

The Environmental Corner

*By: Steve Henshaw , P.G., President & CEO,
EnviroForensics*



How Clean Is Clean May Depend on How Clean You Need It To Be

“How clean is clean,” has been a phrase that has been debated for decades. It is used in reference to determining the degree to which a site that is contaminated by chlorinated solvents such as PCE (Perc) and TCE, needs to be cleaned up and remediated before the site is deemed to be free of environmental encumbrances. Commonly, this clean up level is based on concurrence from the regulatory agency overseeing the site. When the regulatory agency determines that cleanup levels have been satisfactorily demonstrated, they will issue a No-Further-Action (or equivalent) letter. But not all site closures are equal, nor in the best interest of the property owner.

I want to tell you this because obtaining site closure may not avail a property owner with property that can be marketed and utilized to its fullest value, even constricting future land uses. I want to tell you this because most people are so afraid of the environmental contamination that their

focus is on getting the site closed. By putting the site closure focus ahead of the future value may leave a property owner with a long-term management problem and an under performing asset. If property owners do not think about the future land use and long-term monitoring requirements of a property, they could be restricted to use the property for a specific land use (e.g. industrial or commercial) by way of a deed restriction that is placed on the property for generations to come. The property owner could be required to manage contamination left in place

by having to ensure that the deed restriction is enforced. They could be required to maintain the operation and maintenance of a vapor mitigation system for as long as twenty to thirty years after site closure. They might even find that a bank is not willing to lend on the property, restricting the use of the property as collateral for fear of future changes in the law or potential future third party personal injury or property value claims.

The most important thing to un-

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Cleaner & Launderer

November 2014

derstand about what I'm telling you is that site closure from a regulatory agency may not mean that the site is cleaned to the level that you need it to be. Today, site closures issued by regulatory agencies are typically based on the risk of the contaminants left behind to human health and the environment. Just because a site does not pose a risk to human health or the environment doesn't mean that the site is as valuable as it could be if contamination were not left in place.

Clearly, the degree to which a site is cleaned up is a function of cost. If a company or a person is responsible (referred to as the responsible party or RP) for causing contamination, it behooves them to try to close the site by spending the least amount of money possible. If the RP is the property owner, spending money on cleanup might be taken out of one pocket today, but could be taken out of the other pocket tomorrow, because the property is less valuable. Often times the RP is strapped for cash and would rather spend less today hoping they can dodge the potential future property diminution. In these situations, rolling the dice may make perfect sense.

The next thing that will be helpful to understand is that risk-based site closures come in many forms. A site can be "closed" by a regulatory agency while leaving high concentrations of contaminated soil in place, beneath the building or parking lot. This might be a good option, but most likely a vapor mitigation system will need to be monitored for decades, groundwater wells will need to be sampled for many years, and a long term plan will need to be put in place to protect any workers that might

come into contact with the contamination in the future. If the property is used for industrial purposes and is located in an area designated for that use, this approach could make a lot of sense. Conversely, if the property is zoned commercial, but is located next to residential houses, schools or day care, the cost to monitor the site could last for decades and cost tens of thousands, even hundreds of thousands of dollars. For this reason, when you or your team (attorney and consultant) are evaluating cleanup options, the cheapest closure today may not be the cheapest in the long run.

Another thing that is important to understand about cleanup strategies is that those paying the cleanup bills have everything to gain by pushing for risk-based closures. This is particularly true when a RP has insurance that is responsible for defending and/or indemnifying them against environmental claims. Far too often I've seen insurance carriers hire consultants and attorneys to "represent" the RP, who is their policyholder. Most states allow for a policyholder to select the attorney and consultant of their choice. There is never a down side to selecting a consultant that is true to you and your needs, rather than one appointed by your insurer. To be clear, attorneys and consultants that are selected by insurance carriers get future work from insurance carriers. If the insurance carrier is not able to persuade the policyholder to select their choice of consultant, they may hire their own consultant to push their agenda of doing as little as possible for as long as possible, thereby dragging the project out while they hold onto and reinvest the money in lieu of paying it out to address the contamination.

As I've discussed many times, more and more sites will close using risk-based approaches where contaminated soil and groundwater will be left in place and long-term monitoring will be required. It is extremely important to understand what future responsibilities will be required of you in order to leave contaminated soil and groundwater behind.

In summary, when faced with an environmental claim, the best thing you can do is hire an attorney and a consultant loyal to you. Attorneys and consultants working for your insurance carriers can be nice guys, but they plan on getting future work from the insurance carriers, not from you. Understand the cleanup options and the costs today as well as the long-term monitoring costs that could last twenty, even thirty years down the road. Finally, understand how the cleanup will impact long-term use of the property and the future value of the property. Site closures are costly and risk-based closures have their costs too. Make sure those costs aren't hidden. No one likes surprises.

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With 30 years of experience, Steve Henshaw holds professional geology registrations in numerous states. As President and CEO of EnviroForensics, Henshaw serves as a client and technical manager on projects associated with site characterization, remedial design, remedial implementation and operation, litigation support and insurance coverage matters. He has acted as Project Manager or Client Manager on several hundred projects involving dry cleaners, manufacturers, landfills, refineries, foundries, metal plating shops, food processors, wood treating facilities, chemical blenders and transportation facilities. Henshaw has built a leading edge environmental engineering company that specializes in finding the funding to pay for environmental liabilities. By combining responsible party searches with insurance archeology investigations, EnviroForensics has been successful at remediating and closing sites for property owners and small business owners across the country, with minimal capital outlay from clients.

He is a regular contributing writer for several dry cleaning trade publications on environmental and regulatory issues and remains active with dry cleaning associations by providing insight on changes in law and policy. Contact www.enviroforensics.com; e-mail: shenshaw@enviroforensics.com.