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OBA Comments on the Ministry of the Environment's Proposal for Amending Ontario Regulation 153/04, Brownfields Records of Site Condition

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In February 2009, the Environmental Law Section, in conjunction with the Municipal Law Section, prepared a submission to the Ontario Ministry of the Environment (the "MOE" or "Ministry") regarding its proposed reform package on Brownfield Redevelopment through significant revisions to O. Reg. 153/04 made under the Environmental Protection Act (EPA),[1] the Record of Site Condition ("RSC") Regulation. The MOE published the reform package on the Environmental Registry on October 6, 2008 (Registry Number 010-4642).[2] The original posting was for 120 days. However, at the last minute the MOE extended the deadline by one week to allow for additional ongoing consultation. Due to the considerable amount of material required to be reviewed (much of it very technical in nature), numerous stakeholders and associations worked collaboratively throughout the consultation period to understand the significant implications of the reform package.

One of the most controversial proposals is the MOE's initiative to create more stringent standards. While the soil, sediment and groundwater standards may require updating due to advances in technology, the MOE must be able to validate the increased health and safety protection hoped to be achieved with the proposed standards. The MOE must also examine the proposal in light of the hard economic realities facing brownfield redevelopment projects in the current fiscal climate. If the government's position is that brownfield development is an important public policy, it needs to facilitate the process rather than provide additional barriers. That being said, there are also positive improvements in the reform package that are welcomed by the brownfield development community.

The OBA's specific position was that 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.

The reform package included five areas for a specific change in the O. Reg. 153/04, including the following topics: (1) enhanced RSC integrity; (2) off-site liability protection; (3) streamlined risk assessments; (4) strengthening of current standards; and (5) various complimentary amendments to O. Reg. 153/04. The supporting documentation for the consultation was significant and included hundreds of pages of background documents. The Ministry provided a very helpful blackline of the proposed changes to O. Reg. 153/04 that made it easier to review the proposals in context of the larger draft. In this, the MOE is to be commended as they learned from previous consultations how to better work with stakeholders to facilitate an understanding of the significant complexities in the reform package.

The OBA submission also generally supported concerns expressed by Canadian Petroleum Products Institute ("CPPI"), National Brownfield Association ("NBA"), Building Industry and Land

Development Association ("BILD"), and the Ontario Environmental Industry Association ("ONEIA") on various technical issues that the OBA itself was unable to provide comment on.

However, the proposals are still a concern from a number of perspectives. The Province will achieve a better framework to clean contaminated soils and groundwater if the Government successfully addresses these concerns. The OBA's concerns are particularly relevant for health and environmental considerations, as well as emphasizing the need for a sustainable approach to managing brownfield sites that will promote real clean-ups and create green jobs.

The OBA responded to the MOE's proposal on the following points:

1. Liability Protection and Off-site Migration from an RSC Property

In theory, liability protection for off-site migration is an important key to brownfield redevelopment. However, the proposal in the reform initiative was full of complications that require greater clarification. The proposed process is too complicated and most stakeholders confirmed that they would not "jump through the hoops" to get the limited statutory relief and no common law relief. The OBA's submission centered around developing a "bright-line" test with parameters that could easily be implemented by the qualified persons ("QP") whose primary expertise would be in environmental technical matters. The current proposals are complex and difficult to understand. As an example, there is a proposed requirement for a QP to determine the permitted and existing land uses (respectively) for properties in the "vicinity" of an RSC property. However, there is no guidance on how this task should be completed. Any property that is located wholly or partially within 60 metres of the RSC property is deemed in the "vicinity" of the RSC property. For example, the OBA questioned whether the QP should make enquiries of the owner(s)/occupant(s) of each property, or are existing uses simply observed from the road? What degree of certainty is required? Is it necessary to consult with the local municipality? In addition, the MOE proposed sampling requirements that were very onerous and included four consecutive 90-day periods. No clarity is provided as to the termination of this obligation.

The MOE will need to go back to the drawing board on this part of the proposal to find a solution that is more workable.

2. Streamlined RA Approach — Alternative RA Procedures

The MOE's proposal provided for a more streamlined RA process (known as a Tier 2 model). A full-blown RA is referred to as a Tier 3 process. The OBA strongly supported the Ministry's efforts to streamline the RA process especially since the proposed changes to the standards will force so many more properties into RA.

It is critical that the Tier 2 model provide a truly effective and efficient alternative to the more stringent standards. The OBA highlighted the concerns raised by professional risk assessors at 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.

The OBA raised the point that 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.

During the consultation process, the MOE created a technical working group to review the Tier 2 model, which had not been originally released as part of the formal consultation. The MOE has been responsive to technical comments raised by the working group on such topics as timelines and

process for review, pathway blocking techniques, modified ecological protection, the issue of a Certificate of Property Use being issued (versus an RSC) if the Tier 2 process is utilized, and has agreed that the Tier 2 process may be used in wellhead protection areas.

Many stakeholders (including the OBA) recommended to the MOE that they release the Tier 2 model preferably before (or worst case, at the same time as) the new standards are released so that parties can understand the implications of various remediation options.

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

The strengthened standards were one of the most controversial portions of the reform package. The OBA sections worked with more technical stakeholders to understand the scientific details of the proposal. While a clear explanation was provided by the MOE of the science behind the proposed new standards for contaminated sites, it was less clear that this science has been appropriately applied. The OBA noted, for example, CPPI's concern about the multiplication of conservative assumptions.

In light of this concern, the OBA supported CPPI's comment that the 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. The OBA echoed the suggestion of the NBA, CPPI and others that the Ministry should evaluate and disclose these costs before the proposed standards are implemented.

The OBA raised the issue that it is essential that commercial laboratories be able to reliably analyze soil, groundwater, and sediment to determine whether these meet applicable standards. The OBA also raised an issue noted by ONEIA that some of the new numbers are too low for reliable quantification and required clarification to understand how such numbers could be effectively applied.

4. Transition

The OBA submission strongly recommended that the MOE clarify, in advance of the coming into force of any revision to O.Reg. 153/04, whether property owners and potential purchasers can continue to rely upon RSCs that have been issued under the existing standards, and if so on what basis. This is particularly important where the new standards are more stringent for health reasons.

Many stakeholders (including the OBA) raised the issue that notwithstanding assurances from the Ministry that existing RSCs will enjoy the same regulatory protection as RSCs under the new regime, many banks, municipalities and purchasers will likely demand new RSCs based on the new standards.

The OBA submission observed that the proposed changes appear to be based upon the view held by the MOE that most requirements for an RSC are driven by changes in property use and section 168.3.1 of the EPA. The OBA noted in its submission that, 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 OBA further noted that 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. The OBA also noted that 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.

During the consultations, it was noted by many stakeholders including the OBA that the Tier 2 process (as proposed) will often be unsuitable for "validating" existing generic RSCs. The OBA pointed out that 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 QP 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.

The OBA submission concluded that there could be a significant demand for Tier 3 RAs for sites with existing RSCs. Practical considerations were also raised by the OBA, requesting confirmation from the MOE that there will be sufficient resources to meet this demand and stating that if substantial new resources are not devoted to RAs (for existing and new sites), the timing and cost repercussions may significantly deter beneficial development.

A significant issue raised by the MOE relates to the transition from using the current standards to the proposed standards. During initial consultations prior to the Environmental Registry posting, the MOE had indicated various timelines that included an 18-month transition period where proponents would be afforded a choice as to when they wanted the new standards to apply with a hard start date and a hard end date for the filing of RSCs using the "old" standards. However, during the consultation process, the Ministry indicated that even after the new standards are formally adopted, no one will be permitted to use them until the transition date. The OBA commented that this seems unwise. The OBA raised the point that RSCs must clearly indicate to which set of standards they refer, and preferably what the standards are. Accordingly, the OBA suggested that property owners be permitted to use the new standards as soon as they 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? The OBA agreed, 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.

Finally, the OBA raised the issue that 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 time frame. The OBA made the point that given the significant 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. The OBA recommended that, once the Ministry has accepted an RA for a property, the property owner should have up to three years to submit an RSC in accordance with that RA.

Other Issues

The OBA submission also reminded the MOE that a number of issues raised in the OBA's earlier submission on the MOE's proposed "Update of Brownfield Soil and Ground Water Standards" (Environmental Registry Number 010-0149) in May 2007 should be reviewed by the MOE and the outstanding issues should be addressed. **A copy of that OBA submission can be accessed here.**

On other issues, the OBA recommended that the minimum insurance requirement for a QP be raised to a minimum of five million dollars per claim, with an aggregate coverage of 10 million dollars. As well, since coverage is issued on a "claims made" basis, a QP should be required to carry runoff insurance coverage for at least five years.

The OBA also recommended that the MOE provide a timely, senior internal review of decisions that are made by its staff during the RA process, to create a level and consistent playing field with a greater degree of certainty of outcome, to encourage Brownfield development. Along with this request, the OBA asked the MOE to increase resources for the timely review of RAs or a reallocation of existing resources to meet the increased demand for RAs once the new standards are brought into place. As well, the MOE should provide real deadlines for its approval or rejection of RAs, as the current system provides no certainty because of the practice of "resetting the clock."

The OBA also recommended that the MOE clarify the rules about movement of soil from one site to another. This would involve clarification of the definition of "inert fill" and require consistent interpretation of Regulation 347, R.R.O. 1990 (General - Waste Management) made under the EPA.

Conclusion

The OBA's submission reiterated its concerns that the more stringent standards could have the unintended consequence of sterilizing numerous contaminated sites if major improvements to the RA were not made at the same time. As well, the OBA wanted to ensure that the MOE provides or reallocates sufficient resources to allow property development decisions to be made in a timely fashion and improve the management of cross-boundary issues.

Finally, the OBA (along with many other organizations) requested that the MOE examine the economic repercussions of the proposal, and after considering all the submissions received during the consultation period, that it repost any revisions to the proposal on the Environmental Registry for a further public comment period.

We are hopeful that the MOE and the rest of government has carefully listened to the comments received during the consultation period to ensure that the policy choices it makes have the intended impact of encouraging rather than discouraging brownfield development in the Province of Ontario.

This article is based on the submission made by the OBA. A copy of the OBA's submission is available here. ■

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[1] R.S.O. 1990, c. E.19.

[2] Online: www.ebr.gov.on.ca.