

DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL

DIVISION OF WASTE AND HAZARDOUS SUBSTANCES

SITE INVESTIGATION & RESTORATION SECTION

BROWNFIELD DEVELOPMENT AGREEMENT TIMING AND EXECUTION

MEMORANDUM

TO: Delaware HSCA-Certified Consultants

FROM: James M. Poling, Brownfields Coordinator

Thru: Tim Ratsep, SIRS Administrator *Tim R. 5/16/14*
Keith Brady, Esq., DAG *KTB*

RE: Execution of Brownfields Development Agreement (BDA) Prior to Taking Title of Certified Brownfield Property

DATE: May 19, 2014

This Memorandum addresses the timing and execution of a Brownfield Development Agreement (BDA) prior to taking title to the certified brownfield site. Execution of the BDA is required for entry into the Brownfields Development Program (BDP). The BDA is the Department approved settlement agreement that delineates the rights and obligations of the Brownfield Developer and the State. The BDA, among other provisions, identifies the Brownfield Developer and the certified brownfield site in question, provides for liability protection from past releases, allows for the reimbursement of associated remedial costs, and contains the work plan necessary for achieving a Certificate of Completion of Remedy (COCR).

The previous interpretation of the timing and execution of the BDA was that it had to be entered into prior to receiving brownfield grant funding for eligible remedial costs and ultimately prior to receiving liability protection. The historic interpretation allowed for execution of the BDA after taking title as the definition of a Brownfield Developer provided for liability protection **“at the time of application for a BDA”** (7 Del. C., §9123(1)b.) . This was, however, in contradiction to the Standard of Liability provision wherein it states that **“[n]otwithstanding § 9105 of this title, liability protection is afforded a brownfields developer who enters into a Brownfields Development Agreement with the Secretary...at the time the Brownfields Development Agreement is entered into...”** (7 Del. C., §9125(a)). The definitional provision would undermine the more substantive standard of liability provision and have permitted a party to be otherwise liable, ie, an owner of a property, without the protection afforded the BDA in place prior to taking title.

Accordingly, this subsequent interpretation will become the mandated procedure for entry into the BDP as of July 1, 2014. Procedurally, BDAs will be required to be submitted with the Application for Brownfield Certification and will be required to be executed prior to taking title to the certified brownfield site that is the subject of the brownfield project.