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February 9, 2009

Susan Howard
Senior Policy Analyst
Ministry of the Environment
Integrated Environmental Planning Division
Land and Water Policy Branch
135 St. Clair Ave. W., 6th Floor
Toronto, ON M4V 1P5

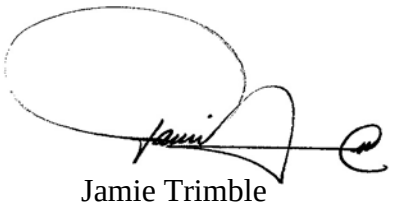
Dear Ms. Howard:

On behalf of the Ontario Bar Association (OBA) I am pleased to provide you with our submission on the Proposal for Amending Ontario Regulation 153/04, Brownfields Records of Site Conditions – EBR Registry Number 010-4642.

The OBA represents more than 18,000 lawyers in each practice area and region across Ontario making us well positioned to offer advice on this important issue.

I trust you will find the enclosed submission both informative and helpful.

Yours truly,



Jamie Trimble
President
Ontario Bar Association

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Comments on Proposal for Amending Ontario Regulation 153/04, Brownfields Records of Site Conditions – EBR Registry Number 010-4642

Submitted on *Monday, February 09, 2009*

Submitted by:

Jamie Trimble	Barry Weintraub	John Mascarin
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Ontario Bar Association	Environmental Law Section	Municipal Law Section

Submitted to:

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Table of Contents

Introduction

The Ontario Bar Association ("OBA") and its Environmental and Municipal Law Sections welcome the opportunity to comment on your Ministry's proposal to amend Ontario Regulation 153/04, Brownfields - Records of Site Condition. The OBA supports the Ministry's vision to facilitate the return of brownfields to productive land use.

Background

The OBA consists of 18,000 lawyers from a broad range of sectors, including those working in private practice, government, non-governmental organizations and in-house counsel. Our members have, over the years, analyzed and provided comments to the Ontario government on numerous legislation and policy initiatives. More than 1,000 of these lawyers belong to our very active Environmental and Municipal Law Sections. Our members have considerable expertise and experience in how environmental laws and policy are interpreted and applied, and represent many points of view. The views expressed herein are the views of the OBA and its Environmental and Municipal Law sections as a whole, and are not necessarily the views of each individual member or other organizations with which they may be involved.

Comments

Fundamentally, if the Ministry adopts the very stringent new standards it has proposed, it must offset them with major improvements to the Risk Assessment ("RA") process or risk sterilizing numerous contaminated sites, with potentially significant environmental and economic consequences.

In particular, we have the following comments on the proposed amendments to O. Reg. 153/04 (the "Amendments"):

1. Liability Protection and Off-site Migration from the RSC Property (Part VIII.1 of the Draft Regulation):

The requirements of the off-site migration mechanism in subsection 168.7.1 of the *Environmental Protection Act* ("*EPA*") should be clear (i.e., a "bright line" test) and relatively easy to implement for qualified persons whose primary expertise will be in environmental technical matters.

a) While paragraphs 33.5(2)1. and 33.5(2)4. require qualified persons to determine the permitted and existing land uses (respectively) for properties in the vicinity of the RSC property, it is not clear how this is to be done. Additional guidance should be provided in addition to paragraph 33.8. For example, must the qualified person ask the owners/ occupants of each property about existing uses or simply look from the road? What happens if owners do not respond or the property use is not apparent? What degree of certainty is required? Is it sufficient/ required to consult the local municipality?

b) With respect to paragraphs 33.5(2)3. and 33.5(2)6., we recommend that the qualified person be required to document how he/she determined the permitted land use and existing land use.

c) Paragraph 33.6(1)4. requires that once the sampling and analysis described in paragraph 33.6(1)3. commences, it must continue until the contaminants' concentrations meet the applicable standard for four consecutive 90-day periods. The intent of this provision appears to be that protection from Orders is provided only if the applicable standard has been met in four consecutive quarterly samples. However, as drafted, the clause may be misinterpreted as requiring such sampling and analysis to continue indefinitely in the (potentially impossible) pursuit of such results. Property owners should have the option of abandoning their pursuit of the limited off-site migration protection afforded under this section.

d) Paragraph 33.9 provides that a property that is located wholly or partly within 60 metres of the RSC property is within the "vicinity" of that RSC property. Since direct measurement may not be practical (e.g., measurements that must be made through a building) or permitted by intervening owners, qualified persons should be entitled to use Parcel Identification Number (PIN) maps generated by the land titles system or some other practical means to determine these measurements.

e) The Ministry should provide greater clarity on the civil consequences where generic criteria are not met at the property boundary, whether under an RA or not. In particular, are affected neighbours still free to sue for civil damages they suffer from loss in property value, if an RA approves exceedences of generic criteria?

3. A Streamlined RA Approach - Alternative RA Procedures:

We strongly support Ministry efforts to streamline the RA process, especially since the proposed changes to the standards will force so many more properties into RA.

However, we wonder whether the proposed "streamlined" approach, as currently drafted, will actually encourage brownfield development. We share the concerns expressed by Canadian Petroleum Products Institute ("CPPI"), National Brownfield Association ("NBA") and Building Industry and Land Development Association ("BILD") and others in this regard; it is critical that the Tier 2 model provide a truly effective and efficient alternative to the Tier 1 standards. We are very concerned by the advice of the professional risk assessors at the Ontario Environmental Industry Association ("ONEIA") that the proposed process will not provide effective streamlining, and provides too little flexibility for real world problems. In addition, the proposed streamlined approach would require a property owner to collect certain data over a minimum of one year. This is a long delay in the context of a property transaction.

Unless the Tier 2 process is adequately flexible and efficient, proponents will be driven either to Tier 3 or to abandon environmentally beneficial and otherwise economic developments.

We encourage the Ministry to work with its technical stakeholders to develop a Tier 2 process that is genuinely streamlined, and to implement the new tool as soon as possible, without waiting for the new generic standards to take effect.

4. Strengthened Soil and Ground Water Site Condition Standards - The New Standards

We appreciate the clear explanation that has been provided of the science behind the new Standards for contaminated sites. However, it is less clear that this science has been appropriately applied; we note, for example, CPPI's concern about the multiplication of conservative assumptions.

In light of this concern, we support CPPI's comment that your Ministry's Statement of Environmental Values requires all policies and regulations to "... take into account social, economic and other considerations". Preliminary information suggests that the proposed standards may have large social and economic costs. We echo the suggestion of NBA, CPPI and others that the Ministry should evaluate and disclose these costs before the proposed standards are implemented.

It is also essential that commercial laboratories be able to reliably analyze soil, groundwater, and sediment to determine whether these meet applicable standards. We understand from ONEIA that some of the new numbers are too low for reliable quantification. If so, we do not understand how such numbers can be effectively applied..

5. Complementary Technical Regulatory Amendments:

We have no comments on these amendments.

6. The Transition

The transition from the current standards to the new standards will undoubtedly be difficult. We recommend that the Ministry clearly explain whether, and if so on what basis, property owners and potential purchasers can continue to rely upon Records of Site Condition that have been issued under the existing standards. This is particularly important where the new standards are more stringent for health reasons.

Notwithstanding assurances from the Ministry that existing RSC's will enjoy the same regulatory protection as RSC's under the new regime, many banks, municipalities and purchasers will likely demand new RSCs based on the new standards.

The proposed changes appear to be based upon the view that most requirements for an RSC are driven by changes in property use and s. 168.3.1 of the EPA. In fact, most RSC registrations are driven by the requirements of municipalities, creditors and purchasers, regardless of any change in property use, and they typically want the best protection available against possible future liability. The fact that "change in use" protections will survive under the new system provides very limited comfort. This may well require a property owner to do a Tier 2 or Tier 3 assessment to validate the earlier results. As a result, the new standards may precipitate a significant surge in demand for RAs to validate existing RSCs, unless buyers, municipalities and banks are given comfort that they can rely on previous RSCs or are prohibited from requiring new RSCs from existing registrants.

As we understand it, Tier 2 (as proposed) will often be unsuitable for "validating" existing generic RSCs. The Tier 2 model has built-in hard caps, which preclude the model from yielding a standard in the range of the existing Table 3 standards for some substances, regardless of the risk parameters. Further, the Tier 2 process prescribes a set of substances as risk parameters, which in many cases will be broader than the set selected by the Qualified Person under the existing system. In such situations, there will be no existing test results for the full slate of substances for which testing is prescribed under the proposed Tier 2 process.

Thus, there could be a significant demand for Tier 3 RA's for sites with existing RSCs. Will there be sufficient resources to meet this demand? If substantial new resources are not devoted to RA (for existing and new sites), the timing and cost repercussions may significantly deter beneficial development.

The Ministry has indicated that, even after the new standards are formally adopted, no one will be permitted to use them until the transition date. This seems unwise. Records of Site Condition must clearly indicate to which set of standards they refer, and preferably what the standards are. Accordingly, we suggest that property owners be permitted to use the new standards as soon as these are adopted. For the many parameters where the acceptable standards will become less stringent what is the point of requiring property owners to clean up to standards which no longer have scientific support? We agree, however, that owners should be required to select one set of standards or another, and should not be able to cherry pick numbers from both sets.

The Ministry also needs to make clear provision for a smoother transition on risk-assessed sites. Some property owners will be caught, through no fault of their own, if remediation measures fail to achieve the anticipated target within the rigid 18-month time frame. Given the huge amount of time and money that will have been invested in the project to that date, it would not be fair to compel them to start over as the current proposal suggests. We recommend that, once the Ministry has accepted a RA for property, the property owner should have up to three years to submit a Record of Site Condition in accordance with that RA.

Other Issues

In addition to the issues raised by the proposed amendments, we remain concerned about several aspects of the brownfields process raised in our previous comments, such as continuing problems with slow, expensive and unpredictable RAs. In particular, we request that you review again the OBA's comments re EBR Reg 010-0149 in May 07. A copy is posted at http://www.oba.org/en/pdf/Brownfields_Letter_22_May_07.pdf.

a. *Enhanced Record of Site Condition (RSC) Integrity - Insurance for Qualified Persons:*

The Ministry needs to increase minimum QP insurance requirements. In our experience, the current minimum amount of insurance provided in section 7 of the regulation is not sufficient to protect the public. The losses that flow from errors by qualified persons can

easily reach several million dollars. In addition, qualified persons may work on multiple sites and projects in a single year. Such coverage must be divided among the different projects, and little or nothing may be left for those injured by their negligence. We recommend that qualified persons be required to hold at least $5 million insurance per claim, with an aggregate coverage of $10 million. Since such coverage is issued on 'claims made' basis, qualified person should be required to carry runoff coverage for at least five years.

b. Review of RA Decisions:

The Ministry should provide a timely, senior internal review of decisions that are made by its staff during the RA process. At present, property owners are completely at the mercy of the uncontrolled discretion of the Ministry's RA staff. These staffers undoubtedly do their best under difficult conditions. However, their decisions vary unpredictably from one property to another, for reasons that are rarely explained. An appeal process to senior staff, with reasons, would help create a level playing field, and a greater degree of certainty that would encourage brownfield development.

c. Adequate Resources for Effective RA

The proposed Standards will greatly increase demands for timely RA, and will increase the pressure on Ministry's resources. If these demands are not met, the timing and cost repercussions may significantly deter beneficial development. The Ministry must therefore provide adequate resources for timely and efficient RA, or reallocate existing resources. For example, not all RAs require equally intense government review. As in the current Approvals pilot project, the Ministry should consider giving more expedited reviews to RAs prepared by QPs who have undergone additional training, and who have proven their ability to prepare high quality RAs.

d. RA Deadlines

The Ministry should provide real deadlines for its approval or rejection of RAs. The current system provides no certainty because of the practice of "resetting the clock".

e. – Inert Fill/ Regulation 347

The Ministry needs to clarify the rules about soil movement from one site to another. We were glad to see that Section 40, Schedule E would allow soil to be brought onto a property, provided it meets the applicable site condition standards. However, this is inconsistent with some Ministry staff's interpretation of Regulation 347 and the definition of inert fill. Staff sometimes argue that soil moved from one site to another is "waste" unless it is "inert fill". In the absence of a clear definition of "inert fill", some staff demand that imported soils meet Table 1 Standards, regardless of the standards applicable to the receiving site. This is illogical. The Ministry should clarify the conditions under which soil may be moved from one site to another.

Conclusions

If the Ministry adopts the very stringent new standards it has proposed, it must offset them with major improvements to RA or risk sterilizing numerous contaminated sites, with grave environmental and economic consequences. It must also provide or reallocate adequate resources, to allow property development decisions to be made in a timely fashion, and improve the management of cross-boundary issues.

We understand that the Ministry has been working with many stakeholders to revise its proposal, and has already agreed to make many changes not disclosed to us. Some of our concerns may be addressed by such changes. Since the proposed amendments ae likely to have such large economic effects, we would appreciate an opportunity to comment on the revised proposal. We therefore recommend that the Ministry should revise its proposal, and repost it for a further period of public comment.

Thank you for this opportunity to provide our comments on your Ministry's proposal to amend Ontario Regulation 153/04.