



Beyond the NFR: Issues and Opinions

The No Further Remediation letter has been an extremely useful tool for reducing concern about environmental risk that can complicate real estate transactions. To explore the issues and tradeoffs that are part of the NFR process, Carlson Environmental talked to a number of bankers, lawyers, and policy officials.

We learned that the NFR letter solves most but not all of the problems that may confront parties to a deal. A summary of our discussions is presented below in Part Two of our series on the No Further Remediation letter.

The NFR Letter is Helpful...

1. Issuance of the NFR letter means that a property has been investigated under the watchful eye of the Illinois EPA.

When the government issues an NFR letter, it goes on record stating that the site poses no known threat to human health and the environment for the contaminants investigated, as long as it's managed in accordance with the limitations set forth in the NFR letter. This declaration is important to both buyers and lenders.

"The buyer is the most likely to be comforted because this person is primarily concerned with the four corners of the property," according to attorney Harvey Sheldon, "The NFR, at the very least, shows the buyer that the property has been looked at carefully for the most likely problems. It is helpful but doesn't begin to solve all the problems that might come up later."

From the lender's viewpoint, Sam Bodine of Bank One explains, "The NFR gives us comfort that the Illinois EPA has reviewed and agreed with the work of the consultants. Also, in the event of foreclosure, the NFR letter limits the liability of the bank."

2. The NFR offers closure for environmental issues, allowing deals to move forward.

The NFR letter creates a presumption that the property owner or operator has complied with all applicable cleanup requirements. By issuing the NFR letter, the Illinois EPA releases the Remediation Applicant and property owner from any responsibility to continue a site cleanup.

"It creates closure, so people doing development can be assured where things stand relative to government on cleanup issues," explained Gary King, Manager of the Division of Remediation, at the Illinois EPA.

3. The NFR provides protection from government liability.

While the NFR is not a release of liability in the strict legal sense, it is a clear statement that no further remediation is necessary in the opinion of the state. According to Scott Phillips, Senior Land Attorney at the Illinois EPA, this constitutes a "rebuttable presumption" that the state would be hard pressed to overcome should it consider a lawsuit in the future.

Despite the apparent protection from state liability, some fear that the USEPA may still sue a property owner or interested party in the future. To address this "re-opener stigma" the Illinois EPA and the USEPA have entered into a Superfund Memorandum of Understanding ("SMOU").

This agreement stipulates that the USEPA will accept and honor the conclusions made by the state in the NFR letter. To date, the USEPA has not taken an independent action against a responsible party after an NFR letter has been issued.

...But it's no Panacea

1. The NFR offers no protection against non-governmental liability.

(Continued)

In the next
Carlson Report:

*New ASTM
Standards...*

Property owners holding an NFR letter are still subject to lawsuits from third parties.

"Protection from the government is far from the only concern," says Harvey Sheldon. "Adjacent land owners and successor owners are much more likely to sue over environmental impacts than the government, which has bigger fish to fry."

2. The NFR does not always tell the whole story.

A property owner can limit the clean up to a designated area or to specific chemicals. The scope of the site investigation is dictated by the applicant, not the Illinois EPA. There are, in fact, two types of NFR letters:

- **A *comprehensive* NFR letter** signifies that an entire area or site has satisfied cleanup objectives and is protective of human health and the environment.
- **A *focused* NFR letter** signifies that either the remediation area is only a portion of a larger parcel, or that the site owner has elected to limit the scope of the investigation to specific contaminants, or both.

As Carlson Environmental's Ken James notes, "It is important to understand the type of letter as well as the fine print. On the whole, it is safe to say that the letter means that the property has been carefully looked at for the most likely problems. But you also must remember that other chemicals may be present on the property in areas outside the investigation zone."

The Tradeoff: Cost Savings but More Responsibility

By using institutional and engineered controls as the means to getting an NFR, most cleanups become less costly than the treatment or removal of contaminants. However, the NFR is acceptable only so long as the controls remain in effect.

Problems may ensue if the barriers are removed or breached, or if the property designation changes – from commercial to residential, for example. Therefore, the use and maintenance of these controls often requires a long-term commitment from the owner.

The Illinois EPA notes that any of the following could lead to the NFR letter becoming null and void:

- Violation of controls or the land use restriction on the property
- Failure to operate and maintain preventive or engineering controls
- Improper disturbance or removal of contamination
- Failure to comply with recording requirements
- Obtaining the NFR letter by fraud or misrepresentation
- Subsequent discovery of contaminants not identified as part of the investigation upon which the NFR letter was based

Monitoring and Enforcement

As the number of NFRs accumulate, monitoring and enforcement of these sites will become more important.

"Right now there is no institutional mechanism for the review or assessment of properties with NFRs to determine if their terms are being met," says Illinois EPA Project Manager Jennifer Seul, "For now the matter is need driven and so far the state has not revoked any letters yet."

The NFR Matters

While the NFR may not remove all the stigma or environmental risk associated with a property, it still plays a crucial part in the transaction process.

In the opinion of Attorney Myles Berman of Altheimer & Gray "The NFR is like a pill that regulates blood pressure. It may not eliminate the whole problem, but it allows you to manage it for the time being..."

For More Information:

Please refer to the attached sheet for a directory of Illinois EPA Bureau of Land staff and a listing of fact sheets pertaining to the NFR process. The information is available at www.epa.state.il.us.

© 2000 Carlson Environmental, Inc. All rights reserved.