

## Ontario proposes Brownfields regime overhaul

Ontario has published a proposal for regulatory amendments, new clean-up standards, and new guidance documents that will significantly affect the Brownfields regime. The package of proposed reforms was published October for 120 day consultation.

Major changes will include:

- ◆ New clean-up standards. Many will be more stringent than current standards – meaning that more properties will require risk assessment.
- ◆ New definitions and procedures for Phase 1 and 2 Environmental Site Assessments
- ◆ New rules and procedures for filing Records of Site Condition
- ◆ New rules for assessing contaminants and investigating neighbouring land uses to set thresholds for off-site contamination

No limitation of civil liability is proposed.

The proposed clean-up standards are refinements of the proposals published in March 2007, to correct errors, modify analytical detection methods,

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reflect recent scientific and technological developments, and address excessive conservatism. New tables have been added for shallow soil and environmentally sensitive sites.

Download MOE's Table comparing current standards (March 9, 2004) with the new standards proposed October 6, 2008. (See EBR Posting No. 010-4642 at [www.ebr.gov.on.ca](http://www.ebr.gov.on.ca)).

The new standards will come into force one year after the regulations are adopted.

New, stricter standards will mean that fewer RSCs can be done based on the generic standards. Hence risk assessment will be required more often. MOE is proposing to streamline the risk assessment process for qualifying sites through an online "modified generic risk assessment tool". Stakeholders are encouraging MOE to develop and implement this tool – a complex and time-consuming task – before putting the new standards into effect. Failure to have this tool in place will add significant

cost, time, complexity and uncertainty to Brownfields development.

Download the proposed regulations, standards and technical documents from EBR Posting No. 010-4642 (at [www.ebr.gov.on.ca](http://www.ebr.gov.on.ca)).

## Class Action : SCC finds industry liable despite regulatory approval

*The Supreme Court of Canada upheld a Quebec class action brought by neighbours of a St. Lawrence Cement facility for causing odour, noise dust "annoyance" to neighbours. The company was held liable for damages even though it was established in the neighbourhood by a special provincial statute in 1952.*

Neighbours complained for years, and eventually launched a class action lawsuit that took more than a decade to reach the Supreme Court. The decision in *St. Lawrence Cement Inc. v. Barrette*, (2008) SCC 64, was released on November 20, 2008.

The SCC based liability in this case on Article 976 of Quebec's Civil Code. It

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prohibits owners of land from imposing abnormal or excessive annoyances on neighbours. The SCC described this article as imposing “no-fault” liability.

This decision will be followed in Canada’s common law provinces. The Supreme Court’s analysis included a comparative review of Canadian common law and French civil law. The SCC found that “in both these legal systems, a scheme of no-fault liability in respect of neighbourhood disturbances is accepted in one form or another.”

The SCC distinguished its 2001 refusal to certify a nuisance class action in *Hollick v. City of Toronto*, seemingly on the basis that the plaintiffs in *St. Lawrence Cement Inc. v. Barrette* defined the class of plaintiffs more strictly and provided the trial court with more persuasive evidence of their “injury”.

### **Court of Appeal denies Lafarge - Cement company to abandon bid to burn tires**

In late November the Ontario Court of Appeal refused leave to appeal a Divisional Court decision that upheld neighbours’ rights to challenge Lafarge’s certificate of approval to burn municipal waste and used tires in its Bath, Ontario cement kiln. In response, Lafarge announced that it will abandon the proposal. Opposing neighbours announced their intention to seek recovery of their costs of preparing for the aborted ERT appeal that was abandoned.

We reported on the Divisional Court decision in our August 2008 issue. The Divisional Court upheld the Environmental Review Tribunal (ERT) decision granting neighbours leave to appeal the MOE’s decision to issue the approval to Lafarge. A number of industry associations expressed serious concerns that upholding the neighbours’ right to appeal would increase uncertainty, cost and delay to industrial approvals.

In granting neighbours the right to appeal, the Divisional Court upheld the ERT’s finding that the MOE is required

to consider its Statement of Environmental Values whenever it issues a certificate of approval. This means that some applicants for approval will be required to assess local conditions and cumulative effects on the environment.

The Divisional Court also dismissed Lafarge’s argument that an industry is entitled to approval if it demonstrates compliance with the point of impingement standards in O. Reg. 419/05. The Divisional Court upheld the ERT’s ruling that an appeal of the approval is justified where evidence shows that emissions could result in adverse effects to neighbouring property owners.

Coincidentally, just days before the Court of Appeal refused Lafarge’s right to appeal, the Supreme Court of Canada upheld neighbours’ rights to recover damages for environmental nuisance from another cement manufacturer. See our discussion in this issue on *St. Lawrence Cement Inc. v. Barrette*.

MOE is consulting with stakeholders to make adjustments to the approvals process. We do not expect this to disrupt the processing of most industrial approval applications.

### **Ontario’s Waste Diversion Act faces 5-year review**

In October Ontario’s MOE announced the review of the *Waste Diversion Act, 2002*. A discussion paper titled “Toward a Zero Waste Future: Review of Ontario’s Waste Diversion Act, 2002” was simultaneously released.

Two key elements of the review are:

- ◆ a move towards extended producer responsibility (EPR)
- ◆ increased reduction and diversion from the IC&I sectors

A three-month public comment period ends January 15, 2008. The discussion paper and consultation details are in EBR posting No. 010-4676 at [www.ebr.gov.on.ca](http://www.ebr.gov.on.ca). For legal advice call Jennifer Agnolin at (416) 862-4830.

### **Ottawa not legally bound to implement Kyoto**

The Federal Court of Canada has ruled that the *Kyoto Protocol Implementation Act, 2007* does not bind the federal government to meet the Kyoto greenhouse gas (GHG) reduction commitments it agreed to when it signed the Protocol. The Court found that it does not have a role in forcing climate change actions on the government.

In a ruling, released October 20, 2008, The Honorable Mr. Justice Barnes concluded that “Parliament has, with the *KPIA*, created a comprehensive system of public and Parliamentary accountability as a substitute for judicial review.” Friends of the Earth had brought three motions for alleged breaches of duty by the federal government in failing to prepare an initial Climate Change Plan, as well as failing to promulgate the related GHG reduction regulations within a specific timeframe.

The Court ruled that it “has no role to play reviewing the reasonableness of the government’s response to Canada’s Kyoto commitments ...” While the federal government may have had a duty to produce and publish a GHG reduction plan under the Act, it did not have to draft one designed to meet the Kyoto targets.

In late November 2008, lawyers for Friends of the Earth and Ecojustice gave notice of their intention to appeal *Friends of the Earth v. Canada (Governor in Council)*, 2008 FC 1183 ([www.canlii.ca](http://www.canlii.ca)) to the Federal Court of Appeal.





**Electricity Plan hearing interrupted to reconsider renewables**

In September, Ontario Energy Board's (OEB) hearing to review the Ontario Integrated Power Supply Plan (IPSP) was interrupted from its goal of replacing coal-fired energy generation in Ontario. A supplemental directive issued by Minister of Energy and Infrastructure, George Smitherman has sent proponent Ontario Power Authority (OPA) back to the drawing board, for as long as six months.

In June 2006 the Energy Minister directed the OPA to prepare a Supply Plan. The OPA filed its IPSP with the Ontario Energy Board for approval in August 2008, and hearings commenced. By mid-September, cross examination of the OPA witnesses was well underway when Minister Smitherman issued his supplemental directive. Highlights of the directive include a requirement that the OPA establish new targets in the following areas:

- ◆ amount and diversity of renewable energy
- ◆ improvement of transmission capability where it is needed to facilitate new renewable energy supply
- ◆ potential to convert coal-fired generation to biomass
- ◆ availability of distributed generation
- ◆ pumped storage to service peak demand
- ◆ accelerated conservation through smart metering

The supplemental directive also requires the OPA to undertake enhanced consultation with First Nations and Métis Communities and to "consider" the principle of Aboriginal partnership in generation and transmission.

After submissions, the OEB adjourned the hearing on October 2, 2008. The IPSP hearing is not likely to resume until spring of 2009.

**DOW launches NAFTA claim re herbicide ban**

Dow AgroSciences, the giant Indianapolis-based chemical maker, has submitted a NAFTA Notice of Intent to challenge Quebec's restrictions on Dow's popular and profitable herbicide, 2,4-D. Dow has submitted a claim of arbitration under Chapter 11 of NAFTA, claiming Canada has breached its obligations to provide fair and equitable treatment under international law. While claiming only a modest settlement of \$2 million, plus costs, Dow is likely hoping to forestall similar bans being considered by Ontario and a number of US jurisdictions.

This has the potential to be a scientific show-down before a NAFTA arbitration panel. The Quebec Environment Ministry insists the 2006 decision to ban the application of the herbicide for cosmetic purposes on public and private properties is scientifically valid. It has assembled a team of chemists, microbiologists and other specialists to back its ban. Dow argues that the Quebec ban is based on "non-scientific criteria." Dow contends

that scientific reviews, including one by Health Canada's Pest Management Regulatory Agency, have concluded that "2,4-D can be used safely according to label directions."

At least two other NAFTA environmental challenges by U.S. companies have succeeded in Canada. They include the 1997 challenge by Ethyl Corporation against a ban on imports of MMT, an additive used in unleaded gasoline. The Canadian government withdrew the ban and settled. In 2000, an arbitration panel upheld a challenge by S.D. Myers, Inc., against Canada's 1995 ban on the export of PCB wastes from Canada to the U.S. Several other outstanding claims include Chemtura's challenge of Canada's right to reject canola seed stock treated with the banned pesticide lindane, Vito Gallo's challenge of Ontario's legislation killing the Adam's Mine landfilling project, and a Nova Scotia environmental review panel's rejection of Bilcon's proposed basalt quarry and marine terminal.

**Toronto passes toxics Right-to-Know By-law**

Toronto City Council passed a Toxics Right to Know By-law requiring some 5,000 – 7,000 businesses to annually file public reports on their environmental releases of 25 toxic substances of "priority health concern". The By-law, recommended by the City's Department of Health was passed on December 4, 2008. The first reports will have to be filed by January 1, 2011.

Substances that require reporting include widely used solvents, polycyclic aromatic hydrocarbons and volatile organic compounds. (See Table listing the proposed substances and reporting thresholds on back page of this issue).

Before making the recommendation to proceed, the Board of Health studied Ontario's proposed Toxics Reduction Strategy. After study, the Board of Health recommended that City Council proceed

because the Toronto program will fill important reporting and disclosure gaps left by both the federal NPRI and the proposed provincial strategy.

The City intends to liaise with senior provincial and federal staff to "avoid duplication and ensure seamless integration" of reporting methods.

The Toronto Board of Health also recommended to other Boards of Health in Ontario that they enact similar by-laws.

The City plans to hire six extra staff to assist businesses in complying with the by-law and reducing emissions of these substances. The City says it will provide "online calculators" to estimate substance use and emissions based on, for example, the chemicals a company purchases and the processing equipment it employs.

First phase reports will be required by January 1, 2011. Fines for non-compliance are up to \$100,000 for repeat offenders. The By-law is enacted as Chapter 423 of the Municipal Code.



**30-year PCB saga ending**

Ottawa has finally promulgated regulations to phase out the use and storage of high level PCBs in electrical equipment and transformers. Its new PCB Regulations (SOR/2008-273) set deadlines for destruction of high level PCBs in storage. The regulations are intended to achieve removal of 50% of the PCBs still in use and 100% of the PCBs currently in storage by the end of 2009. Remaining low level PCBs (fluids containing less than 50 mg of PCB per kilogram) will be eliminated by 2025.

The move will bring to an end more than 30 years of federal regulatory action to control and phase out the use

of PCB, which began with their 1976 listing under the Environmental Contaminants Act, the precursor of today's *Canadian Environmental Protection Act*, 1999.

An estimated 71 facilities across the country – primarily utilities, pulp and paper companies, iron and steel makers, and mines, as well as government agencies, hospitals, schools and other industrial sectors – account for the majority of the PCBs in use or storage. Compliance is expected to be expensive with final disposal costs estimated at up to \$255 million. The PCB Regulation, published in the Canada Gazette Part II on September 17, 2008, consolidates and replaces the previous Chlorobiphenyls Regulations and the Storage of PCB Material Regulations.

**Toronto Environmental Reporting Program:  
Proposed Substances and Thresholds**

| Chemical Name                               | Reporting Threshold (kg/yr) |
|---|-----------------------------|
| Acetaldehyde                                | 100                         |
| Acrolein                                    | 100                         |
| Benzene                                     | 100                         |
| 1,3-Butadiene                               | 100                         |
| Cadmium                                     | 1.0                         |
| Carbon tetrachloride                        | 100                         |
| Chloroform (Trichloromethane)               | 100                         |
| Chromium, Hexavalent                        | 10                          |
| Chromium, Non-hexavalent                    | 100                         |
| 1,2-Dibromo ethane (Ethylene dibromide)     | 100                         |
| 1,4-Dichlorobenzene                         | 100                         |
| 1,2-Dichloroethane (Ethylene dichloride)    | 100                         |
| Dichloromethane (Methylene chloride)        | 100                         |
| Formaldehyde                                | 100                         |
| Lead  | 10                          |
| Manganese                                   | 10                          |
| Mercury                                     | 1.0                         |
| Nickel                                      | 100                         |
| Tetrachloroethylene (Perchloroethylene)     | 100                         |
| Trichloroethylene                           | 100                         |
| Vinyl chloride                              | 100                         |
| Polycyclic Aromatic Hydrocarbons (PAHs)     | 10d                         |
| Nitrogen Oxides (NOx)                       | 200                         |
| Particulate Matter 2.5 (PM <sub>2.5</sub> ) | 30                          |
| Volatile Organic Compounds (VOCs) total     | 100                         |

**Engagements of Note**

For the 3rd year, **Donna Shier** chaired the annual *Law Society Advanced Roundtable in Environmental Law 2008* on October 28, 2008. W+SEL lawyer **Juli Abouchar** participated as facilitator on Aboriginal and EAA.

**Juli Abouchar** also lectured on Environmental Due Diligence at Osgoode Hall Law School and at the Schulich School of Business on November 5 and November 10, 2008, respectively.

On November 24, 2008, **Doug Petrie** chaired the *ABCs of Practical Air and GHG Emissions Compliance*. Doug also presented on Managing Investigations. **John Willms, Paul Manning and Vivienne Ball** also presented at this event.

**Marc McAree** spoke at the *CCA/CCH 3rd Annual Ultimate Corporate Counsel Conference*, November 12, 2008 on Corporate Social Responsibility (CSR) and Environmental Management.

**Vivienne Ball** presented on obligations to respond and report spills at the Region of Waterloo's 2008 Spills Presentation Workshop on October 7, 2008.

**John Willms** will make a presentation about the Environmental Assessment Process at The Canadian Institute Waste-Based Energy Conference on December 4, 2008.

**2009 Conferences****January**

The Canadian Institute

- ◆ *Structuring, Negotiating & Financing Power Projects* - **Paul Manning**
- ◆ *E-Waste Management* - **Jennifer Agnolin**

**February**

The Canadian Institute

- ◆ *5th Annual Provincial/Municipal Government Liability* - **Marc McAree**
- ◆ *Aboriginal Law Consultation and Accommodation* - **Juli Abouchar**

Insight Information

- ◆ *3rd Annual Corporate Counsel Summit* - **Marc McAree**

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