

BROWNFIELDS UPDATE

A publication of Pyramid Environmental & Engineering, P.C.

Spring 2005

BROWNFIELDS OVERVIEW

An Update on the Brownfields Economic Redevelopment Initiative

Background

Since its inception in 1995, the U.S. Environmental Protection Agency's (EPA) Brownfields Initiative has grown into a proven, results oriented program that has changed the way



contaminated property is perceived, addressed, and managed. In January 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act, which authorizes up to \$250 million in funds annually for brownfields grants.

Definition of A Brownfield

A brownfield is a property, the expansion, redevelopment or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminants. The Brownfields Pro-

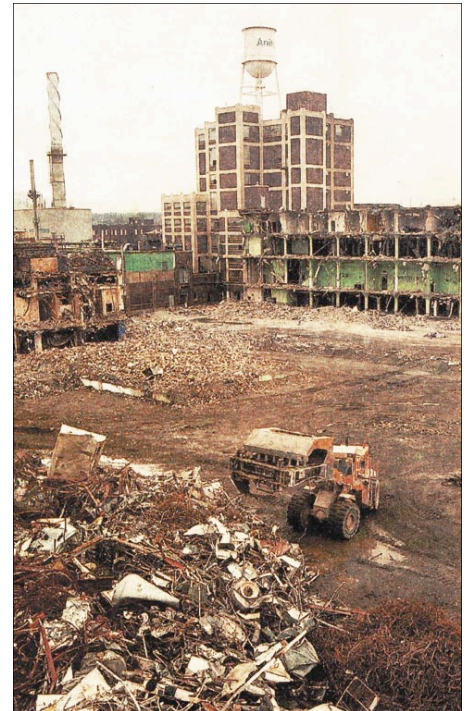
gram encourages redevelopment of America's estimated 450,000 abandoned and contaminated waste sites and reflects a new model of environmental stewardship that protects the environment, promotes partnership, strengthens the marketplace, and sustains reuse. For every acre of reused brownfields an estimated 4.5 acres of unused green space is preserved.

Since the beginning of the program, EPA has leveraged more than \$6.5 billion in brownfields cleanup and redevelopment funding. Brownfields grants serve as the foundation of the program and include Assessment Grants, Revolving Loan Fund Grants, and Cleanup Grants.

Identifying A Brownfields Site

There are a wide variety of potential brownfields sites. Almost any former manufacturing, distribution, or recycling facility that used, produced, or reclaimed chemicals is a potential brownfields site. Depending on the extent of contamination, in some cases, only portions of a site are targeted for brownfields redevelopment.

EPA has developed guidelines that determine whether a site poses a high or low risk to nearby populations and environments. High-risk sites are generally not good candidates for brownfields redevelopment. Low-risk



"Any abandoned, idle or underutilized property where environmental contamination hinders redevelopment is a potential brownfield property. Developers should not have to look far to find brownfields properties. There are literally many thousands of these properties across the state."

*Bruce Nicholson, Brownfields Program Mgr.
NC DENR / Division of Waste Mgmt.*

sites tend to have lower levels of contamination, and other factors that reduce risk, and therefore can make good candidates for redevelopment.

Common brownfields sites include gas stations, dry cleaners, and textile mills.

Providing affordable solutions for environmental issues, helping to build profitability now and in the future.


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RISK-BASED CORRECTIVE ACTION

Site-specific Goals and Cost-effective Remedies

Douglas Canavello, P.G., Program Manager

The heart of North Carolina's Brownfields Program is the way site-specific goals for clean-up of soil and groundwater contamination are negotiated and set.

The Risk Based Corrective Action (RBCA) method is defined by EPA as "a streamlined approach in which exposure and risk assessment practices are integrated with traditional components of the corrective action process to ensure that appropriate and cost-effective remedies are selected, and that limited resources are properly allocated".

RBCA (often referred to as "Rebecca") incorporates risk assessment principles and focuses on the reduction or elimination of risk to human health, the environment and groundwater, based on site-specific conditions.

When many of the original environmental laws and regulations were initiated in the 1970's and 1980's, risk levels for hazardous chemicals were based on laboratory exposures to chemicals under constant and controlled conditions.

Properties evaluated by phase I and phase II environmental assessments where contamination was identified, were compared to cleanup limits, such as the North Carolina Groundwater Standards NCAC 2L.

RBCA can save developers time and money by tailoring the remediation to the site's future use instead of requiring the clean-up to meet more stringent "one size fits all" standards.

Frequently, an environmental consultant would provide estimates for costs of clean-up to regulatory levels that were not risk-based. At this point, the estimated costs may have made the transaction unattractive, and the property would remain unsold.

A developer with a plan for the property that provides significant economic development now has the opportunity to use RBCA, under a brownfields agreement, to clean up the property to a level that protects environmental and health risks, but not to pre-set

"one size fits all" clean-up standards. Methods such as impermeable barrier capping and natural attenuation can allow higher levels of contamination to remain in place.

When the negotiated clean-up levels and required remediation efforts are defined, based on the planned use of the site, the lower costs of the environmental work may allow the transaction to go forward.

RBCA is an established way of managing environmental liabilities. Its customized approach to site specific variables makes it particularly valuable in brownfields situations where the cost to redevelop must be competitive with other development alternatives.

If you are interested in further information regarding RBCA and brownfields agreements, and their potential application to a site of interest, please contact Douglas Canavello, P.G. of Pyramid Environmental at (336) 335-3174, toll-free (866) 545-9507, or email info@pyramidenvironmental.com.

Why Should You Invest in Brownfields?

For the private sector, brownfields redevelopment can mean new business opportunities, the potential for profit on unused or underutilized properties, improved community and environmental stewardship, and access to untapped urban markets.

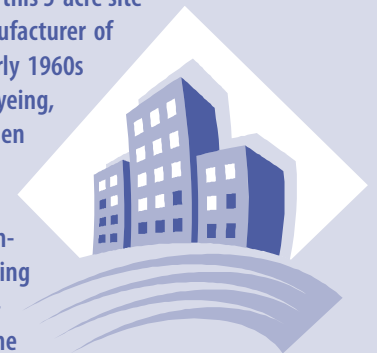
"Of course, I recognize that the indispensable element in so many successful brownfields projects in the private marketplace [is] the visionary business leader or entrepreneur who can look at a crumbling building on a weed-choked lot and see opportunity."

*Christine Todd Whitman,
Former Administrator of the U.S. EPA*

Brownfields In Action: A Local Success Story

THE FORMER OXFORD PRINTING BUILDING SITE

Like so many other properties in the textile industry, this 5-acre site just west of Oxford had seen robust times as a manufacturer of sleeping bags and other outdoor items from the early 1960s through the mid-70s, and as fabric screen printing, dyeing, and finishing plant from the late 70's until 1995 when Oxford Printing closed its doors. Redevelopment of this site was hindered by liability concerns regarding possible contamination resulting from previous on-site operations, and possible impacts from an adjoining National Priorities List (NPL) site where cleanup activities were ongoing. Under the brownfields program, the developer conducted assessment activities and a cleanup and closure of the former flood drain/sump collection system at the facility. The brownfields agreement for the property contains land use restrictions to protect against possible exposure to impacted groundwater that may encroach onto the property from the NPL site. The agreement has also provided liability protection that enabled the developer to perform necessary repairs at the facility and restore the site to productive reuse for warehousing purposes.



BROWNFIELDS AGREEMENTS

How the Process Works in North Carolina

Brett S. Higgins, Project Manager

When assessing whether a brownfields redevelopment project makes sense for a particular site, it is necessary to evaluate the site's current environmental conditions through a phase I environmental site assessment (ESA), due diligence, and a phase II ESA.

The phase I ESA and due diligence process provide an initial screening to identify potential sources of contamination and possible legal and financial risk. A phase II ESA includes testing the property's soil, water, and/or air to identify the type, quantity, and extent of contamination. For private sector entities, the brownfields agreement process begins after the phase II ESA has revealed a manageable level of contamination.

"Our brownfields program is a tool that allows those prospective developers who did not cause or contribute to the contamination [to] get a handle on environmental liability, and take it from uncertain and potentially unmanageable costs that could sink a loan to more certain, more manageable costs that are defined before a loan is sought."

Bruce Nicholson, Brownfields Program Manager
North Carolina DENR / Division of Waste Management



Letter of Intent The process in North Carolina begins with a prospective developer (PD) submitting a letter of intent (LOI) to the Project Manager (PM) at the North Carolina Department of Environment and Natural Resources (DENR).

The PM then reviews the LOI and determines if the proposed project is eligible, not eligible, or if more information is required from the PD to complete an eligibility determination.

Letter of Eligibility If the PM has adequate information and determines that the proposed project is eligible, the PM then sends the PD a letter of eligibility requesting all available assessment data regarding the site. Once the PD furnishes all available assessment data, the PM reviews it to determine if additional data is needed.

If more data is needed, the PM will send the PD a letter detailing the additional assessment requirements (possibly including a receptor survey), which the PD then must perform and submit, along with proposed site plans. (At the same time, the PD may wish to begin work on developing a brownfields plat map for the proposed development pursuant to DENR guidelines.)

Draft Brownfields Agreement Once the PM has determined that they have enough assessment data, a draft brownfields agreement is prepared by

DENR and furnished to the PD, along with a bill for \$2000 to cover DENR's brownfields fee.

The draft brownfields agreement is then subject to negotiation between the PD and DENR, and if the negotiations succeed, ancillary documents are created and the agreement is finalized. Once an agreement is finalized, an acceptable brownfields plat map for the site must be approved in accordance with DENR guidelines.

Public Notice and Comment After a brownfields plat map is approved, the agreement is then subject to an involved public notice and comment process.

Although there are a number of steps in the process, prospective developers can leverage the expertise of qualified environmental consultants and attorneys to help navigate the process as smoothly as possible.

Contact Information To learn more about this process, contact Tony Duque, with the North Carolina Division of Waste Management at (919) 733-4996, ext. 287 or email tony.duque@ncmail.net.

For more information on environmental regulations, solutions for contamination, and protecting the value of your commercial investments, contact Douglas Canavello, P.G. of Pyramid Environmental at (336) 335-3174, toll-free (866) 545-9507, or email info@pyramidenvironmental.com.

New Tax Incentives Equal More Money in Your Pocket

Brownfields tax incentives allow prospective developers or property owners to immediately reduce their taxable income by the cost of their eligible cleanup expenses, thus offsetting short-term clean up costs.

The State of North Carolina Brownfields Property Reuse Act of 1997 provided an amendment to North Carolina General Statutes that creates a partial tax exemption for the value of qualifying improvements to a brownfields site during the project's first five taxable years.

The five-year period begins the first January following the completion of the improvements. In year one, ninety percent (90%) of the appraised value for qualified improvements is excluded; in year two, seventy five percent (75%); year three, fifty percent (50%); year four, thirty percent (30%); and in year five, ten percent (10%) will be excluded.



To take advantage of this tax exclusion, prospective developers or property owners need only submit a one-time application along with a copy of the brownfields agreement and documentation that the improvements have been completed. If a development includes out-parcels or is being phased, each phase or out-parcel would have its own five-year period.

Additional tax incentives are available to qualified brownfields properties within an EPA Brownfields Pilot Area. Through the Taxpayer Relief Act of 1997, environmental cleanup costs are fully deductible in the year they are incurred, rather than having to be capitalized. This tax incentive, which originally expired on December 31, 2003, was recently extended through December 31, 2005.

IS THE LAW ON YOUR SIDE?

Liability Protection Incentives for Brownfields Redevelopment

D. Marsh Prause, Esq.

A critical component of the evaluation of any proposed brownfields deal is a realistic assessment of the prospective developer's legal exposure given the potential liabilities associated with acquiring or developing contaminated real estate. Although potential liability remains a concern, recent developments have increased the opportunities for liability protection and made the law's impact on brownfields deals easier to predict.

A prospective developer must evaluate liability issues under both State and Federal law. Liability protection is available under North Carolina law (The Brownfields Property Reuse Act of 1997) if a prospective developer enters into and complies with a qualifying "Brownfields Agreement" with the Department of Environment and Natural Resources. Liability protection also may be available in some circumstances under federal law (the

Comprehensive Environmental Response, Compensation, and Liability Act known as "CERCLA") through the "Small Business Liability Relief and Brownfields Revitalization Act" (known commonly as the "Brownfields Amendments") signed by President Bush in 2002.

The 2002 Brownfields Amendments clarify the criteria for establishing the "innocent landowner" defense to CERCLA liability and create two new defenses to CERCLA liability for "bona fide prospective purchaser" and "contiguous property owner" situations. To qualify for any of these forms of liability protection under federal law, a prospective developer must conduct "all appropriate inquiries" into a property's prior ownership and use before acquiring it. EPA is currently considering proposed regulations defining what constitutes "all appropriate inquiries." In addition to

"all appropriate inquiries," each of the three forms of liability protection under federal law involves additional threshold requirements the prospective developer must satisfy.

Although a full discussion of liability issues and protections under these laws is well beyond the scope of this brief article, the essential message is that new laws have created opportunities for prospective developers of brownfields sites and that prospective developers should carefully evaluate those opportunities in consultation with a qualified environmental consultant such as Pyramid Environmental, and experienced legal counsel.

D. Marsh Prause is an environmental attorney with Smith Moore LLP in Greensboro, NC. He can be reached at (336) 378-5380 or by e-mail at marsh.prause@smithmoorelaw.com.

BROWNFIELDS UPDATE

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PYRAMID

ENVIRONMENTAL & ENGINEERING, P.C.

700 North Eugene Street- Greensboro, North Carolina 27401

Phone: 336.335.3174 or Toll Free 1.866.545.9507

FAX: 336.691.0648 Email: info@pyramidenvironmental.com

Check us out on the web at:

www.pyramidenvironmental.com