Brownfields Program Guidelines and Issue Resolutions
August 2010

This document is provided as guidance for the brownfields agreement process. In this document we set out provisional interpretations of those parts of the brownfields statute that the regulated community has indicated are unclear or that have been amended by legislative act since the law was enacted.

TABLE OF CONTENTS:

ISSUE 1: PURPOSE OF THE ACT
ISSUE 2: RELATIONSHIP TO VOLUNTARY CLEANUP PROGRAM
ISSUE 3: PUBLIC BENEFIT
ISSUE 4: FEDERAL SUPERFUND SITES
ISSUE 5: SUBMISSION OF REPORTS AND FEES
ISSUE 6: GROUND WATER AND SOIL REMOVALS
ISSUE 7: GROUND WATER RECEPTORS
ISSUE 8: UNDERGROUND STORAGE TANK PROGRAM
ISSUE 9: INSURANCE AS SAFETY
ISSUE 10: PERMITS
ISSUE 11: LIABILITY PROTECTION
ISSUE 12: OWNER/OPERATOR VS. BUYER AS PROSPECTIVE DEVELOPER

ISSUE 1: PURPOSE OF THE ACT (back to top)

The Brownfields Property Reuse Act (the Act) of 1997 is intended to encourage and facilitate the redevelopment of abandoned, idled, or underused properties that have actual or perceived environmental contamination by removing barriers to redevelopment posed by the prospective developer's (PD's) potential liability clean-up costs. The Act is not intended to circumvent practical or necessary remediation of properties under any state or federal cleanup program. The Act is clearly intended for sites at which legitimate redevelopment is both planned and possible. Brownfields agreements are only appropriate when a PD commits to a redevelopment project which the Department believes will have public benefit and will leave public health and the environment protected. Brownfields agreements are not appropriate for situations involving only cleanup, or even situations involving cleanup and conveyance but no redevelopment. The Department intends to use the discretion provided for in G.S. § 130A-310.32 to enter into brownfields agreements only for properties with legitimate redevelopment projects where the Department perceives that cleanup liability is a significant impediment to the property's redevelopment. A brownfields agreement is appropriate for a non-causative buyer or seller of a brownfields property when liability relief is necessary for the redevelopment of the property to proceed. The Department intends to interpret the provisions of the Act as broadly as possible in order to provide liability relief for as many redevelopment projects as possible. For example, the Department realizes that some PDs will need to purchase properties before the technical reviews required by the brownfields process or a brownfields agreement are complete. Therefore, the Department intends to consider a PD that demonstrates such need to be a "buyer" under the Act as long as the PD's Letter of Intent is submitted to the Department before the PD purchases the property. The Department cautions, however, that the submission of a Letter of Intent and the Department's initiation of the review of technical data does not guarantee that the Department will enter into a brownfields agreement.

ISSUE 2: RELATIONSHIP TO VOLUNTARY CLEANUP PROGRAM (back to top)

The Department recognizes that the Brownfields Program provides a mechanism that is a part of the overall effort to redevelop contaminated sites in North Carolina. Many of the sites addressed by the

Voluntary Cleanup Program (VCP) within the Inactive Hazardous Sites Branch are cleaned up for the purposes of property transfer and/or redevelopment and transfer. Both the Brownfields Program and the VCP can result in the redevelopment of contaminated brownfields properties. The difference between the two programs lies in whether the party seeking entry into the program did or did not cause or contribute to the contamination at the site. The Brownfields Property Reuse Act (the Act) of 1997 allows only those parties who did not cause or contribute to the contamination, called prospective developers (PDs), to enter the Brownfields Program, and sets forth public policy that allows the Department to treat a PD differently than it treats the polluter of the property. In making this separation clear, the Act allows the Brownfields Program to work with PDs toward the safe redevelopment of sites and provides PDs unprecedented regulatory flexibility and liability protection unavailable to polluters participating in the VCP.

The State's VCP provides a means for parties who are responsible for site contamination to voluntarily achieve final remediation of a site. Whereas the State's Brownfields Program is primarily a redevelopment initiative, the VCP is fundamentally a cleanup program. Because VCP site cleanups restore value to formerly contaminated properties, and enable lenders to make conventional (collateral) loans for redevelopment or expansion, the VCP is also an integral part of successful redevelopment. Under the VCP, the remedy may, in certain circumstances, involve alternate cleanup standards and institutional controls. Barring severe site hazards, the Department will place oversight of the voluntary cleanup under the privatized portion of the voluntary cleanup program, known as the Registered Environmental Consultant or "REC" Program. RECs are responsible both for conducting the cleanup and for certifying its regulatory compliance in place of state oversight. Statutorily authorized rules for this program are designed to accomplish a complete cleanup and address all contaminated media.

In contrast to VCP projects, brownfields projects require site-specific decisions about restricting assessments for certain media and about determining protective engineering and institutional measures, and require the Department to then weigh these factors against the potential public benefits of the redevelopment. In addition, under the Brownfields Program the Department provides a brownfield agreement that both defines and limits the PD's liability for cleanup at the site. For these reasons the Department necessarily must be directly involved in making these judgements and in ensuring all decisions and protective measures are properly designed and implemented.

ISSUE 3: PUBLIC BENEFIT (back to top)

G.S. § 130A-310.32(a)(3) requires that a prospective developer (PD) provide the Department with information necessary to demonstrate that the proposed redevelopment will have "public benefit commensurate with the liability protection provided." While the public benefit may be difficult to quantify, in its Letter of Intent the PD must provide as detailed a description of such benefits as possible. Public benefits have included such factors as job creation, tax base improvements, revitalization of blighted area, improved retail shopping opportunities, as well as potential cleanup activities or project set-asides that have community or environmental benefits. The Department intends to agree to a brownfields redevelopment project at those properties where reuse is clearly to the public's benefit, and where the public feels protected by the terms of the agreement and views the redevelopment as a positive step for the local community.

As a general rule, then, the Department would like to see letters of support for the proposed redevelopment from a local governmental unit(s) (city, county, etc.) and community groups. The Department believes the best evidence and demonstration of perceived public benefit is that provided by local community groups representing the people living and working in areas adjacent to the proposed redevelopment, who submit letters of support describing the public benefits in terms that

relate to improving the quality of life for the neighboring communities. The inclusion of such support letters with the Letter of Intent is recommended and encouraged.

The Department does not intend to refuse to enter into a brownfields agreement based solely on a lack of letters of support at the Letter of Intent stage. Rather, letters of support from the public and from local governments, whether submitted with the Letter of Intent or during the public comment period, will help guide the Department in considering whether to enter into an agreement. However, the Department will give priority in the allocation of its resources to those projects that demonstrate the most benefit to the community and that have the strongest local support. The Department strongly recommends that PDs enlist the support of the local government, community and environmental groups as early in the redevelopment process as possible.

ISSUE 4: FEDERAL SUPERFUND SITES (back to top)

G.S. § 130A-310.37(c) prohibits the Department from entering into brownfields agreements for federal Superfund sites. This prohibition will leave eligible for a brownfields agreement most properties that are not priorities for the US EPA, notably those sites formerly listed on the US EPA CERCLA Information System (CERCLIS) as having no further remedial action planned (NFRAP) and lightly contaminated properties not listed on CERCLIS. There are some properties, however, that are heavily contaminated, or that pose a great health or environmental risk. These properties are noted on CERCLIS as sites in the nation that pose the highest risks and that have thus been listed on the National Priorities List (NPL). These properties remain under the jurisdiction of the US EPA. Under the present federal law, any responsible party, including any "non-innocent" owner, at one of these properties may be held jointly and severally liable for the entire cost of cleanup of the property. Therefore, the Department will not enter into a brownfields agreement for any part of a property that lies within a NPL site.

Additionally, there are sites listed on CERCLIS, called NPL-caliber sites, which, pending further investigation, are likely to be listed on the NPL, and others, called response action properties, that have had response actions funded and conducted by the US EPA. Because federal liability will remain an issue for these sites, a brownfields agreement between the Department and a prospective developer will not entirely define the cleanup liability. For this reason, the Department will consider brownfields agreements on NPL-caliber sites and response action properties only with the knowledge and involvement of the US EPA. Note that the US EPA "Guidance On Agreements with Prospective Purchasers of Contaminated Property" explains the circumstances under which the US EPA may enter into an agreement with a prospective purchaser for an NPL, NPL-caliber, or response action site.

ISSUE 5: SUBMISSION OF REPORTS AND FEES (back to top)

G.S. § 130A-310.39(a)(1) requires that "A prospective developer who submits a proposed brownfields agreement for review by the Department" pay an initial fee of two thousand dollars ($2,000). As a matter of practicality and convention, the Department will prepare and submit to the prospective developer (PD) for review a draft brownfields agreement that is acceptable to the Department. The $2,000 fee is due at the time the Department submits its draft agreement, and further negotiation between the Department and the PD regarding the terms of the agreement will be predicated on the Department’s receipt of this initial fee. PDs should be aware that, at the present time, the services provided by the Brownfields Program are federally funded, and that there are no state funds appropriated for any of the technical guidance provided by the Department for this Program. Should state funds be expended in the future, a 1999 amendment to the brownfields statute specifies that PDs will pay the Department a fee equal "to the full cost to the Department and the Department of Justice of

all activities related" to the development and implementation of a brownfields agreement. At such a juncture (for instance, if federal funds can no longer be obtained, or should the demand for brownfield agreements outstrip the supply of federal funds), the Department may require PDs to pay this "full cost" fee which could be far in excess of $2,000 per site; the current estimate, though site-specific, ranges from $10,000 to $20,000 per site. Should such a situation occur at any time during the brownfields process before the agreement is signed, in order to comply with the statute, the Department reserves the right to request from the PD a fee equal to all costs incurred from such time until the agreement is complete and signed. After the agreement is signed the Department will not ask for full cost fees retroactively. All checks should be made payable to NC DENR. Reports and checks should be sent to: NC Division of Waste Management, ATTN: Shirley Liggins, Mail Service Center 1646, Raleigh, NC 27699-1646.

ISSUE 6: GROUND WATER AND SOIL REMOVALS (back to top)

The Department will consider entering into brownfields agreements for properties where groundwater and soil are contaminated somewhat in excess of unrestricted use standards, and will generally allow the prospective developer to refrain from cleaning up either media if the contamination poses no unacceptable risk to people or the environment. Some properties, however, may contain highly contaminated areas where a redevelopment plan may eliminate risks to people, but may not eliminate significant risks to the environment or to the long term safety of the redevelopment. Although a redevelopment design may eliminate these areas as risks to people using the property, such areas may remain a continuing source of groundwater contamination, reduce the margin of safety provided by the redevelopment design, or jeopardize the permanence of the agreement. As an example, some properties may have petroleum products or other contaminants floating on top of the ground water or contain pockets of highly contaminated soils. As another example, the public and the Department may feel comfortable when a four-inch thick asphalt parking lot covers soil contaminated at three times unrestricted use standards, but may feel much less comfortable if there are hot spots in the area significantly more contaminated, even though the redevelopment design indicates both areas would be made safe. Remediation of highly contaminated areas will decrease the likelihood that the agreement will be reopened in the future due to an increased calculated risk, and will reduce the chance of third party lawsuits. In sum, the Department believes that it is in the best interest of the public to clean up these highly contaminated areas whenever practical and intends to specify in the brownfields agreements that those areas are to be cleaned up accordingly.

ISSUE 7: GROUND WATER RECEPTORS (back to top)

In order to redevelop properties where groundwater contamination exists, it is important to identify and eliminate any pathway from the contaminated groundwater to any "receptor." Receptors in this sense include not only wells that supply people with groundwater for drinking, cooking, bathing and so forth, but also other avenues whereby contaminated groundwater, or volatiles from contaminated ground water, can reach people. These include basements, utility manways and chases, storm sewers, other underground utilities, drains, and surface water flows and seeps. The brownfields process will generally require the identification, by conducting a thorough receptor survey, and elimination of all identified pathways by which people could be exposed to contaminants in the groundwater.

ISSUE 8: UNDERGROUND STORAGE TANK PROGRAM (back to top)

The Brownfields Property Reuse Act of 1997 makes those properties which fall under Part 2A of Article 21A of Chapter 143 of the General Statutes (the Underground Storage Tank Program) ineligible

for brownfields agreements. The Department recognizes that USTs are part of the contamination problem of many properties, and that their remediation should be addressed concurrently with any plans for redevelopment under a brownfields agreement. The Department intends to include UST remediations within brownfields agreements by requiring prospective developers (PDs) to identify UST problems within the properties, and by making the liability protection provided by the agreements contingent on PDs addressing any UST problems on the properties in accordance with the UST regulations in place. This approach will allow the Department to enter into a brownfields agreement, and thus encapsulate the PD's liability, even before all UST remediations are complete.

Some properties that are candidates for a brownfields agreement may have had USTs removed but may not have had the residual soil contamination remediated to standards. In such cases, the PD may not be responsible for any UST cleanups. Nevertheless, the Department intends to condition brownfields agreements on the commitments, either by PDs or by the parties responsible for the USTs, to comply with UST legal requirements. In neither case will the redevelopment be allowed to impede the final remediation of the USTs.

ISSUE 9: INSURANCE AS SAFETY (back to top)

Brownfields agreements are designed to allow redevelopment of contaminated properties provided the properties can be made safe for their intended reuse. The Department recognizes that properties can be made safe in various ways, such as engineered controls, institutional controls, soil or ground water removals or cleanups, and impervious caps. There have also been suggestions for contingency plans, in case the agreed upon methods do not work or fail in the future, and for insurance policies covering expenses for future harm caused by the redevelopment. The Department considers many of the methods by which prospective developers intend to protect those people working and living on or in the vicinity of redeveloped properties as viable ways to make properties safe. However, the Department does not consider methods to compensate people for harm caused by unsafe redevelopment as legitimate ways to make properties safe for the intended reuse as required by the Act.

ISSUE 10: PERMITS (back to top)

There is nothing in the Brownfields Property Reuse Act of 1997 that relieves the prospective developer from having to obtain any and all applicable permits, licenses, and approvals for any Brownfields Property response actions or redevelopment.

ISSUE 11: LIABILITY PROTECTION (back to top)

One of the major benefits to prospective developers (PDs) who enter the Brownfields Program, but which is generally unavailable to those in cleanup programs, is the liability protection offered in the form of a covenant-not-to-sue contained in the brownfields agreement. Once the "safe-making" actions specified in the brownfield agreement are completed, liability protection is automatically in force which protects the PD from enforcement action by the Department for remaining contamination known to exist at the site prior to its redevelopment (it is important to note that the agreement does not provide liability protection concerning future site contamination for which the PD or other party may be responsible). Because the brownfields agreement defines the PD's cleanup liability at the property, and limits that liability to those actions specified it the agreement, it removes the uncertainty regarding site cleanup costs. In this way, the agreements function to provide comfort to lenders or other entities that would not otherwise be willing to offer project funding. The brownfields agreement, then, is the chief mechanism for breaking this common barrier to obtaining redevelopment financing. In their Letters of Intent, PDs must make the case that the liability protection provided by a brownfield agreement is

necessary to break such a barrier or is otherwise required for the redevelopment project to proceed.

ISSUE 12: OWNER/OPERATOR VS. BUYER AS PROSPECTIVE DEVELOPER (back to top)

Owners of potential brownfields properties who did not cause or contribute to the contamination are potentially eligible to be prospective developers (PDs) under the brownfields statute. In most cases, owners who did not operate the industrial facility on the property, and, likewise, buyers having no history with the property, will have little difficulty establishing that they did not cause or contribute to the site contamination. However, owners who have operated the industrial facility on the property will naturally find it much more difficult to prove to the Department that they did not cause or contribute to the contamination at the property. Furthermore, as stated above in Issue 1, the Program will not be used to circumvent statutorily supported efforts by state or federal cleanup programs to enforce against parties responsible for contamination on the property. Therefore, the Brownfields Program's policy is to provide these cleanup programs the opportunity to enforce against an owner/operator as a potentially responsible party before the Program considers any effort the owner/operator may make to prove, as an applicant PD, that they did not cause or contribute to site contamination. Hence, in order to maintain consistency with the intent of the law, not interfere with any potential enforcement by state and federal cleanup programs, and use resources efficiently to expedite the redevelopment of these sites, the Department strongly encourages the buyer/future owner to apply as the PD rather than have the owner who was the operator of the facility apply as the PD.