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DOES “NO” MEAN “NO”?

What a No Further Action Letter gives you.[©]

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Overview: Our clients are increasingly involved with transactions involving Texas properties that have previously undergone environmental remediation. This piece takes a look at the State’s process for providing written confirmation with respect to remediation undertaken at a property, particularly the No Further Action letter and the Certificate of Completion issued under the Voluntary Cleanup Program. It also considers potential gaps in otherwise-anticipated protection from liability provided by such confirmation that should be considered when purchasing property.

In a proposed transaction involving real property, best practice is for a purchaser to determine if there are potentially problematic environmental conditions at the site. Those conditions are typically identified in environmental assessment reports (Phase I reports) as “recognized environmental conditions” (RECs). Soil and groundwater sampling may then be used to verify whether those RECs actually present issues.

A purchaser, along with its equity investors and its lenders, will be concerned if environmental contaminants are present at an investigated site and will typically want comfort that the site conditions do not pose a threat to human health or the environment. Where environmental contaminants have exceeded permissible regulatory levels at a site, those parties will want to know whether the appropriate governmental authorities have been presented with data regarding the site conditions and then made a determination that a response action has appropriately addressed those contaminants.

In Texas, that process will typically take place under one of several Texas Commission on Environmental Quality (TCEQ) programs: the Voluntary Cleanup Program (VCP), the Petroleum Storage Tank (PST) program, or the Industrial and Hazardous Waste program (generally referred to as Corrective Action). The response action process will be governed either by the Texas Risk Reduction Program (TRRP) rules in 30 Tex. Admin. Code §350 or, in the case of petroleum storage tanks, by the PST rules in 30 Tex. Admin. Code §334.

If environmental contamination conditions needed to be addressed, and if appropriate remediation has been performed under a TCEQ program, TCEQ will confirm in writing that no additional response actions are necessary at the affected property. The written form of the State's determination will depend on which TCEQ program issues that confirmation. A "no further action" (NFA) letter is issued under the PST and Corrective Action programs. A Certificate of Completion (COC) is issued under the VCP. There are some critical differences between an NFA letter and a COC.

A COC is intended to address all contaminants within designated boundaries at a site entered into the VCP. A COC, once issued, then provides a release of liability from the State to future purchasers and also to any purchaser enrolled as a VCP applicant prior to acquiring the site. The COC relates only to the land use contemplated by the COC (residential or commercial/industrial) and only to contaminant releases that occurred prior to the date of the COC.

In contrast, an NFA letter will generally apply to particular contaminants identified in the specified area of the site at which a response action was performed. An NFA letter, once issued, confirms the State's determination that the response actions performed met the then-applicable State remediation standards for the contaminants at the area of the site addressed. Unlike a COC, an NFA letter does not provide a release of liability from the State. Notwithstanding the State's issuance of a NFA letter for a site, the State could seek to pursue persons that qualify as a "responsible party" under the Texas Health and Safety Code for cleanup liability in certain instances, such as a substantial change in circumstance (as defined in 30 Tex. Admin. Code §350.35) at the site. Examples include:

- A change in land use from that specified in the NFA letter.
- A failure to maintain a required physical or institutional control.
- A later determination that the technical information that supported the State's NFA decision did not sufficiently characterize threats to human health or the environment.
- A change in the State's cleanup standards.

The statutory definition of "responsible party" uses a strict liability standard and includes persons that qualify as current or former owners or operators of the site.

Consequently, an NFA letter can be characterized as recognizing that there is no further action required at the time the letter is issued. In analyzing the effect of an NFA letter, the reader should consider not only the time-specific nature of the NFA letter, but also the scope of that letter, particularly the portions of the site to which it applies and the contaminants at issue. The NFA determination may not extend to the site in its entirety or to all conditions at the site. Also, if circumstances at the site change, such as a new release or the discovery of previously unknown contaminants, the NFA will not provide the same protection as would be enjoyed by a party that is entitled to receive the protection offered by a COC.

Keep in mind that there can be circumstances where the State may issue COCs or NFA letters that acknowledge conditional or partial completion of response action at a site, but require additional response action. As a result, certain obligations or restrictions are then imposed until the additional response action has been completed. If there are such applicable obligations or conditions, purchasers will want to determine how they may adversely impact the Purchaser's intended use of the site. A related question is whether those obligations have been properly addressed, and the conditions met, since their imposition and if not, the potential consequences of that failure. Finally, if additional response actions remain, is there a party (other than the purchaser) contractually obligated to complete the response actions and, if so, what are that party's obligations?

Neither COCs nor NFA letters provide protection from third party claims. The determination by TCEQ that environmental conditions at a site meet State standards may, however, under Texas case law serve to limit the ability of a third party to prove up damages from contamination.

While COCs and NFA letters provide comfort that governmental standards at a site were satisfied at the date the State issued its determination, that may not be the end of the story. A purchaser may want to consider whether events impacting the site (including offsite events) which occurred subsequent to that determination could limit the comfort provided by an NFA letter or a COC. Also, if a COC or NFA letter imposes controls or if there are other "activity and use limitations" (as that term is used in ASTM E1527-13), the purchaser will want to factor those into its transactional analysis.

COCs and NFA letters are instrumental in providing to purchasers, along with their equity investors and lenders, the comfort that allows deals to get done in Texas. The fact that under some circumstances there may be certain gaps in the protection ultimately provided by COCs and NFA letters should not undermine the value of that written confirmation from the State.

The take away is this: A COC or NFA letter reflects the State's determination as to whether certain environmental conditions at a site comply with Texas environmental regulatory requirements at a specific point in time. That determination will not necessarily provide the proverbial "get out of jail" card a purchaser may want. Additional due diligence may be advisable before completing the purchase.

This is one in a series of occasional pieces discussing environmental issues of current interest to clients and friends of the firm. This material is not intended as legal advice. Readers should not act upon information discussed in this material without consulting an attorney.

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