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Issue No. 8 | Winter 2018 **Is It a REC? – Look Further at NFA Letters**

The NFA, or No Further Action, letter is often considered an ace in the hole for buyers and lenders of property that has seen some sort of environmental contamination. Especially when dealing with the vagaries of subsurface soil and groundwater contamination, the NFA letter can be the only written statement that nothing further is required in response to the concerns. But that's not really what NFAs say or do. After all, not even your environmental consultant is likely to make such assurances, so why should a government agency? When performing Phase I ESAs under the American Society for Testing and Materials (ASTM International) E1527-13 Standard Practice for Environmental Site Assessments, it can be agreed that having an NFA is better than not. But does an NFA in hand mean that the particular environmental concern can be "written off" and no longer considered a *recognized environmental condition (REC)?* Not really.

NFA ≠ No Further Action

ASTM Definitions

The importance of a NFA when performing an environmental site assessment is linked to whether a REC should be defined as controlled or historic. Readers of last quarter's Is it a REC? issue will recall that the ASTM Standard defines a controlled REC (CREC) as "*a recognized environmental condition resulting from a past release of hazardous substances or petroleum products that has been addressed to the satisfaction of the applicable regulatory authority (for example, as evidenced by the issuance of a no further action letter or equivalent, or meeting risk-based criteria established by regulatory authority),* ***with hazardous substances or petroleum products allowed to remain in place*** *subject to the implementation of required controls (for example, property use restrictions, activity and use limitations, institutional controls, or engineering controls).*"

The ASTM Standard also defines a historical REC (HREC) in a similar way, except the past release(s) has been addressed "*without subjecting the property to any required controls.*"

How to Interpret

A key factor in determining the true usefulness of a NFA letter is whether a future owner will be bound by activity and use limitations. Such limitations may include no use of groundwater underlying the property because the NFA agreement allows some degree of contamination to remain, or the remaining contamination makes the property suitable only for industrial use. As a result , the buyer with a change of use in mind (i.e., commercial/industrial to residential) would not be as satisfied with that particular NFA. In cases where the site conditions allow for interpretation as a HREC, the past environmental conditions should cause no property use restrictions, and the NFA letter becomes more reliable.

There are also different types of NFAs, and these can vary widely by state. Most state environmental agencies issue an NFA for releases from petroleum storage tanks following adequate investigation and/or cleanup under their corresponding petroleum tank program. In these situations an NFA letter will never state that the property is clean. They basically acknowledge that the investigated release (spill, leak, former tanks, etc.) has occurred, but the environmental agency no longer regards it as worthy of further attention. Future releases may get separate NFAs. Also important to note is that the NFA is based upon the site investigation information presented to the regulators. If incomplete, or if the site conditions change in the future, the NFA letter usually includes language that allows the regulators to reconsider the case and decide to require further action after all. Some of the factors that can change the NFA status of a property can be as simple as removing surface pavement or fence lines, or a downgradient property owner deciding to install a drinking water well.

Under State Voluntary Action Programs, also called Voluntary Remediation or Brownfields programs, the NFA is much more specific. These are multi-page documents that spell out the agreed-upon limitations on property use and often include deed restrictions. In cases where the extent of contamination may be less well defined, a buyer or lender will want something in addition to an NFA. These may include environmental restrictive covenants, indemnification agreements, insurance, or even escrow funds that may not make the residual contamination any less of a regulatory issue, but will lessen the financial burden on the deal.

Case Study Examples

Beware of Closed LUST Sites – The shear volume of leaking underground storage tank (LUST) cases and their financial hit on state reimbursement programs is one reason that many LUST cases are closed and NFAs issued by regulators when soil and groundwater contamination remains. One such case involved a closed service station where the gasoline LUST had been removed but no closure investigation performed. When a prospective purchaser performed a Phase I and II ESA, his consultant submitted the site investigation results to the state Department of Environmental Quality, who issued a NFA. While this helped the transaction proceed, the purchaser also was advised to consider the residual contamination impact in his redevelopment plan. For example, the NFA precluded use of the state's LUST trust fund to reimburse cleanup actions because no cleanup was required based on current site conditions. However the proposed redevelopment included excavating an underground parking garage near the LUST area. As a result the new owner had to consider costs for disposal of petroleum contaminated soils encountered in the excavation, and installation of a vapor barrier to prevent future entry of petroleum vapors as part of his development plan.

Going Further than the NFA – Site investigations at a former metal fabrication facility that used chlorinated solvents for parts cleaning identified contaminated soils and groundwater under the building. The state environmental protection agency directed further investigations and limited cleanup under its Site Remediation Program and eventually issued a NFA letter for the property. The specific requirements of the NFA included engineering controls (the existing building foundation as a partial cap for contamination) and institutional controls (no groundwater use). A prospective purchaser of the property was provided the NFA and supporting documentation when conducting its Phase I due diligence. A careful review of the NFA revealed that the restrictions were required as the principal means of controlling exposures to the residual contamination, which was above applicable cleanup levels but was allowed to remain at the property under the NFA. The buyer's Phase I ESA concluded that the residual contamination must continue to be managed and will impose future activity and use limitations, and designated the NFA as a Controlled REC (CREC). This conclusion allowed the new owner to properly plan and budget to maintain the engineering controls and be fully prepared for any future limitations on property use.

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