The Ghost of Brownfields Past

By Dixon Snukals

Earlier in your career, you represented a client during the purchase negotiations for a property participating in the North Carolina Brownfields Program. The negotiations went well, and the seller agreed to be responsible for response actions required by the Brownfields agreement. The property was previously home to a laundromat, but with appropriate land use restrictions in place, your client was able to develop the property into a successful retirement home. Recently, you got a surprise call from your client. Your client was not happy.

You learn that your client just received an email from the North Carolina Division of Waste Management (“DWM”) notifying them that a Land Use Restriction Update (“LURU”) was not timely submitted for the property. The email informs your client that the property is currently not in compliance with the Brownfields agreement. But that’s not all. Because of the noncompliance, DWM has taken this opportunity to request further investigation into whether vapor intrusion mitigation is necessary. DWM is particularly concerned about the presence of trichloroethylene (“TCE”) beneath the building. It now wants an evaluation of the vapor intrusion pursuant to the recent assessment guidance that it issued in February 2017.

Your client wants to know, can the DWM do this? Unfortunately for your client, the answer is yes. Because the site was deemed noncompliant for the LURU deficiency, DWM was able to look further into the agreement and determined that vapor intrusion testing was necessary. Typically, DWM does not use these types of technical deficiencies to require additional site evaluation. But your client’s property has TCE.

When the Brownfields agreement for the property was completed in the mid-2000s, vapor intrusion was not as thoroughly understood at it has become in recent years. Furthermore, TCE has since been studied in more depth by the EPA, which revealed a previously unknown potential for risk to unborn children. Evaluation of vapor intrusion potential at Brownfields sites, especially those with TCE, has become a priority focus for DWM, and vapor intrusion mitigation for those sites is commonly found in newer Brownfields agreements. If your client enters into a Brownfields agreement with DWM today, it is likely that it will have to contemplate vapor intrusion mitigation.

If your client entered into a Brownfields agreement before 2005, and your client operates a school, daycare, or other residential facility with sensitive receptors, there is the potential that DWM will want to investigate vapor intrusion potential at your client’s property at some point in the near future. As the hypothetical above suggests, DWM will be vigilant for technical compliance issues at these sites to require further investigation.

DWM could also exercise its authority under the “reopener clause” of the agreement to require vapor intrusion remediation. All Brownfields agreements contain a provision that allows DEQ to require additional remediation of the site if:

- DEQ obtains new information about a contaminant associated with the Brownfields Property or exposures at or around the Brownfields Property that raises the risk to public health or the environment associated with the Brownfields Property beyond an acceptable range and in a manner or to a degree not anticipated in this Agreement.

Before 2005, soil remediation for TCE impacted sites would have been common, but vapor intrusion evaluations were not. Within the past decade, scientific studies have revealed new information about the health effects of TCE exposure on the most vulnerable populations (pregnant women, children, and the elderly). If DWM cannot force vapor intrusion evaluation through technical noncompliance, it will undoubtedly rely on TCE research developments as a basis for reopening the Brownfields agreement.

If your client’s Brownfields site meets the criteria for TCE re-evaluation (i.e. pre-2005 and houses vulnerable populations), it is likely that DWM is already looking for ways to initiate a vapor intrusion investigation. Given these actions by DWM, it may be advisable to reach out to those Brownfields clients that could be impacted to alert them to DWM’s heightened focus on vapor intrusion issues. This might be a good opportunity to remind them of the importance of timely submitting their LURU certifications and otherwise complying with their Brownfields agreement. Even technical compliance, though, may not avoid further review, since DWM has indicated that it will eventually look at old Brownfield sites where vapor intrusion analysis was not previously considered, but may now be required.

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