

When Does NFA Really Mean NFA?

Many developers have discovered the virtues and rewards of buying a contaminated site, remediating it, obtaining a No Further Action letter (NFA) from the New Jersey DEP and putting the site to productive reuse. For those more risk-averse, buying a remediated property with an NFA and developing it is the ticket. What makes the NFA valuable is its finality—NJDEP promises not to come back to ask for more cleanup. Recent changes in the state's groundwater standards, however, may make existing NFAs less than final.



“Due diligence is ongoing, and sometimes a remediator with an NFA letter, thinking his job is over, may have to get back to work.”

When a party cleans up a site in accordance with NJDEP's Technical Regulations, or when no further cleanup is required, NJDEP will issue an NFA. Most NFAs have so-called “reopeners” for changes in action levels by order of magnitude. In other words, NJDEP may only compel additional remediation at a site with NFA status if a cleanup standard applied at the site has decreased by more than a factor of 10. For example, if a compound's cleanup standard was 1,000 parts per million and was lowered to 100 ppm, NJDEP may require more remediation.

Under DEP's new water quality regulations effective November 7, 2005, action levels for several contaminants were changed by an order of magnitude. Many of these are common organic compounds found in groundwater. Consequently, property owners with NFAs, or purchasers of property with NFAs attached, should be certain the standards for the contaminants of concern at their site have not changed by an order of magnitude. If the standards have changed, will further remediation be required? If required, how extensive? Here we will discuss several ways the new regulations will change due diligence.

It is important to note that the “reopener” only applies to those who actually caused the contamination in the past. An owner of a property with an NFA designation who is not responsible for past discharges at the site will not be held liable for additional cleanup necessitated by a change in standards, as long as they are an “innocent purchaser” under the New Jersey Spill Act and undertook “all appropriate inquiry” before purchase. Regulations under the Spill Act define and set forth requirements for innocent purchaser status. Apart

from interaction of the NFA “reopener” with due diligence requirements of the regulations, the activities required to become an innocent purchaser are beyond the scope here.

Representatives of the NJDEP believe as many as 2,500 sites may be reopened because of the change in order of magnitude. NJDEP is preparing a policy position on how these sites will be chosen or located. Those sites cleaned up before the era of electronic data submittal will probably fly under NJDEP's radar unless the property is subject to the Industrial Site Reuse Act. Any event that triggers an ISRA review—such as sale of the property—will bring previous contamination to the attention of NJDEP and, if standards have changed by an order of magnitude, will probably result in further cleanup. Where a nonpermanent cleanup, such as some type of engineering control (for example, a cap, such as a parking lot), has been approved, DEP may require additional remedial activities only if the control is no longer protective of human health and the environment.

The “innocent purchaser” defense requires a prospective purchaser to perform a number of different investigations into the site. One is to compare past data about contamination to current remediation standards to determine if there has been an order of magnitude change. Fourteen contaminants under the new Groundwater Quality Standards have changed by an order of magnitude, and a careful purchaser will examine what has been done in the past at a site with respect to groundwater. If a prospective purchaser performs all activities required under the regulations and documents the findings, they will not be liable for cleanup of contamination even if discovered after closing.

NJDEP is also proposing new soil remediation standards, which will probably be adopted sometime in the winter of 2007, after undergoing the promulgation process and comment period. These proposed standards, too, change the level of contamination allowable for certain chemicals by an order of magnitude. The lesson to be learned is that due diligence is an ongoing matter, and sometimes a remediator who has obtained an NFA thinking his job is over may have to get back to work. —RENU

The views expressed here are those of the author and not of Real Estate Media or its publications.

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