

A No Further Action letter might only be a temporary reprieve

By: Scott Anders and Matthew Parks  January 22, 2015  0



Scott Anders

For those familiar with commercial real estate deals, it is well known that buyers and lenders want to see a No Further Action Letter when dealing with property that has suffered some sort of environmental contamination.

An NFA is seen as a panacea for all environmental ills on real property. Lenders demand to see an NFA before they will loan money to any potential purchaser. Real estate brokers will tell you that attempting to sell contaminated property without an NFA will lead to far fewer potential buyers and a greatly reduced price. Many prospective buyers do not want anything to do with a contaminated property without an NFA.

What many banks and real estate brokers do not know, or choose to ignore, is that an NFA may only be a temporary reprieve from additional remediation work at the discretion of Idaho's Department of Environmental Quality. DEQ may reopen an NFA. Admittedly, this is a rare occurrence, but it's possible.

DEQ typically will not grant an NFA until the voluntary remediation plan has been completed and further environmental hazards are not detected consistent with DEQ's standards.

While lenders and brokers may want an NFA, that's not where the story ends. It is very much up to the buyer of a formerly contaminated property to make sure that the property's future uses are disclosed and discussed, because real danger may exist in a change of use of the property. NFA or not, the due diligence process is extremely important in saving a prospective purchaser from the many problems that lurk on a previously contaminated property.



Matthew Park

If the planned use of the property is similar to its previous uses or is even less intense in nature, then the purchaser should be just fine with the NFA. However, if the planned use of the property is significantly different from the most recent use of the property, the purchaser can inadvertently enter into a real quagmire if the due diligence process is glossed over. A significant change of use may cause DEQ to reexamine its previous NFA determination to see if further investigation is needed.

A simple example of the types of issues that can arise with a use change includes a commercial office space with a former gas station on the corner. Assuming that the gas tanks leaked and most of the contaminated soil was removed, a seller will likely get an NFA to continue with the commercial building on the site. But what if the buyer wants to change use of the property from the commercial building into condominiums with an underground garage? Test results needed to get the NFA for the commercial building on the property may not be sufficient for such a change in use. Acceptable levels of contaminants for one use will be different than for another.

It is important that the buyer get a copy of the NFA file from the respective state agency in order to determine if the NFA will be sufficient for the intended use. The buyer should also employ an environmental consultant to help sort through the issues long before the closing date of any sale and perform an independent Phase I (and possible Phase II) assessment of the property for the buyer in advance of closing.

A buyer can save money, time, and grief by closely examining all environmental concerns with a property, including scrutinizing any NFA. And buyers should be ready to walk away if they are not satisfied with what they find, instead of paying minimal attention to the potential environmental issues before them.

Finally, while a NFA might be valuable, even more valuable are a Certificate of Completion under a Voluntary Remediation Work Plan or, if requested from the DEQ after receipt of a Certificate of Completion, a Covenant Not to Sue from the DEQ. These documents provide much more information about the permitted future uses and any remaining potential environmental issues, and much more comfort to both purchasers and lenders. The Idaho



Legislature created the Voluntary Cleanup Program in 1996 by passing the Idaho Land Remediation Act, which encourages innovation and cooperation between the state, local communities, and private parties to revitalize properties suffering from hazardous substance or petroleum contamination. More information on this program and application materials are available on the DEQ's website.

Scott S. Anders is an attorney and shareholder in Jordan Ramis PC and has been practicing law for more than two decades. Scott focuses his practice on land use, real estate, and business matters. You can contact Scott at 360.567.3904 or by e-mail at scott.anders@jordanramis.com.

Matthew Parks is an attorney at Elam & Burke. His law practice emphasizes construction, litigation, banking, administrative and legislative work, and public entity representation. You can reach Mr. Parks at 208-343-5454 or mcp@elamburke.com.

ABOUT SCOTT ANDERS AND MATTHEW PARKS



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Phone: (208) 336-3768 Fax: (208) 336-5534

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