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BROWNFIELDS PROGRAMS AND TAX INCENTIVES ARE STIMULATING THE REDEVELOPMENT OF BROWNFIELDS PROPERTIES IN NORTH CAROLINA AND SOUTH CAROLINA

Farah Rodenberger, Esq.*

I. INTRODUCTION

“Years ago, people were less aware of how disposing of chemical wastes might affect public health and the environment.”¹ Concentrated or continuous, chemical waste disposals resulted in uncontrolled or abandoned hazardous waste sites, such as deserted warehouses and landfills.² Concern over the extent of this problem led Congress to enact the Comprehensive Environmental Response, Compensation, and Liability Act³ (CERCLA) in 1980 to locate, investigate, and clean up the worst sites nationwide.⁴ Pursuant to the Superfund Program, as CERCLA is more commonly known,⁵ the United States Environmental Protection Agency (EPA) has the authority to regulate the cleanup of both high-risk

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¹ Environmental Protection Agency (EPA), Superfund: About Superfund, <http://www.epa.gov/superfund/about.htm> (last visited Sept. 16, 2005) [hereinafter “About Superfund”].

² *Id.*

³ Pub. L. No. 96-510, 94 Stat. 2767 (1980); 42 U.S.C. §§ 9601-9675 (2000).

⁴ See generally *id.*; see also About Superfund, *supra* note 1.

⁵ See EPA, SUPERFUND: 20 YEARS OF PROTECTING HUMAN HEALTH AND THE ENVIRONMENT 8 (2000), available at <http://www.epa.gov/superfund/action/20years/index.htm>.

contamination sites, known as Superfund sites,⁶ and lower-risk contamination sites, known as brownfields sites.⁷

In general, "the term 'brownfield site' means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."⁸ Brownfields sites do not include those facilities that are listed or proposed for listing on the National Priorities List (NPL),⁹ or a facility that is the subject of a planned or ongoing removal action under CERCLA.¹⁰

Under CERCLA and analogous state legislation,¹¹ private developers may face liability regardless of whether they have contributed by action or relationship to the release or threatened release of a hazardous substance.¹² As the owners or operators of a contaminated or potentially contaminated facility, they may be liable for cleanup costs.¹³ As a result, CERCLA has received criticism because these potential liabilities may encourage landowners to abandon their contaminated properties rather than redevelop

⁶ See 42 U.S.C. § 9601. In general, Superfund sites include those uncontrolled or abandoned places where hazardous waste is located, possibly affecting local ecosystems or people. See EPA, Superfund: Sites, <http://www.epa.gov/superfund/sites/index.htm> (last visited Oct. 25, 2005). The Superfund Program uses a variety of classifications to distinguish contaminated hazardous waste sites. See EPA, Superfund Site Classifications, <http://www.epa.gov/superfund/sites/siteclass/index.htm> (last visited Oct. 25, 2005).

⁷ 42 U.S.C. § 9601. For a description and definition of brownfields, see *infra* notes 8-10 and accompanying text.

⁸ 42 U.S.C. § 9601(39).

⁹ The NPL is the list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. 42 U.S.C. § 9605(a)(8)(B). The NPL is intended as a guide for the EPA in determining which sites warrant further investigation. *Id.* CERCLA authorizes two kinds of response actions: short-term removals, where actions may be taken to address releases or threatened releases requiring prompt response; and long-term remedial response actions, that permanently and significantly reduce the dangers associated with releases or threats of releases of hazardous substances that are serious, but not immediately life threatening. Long-term response actions can be conducted only at sites listed on the NPL. See generally EPA, Superfund: CERCLA Overview, <http://www.epa.gov/superfund/action/law/cercla.htm> (last visited Sept. 16, 2005).

¹⁰ See 42 U.S.C. § 9601(39)(B); see generally EPA, Brownfields Cleanup and Redevelopment Home Page, <http://www.epa.gov/brownfields/> (last visited Nov. 5, 2005).

¹¹ See, e.g., N.C. GEN. STAT. § 130A-310.7 (2003); S.C. CODE ANN. § 44-56-200(A) (2004).

¹² 42 U.S.C. § 9607(a).

¹³ *Id.*

them.¹⁴ Some scholars argue that the abandonment of contaminated properties results in urban sprawl, decreased tax revenues, and increased environmental justice issues.¹⁵ Both federal and state governments have responded to these growing concerns by enacting brownfields revitalization and tax legislation to encourage the redevelopment of brownfields and protect private developers from the strict and joint and several liability scheme¹⁶ under CERCLA.¹⁷

In 1995, the EPA responded to the growing number of brownfields properties by initiating its Brownfields Program,¹⁸ under which the EPA provided funds to local governments for use at projects for the redevelopment of contaminated properties.¹⁹ Congress enacted tax legislation in 1997, known as the Taxpayer Relief Act,²⁰ which provided prospective purchasers with incentives to stimulate cleanups and

¹⁴ See 147 CONG. REC. H2348-49 (daily ed. May 21, 2001) (statements of Rep. Gillmore and Rep. Duncan).

¹⁵ See Flannary P. Collins, *The Small Business Liability Relief and Brownfields Revitalization Act: A Critique*, 13 DUKE ENVTL. L. & POL'Y F. 303 (2003).

¹⁶ Under 42 U.S.C. § 9607(a)(4), owners, operators, or responsible parties may be liable for all costs of removal or remedial action, any necessary costs, damages, and the costs of any health assessment associated with hazardous substance removal.

¹⁷ Collins, *supra* note 15, at 304.

¹⁸ EPA's Brownfields Program:

is designed to empower states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. . . . [The] Brownfields Program provides financial and technical assistance for brownfields activities through an approach based on four main goals: Protecting the Environment[:] Addressing brownfields to ensure the health and well-being of people and the environment[:] Promoting Partnerships[:] Enhancing collaboration and communication to facilitate brownfields cleanup and reuse[:] Strengthening the Marketplace[:] Providing financial and technical assistance to bolster the private market[:] Sustaining Reuse[:] Redeveloping brownfields to enhance a community's long-term quality of life.

EPA, Brownfields Cleanup and Redevelopment: Brownfields Mission, <http://www.epa.gov/brownfields/mission.htm> (last visited Sept. 17, 2005) [hereinafter "Brownfields Mission"].

¹⁹ EPA, Brownfields Cleanup and Redevelopment: About Brownfields, <http://www.epa.gov/brownfields/about.htm> (last visited Oct. 7, 2005) [hereinafter "About Brownfields"].

²⁰ Pub. L. No. 105-34, 111 Stat. 788 (1997). The Brownfields Tax Incentive, Pub. L. No. 106-554, 114 Stat. 2763 (2000), and the Working Families Tax Relief Act of 2004, Pub. L. 108-311, 118 Stat. 1166 (2004), extended the Brownfields Tax Incentive through December 31, 2005. See <http://www.epa.gov/brownfields/bftaxinc.htm> (last visited Aug. 30, 2005).

redevelopments of brownfields in distressed urban and rural areas.²¹ Subsequently, on January 11, 2002, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act²² (Brownfields Act), whereby EPA's Brownfields Program became law.²³ The Brownfields Act was intended to boost funding for assessment and cleanup, enhance state response programs, and clarify Superfund liability.²⁴ Since 1995, many states have also implemented their own brownfields programs and tax incentives to stimulate cleanups and redevelopments of brownfields properties.²⁵

Business developers may be wary of brownfields primarily because of the possibility of facing environmental liability and the high costs associated with environmental cleanups.²⁶ Brownfields revitalization legislation offers certain protections against liability and permits developers to perform lesser cleanups determined by land use restrictions and other factors.²⁷ Legislation offers further financial incentives to develop brownfields in the form of deductions, tax exclusions, and other tax incentives.²⁸ Of course, business developers rarely select business locations based solely on the availability of brownfields programs and brownfields tax incentives.²⁹ Factors such as population, education, existing infrastructure, and access to transportation are critical in selecting a business location.³⁰ All other factors being equal, however, brownfields

²¹ Taxpayer Relief Act, Pub. L. No. 105-34 at § 941, 111 Stat. at 790.

²² Pub. L. No. 107-118, 115 Stat. 2356 (2002).

²³ 42 U.S.C. § 9607.

²⁴ EPA, THE NEW BROWNFIELDS LAW (Jan. 2002), available at <http://www.epa.gov/brownfields/pdf/bflawbrochure.pdf>.

²⁵ See *infra* Parts III & IV; see also EPA, State Brownfields and Voluntary Response Programs, http://www.epa.gov/brownfields/pubs/st_res_prog_report.htm (last visited Nov. 2, 2005).

²⁶ See Collins, *supra* note 15, at 304.

²⁷ 42 U.S.C. § 9607(o) (de minimis exemption).

²⁸ See generally Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788; Brownfields Tax Incentive, Pub. L. No. 106-554, 114 Stat. 2763; Working Families Tax Relief Act of 2004, Pub. L. 108-311, 118 Stat. 1166 (extending Brownfields Tax Incentive through December 31, 2005); see also EPA, Brownfields Cleanup and Redevelopment: Brownfields Tax Incentive, <http://www.epa.gov/brownfields/bftaxinc.htm> (last visited Aug. 30, 2005) [hereinafter "Tax Incentive"]; EPA, BROWNFIELDS TAX INCENTIVE FACT SHEET (June 2003), available at http://www.epa.gov/brownfields/facts/taxincentive_03.pdf [hereinafter "FACT SHEET"].

²⁹ See Robert H. Abrams, *Superfund and the Evolution of Brownfields*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 265, 277-87 (1997).

³⁰ *Id.*

programs and brownfields tax incentives may ultimately determine the final selection of a location for a business.

This article examines the federal Brownfields Program, tax incentives, and brownfields accomplishments. Parts III and IV will study the Brownfields Program in both North and South Carolina, finding that current brownfields legislation is encouraging the redevelopment of brownfields, which may thereby decrease urban sprawl, job loss, loss of tax revenues, and environmental justice problems.

II. THE FEDERAL BROWNFIELDS PROGRAM, TAX INCENTIVES, AND ACCOMPLISHMENTS

A. An Overview of the Federal Brownfields Program

Generally, the Brownfields Program³¹ empowers states and communities to work together to prevent, assess, clean up, and reuse brownfields, while at the same time increasing local tax bases, facilitating job growth, utilizing existing infrastructure, and improving and protecting the environment.³² However, certain properties may not be redeveloped under the Brownfields Act, including Superfund sites (most of which are listed on the NPL³³), sites subject to certain enforcement and removal actions, and certain other properties.³⁴ There are an estimated 450,000 brownfields in the United States,³⁵ although some estimates are as high as one million.³⁶

More specifically, the Brownfields Act has:

1. Increased funding authority under the Brownfields Program up to \$200 million per year;³⁷
2. Expanded eligibility under the Program to new entities, properties, and activities;³⁸

³¹ See *supra* note 18.

³² 42 U.S.C. § 9601(39)(C); see also Brownfields Mission, *supra* note 18, at <http://www.epa.gov/brownfields/mission.htm>.

³³ 42 U.S.C. § 9605(a)(8)(B); see also *supra* note 9.

³⁴ 42 U.S.C. § 9601(39)(B).

³⁵ About Brownfields, *supra* note 19.

³⁶ Linda Roeder, *Brownfields: Bill Congress Sends to White House Includes Brownfields Redevelopment*, 197 DAILY ENVTL. REP. A-1 (Oct. 13, 2004).

³⁷ 42 U.S.C. § 9604(k).

³⁸ *Id.*

3. Expanded the Program to cover certain low risk petroleum contamination where there is no viable responsible party, and to provide funding up to \$50 billion;³⁹
4. Expanded the Program to cover controlled substances under the Control Substances Act;⁴⁰
5. Expanded the Program to cover mine-scarred land;⁴¹
6. Increased funding for assessments and cleanups;⁴²
7. Augmented roles of states and tribes;⁴³
8. Provided authority for Brownfields research, training, and technical assistance;⁴⁴
9. Clarified liability under CERCLA, intending to lessen the burden on prospective purchasers,⁴⁵ innocent landowners,⁴⁶ and contiguous property owners;⁴⁷ and
10. Clarified liability protection for certain small volume contributors and contributors of municipal solid waste.⁴⁸

Grants through the EPA serve as the foundation of the Brownfields Program. The funding available under the Brownfields Program facilitating redevelopment includes: assessment grants,⁴⁹ revolving loan fund (RLF) grants,⁵⁰ job training grants,⁵¹ and cleanup grants.⁵² The

³⁹ *Id.* at § 9601(39)(D)(ii)(II).

⁴⁰ 21 U.S.C. § 802 (2000); 42 U.S.C. § 9601(39)(D)(ii)(I).

⁴¹ 42 U.S.C. § 9601(39)(D)(iii).

⁴² *Id.* at § 9604(k).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at §§ 9601(40) & 9607(r)(1).

⁴⁶ *Id.* at § 9601(35).

⁴⁷ 42 U.S.C. §§ 9604(k) & 9607(q).

⁴⁸ *Id.* at § 9604(k).

⁴⁹ See *id.*; EPA, Brownfields Cleanup and Redevelopment: Brownfields Assessment Pilots/Grants, http://www.epa.gov/brownfields/assessment_grants.htm (last visited Oct. 10, 2005).

⁵⁰ 42 U.S.C. § 9604(k). RLFs enable states, political subdivisions, and Indian tribes to make low interest loans to carryout cleanup activities at brownfields properties. See EPA, Brownfields Cleanup and Redevelopment: Brownfields Cleanup Revolving Loan Fund Pilots/Grants, <http://www.epa.gov/brownfields/rlfst.htm> (last visited Oct. 10, 2005).

⁵¹ 42 U.S.C. § 9604(k). "EPA, other federal agencies, local job training organizations, community colleges, labor groups, and others have established partnerships to develop long-term plans for fostering workforce development through environmental training, ensure the recruitment of trainees from socio-economically disadvantaged communities,

Brownfields Act authorizes up to \$50 million per year for building and enhancing state and tribal response programs, and expands activities that are eligible for funding.⁵³ While the majority of loans and grants under the Brownfields Act involves funding “eligible entities,” such as state, local, quasi-governmental, and not-for-profit entities,⁵⁴ the Act also provides funding to private parties through RLFs administered by an “eligible entity.”⁵⁵

To qualify for a loan under the Brownfields Act, a prospective purchaser has to locate an eligible property and request a prospective purchaser agreement from the federal government delineating the endpoints of the purchaser’s liability.⁵⁶ The purchaser must then conduct an “all appropriate inquiry”⁵⁷ (AAI) and formulate an AAI report.⁵⁸ The AAI report is used to show that the defendant carried out all inquiries into the previous ownership and uses of the facility and took reasonable steps to stop any continuing release of hazardous substances; prevent any threatened future release; and prevent or limit any human, environmental, or natural resource exposure to previously released hazardous substances.⁵⁹

On October 21, 2005, the EPA finalized its AAI Rule⁶⁰ under the Brownfields Act.⁶¹ This final rule,⁶² which will change the way in which

provide quality worker-training, and allow local residents an opportunity to qualify for jobs developed as a result of Brownfields efforts.” EPA, Brownfields Cleanup and Redevelopment: Brownfields Job Training Pilots/Grants, <http://www.epa.gov/brownfields/job.htm> (last visited Oct. 10, 2005).

⁵² 42 U.S.C. § 9604(k). “Cleanup grants provide funding for a grant recipient to carry out cleanup activities at brownfield sites.” EPA, Brownfields Cleanup and Redevelopment: Brownfields Cleanup Grants, http://www.epa.gov/brownfields/cleanup_grants.htm (last visited Aug. 22, 2005).

⁵³ 42 U.S.C. § 9604(k)(12).

⁵⁴ *Id.* at § 9604(k)(1).

⁵⁵ *Id.* at § 9604(k)(3)(B).

⁵⁶ See Christopher Brown, *All Appropriate Inquiry Audit Leads to Continuing Obligations, Speaker Says*, 183 DAILY ENVTL. REP. A-11 (Sept. 24, 2004).

⁵⁷ See 42 U.S.C. § 9601(35)(B).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See generally EPA, Brownfields Cleanup and Redevelopment, All Appropriate Inquiries Final Rule, http://www.epa.gov/brownfields/aa/aa_final_factsheet.htm (last visited Nov. 5, 2005) [hereinafter “AAI Final Rule”].

⁶² The final rule is effective on November 1, 2006—one year after being published in the Federal Register. See 70 Fed. Reg. 66,069–66,113 (Nov. 1, 2005) (to be codified at 40 C.F.R. 312). “Until November 1, 2006, both the standards and practices included in the

environmental site assessments are conducted, will have to be followed by prospective developers who wish to qualify for one of the Landowner Liability Protections (LLPs)⁶³ provided by the Brownfields Act.⁶⁴ Parties who receive grants under the EPA's Brownfields Grant program to assess and characterize properties will have to comply with the new AAI standards.⁶⁵ According to the EPA, inquiries under the AAI Rule include:

- interviews with past and present owners, operators, and occupants;
- reviews of historical sources of information; reviews of federal, state, tribal, and local government records;
- visual inspections of the facility and adjoining properties;
- commonly known or reasonably ascertainable information; and
- the degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination.⁶⁶

The AAI report may not necessarily encompass sampling and analysis,⁶⁷ which can be costly. However, the report may not end an inquiry depending on the contamination discovered: in other words, the prospective purchaser may have to conduct sampling and analysis as part of the required environmental due diligence.⁶⁸

Continuing obligations may also be imposed on the prospective purchaser aside from any required cleanup; these obligations will include complying with land use restrictions, taking reasonable steps to prevent releases, avoiding the worsening of the contamination, providing access and assistance to state and federal regulators as needed, and complying with requests for information from regulators.⁶⁹ The EPA has issued non-

final regulation and the current interim standards established by Congress for all appropriate inquiries . . . will satisfy the statutory requirements for the conduct of all appropriate inquiries." AAI Final Rule, *supra* note 61.

⁶³ See EPA, Cleanup Enforcement: Landowner Liability Protections, <http://www.epa.gov/compliance/cleanup/redevelop/landowner.html> (last visited Nov. 5, 2005).

⁶⁴ Pub. L. No. 107-118 at §§ 221 & 222, 115 Stat. 2356. The AAI requirements are applicable to any party who may potentially claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner. See AAI Final Rule, *supra* note 61.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See 42 U.S.C. § 9601(35)(B).

⁶⁸ *Id.*

⁶⁹ *Id.*

binding guidelines that are available to the public for evaluating potential liability and obligations.⁷⁰ Following the completion of the AAI report, the prospective purchaser and the EPA may negotiate a prospective purchaser agreement containing certain covenants-not-to-sue concerning past contamination at the property.⁷¹

B. Federal Tax Incentives Specifically Associated with the Redevelopment of Brownfields

The Taxpayer Relief Act⁷² includes tax incentives to stimulate cleanups and redevelopments of brownfields in distressed urban and rural areas.⁷³ Tax incentives do not apply to the redevelopment of properties listed or proposed for listing on EPA's NPL, which designates the majority of Superfund sites.⁷⁴ The Act does not provide a tax credit for environmental cleanup costs, but provides that property owners can fully deduct eligible environmental cleanup costs as current expenses in the year the owners incur them rather than capitalizing costs as long-term assets.⁷⁵ These tax incentives lower a company's taxable income, which may indirectly reduce the company's tax burden.⁷⁶ Theoretically, the savings generated in the early years of a company's operations should help the company apply investments to new equipment, infrastructure, and productivity.

A taxpayer must meet two basic requirements to qualify for the federal brownfields tax incentives: first, the property owner must be the taxpayer, and second, the taxpayer must hold the property for only business or

⁷⁰ See generally EPA, Brownfields Cleanup and Redevelopment: Brownfields Liability, <http://www.epa.gov/brownfields/liab.htm> (last visited Oct. 10, 2005).

⁷¹ *Id.*; see also MEMORANDUM FROM OFFICE OF SITE REMEDIATION ENFORCEMENT TO THE SUPERFUND SENIOR POLICY MANAGERS ABOUT THE BONA FIDE PROSPECTIVE PURCHASERS AND THE NEW AMENDMENTS TO CERCLA (May 31, 2002), available at <http://www.epa.gov/brownfields/pdf/bfpp0502.pdf>.

⁷² Pub. L. No. 105-34, 111 Stat. 788; see *supra* note 20.

⁷³ See generally Tax Incentive, *supra* note 28, at <http://www.epa.gov/brownfields/bftaxinc.htm>.

⁷⁴ Taxpayer Relief Act § 941(c)(2)(B); see EPA, Brownfields Cleanup and Redevelopment: Brownfields Tax Incentive—Frequently Asked Questions, <http://www.epa.gov/swerosps/bf/html-doc/taxfaq.htm> (last visited Oct. 12, 2005) [hereinafter "FAQ"].

⁷⁵ Taxpayer Relief Act § 941(a).

⁷⁶ FACT SHEET, *supra* note 28, at http://www.epa.gov/swerosps/bf/facts/taxincentive_03.htm.

income generation purposes.⁷⁷ In other words, the tax incentive is not available to a property owner using the land for personal purposes.⁷⁸ The expenses that a qualified taxpayer may deduct include cleanup expenses that are paid or incurred in connection with the abatement or control of hazardous substances.⁷⁹ In general, eligible expenses include: site assessment and investigation, site monitoring, cleanup costs, operations and maintenance costs, state voluntary cleanup program oversight fees, and costs of removal of demolition debris.⁸⁰

C. *The Accomplishments of the Federal Brownfields Program*

The EPA has reported that since the inception of its Brownfields Program, it has awarded 709 assessment, cleanup, and job-training grants totaling \$190 million; 189 RLF grants totaling over \$165 million; and 150 cleanup grants totaling \$26.8 million.⁸¹ These statistics include awards of \$100 million to states and tribes.⁸² In addition, the U.S. Department of Housing and Urban Development has awarded \$22.7 million in grants and \$87.8 million in loans associated with brownfields redevelopment.⁸³

The federal government estimated that federal tax incentives for site cleanups would decrease federal tax revenues by approximately \$300 million annually,⁸⁴ but the tax incentive may simultaneously leverage as much as \$3.4 billion in private investment and return approximately 8,000

⁷⁷ Taxpayer Relief Act § 941(c). The EPA provides a good example to distinguish deductible and non-deductible expenses: the cost of building an access road simply to speed up the construction of a building is not deductible, but the cost of building the road is deductible where it is paid or incurred in connection with the abatement and control of hazardous substances at the property, such as providing actual access to the hazardous substances. FAQ, *supra* note 74, at <http://www.epa.gov/swerosps/bf/html-doc/taxfaq.htm>. The cost of removing products that are a part of any structure of a building and result in exposure within the building (such as lead-based paint or asbestos) are also not deductible. *Id.*

⁷⁸ Taxpayer Relief Act § 941(c).

⁷⁹ FAQ, *supra* note 74, at <http://www.epa.gov/swerosps/bf/html-doc/taxfaq.htm>.

⁸⁰ *Id.*

⁸¹ Press Release, EPA, 75.9 Million in Brownfield Grants Announced (May 10, 2005), available at <http://www.epa.gov/brownfields/news/pr051005.pdf>. In Fiscal Year 2005 alone, EPA reported that 218 applicants, including three tribal nations, were awarded 302 grants totaling \$75.9 million. *Id.* These included 172 assessment grants, worth \$33.6 million; 106 cleanup grants, totaling \$19.3 million; and thirteen RLF grants, totaling \$20.8 million. *Id.*

⁸² Christopher Brown, *EPA Report Shows Progress by Agencies on Commitments Made in Action Agenda*, 184 DAILY ENVTL. REP. A-11 (Sept. 24, 2004).

⁸³ *Id.*

⁸⁴ See Tax Incentive, *supra* note 28, at <http://www.epa.gov/brownfields/bftaxinc.htm>.

brownfields sites to productive use.⁸⁵ In May 2005, the EPA reported that the overall program has leveraged more than \$7 billion in public and private investment, has helped to create more than 31,000 jobs, and has resulted in the assessment of more than 5,100 properties.⁸⁶ The EPA expects that the demand for brownfields grants will increase in the future.⁸⁷

Despite these successes, between 2000 and 2003, funding for the Brownfields Program decreased by 60%.⁸⁸ In response, Congress passed a bill in 2004 that included a provision to promote brownfields redevelopments and explore innovative funding strategies.⁸⁹ In one of the bill provisions, Congress authorized \$5 million for each fiscal year from 2004 to 2008⁹⁰ to provide for “brightfields,” which are brownfields implementing solar energy technologies.⁹¹ The future success of the Brownfields Program will likely depend on further legislative and financial support.

III. NORTH CAROLINA BROWNFIELDS PROGRAMS, TAX INCENTIVES, AND ACCOMPLISHMENTS

A. *The North Carolina Brownfields Program*

In North Carolina, the Brownfields Property Reuse Act of 1997⁹² (N.C. Brownfields Act) governs the redevelopment of brownfields on a state level. The Division of Waste Management of the North Carolina Department of Environment and Natural Resources (NCDENR or the Department) administers the North Carolina Brownfields Program.⁹³ The NCDENR has the authority to work with prospective developers to put brownfields back into use.⁹⁴ By statute, a “prospective developer” is “any person who desires to either buy or sell a brownfields property for the purpose of developing or redeveloping that brownfields property and who

⁸⁵ *Id.*

⁸⁶ Press Release, 75.9 Million in Brownfield Grants Announced, *supra* note 81.

⁸⁷ FAQ, *supra* note 74, at <http://www.epa.gov/swerosps/bf/html-doc/taxfaq.htm>.

⁸⁸ Roeder, *supra* note 36, at A-1.

⁸⁹ Economic Development Administration Reauthorization Act of 2004, Pub. L. No. 108-373, 118 Stat. 1756 (2004).

⁹⁰ *Id.* at § 218(d); 118 Stat. at 1767.

⁹¹ *Id.* § 218(a); 118 Stat. at 1766.

⁹² N.C. GEN. STAT. §§ 130A-310.30–310.40.

⁹³ See NCDENR, NC Brownfields Program, <http://www.ncbrownfields.org/nws/background.htm> (last visited Sept. 30, 2005) [hereinafter “NC Brownfields Program”].

⁹⁴ *Id.*

did not cause or contribute to the contamination at the brownfields property.”⁹⁵ Under North Carolina statute, a “brownfield” is defined as:

[A]bandoned, idled, or underused property at which expansion or redevelopment is hindered by actual environmental contamination or the possibility of environmental contamination and that is or may be subject to remediation under any State remedial program other than Part 2A of Article 21A of Chapter 143 of the General Statutes [the Underground Storage Tank Program (UST)] or that is or may be subject to remediation under [CERCLA]⁹⁶

While both UST and CERCLA sites contribute to contamination problems, these sites remain ineligible under North Carolina’s Brownfields Program.⁹⁷ Nevertheless, the NCDENR incorporated requirements to address UST legal requirements within brownfields agreements, even though prospective developers may not be responsible for UST cleanups.⁹⁸

1. The NC Brownfields Agreement

The focal point of the N.C. Brownfields Act is the “brownfields agreement.”⁹⁹ The Act defines a “brownfields agreement” as “an agreement between [NCDENR] and a prospective developer that meets the requirements of [North Carolina General Statute] § 130A-310.32.”¹⁰⁰ Under Section 130A-310.32, a prospective developer must demonstrate:

- (1) The prospective developer, and any parent, subsidiary, or other affiliate of the prospective developer has substantially complied with:
 - a. The terms of any brownfields agreement or similar agreement to which the prospective developer or any parent, subsidiary, or other affiliate of the prospective developer has been a party.

⁹⁵ N.C. GEN. STAT. § 130A-310.31(b)(10).

⁹⁶ § 130A-310.31(b)(3).

⁹⁷ NCDENR, *Brownfields Program Guidelines and Issue Resolutions* (March 2002), available at http://www.ncbrownfields.org/nws/pdf/Guidelines_and_Issue_Resolutions.pdf. [hereinafter “*Guidelines and Issue Resolutions*”].

⁹⁸ *Id.*

⁹⁹ See generally NC Brownfields Program, *supra* note 93. For an example of the N.C. Brownfields Agreement, see NCDENR, Brownfields Agreement, <http://www.ncbrownfields.org/BF-APPB.HTM> (last visited Oct. 10, 2005).

¹⁰⁰ N.C. GEN. STAT. § 130A-310.31(b)(2).

- b. The requirements applicable to any remediation in which the applicant has previously engaged.
 - c. Federal and state laws, regulations, and rules for the protection of the environment.
- (2) As a result of the implementation of the brownfields agreement, the brownfields property will be suitable for the uses specified in the agreement while fully protecting public health and the environment instead of being remediated to unrestricted use standards.
 - (3) There is a public benefit commensurate with the liability protection provided under this Part.
 - (4) The prospective developer has or can obtain the financial, managerial, and technical means to fully implement the brownfields agreement and assure the safe use of the brownfields property.
 - (5) The prospective developer has complied with or will comply with all applicable procedural requirements.¹⁰¹

Simply, the Act requires a developer who was previously uninvolved with the contaminated property to demonstrate the financial ability to implement the project, and to demonstrate that the specified uses will suit the planned development and provide a meaningful benefit to the public.¹⁰² The prospective developer must agree to perform all actions the NCDENR deems necessary to render the property safe for a planned project.¹⁰³ In return for developing the property, the NCDENR limits a prospective developer's liability with an agreement known as a "covenant-not-to-sue."¹⁰⁴

Generally, the limit of liability continues as long as activities do not increase the risk of harm to the public or to the environment, and no further remediation to achieve applicable use standards is required.¹⁰⁵ This protection may also extend to other parties, as set forth in the statute:

¹⁰¹ *Id.* at § 130A-310.32(a)(1)-(5).

¹⁰² § 130A-310.32(a)(4).

¹⁰³ § 130A-310.32.

¹⁰⁴ § 130A-310.33. A developer can benefit from this covenant not to sue because he or she can approach a lender with a specific liability report for environmental cleanup, and the lender may be more willing to approve a loan. *Guidelines and Issue Resolutions*, *supra* note 97.

¹⁰⁵ N.C. GEN. STAT. § 130A-310.33(a).

- (1) Any person under the direction or control of the prospective developer who directs or contracts for remediation or redevelopment of the brownfields property;
- (2) Any future owner of the brownfields property;
- (3) A person who develops or occupies the brownfields property;
- (4) A successor or assign of any person to whom the liability protection provided under this Part applies; or
- (5) Any lender or fiduciary that provides financing for remediation or redevelopment of the brownfields property.¹⁰⁶

The N.C. Brownfields Act does not require a prospective developer to undertake additional remediation unless: (1) the developer knowingly or recklessly provides certain false information; (2) there is new information of previously unreported contamination, unless the brownfields agreement provides otherwise; (3) the level of risk to the public health or environment is unacceptable; (4) there is new information about a particular contaminant that raises the risk to the public health or environment beyond an acceptable range and in a manner unanticipated by the brownfields agreement; or (5) the prospective developer fails to timely and properly file a notice of development under the Act.¹⁰⁷

It is important to note that the N.C. Brownfields Act does not create an avenue for a responsible person to avoid liability;¹⁰⁸ one cannot circumvent practical or necessary remediation of properties under any federal or state cleanup program. Notably, the Act does not protect a developer from third-party liability.¹⁰⁹ The NCDENR does not enter into brownfields agreements where the developer envisions performing the cleanup alone (without redevelopment), or where the developer intends only to perform the cleanup and to convey the property.¹¹⁰ Brownfields agreements under the NCDENR are solely for planned redevelopment projects where the cleanup would otherwise be a serious obstacle to redevelopment.¹¹¹

¹⁰⁶ § 130A-310.33(a)(1)-(5).

¹⁰⁷ § 130A-310.33(c)(1)-(5).

¹⁰⁸ *Guidelines and Issue Resolutions*, *supra* note 97.

¹⁰⁹ N.C. GEN. STAT. §§ 130A-310.30-310.40; *Guidelines and Issue Resolutions*, *supra* note 97.

¹¹⁰ *Guidelines and Issue Resolutions*, *supra* note 97.

¹¹¹ *Id.*

2. Obligations Under the NC Brownfields Agreement

The N.C. Brownfields Act prohibits the NCDENR from entering into brownfields agreements for federal Superfund sites.¹¹² To identify a potential site for redevelopment, a developer should review the EPA's CERCLA Information System (CERCLIS).¹¹³ CERCLIS includes a list of both high risk properties on the NPL that remain under the EPA's jurisdiction as well as lightly contaminated properties and sites not under the EPA's jurisdiction that may potentially be redeveloped.¹¹⁴ CERCLIS also lists NPL-caliber sites, which the EPA is likely to list on the NPL in the future, and response action properties,¹¹⁵ at which response actions by EPA have occurred.¹¹⁶ At these properties, brownfields agreements are a possibility, but both the NCDENR and EPA will be involved in the negotiating of any brownfields agreement.¹¹⁷

There may be certain circumstances where a prospective developer has no obligation to clean up groundwater or soil at the property under the brownfields agreement.¹¹⁸ For example, there may be no cleanup obligation where the water's contamination reaches levels slightly in excess of unrestricted use standards and the contamination poses no risk to

¹¹² N.C. GEN. STAT. § 130A-310.37(c). This prohibition leaves eligible for a brownfields agreement most properties that are not priorities for the EPA, notably those sites formerly listed on the EPA's CERCLA Information System (CERCLIS), *see* 42 U.S.C. § 9616, as having no further remedial action planned and lightly contaminated properties not listed on CERCLIS. *See generally Guidelines and Issue Resolutions*, *supra* note 97, at http://www.ncbrownfields.org/nws/pdf/Guidelines_and_Issue_Resolutions.pdf.

¹¹³ 42 U.S.C. § 9616; *see generally* EPA, Superfund (CERCLIS): Overview, <http://www.epa.gov/enviro/html/cerclis/> (last visited Oct. 10, 2005) [hereinafter "Superfund Overview"].

¹¹⁴ Superfund Overview, *supra* note 113, at <http://www.epa.gov/enviro/html/cerclis/>. Some properties are heavily contaminated or 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 NPL and remain under the jurisdiction of the EPA. *Id.* Under 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. 42 U.S.C. § 9616. Therefore, the NCDENR will not enter into a brownfields agreement for any part of a property that lies within a NPL site. *See Guidelines and Issue Resolutions*, *supra* note 97, at http://www.ncbrownfields.org/nws/pdf/Guidelines_and_Issue_Resolutions.pdf.

¹¹⁵ 42 U.S.C. § 9601(25).

¹¹⁶ 42 U.S.C. § 9616; *see generally Guidelines and Issue Resolutions*, *supra* note 97, at http://www.ncbrownfields.org/nws/pdf/Guidelines_and_Issue_Resolutions.pdf.

¹¹⁷ *Guidelines and Issue Resolutions*, *supra* note 97, at http://www.ncbrownfields.org/nws/pdf/Guidelines_and_Issue_Resolutions.pdf.

¹¹⁸ *Id.*

people or to the environment.¹¹⁹ On the other hand, some properties may pose a threat to people or the environment, or both; for example, some properties may have petroleum products or other contaminants flowing on the top of groundwater, where significant remediation will be required.¹²⁰ While developers may be reluctant to assume responsibility for highly contaminated properties, remediation of highly contaminated areas will decrease the likelihood that the agreement will be reopened in the future.¹²¹

The NCDENR states that its brownfields agreement is largely market driven and that the “[p]rospective [d]eveloper with a potential brownfields site [must apply] to the [NC]DENR for entry into the program with the submittal of the Letter of Intent.”¹²² The Letter of Intent¹²³ provides information that the redevelopment will have “public benefit commensurate with the liability protection afforded.”¹²⁴ Public benefits may include “job creation, tax base improvements, revitalization of blighted area, improved retail shopping opportunities, and potential cleanup activities.”¹²⁵ The NCDENR encourages developers to obtain letters of support from local governmental units, community groups, and environmental groups for guidance in rendering a decision on whether to enter into a brownfields agreement.¹²⁶ The NCDENR then determines whether a site is eligible based on criteria in the statute.¹²⁷ Once eligibility is determined, the NCDENR notifies the prospective developer, reviews data for the site, and determines what, if any, additional data or cleanup is

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² NCDENR, Brownfields Program: Agreement Process, http://www.ncbrownfields.org/nws/agreement_process.htm (last visited Sept. 30, 2005) [hereinafter “Agreement Process”].

¹²³ For guidance documents on the N.C. Brownfields Agreement Letter of Intent, see NCDENR, Guidance for Completing a North Carolina Brownfields Letter of Intent, <http://www.ncbrownfields.org/BF-APPA.HTM> (last visited Oct. 10, 2005).

¹²⁴ N.C. GEN. STAT. § 130A-310.32(a)(3).

¹²⁵ *Guidelines and Issue Resolutions*, *supra* note 97, at http://www.ncbrownfields.org/nws/pdf/Guidelines_and_Issue_Resolutions.pdf.

¹²⁶ *Id.* Additionally, for a fee of \$2,000, the NCDENR will supply a draft brownfields agreement to the prospective developer as long as the Department’s Brownfields Program remains federally funded. N.C. GEN. STAT. § 130A-310.39; *Guidelines and Issue Resolutions*, *supra* note 97, at http://www.ncbrownfields.org/nws/pdf/Guidelines_and_Issue_Resolutions.pdf.

¹²⁷ N.C. GEN. STAT. § 130A-310.34.

needed to make the site safe for the proposed reuse.¹²⁸ The developer “prepares a Notice of Intent to Redevelop a Brownfields Property . . . containing the proposal for the land use, all of the remedial actions to be conducted, and the land use restrictions to be put in place.”¹²⁹ The Notice is available for public comment,¹³⁰ and if the NCDENR approves the agreement, it is signed and implemented.¹³¹ The liability protection provided by the agreement is then contingent on the prospective developer performing the work.¹³²

B. NC Voluntary Cleanup Program

Parties responsible for contamination in North Carolina cannot enter into a brownfields agreement, but may instead enter the Voluntary Cleanup Program¹³³ (VCP), which the Inactive Hazardous Sites Branch¹³⁴ of the Superfund Section at the NCDENR administers. The VCP establishes a means for responsible parties to voluntarily achieve final site remediation.¹³⁵ While the Brownfields Program is a redevelopment program, the VCP is essentially a cleanup program.¹³⁶ The VCP also serves as a redevelopment program in that the cleanups restore value to the properties and lenders will be more likely to approve loans for redevelopment.¹³⁷ The VCP permits privatized oversight, through the

¹²⁸ *Id.* at § 130A-310.35; Agreement Process, *supra* note 122, at http://www.ncbrownfields.org/nws/agreement_process.htm.

¹²⁹ Agreement Process, *supra* note 122; N.C. GEN. STAT. § 130A-310.34.

¹³⁰ N.C. GEN. STAT. § 130A-310.34(b). There is a sixty-day public comment period. *Id.* The NCDENR considers all public comments, either approving, modifying, or canceling the brownfields agreement. § 130A-310.34(d).

¹³¹ Agreement Process, *supra* note 122, at http://www.ncbrownfields.org/nws/agreement_process.htm.

¹³² N.C. GEN. STAT. § 130A-310.33.

¹³³ *See id.* at § 130A-310.9; NCDENR, Superfund Section: Inactive Hazardous Sites Branch, <http://wastenot.enr.state.nc.us/SFHOME/IHSBRNCH.HTM> (last visited Sept. 30, 2005) [hereinafter “IHSB”].

¹³⁴ *See generally* IHSB, *supra* note 133, at <http://wastenot.enr.state.nc.us/SFHOME/IHSBRNCH.HTM>; North Carolina Inactive Hazardous Sites Response Act of 1987, N.C. GEN. STAT. §§ 130A-310–310.13.

¹³⁵ N.C. GEN. STAT. § 130A-310.9; *see Guidelines and Issue Resolutions*, *supra* note 97, at http://www.ncbrownfields.org/nws/pdf/Guidelines_and_Issue_Resolutions.pdf.

¹³⁶ *See Guidelines and Issue Resolutions*, *supra* note 97, at http://www.ncbrownfields.org/nws/pdf/Guidelines_and_Issue_Resolutions.pdf.

¹³⁷ *See id.*

Registered Environmental Consultant (REC) Program,¹³⁸ and, like the Brownfields Program, permits alternative cleanup standards and institutional controls.¹³⁹ The REC is responsible for both the cleanup and for certifying regulatory compliance.¹⁴⁰

C. North Carolina Tax Benefits Specifically Associated with the Redevelopment of Brownfields

On July 1, 2001, the General Assembly of North Carolina enacted legislation providing property tax incentives to encourage the redevelopment of brownfields properties.¹⁴¹ An owner of land in North Carolina is entitled to a partial exclusion from property tax liability for the first five taxable years upon completion of a "qualifying improvement"¹⁴² on a brownfields property after either July 1, 2000 or the date of the brownfields agreement, whichever is later.¹⁴³ The percentage of the appraised value of the "qualified improvements" that is excluded for each of the first five taxable years is graduated as follows:¹⁴⁴

¹³⁸ 15A N.C. ADMIN. CODE 13C.0300 (1997); NCDENR, Superfund Section: Registered Environmental Consultant Program, <http://www.wastenotnc.org/sfhome/recprog.htm> (last visited Sept. 30, 2005).

¹³⁹ N.C. GEN. STAT. § 130A-310.9; *see generally* IHSB, *supra* note 133, at <http://wastenot.enr.state.nc.us/SFHOME/IHSBRNCH.HTM>.

¹⁴⁰ *See supra* note 138.

¹⁴¹ N.C. GEN. STAT. § 105-277.13 (2004) (stating that qualifying improvements on brownfields properties are designated a special class of property under the North Carolina Constitution and should be appraised, assessed, and taxed accordingly).

¹⁴² A "qualifying improvement" is an improvement made to real property that is subject to a brownfields' agreement with the NCDENR. *Id.* at § 105-277.13(b).

¹⁴³ *Id.* at § 105-277.13(a).

¹⁴⁴ *Id.* at § 105-277.13(c).

Figure 1

Year	Percent of Appraised Value Excluded
1	90%
2	75%
3	50%
4	30%
5	10%

Property owners must file a one-time application in the January following completion of the “qualifying improvement.”¹⁴⁵ If the owner conveys the property during the five-year period, the future owners are eligible to file for the property tax relief for the remainder of the five-year period following the conveyance.¹⁴⁶

D. Accomplishments of North Carolina’s Brownfields Program

In recent years, the EPA has awarded significant brownfields grants to North Carolina. In 2003, it announced \$600,000 in specific assessment grants to North Carolina cities, including: \$200,000 to Concord, \$200,000 to Farmville, and \$200,000 to Greensboro.¹⁴⁷ In 2004, the EPA awarded \$2 million in grants to three communities for cleanup and assessments.¹⁴⁸ These grants included: \$1,400,000 for hazardous substances and petroleum contamination at up to six properties; \$200,000 to Laurinburg for hazardous substances and petroleum contamination at a former hospital property; and \$400,000 to Raleigh for hazardous substances and petroleum contamination at up to 100 properties over the next ten years.¹⁴⁹

¹⁴⁵ *Id.* at § 105-282.1(a)(2)c.

¹⁴⁶ *Id.*

¹⁴⁷ Press Release, EPA, EPA Awards Brownfields Grants to Cities in the Southeast (June 20, 2003), available at <http://www.epa.gov/region04/oeapages/03press/062003.htm>.

¹⁴⁸ Press Release, EPA, North Carolina Re[c]eives EPA Brownfields Grants (June 15, 2004), available at <http://www.epa.gov/region04/oeapages/04press/061504e.htm>.

¹⁴⁹ *Id.*

So far, the EPA has awarded \$1 million in 2005 to brownfields programs in North Carolina.¹⁵⁰

At the state level, statistics show that North Carolina's Brownfields Program is also having a significant impact on redevelopment. For example, in October 2004, the NCDENR reported that it expected to complete twenty-two brownfields agreements in the year 2004, and it completed fifteen brownfields agreements in the year 2003—a 50% increase over the year 2002.¹⁵¹ Overall, the NCDENR estimated completion of sixty-one brownfields agreements under the N.C. Brownfields Act, representing the redevelopment of 1,100 acres and \$1 billion in private investments, up from \$550 million in private investments at the end of the year 2003.¹⁵²

Redevelopment of brownfields also impacts rural communities. For example, four of the twenty-two brownfields agreements in 2004 and four of the fifteen brownfields agreements in 2003 involved rural properties.¹⁵³ Overall, nineteen of the sixty-one completed projects involved rural properties.¹⁵⁴ By June 30, 2004, the NCDENR reported that North Carolina's brownfields fund had a balance of \$96,645, including \$48,047 collected in fees and interest during that fiscal year.¹⁵⁵ The number of Brownfields agreements and the amount of private investments show that the Brownfields Program in North Carolina is effectively increasing the redevelopment of brownfields. The NCDENR is hopeful that the demand for brownfields agreements will continue to increase in the future.¹⁵⁶

¹⁵⁰ Press Release, EPA, EPA Awards \$1 Million in Brownfields Grants to Programs in North Carolina (May 10, 2005), *available at* <http://www.epa.gov/region04/oeapages/05press/051105d.htm>.

¹⁵¹ NCDENR, THE NC BROWNFIELDS PROGRAM: ANNUAL REPORT TO THE NORTH CAROLINA GENERAL ASSEMBLY 3 (Oct. 4, 2004) [hereinafter "2004 ANNUAL REPORT"]; NCDENR, THE NC BROWNFIELDS PROGRAM: ANNUAL REPORT TO THE NORTH CAROLINA GENERAL ASSEMBLY 4 (Dec. 2003) [hereinafter "2003 ANNUAL REPORT"].

¹⁵² 2004 ANNUAL REPORT, *supra* note 151, at 3, 5; 2003 ANNUAL REPORT, *supra* note 151, at 4.

¹⁵³ 2004 ANNUAL REPORT, *supra* note 151, at 8; 2003 ANNUAL REPORT, *supra* note 151, at 7-8.

¹⁵⁴ 2004 ANNUAL REPORT, *supra* note 151, at 8.

¹⁵⁵ 2003 ANNUAL REPORT, *supra* note 151, at 10-11.

¹⁵⁶ 2004 ANNUAL REPORT, *supra* note 151, at 8.

IV. SOUTH CAROLINA BROWNFIELDS PROGRAMS, TAX INCENTIVES, AND ACCOMPLISHMENTS

A. The South Carolina Brownfields/Voluntary Cleanup Program

The General Assembly in South Carolina enacted the Brownfields/Voluntary Cleanup Program Act¹⁵⁷ (the “S.C. Brownfields/VCP Act”) in May 2000, approximately three years after the North Carolina General Assembly enacted the N.C. Brownfields Act. Under the authority of the South Carolina Hazardous Waste Management Act,¹⁵⁸ which adopted CERCLA section 107¹⁵⁹ by reference in 1981, the South Carolina Department of Health and Environmental Control (SCDHEC or the Department) administers the Brownfields/VCP Program through its Site Assessment and Remediation Division.¹⁶⁰ The stated purposes of the S.C. Brownfields/VCP Act include: (1) returning to use industrial and commercial facilities whose redevelopment is complicated by real or perceived environmental contamination; (2) providing an incentive to conduct response actions at a site by providing nonresponsible parties State CERCLA liability protection or by providing responsible parties with a covenant-not-to-sue; and (3) providing reimbursement to the Department for oversight costs.¹⁶¹

1. The SC Voluntary Cleanup Contract

At the heart of the South Carolina Brownfields/VCP Program is the Voluntary Cleanup Contract¹⁶² (VCC), which both responsible and nonresponsible parties may enter into with SCDHEC.¹⁶³ Unlike parties responsible for site contamination, nonresponsible parties entering into VCCs must “provide a measurable benefit to the State, the community, or the Department.”¹⁶⁴ To enter into the Voluntary Cleanup Program, a nonresponsible party must submit the Information and Certification

¹⁵⁷ S.C. CODE ANN. §§ 44-56-710–760 (2000).

¹⁵⁸ *Id.* at §§ 44-56-10–840.

¹⁵⁹ 42 U.S.C. § 9607.

¹⁶⁰ S.C. CODE ANN. §§ 44-56-710–760.

¹⁶¹ *Id.* at § 44-56-710.

¹⁶² To view a model VCC, see SCDHEC, Voluntary Cleanup Contract, http://www.scdhec.gov/lwm/forms/NRP_Model_June_2005.pdf (last visited Oct. 10, 2005).

¹⁶³ See SCDHEC, Division of Site Assessment and Remediation, Superfund Contract/Community Relations Section, http://www.scdhec.gov/lwm/html/vcp_info.html (last visited Oct. 10, 2005) [hereinafter “Superfund Contract/Community Relations”].

¹⁶⁴ S.C. CODE ANN. § 44-56-750(B)(4).

form,¹⁶⁵ which is analogous to the Letter of Intent used in North Carolina.¹⁶⁶

For the most part, the S.C. Brownfields/VCP Act mirrors the North Carolina Act, with several modifications. By comparison, North Carolina prohibits UST ("underground storage tanks") sites from its Brownfields Program by defining "brownfields" to exclude UST sites,¹⁶⁷ while South Carolina effectively excludes UST sites by defining "contaminant" under the S.C. Brownfields/VCP Act to exclude petroleum products.¹⁶⁸ Like North Carolina,¹⁶⁹ South Carolina expressly excludes from its Brownfields/VCP Program properties that are "listed or proposed to be listed on the [NPL] pursuant to CERCLA Section 105."¹⁷⁰

The S.C. Brownfields/VCP Act does not separate its brownfields program (available only to nonresponsible parties in North Carolina) from its voluntary cleanup program (available only to responsible parties in North Carolina), as the N.C. Brownfields Act does.¹⁷¹ Instead, both nonresponsible parties and responsible parties enter the same program in South Carolina. Although South Carolina does not separate the programs, the distinction between the two groups can be found in the terms and conditions of the Brownfields/VCP Program.¹⁷² For example, only nonresponsible parties in South Carolina can obtain protections from state Superfund liability for existing contamination by agreeing to perform an environmental assessment or remediation.¹⁷³ Furthermore, in South Carolina, the statute is more specific as to who can perform a voluntary cleanup: the S.C. Brownfields/VCP Act does not include responsible parties if they are "subject to a Department order or permit for assessment and remediation."¹⁷⁴

¹⁶⁵ Superfund Contract/Community Relations, *supra* note 163, at http://www.scdhec.gov/lwm/html/vcp_info.html. To view South Carolina's Information and Certification form, see SCDHEC, Information and Certification, http://www.scdhec.gov/lwm/forms/Cert_and_Info.pdf (last visited Oct. 5, 2005).

¹⁶⁶ See *supra* notes 122-125 and accompanying text.

¹⁶⁷ N.C. GEN. STAT. § 130A-310.31(b)(3).

¹⁶⁸ S.C. CODE ANN. § 44-56-720(2).

¹⁶⁹ See N.C. GEN. STAT. § 130A-310.37(c); see generally *supra* notes 112-117 and accompanying text.

¹⁷⁰ S.C. CODE ANN. § 44-56-730(A).

¹⁷¹ See generally *supra* Parts III.A. & III.B.

¹⁷² See Superfund Contract/Community Relations, *supra* note 163, at http://www.scdhec.gov/lwm/html/vcp_info.html.

¹⁷³ See generally S.C. CODE ANN. §§ 44-56-740 & 750.

¹⁷⁴ *Id.* at § 44-56-730(B).

Another noteworthy difference between the North Carolina and South Carolina statutes is the covenant-not-to-sue. North Carolina generally offers a covenant-not-to-sue as part of the brownfields agreement.¹⁷⁵ South Carolina does not provide a covenant-not-to-sue in the VCC.¹⁷⁶ However, in South Carolina, a covenant-not-to-sue is granted in the certificate of completion issued by the state once it determines that the “non-responsible party has successfully and completely complied with the [VCC] and has completed the voluntary cleanup approved under [the statute].”¹⁷⁷ The two states also offer different covenants-not-to-sue, with statutory exceptions that protect against state CERCLA liability.¹⁷⁸ In South Carolina, the certificate of completion “provide[s] the Department’s covenant not to sue the nonresponsible party for State CERCLA liability, except for releases and consequences that the nonresponsible party causes.”¹⁷⁹ CERCLA liability protection in South Carolina is statutorily revoked if “a party or successor . . . changes the land use from the use specified in the certificate of completion to one which requires a more comprehensive cleanup.”¹⁸⁰ In North Carolina, a nonresponsible party may not only be liable in the event the party causes, releases, or changes the land use, but he or she may also face liability in other circumstances.¹⁸¹

In South Carolina, the covenant-not-to-sue that is available to a responsible party in its certificate of completion is limited to “work done in completing the response actions specifically covered in the [VCC] and completed in accordance with the approved work plans and reports.”¹⁸² The covenant is contingent on SCDHEC’s determination that the work “successfully and completely complied with” the VCC.¹⁸³ The covenant-not-to-sue in the case of a responsible party is set forth in both the VCC and the certificate of completion.¹⁸⁴ Therefore, the VCC may provide for protection against claims for contribution regarding contamination present

¹⁷⁵ N.C. GEN. STAT. § 130A-310.33(A).

¹⁷⁶ S.C. CODE ANN. § 44-56-740(A)(2)(a).

¹⁷⁷ *Id.* at § 44-56-750(C)(1).

¹⁷⁸ According to S.C. CODE ANN. § 44-56-710(2), one purpose of the Voluntary Cleanup Program is to “provide an incentive to conduct response actions at a site by providing nonresponsible parties State CERCLA liability protection or by providing responsible parties with a covenant not to sue.”

¹⁷⁹ S.C. CODE ANN. § 44-56-750(C)(1)(a).

¹⁸⁰ *Id.* at § 44-56-750(C)(3).

¹⁸¹ N.C. GEN. STAT. § 130A-310.33(a)(1-5).

¹⁸² S.C. CODE ANN. § 44-56-740(A)(5).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at §§ 44-56-740(B)(1)(a) & 44-56-740(A)(2)(a-c).

at the site prior to signing the VCC.¹⁸⁵ "This protection may be granted at the conclusion of the period allowed for comment from the site's potentially responsible parties as identified through a reasonable search."¹⁸⁶ Contribution protection is never available to responsible parties.¹⁸⁷

2. The Requirements of a South Carolina VCC

The South Carolina Brownfields/VCP Act provides for planning, preparation, and implementation of a cleanup plan for a responsible party. For example, the VCC must contain the following components: (a) submission of a work plan, health and safety plan, and provisions from written progress reports; (b) a grant of access to perform and oversee response actions; and (c) a legal description of the property.¹⁸⁸

With nonresponsible parties, the VCC must contain these same above items, but must also contain the following requirements: (d) a provision for the Department to have the opportunity to inspect and to copy any and all documents or records in the nonresponsible party's custody, possession, or control which identifies or potentially identifies a responsible or potentially responsible party; and (e) a provision that the Department has an irrevocable right of access to the property once the property is acquired by the nonresponsible party. The right of access remains until a complete remediation is accomplished for unrestricted use.¹⁸⁹

Prior to entering into the VCC, the nonresponsible party must also guarantee that: (a) it is not a responsible party at the site; (b) it is not a parent, successor, or subsidiary of a responsible party at the site; (c) its activities will not aggravate or contribute to existing contamination on the site or pose significant human health or environmental risks; and (d) it is financially viable to meet the obligations under the contract.¹⁹⁰

¹⁸⁵ *Id.* at § 44-56-750(B)(7).

¹⁸⁶ *Id.*

¹⁸⁷ *See generally id.* at § 44-56-740 (precluding contribution protection from applying to responsible parties by failure to mention the protection).

¹⁸⁸ S.C. CODE ANN. § 44-56-740(A)(1)(a-c).

¹⁸⁹ *Id.* at § 44-56-750(B)(1)(d-e).

¹⁹⁰ *Id.* at § 44-56-750(A)(2)(a-d).

Pursuant to the statute, the South Carolina Brownfields Cleanup Revolving Loan Fund¹⁹¹ (SCBCRLF) provides loans to counties and cities in South Carolina in order to finance cleanup activities referenced in the VCC.¹⁹² Loan recipients may use the proceeds to finance the cleanup process for engineering evaluations, cost analysis of alternatives, public participation requirements, and site monitoring.¹⁹³ All other local governments, businesses, non-profit organizations, and public and private parties in South Carolina that are “not in the jurisdiction of the coalition partnership” and that also qualify as nonresponsible parties may also apply for up to \$900,000 in loan money.¹⁹⁴ “[L]oan payments . . . are used to make new loans to other borrowers for the same authorized activities. Borrowers [are] responsible for paying all closing costs and obtaining environmental insurance.”¹⁹⁵ The South Carolina Jobs and Economic Development Authority manages the SCBCRLF and works with SCDHEC in administering the fund.¹⁹⁶

B. South Carolina Tax Benefits Specifically Associated with the Redevelopment of Brownfields

South Carolina offers not only property tax benefits, but also income tax and *ad valorem*¹⁹⁷ tax benefits for the redevelopment of brownfields.¹⁹⁸ Tax incentives are available only for nonresponsible parties that have entered into a VCC with SCDHEC.¹⁹⁹ The tax incentives in South Carolina are more varied than North Carolina’s partial property tax exclusion for a five-year period.²⁰⁰ The South Carolina tax incentives for taxpayers²⁰¹ include:

¹⁹¹ See Superfund Contract/Community Relations, *supra* note 163, at http://www.scdhec.gov/lwm/html/vcp_info.html. The SCBCRLF totals \$4.25 million in available funds. *Id.*

¹⁹² S.C. CODE ANN. § 44-56-720(10); Superfund Contract/Community Relations, *supra* note 163, at http://www.scdhec.gov/lwm/html/vcp_info.html.

¹⁹³ See SCBCRLF, *Fact Sheet 2* (SCDHEC 2004), available at http://www.scdhec.gov/lwm/forms/BCRLF_Fact_Sheet.pdf.

¹⁹⁴ *Id.* at 2.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1.

¹⁹⁷ See S.C. CODE ANN. § 12-37-220 (2004) (a tax based on the assessed value of real estate or personal property).

¹⁹⁸ *Id.* at § 12-6-3550 (2004).

¹⁹⁹ *Id.* at § 12-6-3550(D).

²⁰⁰ N.C. GEN. STAT. § 105-277.13(a).

²⁰¹ See S.C. CODE ANN. § 12-6-3360(M)(1): “‘Taxpayer’ means a sole proprietor, partnership, corporation of any classification, limited liability company, or association

1. A state tax credit of 50% for expenses incurred by a taxpayer to clean up a property but not to exceed \$50,000 in a taxable year;²⁰²
2. An additional state tax credit of 10% of the clean up expenses, not to exceed \$50,000, in the final year of the cleanup;²⁰³
3. A job tax credit is available for taxpayers operating in manufacturing, tourism, processing, warehousing, distribution, research and development, corporate office, qualifying service-related facilities, and qualifying technology intensive facilities;²⁰⁴
4. An industrial development project requiring a fee in lieu of property taxes is given if the project costs at least \$1 million and is "invested within the time period provided in subsection (C)";²⁰⁵ and
5. An *ad valorem* tax exemption.²⁰⁶

taxable as a business entity which is subject to South Carolina taxes as contained in Sections 12-6-510 and 12-6-530 and Chapter 7 of Title 38."

²⁰² *Id.* at § 12-6-3550(B).

²⁰³ *Id.* at § 12-6-3550(C).

²⁰⁴ *Id.* at § 12-6-3360(A). Subsection (C) states:

Subject to the conditions provided in subsection (N) of this section, a job tax credit is allowed for five years beginning in year two after the creation of the job for each new full-time job created if the minimum level of new jobs is maintained. The credit is only available to taxpayers that increase employment by ten or more full-time jobs, and no credit is allowed for the year or any subsequent year in which the net employment increase falls below the minimum level of ten. The amount of the initial job credit is as follows:

- (1) (a) Eight thousand dollars for each new full-time job created in distressed counties.
(b) Four thousand five hundred dollars for each new full-time job created in least developed counties.
- (2) Three thousand five hundred dollars for each new full-time job created in under developed counties.
- (3) Two thousand five hundred dollars for each new full-time job created in moderately developed counties.
- (4) One thousand five hundred dollars for each new full-time job created in developed counties.

§ 12-6-3360(C).

²⁰⁵ S.C. CODE ANN. § 4-29-67 (2004).

²⁰⁶ *Id.* at § 12-37-220(A). Subsection (A)(7) states:

[A]ll new manufacturing establishments located in any of the counties of this State after July 1, 1977, for five years from the time of establishment and all additions to the existing manufacturing establishments located in any of the counties of this State for five years from the time each such addition is made if the cost of such addition is fifty thousand dollars or more. Such additions shall

Therefore, this provision allows South Carolina taxpayers to qualify for an additional \$1,000 income tax credit for cleanup expenses paid or accrued by the taxpayer equal to 50% of the cleanup expenses but not to exceed \$50,000 in a taxable year.²⁰⁷ One may also be entitled to an additional 10% of the total cleanup costs, not to exceed \$50,000, in the final year of cleanup following receipt of SCDHEC's certificate of completion.²⁰⁸ A taxpayer that qualifies for additional tax credit may therefore carry forward for a period of five years any unused tax credit, up to \$100,000;²⁰⁹ however, the taxpayer must file for a tax credit certificate every year.²¹⁰

Additionally, taxpayers may also qualify for a job tax credit against state income tax or premium tax based on new jobs created over a five-year period.²¹¹ The premium tax credit is capped at up to 50% of a taxpayer's income tax liability and 50% of a taxpayer's insurance premium tax liability.²¹² A taxpayer may carry forward any unused credits for up to fifteen years.²¹³ Regardless of whether the location is a qualifying brownfield, if the facility is one of those enumerated in the statute,²¹⁴ the credit amount allowed in developed counties is \$1,500 per new job,²¹⁵ with an additional \$1,000 per job if located in a multi-county

include additional machinery and equipment installed in the plant. Provided, however, that the exemptions authorized in this item for manufacturing establishments, and additions thereto, shall not include exemptions from school taxes or municipal taxes but shall include only county taxes. Provided, further, that all manufacturing establishments and all additions to existing manufacturing establishments exempt under statutes in effect February 28, 1978, shall be allowed their exemptions provided for by statute until such exemptions expires.

§ 12-37-220(A)(7).

²⁰⁷ *Id.* at § 12-6-3550.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at § 12-6-3550(B).

²¹⁰ *Id.* at § 12-6-3550(E)(1).

²¹¹ S.C. CODE ANN. § 12-6-3360(C).

²¹² *Id.* at § 12-6-3360(A).

²¹³ *Id.* at § 12-6-3360(H).

²¹⁴ *Id.* at § 12-6-3360(A). Subpart (A) states:

Taxpayers that operate manufacturing, tourism, processing, warehousing, distribution, research and development, corporate office, qualifying service-related facilities, and qualifying technology intensive facilities are allowed an annual job tax credit as provided in this section. In addition, taxpayers that operate retail facilities and service-related industries qualify for an annual jobs tax credit in counties designated as least developed or distressed.

²¹⁵ *Id.* at § 12-6-3360(C)(1)(b)(4).

business or industrial park.²¹⁶ Taxpayers that otherwise qualify for a job tax credit²¹⁷ may receive an additional \$1,000 per job where the property is a qualifying brownfield.²¹⁸ To receive a job tax credit, the company must invest a minimum of \$5 million at a single site within three years²¹⁹ and must increase employment by ten or more full time jobs in a single year.²²⁰

Taxpayers with qualifying brownfields projects in multi-county industrial parks who invest a minimum of \$1 million within five years may negotiate with the county to reduce the rate at which real or personal property will be assessed over a twenty-year period for *ad valorem* tax purposes.²²¹ South Carolina has assessed most manufacturing property at 10.5% of fair market value.²²² "New and expanding businesses which invest \$5 million or more can enter into a fee in lieu of property taxes which can reduce a 10.5% assessment ratio to 6% for twenty years and eliminate inflationary increases in the value of real property for that period."²²³ The benefit of this incentive is that a company can reduce its annual tax liability for a twenty-year period, and tax payments to local governments are stabilized for the term of the agreement with the government.²²⁴

A taxpayer opting to pay a fee must forego a five-year moratorium on the non-school portion of *ad valorem* taxes otherwise available to manufacturing facilities, corporate headquarters, corporate office facilities, and distribution facilities.²²⁵ Taxpayers negotiating fees must also comply with SCDHEC's nonresponsible party VCCs and obtain a certificate of completion.²²⁶ Taxpayers investing a minimum of \$50,000 in an establishment or addition are given an *ad valorem* tax exemption for five

²¹⁶ *Id.* at § 12-6-3360(E)(1).

²¹⁷ S.C. CODE ANN. § 12-6-3360(A).

²¹⁸ *Id.* at § 12-6-3360(E)(2).

²¹⁹ *Id.* at § 12-6-3360(F)(2)(a).

²²⁰ *Id.* at § 12-6-3360(C).

²²¹ S.C. CODE ANN. § 4-12-30(B); S.C. DEP'T OF REVENUE, SOUTH CAROLINA TAX INCENTIVES FOR ECONOMIC DEVELOPMENT 111-112 (2004), available at <http://www.sctax.org/NR/rdonlyres/8FB60B6D-BE74-4333-BD98-50F33708E413/0/taxincentive2004.pdf> [hereinafter "S.C. TAX INCENTIVES"].

²²² S.C. TAX INCENTIVES, *supra* note 221, at 2.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See generally S.C. CODE ANN. § 12-37-220(A)(7).

²²⁶ *Id.* at § 12-37-220(B)(44).

years from the date of establishment or addition.²²⁷ This incentive does not apply to school or municipal taxes.²²⁸

C. Accomplishments of South Carolina's Brownfields/VCP Program

The EPA has awarded significant grants to the state of South Carolina, including a substantial contribution to the brownfields loan fund, the SCBCRLF, in 2002.²²⁹ That same year, the EPA awarded \$75,000 in job training grants to Charleston and \$400,000 for assessment pilot programs.²³⁰ In 2003, the EPA awarded \$200,000 to Florence and \$200,000 to Rock Hill²³¹ in specific assessment grants and \$625,000 for assessments and cleanups in 2004.²³² These grants in 2004 included \$200,000 to Aiken County in connection with a twenty-two acre abandoned textile mill property; \$200,000 to Charleston for petroleum contamination at two properties; \$200,000 to Spartanburg for hazardous substances at a thirty-acre dump site and for petroleum contamination; and \$25,000 to SCDHEC for hazardous substances at a former service station property.²³³ As of mid-2005, the EPA had awarded \$260,000 in brownfields grants to programs in South Carolina.²³⁴

SCDHEC reported that a total of thirty-five responsible parties and thirty-four nonresponsible parties entered South Carolina's Voluntary Cleanup Program between 1996 and June 30, 2002, the end of that fiscal year.²³⁵ Also during this period, thirteen Letters of Agreement were

²²⁷ *Id.* at § 12-37-220(A)(7). Counties, not municipalities, have the authority to negotiate this exemption. *Id.*

²²⁸ *Id.*

²²⁹ Press Release, EPA, EPA Awards Brownfields Grants in the Southeast (May 21, 2002), available at <http://www.epa.gov/Region4/oeapages/02press/050102.htm> (EPA awarded \$900,000 to the State of South Carolina for the SCBCRLF, which may be available indirectly to private parties through eligible entities for the development of brownfields).

²³⁰ Press Release, EPA, EPA Awards Brownfields Job Training Grant to Charleston, South Carolina (Sept. 13, 2002), available at <http://www.epa.gov/region04/oeapages/02press/09-13-02a.htm>.

²³¹ Press Release, EPA Awards Brownfields Grants to Cities in the Southeast, *supra* note 147.

²³² Press Release, EPA, EPA Awards Brownfields Grants in South Carolina (June 15, 2004), available at <http://www.epa.gov/Region4/oeapages/04press/061504g.htm>.

²³³ *Id.*

²³⁴ Press Release, EPA, EPA Awards Brownfields Grants in South Carolina (May 11, 2005), available at <http://www.epa.gov/Region4/oeapages/05press/051105e.htm>.

²³⁵ S.C. BUREAU LAND & WASTE MGT., HAZARDOUS WASTE CONTINGENCY FUND ANNUAL REPORT, FISCAL YEAR 2002, JULY 1, 2001–JUNE 30, 2002, ii (2003) [hereinafter "HAZARDOUS WASTE CONTINGENCY FUND ANNUAL REPORT"].

written.²³⁶ The nonresponsible party contracts represented the redevelopment of approximately 760 acres of brownfields.²³⁷ More recently, through December 2004, a total of seventy responsible parties and forty-five nonresponsible parties have entered into the VCP²³⁸ and twenty Letters of Agreement were written.²³⁹ The seventy non-responsible party contracts represented the redevelopment of approximately 1,980 acres of brownfields.²⁴⁰

V. CONCLUSION

Private developers have benefited from well-defined liability protections, as well as an array of financial incentives to evaluate and redevelop brownfields in North Carolina, South Carolina, and across the country.²⁴¹ Since the enactment and reauthorization of the federal Taxpayer Relief Act,²⁴² the federal government has offered tax incentives for eligible cleanup expenses to stimulate cleanups and redevelopments of brownfields.²⁴³ In North Carolina, tax incentives in the form of partial and graduated property exemptions for five years were enacted in July 2001.²⁴⁴ In South Carolina, more complicated corporate tax incentives were enacted beginning in May 2002, such as tax credits, job tax credits, fees-in-lieu of property taxes, and *ad valorem* tax exemptions.²⁴⁵ The number of brownfields redevelopments has increased dramatically since January 2002.²⁴⁶ This increase indicates a growing comfort with statutory protections from environmental liability, and proves that financial incentives may be encouraging brownfields redevelopments in North Carolina and South Carolina.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Teleconference with J.C. Overcash, Bureau Land & Waste Mgt., S.C. Dept. Health & Env'tl. Control (Jan. 6, 2005).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ See *infra* tbl.1 (showing various tax incentives available in North Carolina, South Carolina, and the federal government).

²⁴² See Pub. L. No. 105-34, 111 Stat. 788; see generally Tax Incentive, *supra* note 28, at <http://www.epa.gov/brownfields/bftaxinc.htm>.

²⁴³ *Id.*; see generally *supra* Part II.B.

²⁴⁴ *Infra* tbl.1; see *supra* Part III.C. and accompanying text.

²⁴⁵ See *supra* Part IV.B. and accompanying text.

²⁴⁶ See *infra* tbls.3 & 4.

Table 1

**Tax Incentives Available to Certain Non-Responsible Parties from
the Federal Government, North Carolina, and South Carolina**

	Federal Government (since 1997)	North Carolina (since July 2001)	South Carolina (since May 2002)
Tax incentives	<ul style="list-style-type: none"> • Full deduction for eligible cleanup costs as current expenses in the year the owners incur them.²⁴⁷ 	<ul style="list-style-type: none"> • Partial exclusion from property tax liability for the first 5 taxable years upon completion: 90% (year 1), 75% (year 2), 50% (year 3), 30% (year 4), and 10% (year 5).²⁴⁸ 	<ul style="list-style-type: none"> • State corporate tax credit for cleanup expenses up to 50% of the expenses, not to exceed \$50,000 per year (which may be carried forward 5 years).²⁴⁹ • State corporate tax credit of 10% not to exceed an additional \$50,000 in the final year of cleanup.²⁵⁰ • For specified taxpayers, an additional job tax credit²⁵¹ in the amount of \$1,000 for each new job created over a 5-year period (which may be carried forward 15 years).²⁵² • Property tax exemption with a negotiable fee for certain projects involving at least \$1 million.²⁵³ • <i>Ad valorem</i> tax exemption.²⁵⁴

²⁴⁷ Taxpayer Relief Act § 941(a).

²⁴⁸ N.C. GEN. STAT. § 105-277.13.

²⁴⁹ S.C. CODE ANN. § 12-6-3550(A).

²⁵⁰ *Id.* at § 12-6-3550(C).

²⁵¹ *Id.* at § 12-6-3360(E)(2) (\$1,000 job tax credit for jobs located on a property where a response action has been completed pursuant to a nonresponsible party voluntary cleanup contract is in addition to credits under subsection (C)).

²⁵² *Id.*; *id.* at § 12-6-3360(H).

²⁵³ S.C. CODE ANN. § 4-29-67(B)(3).

²⁵⁴ S.C. CODE ANN. § 12-37-220(B)(44).

The EPA has awarded substantial grants to state and local governments and other eligible entities in North Carolina and South Carolina.²⁵⁵ From the perspective of private developers, it is noteworthy that the EPA has awarded a \$900,000 grant to the SCBCRLF in 2002.²⁵⁶ This amount may be available to private developers through eligible entities, such as states, as well as local, quasi-governmental, and not-for-profit entities. Also, the EPA issued \$2 million in grants to North Carolina for specific assessments and cleanups in 2004.²⁵⁷ In that same year, the EPA issued \$625,000 to South Carolina for specific assessments and cleanups.²⁵⁸ While the EPA has issued significant grants to both North Carolina and South Carolina, the money awarded to North Carolina is only available to eligible entities (such as state, local, and quasi-governments, as well as not-for-profit entities),²⁵⁹ whereas a significant portion of the grants in South Carolina may be available to private developers by persuading eligible entities to administer money from the SCBCRLF for their individual private brownfields redevelopment projects.²⁶⁰

²⁵⁵ See *infra* tbl.2 (showing examples of recent grants from EPA).

²⁵⁶ *Id.*; Press Release, EPA, EPA Awards Brownfields Grants to States in the Southeast (May 7, 2002), available at <http://www.epa.gov/region4/oeapages/02press/050702b.htm>.

²⁵⁷ See *infra* tbl.2; Press Release, North Carolina Re[c]eives EPA Brownfields Grants, *supra* note 148.

²⁵⁸ See *infra* tbl.2; Press Release, EPA Awards Brownfields Grants in South Carolina, *supra* note 234.

²⁵⁹ See *supra* Part III.D. and accompanying text.

²⁶⁰ See *supra* Part IV.C. and accompanying text.

Table 2

Examples of Recent Grants from EPA to North Carolina and South Carolina

Year	EPA Grants to North Carolina	EPA Grants to South Carolina
2005	<ul style="list-style-type: none"> • \$1 million in grants as of August 14, 2005.²⁶¹ 	<ul style="list-style-type: none"> • \$260,000 in grants as of August 14, 2005.²⁶²
2004	<ul style="list-style-type: none"> • \$2 million in grants for specific cleanup/assessments to 3 communities, which may impact approximately 100 properties.²⁶³ 	<ul style="list-style-type: none"> • EPA awards \$625,000 in grants for specific assessments and cleanups to Aiken County, Charleston, and a private company.²⁶⁴
2003	<ul style="list-style-type: none"> • \$200,000 in grants to the City of Concord for specific assessments.²⁶⁵ • \$200,000 in grants to the City of Farmville for specific assessments.²⁶⁶ • \$200,000 in grants to the City of Greensboro for specific assessments.²⁶⁷ 	<ul style="list-style-type: none"> • \$200,000 in grants to the City of Florence for specific assessments.²⁶⁸ • \$200,000 in grants to the City of Rock Hill for specific assessments.²⁶⁹
2002	<ul style="list-style-type: none"> • \$200,000 for an assessment pilot in the Land-of-Sky region to stimulate economic and environmental recovery from the effects of industrial and residential migration to former greenfields and rural areas.²⁷⁰ • \$100,000 for assistance to the City of Wilmington.²⁷¹ 	<ul style="list-style-type: none"> • \$75,000 in grants to City of Charleston for job training at brownfields sites.²⁷² • \$200,000 for an assessment pilot to the Catawba Regional Council of Governments.²⁷³ • \$200,000 for an assessment pilot to the City of Laurens.²⁷⁴ • \$900,000 to the Revolving Loan Fund.²⁷⁵

²⁶¹ Press Release, EPA Awards \$1 Million in Brownfields Grants to Programs in North Carolina, *supra* note 150.

²⁶² Press Release, EPA Awards Brownfields Grants in South Carolina, *supra* note 234.

²⁶³ Press Release, North Carolina Re[c]eives EPA Brownfields Grants, *supra* note 148.

²⁶⁴ Press Release, EPA Awards Brownfields Grants in South Carolina, *supra* note 232.

²⁶⁵ Press Release, EPA Awards Brownfields Grants to Cities in the Southeast, *supra* note 147.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ Press Release, EPA Awards Brownfields Grants in the Southeast, *supra* note 229.

²⁷¹ *Id.*

²⁷² Press Release, EPA Awards Brownfields Job Training Grant to Charleston, South Carolina, *supra* note 230.

²⁷³ Press Release, EPA Awards Brownfields Grants in the Southeast, *supra* note 229.

The rates at which private developers are entering into agreements in North Carolina and South Carolina to redevelop brownfields have been increasing since the enactment of tax incentives in these states.²⁷⁶ A comparison of accomplishments since the inception of the federal Brownfields Program and accomplishments since the enactment of tax incentives shows increasing numbers of brownfields redevelopments since the enactment of tax incentives.²⁷⁷

Table 3

Accomplishments Reported by Federal Government, North Carolina, and South Carolina

	Federal Government (Between 1995 and May 2005)	North Carolina (Between 1997 and December 2004)	South Carolina (Between 1996 and December 2004)²⁷⁸
Accomplishments Reported	<ul style="list-style-type: none"> • Over \$7 billion in investments.²⁷⁹ • Over 31,000 jobs created.²⁸⁰ • Over 5,100 properties assessed.²⁸¹ • 218 applicants have received 302 grants totaling \$75.9 million.²⁸² 	<ul style="list-style-type: none"> • Up to 61 brownfields agreements.²⁸³ • Over \$1 billion in private investments, up from a total of \$550 million in private investments in 2003.²⁸⁴ • 1,100 acres of brownfields redeveloped.²⁸⁵ 	<ul style="list-style-type: none"> • 70 nonresponsible parties entered VCP.²⁸⁶ • 45 responsible parties entered into the VCP.²⁸⁷ • 1,976.6 acres of brownfields redeveloped.²⁸⁸

²⁷⁴ *Id.*

²⁷⁵ Press Release, EPA, EPA Awards Brownfields Grants to States in the Southeast, *supra* note 256.

²⁷⁶ See *infra* tbl.3 (showing reported brownfields accomplishments since the inception of the federal Brownfields Program).

²⁷⁷ *Id.*

²⁷⁸ Statistics include events between 1996 and 2000, which was before the S.C. Brownfields/VCP Act was enacted.

²⁷⁹ Press Release, 75.9 Million in Brownfield Grants Announced, *supra* note 81.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ 2004 ANNUAL REPORT, *supra* note 151, at 3.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 5.

Table 4**Accomplishments Reported Since the Enactment of the Federal Brownfields Act²⁸⁹ in North Carolina and South Carolina**

	Federal Government (since 2002)	North Carolina (2003 & 2004)	South Carolina (Between July 2002 and Dec. 2004)
Accomplish- ments Reported	<ul style="list-style-type: none"> • 709 assessment grants totaling \$190 million.²⁹⁰ • 189 revolving loan fund grants totaling over \$165 million.²⁹¹ • 150 cleanup grants totaling \$26.8 million.²⁹² 	<ul style="list-style-type: none"> • 37 brownfields agreements complete (of which 22 were in 2004 and 15 were in 2003, up 50% over the year 2002).²⁹³ • 79 Letters of Intent received (of which 45 were in 2004 and 34 were in 2003).²⁹⁴ 	<ul style="list-style-type: none"> • 36 nonresponsible parties entered VCP.²⁹⁵ • 10 responsible parties entered VCP.²⁹⁶ • 7 Letters of Agreement written.²⁹⁷ • 1,216.6 acres developed.²⁹⁸

Recently, brownfields agreements and redevelopments have been increasing each year in North and South Carolina. In North Carolina, brownfields agreements increased by 50% in 2003 and over 46% in 2004.²⁹⁹ Meanwhile, in South Carolina, thirty-six nonresponsible parties

²⁸⁶ Teleconference with J.C. Overcash, *supra* note 238.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356.

²⁹⁰ Press Release, 75.9 Million in Brownfield Grants Announced, *supra* note 81.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ 2004 ANNUAL REPORT, *supra* note 151, at 3; 2003 ANNUAL REPORT, *supra* note 151, at 4.

²⁹⁴ 2004 ANNUAL REPORT, *supra* note 151, at 3.

²⁹⁵ HAZARDOUS WASTE CONTINGENCY FUND ANNUAL REPORT, *supra* note 235, at ii; Teleconference with J.C. Overcash, *supra* note 238.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ 2004 ANNUAL REPORT, *supra* note 151, at 3; 2003 ANNUAL REPORT, *supra* note 151, at 4.

entered the VCP between July 2002 and December 2004,³⁰⁰ whereas thirty-four such agreements were completed between 1996 and June 2002, over a six-and-a-half-year time-period.³⁰¹ While it remains unclear whether the better defined protections against legal liability or the financial incentives are having a stronger affect on brownfields redevelopments, it is clear that the combination of the two may be encouraging brownfields redevelopments in both states.

The increase in brownfields agreements and acreage of redevelopment in South Carolina suggests that the protections from liability and tax incentives available in South Carolina may be favorable for redevelopment. As stated above, the VCC in South Carolina may provide for protection against claims for contribution regarding contamination present at the site prior to signing the VCC.³⁰² Also, the tax incentives, while complicated, offer various corporate and property tax benefits that may encourage new businesses.³⁰³

In any event, whether a private developer would enjoy greater benefits from redevelopment in North Carolina or South Carolina will depend on the specific circumstances of the redevelopment. The tax incentives offered in South Carolina, including corporate income tax credits and job tax credits,³⁰⁴ are perhaps more difficult to evaluate than the straightforward partial and graduated property tax exemptions in North Carolina.³⁰⁵ In selecting a business location, developers must consider factors such as population, education, existing infrastructure, and access to transportation. In the case of a brownfields redevelopment, business developers also consider the circumstances surrounding the contemplated redevelopment and the variables that may change each year, such as corporate income, job creation, and different tax incentives, to determine which state's program is favorable. For example, if a business is losing money or paying little in income taxes, the company may not reap any benefits from the tax credits. On the other hand, real property tax exemptions, such as those implemented in North Carolina, are important to consider because they may benefit a company regardless of business profitability.

³⁰⁰ HAZARDOUS WASTE CONTINGENCY FUND ANNUAL REPORT, *supra* note 235, at ii.

³⁰¹ *Id.*

³⁰² S.C. CODE ANN. § 44-56-750(B)(7).

³⁰³ See *supra* Part IV.B. and accompanying text.

³⁰⁴ See generally *id.*

³⁰⁵ See generally *supra* Part III.C. and accompanying text.

Business developers seem more willing to embrace brownfields redevelopment today due to their ability to avoid certain environmental liability and the ability to offset losses associated with expensive environmental cleanups with funding options and tax incentives. Recently, EPA Administrator Stephen Johnson spoke at the Brownfields 2005 Conference in Denver, Colorado, commenting on the new AAI procedures for conducting assessments of contaminated sites to avoid liability under federal law.³⁰⁶ Johnson feels optimistic that the new Rule will continue to increase private cleanups of brownfields properties, saying that the AAI rule establishes “clear standards for environmental due diligence . . . increases certainty about environmental standards and superfund liability, and it will help reduce urban sprawl.”³⁰⁷ Hopefully, further federal and state legislation and the success of the brownfields programs and tax incentives in the Southeast and across the country will encourage the redevelopment of brownfields in the future. Doing so would discourage the abandonment of contaminated properties that would otherwise result in urban sprawl, decreased tax revenues, and increased environmental justice issues.

³⁰⁶ See *New Brownfields Rule to Speed Pace of Cleanups, EPA's Johnson Says*, DAILY ENVTL. RPT. A-8 (Nov. 3, 2005).

³⁰⁷ *Id.*

