



Environmental Law

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May 22, 2007

Adam Leus, Brownfields Specialist
Ministry of Environment
40 St. Clair Ave. W., 7th floor
Toronto, ON, M4V 1M2

Dear Mr. Leus:

Re: Brownfields Standards Submission – 010-0149

1. Introduction

The Ontario Bar Association (OBA), Environmental Law Section (ELS), welcomes the opportunity to comment on your Ministry's proposal to update the *Soil, Ground Water and Sediment Standards for Use under Part XV.1 of the Environmental Protection Act*: posting # 010-0149.

2. Background

The OBA consists of 17,000 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 500 of these lawyers belong to our very active Environmental Law Section. Our members have considerable expertise and experience in how environmental laws and policy are actually interpreted and applied, and represent many points of view.

3. Overview

The ELS of the OBA acknowledge the importance of keeping the Brownfield Site Condition Standards based upon accurate and up to date science. We understand that other stakeholders, such as the Ontario Environmental Industry Association, will comment on scientific and technical aspects of the proposal. The ELS of the OBA will not do likewise.

Our comments focus on:

- The transition from the current standards to the proposed new standards, and
- The practical impact of the new standards on the timeliness and predictability of brownfields redevelopments in Ontario.

4. The Transition

We commend the MOE for providing a phase-in period, but ask that you consider the following:

Clarify the Trigger Date

We suggest that the current MOE standards should apply to any Record of Site Condition (RSC) *submitted* for filing in the Environmental Site Registry within the proposed 18 month phase in period. That is, it should not be necessary to actually have the RSC *filed* by the transition date, since owners cannot control the length of the process between submission and filing. The 18 months should not be eroded by the MOE's own processes.

For the same reason, consideration should be given to allowing the current standards to be used at any site that has begun¹ the risk assessment process when the transition period starts to run, even if the Record of Site Condition is not filed within the 18 month period. Such sites often use generic criteria for most parameters, even if site-specific criteria must be developed for one or more specific parameters. It seems unfair to change the benchmarks partway through the risk assessment process, especially since the MOE's own constraints can prolong the time required to complete and implement a risk assessment.

¹ We suggest that the Risk Assessment Pre-submission Form or some other objective step be referenced to mark the commencement of the Risk Assessment process.

MOE Discretion to Extend Phase-in Period

There is a potential injustice in having a fixed phase-in period for all circumstances. One way for the Ministry to approach resolving this injustice is to provide a discretionary power to extend the phase-in period in appropriate circumstances with a right of appeal of the Ministry's exercise of its discretion. For example, if a remediation has been conducted diligently over a number of years and misses the deadline by a relatively modest amount of time (in the context of the overall project), the MOE should have the discretion to acknowledge an RSC based on the previously applicable standards. In our view, this would balance the interest of implementing the new standards, while not penalizing persons who have undertaken projects that require a significant amount of time to complete.

Standard Used Should be Clear on the Face of the RSC

Future owners and lenders could be confused by the continued evolution of MOE standards, and be unsure what an RSC of any particular date means about the levels of contaminants on a property. We therefore propose that the RSC form be amended to require the Qualified Person to clearly state which set of MOE standards was applied. It could even be helpful for the RSC to specify the actual level of the standard (e.g., Nickel 37 u/g in soil) for all contaminants on the property in their certifications. In addition, we suggest that the Environmental Site Registry should clearly show the relevant dates for each set of MOE standards, to assist those interpreting RSCs which do not contain such certifications.

Late filing of existing RSCs

Please clarify how s. 168.4(6) of the *Environmental Protection Act* will apply to Records of Site Condition that were prepared before October 1, 2004, but have not yet been filed, once the new MOE standards come into effect.

Impact on trustworthiness of existing RSCs

We strongly support the continued recognition of RSCs based on the current generic standards. This is fair to current owners and occupants of properties for which RSCs have been filed, and is essential to the confidence of Ontario's brownfield developers and buyers. However,

we believe that the MOE needs to actively address the potential for erosion in public trust in such RSCs, once the new standards come into force. If the current standards are not sufficiently stringent to protect public health and the environment (which is presumably why they are being replaced), why should the public trust RSCs based on such standards? Will municipalities be able to require that RSCs under the current standards be redone under the new MOE standards before the Chief Building Official is permitted in law to issue a building permit? And what will the implications be for civil liability? We urge the MOE to provide clear and reliable ways of addressing these concerns before amending the MOE standards.

5. Impacts on timeliness and predictability

The new MOE standards will have substantial practical implications that are not discussed in your posting, and which could seriously disrupt brownfields redevelopment. In our view, the MOE should not adopt the new standards until it has the resources to properly manage the resulting workload.

RSC Applications:

A large number of additional RSCs may be sought in the 18-month transition period. How will the Ministry manage this increased demand coupled with the switch to prior review of RSCs in Bill 187? If the regulatory process becomes backlogged, transactions could remain stagnant or fall through pending receipt of acknowledgements of the RSCs.

Risk Assessment:

The new MOE standards may force a high percentage of brownfield cleanups into risk assessment; we understand that about half of the RSCs now on the Environmental Registry would not achieve the new standards. The current process of MOE response and re-activation of timing leads to an average 12 to 18 month process for a risk assessment. This slow pace and the unpredictability of the process is already a major obstacle to brownfields redevelopment; how will the MOE cope with this significant added strain? If the MOE cannot devote proper resources to facilitating risk assessments, the process will have limited utility.

In our view, it is imperative that the Ministry take immediate action to improve the timeliness and predictability of its risk assessment reviews. Aside from additional personnel, much could be achieved with improved communication between technical reviewers and the risk assessment consultant. Early issues resolution meetings or discussions could achieve a better level of understanding. In addition, quality assurance and quality control measures should also be considered for external reviewers retained by the Ministry to ensure consistency across the province and over time.

Conclusion

Thank you for the opportunity to provide our comments on this initiative. We urge the MOE to provide clear and reliable ways of addressing these concerns before amending the standards.

Yours truly,



Marc McAree
Chair, Environmental Law Section

cc: OBA ELS Executive
OBA ELS Section Coordinator

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