



Contaminated Property: Issues and Liabilities

May 2016

The North Carolina Department of Environmental Quality (NC DEQ) is authorized to approve risk-based cleanup remedies for contaminated properties as long as those remedies adequately protect human health and the environment. This brochure is intended to provide current and future owners and users of contaminated properties with information about risk-based cleanups, potential risks from residual contamination, and possible real estate issues associated with contaminated property.

Why am I receiving this brochure?

In 2015, the North Carolina General Assembly passed Session Law 2015-286 that requires certain parties responsible for cleaning up environmental pollution to provide this brochure to owners of property where that contamination has spread. The new law allows groundwater contamination to be cleaned up to risk-based standards only if owners of all affected properties give consent to limit the use of their property so that contact with residual contamination can be avoided. If you do agree to limit the use of your property and allow risk-based standards, you will be asked to sign a consent form granting such permission. However, as a property owner you are not required to consent to the use of risk-based standards for your property. The intent of this brochure is to help you and future property owners be aware of and understand environmental contamination, and provide resources to assist you in making informed decisions. This brochure provides answers to commonly asked questions and contact information if you have additional questions.

How does contamination occur?

Environmental contamination is common in many urban and industrial areas. The potential for releases to the environment exists wherever hazardous materials are stored or managed. While most releases occur in industrial or commercial settings, products used in residential settings such as pesticides, gasoline, paints and cleaning agents can also contribute to contamination if not handled properly. Releases to the environment can occur in many ways, including spills, leaks, dumping, burying, pumping or abandoning of hazardous materials. If releases are not addressed promptly, contaminants can migrate through the ground and impair the quality of soil, groundwater, surface water, sediments and even air. Where the release occurs, the nature of the release, and its chemical characteristics will affect how much risk the contaminants pose to human health and the environment.

What is risk-based remediation?

Remediation is action taken to clean up, reduce, remove or prevent the migration of contaminants in order to protect human health and the environment. Remediation standards are the target concentrations for each contaminant that must be met in order for a site to be considered “clean.” Traditional remediation standards require reducing contaminant levels so that the affected media (e.g., soil or groundwater) have no limits on their use – these are known as unrestricted use standards. Unrestricted use standards rely on conservative assumptions about how a person may become exposed to contamination. When potential exposure to contamination can be prevented by using land-use controls, risk-based remediation standards may be a viable alternative to cleaning up to unrestricted use standards. Risk-based remediation standards are target cleanup levels that protect people and the environment from risks posed by residual contamination for the actual current use and the projected future use of affected property. Risk-based remediation is designed to control risks by reducing contaminant concentrations as needed by performing active remediation, using engineered controls to prevent contact with contamination, and using land-use controls to prevent future activities that may expose residual contamination.

A simple example of risk-based remediation would involve an urban site where a leaky drum has caused low levels of groundwater contamination. If public water service is provided to properties in the affected area and groundwater is not a drinking water source, a risk-based remedy may include removing the drum and the most highly impacted soil (i.e., active remediation), and filing restrictions in the chain of title of affected properties to prevent installation of future drinking water wells (i.e., land-use controls).

Risk-based cleanups have been successfully performed at many sites across the state to provide appropriate and reliable protection from potential exposure to residual contamination.

Active remediation is the work performed to reduce contaminant concentrations in order to eliminate a current risk or to minimize a potential future risk. **Engineering controls** are barriers or systems that prevent contact with contamination, such as a concrete pad to prevent contact with contaminated soil, or a vapor barrier system to control the intrusion of vapors from the subsurface into a building. **Land-use controls** document the permissible uses of property in the chain of title to eliminate potential future risks from residual contamination.

What goes into making risk-based cleanup decisions?

Investigating and cleaning up contamination requires expertise from many disciplines including environmental engineers, geologists, toxicologists and risk assessors. Such professionals working for private companies and local, state and federal agencies are key to adequately assessing and remediating contaminated sites. The first step in the cleanup process is an environmental assessment of the site. A site assessment involves collecting and analyzing environmental samples and other information to understand the existing site conditions. A typical assessment includes evaluating the characteristics of contaminated media (soil, groundwater, etc.), determining the type and concentration of chemicals present, defining the extent of contamination and how it’s moving, evaluating the stability of the contamination, and determining who is (or may become) exposed to contaminants. A complete

site assessment allows for a thorough understanding of the conditions at a site and provides the information necessary to evaluate site risks. Risk-evaluation involves using standard U.S. Environmental Protection Agency risk calculation methods to determine if unacceptable risks are present at a contaminated site. Examples of unacceptable risk might include a contaminated drinking water supply well that exceeds a safe drinking water standard; surface soil with contaminant levels above an acceptable residential concentration in a homeowner’s back yard; or indoor air that has unacceptable levels of a contaminant that originated from the site.

All unacceptable risks must be made safe.

Once the immediate unacceptable risks are made safe, parties responsible for cleanup will evaluate the site assessment and risk information to develop a remedial strategy designed to ensure long-term protection from future risks posed by residual contamination.

Risk-based cleanups allow remediating parties to (i) use site-specific information to evaluate the risks from residual contamination; (ii) set cleanup goals for the amount of contamination that can safely remain in place; and (iii) use land-use controls to prevent future activities that could result in exposure to residual contamination. If a remediating party proposes to use the risk-based approach set out under state law to clean up its site, it must have permission from affected parties and the remedy must be reviewed and approved by the N.C. Department of Environmental Quality (NC DEQ) prior to implementation. If the approved risk-based remedy is completed and adequately protects current and future users of the property, NC DEQ may issue a No Further Action decision to document that no additional remediation work is necessary. Perpetual maintenance of land-use controls is required when a No Further Action decision is made for a site where the remedy relies on land-use controls. Such maintenance may include the current property owner certifying annually that the controls are being complied with, and remain recorded at the register of deeds office. No Further Action decisions can also be rescinded with further remediation required if new information reveals that a site poses an unacceptable risk or if land-use controls have been compromised.

What are land-use controls and how do they work?

Land-use controls, which are also called “land-use restrictions,” “institutional controls,” or “notices” are a necessary part of risk-based cleanups. Land-use controls are typically made up of a document listing the restricted uses, and a survey plat depicting the property where the restrictions apply. These documents are filed in the property chain of title at the register of deeds office, and serve to inform current and future property owners that residual contamination exists at the property and to specify how the property can safely be used. As an example, a property with residual contamination in groundwater may not pose a health concern if public water service is provided and groundwater is not used as a drinking water source. However, to help ensure that no one drinks contaminated well water in the future, a notice or restriction may be filed in the chain of title prohibiting the installation of water supply wells. Land-use controls that are part of a risk-based remedy allowed by Session Law 2015-286 can only be filed with the permission of the property owner.

Contamination from a neighboring property has migrated to my property, should I allow land-use controls to be recorded in my chain of title?

If a party responsible for cleanup is asking you to agree to place land-use controls on your property as part of its environmental cleanup, it is recommended that you carefully review the proposed land-use controls and seek the advice of an environmental attorney, as appropriate. If the remediating party cleaning up the contamination intends to use a risk-based remedial strategy under Session Law 2015-286, and that remedy proposes to use land-use controls on your property, they will need your permission. You should be aware that land-use controls are legally binding and are recorded in the chain of title for your property to help ensure that you and future owners are aware of the residual contamination and how the property can be safely used. If you agree to land-use controls, once the controls are recorded in the chain of title, they can only be removed with NC DEQ’s approval.

Are properties with residual contamination safe?

Properties with residual contamination are safe when owners and occupiers adhere to recorded land-use controls in order to avoid contact with contamination. Risk-based cleanups, like traditional cleanups, are designed to protect human health and the environment. Risk-based cleanups involve using a combination of active remediation, engineering controls and/or land-use controls to ensure that properties with residual contamination are safe. Risk-based remediation has been used across the state to clean up contamination to safe levels and provide appropriate long-term land-use controls to prevent future contact with residual contamination. It is important to remember that properties cleaned up to risk-based standards are safe as long as users comply with the restrictions that apply to the property.

Do I have any legal obligations for residual contamination on my property?

If your property has residual contamination, even if you did not cause it to occur, you are responsible for ensuring safe use of your property by complying with the controls or restrictions that apply to your property. In certain situations, you may be held liable if you are found to be responsible for knowingly contributing to the further migration of contamination. Legal questions related to property rights and owner liability are best answered by a qualified attorney.

Does residual contamination affect property value and marketability?

Property values are influenced by many factors including, but not limited to location, property characteristics and condition, and the overall health of the real estate market. Environmental contamination may also be a factor based on the extent and nature of contaminants, the effectiveness of the cleanup, and the real (or perceived) risks associated with the contamination. Due to the wide variety of market factors and property-specific factors that influence value, it’s not possible to give a definitive answer about whether environmental contamination affects a given parcel’s value.

While environmental contamination may carry a stigma that affects the perceived value of a property,

the potential for exposure to residual contamination can be safely managed using the cleanup strategies described in this brochure. In the long-term, residual contamination may have little to no impact on property value if other factors are favorable to the buyer or seller.

Does residual contamination affect real estate financing?

Lending institutions follow standard policies and procedures in order to help minimize the financial risks they assume when lending money for real estate transactions. Lenders will require that an appropriate level of due diligence be conducted to evaluate the subject property. The property condition, including the presence of any residual contamination, must be considered when evaluating the terms of a loan. Most lending institutions will request details about residual contamination, any potential unknown risk, regulatory status, and the manner in which potential human health or environmental risks are managed.

Lending institutions vary with regard to their comfort level when it comes to lending money for contaminated property. Some institutions routinely work with borrowers seeking to buy or refinance loans on property with residual contamination. The more information that you provide to address the above considerations, the higher the chance the lender will be comfortable with the financial risk. It is recommended that borrowers inquire with multiple lenders in order to obtain the best terms for their borrowing situation.

As a property owner, am I required to disclose the presence of residual contamination?

Most purchases of residential property are subject to the Residential Property Disclosure Act which requires the seller to provide a Residential Property and Owners Association Disclosure Statement (“disclosure statement”). This disclosure statement asks questions about the property conditions, including one regarding the presence of contamination, and allows the seller to answer, “Yes,” “No” or “No Representation” to any of the questions. Sellers must sign the disclosure statement, attesting that the information is true and correct. While sellers may choose to answer “No Representation” to any question in the disclosure statement, if you are a seller working with a licensed

real estate broker, the broker has a duty to disclose material facts that the broker knows or reasonably should know, regardless of the seller’s representations. You are encouraged to consult a North Carolina real estate attorney if you have any questions regarding matters of real estate law.

How do I find out more?

You can learn more about contaminated properties in North Carolina by going to the North Carolina Department of Environmental Quality’s (NC DEQ) website: <http://deq.nc.gov/>. In addition to locating contaminated properties, the website provides access to contact information and online records. NC DEQ’s environmental cleanup programs are overseen by the state Division of Waste Management, (919) 707-8200, and the state Division of Water Resources, (919) 707-9000.

Questions about North Carolina’s real estate disclosure laws may be directed to the North Carolina Real Estate Commission (NC REC) at (919) 875-3700. In addition, the NC REC’s website, <https://www.ncrec.gov/>, provides a wide variety of additional real estate resources. The overview of disclosure law provided in this publication is not a substitute for receiving situation-specific professional advice. Sellers and buyers of real estate are urged to seek advice from a licensed real estate professional and/or an attorney if they have questions.

This publication is intended solely as guidance, and does not contain any mandatory requirements, except where requirements found in statute or administrative code are referenced. This guidance does not establish or affect legal rights or obligations, and is not finally determinative of any of the issues addressed. This guidance does not create any rights enforceable by any party in litigation with the N.C. Department of Environmental Quality. Any decisions made by the N.C. Department of Environmental Quality in any matter addressed by this guidance will be made by applying the governing statutes and administrative codes to the relevant facts.

Prepared by the N.C. Department of Environmental Quality, in consultation with the N.C. Real Estate Commission, and the N.C. Department of Justice’s Consumer Protection Division.