40] See http://www.state.nj.us/dep/srp/srra/senate_hearing_20101209.pdf.

cleanups that would have taken five years to resolve before are now taking nine months.

- In Ohio, one interviewee cited the example of a complicated Delphi plant that went through the entire process in just under one year. That interviewee also indicated that time frames are now between one-third to one-half of the schedule under the former state regulatory program.
- Existing state employees can concentrate on higher risk sites and enforcement cases. This should result in improved results for high risk sites and enforcement cases (that is reportedly the case in New Jersey).
- The increased rate of cleanup and shorter time frames will entice new real estate investment to existing developed areas, contributing to smart growth, community revitalization, and sustainability goals. Between the shorter time frames for review and the impressive five- and tenfold increase in the pace of cleanups under LSRP, the obvious conclusion is that the LSRP model is accelerating brownfield cleanups.
- The quality of work submitted to the state will improve. A representative from one state (New Jersey) added that a significant benefit is improving the quality of consultants' work submitted to the state. The LSRP framework tends to change the dynamics—because a consultant's worst mistake is to certify something that will later be overruled and that could lead to a loss of the consultant's license, the consultant's scientific objectivity must be maintained even when the client may ask for a less rigorous approach.

19.4 Financial and Administrative Implications

Ecology's budget and staffing should be continued at their current levels, but with a change in focus, as outlined above. The way this has worked in other states is that the LSRP programs have enabled a significant increase in the total volume of sites going through the system. While there is less state oversight required on each site, the larger volume of sites, each of which requires state review at several points (screenings, audits, and approval of liability releases), requires that state resources and personnel be maintained or enhanced. Additionally, these states were able to enhance their enforcement programs. Connecticut and Massachusetts both report that they were able to increase budgeting and staffing in the years following the adoption of their LSRP programs.

In each state where LSRP has been introduced, there have been concerns on the part of employees that it would lead to lower state budgets and personnel requirements because there would be less need for state oversight. This corresponds to the related concern that, with less state oversight, that state's role in policing cleanups would be weakened.

Both Massachusetts and Connecticut reported that they were able to expand budgets and staffing following adoption of LSRP programs. The reason is primarily that LSRP allowed them to expand their caseloads quite significantly, and even though their involvement in each site was smaller, the number of sites was much higher. The staff role did not dissipate; it evolved from day-to-day management of fewer sites to intermittent oversight, recording, and auditing of many sites. It is still too early to assess changes in New Jersey, since it adopted the LSRP model in only 2009.

19.5 Implementation Steps

19.5.1 Laying the Groundwork for Statutory Changes

Described here is a set of steps to be undertaken to lay the groundwork for statutory changes:

1. Conduct a study that projects Ecology staffing levels needed to: eliminate the backlog; bring the system into balance so that new sites do not exceed closed sites; and establish turnaround times that are more responsive to the needs of the real estate community. Studies in Massachusetts and New Jersey demonstrated that staffing would have to double to meet these objectives—the results helped create consensus that the LSRP model was a necessity.
2. Establish a stakeholder committee to, first, build consensus and support of the LSRP concept, and second, to develop a specific legislative proposal.
3. Ecology should hold a series of open meetings with employees to build understanding of the LSRP model and how their jobs could change under an LSRP framework. A Webcast to be held with administrators in the LSRP states could serve to help gain buy-in for the benefits of LSRP.

19.5.2 Administratively Developed Pilot

Another approach is to develop an administratively created pilot program to test certain concepts in advance of legislation and support a transition to an LSRP program.

A pilot program might be undertaken administratively through the current VCP by authorizing licensed environmental professionals to conduct investigations and cleanup at certain low-risk sites, with the state's NFA and a faster process as the lure.

Note that New Jersey initially established a modest "cleanup star" LSRP program for lightly contaminated sites; however, the cleanup star program was regarded as far too limited to achieve real gains. The lesson from that experience is that the halfway step is not the real solution and should be regarded only as an interim measure.

19.5.3 Post-legislative Change Implementation

Implementation of the LSRP program would involve:

1. Establishing interim regulations for the transition period. For example, interim regulations will need to address how and under what circumstances sites may be switched from a current regulatory regime to the new LSRP program.
2. Creating an environmental professional licensing board. If this is not established in the statute, the board will need to adopt LSRP qualifications in the areas of education (including continuing education), experience, and written tests. The board should also adopt strict ethics requirements for LSRPs. This will require development of an application process.
3. Establishing procedures for screening and reviewing documents that LSRPs are required to submit. Establish procedures for the state to intervene in sites where there is significant risk to public health and the environment.
4. Establishing a state auditing program for professionally certified cleanups.
5. Developing a staff training program designed to transition staff from their current roles in overseeing cleanups to the new role under the LSRP scheme.

The following individuals were interviewed for this analysis:

- Colleen Kokas, New Jersey Department of Environmental Protection
- Jan Czeczotka, Connecticut Department of Environmental Protection
- Janine Commerford, Massachusetts Department of Environmental Protection

- Andrew Robins, Attorney at Law, Sills and Cummins, Newark, NJ
- Ira Whitman, Principal, the Whitman Company, East Brunswick, NJ
- Ann Catino, Attorney at Law, Halloran & Sage LLP, Hartford, CN
- Craig Kasper, CEO, Hull and Associates, Dublin, OH
- Phil Brilliant, President, Brilliant Environmental, Toms River, NJ
- Nancy Mendel, Attorney at Law, Caplan Hecht Mendel, New Haven, CN

20 INCREASE STAFFING LEVELS OF VOLUNTARY CLEANUP PROGRAM

Increase the number of VCP site managers, as needed, to provide oversight on projects with appropriate fee adjustments to fully support increased staff.

20.1 Challenges Addressed

- Length of cleanup process
- Backlog of sites

20.2 Construct of Tool

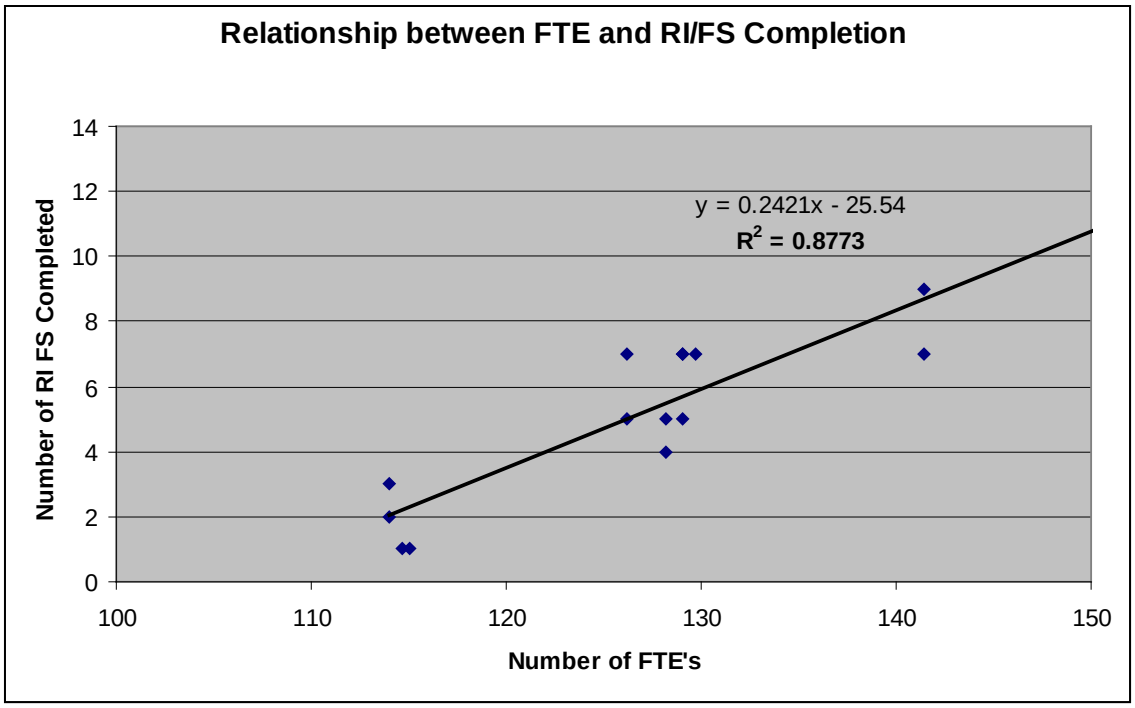
Under the VCP administrative pathway, Ecology staff provide technical consultation and opinion letters indicating whether proposed remedial investigation and cleanup actions sufficiently comply with the MTCA statute, administrative rules, and guidelines. The cost for these services is reimbursed to the state by fees paid by the project proponent based on a set formula.

The number of staff assigned to oversee the remedial investigation and negotiate the terms of a formal administrative order may have a profound influence on the number of the investigations and negotiations completed. A regression analysis was performed to examine the relationship between two variables over a 20-year period from 1988 to 2008.

The regression reflects a strong positive correlation between the number of staff and the number of remedial investigations and feasibility studies completed (see Figure 20-1).[41]

[41] Means, J. Brownfields redevelopment in Washington State: evaluating legal mechanism performance in the brownfield context. Master's thesis, Evergreen College. 2008.

Figure 20-1. Relationship between Full-Time Employee Number and Remedial Investigation/Feasibility Study Completion



The more staff dedicated to a project, the shorter the time to completion. Increasing the number of staff in the VCP appears to be an effective tool to decrease the length of the administrative process and foster completion of a larger number of cleanups in the state.

In the past, approximately 24 percent of all sites in the Toxics Cleanup Program have gone through the VCP. In recent years, this has shifted dramatically and nearly 90 percent of new sites are going into the VCP. Currently, the staffing level for VCP site managers is approximately 12 full-time employees, while the staff for the formal program that manages the most complicated and highly contaminated sites is approximately 55 full-time employees.

Ecology could more aggressively use the fees paid by project proponents to fund VCP staff salaries. This may require an increase in the staff hourly rate cost recovery formula

The state may seek reimbursement from the project proponent for staff costs to provide this technical consultation (RCW 70.105D.030(1)(i); WAC 173-340-550(6)). Given this authority, there is the potential to manage the VCP so that it approaches self-sufficient funding through payments for service.

Under the formal administrative pathway, parties have the ability to prepay for dedicated Ecology staff to provide oversight of cleanup projects (WAC

173-340-550(7)). A prepayment agreement is available for potentially liable parties or parties entering into a PPA. The stated purpose of prepayment agreements is to enable Ecology's oversight of remedial actions at lower-priority sites. This provides parties with an alternative approach to MTCA's worst-first approach that prioritizes staff and resources on sites that pose the highest risk to human health and the environment. A prepayment agreement requires a party to pay in advance for Ecology staff costs at a set formula, allowing the department to increase staff for the unanticipated workload. Ecology makes a case-by-case determination whether to enter into a prepayment agreement, based on the public interest and authorization to increase staffing.

An alternative approach is to more frequently use prime contractors to provide additional staff capacity. Ecology has the authority to contract for additional expertise as needed and has on-call agreements with several prime contractors. This alternative allows the agency to add capacity as needed with great flexibility. Ecology establishes multiyear agreements with prime contractors who conduct remedial actions and other activities at the direction of the agency. These prime contractors have the expertise to support Ecology's oversight duties as well.

20.3 Benefits of Tool

- Increases capacity of a successful state program.
- Provides private funds to increase the capacity of the public agency to undertake a greater workload.
- Increases resources to expedite the administrative process of conducting cleanup actions, resulting in faster cycle times.

20.4 Financial and Administrative Implications

An increase in VCP staff would incur additional management responsibilities and administrative support needs.

The intention of this tool is to increase staff resources in a way that is revenue-neutral to the state. Financial costs will be offset by fees paid by project proponents.

20.5 Relationship to Other Policy Options

Additional staff resources would expand Ecology's capacity to process brownfield sites and support nearly all of the other policy recommendations.

20.6 Implementation Steps

1. Review the current staff cost reimbursement formula to assess whether it fully compensates the state for resources. Adjust the formula as needed to approach self-sufficient funding in the VCP through fees.
2. Amend administrative rules to allow parties entering the VCP to prepay for additional staff WAC 173-340-550(7).

21 TRANSFER AND CLOSURE REPORTING SYSTEM

Adoption of procedure that ensures that, before a sale of a property that had been used for industrial and commercial activities likely to have released hazardous substances, the owner shall be required to undertake a range of actions and subsequent notification of Ecology.

21.1 Challenges Addressed

- Backlog of contaminated sites

21.2 Construct of Tool

MTCA administrative rules require that an owner or operator give notice to Ecology within 90 days of knowledge of an unpermitted hazardous substance release (WAC 173-340-300). The state Hazardous Waste and Toxics Reduction program requires reporting of use of hazardous materials through notification of dangerous waste activity, annual dangerous waste reporting, and tracking of corrective actions. Ecology also implements Title II of the Superfund Amendments and Reauthorization Act, also known as the Federal Emergency Planning and Community Right to Know Act, which requires notification of presence on site, use, and release of a list of hazardous chemicals for certain facilities. A mandatory reporting system could be linked to the closure and/or sale of industrial and commercial property where hazardous substances are used. This system would improve the state's understanding of the number of contaminated sites. The system could potentially address the challenge of identifying and tracking potentially liable parties as well.

A statutory requirement that, upon closure of a business or the transfer of ownership of an industrial and commercial facility where hazardous substances were used, the seller will notify Ecology of the transfer and undertake a range of requirements:

- Disclosure of the use and/or the release of hazardous materials before sale.
- Undertake and complete a Phase I environmental site assessment investigation before sale.
- Conduct a remedial investigation and feasibility study and develop a cleanup action plan before sale.
- Complete the cleanup of the site before sale.

This range of options would be defined in the statute in addition to the requirement to report to Ecology. The requirements beyond disclosure could be phased so that the cleanup process does not impede the real estate transaction. For example, in Massachusetts, there is a mandatory notice of contamination, but it includes schedules for follow-up actions that vary based on ownership. A responsible party must take action within one year, but an innocent landowner or prospective purchaser would have a period of five years to initiate the cleanup process.

An alternative approach to completing the cleanup process would be to require execution of a "remediation agreement" between the purchaser and the seller that allows the transaction to proceed to meet market development or financing demands, but still forecasts a resolution to the environmental concerns.

The definition of types of properties that would be required to report could be based on the North American Industry Classification System code, land use zoning codes, and/or a target list of hazardous substances.

Ecology tracks contaminated sites through its Integrated Site Information System. It includes brownfield sites, the Environmental Covenant Registry, leaking underground storage tank sites, state cleanup sites, and underground storage tank sites.

Ecology also uses automated data systems to:

- Track compliance and technical assistance visits.
- Measure pollution prevention and compliance progress.
- Track amounts of dangerous waste generated each year and its proper transport, treatment, and/or disposal.
- Identify toxic chemicals released and stored by businesses.
- Track information on facilities that prepare pollution prevention plans and pay fees.

Owners of properties listed in some subset of these tracking systems could be required to submit information before property transaction; and perform, or set up a schedule to perform, investigations and/or cleanup, depending on the status and conditions of the property.

21.3 Benefits of Tool

- Improves knowledge and understanding of the number and types of contaminated sites in the state.

- Greater public awareness of the presence and magnitude of contaminated sites
- Improved ability of the state to track the potentially liable parties

21.4 Financial and Administrative Implications

Ecology would have to develop a database to log and track notifications. This administrative and information technology task would itself require a significant amount of staff resources. The requirements to conduct remedial actions before property transaction would likely dramatically increase the number of cleanup sites requiring Ecology oversight. This capacity issue has been addressed in other states, including Massachusetts and New Jersey, by linking a reporting requirement with an LSRP program.

The increased administrative demands of this policy would be reflected in greater financial needs to support staffing and information technology to implement the reporting system.

21.5 Relationship to Other Policy Options

There are several significant relationships to other policy options that may greatly reduce the need for and/or impact of the adoption of the property transfer and closure reporting system.

- PPA improvements—Reporting system would better define the risk relationship of the seller and buyer while providing notification to Ecology of the existence of a contaminated site. This is similar to the concept of a "remediation agreement" between the parties.
- LSRP program—Increases the capacity to move the additional new sites identified in the reporting system through the cleanup process.

21.6 Implementation Steps

1. Conduct further analysis of existing reporting requirements under state and federal law to minimize duplication of effort. Additional research also needed on the information technology requirements of the reporting system.

2. Establishment of the reporting system would benefit from further outreach to the potentially regulated community to better understand implications of the policy and refine the concept.

3. Adoption of a statutory provision that, like the residential property sales disclosure (RCW 64.06) for known material defects, requires notification to the buyer of the presence or suspected presence of contaminants with the corresponding required seller actions. The statute could require notification to Ecology at various points in the transaction.

22 AREA-WIDE GROUNDWATER REMEDIAL ACTION GRANT

Revise the eligibility criteria for Area-wide Groundwater Remedial Action Grants to remove onerous requirements.

22.1 Challenges Addressed

- Area-wide approach to contamination

22.2 Construct of Tool

Area-wide groundwater contamination is defined as:

> multiple adjacent properties with different ownerships affected by hazardous substances from multiple sources that have resulted in commingled plumes of contaminated ground water that are not practicable to address separately. (WAC 173-322-020)

The purpose of the Area-Wide Groundwater Remedial Action Grant program is to provide funding to local governments that facilitate the cleanup and redevelopment of property in their jurisdictions where the groundwater has been contaminated by hazardous substances from multiple sources (WAC 173-322-090). The grants enable local governments to assist the cleanup and redevelopment of property involved in such contamination in their jurisdictions. Ecology will consider funding up to 100 percent of eligible project costs for area-wide groundwater projects. The goal of this grant program is to develop area-wide solutions, including investigation work plans, model remedies, or area-wide determinations on whether groundwater is drinkable.

The eligibility criteria for this grant include that the area-wide groundwater action be required under an order or decree or be approved by Ecology or the USEPA. The local government grantee may be a potentially liable person at a site, or may own or have ownership interest in a site without being liable for contamination. It is also possible that the local government may not own a site, but may apply for a grant to help with cleanup of contaminated groundwater at a site in its jurisdiction. In this case, the local government must agree to administer or manage the grant and act as the project lead or sponsor.

The administrative rules also require that the grant be partially repaid if it covers privately owned land (WAC-322-050(7) and WAC 322-090(7)(e)):

> (e) Repayment of grant funds. If the property impacted by the area-wide ground water contamination is owned by private parties, then the grant amount shall be partially repaid to the department. The terms and amount of repayment shall be included in the grant agreement between the applicant and the department. The applicant shall obtain partial reimbursement from potentially liable persons and potentially responsible parties. Reasonable measures shall be taken by the applicant to maximize reimbursement.

The guidelines further state that, in addition to the information required in the application form, the local government must also submit the following:

- A copy of the reimbursement agreement with affected property owners
- A commitment by the applicant to partially reimburse Ecology from funds obtained from affected property owners

This requirement for repayment has been a barrier for a local governments considering application for this grant.

22.3 Benefits of Tool

- Provides financial resources to local governments to address area-wide groundwater contamination.
- Grants based on results of area-wide groundwater studies can reduce transactional costs, decrease uncertainty, and assist in risk management for cleanup and redevelopment of individual properties in contaminated areas.

22.4 Financial and Administrative Implications

This grant program is already established under the Remedial Action Grant administrative rules. An area-wide groundwater grant has never been issued because of the problematic eligibility criteria. The grants would be administered by Ecology staff under the same procedures as other Remedial Action Grants. Therefore, the administrative implications will be considered minimal and insignificant after rulemaking is completed.

These grants would be issued from the total amount appropriated for Remedial Action Grants for a given biennium. They would not increase financial obligations on the state, but rather improve an existing grant program.

22.5 Relationship to Other Policy Options

BDAs—one of the key functions of a BDA is to address contamination on an area-wide basis. This grant is a potentially powerful tool to support that important effort.

PPAs—the findings of area-wide groundwater studies would be very beneficial to apportioning liability under PPAs.

22.6 Implementation Steps

1. Conduct further research and analysis on the potential implications of the policy change on state constitution prohibition on lending of public credit to private parties.

2. Propose rule amendment to revise WAC-322-050(7) and WAC 322-090(7)(e).