

ENVIRONMENTAL LAW

BROWNFIELDS

New Brownfields Law October 1, 2004 But Mandatory Clean-up Postponed

New voluntary clean-up regulations will limit liability of owners, lenders and purchasers to MOE orders. However, there is no protection from civil lawsuits, or for off-site contamination.

The new regime replaces the MOE Guideline for Use at Contaminated Sites in Ontario, with a new Record of Site Condition Regulation, a public Environmental Site Registry and designation of regulated professionals as “qualified persons” permitted to supervise and certify clean-ups.

The government has postponed proclamation of the mandatory change of land use clean-up provisions. When EPA s. 168.3.1 is proclaimed in future, most land use changes to more sensitive uses (e.g. from industrial to residential) will require clean-up and filing of a Record of Site Condition. Until the government proclaims this section, RSCs and clean-ups will continue to be ‘voluntary’ - i.e. required by purchasers, lenders, insurers or municipalities, but not by provincial law.

Brownfields Amendments

The Brownfields Amendments and Record of Site Condition Regulation (O. Reg. 153/04) will take effect on October 1, 2004 changing the *Environmental Protection Act, Ontario Water*

www.willmsshier.com

Spill and Emergency Cell No.
(416) 802-0711

4 King Street West, Suite 900
Toronto, Ontario, M5H 1B6
Tel: 416 863-0711 Fax: 416 863-1938

EDITOR: Barry N. Spiegel
Email: bspiegel@willmsshier.com

Resources Act, Education Act and Municipal Act, 2001.

The new legal regime includes

- property tax incentives
- liability protection for owners
- regulated standards for clean-up and redevelopment of contaminated sites
- definition of classes of “qualified persons” (QP) permitted to conduct and supervise clean-ups and certify Records of Site Condition (RSC)
- mandatory QP insurance requirements
- an Environmental Site Registry.

Highlights

1. Details are set out in the Record of Site Condition Regulation - O. Reg. 153/04, including definitions of Environmental Site Assessment (ESA) standards, transitional provisions, mandatory contents of RSCs, and risk assessment reports.
2. Clean-up standards are published in “*Soil, Groundwater and Sediment Standards for Use under Part XV.1 of the Environmental Protection Act*” (March 9, 2004). These standards, incorporated by the regulation, will replace the Tables in the Guideline.
3. Only petroleum hydrocarbon standards have been changed from the Guideline. Now fractional analysis is required—more precise, more expensive. Ontario labs are gearing up to provide this analysis, which is the CCME standard used in most other provinces.
4. “Qualified Persons” include three levels of QP who can certify RSCs, and a fourth category of QP who can conduct and supervise risk assessments. (MOE is developing new QP criteria that will replace these in 2006.)
5. Individuals registered under the governing statutes as professional engineers, professional geoscientists, certified engineering technicians and technologists and architectural technologists, professional agrologists, and chartered chemists will be able to conduct and certify Phase I ESAs and RSCs. Only engineers,

geoscientists, agrologists, and chemists can conduct and certify Phase II ESAs and RSCs.

6. Only engineers and geoscientists can certify RSCs based on risk assessment. Prescribed educational and experience requirements apply to professionals conducting or supervising risk assessments.
7. MOE has issued Technical Updates setting out transitional requirements and deadlines for submissions grandfathered under the Guideline.

For more information and downloads, visit our Online Compliance Centre at:

<http://www.willmsshier.com/compliance>.

PROSECUTION

Kingston Fisheries Act Conviction Means Water Pollution Hard to Defend

Fisheries Act charges for water pollution will be harder to defend in the wake of a May 2004 Ontario Court of Appeal decision. The Court upheld convictions and \$150,000 in fines against the City of Kingston, based on evidence that landfill leachate seeping into the Cataraqui River killed fish in lab tests. The Crown did not need to prove that the leachate was toxic in the River, or that it killed the specific kinds of fish living in the River.

In *Kingston*, the Court of Appeal held that the test for water pollution under the *Fisheries Act* is stricter than the *Ontario Water Resources Act* (OWRA) test articulated by the Appeal Court in its 2001 *INCO* decision. (See our website for more detailed discussion).

Local residents, environmentalists and the MOE worked together to prosecute the City. Citizens who successfully prosecute under the *Fisheries Act* are automatically awarded 50% of the fines and penalties.

The *City of Kingston* decision underlines the importance of due diligence and proactive environmental management for owners of landfills and for others who control or cause effluent discharges into water that may contain fish.



GUIDE TO ONTARIO'S NEW LEGISLATION, REGULATIONS, CONSULTATIONS

WASTE – EAA, HAZARDOUS WASTE PRE-TREATMENT RULES & REDUCTION	
<i>Pre-Treatment Requirements for Hazardous Wastes Prior to Land Disposal (LDR)</i>	MOE conducting focused consultation for regulation to harmonize pre-treatment of hazardous waste regime with US. Problems include lack of treatment capacity and approval delays for new waste management facilities. Implementation phasing must account for capacity lag. Regime also requires straightforward, science-based procedure for delisting certain classifications of waste once treated.
<i>Ontario's 60% Waste Diversion Goal Discussion Paper (June 2004)</i>	Proposes mandatory targets – i.e. 60% for municipalities over 250,000 pop by 2008; plus options for more organics/composting programs; enforcement of 3Rs regs (source separation, waste and packaging audits and work plans). Problems include approvals roadblocks, funding issues; uncertainty around meaning and measurement of diversion. Province looking to municipalities to solve the problem. No focus on providing resources, reduction, or province's role in developing markets. Energy from Waste (EFW) is not considered to be diversion. Consultation ends August 16, 2004.
<i>Interim Guidelines for the Production and Use of Aerobic Compost in Ontario</i>	MOE proposes adopting the CCME criteria for metals that have been adopted by all other provinces. Ontario's more stringent standards for several metals will be relaxed to harmonize. Consultations ended July 4, 2004. Sensible since Ontario needs to promote composting to increase diversion.
MOE Advisory Panel on Environmental Assessments in Ontario	MOE acknowledges that the <i>Environmental Assessment Act</i> process in Ontario is too complex, costly and uncertain for waste, transit, transportation and clean energy projects. The <i>Sutcliffe</i> decision has increased uncertainty and delay. The Minister has appointed an Advisory Panel to recommend improvements by late summer 2004.
WATER – RELIEF FOR RURAL, SMALL SYSTEMS, PERMIT TO TAKE WATER RESTRICTIONS AND CONDITIONS, OPERATOR TRAINING	
Water Taking and Transfer Regulation (Proposed Amendments to O. Reg. 285/99)	Consultations on proposal to amend regulation for water taking permits, to require consideration of ecosystem functions, water availability, proposed water use and interests of neighbours before issuing permits. In watersheds with "high water use" new or expanded permits for some food and beverage manufacturing, aggregate processing, concrete and industrial manufacturing will be refused or seasonally limited. Monitoring and reporting of water use will be phased in. Consultation ends August 17, 2004.
Drinking-Water Systems Regulation amendments (O. Reg. 170/03)	Drinking-Water Systems Regulation was amended in June 2004 to ease or postpone requirements for smaller municipal and non-municipal systems. Definitions now clarify that food manufacturers are not included in the regulation.
Drinking Water and Waste Water Operator Certification (O. Reg. 128/04 & 129/04)	Separate regulations now govern training and certification of drinking water treatment plant operators and sewage works operators, and system. Graduated hours of training depending on size and complexity of system.
BROWNFIELDS BECOMES LAW – OCTOBER 1, 2004	
<i>Brownfields Statute Law Amendment Act RSC Regulation O. Reg. 153/04</i>	See W&SEL article overleaf for details. Effective October 1, 2004, the Guideline for Use at Contaminated Sites in Ontario will be replaced by the Record of Site Condition Regulation (O. Reg. 153/04). The Regulation incorporates MOE soil, groundwater and sediment standards as regulatory standards (replacing the Guideline Tables). On interim basis (until 2006), specified regulated professions are prescribed as "qualified person" to conduct clean-up activities. The MOE has not set a date for proclamation of the mandatory requirements for clean-up prior to change of use in EPA sections 168.3.1 and 168.6(5) and (6).
AIR – MOE PROPOSING MAJOR REVAMPING OF REGULATIONS, PROGRAMS	
<i>Ontario's Clean Air Action Plan (June 2004)</i>	Overview of approaches and actions Ontario is taking to address smog issues including nitrogen oxides (NO _x), sulphur dioxide (SO ₂), fine particulate matter (PM _{2.5}) and volatile organic compounds (VOCs). This document also serves as Ontario's Implementation Plan for the Canada-Wide Standards for Particulate Matter and Ozone.
<i>Proposed Guideline for Implementation of Air Standards in Ontario (June 2004)</i>	Important consultation document with serious implications for emitters. As new / updated air standards come into force, emitters will be required to bring operations into compliance. Where industrial or institutional emitters cannot comply within 5 year phase-in of new/updated standard, MOE proposes a risk management process for weighing health and environmental risks against economic and technical factors. Objective is to set time-frames and compliance compromises to allow emitters to carry on business without exceeding acceptable risk thresholds. Full public financial disclosure will be required.
<i>Updating Ontario's Regulatory Framework for Local Air Quality (June 2004)</i>	Proposal to amend EPA Regulation 346 (General Air) to phase in new and updated emission limits (standards) and averaging times, new dispersion models, and to deal with implementation/compliance issues through regulatory risk based decision-making framework. Includes proposed update of Reg. 346 Schedule 1 plus new Schedule 2 with effects-based point of impingement emission concentration limits and averaging times.
<i>Air Dispersion Modelling Guideline for Ontario (April 2004)</i>	MOE proposal for phasing out Reg. 346 dispersion model and replacing it with US EPA models, new and updated standards and new averaging times. MOE is proposing a new regulatory limit of 1 Odour Unit, 10-minute average, at the most impacted Sensitive Receptor. This stringent limit may be impossible for some facilities to achieve. Quantification of odour is complex, costly and uncertain. Both compliance and enforcement will be difficult. Proposals for standards, phase-in and compliance issues are in <i>Regulatory Framework and Implementation of Air Standards</i> proposals. Consultation ends October 19, 2004.
<i>Ontario's Industry Emissions Reduction Plan: (June 2004)</i>	" <i>Proposal for a Nitrogen Oxides (NO_x) and Sulphur Dioxide (SO₂) Regulation</i> " Focused on smog reduction, this proposal follows the December 2002 Discussion Paper. MOE is proposing mandatory regulatory caps on NO _x and SO ₂ beginning 2006 for specific facilities in petroleum, iron and steel, pulp and paper, glass, cement, carbon black and non-ferrous smelting sectors. Consultation ends August 20, 2004.
New Air Standards	MOE proposed new and updated standards and averaging times for 29 air pollutants in notices published on the Environmental Registry in late June. See <i>Regulatory Framework</i> paper for proposed updates to Reg. 346 Schedule 1 and new Schedule 2, and EBR Environmental Registry for individual contaminant documents. Watch our website and next newsletter for more info.
PLANNING AND SOURCE PROTECTION	
<i>Greenbelt Protection Act</i>	Royal Assent June 24, 2004. Retroactively in effect as of December 16, 2003. Anti-Sprawl discussion paper published July 12, 2004
Land Use Planning Consultations	Consultations on Provincial Policy Statements; proposed amendments to <i>Planning Act</i> ; proposals to reform Ontario Municipal Board. Consultation ends August 31, 2004.
<i>Drinking Water Source Protection Act, 2004 (Draft)</i>	In late June, the MOE published draft legislation to guide public consultation on source protection legislation. Meanwhile, Technical and Implementation Committees continue to work through the summer on recommendations for water taking fees and implementing a source protection planning regime. Consultations end August 22, 2004.
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