Response to Comments regarding Brownfields Agreement

Former BASF Landfill

Sand Hill Road, Asheville, Buncombe County, NC

Project # 15011-11-11

Public Comment Period

September 25, 2015 through October 24, 2015

And a February 4, 2016 Public Meeting

Several comments were received during the draft Brownfields Agreement public comment period for the Former BASF Landfill property in Asheville, NC. Only comments concerning the draft Brownfields Agreement and Brownfields Property were considered during the Brownfields decision process. The response to comments are provided below with any subsequent changes to the Brownfields Agreement indicated beneath the response.

**A comment was raised regarding the General Warranty Deed for the property. Specifically a concern was raised that the use, a “playground” allowed in the Brownfields Agreement is restricted under the General Warranty Deed.**

The Brownfields agreement as outlined sets out conditions with which Enka Partners(the Brownfields prospective developer) will need to comply in order to receive liability protection for existing contamination on the property as they exercise their property rights to use the property in a manner they have proposed to use it. Therefore, this agreement does not “allow” playgrounds; it merely sets forth the conditions which Enka Partners comply with in order to limit its liabilities to DEQ for the already existing contamination at the property.

The Brownfields Program does evaluate the environmental conditions at a property, the risks, if any, associated with that intended use and determines if the use is acceptable based on this evaluation. The risks with a landfill are exposure to the material in the landfill and the potential for landfill gases. These risks have been addressed in the agreement with a minimum of 2 feet of clean fill and a landfill gas assessment including mitigation measures if landfill gas is detected. Based on this evaluation the Brownfields Program has determined that with appropriate measures exposure can be eliminated and the proposed uses are acceptable from an environmental perspective, which is what the Brownfields agreement addresses.

The General Warranty Deed for the property is not an environmental matter that the Department of Environmental Quality has any jurisdiction over. It is a matter for the private parties that were involved with the real estate transaction of this property to resolve. In all circumstances, the prospective developer will be required to meet the requirements of the Brownfields Property Reuse Act in order to receive the Act’s liability protections.

During the drafting of this Response to Public Comments Document, DEQ received communication from Enka Partners that they desired to remove the reference to play areas or playgrounds from the agreement. As a result, DEQ has revised the final BFA to remove any specific mention of play areas or playgrounds as an allowable land use.

**A comment was raised regarding concern that the proposed redevelopment poses additional and unfair risks upon BASF.**

DEQ believes the Brownfields agreement specifically addresses this concern with Land Use Restrictions that dictate these issues and identify the current owner of the property as responsible. Paragraphs 17.b., 17.c., and 17.e. of the Brownfields agreement are the land use restrictions that address this issue and are included for ease of reference:

*17.b. No physical redevelopment of the Property may occur unless and until DEQ’s Solid Waste Section and Brownfields Program conclude in writing that the proposed redevelopment will not negatively affect the cover, structural integrity and monitoring systems at the closed landfill facility.*

*17.c. No physical redevelopment of the Property may occur unless and until DEQ’s Solid Waste Section and Brownfields Program review a plan for redevelopment (Redevelopment Plan) that will address:*

*i. public safety for all aspects of the redevelopment;*

*ii. maintenance of the landfill cover, structural integrity and monitoring systems;*

*iii. the plan shall include a minimum of 2 feet of clean fill for any waste containing area of the landfill and the maintenance there of;*

*iv. assessment and management of methane and landfill gases;*

*v. soil and groundwater management during the redevelopment phase;*

*vi. the plan shall be certified by a licensed Professional Engineer in North Carolina; and*

*vii. within 90 days after the conclusion of physical redevelopment**, the then owner of the Property shall provide DEQ a report**, subject to written DEQ approval**, on environment-related activities* *conducted pursuant to the Redevelopment Plan, which report* *shall include a summary and drawings* *and describe how the physical redevelopment was accomplished in accordance with the Redevelopment Plan. DEQ agrees to review the Redevelopment Plan and to provide comments or questions to the Project Developer within 45 days of receipt of the Redevelopment Plan.*

*17.e. The owner of the Property shall, at its own expense, correct any impacts to the landfill, as determined by DEQ, that increase the cost of compliance or ability to comply with rules and regulations for environmental protection, or adversely affect environmental permits regarding the landfill that are caused by development on the landfill. Said corrections must be made with prior DEQ approval to the written satisfaction of DEQ’s Brownfields Program and Solid Waste Section.*

Thus, under the Brownfields agreement, any impacts caused by the redevelopment are the responsibility of the land owner (Enka Partners) rather than BASF. The agreement, therefore, clearly establishes that the impacts of the redevelopment regarding environmental matters will be the responsibility of the land owner, currently Enka Partners, not BASF.

**Several comments were raised regarding perceived deficiencies in surface water sampling and analysis of the unnamed tributaries and Hominy Creek for metals which may or may not indicate contamination due to coal ash.**

Sampling and analysis at the property have been conducted in accordance with the post closure requirements for the former industrial landfill. However, the Brownfields Program, is requiring the sampling and analysis of the unnamed tributaries along with Hominy Creek for an expanded list of metals and volatile organic compounds. The following land use restriction 17.d., has been included in the Brownfields agreement:

*d. Within 30 days following recordation of the Notice referenced below in paragraph 22, the then owner of the Property shall submit to DEQ a written plan for monitoring surface water at the Property through sampling and analysis. The owner shall be responsible for making any modifications to the plan necessary for DEQ approval. Upon DEQ approval of the plan, in writing, the plan shall be implemented by the owner of the Property on the schedule in the approved plan.*

*i. The plan shall include, at a minimum:*

*A. designation of at least four (4) surface water locations to be sampled pursuant to the plan;*

*B. a schedule for sampling of the designated surface water locations for volatile organic compounds and metals at least once each year during the same thirty-day period, and a plan for increasing the sampling frequency should results show above DEQ established acceptable risk levels;*

*C. analysis of the samples by the most current version of U.S. Environmental Protection Agency Method 8260, 200.7, 200.8, 245.1, and 300.0;*

*D. provision of the sampling analyses to DEQ in writing within 30 days after sampling;*

*E. provision for a calculation of resultant risk in accordance with DEQ guidelines and procedures.*

*ii. When the plan requires sampling, analysis, and reporting, the then owner of the affected portion(s) of the Property shall be responsible for compliance. The plan may be amended with DEQ’s prior written approval. The required monitoring shall continue until sampling pursuant to the plan shows the concentrations of any and all metals and volatile organic compounds present in excess of the standards set forth in the most current version of Title 15A of the North Carolina Administrative Code, Subchapter 02B, (January 1, 2015 version), are stable, declining or undetected for a minimum of three (3) consecutive years; and*

*iii. Should the analytical results of the surface water sampling indicate unacceptable risk levels when calculated in accordance with DEQ guidelines and procedure, the then owner of the property shall submit a plan to DEQ for written approval to mitigate said risk to acceptable levels, including institutional controls for public notice and access restriction. Once approved by DEQ, said measures shall be implemented by the then owner on a schedule acceptable to DEQ.*

**A comment was raised that Exhibit 2 the contaminant tables for the property did not fully disclose the extent of contamination at the property.**

 The Brownfields agreement Exhibit 2 is a compilation of the most recent data from the site. Since the agreement went to public notice in September 2015, there is more recent surface water data from Hominy Creek that have no detections of constituents monitored in accordance with the post closure requirements above the 2B standard.

**A comment was raised regarding the hazards of natural radioactive elements present in coal ash.**

Natural radioactive elements can be found in the environment.  As such, they can also be present in coal and the ash that results from that coal’s combustion.  The level of radiation in coal ash is typically on par with naturally occurring levels.  Exposure to fly ash is virtually eliminated at a landfill because the material is buried. Furthermore, the Brownfields Agreement and the post closure requirements for this former Industrial Landfill requires maintaining a minimum of 2 feet of clean fill on all waste portions.

**A comment was raised regarding the posting of the Summary Notice at the site and availability of the Notice at the library.**

 The Prospective Developer provided the Brownfields Program with documentation showing the posting at the site in accordance with the Brownfields Property Reuse Act. The library indicated the documents for public notice were taken from the library on Monday October 26, 2016, but did not know who took the documents. The 30-day public notice period began on September 25, 2015 and officially ended on Saturday October 24, 2015. DEQ allowed for comments to be received through Monday October 26, 2015 to account for the weekend. Hence, despite the removal of the documents on October 26, 2016, the availability of the documents at the library met the statutory requirements.

**Several comments were received regarding the contaminants and conditions of the former landfill and if the landfill would be cleaned up.**

The Brownfields Program evaluates contaminants at the property including risk receptors associated with contamination. The Brownfields agreement for the property includes measures to address risk by eliminating exposure. This is accomplished with clean fill, assessing landfill gases and implementing mitigation measures if necessary, or restricting access, if for example surface water is impacted. The object of the brownfields agreement is not to “clean up” the landfill. Rather, the Brownfields agreement is a vehicle for a non-causative prospective developer to safely redevelop a site, bringing a property back into productive reuse. The Brownfields agreement only affects the liability of a non-causative prospective developer and does not afford any liability protection to the responsible party.

**A comment was raised regarding a past worker who may have become ill due to exposure in an occupational setting at the Former BASF plant and how this could impact children.**

The proposed Brownfields redevelopment is an open air sportsplex, where landfill material is encapsulated with 2 plus feet of clean fill. This is not an enclosed manufacturing plant where an employee is working 8-12 hour shifts 5 days week, while working directly with raw materials or chemicals. Therefore, the proposed reuse cannot be compared to an occupational setting or screening limit for workers at the former facility that contributed waste to the landfill.

**Several comments were raised regarding a sportsplex on a landfill when there is virgin, uncontaminated property available.**

 The Brownfields Program is a voluntary program for prospective developers who desire to redevelop a property that may have real or perceived environmental contamination. The Brownfields Program is working with Enka Partners, the prospective developer. The Brownfields Program evaluates the property and determines if the site can be made safe for its intended reuse, this has been completed for this site, with the implementation of the land use restrictions contained in the Brownfields agreement.

 DEQ also has landfills that have been redeveloped for sports fields. The Flemington Landfill is now the Cape Fear Regional Soccer Complex. A former Winston Salem Landfill has been redeveloped into soccer and baseball fields. Additionally many states across the country have converted landfills to sports fields, golf courses, playgrounds, and county parks.

 DEQ has no comment of the availability of other land for this purpose, nor on the development of virgin land for this purpose.

The findings of the NC General Assembly when the Brownfields Property Reuse Act of 1997 was enacted are perhaps relevant (Session Law 1997-357):

*The General Assembly makes the following findings:*

*(1) There are abandoned, idle, and underused properties in North Carolina, often referred to as "brownfields", that may have been or were contaminated by past industrial and commercial activities, but that are attractive locations for redevelopment.*

*(2) The reuse, development, redevelopment, transfer, financing, and other use of brownfields is impaired by the potential liability associated with the risk of contamination.*

*(3) The safe redevelopment of brownfields would benefit the citizens of North Carolina in many ways, including improving the tax base of local government and creating job opportunities for citizens in the vicinity of brownfields.*

*(4) Potential purchasers and developers of brownfields and other parties who have no connection with the contamination of the property, including redevelopment lenders, should be encouraged to provide capital and labor to improve brownfields without undue risk of liability for problems they did not create, so long as the property can be and is made safe for appropriate future use.*

*(5) Public and local government involvement in commenting on the safe reuse of brownfields will improve the quality and acceptability of their redevelopment.*