

The risks of reopeners at closed remediation sites

Imagine you are a real estate developer about to close on 75 acres of land on which you plan to build an industrial park. The property had some minor pollution issues from an old factory on the site, but the current owner had the contaminated soil removed. Additionally, the state environmental authority issued a No Further Action letter affirming that the property now meets state requirements for its intended use. Can you now pursue your plans without concern about pre-existing environmental conditions?

Perhaps not. While the state may have signed off on the remediation, it almost certainly left the door open for additional cleanup under certain circumstances. Furthermore, provisions found in No Further Action letters, Covenants Not to Sue, and Certificates of Completion called “reopeners” set forth conditions by which the state may require a property owner to pay for the additional remediation. In essence, virtually no environmental cleanup project is ever unequivocally closed.

It is rare for contractual reopeners to be invoked, but when they are, they can be a nightmare for property owners. Investments in a site can be threatened, and additional remediation costs have the potential to be ruinous. However, risk management and insurance solutions can provide property owners with a level of comfort that reopeners will not pose the threat of a financial disaster.

Brownfields redevelopment and reopeners

State governments typically are anxious to have “brownfields” – abandoned or underutilized industrial and commercial sites where expansion or redevelopment is complicated by real or perceived contamination – put to constructive use. Since the passage of the federal Small Business Liability Relief and Brownfields Revitalization Act in 2002, state brownfields redevelopment policies have been codified. Moreover, government funding has been increased and exemptions for private parties have been strengthened, creating more incentives to reinvest. Brownfields programs initially were designed to encourage redevelopment of mildly contaminated properties, but these programs increasingly address even seriously contaminated sites. The US Environmental Protection Agency (EPA) has in recent years delegated much of the responsibility for environmental enforcement and cleanup to the states, which typically manage those responsibilities under their brownfields redevelopment programs.

After contaminated property has been cleaned up, property owners understandably want the state to certify that it has been cleaned to the state’s satisfaction, and ask for assurances that the state will not pursue further remedial action. Documentation usually takes the form of a No Further Action letter, a Certificate of Completion or a Covenant Not to Sue.¹ However, states will almost never issue an unconditional release of liability. Nearly every state environmental authority makes use of “reopeners,” contract qualifiers that allow the government to demand payment for additional cleanup of a site.

¹A Covenant Not to Sue, which defines those parties no longer liable to conduct further clean-up at a site, often is issued concurrently with a No Further Action letter.

Reopeners, which sometimes are spelled out in detail by state environmental laws, may require further remediation under circumstances such as:

- Imminent and substantial endangerment to the public health and environment,
- Certificate obtained through fraud or misrepresentation,
- Remedial response actions fail to meet criteria,
- Use of land not in compliance with restrictions,
- Previously undiscovered contamination,
- New contamination or change in condition that exacerbates contamination, and
- Maintenance conditions not met.

Additionally, states may reserve the right to reopen remediation projects if there are changes in laws that require cleanup to different levels than prior laws, though many states explicitly absolve developers of brownfields properties from liability for changes in the law to encourage redevelopment.

US EPA and reopeners

The US EPA also makes use of reopeners. In Covenants Not to Sue for cases falling under the purview of the Comprehensive Environmental Response, Compensation, and Liability Act – otherwise known as CERCLA or Superfund – the EPA, at a minimum, requires reopeners permitting the government to seek further response action “if information is received after entry of the consent decree regarding previously unknown site conditions or new scientific determinations, and such information indicates there is an imminent and substantial endangerment to public health or the environment.” [52 FR 28038]

The US EPA’s authority to reopen sites is not limited to only those in which the agency originally managed the cleanup process. Under CERCLA, the EPA has the authority to reopen approved cleanups on state brownfield sites if warranted. The Small Business Liability Relief and Brownfields Revitalization Act of 2002 limits the EPA’s authority to reopen cleanups on brownfield sites deemed clean by a state. However, the possibility of federal intervention remains under certain circumstances. As a practical matter, the EPA has shown little interest in state-regulated brownfields, and has gone on record as saying that most brownfields exhibit contamination at levels below the horizon of the agency’s regulatory concern.

Reopener scenarios and consequences

State officials typically are disinclined to reopen cleanups on brownfield sites. In addition to negative public relations consequences, which could deter developers from future investments in brownfields, state officials may be reluctant to investigate supposedly clean sites only to find that scarce state funds must be committed in addition to or in lieu of private funds for further remediation. Despite the preference of states to avoid further work on sites declared clean, cleanups sometimes are reopened and contractual reopener provisions may be triggered.²

Some states have statutory or regulatory provisions for post-cleanup inspections of brownfield sites. New Jersey, for example, requires a review of certain types of brownfield redevelopment projects once every five years. These periodic reviews can uncover issues requiring attention. Additionally, special interest groups and other third parties may sue to have cleanups reopened. The Bronx Committee for

² A 2003 study by The Environmental Law Institute and Cleveland State University found that less than one percent of completed brownfields cleanups are reopened. See Robert A. Simons et al., “Quantifying Long-Term Environmental Regulatory Risk for Brownfields: Are Reopeners Really an Issue?” quoted in David A. Dana, “State Brownfields Programs as a Laboratory of Democracy?” NYU Law Journal, February 1, 2006, p. 96

Toxic Free Schools, for example, filed a lawsuit against New York City's School Construction Authority in 2007, claiming it failed to ensure the proper remediation of a brownfield site on which it planned to build a school campus.

Environmental groups exert pressure on states to raise cleanup standards on brownfield projects and to be more aggressive in policing redeveloped sites. In New York, environmental groups sued the Department of Environmental Conservation, claiming that state regulations for brownfield cleanups are too lenient. Keri Powell, an attorney for Earthjustice who prepared the New York suit, stated that she believed, as a result of the suit, New York "has reopened virtually every cleanup across the state to determine whether it was actually cleaned up to a level sufficient to protect against vapor intrusion." The group alleges that toxic vapors may have triggered clusters of illness in some communities.³

A reopened cleanup can be disastrous for property owners. In addition to potential liability for the cost of remediation if reopener provisions are triggered, a remediation project can halt ongoing development or drive away tenants. Third parties may be motivated to file lawsuits alleging the contamination caused harm to people or damage to adjacent properties. Real estate companies also may be subject to lawsuits by investors or other stakeholders if they fail to adequately disclose the potential financial consequences of environmental liabilities on a timely basis.

Risk management and insurance

In a contamination event, it is not always immediately clear who is responsible for cleaning it up. Under CERCLA and many state environmental laws, companies that generate hazardous substances disposed of at a contaminated site, current and former owners and operators of the site, and transporters who selected the site for disposal – "potentially responsible parties" – may be held responsible for part or all of the cleanup costs. Developers of brownfield sites typically enjoy limited protections from environmental laws. Additionally, "innocent purchaser" statutes may protect purchasers from liability if, except for their ownership of the property, they would not be responsible for the contamination on the site. Under circumstances where these protections do not apply or are overridden by reopeners, government agencies may bring claims for remediation costs against current property owners.

While state laws typically provide certain immunities from environmental liability to brownfield site developers, buyers of cleaned brownfield sites may, nonetheless, demand indemnification agreements from sellers. These require the seller to indemnify the buyer for some or all of any remediation expenses or third party liability costs incurred by the buyer due to pre-existing contamination. Lenders also often require indemnification agreements to protect their interests. Both buyers and sellers of brownfields need competent legal advice in drafting indemnification agreements to be certain they are as fully protected as possible under both state and federal environmental laws. Environmental indemnifications in real estate transactions must be drafted with care and specificity in order to be upheld and enforceable in court actions.

While an indemnification agreement is often essential to close the transfer of a previously contaminated site, the agreement does not absolve a buyer from environmental liability if a cleanup is reopened. If the buyer is held responsible for some portion of the cleanup costs or for third-party liability settlements, it is up to the buyer to collect from the seller under the indemnification agreement. As a result, a seller may be required to guarantee payment of its potential obligations through financial mechanisms such as escrow funds, hold backs, letters of credit, bonds or environmental insurance policies. Of these various mechanisms, insurance policies are often the most acceptable, especially to sellers. Insurance policies typically do not require the seller to tie up credit lines or to sequester assets that could be used for other purposes.

³Denise Kalette, "Turning Brownfields into Goldfields," The National Real Estate Investor, July 1, 2007

The insurance industry offers a variety of insurance products to manage the environmental risks associated with real estate transactions, including the risk associated with reopening a cleanup. Real estate environmental liability policies typically cover the costs of cleaning up pre-existing contamination that was unknown at the time the property was transferred, as well as certain third-party bodily injury and property damage claims and natural resource damages. Reopener coverage typically is provided for known pollution events where a No Further Action letter or equivalent determination has been issued. Environmental insurance coverage also is available to protect property owners from business interruption losses. This can include tenant suspensions and delays in construction as the result of a covered environmental event.

Lenders also may want assurances that environmental problems will not pose a threat to mortgage repayments, and may require a borrower to obtain a real estate environmental liability policy. If there is a default on the loan caused by a pollution condition on the insured property, the policy will generally indemnify the lender for either the outstanding loan balance or the cost of cleaning the property. Under some policies, foreclosure is not required before making a claim. Coverage may be provided for cleanup costs incurred after a lender takes possession of a property, as well as third-party claims for bodily injury and property damage caused by a pollution event.

Environmental insurance products can be complex, and policy terms and conditions vary widely from insurer to insurer. Buyers and sellers of brownfields should consult with their insurance broker, with input from legal counsel, if appropriate, as to the most effective insurance program for their particular needs. Insurance buyers should seek out brokers that have expertise and experience in environmental insurance coverages, and that have access to the leading insurance markets for environmental insurance products. They should look for an insurance company that is financially secure, that has proven underwriting expertise in environmental risks, and that offers competitively priced products that provide coverage tailored to the risk to be insured.

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