

## **Environmental Law Fact Sheet**

### **MOLD CONTAMINATION: SYMPTOMS, SELF-HELP REMEDIES AND PARTICULAR CONCERNS FOR RENTERS AND HOMEOWNERS**

This Environmental Law Fact Sheet is part of a series offered by the Environment, Energy, and Natural Resources Section of the North Carolina Bar Association. The series is intended to provide an introduction to someone living or working in North Carolina who is confronted with an issue of environmental law. We hope that the series will be useful as a starting point for people looking for information about their rights and obligations under North Carolina law. (As with any introduction to the law, this is not a complete explanation, and it should not be understood as legal advice. Readers may wish to consult a lawyer with the details of their matter.) You can find fact sheets addressing other environmental law topics on our website at: <http://environmental.ncbar.org/>

You notice the symptoms: sneezing, chronic coughing, runny nose, nasal congestion, and itchy, watery eyes. If you are a seasonal allergy sufferer, you might mistake the symptoms for just what happens when you forget to take your prescription nasal spray. If you have never had allergies, you may think you are suffering from adult onset. Couple these more mild symptoms with more severe ones, like skin rashes and hives, sinus headaches or reduced lung capacity and difficulty breathing and you might have been exposed to mold.<sup>1</sup> These symptoms are typical of mold contamination in your residence, community space or workplace.

Mold is obvious when it grows in bathrooms along tile grout in shower stalls, or on shower curtains. It is also easily recognized in refrigerator water pans. However, mold can grow in almost any place exposed to prolonged moisture. Dark, damp places have a higher chance of supporting mold growth.

Allergic responses to mold are quite common. Symptoms of exposure to toxic mold, or mold that produces toxins, are typically more severe than non-toxic mold, and the symptoms tend to affect those prone to respiratory distress to a greater degree than others.<sup>2</sup> Those problems may include pulmonary hemorrhage or memory loss. Still, relatively few cases of severe reactions have been documented. Where they have been documented, it has been extremely difficult to show that toxic mold caused the symptoms.<sup>3</sup>

Mold has been found frequently in buildings where moisture builds and there is little ventilation.<sup>4</sup> Wallboard, sheetrock or cellulose insulation can act as wicks for any floodwater or unrepaired water leaks. Microscopic mold spores quickly become airborne and travel throughout the air conditioning and heating systems. A mold infested home creates a severely unpleasant environment for anyone predisposed to allergies and may cause structural damage to the dwelling if left unchecked.<sup>5</sup>

Homeowners, renters and employees facing mold problems have sought remedies in the court systems, often with little success. Still, avenues to remedy mold problems do exist. First, avoid mold problems in your home by 1) using exhaust fans in the bathroom or while cooking to reduce moisture, 2) using ecologically sensitive mold prevention products to prevent mold growth, 3) repairing leaks promptly, and 4) using high performance filters to trap mold spores and inhibit its growth. Keep humidity levels between 40% and 60%, promptly fix leaky roofs, windows, and pipes and thoroughly clean and dry affected areas after flooding.<sup>6</sup> In

addition, there are specific allergy tests that can determine if you have a mold allergy. Allergy testing increases your knowledge about specific allergens and pinpoints the allergens to avoid.<sup>7</sup>

### **What are your legal rights if you have mold and you are a renter?**

While there is no specific statute regarding mold, toxic or otherwise for renters, North Carolina's implied warranty of habitability statute and the Unfair and Deceptive Trade Practices Act could provide some protection. For renters, landlords are required to maintain habitable premises. N.C.G.S. § 42-42(a). Upon notification of a problem with the dwelling, in this case mold, the tenant may ask for repair and clean-up of the mold. If the mold is not caused by the tenant's own negligence, and the landlord fails to cure the defect, the tenant may have an action for breach of the implied warranty of habitability and may sue for rent abatement. If the tenant sues to lessen the amount of rent to be paid because of a breach of the implied warranty of habitability, the amount of damages is the difference between the fair rental value of the property in a warranted condition and the fair rental value of the property in its unwarranted condition, provided, however, the damages do not exceed the total amount of rent paid by the tenant; and the tenant is entitled to any special and consequential damages alleged and proved. Von Pettis Realty, Inc. v. McKoy, 135 N.C. App. 206, 519 S.E.2d 546 (1999).

Based on that implied warranty of habitability, a landlord commits an unfair or deceptive trade practice by charging a tenant rent for a dwelling that the landlord knows to be uninhabitable.

A landlord commits an unfair or deceptive trade practice by charging a tenant rent for a dwelling the landlord knows is uninhabitable. Whether a landlord has committed an unfair or deceptive trade practice is a case by case inquiry; a violation is marked by immoral, unethical, oppressive, unscrupulous, or substantially injurious conduct. N.C. Gen. Stat. § 75-1.1 (2007); Dean v. Hill, 171 N.C. App. 479, 486, 615 S.E.2d 699, 703 (2005). "Upon properly submitted issues the jury is to determine the facts and the trial court is to determine, as a matter of law, whether the landlord engaged in unfair or deceptive trade practices." Foy v. Spinks, 105 N.C. App. 534, 540, 414 S.E.2d 87, 90 (1992).

Elder v. McNeel, NO. COA08-202, 2008 N.C.App. LEXIS 2221, at 12 (N.C. App. Dec. 16, 2008).

In Elder, however, even where evidence was found that mold existed on the windows, under beds, on furniture and linens, and where a code enforcement inspector found mold spores in the attic and interior of the house, the trial judge found the house to be fit and habitable during the time of the suing tenant's occupancy. In this case, since the dwelling was deemed habitable, no cause of action existed for unfair and deceptive trade practices. Where an action exists, the complaining tenant could be awarded treble damages and attorney fees. N.C.G.S. §§ 75-1.1, 75-16.

These two legal claims are important because they show a duty for the landlord to remedy mold and the possibility of attorney fees in the event the landlord does not remedy and continues to charge rent for the uninhabitable premises.

### **What are your rights if you are a purchaser from a builder?**

For purchasers, the North Carolina Court of Appeals reaffirmed that North Carolina recognizes a claim for breach of implied warranty of habitability against a builder. The warranty extends to only recently constructed homes.

[I]n every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.

Gaito v. Auman, 313 N.C. 243 at 248 (1985) citing Hartley v. Ballou, 286 N.C. 51 at 62 (1974).

Here, were the new homeowner to encounter mold problems within a reasonable period of time, the builder could be sued for breach of the implied warranty of habitability due to mold contamination. The finder of fact would still need to determine whether the mold contamination constituted uninhabitable dwelling conditions.

### **Homeowners and Insurance Exclusions**

For other homeowners, a remedy may lie with their homeowner's insurance. Here the large hurdle often faced by homeowners is a general exclusion for mold damage. In these cases, the damage that caused the mold to propagate must have occurred during the time when the homeowner was insured by the agency, and then the homeowner must work to overcome any exclusion specifically written in the policy for mold damage. Nelson v. Hartford, 177 N.C. App. 595 (2006).

### **Conclusion**

When facing mold, the best course of action is to immediately act to eradicate the cause of the mold and to clean up surfaces or areas where mold exists. Testing for toxicity is extremely expensive and the legal hurdles to a favorable award are high. While your insurance may cover the cost of replacing items damaged by mold, medical bills are often even harder to get covered because of the difficulty in proving a link between mold contamination and symptoms. Document mold contamination with photos and journal entries of symptoms and

odors. Communicate these concerns early with your landlord, homebuilder or insurance company.

Endnotes:

---

<sup>1</sup> Inhaling or touching mold or mold spores may cause allergic reactions in sensitive individuals. Allergic responses include hay fever-type symptoms, such as sneezing, runny nose, red eyes, and skin rash (dermatitis). Allergic reactions to mold are common. They can be immediate or delayed. Molds can also cause asthma attacks in people with asthma who are allergic to mold. In addition, mold exposure can irritate the eyes, skin, nose, throat, and lungs of both mold-allergic and non-allergic people. Symptoms other than the allergic and irritant types are not commonly reported as a result of inhaling mold. Research on mold and health effects is ongoing. Found at <http://www.epa.gov/mold/moldbasics.html>. “A Brief Guide to Mold and Moisture in Your Home” EPA 402-K-02-003, 2002.

Some people are sensitive to molds. For these people, exposure to molds can cause symptoms such as nasal stuffiness, eye irritation, wheezing, or skin irritation. Some people, such as those with serious allergies to molds, may have more severe reactions. Severe reactions may occur among workers exposed to large amounts of molds in occupational settings, such as farmers working around moldy hay. Severe reactions may include fever and shortness of breath. Some people with chronic lung illnesses, such as obstructive lung disease, may develop mold infections in their lungs. Found at [http://www.cdc.gov/MOLD/dampness\\_facts.htm#health](http://www.cdc.gov/MOLD/dampness_facts.htm#health).

<sup>2</sup> Certain individuals with chronic respiratory disease (chronic obstructive pulmonary disorder, asthma) may experience difficulty breathing. Individuals with immune suppression may be at increased risk for infection from molds. Found at <http://www.cdc.gov/MOLD/stachy.htm#Q1>.

<sup>3</sup> The term “toxic mold” is not accurate. While certain molds are toxigenic, meaning they can produce toxins (specifically mycotoxins), the molds themselves are not toxic, or poisonous. There are very few reports that toxigenic molds found inside homes can cause unique or rare health conditions such as pulmonary hemorrhage or memory loss. These case reports are rare, and a causal link between the presence of the toxigenic mold and these conditions has not been proven. Found at <http://www.cdc.gov/MOLD/stachy.htm#Q1>.

<sup>4</sup> Since mold requires water to grow, it is important to prevent excessive moisture in buildings. Some moisture problems in buildings have been linked to changes in building construction practices since the 1970s, which resulted in tightly sealed buildings with diminished ventilation, contributing to moisture vapor buildup. Other moisture problems may result from roof leaks, landscaping or gutters that direct water into or under a building, or unvented combustion appliance. Found at <http://www.osha.gov/dts/shib/shib101003.html>.

<sup>5</sup> Mold may be hidden in places such as the back side of dry wall, wallpaper, or paneling, the top side of ceiling tiles, the underside of carpets and pads, etc. Other possible locations of hidden mold include areas inside walls around pipes (with leaking or condensing pipes), the surface of walls behind furniture (where condensation forms), inside ductwork, and in roof materials above ceiling tiles (due to roof leaks or insufficient insulation). Found at <http://www.epa.gov/mold/hiddenmold.html>.

<sup>6</sup> Inside your home you can control mold growth by: Keeping humidity levels between 40% and 60%; promptly fixing leaky roofs, windows, and pipes; thoroughly cleaning and drying after flooding; ventilating shower, laundry, and cooking areas. Found at [http://www.cdc.gov/MOLD/dampness\\_facts.htm#control](http://www.cdc.gov/MOLD/dampness_facts.htm#control).

<sup>7</sup> Allergy tests help find allergies to pollen, molds, dust mites, animal dander, insect stings, foods and some medicines. Finding out what you are allergic to is an important first step to effective allergy treatment. Today allergy tests are more convenient and accurate than ever before. When combined with a detailed medical history, allergy testing can identify the specific things that trigger your allergic reactions. Allergy testing can be done as skin tests or as blood tests. American College of Allergy, Asthma and Immunology. Found at <http://www.acaai.org/public/advice/Allergy+Testing.htm>.

## **Environmental Law Fact Sheet**

### **SMALL BUSINESSES: OPERATING A BUSINESS**

This Environmental Law Fact Sheet is part of a series offered by the Environment, Energy, and Natural Resources Section of the North Carolina Bar Association. The series is intended to provide an introduction to someone living or working in North Carolina who is confronted with an issue of environmental law. We hope that the series will be useful as a starting point for people looking for information about their rights and obligations under North Carolina law. (As with any introduction to the law, this is not a complete explanation, and it should not be understood as legal advice. Readers may wish to consult a lawyer with the details of their matter.) You can find fact sheets addressing other environmental law topics on our website at: <http://environmental.ncbar.org/>

As a small business owner, should you be concerned about environmental law issues? It depends on your business. Some small business owners will never be affected by an environmental law. However, if your business involves owning or operating a facility, working with hazardous chemicals or oil, or owning or leasing property, there are certain things that you should know.

Please keep in mind that this paper is not intended to provide legal advice but is meant to alert you to the kinds of issues that can arise in the operation of a small business.

If you operate a business that works with hazardous chemicals, such as a drycleaners, or oil, such as an automotive repair shop, or if you generate large amounts of waste, you should make sure that you are complying with the environmental rules that apply to your operations. These requirements can be complicated, and it is strongly recommended that you seek advice as you begin operations.

#### **Working with Chemicals**

If you handle or store large amounts of chemicals, you may be required to make yearly reports to a state agency, your local government, and your fire department under the Emergency Planning and Community Right to Know Act (“EPCRA”). EPCRA applies to any chemical for which the Occupational Safety and Health Administration requires a Material Safety Data Sheet (“MSDS”). If you store large amounts of chemicals for which MSDSs are required, you may be required to provide a list of those chemicals to the North Carolina State Emergency Response Commission, a local emergency response commission, and your local fire department. You may also be required to provide, once a year, a “Tier II Emergency and Hazardous Chemical Inventory Form” to those same three agencies, reporting the amount of those chemicals stored at your facility during the year. Certain facilities may also be required to, once a year, file a second form, called a “Toxic Chemical Release Inventory” form, reporting the amount of certain chemicals released during the previous year. More information about EPCRA is available at <http://www.dem.dcc.state.nc.us/SERC/downloads.htm>.

#### **Hazardous Waste**

If you generate hazardous waste, you are required to comply with rules governing the handling and disposal of your waste. Examples of the kinds of wastes that would be considered hazardous include the following:

1. Spent solvents and filter cartridges from drycleaning processes;
2. Ignitable and toxic wastes, solvent wastes, and paint wastes from furniture/wood manufacturing and refinishing;
3. Solvent wastes and paint wastes from construction activities;
4. Acids and bases, solvents, paint wastes, and used oil and antifreeze from vehicle maintenance activities;
5. Pesticides, rinsewater, and containers;
6. Washes and dyes from leather processing.

The requirements for disposal of these wastes depend on the amount of waste your operation generates. At a minimum, you must be sure that these wastes are disposed of properly, by delivery to a properly licensed facility. You must also handle the waste properly in your facility and limit the amount of waste you are storing at any particular time. You may also be required to register for and obtain an EPA identification number. If you need additional information, the Environmental Protection Agency has published a handbook on this topic, which is available online at <http://www.epa.gov/epaoswer/hazwaste/sqg/handbook/k01005.pdf>.

If you plan to discharge wastes to the sewer system, you may be required to obtain a permit, called an "Industrial User Pretreatment Permit." These permits are obtained by submitting an application to the Department of Environment and Natural Resources Division of Water Quality. Permits generally include conditions, including limits on the amount of waste that can be discharged and the regular filing of reports. More information about these permits is available at <http://h2o.enr.state.nc.us/percs/Pretreatment/PERCSPretreatmentHome.html>.

Besides hazardous chemicals, there are other types of waste that have special disposal requirements. For example, fluorescent bulbs and spent lead acid batteries should both be disposed of at an approved facility, and neither should be placed in the trash. Also, wooden pallets may not be placed in a landfill but must be reused or recycled. Additionally, if your operation will involve emissions to the air, you may be required to obtain construction and operating permits.

## **Storage Tanks**

Finally, if you operate storage tanks, there may be rules you must follow. Regulated USTs, including those storing motor fuel, must have an operating permit and be equipped with leak detection and corrosion protection equipment. (More information is available at <http://www.wastenotnc.org/ust/docs/Responsibilities.pdf>) ASTs generally do not need to be registered, but construction standards are established by the North Carolina Building Code.

Failure to comply with these requirements can result in fines ranging from hundreds to thousands of dollars. As a result, if you are operating a facility that deals with hazardous substances, produces hazardous wastes, or operates storage tanks, you should inform yourself about all the applicable regulations. The Department of Environment and Natural Resources Division of Pollution Prevention and Environmental Assistance provides assistance to small business owners and can help you assess your waste handling procedures. Their phone number is (919) 763-0136, and their website is <http://www.p2pays.org/category.asp?cat=2>.

## **Environmental Law Fact Sheet**

### **WHAT NORTH CAROLINIANS SHOULD KNOW ABOUT THEIR MINERAL, TIMBER AND WATER RIGHTS**

This Environmental Law Fact Sheet is part of a series offered by the Environment, Energy, and Natural Resources Section of the North Carolina Bar Association. The series is intended to provide an introduction to someone living or working in North Carolina who is confronted with an issue of environmental law. We hope that the series will be useful as a starting point for people looking for information about their rights and obligations under North Carolina law. (As with any introduction to the law, this is not a complete explanation, and it should not be understood as legal advice. Readers may wish to consult a lawyer with the details of their matter.) You can find fact sheets addressing other environmental law topics on our website at: <http://environmental.ncbar.org/>

People who own or plan to purchase property often have expectations about the property rights that come along with ownership. These property rights are sometimes thought of as a bundle of sticks: the right to each particular use of the property is a separate stick. One or two sticks can be removed without ruining the bundle, and, in the same way, particular uses are sometimes removed from the bundle of property rights, by law or by contract. As discussed below, mineral, timber, and water rights are sometimes removed from the bundle - that is, they are “severed” from other property rights - which can be an important issue for property owners.

#### **MINERAL RIGHTS**

In North Carolina, a landowner usually owns the surface of the land, as well as the ground below the surface, including any minerals found there. However, ownership rights to the minerals on or under the surface may be severed from the surface rights to the land. The mineral rights can then be transferred as a separate property interest. Due to this fact, it is important to check the deed closely before you buy property in North Carolina to determine whether the mineral rights have been severed. If they have, the mineral rights could belong to someone other than the person selling the land.

#### **TIMBER RIGHTS**

Similarly, standing timber rights are severable as a separate property interest. A landowner can transfer to another the right to enter his or her land and remove standing timber through a proper contract. The owner can place restrictions on the removal of timber, such as size, kind, location, quantity, and specific time limitations for when another can enter the land and remove the timber. After the timber has been removed according to the contract, all rights revert back to the landowner. Again, before you purchase property, it is important to ensure that the timber rights have not been transferred.

#### **WATER RIGHTS**

In the United States, there are two primary systems of water rights. In the West where water is scarce, many states follow “prior appropriation” water rights which favor older claims to water. In the East where water is more plentiful, most states, including North Carolina, follow “riparian” water rights.

### *“Reasonable Use” of Water*

Riparian water rights mean that owners of land nearby and touching a natural body of water have the right to make reasonable use of that water. Each owner can take, use, and discharge surface water for their reasonable use. What is reasonable use? All customary household, agriculture, and industrial uses are presumed to be reasonable. That said, every owner’s riparian right is equal. This means that even an owner’s reasonable use must not interfere with the reasonable uses of other owners by diminishing the quality (*i.e.*, polluting) or quantity (*i.e.*, constructing a dam) of the water. If the use does interfere, adversely affected owners can sue for damages and for an injunction to stop the infringing use.

The same holds true for water found beneath the surface (*i.e.*, well water). As with surface water, a landowner has rights to groundwater for their reasonable use. Any use of the water on the property is presumed to be reasonable. However, the same restrictions applied to surface water also apply to groundwater. If an owner wastes the water, pollutes the water or uses the water for an off-site purpose, this use could be considered unreasonable.

### *Water Ownership*

A landowner has rights to use surface and ground water reasonably, but this does not mean he or she owns the water. In North Carolina, salt and fresh water that is navigable and the land beneath that water are owned by the State “in trust” for the public. This public trust right allows the public to navigate freely, swim, hunt, fish, and otherwise enjoy all recreational activities in the water. However, this does not create a right to trespass on private property to gain access to these waters. Remember also that the public trust right only extends to navigable water, meaning water that can be navigated by a watercraft such as a boat or a canoe. If the water body is too small to be navigated, it is not in the public trust and can be privately owned (*i.e.*, the public may not use it).

Riparian right owners, meaning those owning land adjacent to the water, still have the right of reasonable use of navigable waters; however, their ownership ends at the mean high tide line of the water body. Anything below that line is owned by the State. Gradual natural erosion will reduce the amount of land held by the owners of land adjacent to a navigable body of water, but a sudden event, like a flood, will not move the property boundary line. Further, since the State owns the water, landowners are restricted by navigation requirements. For example, building a pier that could interfere with navigation could require a landowner to obtain a permit before construction.

In the face of ever-growing water needs, it is important for landowners to remember these two points: (1) that navigable water is held in trust for and can be freely used by the public; and (2) that riparian right owners can only use water in a reasonable manner.



## Environmental Law Fact Sheet

### SEDIMENTATION

This Environmental Law Fact Sheet is part of a series offered by the Environment, Energy, and Natural Resources Section of the North Carolina Bar Association. The series is intended to provide an introduction to someone living or working in North Carolina who is confronted with an issue of environmental law. We hope that the series will be useful as a starting point for people looking for information about their rights and obligations under North Carolina law. (As with any introduction to the law, this is not a complete explanation, and it should not be understood as legal advice. Readers may wish to consult a lawyer with the details of their matter.) You can find fact sheets addressing other environmental law topics on our website at: <http://environmental.ncbar.org/>

From time to time, property owners are dismayed to find that construction work or other kinds of “land-disturbing activities” have resulted in large amounts of soil deposited in their yard, in the street in front of their house, or in nearby streams or lakes. Although not as dangerous as hazardous chemicals or nutrients, this is a kind of pollution. It can be aesthetically unattractive, and it can be harmful, for example, to streams that are choked by sediment. For a property owner who is harmed by sediment pollution, North Carolina has laws and rules that may provide some relief.

#### 1. Sedimentation Pollution

Sedimentation occurs when soil is transported from one site to another by wind, water or gravity. When it is transported into water and wetlands, the soil can damage the water quality and habitat of the water body and wetland areas. In addition, soil from the land of one land owner can be transported to the land of another land owner and can cause damage. Some sedimentation occurs naturally without any human activity. However, when human activity causes sedimentation, the activity can be subject to government regulation and legal remedies.

#### 2. Government Regulatory Programs

**Sedimentation Pollution Control Act of 1973 (G.S.113A-50 et seq.)** - This is a comprehensive State regulatory program designed to regulate land-disturbing activities that create sedimentation pollution. Generally the Act requires a person engaging in a land-disturbing activity to take measures to assure that the activity does not result in sediment entering waters or wetlands or leaving the property of the person responsible for the land-disturbing activity. In cases where the land-disturbing activity will disturb more than one acre, an erosion and sedimentation control plan must be approved by the proper governmental authority.

**Administrative Rules** - The administrative rules that provide greater detail on how the Act is implemented are adopted by the North Carolina Sedimentation Control Commission and are found in the North Carolina Administrative Code, Title 15A, Chapter 4.

**State Administrative Agency** - The Act is administered by the North Carolina Department of Environment and Natural Resources, Division of Land Resources, Land Quality Section. The program is administered through the eight Regional Offices of the Department. The Sedimentation Control Commission can delegate authority to another State agency to administer a program if the program meets the standards of the general State program. A delegation has

been made to the N.C. Department of Transportation to administer a program for its activities. This delegation is reviewed annually.

**Local Government Programs** - The Act applies statewide but allows local governments to administer programs in cooperation with the State if they have a program and ordinances that meet State standards. Most of the more populous cities and counties have approved programs. Regardless of the existence of a local program, the State retains jurisdiction over activities by the State, the United States, local governments, and other entities with eminent domain authority such as public utilities. The State also retains jurisdiction over activities funded in whole or in part by the State or the United States.

**Exemptions** - The Act does not apply to the following:

- Agricultural activities on agricultural land.
- Forestry activities on forest land where the activity is in accordance with best management practices adopted by the Department of Environment and Natural Resources.
- Mining activities for which a mining permit is required.
- Activities essential to protect human life during the existence of an emergency.

## **Enforcement**

**Civil Penalties** - The State and local governments can impose fines, including daily fines, for violations of the statute, the rules, an order or the terms of any permit.

**Criminal Penalties** - A person who knowingly violates the Act, an ordinance or administrative rules is guilty of a Class 2 misdemeanor with a fine not to exceed \$5,000.

**Restoration** - In addition to other enforcement actions, the State or local government can order restoration of waters and land so as to mitigate the detrimental effects of sedimentation pollution.

**Injunction** - In addition to the other enforcement actions, the State or local government can file suit in Superior Court and ask the Court to enter an order prohibiting violations or threatened violations and requiring the violator to abate a violation through restoration of a damaged area.

**Stop-Work Orders** - The State, through the Secretary of the Department of Environment and Natural Resources, can issue a stop-work order to stop activities causing a continuing violation. The stop-work order can also specify measures necessary to correct a violation. Violations of stop-work orders can be a basis for civil penalties. The Attorney General must file a civil suit seeking a court ordered injunction within two days of the service of the stop-work order.

**Citizen Enforcement/Damages** - A person or entity injured by a violation can file suit in Superior Court asking the Court to issue an injunction and to order compliance with

the statute, rules, orders and plans. The suit may also seek recovery of damages suffered by the person bringing the suit. The Court can award attorney's fees and litigation costs to a successful plaintiff. The Court may order a plaintiff to file a bond or other security if the Court enters an injunction.

### **3. Common Law Claims**

**Against Persons and Activities Covered By the Act** - If a person or entity engages in an activity that causes sedimentation pollution and the activity damages another person's property, the person whose property is damaged can file suit to stop the activity and recover damages. In some cases this can be done even if the activity causing the damage complies with or is exempt from the Act and the rules. Since the Act regulates most damaging activities, it is unlikely that a suit would be successful if the activity is covered by the Act and is in compliance with the Act and the rules.

**Against Persons or Entities Exempt From the Act** - If a person is damaged by exempt activities such as agriculture, forestry and mining, that person can file a civil suit in Superior Court seeking injunctive relief and/or damages. Legal theories that can be used to pursue such claims include trespass, negligence and nuisance. These claims all have slightly different elements that must be proved.

**Claims Against State and Federal Government** - Claims against the Federal government may have to be brought in the Federal Court of Claims. Some claims against the State may have to be brought before the North Carolina Industrial Commission under the North Carolina Tort Claims Act.

## Environmental Law Fact Sheet

### SMALL BUSINESSES: BUYING OR LEASING PROPERTY

This Environmental Law Fact Sheet is part of a series offered by the Environment, Energy, and Natural Resources Section of the North Carolina Bar Association. The series is intended to provide an introduction to someone living or working in North Carolina who is confronted with an issue of environmental law. We hope that the series will be useful as a starting point for people looking for information about their rights and obligations under North Carolina law. (As with any introduction to the law, this is not a complete explanation, and it should not be understood as legal advice. Readers may wish to consult a lawyer with the details of their matter.) You can find fact sheets addressing other environmental law topics on our website at: <http://environmental.ncbar.org/>

As a small business owner, should you be concerned about environmental law issues? It depends on your business. Some small business owners will never be affected by an environmental law. However, if your business involves owning or operating a facility, working with hazardous chemicals or oil, or owning or leasing property, there are certain things that you should know.

Please keep in mind that this paper is not intended to provide legal advice but is meant to alert you to the kinds of issues that can arise in the operation of a small business.

Any time you purchase or lease property, it is important to determine whether that property might be contaminated with hazardous substances or oil. By taking possession of the property, you could be required to clean up the contamination, even if you were not responsible for causing it. This is especially true when you are purchasing the property. If you know or suspect that a piece of property that you intend to lease or purchase is contaminated, you should carefully consider whether you are willing to take on the risk that you will be required to clean up the site.

#### Site History

There are several ways in which you can gather information about whether there is contamination on a particular piece of property. You can start by finding out about the history of the property. If the property has been used in the past as a gas station, an automobile service station, a drycleaner, or another type of facility that might deal with hazardous chemicals, you should suspect that there is contamination at the site. You can also gather information by walking around the property. There are several things that you can look for that could indicate contamination: 1) signs of spills, such as staining of pavement or soil, 2) plants that are dead or dying, when surrounding areas seem healthy, and 3) chemical smells coming from the soil or from drains that should not be used for chemical disposal. Additionally, if there are any above-ground storage tanks ("ASTs") at the property, you should examine them for signs of leaks or spills. If you are purchasing a building, you should look for signs of mold, which is potentially a health hazard to people who would be working in the building.

It is also a good idea to inquire about the presence of underground storage tanks ("USTs") on the property. USTs have been used for many years to store things like heating oil and gasoline. Older tanks were not designed and built to last as long as they have; as a result, many have corroded and leaked their contents into the surrounding soil. This is a very common problem in North Carolina and other states. Owners and operators of these USTs can be required to remove the tank and the contaminated soil, which can be expensive.

Newer USTs are designed with protection against corrosion. There are rules that require the UST owner and operator to take steps to ensure that the corrosion protection is operating correctly. (Those rules are discussed in greater detail below.) If the property contains a tank that is still in operation, you should ask the person selling or leasing the property to confirm in writing that he or she has complied with all of the applicable rules.

There are many businesses in North Carolina that professionally investigate property for signs of contamination. If you believe that a site is contaminated, it could be beneficial to you to hire one of these businesses to give you a better idea of the nature of the problem. Hiring a professional may not be in the budget of many small businesses, but a professional consultant may be able to save you money in the future by helping to avoid clean-up responsibilities.

If you know or seriously suspect that the property is contaminated, you may wish to investigate other locations for your business. If your circumstances make that impossible, you should consider consulting with an attorney before signing any kind of contract or agreement with the property owner. A lawyer can advise you about negotiating with the property owner to protect yourself from being held responsible for contamination caused by someone else.

If you are the owner of property that has been contaminated by a leaking UST or by a drycleaner, the State of North Carolina may pay for some of your clean-up costs. The State has set up trust funds that will reimburse property owners for the cost of cleaning up these problems. More information on these funds is available in the State's website, at <http://www.wastenotnc.org/ust/docs/cleanup.pdf> (USTs) and <http://www.ncdsca.org/>.

## **Wetlands**

Finally, if you intend to make changes to your property, you should be aware that laws and regulations designed to protect water quality may restrict the types of changes that you can make. If your property contains low-lying areas prone to flooding, you may be interested in filling in the area so that it can be more easily used. However, these areas may be classified as wetlands, and you may be required to obtain a permit before depositing fill material. Similarly, if your property is adjacent to a waterbody, such as a stream or creek, you may be prohibited from engaging in certain activities in the area alongside the water, known as the buffer zone. If you fail to comply with these requirements, you may be required to remove anything you have placed in those areas and to restore the wetland or buffer zone to its natural state.

Similar requirements are enforced by the local government, either the city or county, with jurisdiction over your property. The local government will likely have an ordinance dealing with sediment and erosion control and with stormwater controls. These ordinances require landowners to take steps to minimize erosion and stormwater runoff both during and after construction. If you are planning to build on a piece of property, you should contact the planning department of the city or county to consult about these requirements.

## **Conclusion**

Many small business owners will never have to deal with environmental laws and regulations. Those who do, however, should be careful to plan ahead for these issues. With

careful planning and preparation a small business owner can create a business that complies with the laws and avoids problems. Nonetheless, these laws are complex, and it can be difficult for even experienced operators to be sure they are not making any mistakes. As a result, if you think that you will be dealing with these types of issues, it would be worthwhile to consult with a professional.

## **Environmental Law Fact Sheet**

### **HOME HEATING OIL TANKS AND THE LEAKING PETROLEUM UNDERGROUND STORAGE TANK CLEANUP FUNDS**

This Environmental Law Fact Sheet is part of a series offered by the Environment, Energy, and Natural Resources Section of the North Carolina Bar Association. The series is intended to provide an introduction to someone living or working in North Carolina who is confronted with an issue of environmental law. We hope that the series will be useful as a starting point for people looking for information about their rights and obligations under North Carolina law. (As with any introduction to the law, this is not a complete explanation, and it should not be understood as legal advice. Readers may wish to consult a lawyer with the details of their matter.) You can find fact sheets addressing other environmental law topics on our website at: <http://environmental.ncbar.org/>

Many owners of older homes may have an underground storage tank located on their property. These tanks, often used to store heating oil, can cause problems as they age and begin to break down, possibly leaking into and contaminating the surrounding soil. However, homeowners who have this problem are not without resources. Homeowners who have underground heating oil storage tanks on their property may be eligible for coverage under North Carolina's Leaking Petroleum Underground Storage Tank Cleanup Funds program. These funds provide reimbursement of certain costs of cleaning up petroleum contamination caused by leaks from such tanks. There are two funds: 1) the Commercial fund and 2) the Noncommercial fund. Most home heating oil tanks are covered under the Noncommercial fund, and this brochure will therefore discuss only issues related to the Noncommercial fund (hereinafter referred to as "the Trust Fund").

This brochure is intended to assist homeowners who are faced with the closure of a home heating oil tank, or who have already closed the tank and have discovered contamination. Issues concerning the cleanup of contamination from heating oil tanks, and eligibility under the trust fund are complex and confusing. This brochure is not intended to identify every issue. If you have a leaking underground heating oil storage tank, it is very important that you consult an attorney who is familiar with the laws and regulations governing those tanks.

#### **What does the Trust Fund Cover?**

The Trust Fund provides reimbursement of certain "reasonable and necessary" cleanup costs incurred by owners and operators of underground heating oil storage tanks, and by landowners whose land contains an underground heating oil tank. The maximum coverage under the Trust Fund is \$1,000,000.00.

In order to qualify for coverage, the landowner, or tank owner/operator must fill out an application and file the application with the North Carolina Department of Environment and Natural Resources, Trust Fund Branch. The Trust Fund Branch will then issue a determination on the application, either granting coverage, in whole or in part, or denying coverage.

Landowners who neither owned nor operated the heating oil tank must pay a deductible. Once the deductible has been paid, landowners only receive reimbursement of 90% of their cleanup costs. The current deductible is \$5,000.00. Therefore, if a landowner pays \$100,000 in

reasonable and necessary cleanup costs, the maximum amount the landowner will be reimbursed from the trust fund is \$85,500.00.

The definition of the term “Owner” of an underground storage tank is not as simple as it sounds. Someone who buys a house that has an underground heating oil storage tank on it is not necessarily the “owner” of the tank for the purposes of the Trust Fund. Whether you become the owner of an underground tank by buying the land in which the tank is buried depends, in part, on when the tank was last used. The Department of Environment and Natural Resources may require you to provide proof of when the tank was last used as part of your Trust Fund application. If you are not the owner or operator of the tank, it may be to your advantage to have the owner or operator apply for coverage, if they can be located and are willing to cooperate. Since tank owners and operators receive more favorable coverage under the Trust Fund than landowners, it is important that a homeowner consult with an attorney to ensure that the most favorable trust fund coverage is obtained.

### **What does the Trust Fund not cover?**

The Trust Fund covers only petroleum contamination originating from leaking underground storage tanks. “Underground” is defined to include any tank that has 10% or more of its volume below ground. As such, even tanks that are mostly above ground may still be considered “underground.”

Many times, homeowners replace their underground heating oil tanks with above-ground tanks. Any leakage from above-ground tanks can cause you to lose, in whole or in part, any coverage under the Trust Fund for your leaking underground tank. In many instances, the Trust Fund will apportion Trust Fund coverage if there is any evidence that an above-ground tank has contributed to contamination. Apportionment means that you will not receive full reimbursement of your cleanup costs. If only your above-ground tank leaks and causes contamination, you will have no coverage under the Trust Fund.

The Trust Fund also does not cover cleanup costs for contamination by chemicals other than petroleum substances. For example, if you have caused or contributed to contamination by dumping paint stripper or thinner into the tank to dispose of it, you may lose trust fund coverage, or have your coverage apportioned so that you receive less than full reimbursement for your cleanup costs.

### **What should I do if I have an underground heating oil tank on my property?**

In general, the law does not require you to dig up an underground heating oil tank or otherwise “close” the tank. However, digging up the tank or otherwise closing it may be to your advantage, particularly if you or your neighbors use private water supply wells, or if you are planning to sell your property. **If you know that your tank has leaked and caused contamination, you are required by law to report the discovery of contamination to the proper authorities, to take actions to stop any further contamination, and to cleanup the resulting contamination.** The cleanup of contamination can be very expensive, and typically requires the services of licensed professionals. Because of the complex rules and regulations governing heating oil tanks, it is always a good idea to consult with a lawyer who is familiar with the applicable laws, rules and regulations.