

Brownfields Agreement Shell Document

The Brownfields Agreement (BFA) shell document, formerly known as Appendix B on this website, has been updated as of June, 2003. *The document will be prepared by the BF Project Manager, based on site-specific information and concerns for a Brownfields Property.* Below is an example shell document used to create a draft BFA to be sent to the Prospective Developer.

NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

IN THE MATTER OF: [Name of Prospective Developer]
UNDER THE AUTHORITY OF THE) BROWNFIELDS AGREEMENT re:
BROWNFIELDS PROPERTY REUSE ACT) [site name]
OF 1997, N.C.G.S. § 130A-310.30, et seq.) [site address]
) City, County
) Brownfields Project Number:

I. INTRODUCTION

This Brownfields Agreement ("Agreement") is entered into by the North Carolina Department of Environment and Natural Resources ("DENR") and **[name of Prospective Developer]** (collectively the "Parties") pursuant to the Brownfields Property Reuse Act of 1997, N.C.G.S. § 130A-310.30, et seq. (the "Act").

[Introductory information here.] A map showing the location of the property which is the subject of this Agreement is attached hereto as Exhibit 1.

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Section VIII (Certification), Section IX (DENR's Covenant Not to Sue and Reservation of Rights) and Section X (Prospective Developer's Covenant Not to Sue), the potential liability of **[name of Prospective Developer]** for contaminants at the property which is the subject of this Agreement.

The Parties agree that **[name of Prospective Developer]**'s entry into this Agreement, and the actions undertaken by **[name of Prospective Developer]** in accordance with the Agreement, do not constitute an admission of any liability by **[name of Prospective Developer]**.

The resolution of this potential liability, in exchange for the benefit **[name of Prospective Developer]** shall provide to DENR, is in the public interest.

[Address compliance with N.C. Environmental Policy Act, N.C.G.S. § 113A-1, et seq., if public moneys or lands are involved and there will be environmental effect.]

II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in the Act or elsewhere in N.C.G.S. 130A, Article 9 shall have the meaning assigned to them in those statutory provisions, including any amendments thereto.

1. "Property" shall mean the Brownfields Property which is the subject of this Agreement, and which is described and depicted in Exhibit 1 of this Agreement.
2. "Prospective Developer" shall mean **[name of Prospective Developer]**.
3. **Add land use definitions based on intended redevelopment.**

III. STATEMENT OF FACTS

4. **[Include in this section, in addition to the provisions appearing here, only those facts relating to the Property that are relevant; avoid adding information that relates only to actions or parties that are outside of this Agreement.]** The Property comprises ____ acres. Prospective Developer has committed itself to redevelopment for no uses other than _____.
5. The Property is bordered to the north by _____, to the south by _____, to the east by _____, and to the west by _____.
6. Prospective Developer obtained or commissioned the following reports, referred to hereinafter as the "Environmental Reports," regarding the property:

Title	Prepared By	Date of Report

7. For purposes of this Agreement, DENR relies on the following representations by Prospective Developer as to prior use of the Property:

PUT THOSE REPRESENTATIONS HERE

8. The most recent environmental sampling at the Property reported in the Environmental Reports occurred on _____, 200_. The following table forth, for contaminants present at the Property above unrestricted use standards, the maximum concentration found at each sample location and the applicable standard:

a. Groundwater contaminants (in micrograms per liter, the equivalent of parts per billion), the standards for which are in Title 15A of the North Carolina Administrative Code, Subchapter 2L, Rule .0202:

Groundwater Contaminant	Sample Location	Date of Max. Concentration Sampling	Maximum Concentration above Std.	Standard µg/l

b. Soil contaminants (in milligrams per kilogram, the equivalent of parts per million), the standards for which are derived using the Guidelines of the Inactive Hazardous Sites Branch of DENR's Superfund Section:

Soil	Contaminant	Sample Location	Depth	Date of Max. Concentration Sampling	Maximum Concentration above Std.	Standard mg/kg

9. For purposes of this Agreement DENR relies on Prospective Developer's representations that Prospective Developer's involvement with the Property has been limited to obtaining or commissioning the Environmental Reports, preparing and submitting to DENR a Brownfields Letter of Intent dated _____, 200_, and the following:

a. On _____, 200_, Prospective Developer **[purchased][contracted to purchase]** the Property **(if either applies)**.

10. Prospective Developer has provided DENR with information, or sworn certifications regarding that information on which DENR relies for purposes of this Agreement, necessary to demonstrate that:

a. Prospective Developer and any parent, subsidiary, or other affiliate has substantially complied with federal and state laws, regulations and rules for protection of the environment, and with the other agreements and requirements cited at N.C.G.S. § 130A-310.32(a)(1);

b. As a result of the implementation of this Agreement, the Property will be suitable for the uses specified in the Agreement while fully protecting public health and the environment;

c. Prospective Developer's reuse of the Property will produce a public benefit commensurate with the liability protection provided Prospective Developer hereunder;

d. Prospective Developer has or can obtain the financial, managerial and technical means to fully implement this Agreement and assure the safe use of the Property; and

e. Prospective Developer has complied with all applicable procedural requirements.

11. Prospective Developer has paid the \$2,000 fee to seek a brownfields agreement required by N.C.G.S. § 130A-310.39(a)(1). Pursuant to N.C.G.S. § 130A-310.39(a)(2), the procedure upon which Prospective Developer and DENR have agreed for payment of the full cost to DENR and the North Carolina Department of Justice ("DOJ") of all activities related to this Agreement is that Prospective Developer shall pay any amount by which DOJ's hours, multiplied by \$36.24, exceed the \$2,000 fee referenced above in this paragraph. (DENR has incurred no costs.)

IV. BENEFIT TO COMMUNITY

12. The redevelopment of the Property proposed herein would provide the following public benefits:

a. a return to productive use of the Property;[use only where property's idle]

b. an increase in the Property's productivity;[use where property's currently in use]

_. a spur to additional community redevelopment, through improved neighborhood appearance and otherwise;[use where surrounding area's depressed]

_. [use where # known: "approximately ___] jobs;

_. ["additional" (if applicable)]["retail"]["office"]["other?"] space for the area;

_. tax revenue for affected jurisdictions;

_. "smart growth" through use of land in an already developed area, which avoids development of land beyond the urban fringe ("greenfields").

_. any additional benefits

V. WORK TO BE PERFORMED

__. **[If no active remediation is to be performed]** Based on the information in the Environmental Reports, and subject to imposition of and compliance with the land use restrictions set forth below, and subject to all other provisions of this paragraph and Section IX of this Agreement (reservation of Rights and DENR's Covenant Not to Sue and Reservation of Rights), Prospective Developer shall not be performing any active remediation at the property.

__. **[Or, if remediation activities are to be performed, include here provisions relating to agency approvals, reporting, any required financial assurances, any petroleum underground storage tanks, etc, and:**

a. Any remediation to be conducted on the property, including:

i. A description of specific areas where remediation is to be conducted.

ii. The remediation method or methods to be employed.

ii. The resources that Prospective Developer will make available.

iv. A schedule of remediation activities.

v. Applicable remediation standards.

vi. A schedule and the method or methods for evaluating the remediation.]

__. By way of the Notice of Brownfields Property referenced below in paragraph ___, Prospective Developer shall impose the following land use restrictions under the Act, running with the land, to

make the Property safe for the uses specified in this Agreement while fully protecting public health and the environment. **[Following is a list of standard land use restrictions.]**

_. No use other than the following may be made of the Property: **[list use(s) we've approved]**

_. Surface water and underground water at the Property may not be used for any purpose without the approval of DENR or its successor in function.

_. No activities that encounter, expose, remove or use groundwater (for example, installation of water supply wells, fountains, ponds, lakes or swimming pools, or construction or excavation activities that encounter or expose groundwater) may occur on the Property without prior sampling and analysis of groundwater to the satisfaction of DENR or its successor in function in any areas proposed for such activities, and submittal of the analytical results to DENR or its successor in function. If such results disclose to DENR or its successor in function contamination in excess of North Carolina's groundwater quality standards, the proposed activities may not occur without the approval of DENR or its successor in function on such conditions as DENR or its successor in function imposes, including at a minimum legal approval of plans and procedures to protect public health and the environment during the proposed activities.

_. Soil underlying paved surfaces and buildings at the Property may not be exposed without prior sampling and analysis of such soil to the satisfaction of DENR or its successor in function, and submittal of the analytical results to DENR or its successor in function. If such results disclose contamination in excess of the applicable standards as determined by DENR or its successor in function, the soil may not be exposed without the approval of DENR or its successor in function on such conditions as DENR or its successor in function imposes, including at a minimum legally approved plans and procedures to protect public health and the environment during the activities that would expose such soil.

_. Soil not previously sampled for contaminants may not be exposed without a minimum of five (5) business days advance written notice to DENR or its successor in function. At the time such soil is exposed, DENR or its successor in function may inspect and sample, or require sampling of, the exposed soil for contaminants. If soil contamination is discovered that DENR or its successor in function determines would likely contaminate groundwater even if capped, or that may pose an imminent threat to public health or the environment if exposed, as much soil as DENR or its successor in function requires shall be removed and disposed of in accordance with applicable law, and any other actions that DENR or its successor in function requires to make the Property suitable for the uses specified in this Agreement while fully protecting public health and the environment shall be taken. If soil contamination is discovered that DENR or its successor in function determines would not contaminate groundwater if capped, or pose an imminent threat to public health or the environment if exposed, as much soil as DENR or its successor in function requires shall be removed and disposed of in accordance with applicable law or capped to the satisfaction of DENR or its successor in function.

_. Soil, landscaping and contours at the Property may not be disturbed without the approval of DENR or its successor in function, except for mowing and pruning of above-ground vegetation.

_. No mining may be conducted on or under the Property, including, without limitation, extraction of coal, oil, gas or any other minerals or non-mineral substances.

_. No basements may be constructed on the Property unless they are, as determined by DENR or its successor in function, vented in conformance with applicable building codes.

__. None of the contaminants known to be present in the environmental media at the Property, including those listed in paragraph __ of this Agreement, may be used or stored at the Property without the prior approval of DENR or its successor in function, except in *de minimis* amounts for cleaning and other routine housekeeping activities.

__. The Property may not be used as a park or for sports of any kind, including, but not limited to, golf, football, soccer and baseball, without the approval of DENR or its successor in function.

__. The Property may not be used for agriculture, grazing, timbering or timber production.

__. The Property may not be used as a playground, or for child care centers or schools.

__. The Property may not be used for kennels, private animal pens or horse-riding.

__. During January of each year after this Agreement becomes effective, the then current owner of any part of the Property shall submit a notarized Land Use Restrictions Update to DENR or its successor in function certifying that the Notice of Brownfields Property containing these land use restrictions remains recorded at the _____ County Register of Deeds office, and that the land use restrictions are being complied with **[Additional annual certifications may be necessary based on site-specific circumstances.]**

__. **[Use if applicable.]** Within thirty (30) days after the effective date of this Agreement, Prospective Developer shall notify DENR that it is ready to effect the abandonment of all groundwater monitoring wells, injection wells, recovery wells, piezometers and other man-made points of groundwater access at the Property in accordance with Subchapter 2C of Title 15A of the North Carolina Administrative Code. Unless DENR notifies Prospective Developer within ten (10) days of receiving such notification to refrain from such abandonment, Prospective Developer shall effect said abandonment and shall, within thirty (30) days after concluding such abandonment, provide DENR a report setting forth the procedures and results.

__. The desired result of the above-referenced **["remediation and" if there's active remediation]** land use restrictions is to make the Property suitable for the uses specified in the Agreement while fully protecting public health and the environment.

__. The guidelines, including parameters, principles and policies within which the desired results are to be accomplished are the Guidelines of the Inactive Hazardous Sites Branch of DENR's Superfund Section, as embodied in their most current version.

__. The consequences of achieving or not achieving the desired results will be that the Property is or is not suitable for the uses specified in the Agreement while fully protecting public health and the environment.

VI. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

__. Commencing upon the **[date that it acquires title to the Property]****["effective date of this Agreement" if Prospective Developer already owns Property]**, Prospective Developer agrees to provide to DENR, its authorized officers, employees, representatives, and all other persons performing response actions under DENR oversight, an irrevocable right of access at all reasonable times to the Property and to any other property to which access is required for the

implementation of response actions at the Property, to the extent access to such other property is controlled by the Prospective Developer, for the purposes of performing or overseeing response actions at the Property under applicable law. DENR agrees to provide reasonable notice to the Prospective Developer of the timing of response actions to be undertaken at the Property. Notwithstanding any provision of this Agreement, DENR retains all of its authorities and rights, including enforcement authorities related thereto, under the Act and any other applicable statute or regulation, including any amendments thereto.

____. DENR has approved, pursuant to N.C.G.S. § 130A-310.35, a Notice of Brownfields Property for the Property containing, inter alia, the land use restrictions set forth in Section V (Work to Be Performed) of this Agreement. Pursuant to N.C.G.S. §130A-310.35(b), within 15 days of the effective date of this Agreement Prospective Developer shall file the Notice of Brownfields Property in the County, North Carolina register of deeds' office, and within three days thereafter shall furnish DENR a copy containing a certification by the register of deeds that the Notice has been recorded and the book and page number where recorded.

____. This Agreement shall be attached as Exhibit A to the Notice of Brownfields Property. Subsequent to recordation of said Notice, any deed or other instrument conveying an interest in the Property shall contain the following notice: "The property which is the subject of this instrument is subject to the Brownfields Agreement attached as Exhibit A to the Notice of Brownfields Property recorded in the _____ County land records, Book _____, Page _____." A copy of any such instrument shall be sent to the persons listed in Section XV (Notices and Submissions), though financial figures related to the conveyance may be redacted.

____. The Prospective Developer shall ensure that assignees, successors in interest, lessees, and sublessees, of the Property shall provide the same access and cooperation. The Prospective Developer shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property are consistent with this Section, Section V (Work to be Performed) and Section XI (Parties Bound/Transfer of Covenant) of this Agreement.

VII. DUE CARE/COOPERATION

____. The Prospective Developer shall exercise due care at the Property with respect to regulated substances and shall comply with all applicable local, State, and federal laws and regulations. The Prospective Developer agrees to cooperate fully with any remediation of the Property by DENR and further agrees not to interfere with any such remediation. DENR agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Prospective Developer's operations by any such remediation. In the event the Prospective Developer becomes aware of any action or occurrence which causes or threatens a release of contaminants at or from the Property, the Prospective Developer shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under N.C.G.S. 130A-310.1 and 143-215.84, and Section 103 of 9603, or any other law, immediately notify DENR of such a CERCLA, 42 U.S.C. release or threatened release.

VIII. CERTIFICATION

____. By entering into this agreement, the Prospective Developer certifies that, without DENR approval, it will make no use of the Property other than that committed to in the Brownfields Letter of Intent dated _____ by which it applied for this Agreement. That use is _____. Prospective Developer also certifies that to the best of its knowledge and belief it has fully and accurately disclosed to DENR all

information known to Prospective Developer and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any regulated substances at the Property and to its qualification for this Agreement, including the requirement that it not have caused or contributed to the contamination at the Property.

IX. DENR'S COVENANT NOT TO SUE AND RESERVATION OF RIGHTS

___ . Unless one of the following applies, Prospective Developer shall not be liable to DENR, and DENR covenants not to sue Prospective Developer, for remediation of the Property except as specified in this Agreement:

- a. The Prospective Developer fails to comply with this Agreement.
- b. The activities conducted on the Property by or under the control or direction of the Prospective Developer increase the risk of harm to public health or the environment, in which case Prospective Developer shall be liable for remediation of the areas of the Property, remediation of which is required by this Agreement, to the extent necessary to eliminate such risk of harm to public health or the environment.
- c. A land use restriction set out in the Notice of Brownfields Property required under N.C.G.S. 130A-310.35 is violated while the Prospective Developer owns the Property, in which case the Prospective Developer shall be responsible for remediation of the Property to current standards.
- d. The Prospective Developer knowingly or recklessly provided false information that formed a basis for this Agreement or knowingly or recklessly offers false information to demonstrate compliance with this Agreement or fails to disclose relevant information about contamination at the Property.
- e. New information indicates the existence of previously unreported contaminants or an area of previously unreported contamination on or associated with the Property that has not been remediated to current standards, unless this Agreement is amended to include any previously unreported contaminants and any additional areas of contamination. If this Agreement sets maximum concentrations for contaminants, and new information indicates the existence of previously unreported areas of these contaminants, further remediation shall be required only if the areas of previously unreported contaminants raise the risk of the contamination to public health or the environment to a level less protective of public health and the environment than that required by this Agreement.
- f. The level of risk to public health or the environment from contaminants is unacceptable at or in the vicinity of the Property due to changes in exposure conditions, including (i) a change in land use that increases the probability of exposure to contaminants at or in the vicinity of the Property or (ii) the failure of remediation to mitigate risks to the extent required to make the Property fully protective of public health and the environment as planned in this Agreement.
- g. The Department obtains new information about a contaminant associated with the Property or exposures at or around the Property that raises the risk to public health or the environment associated with the Property beyond an acceptable range and in a manner or to a degree not anticipated in this Agreement.
- h. The Prospective Developer fails to file a timely and proper Notice of Brownfields Property under N.C.G.S. 130A-310.35.

___ Except as may be provided herein, DENR reserves its rights against Prospective Developer as to liabilities beyond the scope of the Act, including those regarding petroleum underground storage tanks pursuant to Part 2A, Article 21A of Chapter 143 of the General Statutes.

___ This Agreement does not waive any applicable requirement to obtain a permit, license or certification.

X. PROSPECTIVE DEVELOPER'S COVENANT NOT TO SUE

___ In consideration of DENR's Covenant Not To Sue in Section IX of this Agreement and in recognition of the absolute State immunity provided in N.C.G.S. §130A-310.37(b), the Prospective Developer hereby covenants not to sue and not to assert any claims or causes of action against DENR, its authorized officers, employees, or representatives with respect to any action implementing the Act, including negotiating, entering, monitoring or enforcing this Agreement or the above-referenced Notice of Brownfields Property.

XI. PARTIES BOUND & TRANSFER/ASSIGNMENT NOTICE

___ This Agreement shall apply to and be binding upon DENR, and on the Prospective Developer, its officers, directors, employees, and agents. Each Party's signatory to this Agreement represents that she or he is fully authorized to enter into the terms and conditions of this Agreement and to legally bind the Party for whom she or he signs.

___ No later than fourteen (14) days prior to any transfer or assignment by Prospective Developer of any interest in the Property, Prospective Developer shall provide in writing to DENR the transferee or assignee's name, mailing address, telephone and facsimile numbers, and e-mail address.

XII. DISCLAIMER

___ This Agreement in no way constitutes a finding by DENR as to the risks to public health and the environment which may be posed by regulated substances at the Property, a representation by DENR that the Property is fit for any particular purpose, nor a waiver of Prospective Developer's duty to seek applicable permits or of the provisions of N.C.G.S. § 130A-310.37.

XIII. DOCUMENT RETENTION

___ The Prospective Developer agrees to retain and make available to DENR all business and operating records, contracts, site studies and investigations, and documents relating to operations at the Property, for ten years following the effective date of this Agreement, unless otherwise agreed to in writing by the Parties. At the end of ten years, the Prospective Developer shall notify DENR of the location of such documents and shall provide DENR with an opportunity to copy any documents at the expense of DENR.

XIV. PAYMENT OF ENFORCEMENT COSTS

___ If the Prospective Developer fails to comply with the terms of this Agreement, including, but not limited to, the provisions of Section V (Work to be Performed), it shall be liable for all litigation and other enforcement costs incurred by DENR to enforce this Agreement or otherwise obtain compliance.

XV. NOTICES AND SUBMISSIONS

___ Unless otherwise required by DENR or a Party notifies the other Party in writing of a change in contact information, all notices and submissions pursuant to this Agreement shall be sent by prepaid first class U.S. mail, as follows:

for DENR:

[Project Manager]
N.C. Division of Waste Management
Brownfields Program
1646 Mail Service Center
Raleigh, NC 27699-1646

for Prospective Developer:

[Name]
[Company]
[Address]

Notices and submissions sent by prepaid first class U.S. mail shall be effective on the third day following postmarking. Notices and submissions sent by hand or by other means affording written evidence of date of receipt shall be effective on such date.

XVI. EFFECTIVE DATE

___ This Agreement shall become effective on the date the Prospective Developer signs it, after receiving it, signed, from DENR. Prospective Developer shall sign the Agreement within seven (7) days following such receipt.

XVII. TERMINATION OF CERTAIN PROVISIONS

___ If any Party believes that any or all of the obligations under Section VI (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the Party requesting such termination receives written agreement from the other Party to terminate such provision(s).

XVIII. CONTRIBUTION PROTECTION

___ With regard to claims for contribution against Prospective Developer in relation to the subject matter of this Agreement, Prospective Developer is entitled to protection from 130A-310.37(a)(5)-(6). The such claims to the extent provided by N.C.G.S. subject matter of this Agreement is all remediation taken or to be taken and response costs incurred or to be incurred by DENR or any other person in relation to the Property.

___ The Prospective Developer agrees that, with respect to any suit or claim for contribution brought by it in relation to the subject matter of this Agreement, it will notify DENR in writing no later than 60 days prior to the initiation of such suit or claim.

___ The Prospective Developer also agrees that, with respect to any suit or claim for contribution brought against it in relation to the subject matter of this

Agreement, it will notify DENR in writing within 10 days of service of the complaint on it.

XIX. PUBLIC COMMENT

____. This Agreement shall be subject to a public comment period of at least sixty days starting the day after publication of the approved summary of the Notice of Intent to Redevelop a Brownfields Property required by N.C.G.S. § 130A-310.34 in the North Carolina Register, or the day after publication of the same in a newspaper of general circulation serving the area in which the Property is located, whichever occurs later. After expiration of that period, or following a public meeting if DENR holds one pursuant to N.C.G.S. § 130A-310.34(c), DENR may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

IT IS SO AGREED:
NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL
RESOURCES

By:

Linda M. Culpepper
Deputy Director, Division of Waste Management

Date

IT IS SO AGREED:
[Name of Prospective Developer]
By:

Name/Title Typed:

Date