

How clean is clean? Basics of buying formerly polluted properties

By: Amy Lynn Strege
Finn & Finn, Ltd

Acronyms you need to know

- * VSR/SRP- Voluntary Site Remediation/Site Remediation Program
- * UST/LUST- Underground Storage Tank/Leaking Underground Storage Tank
- * NFR- No Further Remediation
- * TACO- Tiered Approach to Corrective Objectives

Triggers

- * Government (Federal, State, Local)
 - * Eminent Domain
 - * Notice of intent to sue (RCRA, CERCLA)
- * Potential purchaser
- * Probate
- * Bankruptcy (Chapters 7, 11, or 13)
- * Company Spin-offs/divisions

Why do it?

- * Limitation on future liability
- * Defines parameters of pollution- so you know what you have
- * Funding to assist (LUST program, Drycleaner FUND)
- * Prevent litigation with local government
- * Get top dollar from purchase

What?

- * TACO tiers:
 - * Residential vs. Commercial
 - * Residential: cleanest of clean, “white glove” “could eat the dirt”
 - * Commercial: clean, no known dangers to health
 - * Focused vs. General
 - * Focused: one known substance in the known area(s)
 - * General: full investigation, all substances

How?

- * Dig and haul
 - * Expensive- largest cost is travel and tipping fees
- * In-Situ treatment options
 - * Usually cheaper
- * Engineered Barriers
 - * Decrease initial cost but require maintenance

Who?

- * Owner of parcel
 - * Need to ensure that you have the actual owner
 - * May need title work done
 - * Easement issues
- * Owner of polluting entity
 - * Need to ensure that you have the right entity
 - * Find all successors-in-interest of historical polluters

Process

- * RA (Remedial Applicant) applies
- * SI (Site investigation) conducted
 - * At Federal level called RI/FS (Remediation Investigation/Feasibility Study)
- * RAP made (Remedial Action Plan) prepared and submitted, ultimately approved
- * Clean up work completed
- * Sampling to prove effectiveness
- * Institutional Controls placed
- * NFR letter issued
- * O&M (Operation and Maintenance)

RA applies

- * Remedial Applicant (RA)
 - * Can be owner of property
 - * Can be operator of facility (i.e. tenant/lessee)
 - * If tenant, owner must also sign off
- * DRM-1 and DRM-2 forms- available online
- * Hire remediation consultant (and attorney)
- * Submit to IEPA

Site Investigation/ Remediation Plan

- * Environmental Consultant does this
 - * Can be focused or general
 - * Sampling
 - * Surveying
- * Develop plan to remediate
 - * Options
 - * Budget

Approvals needed

- * Once develop a plan, submit to IEPA and any other agency involved (i.e. Drycleaner FUND, LUST administrator, etc.)
- * This includes getting any Ordinances or Agreements in place as needed
- * Do not begin until 100% certain all relevant agencies have signed off and all paperwork is in order

Institutional controls

- * NFR's are the main "Institutional Control"
 - * Required in almost 100% of sites- get them at the end

Before work begins, need to obtain (if applicable):

- * Groundwater Ordinance
 - * For pollution that may impact drinking water aquifers
- * Highway Authority Agreement
 - * For pollution that goes under an adjacent roadway

Groundwater Ordinance

- * Most effective in urban areas where everyone is on City water
- * Stops any permits for well digging to issue in a certain geographic area- monitored by local authority for wells (usually the County)
- * Has to pass City Council- may require fees or other consideration (i.e. City may force you to get “more clean”)

Highway Authority Agreements

- * Obtained from whomever “owns” the road
 - * If corner lot, may need one from Municipality and one from County or State
- * Includes future cost recovery provisions
 - * If/when they ever go into the area where the pollution is, you have to pay for that portion of their work.
- * Pay a fee of around \$10,000 each for them.

Start/Finish Work

- * Once all approvals gotten, get any local permits:
 - * Earth moving, demolition, construction, etc.
- * Sampling
 - * Often IEPA will require sampling during and after work to show that all pollutants are within acceptable levels
- * Closure work
 - * This may include installation of leachate systems, water treatment facilities and/or engineered barriers.

Obtain NFR letter

- * Send final report including samples, pictures, description, and plans for future O&M to IEPA
- * IEPA reviews, eventually issue NFR letter
- * Review NFR letter to ensure it is accurate prior to recording- make sure it reads as you want it to
- * Inform all potential purchasers and current and future tenants in writing

Got my NFR letter now what?

- * Need to record it so it shows up in title search
 - * Try to limit it to only the affected area if possible
- * NFR letters can be limited in scope,
 - * May need amended NFR letter later (more clean-up)
- * Recommend review annually when you pay property taxes

O & M

- * If there is an engineered barrier, water treatment or leachate collection system, may need to:
 - * Resample every 5-10 years
 - * Annual inspections
 - * Replacement of filters, carbon, or other items
 - * Review of documentation every 5-10 years
 - * Certain discharge permits may be needed, may be renewed ever 4-12 years depending on type

Other issues

- * Intrusion onto neighboring parcels
 - * Need to negotiate with them to clean their parcel
 - * If they do not allow you onto their property, see if you can get a waiver of liability
 - * May need to file an action for right to enter to clean up
- * Records are public
 - * NFR letters are filed
 - * Ordinances and Agreements have to pass through a government body

Emerging issues

- * New “Vapor Intrusion” Regulations now in effect
 - * Many past clean-ups with NFR letters, even general NFR letters, now need to do more clean up or create an engineered barrier
 - * Past NFR letters were based on the ingestion and skin contact pathways
 - * Amended regulations now account for inhalation pathway, which has different concentrations for different pollutants

Conclusion

- * A history of pollution does not prevent property from being productively utilized in the future
- * There are ways to protect yourself if you own a formerly polluted parcel, or if you are looking to buy a formerly polluted parcel
- * An attorney should be involved to ensure paperwork is done correctly and meets your liability goals

Publications

- * <http://www.environmentalleader.com/2013/11/11/what-is-so-great-about-a-no-further-remediation-letter-anyway/>
- * <http://www.carlsonenv.com/carlsonreport%5C10%20Critical%20Issues.pdf>
- * <http://www.ecgmidwest.com/site-remediation/no-further-remediation-nfr-letter>
- * <http://www.epa.state.il.us/land/taco/3-no-further-remediation-letters.html>
- * <http://www.epa.state.il.us/land/site-remediation/site-remediation-faq.html>

Thanks for Participating!

Any Questions?

Amy Lynn Strege is a Junior Partner at Finn & Finn, Ltd.
Amy graduated from Chicago-Kent College of Law in
2007 with a Certificate from their “Program in
Environmental and Energy Law” (PEEL).

Amy can be reached at

stregeamy@waukegan.com

OR

(847) 599-0202