Ontario Contaminated Site Guideline Changed to Appease Consultants, Insurers, Municipalities

AFTER TWO YEARS OF CONSULTATIONS with concerned stakeholders, Ontarioís Ministry of the Environment (MOE) has revised the Record of Site Condition (RSC) to be signed by owners and consultants as evidence of site clean-up.

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The RSC was introduced in July 1996, as part of the Guideline For Use At Contaminated Sites In Ontario (the Guideline). Although the Guideline was revised in February 1997 to correct a number of errors, the RSC was not changed. The Guideline established the new clean-up process that now relies on private sector consultants to supervise and document site clean-ups. The filing of an RSC is not mandatory in most cases. However, the RSC provides the only route to a formal acknowledgement by the MOE that a site clean-up has been documented.

Professional engineers and their insurers objected to the original RSC, arguing that the mandatory consultantís affidavit invited unwarranted exposure to liability. Some municipalities wanted changes that would facilitate their use of RSCs as assurances of clean-up when granting land use planning approvals.

When the Guideline was issued, the MOE projected that it would result in a surge of clean-ups and RSC filings. According to one source, RSC filings were an order of magnitude lower than expected. Moreover, most of the RSCs subjected to the MOE's spot audit program failed the audit. Many of the problems were apparently related to documentation.

The new RSC should be more easy to use, and resolves some of the stakeholdersí concerns. It was posted on the Environmental Registry on Sept. 24, and the MOE has stated that the new, 16 page form is now being accepted.

However, the new RSC, by itself, is unlikely to result in an upsurge of filings. Parties whose title or security interest may be affected by a registration on title are sure to avoid filing an RSC wherever possible. Others may avoid the RSC because of the uncertain impact of contamination stigma on property value, or fear of claims from neighbours. We expect that many transactional clean-ups will continue to be conducted under private agreements between the parties.

Highlights:

1. The consultant's affidavit has been changed to clarify that the consultant is giving an opinion based on professional judgement, and not a warranty or certification that the site is not contaminated. It now states:

> Although the information represents the site conditions at the test locations at the time of sampling only, and conditions between and beyond the test locations may vary, I have collected sufficient information and taken all reasonable steps to form the opinion that the site meets the criteria for the land use set out in Part 3.2 of this RSC.

2. The public reliance provisions of the consultant's affidavit have been tweaked. The original RSC contained what some regarded as an invitation to sue. It baldly stated "I acknowledge that public authorities, future owners, occupants and others may rely on this statement."

The new wording limits the number of potential plaintiffs. It reflects the fact that the statements in the new RSC are more clearly based on the underlying data in the reports and the consultants' conclusions based on those reports. It also specifically excepts contamination arising from actual use of the site since the date of the RSC. The new provision states:

> "I acknowledge that public authorities, parties acquiring or intending to acquire an interest in this site, current occupants and their consultants may rely on the statements in this RSC. Reliance on the statements contained herein is subject to the limitations and qualifications contained in the MOE Guideline for Use at Contaminated Sites in Ontario, Revised February 1997 and further subject to the actual use of the site since the date of this RSC."

3. Site Owner's disclosure and public reliance provisions (in Statement of Site Owner) have been tweaked:

> [Owner] agrees to "provide, on request, all reports listed in Table 1,Part 2 to municipal authorities dealing with the site and a party who is acquiring an interest in the site from me." [Owner states that s/he has made reasonable inquiries into previous ownership and use of site, and that in best of knowledge has provided relevant info to consultant.]
>
> ...Any party intending to purchase, lease, take a security interest in,or occupy the site may review the RSC and any supporting documents to satisfy themselves with respect to the environmental condition of the site, and the extent of responsibility and liability that may arise from taking ownership, taking a security interest, or occupying the site."

Note that these two provisions are different: The initial disclosure provision imposes a personal obligation on the owner to provide ALL of the reports to the municipality and a "party who is acquiring an interest from me."

The subsequent, more general, buyer-beware

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provision permits parties "intending to purchase, lease, take a security interest in, or occupy the site" to review the RSC (no problem, because it is a public document) and "any supporting documents."

Unclear is the extent to which future owners, or consultants will be obliged to disclose these supporting documents? If so, do they have to disclose ALL of the supporting documents? Who will pay to have the documents reproduced and delivered? Owners will have to ensure that they have the right to obtain copies of the reports from consultants on request. How difficult will it be for succeeding purchasers to obtain reports from consultants who prepared them for owners who have long since sold the property?

Other Changes

1. The document design is improved to provide more clarity.

2. The operative term used is now "site" rather than property - "site" identifies the portion of the property to which the RSC applies - the consultant's opinion will be restricted to the defined portion of the property (registerable legal description required as part of filing).

3. The RSC becomes a "public document" after the MOE acknowledges it.

4. The RSC describes the "final environmental conditions of the site after the process outlined in the Guideline has been followed. The statements signed in Part 5 by the consultant are to confirm that the site meets the conditions indicated in Part 3.2." (3.2 sets out the proposed land use and the assessment and/or restoration approaches used (e.g. generic criteria, full depth clean-up, stratified clean-up, site specific risk assessment [SSRA] based etc.)

A completed RSC may be submitted after a Phase I ESA. The original document referred to "public consultation." This expression has been replaced by "public communication."

For more information, or legal advice contact: Donna Shier or Doug Petrie at Willms & Shier, Barristers and Solicitors (416) 863-0711

Q: *Are there any ambient air quality guidelines or objectives? Specifically, we are concerned with silica dust?*

A: *Canadian Environmental Regulation and Compliance News* (CERCN) contacted W.M. Glenn, an award-winning writer, specializing in hazardous waste and toxic chemical issues to address this question. Glenn is the author of more than a dozen environmental books and compiles the *Hazardous Materials Compliance Data Sheets* for Templegate Information Services Inc. Glenn supplied the following information.

The two air quality standards that apply to airborne dust (suspended particulate matter under 44 micrometres is defined as dust) are:

- ambient air quality criteria for suspended particulate matter: 120 micrograms per cubic metre averaged over 24 hours or 60 micrograms per cubic metre averaged over one year; and
- point of impingement standard for suspended particulate matter: 100 micrograms per cubic metre averaged over 1/2 hour.

The following objectives apply to the respirable portion of silica (under 10 micrometres in diameter):

- ambient air quality criteria for silica: 5 micrograms per cubic metre averaged over 24 hours; and
- point of impingement: 1.5 micrometres per cubic metre averaged over 1/2 hour.

In addition, Ontario's Ministry of the Environment (MOE) has interim air quality criteria for PM10 now under consideration. To obtain information about the status of the PM10 initiative contact the Ministry at: 1 (800) 565-4923; (416) 325-4000; fax: (416) 314-6790.

Q: *Is there a difference between the federal Transportation of Dangerous Goods Act and the Ontario Dangerous Goods Transportation Act?*

A: The *Transportation of Dangerous Goods Act* gives the federal government the authority to regulate the international and interprovincial movement of dangerous goods. The provinces and territories have enacted their own transportation of dangerous goods legislation to regulate intraprovincial traffic. These all incorporate by reference the federal regulations to create a comprehensive regulatory system throughout Canada. Effectively, road transport of all dangerous goods, except those which are radioactive, is controlled by the provinces and territories, while all other modes of transportation come under federal rules.

This topic is dealt with at greater length in *Canada's Environmental Legislation, 1998,* published by Templegate Information Services Inc.

Q: *How and when are costs awarded by Ontario's Environmental Assessment and Appeal Boards?*

A: Participating in a hearing before the Environmental Assessment and Appeal Board invariably entails costs, and, in long hearings, these can be quite substantial. Typically they might include: fees for lawyers; fees for expert assistance; travel and accommodation expenses; and costs of material used for preparation such as photographs or graphics.

The board has the power to award costs to or against a party at the conclusion of the hearing. Written applications for costs, with supporting information, are required before the Board can decide whether costs will be given and in what amounts. In determining the award of costs, the board will consider, among other things, the parties' co-operation in and contribution to the hearing.