



What's the Risk & How to Navigate



Denise Chamberlain
Director of Risk Management
ARCADIS U.S., Inc.
denise.chamberlain@arcadis-us.com

Imagine the result



Agenda



- **What are the Risks?**
- **How to Navigate -- Practical Risk Management Tips & Techniques**
- **Phases of Brownfield Redevelopment**
 - Due Diligence
 - Remediation & Development
 - Post-Remediation & Development
- **Specific Risk Management Techniques**
 - Insurance Products
 - WV Voluntary Land Stewardship Program



Due Diligence

Due Diligence



- **What is the Risk?**
 - Adequate characterization & costing
 - Understanding of remedial process & timing
 - CERCLA Bona Fide Prospective Purchaser Defense (BFPP)
 - ***EPA Must Implement Controls to Ensure Proper Investigations Are Conducted at Brownfield Sites***, U.S. EPA Office of Inspector General, 11-P-0107, Feb. 14, 2011
 - 35 All Appropriate Inquiry (AAI) Reports – 100% Basic Mistakes
 - What do you get at the end of the project?
 - Federal / state liability protections / releases analysis
 - Post-remediation & redevelopment analysis

Due Diligence

- **How to Navigate –**
 - Assemble the right team
 - Evaluate each phase of brownfield redevelopment
 - Select the right environmental firm to conduct AAI to qualify for CERCLA BFPP Defense
 - Primary service offering & good insurance coverage
 - AAI Standard (whether or not an EPA Assessment Grantee)
 - All Appropriate Inquiries Rule: Reporting Requirements Checklist for Assessment Grant Recipients (June 2011)
<http://www.epa.gov/brownfields/aai/AAI-Reporting-fact-sheet-and-checklist-062111-Final.pdf>
 - Remain proactive – Do not just “check the box” – Get the protection that you bargained for
 - Structuring the transaction – special care with purchaser indemnifications and other provisions

Remediation & Development

Remediation & Development

- What is the Risk?

- *Ashley II of Charleston LLC v. PCS Nitrogen, Inc. v. Ross Development Corp. et al*, 2010 U.S. Dist. LEXIS (D. South Carolina, Oct. 13, 2010)

- Long industrial use & several responsible parties (PRPs)
- Purchaser asserted BFPP Defense
- Court held that purchaser failed to exercise appropriate care –
 - Purchaser –
 1. Failed to clean out and fill in known underground sumps and concrete pads during demolition
 2. Failed to prevent debris piles from accumulating
 3. Failed to investigate and remove debris piles on a timely basis
 4. Failed to maintain run off controls



Remediation & Development

- **What is the Risk?**
 - Ashley II of Charleston LLC continued:
 - Court held that purchaser failed to exercise appropriate care –
 - Purchaser –
 5. Knew underground sumps contained hazardous substances were cracked and often filled with rain water
 6. Failed to conduct tests to determine if soil below the underground structures was contaminated
 7. In summary, failed to prove that no disposals occurred on site after purchaser's acquisition
 - Court held that Purchaser was affiliated with PRPs due to purchaser's broad indemnification of PRPs
 - Other cases – inaction = lack of due care



Remediation & Development

- **How to Navigate?**
 - Remediation & Redevelopment Strategy & Costs
 - Adequate characterization & costing
 - Understanding of remedial process & timing
 - Periodic Analysis –
 - Risks of violating continuing obligations under BFPP Defense
 - Issues raised during due diligence investigations
 - Staging Remediation & Development
 - Contingency Funds for various stages
 - Keeping track of timeliness of actions



Remediation & Development

- **How to Navigate?**
 - Insurance coverage
 - Overview of environmental insurance marketplace
 - Pollution Legal Liability
 - Commercial Pollution Legal Liability
 - Cleanup Cost Cap
 - Contaminated Property Development Insurance
 - Lender Environmental Protection
 - Contractor's Pollution Liability / Errors & Omissions



Remediation & Development

- **How to Navigate?**
 - Insurance coverage
 - State of the Insurance Marketplace
 - Current Insurance Carriers
 - Current Coverage
 - Insurance Coverage
 - Environmental Professionals
 - Transactional Protections



Post Remediation & Development

Post Remediation & Development

•What is the Risk?

- Continued remedy protection
- Multiple property owners
 - Sales, foreclosures, bankruptcy auctions
- Change of use without understanding about remedy
- Continued care obligations – meeting the standard



Post Remediation & Development

- **How to Navigate?**

WV Voluntary Land Stewardship Program --

1. Comprehensive voluntary approach
2. Built on existing programs & initiatives
3. Based on best practices
4. Creates a program that is appealing to both the public and private sectors
5. Utilizes current national standards or develops systems that can be applied nationwide
6. Sound perpetual care mechanism



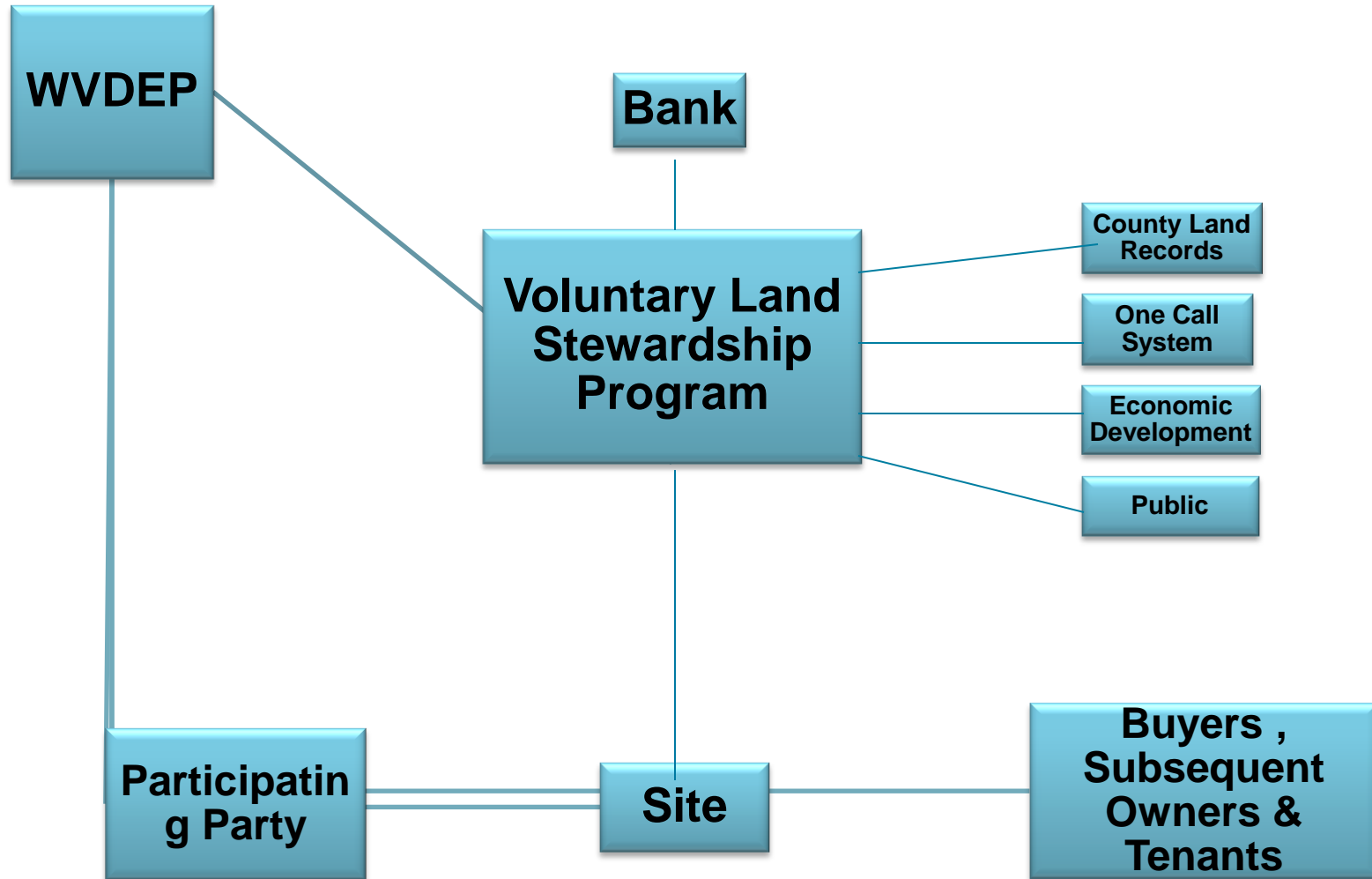
Voluntary Land Stewardship Program

WV DEP Institutional Controls Focus Group --

- WV Manufacturers Association
- WV Chamber of Commerce
- WV Coal Association
- WV Development Office
- FMC Corporation
- Dow Chemical Company
- U.S. EPA
- Marshall University, Center for Business and Economic Research (CBER)
- Marshall University, Center for Environmental, Geotechnical and Applied Sciences (CEGAS)
- ARCADIS U.S., Inc.



Voluntary Land Stewardship Program

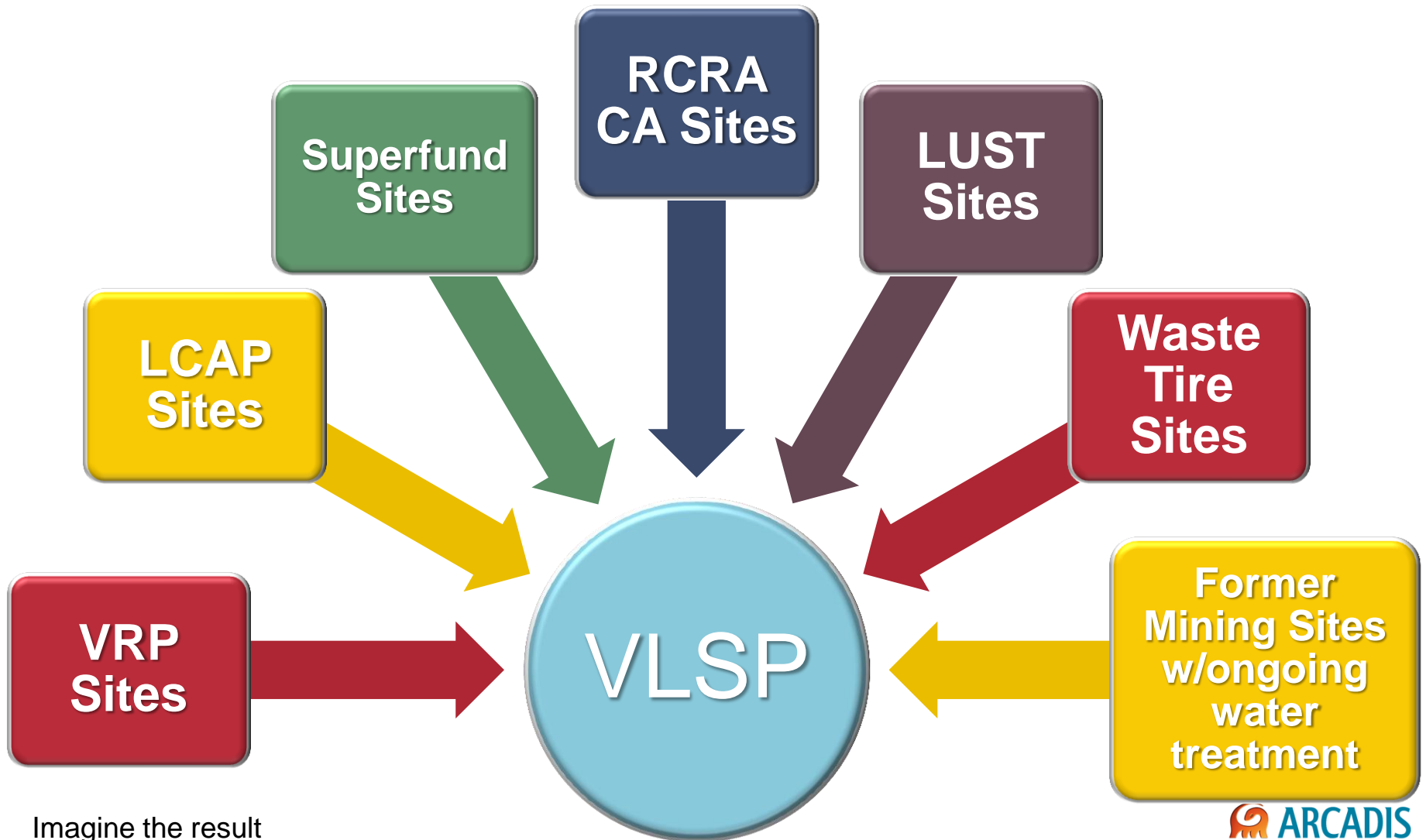


Voluntary Land Stewardship Benefits



- Risk management tool against long-term liability exposure
- Provides additional safeguards & oversight to ensure short- and long-term protection
- Reduces regulatory reopeners for remedy breaches
- Eases negotiation for sales price / transfer when conveyance includes a subscription of VLSP services for a period of time at a specified cost
- Eases transfer of sites with institutional & engineering controls

Risk Management Tool for All Sites



Imagine the result

Voluntary Land Stewardship Program -- Pilot

- Demonstrate, strengthen & refine program
 - Develop / refine
 - Enrollment process
 - Acceptance criteria
 - Service descriptions
 - Service / trust agreements
 - Notices / reports
 - Description of environmental registry components
- Pilot Sites
 - Provide VLSP services
 - Voluntary Remediation Program
 - RCRA Corrective-Action
 - LCAP Landfill



Program Initiative – More Information

- September 2010 Fact Sheet
- WV Institutional Controls Focus Group Interim Report dated September 9, 2010

<http://www.dep.wv.gov/dlr/oer/voluntarymain/Pages/default.aspx>



Imagine the result

