

# ENVIRONMENTAL LAW UPDATE

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## Minefields of Opportunity: Liability in the Brownfields Remediation Regime

Brownfields redevelopment ought in principle to be a win-win proposition for municipalities and developers. The aesthetic and economic restoration of abandoned industrial sites is socially desirable and potentially profitable. Because brownfields are often located in fully serviced districts in or near urban core areas, their redevelopment discourages urban sprawl and enhances tax revenues.

In spite of these benefits, however, brownfields acquisition and redevelopment in Ontario have been slowed by the fear of Ministry of the Environment (MOE) remediation or cleanup orders (under the *Environmental Protection Act* or the *Ontario Water Resources Act*). To allay some of these concerns, the Ontario legislature passed the *Brownfields Statute Law Amendment Act (BSLAA)* in 2001. On October 1, 2004, Regulation 153/04, implementing key provisions of the *BSLAA*, came into effect. While this is a welcome development, we believe that caution should be exercised before reliance is placed on the protections of the Regulation.

### Record of Site Condition (RSC)

Regulation 153/04 establishes a regime for regulatory sign-off on completion of remediation. This is to be achieved through the filing of a Record of Site Condition (RSC) ostensibly protecting past, present and future owners and occupiers from the threat of cleanup orders. Compliance with this regime purports to offer landowners, developers and investors the opportunity to reap the benefits of brownfields redevelopment free from some of the contingent risks. Specifically, the Regulation sets out:

- the contents of the RSC and other requirements for filing an RSC,
- the property use changes that require the filing of an RSC,
- interim qualifications requirements for the person who certifies the RSC,
- the requirements for conducting site assessments,

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- the soil and groundwater criteria that must be met (tied to the proposed property use and reflecting different approaches to site cleanup), and
- the conditions under which a past owner may receive immunity from orders.

The Regulation will be implemented in two phases. The framework for completing and filing an RSC came into force on October 1, 2004 and filing will become mandatory in 2005.

## **Implications and Limitations**

The MOE has championed the Regulation as bringing peace of mind to investors and developers who purchase or redevelop brownfields for which an RSC has been filed. Although the Regulation is a good first step, it has a number of shortcomings. The main problems are the following:

### **■ Off-site Contamination**

In our view, the absence of an off-site contamination provision in the Regulation is a significant shortcoming. It is true that innocent purchasers are already protected from off-site remediation orders insofar as a purchaser cannot be ordered to execute a cleanup unless it “caused” or “permitted” the contamination. However, establishing causation when it comes to migration can be a complicated task, which is one of the reasons no-fault liability with regard to contaminated sites was originally instituted. If brownfields redevelopment is to be effectively fostered, explicit protection from orders for off-site contamination should be incorporated into the Regulation.

### **■ Civil Liability**

A greater issue is the threat of civil liability. Unlike most American brownfields legislation, the *BSLAA* (and the Regulation) offer no protection from civil liability to those who have filed RSCs or who rely on the accuracy of RSCs in purchasing, occupying or developing land. That the government should have felt it necessary to provide the MOE itself with protection for actions taken in reliance on the accuracy of RSCs is highly revealing, as is the MOE’s recommendation that independent due diligence be undertaken by those wishing to rely on RSCs. This essentially concedes that the Regulation is unlikely to eliminate one of the costliest obstacles to brownfields investment. While the RSC offers some protection from the threat of unexpected orders, significant civil liability concerns remain.

## **Conclusion**

With the Regulation, compliance will become more complicated, not less. Consultants, owners, occupiers, and others need to be aware of these changes and to be prepared to incorporate the costs and procedural consequences into their planning.

While providing an exemption from liability to orders is a good incentive for investment and redevelopment of brownfields, the absence of further protection from off-site contamination and civil liability could be enough to derail the prospects of significant brownfields redevelopment. Only time will tell whether the new and complicated process and its attendant risks will result in increased redevelopment of brownfields sites.

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## Ontario's Five-Point Plan for Cleaner Air

The Ontario government recently announced a five-point action plan to reduce industrial emissions of harmful air pollutants. The plan includes:

1. Applying tough nitrogen oxide (NO<sub>x</sub>) and sulphur dioxide (SO<sub>2</sub>) limits to more industrial sectors than ever before.
2. Making the NO<sub>x</sub> and SO<sub>2</sub> limits even stricter in future years.
3. Setting new air standards for 29 harmful pollutants, including carcinogens and toxins that could pose a threat to human health.
4. Achieving a better picture of industrial emissions through updated technology.
5. Introducing a faster, risk-based approach to implementing new air standards.

### New NO<sub>x</sub> and SO<sub>2</sub> Industry Sector Emission Caps

The MOE recently released *Ontario's Industrial Emissions Reduction Plan: Proposal for NO<sub>x</sub> and SO<sub>2</sub> Regulation* ("ERP"). The ERP sets out to establish new NO<sub>x</sub> and SO<sub>2</sub> industry sector emissions caps for 2006, 2007-09, 2010-14 and 2015 and onward, as well as budgets for each sub-sector and allowance allocations for each facility within each sub-sector.

If the proposed ERP is implemented, emissions of NO<sub>x</sub> from five industrial sub-sectors—petroleum, iron and steel, pulp and paper, glass, and cement—would be capped in 2006. The caps would be reduced over time: by 2015 they would be 21% below their 1990 levels.

Likewise, emissions of SO<sub>2</sub> from six industry sub-sectors—petroleum, iron and steel, pulp and paper, cement, carbon black and non-ferrous smelting—would be capped in 2006. These caps would also be reduced over time so that by 2015 they would be 46% below their 1994 levels. The caps are the maximum number of allowances that will be allocated in a year. The MOE proposes to allocate the NO<sub>x</sub> and SO<sub>2</sub> allowances yearly to regulated industrial facilities in Ontario as indicated in the ERP.

The current emissions trading system, which applies to the electricity sector, would be extended to include the industry sub-sectors named in the ERP.

### New and Updated Standards for 29 Air Pollutants

As part of the ongoing update of Ontario's air standards, new or updated effects-based standards for 29 pollutants are proposed for incorporation (in a new Schedule 2) into Ontario Regulation 346 ("General – Air Pollution"). Effects-based standards are based on health and environmental impact without consideration of technical or economic factors.

Where barriers to implementation are identified, the proposal is to deal with them in accordance with the risk-based decision-making process in the proposed *Guideline for the Implementation of Air Standards in Ontario (GIASO)*. This allows for consideration of timing, technology and economic factors, but also outlines a process for risk ranking. The proposed risk-based decision-making process contemplates the use of options, incentives and enhanced enforcement to promote the implementation of air standards while providing flexibility and consistency to regulated industries. Any exemptions based on the GIASO will be time-limited, as the intent is to promote an updated review of technologies and achieve the desired effects-based standard by creating a cycle of continuous improvement.

### Updating Ontario's Regulatory Framework to Protect Local Air Quality

The position paper *Updating Ontario's Regulatory Framework for Local Air Quality* considers the proposed regulatory amendments to Regulation 346. In short, the amendments would:

- Phase out certain standards from Schedule 1 of Regulation 346 and introduce phase-in periods for new/updated air standards in Schedule 2 as needed. The recommended phase-in period for new standards is five years unless otherwise prescribed by regulation.
- Permit co-existence of Schedules 1 and 2 of contaminants during the phase-in periods for new air dispersion models (see below) and new and revised air standards. New effects-based standards would be introduced into Schedule 2 with a phase-in period. Once new standards take effect, the standards for these contaminants in Schedule 1 will be phased out. Thus Schedule 2 will eventually supersede Schedule 1.
- Require any new facility submitting an application for a Certificate of Approval to use the new models to demonstrate compliance with the standards in Schedule 2. If there is no value for a contaminant in Schedule 2, the facility must comply with the appropriate value in Schedule 1.

## Air Dispersion Modelling Guideline for Ontario

The MOE proposes to replace the outdated air dispersion models found in the Appendix to Regulation 346 with a suite of United States Environmental Protection Agency air dispersion models (in particular AERMOD with PRIME). These “new” models are based on more recent science than the thirty-year-old Regulation 346 models and include more realistic treatments for several of the processes that affect dispersion. The new models consider all atmospheric stabilities (i.e., stable, neutral and unstable) and can also incorporate actual or representative meteorological data into the model. Hence, the new air dispersion models are better assessment tools for predicting maximum ground level or point of impingement (POI) concentrations of contaminants. The key advantage to the new air dispersion models is the ability to assess compliance with air standards with variable averaging periods.

Industrial stakeholders will need time to assess their overall plant emissions using these new models and address compliance where necessary. The MOE proposes to phase in the use of the new models. The proposed phase-in period will be three years, commencing from the time the Regulation 346 is amended. During the phase-in period, a facility would be able to choose whether to use the Regulation 346 models in the Appendix to meet half-hour POI standards in Schedule 1, or use the new models to meet 1-hour POI standards in Schedule 1. Alternatively, compliance with the effects-based standards in the proposed Schedule 2 would also be accepted in the interim period. Companies submitting new Certificate of Approval applications for new facilities during the interim period would be required to demonstrate compliance with the Schedule 2 standards using the new models.

## Ontario’s Clean Air Action Plan

The MOE also released *Ontario’s Clean Air Action Plan* describing Ontario’s smog reduction efforts. This report serves as Ontario’s Implementation Plan for the *Canada-Wide Standards for Particulate Matter and Ozone* that the Canadian Council of Ministers of the Environment agreed to achieve by 2010.

All components of the five-point action plan are posted on the Environmental Bill of Rights Registry ([www.ene.gov.on.ca/envision/env\\_reg/ebr/English/index.htm](http://www.ene.gov.on.ca/envision/env_reg/ebr/English/index.htm)). Public commentary and stakeholder feedback will be considered in drafting legally binding regulations in the months to come.

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