

brownfields clean water

The new Clean Water Act in Ontario could add to the confusion surrounding liability for cleaning up brownfields in Ontario.

The unintended — although predictable — result of unlimited and uncertain statutory remediation liability is that many former industrial properties have languished across Canada. Developers, lenders and others who might have an interest in putting these brownfields back into use have faced a potential statutory risk of being ordered to clean up contamination left on the site. The situation has been exacerbated in Ontario where remediation orders have often been issued to mere “deep pockets” or innocent landowners — regardless of who was at fault for the legacy contamination.

There has been recent progress to clarify the statutory liability for brownfield remediation in Ontario. However, Ontario’s new Clean Water Act, 2006 could muddy the waters again by introducing ambiguity as to liability for cleaning up legacy contamination. It is conceivable, for example, that a brownfield owner who operates a remediation system to manage legacy contamination to the satisfaction of the Ontario Ministry of the Environment could find itself having to answer to a municipality as well, pursuant to new regulatory powers granted under the Clean Water Act.

Liability for legacy contamination can be unfair

Traditionally, the “polluter pays” principle is the approach taken in much of Canada’s environmental legislation. The polluter pays principle is attractive in theory, as it purports to impose the responsibility for pollution on those who caused it, were in a position to prevent it and profited from it.

In practice, however, the application of the polluter pays principle can be problematic, particularly in the case of legacy contamination. Often, the activity causing the legacy contamination occurred decades ago and the original “polluter” no longer exists, cannot be found or has no funds. To address this gap, Canadian jurisdictions typically use an expanded framework that assigns remediation liability to a broad range of potentially responsible parties.

Ontario’s Environmental Protection Act authorizes the

Ministry of the Environment to order any person who has caused or permitted contamination, or who has, or at any time in the past had, ownership, management or control of the property, to remediate it. While this approach may lessen the short-term impact on the public purse, it can raise concerns about unfairness.

First, liability does not depend on traditional concepts of fault or negligence, and due diligence (i.e. reasonable care) is not taken into account. For example, the activity we now call “polluting” was often both legal and best practice at the time the activity took place. While it is now known that trichloroethylene is mobile in soil and can cause groundwater contamination, for example, until the late 1970s, scientists, regulators and industry generally believed that releases of trichloroethylene on the ground would evaporate rapidly in the air. As a result, until at least the 1970s, the state-of-the-art disposal instructions advised pouring spent trichloroethylene on dry ground to allow it to evaporate. Today, companies and individuals that followed these then lawful and state-of-the-art practices for the substance may be subject to statutory liability to remediate it.

Second, liability is unlimited. Corporations or individuals can be held jointly and severally liable for the full costs of remediation regardless of the amount of investment in or profits made from the property or the business that operated there (and in some cases, such remediation costs are much higher than the investment or profit).

Third, liability is indefinite. Even if a party remediates the brownfield to applicable government standards, the same party may be “on the hook” again years later if government standards change. In other words, there is generally no way to provide permanent closure with respect to statutory remediation liability.

Encouraging brownfield developments

For over a decade the Ontario government has been working toward reducing the statutory liability chill that is a bar-



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rier to brownfield redevelopment. The potential societal benefits of the policy are many: encouraging the safe, productive and profitable redevelopment of brownfields; reducing risks to public health, the environment and drinking water sources; revitalizing urban cores; restoring tax bases; and reducing pressures that create urban sprawl, thereby reducing the need to extend costly infrastructure and the consumption of farmland.

In 2001, Ontario passed the Brownfields Statute Law Amendment Act, 2001, which amended the Environmental Protection Act to clarify the liability risks associated with redeveloping brownfields. The first provisions to come into effect in 2002 provided limited statutory protection with respect to legacy contamination for municipalities, secured creditors, receivers and others such as consulting engineers who undertake investigative or other actions related to brownfields.

Additional amendments took effect in 2004 and 2005, along with new regulations set out in Ontario Regulation 153/04, which provide statutory protection from most remediation orders concerning legacy contamination to owners who file a Record of Site Condition. A record of site condition confirms that the soil and groundwater at a brownfield meet the applicable government standards for an existing or proposed property use. It may be filed either voluntarily or as required for certain changes in property use.

Ontario's efforts to clarify the law concerning brown-

fields, while not insignificant, did not fully address the liability chill because the statutory protections could be lost in specified and arguably uncertain circumstances (commonly referred to as "RSC re-openers"). As a result, proposed amendments to clarify these issues are currently before Ontario's Legislative Assembly as part of the province's budget bill.

So while the Ontario government continues to make good progress with respect to clarifying brownfield liability issues, this progress could be slowed if the Clean Water Act, 2006 introduces a new potential or perceived layer of uncertainty.

Impact of the Clean Water Act, 2006

The Clean Water Act, 2006, expected to come into force this summer (although the full set of regulations is not expected to be out for approximately 18 months), was a response to the tragedy in Walkerton, Ontario, when *E. coli* bacteria contaminated the town's drinking water supply. The important purpose of the Act is to protect existing and future sources of drinking water.

The Clean Water Act employs a watershed-based approach to drinking water protection. It will divide Ontario into source protection areas and regions (most of which align generally with existing conservation authority jurisdictions). For each, a source protection plan must be

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prepared by a committee consisting of municipal, business and public interest representatives appointed by the source protection authority for the area. The source protection plan may designate areas where certain activities are prohibited or where a risk management plan will be required for certain activities to be conducted. Consulting engineers will be called upon to help prepare the source protection plans and risk management plans. Each municipality will be responsible for enforcing the prohibitions and restrictions set out in the Clean Water Act and the source protection plan within the boundaries of its jurisdiction.

The Clean Water Act provides that if a source protection plan identifies an area where legacy contamination from a past activity is a significant threat to drinking water, the Minister of the Environment may require a clean up order to be issued under the Environmental Protection Act.

In this respect, it appears the Clean Water Act is intended to rely on the Environmental Protection Act's existing liability regime to order potentially responsible parties to investigate and/or remediate legacy contamination. As a result, the Clean Water Act should not likely introduce new uncertainty into Ontario's brownfield regime because the statutory protections discussed above would apply. In other words, if a property owner were to file a record of site condition showing that the property meets the applicable soil and groundwater standards for a property use, most remediation orders that would otherwise relate to the legacy contamination generally could not be issued to the owner or subsequent owners or occupiers of the property.

Enter some new ambiguities

That said, the Clean Water Act does introduce some new potential ambiguities. It authorizes the promulgation of regulations that may "require risk management plans to contain provisions dealing with the remediation of adverse effects caused by an activity to which the plan relates," and it may require risk management plans "to be prepared to achieve particular standards set out in the rules." Therefore, although the Clean Water Act appears to contemplate the

Could the Clean Water Act result in an owner having to enhance a groundwater remediation system so as to better prevent threats to drinking water?

use of risk management plans only to regulate current "activities" at a property — i.e. presumably not legacy contamination at a property caused by past activities — there is a question of whether the Act's provisions are ambiguous enough to authorize a municipality to regulate and issue orders with respect to legacy contamination in certain circumstances.

For example, if a risk management plan is required for the continued operation of a manufacturing facility, could such a plan include additional requirements regarding the investigation and/or remediation of legacy contamination caused by the facility's past operations, even if the owner previously filed a record of site condition for the property?

Further, if a groundwater remediation system is currently being operated at a property in accordance with the Environmental Protection Act to minimize the risk of potential off-site migration of legacy contamination, could the Clean Water Act authorize a municipality to order the owner of such a system, who may not be the polluter and may be operating the system in full compliance with the Environmental Protection Act, to enhance the system so as to better prevent threats to drinking water?

In conclusion, while the Clean Water Act is not likely intended to impose a new liability framework with respect to the remediation of legacy contamination, the Ontario government should be aware of any unintended consequences of the Act's new powers. While we all want to ensure that sources of drinking water are protected, we also want to ensure there are no new potential or perceived barriers to brownfield development.

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