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Report

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MOE Encourages Industry, Municipalities and Conservation Authorities To Implement New Voluntary "Excess Soil" Guidelines

by Marc McAree, Partner and Certified Environmental Law Specialist

The Ontario Ministry of the Environment (MOE) has released new voluntary guidelines for the handling, transport and temporary storage of "excess soil" generated during construction or redevelopment activities (Guidelines). The MOE is encouraging municipalities and Conservation Authorities to consider the Management of Excess Soil – A Guide for Best Management Practices *when establishing by-laws and issuing permits or approvals. The MOE anticipates that industry will develop complementary codes of practice to support the Guidelines*.

Excess soil is excavated, usually during construction, and moved off-site to be stored temporarily; reused at another development or commercial fill site; or processed, treated and/or disposed at an MOE-approved site. Soil treatment or processing facilities are not covered by the Guidelines and are subject to Environmental Compliance Approval requirements.

MOE Recommendations

The MOE is encouraging owners/operators of both soil source and receiving sites to engage a Qualified Person (QP) to undertake a risk assessment of the proposed reuse opportunities, based on the analysis and characterization of the soil and the pre-existing condition at the receiving site.

In addition, the MOE recommends

- that each load of excess soil removed be accompanied by documentation (signed by the source site QP) that includes appropriate and representative soil analyses
- not mixing and diluting contaminated soils to reduce the concentrations of contaminants
- tracking all shipments and retaining records retained for at least seven years after the completion of all excess soil management activities or their removal from a temporary storage site
- identifying, mitigating and/or eradicating invasive species in excess soils

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- that owners/operators of potential receiving sites conduct public consultation, as well as proactive engagement with First Nations and Métis communities and other stakeholders
- not establishing temporary storage sites for more than two years, and ensuring that all activities are overseen by a QP. The Guidelines suggest operational best management practices for storage sites.

Limitations of the Guidelines

The MOE says the Guidelines "will provide essential guidance for site owners, developers and contractors and will promote a consistent approach to managing excess soil across the province."

However, the Guidelines do not provide an overall regulatory framework for soil management in Ontario, nor do they clarify when an excess soil is a "waste." Standards that could be used to assess the suitability of excess soils sent to receiving sites are also "outside the scope of the guide."

Federal Pest Management Regulatory Agency Announces Review of Active Ingredients in Registered Pest Control Products

by Julie Abouchar, Partner and Certified Environmental Law Specialist

The federal Pest Management Regulatory Agency (PMRA) will reevaluate 23 active ingredients currently found in some 360 pest control products registered for use in Canada. PMRA announced the review of the ingredients on December 30, 2013 following an Application for Judicial Review filed in the Federal Court last August by Ecojustice on behalf of Équiterre and the David Suzuki Foundation. Active ingredients under the microscope include weed killers 2,4-D, bromoxynil and atrazine; insecticides carbaryl, dichlorvos and diazinon; and the wood preservative pentachlorophenol.

PMRA will notify registrants of the review, and may ask some for information. If information is requested, registrants must demonstrate to PMRA that the health and environmental risks, as well as the value of the pest control product, are acceptable. PMRA's proposed approach for the special review is open for comment until February 14, 2014.

Pest Control Products Act Reevaluation Requirement

Subsection 17(2) of the *Pest Control Products Act* requires the Minister of Health to initiate a reevaluation of a registered pest control product "when a member country of the Organisation for Economic Co-operation and Development prohibits all uses of an active ingredient for health or environmental reasons." Each of the active ingredients on PMRA's review list has been banned by the European Union, Norway, Switzerland and/or Japan. Some of the ingredients have been banned for more than 10 years in Europe.

The Federal Court advises that it has not set the hearing dates for the Application for Judicial Review. In addition, the Applicant has not sought to stay the proceeding pending the PMRA review.

Once the PMRA completes the science-based evaluation, PMRA will publish its proposed decision for public consultation. However, PMRA may cancel or amend the registration of a registered pest control product containing one or more of the active ingredients if it uncovers, at any point during the review, reasonable grounds to believe that the product endangers human health or the environment.

Active Ingredients under Review

2,4-D
Acephate
Aminopyralid
Atrazine
Bromoxynil
Carbaryl
Chloropicrin
Chlorthal-dimethyl
Diazinon
Dichlobenil
Dichlorvos
Difenoconazole
Diphenylamine
Fluazifop-P-butyl
Fluazinam
Hexazinone
Imazapyr
Linuron
Paraquat
Pentachlorophenol
Quintozene
Simazine
Trifluralin

Key Environmental Bills Stuck in the Legislative Pipeline in Ontario

by Marc McAree, Partner and Certified Environmental Law Specialist

The Ontario Government is hoping for quick action on four important proposed environmental bills currently stalled on the order paper. Given the instability of the current minority Government, there may only be a small window of opportunity to pass these proposed statutes before a provincial election is called (or forced):

- Bill 6, the *Great Lakes Protection Act*, will establish a new Great Lakes Guardians' Council and require "public bodies" to undertake certain initiatives to protect and restore the ecological health of the Great Lakes-St. Lawrence River Basin
- Bill 83, the *Protection of Public Participation Act*, will create a fast track judicial process for identifying and dismissing "strategic lawsuits against public participation" (SLAPPs)
- Bill 91, the *Waste Reduction Act*, will replace the current act with one based on "individual producer responsibility" and a revamped Blue Box funding formula
- Bill 138, the *Ending Coal for Cleaner Air Act*, will add Part VI.1 to the *Environmental Protection Act* to prohibit the use of coal to generate electricity at certain specified facilities after December 31, 2014.

Environment Minister Requests Programming Motion

Environment Minister Jim Bradley has asked the opposition NDP to support a "programming motion". This may untangle the procedural deadlock and "secure quick passage" for the proposed environmental legislation. The motion will serve to

- schedule committee meetings for Bill 6 then schedule two hours of Third Reading debate followed by a final vote
- send Bill 83 to an immediate Second Reading vote, then schedule committee hearings followed by two hours of Third Reading debate and a final vote
- send Bill 91 to committee where the Government will table amendments
- send Bill 138 to committee.

Disclosure of Oil and Gas & Aboriginal Payments Uncertain, Despite Release of Stakeholder Working Group's Recommendations

by Julie Abouchar, Partner and Certified Environmental Law Specialist

Companies and Aboriginal communities negotiating resource agreements should note the Resource Revenue Transparency Working Group's January 16, 2014 release of its Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments*. The Recommendations stem from Canada's June 2013 commitment to enhance transparency in the extractive sector. The Working Group is comprised of representatives from the Mining Association of Canada, the Prospectors & Developers Association of Canada (PDAC), Publish What You Pay Canada and the Revenue Watch Institute. The Working Group's transparency initiative is widely supported by Canadian mining companies.*

Companies and Aboriginal communities want to know how the reporting would work and whether payments under resource agreements/IBAs will come under the purview of any Canadian requirements. The recommendations do not currently include oil and gas or Aboriginal payments. However, such payments could follow in a second phase of the project, dubbed "transparency 2.0" by Working Group member and PDAC Executive Director, Ross Gallinger, at an

Ontario Bar Association address on February 19, 2014. To take effect, the recommendations must next be adopted, following discussions with provincial securities commissions and the provincial finance ministries. Presumably, Aboriginal communities would be consulted about making IBA payments subject to reporting.

The Proposed Reporting Regime

The Working Group recommends that the requirement apply to mining companies making payments over $100,000 for TSX issuers and $10,000 for venture exchange participants. All profit taxes, royalties, production entitlements, bonuses, dividends, infrastructure, transportation and terminal fees would be reportable, without exemption. The Working Group recommends that mandatory reporting for public companies be established through provincial securities requirements. Access to this information would provide citizens around the world with tools to promote accountable, responsible and transparent management of natural recourses. Companies that fail to report would be penalized consistent with enforcement regimes of provincial securities disclosure requirements.

U.S. Reporting Requirements

Over 100 of the largest Canadian companies listed on U.S. stock exchanges are required to report payments to the U.S. and foreign governments under section 1504 of the U.S. *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the *Dodd-Frank Act*). However, the American Petroleum Institute and others successfully challenged recent rules under this section (SEC Rule 13q-1) which required disclosing the same information to the public. The U.S. District Court for the District of Columbia concluded that Rule 1504 was never meant to require affected companies to disclose information that contract or regulations required be kept confidential, and vacated SEC Rule 13q-1. The U.S. will likely introduce new rules which allow for confidential submission of information under the *Dodd-Frank Act*.

Security for Costs Orders Against Environmental Groups Bolstered by Pointes Decision

by Marc McAree, Partner and Certified Environmental Law Specialist, and Nicole Petersen, Articling Student
(This article is based on a similar article by Marc and Nicole originally published in *Environews*, a publication of the Ontario Bar Association)

Courts are increasingly willing to order security for costs against environmental groups that challenge land developments through judicial review. In Pointes Protection Association v Sault Ste. Marie Region Conservation Authority (Pointes)*, the Court ordered an environmental group to post $20,000 in security for costs. This emerging trend to impose additional financial risk on environmental groups raises important strategic issues for these groups when contemplating litigation. It also effectively bars them from pursuing judicial review*.

In *Pointes*, a local residents' group opposed the development of a residential subdivision around the Point Louise wetland. The Pointes Protection Association (PPA) argued that the Conservation Authority that approved the subdivision did not have legal authority under its statute to approve a development that would destroy 46 hectares of wetlands. The PPA then brought a judicial review application.

1704604 Ontario Ltd. (the Developer) applied to the Court for and was granted party status on consent. The Developer then applied for security for costs. The Developer submitted that the PPA's financial state was uncertain. The Developer sought $60,000 security for costs based on full indemnity.

The Developer argued that none of the individual residents sustained any risk in bringing an application for judicial review because the PPA was a corporation. The PPA countered that it had limited financial resources as a public interest litigant. The PPA noted that a security for costs order would effectively terminate the litigation.

The Costs Order

The Court considered when it may order security for costs. Rule 56.01(1)(d) of the *Rules of Civil Procedure* provides that a Court may order security for costs where the plaintiff or applicant is a corporation or nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent.

The Court concluded that the PPA was not a true public interest litigant and therefore the Court could not shield the PPA from costs. The Court observed that the PPA represented the interests of only a minority of the residents in the area. The Court found that litigation did not affect the interests of the corporation, only the residents. Finally, the Court reasoned that, since the project would impact a localized area, the opposition appeared to stem from a "not-in-my-backyard" attitude. Justice Del Frate wrote at paragraph 26:

> I agree that the developer appears to have a greater capacity to bear the cost of this litigation. However, this does not mean that in every situation where one of the parties is in a better financial position, that party should not be entitled to costs. If that were the case, our courts would be even more congested than they are currently. There must be some deterrent in any type of litigation. Parties should seriously consider the consequences of engaging in any litigation especially one that can be as complicated, protracted, and expensive as this one.

Other cases where Courts have made a costs order under Rule 56.01(1)(d) of the *Rules of Civil Procedure* are *Evolution de Future of Carnival Inc v Toronto Mas Band Association and Festival Management Committee*, 2012 ONSC 1628 (order made against a non-share capital corporation formed just for the purpose of litigation); *Durham Citizens Lobby for Environmental Awareness & Responsibility Inc v Durham (Regional Municipality),* 2011 ONSC 7143 (order made against an environmental public interest litigant because the organization otherwise would have no risk in bringing the litigation).

Although the PPA managed to raise the money to pay the security for costs order (note, they withdrew their application for judicial review and will proceed before the Ontario Municipal Board), not all non-profit corporations will be able to do so. As a result, the availability of judicial review may suffer. As with many legal issues, courts must balance the interests of groups that feel aggrieved with those of the respondents who have approvals to proceed with their projects.

Federal Budget 2014 Quiet on Major Energy, Environment and Aboriginal Initiatives

by John Georgakopoulos, Partner

From our perspective, the federal budget released February 11, 2014 was largely silent about major energy, environmental or Aboriginal announcements. Perhaps no news is good news. However, the Economic Action Plan 2014 *does include several initiatives "to ensure safe and responsible resource development, and conserve Canada's natural heritage." Some of the highlights are below*.

Energy Program Announcements

- Expand accelerated capital cost allowances for clean energy generation to include water-current energy equipment and a broader range of equipment to gasify eligible waste
- Provide $28 million over two years to the National Energy Board for reviews of pipeline project applications (such as the Energy East Pipeline Project) and to support the Participant Funding Program
- Respond to recommendations by the Tanker Safety Expert Panel and the Special Representative on West Coast Energy Infrastructure

Aboriginal Program Announcements

- $40 million over five years for disaster mitigation in First Nations communities
- $323.4 million over two years to continue the First Nations Water and Wastewater Action Plan
- Implementing the *First Nations Control of First Nations Education Act* to reform the on-reserve education system

Environmental Announcements

- Provide funds for improvements to highways, bridges and dams by Parks Canada, expanding snowmobile and recreational trails, supporting early intervention measures to stop the spread of the spruce budworm in Atlantic Canada and Quebec and extending the Recreational Fisheries Conservation Partnerships Program
- Double to ten years, for income tax purposes, the carry-forward period for donations of ecologically sensitive land
- Move forward with a new airport to serve the GTA and other development in the Pickering lands east of Toronto, including preliminary meetings with stakeholders

In the coming months, the Government will release details about a new National Conservation Plan, first announced in the 2013 Speech from the Throne. The Government intends to "increase protected areas, focusing on stronger marine and coastal conservation." We also expect that additional initiatives, including legislative amendments to implement the actions listed above, will be set out in a forthcoming budget bill. We will report on these when they become available.

Noront Submits Environmental Assessment for Eagles Nest Project – What's Next for Aboriginal Communities, Resource Proponents and Government in the Ring of Fire?

By Julie Abouchar, Partner and Certified Environmental Law Specialist

Noront Resources Ltd. submitted its draft Environmental Impact Statement/Environmental Assessment Report for its Eagles Nest Project in Northern Ontario's Ring of Fire on December 21, 2013. Aboriginal communities and resource companies in the region are now wondering what happens next. Resource development in the Ring of Fire, located some 500 km north of Thunder Bay, has been plagued by negotiation challenges between the Ontario government and affected Aboriginal communities. Other setbacks include political indecision and an ongoing slump in commodity prices.

The question now is how will the federal and provincial approvals be coordinated? What will happen once Noront submits its final EIS/EA Report for the Eagles Nest Project? Will the same challenges scupper the project or will project approvals move forward?

Canada–Ontario Coordination

Noront's Eagles Nest Project is a high-grade nickel-copper-platinum group element deposit. The draft Environmental Impact Statement/Environmental Assessment Report (EIS/EA Report) responds to Ontario's requirements for an Individual Environmental Assessment under the Ontario Environmental Assessment Act (EAA). It also responds to Federal requirements for a Comprehensive Study Environmental Assessment under the former *Canadian Environmental Assessment Act* (*CEAA*). Noront submitted the EIS/EA Report to the Canadian Environmental Assessment Agency (CEA Agency) and the Ontario Ministry of the Environment (MOE).

Canada and Ontario have agreed that the processes will be coordinated. The agreement provides that, for the most part, there will be only one set of technical studies. Second, the agreement commits to coordinating consultation opportunities as much as possible. Finally, the agreement provides that Aboriginal groups and stakeholders will only need to submit one set of comments on similar documents. Formal coordination among approval authorities is not

new – Voisey's Bay and Sable Gas/ Maritimes & Northeast Pipeline are examples of successfully coordinated approval processes.

Consultation Plan

The draft EIS/EA also contains a Consultation Plan with Aboriginal communities, the Government, and the public. A review of the EIS/EIA Report indicates that Noront may already have responded to feedback from First Nations consultation and stakeholder engagement. Noront has modified the scope and design of the Eagles Nest Project, particularly regarding the location of the transportation corridor, maximizing the placement of infrastructure underground and maximizing Aboriginal training and employment. Successful consultation will continue to be an important component of the project.

Former Ontario Premier Bob Rae was hired by the Matawa Tribal Council to lead negotiations with the province with an aim to ensure appropriate environmental, education and economic outcomes from resource projects. Veteran Supreme Court justice Frank Iaccobucci has been brought in as the government's lead negotiator.

Conclusion

While the EIS/EIA submission is an important milestone, there is a long road ahead. Progress will depend on the ability of provincial and federal governments to work with Aboriginal communities and industry to overcome infrastructure, consultation and environmental hurdles.

Critical next steps for the Eagles Nest Project

- **Draft Comprehensive Study Report** – The federal CEA Agency will review the draft EIS/EA and prepare a draft Comprehensive Study Report (CSR). Aboriginal groups and government technical reviewers may comment on the draft CSR.
- **Public comment on draft EIS/EA Report** (7 weeks) – Meanwhile, provincial government technical reviewers, Aboriginal communities and the public have seven weeks to review the draft EIS/EA Report and submit comments.
- **MOE Review** (5 weeks) – After the close of the comment period, MOE has five weeks to review comments and ensure that Noront has addressed them. MOE will then publish a Ministry Review which will provide details on whether Noront has met EAA requirements, whether the environmental assessment was prepared in accordance with Noront's final Terms of Reference (which has been awaiting MOE approval since October 6, 2012), and whether the Eagles Nest Project as proposed is in the public interest.
- **Ontario public comment period on Ministry Review** (5 weeks) – Aboriginal groups, the public and the Ontario government have five weeks to comment on the Ministry Review.
- **Federal CSR submission for revie**w – The CEA Agency submits the CSR to the federal Minister of the Environment and posts it for public comment and Aboriginal group review.
- **Recommendation to Minister of the Environment** (13 weeks) – After the government has received comments on the Ministry Review, MOE will make a recommendation to the Minister based on all of the input received. The Minister may either refer the application to the Environmental Review Tribunal, approve the project (with or without conditions), or refer the application to mediation.
- **Federal determination** – The federal Minister of the Environment will either determine (1) that the project is not likely to cause significant adverse environmental effects once mitigation measures are taken into account, in which case federal departments and agencies may issue required permits or authorizations; or (2) that the project is likely to cause significant adverse effects once mitigation measures are taken into account, in which case no required permits or authorizations may be issued.

Meet Willms & Shier Legal Experts at these Upcoming Events		
Mar. 27	**Shopping Centre Law** ICSC 2014 Canadian Shopping Centre Law Conference, Breakfast Roundtables	**Matthew Gardner** will lead the discussion on Environmental Law 101. **Jacquelyn Stevens** will lead the discussion on High Risk Sites - Drafting & Negotiating Leases for Gas Stations, Dry Cleaners and Other Sites with a High Risk of Contamination.
Apr. 3	**Environmental Permitting** The Osgoode Certificate in Mining Law	**Julie Abouchar** will speak on environmental permitting on Day 4 of this five-day event.
Apr. 15	**Engaging Stakeholder Communities: Exploring Ontario's Integrated Regional Planning Process** CI Energy Group's Ontario Power Conference	**Julie Abouchar** is part of the panel discussion on Engaging Stakeholder Communities: Exploring Ontario's Integrated Regional Planning Process.
Apr. 28-30	**Waste Management, Air Emissions and Water & Wastewater Programs** CANECT 2014	Partners **Marc McAree**, **Julie Abouchar** and **John Georgakopoulos** are Chairs and speakers at this three-day event. Other presenters include **Jacquelyn Stevens**, **Joanna Vince** and **Richard Butler**.

Vapour Intrusion: What You Can't See, Smell, Hear, Taste or Feel Can Hurt You!

What usually comes to mind when one thinks about contaminated property—and its environmental impacts—are rusted barrels, polluted soil and groundwater, costly excavation and high-tech remedial options. But in many instances there is a "hidden" issue that can wreak havoc for those buying, selling, assessing, remediating or redeveloping contaminated sites. It is vapour intrusion, and Willms & Shier Partner Marc McAree (with Luciella Longo, Mark Youden and Nicole Petersen) has compiled a timely and detailed regulatory review of this complex subject.

Across Canada, there is limited consistency in how vapour intrusion is regulated. Some provinces address the issue directly through their site assessment and remediation regime for contaminated sites, while others do not. The federal government has published some helpful guidance on the issue. This paper provides an overview of the vapour intrusion regulatory framework and guidance in place across Canada and into the United States, and summarizes some recent vapour intrusion case law in both countries. The paper was first presented to the Ontario Bar Association on February 27, 2013 and has been updated to January 2014. Click here to access the Vapour Intrusion paper.

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