

In 1989, vying for a National Football League franchise (which it won in 1993), Charlotte-based Richardson Sports announced that uptown Charlotte would be the location of the new stadium that it hoped to build. The old Smith Metal & Iron site, next door to the stadium property, looked like a good prospect for practice facilities. The city acquired options on it, hoping to lease it for practice facility construction. But environmental problems loomed large. This thirteen-acre tract was contaminated with PCBs (polychlorinated biphenyls), lead, and small amounts of various other hazardous substances.

When the city's intentions for the site became known, neighbors threatened litigation. Three days of mediation among the owner, the neighbors, the city, the state, the U.S. Environmental Protection Agency (EPA), and various private entities produced an agreement for contributions to a \$6-million cleanup fund. Today the site houses the Carolina Panthers' practice facilities, pictured on the cover of this issue.

The mediated agreement on the Smith Metal & Iron site helped set the stage for enactment of North Carolina's Brownfields Property Reuse Act of 1997.¹ This article describes the nature of the state's brownfields problem and outlines the features of the new legislation.

Definition of Brownfields

Policy makers are beginning to see that the reuse of brownfields is an important piece of the urban redevelopment puzzle. "Brownfields" are properties that are abandoned, idle, or underused because past activities on them—most often manufacturing—have actually or apparently left behind contamination by hazardous substances. Investment tends to flow away from brownfields. From the mid-1980s until recently, most purchasers of commercial property have viewed environmental contamination as an almost-automatic veto on a deal. This is a problem not just in large urban centers but everywhere there are old manufacturing facilities.

In the context of environmental law, most of the discussion about brownfields centers on legal changes and financing to encourage their reuse. North Carolina's new set of tools and recent federal program changes help make redevelopment of brownfields pos-

Courtesy HDR Engineering, Inc. of North Carolina



Brownfields in

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sible. The astute developer and community now may put an abandoned, idle, or underused facility into productive operation and back on the tax rolls, yet avoid passing on environmental liabilities from past problems. Cities as large as Charlotte and as small as Cowpens, South Carolina (population 2,117), are taking advantage of changes in brownfields laws and policies. In fact, some emerging conflicts between brownfields redevelopment and other environmental regulations may make brownfields redevelopment more attractive in less urbanized areas than it is in major metropolitan areas (see “Do Brownfields Redevelopment and Air Quality Mix?” on page 9).

Brownfields policy is important because of “disincentives” (deterrents to redevelopment) created by liability for past disposal of hazardous substances. Both federal and state law shape this kind of liability. The extremely stringent provisions of the federal Resource Conservation and Recovery Act of 1976 (RCRA)² and Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)³ have caused major changes in nearly all commercial real estate transactions. In essence, the purchaser of a property buys some risk of any environmental liabilities on the property, whether or not the purchaser caused them.

The site of the Carolina Panthers’ practice facilities as cleanup began

The legal problem of strict liability is coupled with the difficulty of cleaning up property that has certain common types of contaminants on it. When substances like industrial solvents are spilled or poured on the ground and make their way into the groundwater, cleaning them up can be very expensive (hundreds of thousands of dollars) and very time-consuming (years of pumping groundwater). Equally important for the commercial real estate

transaction is that estimating the cost of cleanup is hard without spending a lot of money just to assess the scope of the problem.

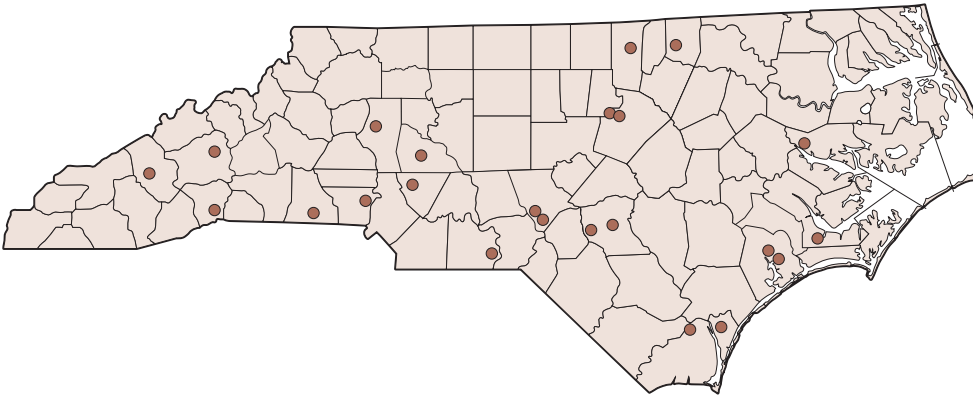
a Green State

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Brownfields in North Carolina

Where does North Carolina rank in the need for brownfields policies? The perception of the state as a mix of rural landscape (“greenfields”) and Sunbelt, research-oriented development obscures the extensive role that manufacturing has played in its economy.

Figure 1
North Carolina Sites on the National Priorities List, 1998



North Carolina ranks high on national brownfields-related manufacturing indexes: eighth in the number of toxic releases to the environment,⁴ fifth in the number of manufacturing production workers,⁵ and first in absolute decrease in the number of farms.⁶ Numerous areas in the state, both urban and rural, have had some manufacturing-oriented industrial development since at least the early twentieth century. This history has left a multitude of actual contamination problems and the perception of still more.

North Carolina thus has a split personality in regard to brownfields. One face has a largely rural character, full of green fields and forests—areas that have not had intensive industrial development and are not perceived to be contaminated by hazardous substances of human making. The other face is manufacturing, much of it scattered throughout the same rural areas. Many small towns in North Carolina have a single old manufacturing facility or a small number of them—textile mills, furniture factories, and the like—that may qualify as brownfields.

The actual number of brownfields sites in North Carolina is unknown. One can begin to estimate it, however, by looking at the National Priorities List and the state's official spill database—a list of reported incidents of possible groundwater contamination.

The National Priorities List, maintained by the EPA, includes only the most seriously contaminated properties. North Carolina has fewer than thirty of these (see Figure 1). But on thousands of properties, there has been some report of actual or possible groundwater contamination. State law largely determines the extent of cleanup liabilities for most of these properties. The main state programs that impose cleanup liabilities are the petroleum under-

ground storage tank program, the Oil Pollution and Hazardous Substance Control Act, the inactive sites program, and the state analogues to the federal RCRA and CERCLA programs. The state's spill database lists 14,314 sites.⁷ For the number by county as of August 21, 1998, see Table 1. To say that each site is a present or future brownfield would be an exaggeration, but because just the threat of contamination is enough to create a brownfield, it is reasonable to guess that at least a thousand might qualify.

The list includes only sites on which reports have been filed, and there is no general obligation to test property for groundwater contamination. Together these facts suggest that the list of reported incidents underestimates the total number of groundwater-contaminated sites in the state.

The overwhelming majority (91 percent) of incidents listed in the state's spill database are petroleum related (see Figure 2, page 6). Many, if not most, have been reported as a result of requirements to assess and monitor underground storage tanks for petroleum. In addition, since 1988, funds have been provided to reimburse owners and operators for some or all of the cleanup costs resulting from leaking underground storage tanks, if the tanks have been properly assessed and monitored. These funds have served as an incentive for companies to report some releases of petroleum into the groundwater. There is no corresponding incentive to test for and report contamination from nonpetroleum substances. In fact, CERCLA works as a major disincentive for groundwater testing and reporting because of the potential liability that comes with ownership of contaminated land. It is thus quite likely that the state's list of groundwater incidents, large though it is, also greatly underrepresents the number of sites at which hazardous substances other than petroleum are turning properties into brownfields.

The Story of the Brownfields Act

As noted earlier, the mediation agreement reached on redevelopment of the Smith Metal & Iron site helped set the stage for North Carolina's Brownfields Act. This success taught lessons familiar to propo-

Table 1
Reported Incidents of Groundwater Contamination in North Carolina, by County

County	Reported Discharges	County	Reported Discharges	County	Reported Discharges
Alamance	296	Franklin	57	Orange	144
Alexander	32	Gaston	294	Pamlico	29
Alleghany	17	Gates	12	Pasquotank	67
Anson	13	Graham	14	Pender	66
Ashe	33	Granville	85	Perquimans	20
Avery	34	Greene	36	Person	56
Beaufort	104	Guilford	1,296	Pitt	371
Bertie	95	Halifax	98	Polk	24
Bladen	27	Harnett	76	Randolph	213
Brunswick	123	Haywood	110	Richmond	75
Buncombe	435	Henderson	156	Robeson	144
Burke	165	Hertford	96	Rockingham	182
Cabarrus	144	Hoke	24	Rowan	229
Caldwell	151	Hyde	18	Rutherford	107
Camden	23	Iredell	184	Sampson	85
Carteret	121	Jackson	60	Scotland	77
Caswell	37	Johnston	174	Stanley	115
Catawba	247	Jones	21	Stokes	42
Chatham	87	Lee	116	Surry	151
Cherokee	41	Lenoir	156	Swain	26
Chowan	36	Lincoln	68	Transylvania	54
Clay	11	Macon	55	Tyrrell	5
Cleveland	162	Madison	34	Union	169
Columbus	114	Martin	84	Vance	95
Craven	204	McDowell	71	Wake	693
Cumberland	251	Mecklenburg	1,317	Warren	28
Currituck	40	Mitchell	40	Washington	49
Dare	74	Montgomery	42	Watauga	77
Davidson	218	Moore	71	Wayne	191
Davie	46	Nash	212	Wilkes	99
Duplin	111	New Hanover	436	Wilson	161
Durham	400	Northampton	67	Yadkin	53
Edgecombe	123	Onslow	244	Yancey	24
Forsyth	552				

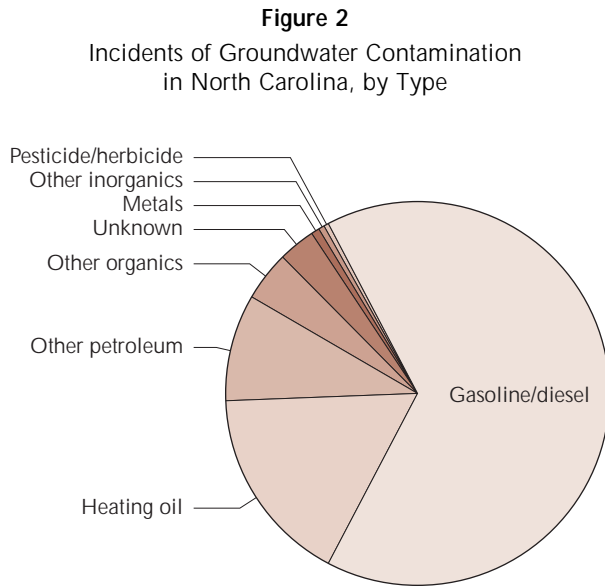
Note: Data are as of August 21, 1998.

nents of alternative dispute resolution: by getting the right people to the table, giving them adequate information, and offering them a neutral, facilitated way to discuss their interests, one sometimes can shape solutions that work for everyone concerned. Some of the same people who participated in the Smith Metal & Iron cleanup, including the key state agency, were ultimately involved in passing the 1997 brownfields legislation.

In 1996 an association representing North Carolina business and industry and some people interested in redeveloping the South End of Charlotte (a group of neighborhoods and a commercial district adjacent to the uptown area) met to discuss possible legislative

changes in the state's approach to liability for cleanup. Eventually, representatives of environmental public interest groups and the state environmental regulatory agency joined in the discussion.

The state wanted greater flexibility to reduce the risk of contamination, even if sites could not be cleaned up to standards. State officials realized that many contaminated properties would never be cleaned up if "clean" meant elimination of all contaminants above levels set in the statewide standards. In some cases, achieving those standards is not technically feasible; in other cases the cost of achieving them far outweighs the value of the property. In both cases the net result is that nothing is done unless a solvent



responsible party can be coerced into cleanup. Most of the time, in North Carolina and elsewhere, the risk remains, unabated.⁸

In the 1997 session of the General Assembly, environmental groups acknowledged the advantages of bringing in new capital to help redevelop currently contaminated sites, as long as the persons actually responsible for the contamination were not “let off the hook.” The result was a consensus bill that set a dramatically new direction for cleanups—a rare occurrence in environmental cleanup legislation of the 1990s.

An Overview of the Brownfields Act

The fundamental change brought about by the 1997 brownfields legislation is a negotiated, or contractual, approach to cleanup. Persons who are eligible for the program and wish to buy or sell eligible sites can legally propose cleanup approaches that do not render the site fully “clean” as defined by current state standards. The obligations that persons eligible for the program take on are embodied in a document: the brownfields agreement.

In contrast, the traditional approach to cleanup is kind of a “lookup” process: Assuming that a solvent, motivated, responsible party exists, that party or the state identifies the contaminants on the property, assesses the vertical and horizontal extent of the contamination, and looks up an appropriate cleanup target in the state’s standards (usually expressed as a certain

mass of contaminants per stated mass of soil or water, or as “parts per million”). The responsible party then searches for an appropriate cleanup technology, installs it, and operates it. All too often, though, somewhere along this standard path, things go awry. And there is never any guarantee that “enough is enough.” There is no way to know how much will have to be spent before the site is clean or the effort must be abandoned.

Under the new brownfields approach, in exchange for performance of a set of agreed-on obligations, eligible persons receive liability protection. In other words, the brownfields agreement “caps” their liability. The persons who receive this protection include not only the prospective developer but also contractors and consultants who participate in the cleanup, future owners of the property, future developers and occupiers of the property, successors and assignees of the prospective developer, and lenders or fiduciaries that provide financing for cleanup or redevelopment.

The brownfields agreement has all the appearance of a win-win deal, but there is a potential for losing. Concerned parties to a transaction must consider the consequences of the agreement for the property. Contamination is likely to remain on or under the site, so risk continues. Contamination may be greater or more dangerous than originally believed. In the future the use of the property may change in a way that increases the risk. The agreement itself may limit the use of the property, and the limits may become problematic. Further, the agreement does not preclude claims from adjoining property owners or other private parties, who may assert injury from the contamination. Finally, the agreement does not terminate the liability of parties who are actually responsible for the contamination, and those parties may be compelled to clean up the residual contamination in the future. This cleanup could be disruptive to ongoing activities at the property.

Steps in Reaching an Agreement

There are five basic steps along the road to a brownfields agreement:

Step 1: The state determines whether the site and the prospective developer are eligible.

The prospective developer must meet the definition in G.S. 130A-310.31 (10): in essence, a party who (1) desires to buy or sell a property for development and (2) has no connection to the person or persons who

contaminated the property. Further, the prospective developer must persuade the state of the following:

- That it and its affiliates are in *compliance* with any other brownfields agreements and with federal and state environmental laws
- That there is a *public benefit* to the development commensurate with the liability protection
- That the property is *not an NPL site*—preferably not even a potential NPL site
- That there is *adequate financing, management, and technical expertise* to carry out any needed cleanup and to implement the brownfields agreement
- That the prospective developer and its affiliates are *not in any way responsible* for the contamination

Step 2: The prospective developer proposes a brownfields agreement and shows adequate data to demonstrate that implementation of the agreement will render the site safe.

The form of the agreement is legally flexible, but G.S. 130A-310.32 sets out certain elements to be included:

A brownfields agreement shall contain a description of the brownfields property that would be sufficient as a description of the property in an instrument of conveyance and, as applicable, a statement of:

- (1) Any remediation⁹ to be conducted on the property, including:
 - a. A description of specific areas where remediation is to be conducted.
 - b. The remediation method or methods to be employed.
 - c. The resources that the prospective developer will make available.
 - d. A schedule of remediation activities.
 - e. Applicable remediation standards.
 - f. A schedule and the method or methods for evaluating the remediation.
- (2) Any land-use restrictions that will apply to the brownfields property.
- (3) The desired results of any remediation or land-use restrictions with respect to the brownfields property.
- (4) The guidelines, including parameters, principles, and policies within which the desired results are to be accomplished.
- (5) The consequences of achieving or not achieving the desired results.

These requirements are loosely modeled on the win-win agreements promoted by Stephen R. Covey.¹⁰ The notion is that a brownfields agreement can set a framework for protecting the interests of the commu-

nity, the state, the property developer, and other concerned persons.

The state has developed some forms for documents related to the brownfields agreement. The agreement actually reached on the Campden Square property in Charlotte's South End is a useful model.

Step 3: The prospective developer prepares and distributes the required public notice of the agreement.

The public notice provisions of the statute are quite prescriptive about both the contents and the audience. The prospective developer must give notice to all local governments with jurisdiction over the property. This is a safeguard for local governments that might not otherwise know about the prospective development. The prospective developer also must publish a notice in a local newspaper as well as in the *North Carolina Register*.

Step 4: There is a public comment process and possibly a public meeting.

The public comment period must last at least sixty days. During the first half of this time, any person may request a public meeting to be held on the proposed brownfields agreement. The decision whether to hold a public meeting is at the discretion of the Department of Environment and Natural Resources (DENR) and will likely be decided by the director of the Division of Waste Management. Given the stated goals of the brownfields program—to benefit the surrounding community and the public—the director probably will seriously entertain any requests for a public meeting.

Step 5: The prospective developer and the state agree or walk away.

In the end the brownfields process is voluntary on both sides. As with any negotiated agreement, either party is free to walk away until it signs a deal.

Weighing of Costs and Benefits

All parties interested in a brownfields agreement—including, at a minimum, the prospective developer, local governments, adjacent property owners, the owner of the subject parcel, and DENR—should weigh the costs and the benefits before taking a position on a brownfields proposal. Some key questions to consider are these:

- Will the planned reuse of the property benefit anyone other than the prospective developer?

- What is the risk posed by known and unknown residual contamination—the contamination that is not fully cleaned up? How is that risk likely to change in the future? If the risk grows too high for whatever reason, who pays?
- How important are institutional and engineering controls—legal and engineering approaches other than cleanup, such as deed restrictions and fences—to maintaining the site as safe?¹¹ How likely is it that those controls will be maintained? What happens if they are not?
- Are there adequate data on contamination to judge whether the site can be made safe?
- Are there persons on the property itself or on adjoining properties who may have or may claim injuries from the contamination?
- Is the proposed use of the land consistent with local land-use plans and market realities?
- Is a brownfields agreement truly necessary to redevelopment of the property? What is the likely future of the property if no agreement is reached?
- Is it important to preserve legal rights to sue other people for cleanup costs?¹²

Another consideration is that, given present staffing levels at DENR, a brownfields agreement will add significant and indeterminate time to a real estate transaction. The first agreement, involving Charlotte's Campden Square, took nearly six months from formal proposal to signing. Some of that time was attributable to the learning process and the need to create new documents and policies from scratch. On the other hand, the state was very familiar with the site and the developer.

Determination of Eligibility

G.S. 130A-310.32 governs basic questions of eligibility. Generally the state can give an opinion about eligibility fairly soon after receiving the information required by the statute.

The state has issued a guidance document on eligibility, along with a form affidavit (a sworn statement) that a prospective developer must submit. The form covers the eligibility criteria in G.S. 130A-310.32. Counsel for prospective developers should review the affidavit to determine whether obvious eligibility problems exist.

The definition of "prospective developer" also serves to limit entrance into the program. However,

the state has interpreted the definition fairly broadly to include as many parties as possible who did not cause or contribute to the contamination.

The relationship with federal cleanup programs is tricky for one class of properties, those that are not yet on the National Priorities List but might score on the CERCLA hazard-ranking system at a level that would qualify them for the list. Until it is clear whether EPA will assert any jurisdiction over such sites,¹³ getting state signoff on a brownfields agreement will be difficult. The corollary is that any site requiring both a state and a federal signoff inherently entails more complexity, and the brownfields agreement process will be time-consuming, at least.

Finally, local opposition to the project may make it difficult, if not impossible, to show the public benefit required under the statute.

Monitoring of Proposed Agreements

As explained earlier, the Brownfields Act calls for fairly extensive public notice and comment procedures. It requires at least three documents: Notice of Intent to Redevelop a Brownfields Property, Summary of the Notice of Intent, and Notice of Brownfields Property. Circumstances may call for a fourth document: Notice of Public Meeting.

The Summary of the Notice of Intent must be published in a newspaper, published in the *North Carolina Register*, and posted at the brownfields site. The full Notice of Intent must be provided to all local governments with jurisdiction over the property. The Notice of Brownfields Property must be filed with the register of deeds and indexed so that it will appear in the chain of title for the property. Thus, when someone does a title search as part of a sale or a purchase of the property, its being a brownfield will be obvious.

Some data on contamination at the site will be included in the Notice of Intent and the Notice of Brownfields Property. Further data may be available in DENR's files.

A sixty-day comment period runs from the last date on which the Summary of the Notice of Intent is published in a newspaper or in the *North Carolina Register*. During the first thirty days, anyone can request a public meeting.

The brownfields agreement documents the commitments that each party makes for a particular site. The statute sets out the elements of a brownfields agreement with some particularity; for a list of them,

see Step 2 under the earlier section “Steps in Reaching an Agreement.”

Effective Commenting on Proposed Agreements

In House Bill 1121, which proposed the North Carolina brownfields program, the General Assembly made five findings:¹⁴

- (1) There are abandoned, idle, and underused properties in North Carolina, often referred to as “brownfields”, that may have been or were contaminated by past industrial and commercial activities, but that are attractive locations for redevelopment.
- (2) The reuse, development, redevelopment, transfer, financing, and other use of brownfields is impaired by the potential liability associated with the risk of contamination.
- (3) The safe redevelopment of brownfields would benefit the citizens of North Carolina in many ways, including improving the tax base of local government and creating job opportunities for citizens in the vicinity of brownfields.
- (4) Potential purchasers and developers of brownfields and other parties who have no connection with the contamination of the property, including redevelopment lenders, should be encouraged to provide capital and labor to improve brownfields without undue risk of liability for problems they did not create, so long as the property can be and is made safe for appropriate future use.
- (5) Public and local government involvement in commenting on the safe reuse of brownfields will improve the quality and acceptability of their redevelopment.

These findings provide a potentially useful ground from which to make comments about a particular proposal. In other words, persons who either support or oppose a particular project should review the proposal to see if it truly addresses the problem and advances the goals set out by the legislature.

G.S. 130A-310.34(d), detailing the procedures for public comment, specifies that DENR “shall give particular consideration to written comment that is supported by valid scientific and technical information and analysis.” This places a premium on understanding the monitoring data and the particular environmental and health risks posed by contaminants at the site.

Do Brownfields Redevelopment and Air Quality Mix?

How can government encourage redevelopment of brownfields while tightening air quality standards in the same areas and preventing development when the standards are not met? Mayors and county commissioners around the country have posed this dilemma to the U.S. Environmental Protection Agency (EPA). Both the U.S. Conference of Mayors and the National Association of Counties have noted the linkages between brownfields redevelopment and air standards. In discussing brownfields, Charlotte Mayor Pat McCrory has said,

We’re concerned that the whole EPA strategy with these new air regulations is not consistent with other strategies, especially brownfields. For example, if we don’t further invest in brownfields . . . [,] that may, in fact, contradict efforts to control urban sprawl, which will increase air pollution. But, in fact, the new air regulations may encourage suburban sprawl and not encourage in-fill development and the recycling of polluted land which we’re attempting to do in Charlotte and Dallas and Chicago and other major urban centers.¹

New air standards for ozone and fine particulates, as well as standards under consideration for hazardous air pollutants (“air toxics”), will hit urban centers—the places normally associated with brownfields redevelopment—especially hard. Typically these places, with greater development density, more manufacturing, and more cars, have poorer air quality.

In North Carolina, for example, current best guesses are that new ozone standards proposed by the EPA will put much of the Piedmont into “non-attainment” status, meaning that the air quality will not meet the new standards. This status could pose a major obstacle to locating new facilities in the Piedmont that emit air pollution. The state and Piedmont local governments (as well as some mountain local governments) will be searching for ways to improve air quality that fit into the state’s plan for complying with the new standards.

North Carolina’s experience with brownfields redevelopment and air quality is likely to be very different from that of large urban centers in the Northeast and the Midwest. State experts already know that a major part of the air quality problem across the Piedmont comes from “mobile sources,” meaning cars and trucks.² For many small Piedmont cities and towns, redeveloping old manufacturing districts—instead of attracting new industries to sites beyond town boundaries—could cut down on the number of vehicle miles traveled and might even allow employees to walk to work, thus also reducing the number of vehicle trips each day. This was the model in the prototypical industrial development of the Piedmont: the textile mill village. In other words, in the Piedmont, at least outside Charlotte, brownfields redevelopment and air quality improvements could work well together by making locations in town—such as old mills—environmentally acceptable for redevelopment.

Notes

1. See, e.g., Comment of Charlotte Mayor Pat McCrory, available at http://www.usmayors.org/USCM/US_Mayor_newspaper/archives/October_15_1997_Volume_64_Issue_18/documents/McCrory_Explains_Mayors_Opposition_to_EPA_s_Air_Plan_102397.html (Sept. 1, 1998).

2. There also are in the state important, large stationary sources of pollutants that form ozone, particularly some electricity-generating plants. But the automobile is a major part of the Piedmont’s air quality problem.

The strong support for the Brownfields Act from all quarters rested on a belief that a site receiving liability protection would be supported by the community in which it was located. Local opposition to a project—whether from the surrounding community or from a local government with jurisdiction over the site—is likely to make consummation of an agreement very difficult. The act gives substantial discretion to DENR to decide whether or not to enter into an agreement. DENR’s initial guidance documents appear to place a high value on community involvement and support. Any proposed land-use restrictions must be reasonable in light of overall land-use planning for the area.

Related Programs

The 1997 Brownfields Act is one of many efforts to change key aspects of cleaning up contaminated property. Persons interested in the field should be aware of several related programs.

EPA makes grants up to \$200,000 for local governments to assess the extent of contamination at brownfields and their potential for reuse.¹⁵ Burlington, Charlotte, Fayetteville, High Point, and Winston-Salem already have won grants under the program, and Wilmington is applying for one in the next round.

EPA has modified its stance on “comfort/status letters” for potential purchasers of brownfields property.¹⁶ These are letters that are supposed to give prospective buyers some level of comfort about the environmental conditions at a property. EPA now will write them for some properties. The letters do not constitute a legally binding covenant not to sue. They do give some level of assurance that EPA has no present interest in a given property.

Further, North Carolina is moving some of its cleanup programs from a statewide approach based on standards to a site-specific approach based on risk. The most-advanced effort is the risk-based priority scheme for cleaning up leaking underground storage tanks for petroleum¹⁷ (which are excluded from coverage under the Brownfields Act) and reimbursing owners for costs. A second important state change is the “other” brownfields bill from 1997. Known by some as the “tanfields” legislation, it allows use of institutional controls such as deed restrictions and contractual obligations to assist cleanups in all state remedial programs.¹⁸ Another new statutory element is the 1997 Dry-cleaning Solvent Cleanup Act.¹⁹ It

ouples a cleanup approach based on risks at a particular site, as in the brownfields statute, with a reimbursement fund for eligible dry cleaners, much like the existing fund for reimbursing costs to clean up leaks at underground storage tanks for petroleum. Finally, the state continues to pursue creation of a framework that will ensure, across different regulatory programs, more consistent estimates of environmental risks.

Administration of the Program

The Superfund Section of DENR’s Division of Waste Management administers the North Carolina brownfields program. DENR staffs it with people who were hired to do other tasks. Thus there will not necessarily be the kind of responsiveness that would be optimal for a program driven largely by the pressures of a fast-paced real estate market.

To compound this problem, the nature of contractual approaches to cleanup is that each site must receive a significant amount of individualized attention. Cleanup of contaminated property always is resource intensive. Given the benefits that a prospective developer can receive from a brownfields agreement and given the burdens that an agreement can place on future use of a site, completion of an agreement will take time.

Summary

In sum, brownfields represent an unanticipated and problematic consequence of the environmental cleanup liability created in the 1970s and 1980s. One might find them in almost any town in North Carolina. For those interested in restoring and reusing these properties—an important need in the attempt to curb urban sprawl—the 1997 North Carolina brownfields legislation creates important new legal tools. The laws are no substitute for economically viable transactions, but they offer the chance to remove some major impediments to property reuse.

For additional information, see the following:

- DENR brownfields page at <http://wastenot.ehnr.state.nc.us/sfhome/brnfld.htm>
- EPA brownfields page at <http://www.epa.gov/swerosps/bf/index.html>

Notes

1. S.L. 1997-357 (H.B. 1121), codified as G.S. 130A-310.30 through -310.40 and scattered provisions of G.S. 130A and 143.

2. 42 U.S.C. §§ 6901-6992k.

3. 42 U.S.C. §§ 9601-9675.

4. See updated details for North Carolina at www.epa.gov/enviro/html/tris/state/north-carolina.html. On the basis of 1994 data, North Carolina ranked ninth in total releases. See www.epa.gov/opptintr/tri/fige6.htm. In 1996 North Carolina ranked eighth. See www.scorecard.org.

5. Compiled by the author from U.S. Bureau of the Census, *County Data Books*, 1988 ed., available online at <http://fisher.lib.virginia.edu/ccdb>.

6. Compiled by the author from Census Bureau, *County Data Books*. Data cover 1982-87.

7. Department of Environment and Natural Resources, Division of Water Quality, Incident Management Database (PIRF table) (as of Aug. 21, 1998). The database, which is updated nightly, is available at <http://gw.ehn.state.nc.us/database/gwdata2.htm>. It is made up of discharges reported to the DENR regional offices pursuant to G.S. 143-215.85.

8. To the author's knowledge, the only case in the last decade when North Carolina has used its powers under state and federal superfund law to force cleanups through litigation is the Peele case, involving a pesticide dump in Johnston County. See *North Carolina v. W. R. Peele, Sr. Trust et al.*, 876 F. Supp. 733 (E.D.N.C. 1995). A variety of practical and legal problems often prevent the state from simply suing some or all of the responsible parties. First, it may be unclear who those parties are. The federal government devotes substantial resources to searching for responsible parties at contamination sites, but North Carolina does not. Second, there may be no responsible parties. Companies dissolve, individuals die, and both companies and individuals move. Often years, sometimes decades, pass from the time a property is contaminated to the time the state discovers the contamination. Third, the state may know who the responsible party is and that party may still exist, but it may lack the resources to pay for a cleanup. Cleaning up contaminated property, especially groundwater, to current standards can cost hundreds of thousands of dollars, sometimes millions, even at sites that on the surface look to be minor facilities. See, e.g., *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 189, 192, 494 S.E.2d 764, 766 (1998) (costs of environmental investigation, remedi-

ation, and cleanup totaled more than \$30 million for plant in Salisbury, more than \$15 million for nearby landfill); *Guilford County Dept. of Emergency Services v. Seaboard Chemical Corp.*, 114 N.C. App. 1, 441 S.E.2d 177 (1994) (state estimated cost of "several million dollars" to clean up groundwater at Seaboard Chemical site near High Point); *In re Camel City Laundry Company*, 123 N.C. App. 210, 472 S.E.2d 402 (1996) (\$500,000 was estimated cleanup cost for dry cleaning facility in Winston-Salem). Fourth, the state has very few attorneys and support staff to pursue cleanup cases. There were no appropriations for additional staff when the brownfields program was created in 1997, and none were proposed in the governor's budget for fiscal year 1998-99.

9. "Remediation" is anything done to solve a contamination problem.

10. See Stephen R. Covey, *The Seven Habits of Highly Effective People: Restoring the Character Ethic* (New York: Simon & Schuster, 1989; reprint, 1st Fireside ed., 1990).

11. See generally Joseph Schilling, "Designing and Enforcing Institutional Controls for Contaminated Properties: A Primer for Local Governments," *Municipal Lawyer* 39 (March/April 1998): 10-11, 27-29; Christine Gaspar and Denise Van Burik, *Local Government Use of Institutional Controls at Contaminated Sites* (Washington, D.C.: International City/County Management Association, April 1998).

12. See 40 U.S.C. § 9607.

13. The connection to EPA in this context is complex, involving state contracts with the agency and overall state relationships with it. The state, of course, does not want to waste time on a project if efforts will not pay off.

14. S.L. 1997-357 (H.B. 1121), codified as G.S. 130A-310.30 through -310.40 and scattered provisions of G.S. 130A and 143. In the General Statutes, the findings appear in an editor's note to G.S. 130A-301.30.

15. See "Announcement of Proposal Deadline," *Federal Register* 62 (Oct. 9, 1998): 52720; "Brownfields Showcase Communities," *Federal Register* 62 (Aug. 20, 1997): 44274.

16. "Policy on the Issuance of Comfort/Status Letters," *Federal Register* 62 (Jan. 30, 1997): 4625.

17. S.L. 1995-377 (S.B. 1012), Petroleum Underground Storage Tanks—Risk-Based Rules, codified as G.S. 143-215.94V(2)(a).

18. S.L. 1997-394 (S.B. 125), amending G.S. 130A-310.3, -310.8, -310.9(b); 143-215.84, -215.85A, -215.88B.

19. S.L. 1997-392 (H.B. 225), Dry-cleaning Solvent Cleanup Act, adding new Part 6 to G.S. 143-215.104A. ☐