

by Leon C. Harmon, Esq. and John W. Davidson, Esq.

Environmental issues have become tremendously important in the last twenty years. Industry expends many resources in the form of money and efforts regarding present, future, and past environmental practices. Industry also faces potential liability regarding property it currently owns, has owned in the past, and property it may purchase in the future. The new "Brownfields" initiatives and other similar programs may provide certain property owners and purchasers some relief.

WHAT IS A BROWNFIELD?

The textbook definition is an "abandoned, idled or under-used industrial or commercial site where expansion or redevelopment is complicated by real or perceived environmental contamination that can add cost, time, or uncertainty to a redevelopment project." Under the right circumstances, a more practical answer is that a brownfield represents an opportunity.

There are several mechanisms by which a business can acquire property that may have some amount of contamination, without acquiring liability at the same time. First, for those acquiring a site which has become contaminated due to activities conducted on the site, the Department of Health and Environmental Control ("DHEC") may agree to enter a "Prospective Purchaser Contract". Generally, this form of contract insulates the purchaser from certain liability in exchange for the purchaser performing agreed upon assessment or cleanup work at the site. Of course, the extent of the work to be undertaken by the purchaser is negotiable.

For sites which have been impacted by contamination migrating from off-site, an owner or purchaser can enter a letter agreement with DHEC which will acknowledge that the owner or purchaser is not liable for the contamination. However, it is necessary to provide DHEC with sufficient information to confirm that the source of contamination is indeed off-site.

Finally, DHEC has prepared proposed legislation addressing voluntary cleanup of contaminated sites. The proposed Voluntary Cleanup Program legislation provides that if a cleanup is conducted by a party that is not responsible for the contamination, DHEC will agree not to sue the party for prior conditions at the site and will also provide contribution protection for claims under the Superfund statute. DHEC hopes to have the proposed legislation introduced shortly in the General Assembly.

A contaminated site is not necessarily unusable. With proper planning and diligence such sites provide an opportunity for redevelopment.