

The Ministry's policy dilemma

By Madeleine Donahue

It has been almost a year since the Ontario Ministry of the Environment (MOE) posted on the Environmental Registry (EBR) proposed revisions¹ to the standards for assessing and restoring contaminated properties. No update or decision on the status of these has yet been released, nor is there any clear idea of when that may occur.

The MOE Standards Development Branch hopes to complete its review of public and technical comments in the near future². Will there be a second EBR posting? It does not appear that decision has yet been made. Much may depend on what the standards will ultimately look like and the MOE policy and decision-makers' perspectives of the potential impact of the changes.

The MOE faces a real dilemma. How does it revise clean-up standards that have not been updated since 1996 without impeding redevelopment of contaminated properties? Would the new standards push many more properties to risk assessments with all the costs, uncertainties and lengthy time-frames accompanying that regulatory process? How does the MOE ensure that the standards are conservative enough to minimize risks to the public and the natural environment? This is a difficult balancing act that calls for the wisdom and foresight of Solomon.

It is in the public interest to ensure that the MOE gets the standards right technically and that there be a fulsome discussion of the ramifications of the standards not only on developers, property owners and lenders but also on the interests of the community at large.

Some lawyers and consultants have commented that the proposed revisions were published with minimal outside consultation. Others queried the justification for some of the new standards, were concerned that some are too conservative, and pointed to some mistakes and errors in calculation or transcription of the new standards. Others have commented that the new standards may encourage risk assessments which may be the best way to assess and address environmental issues on brownfield sites. Still others were concerned there may be a lack of coordination or cohesiveness

between the MOE's Standards Development Branch and the rest of the MOE in advancing these standards.

If the new generic standards are too stringent, many remediation projects will be unable to apply them, with the result that smaller remediation projects or properties may not be cleaned up because it will be economically unfeasible for owners to undertake risk assessments. There are added costs and time delays in submitting a risk assessment to MOE regulatory oversight. Additionally,



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the timelines for many corporate commercial and real estate purchase and sale transactions are usually too short to accommodate a risk assessment approach.

Owners may decide against filing records of site conditions (RSCs) unless laws compel them to do so. They may undertake their own form of risk assessment without involving the MOE, a situation that occurs with some frequency today. That may be cause for concern, particularly if all of the regulatory requirements for the risk assessment have not been adhered to.

Risk assessment is not an exact or perfect science. Only certain "qualified persons" are authorized under Ontario RSC Regulation 153/04 to file RSCs based on risk assessment. Although the qualified person has to provide a certification regarding human health or ecological risk, that opinion is based on experience, judgment, assumptions and, in some cases, recommended risk management measures. A risk assessment is also only as good as the data on which it is based and the judgment, assumptions and conclusions of the risk assessor. Parties reviewing risk assessment reports

frequently have very justifiable concerns with the adequacy of investigation work undertaken on a property, extent of contamination delineation and assumptions that went into the report conclusions. Municipalities and citizen groups may have concerns with such an approach even if a landowner or the MOE consider it appropriate.

The MOE must take care not to unwittingly bias the standards towards risk assessments because everyone is not prepared to accept a risk assessment ap-

proach in all contaminated lands cases. The proposed standards should give owners the option to decide if risk assessment is an appropriate solution, not push them to it by overly stringent standards. Moreover, from a practical perspective, unless the MOE is given new resources to process more risk assessments, existing staff will be unable to review an increased number of risk assessments in a timely manner.

The degree of concern with the proposed revisions to the standards and the sheer volume of comments the Standards Development Branch has received since March 2007, suggest that there is a need for a second EBR posting. This writer is of the view there should be a further posting, not only of a notice of decision on the standards but also a public consultation of sufficient length to enable municipalities, interested public and community interest groups, business representatives, landowners, brownfield developers and legal advisors to express their views to the MOE, to each other and to the government as a whole. The MOE should produce a black line com-

continued overleaf...

¹ The 2 documents that propose revisions are entitled "Rationale for the Development of Generic Standards for Use at Contaminated Sites in Ontario" dated March 7, 2007 and "Soil, Groundwater and Sediment Standards for Use Under Part XV.1 of the Environmental Protection Act" dated March 28, 2007.

² Soil and Groundwater and Sediment Standards for Use Under Part XV.1 of the Environmental Protection Act dated March 9, 2004 which is part of Ontario Regulation 153/04.

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parison between the existing and proposed standards so that the changes are readily apparent.

There are important pros, cons and trade-offs to implementing new clean-up standards in Ontario. If some soil clean-up standards drop below a parts-per-million threshold and can now be measured in parts-per-billion, does ratcheting down of standards make sense? Are the standards practically achievable and, if yes, at what cost? While some of these issues are very technical and complex, the public needs to understand the trade-offs and the risks involved. The MOE should engage the public by explaining its rationale for changes in standards, and the risks/benefits and factors it considered in arriving at revised new standards.

The recent discussion and debates on climate change make it clear that the public is very interested in major environmental issues that affect their health and well-being. Contaminated lands should be no different. The public should be given the opportunity to hear debates about how to manage contaminated lands, how to undertake urban renewal in an economically feasible manner, what the legal liability risks are and how to create safe, vibrant communities. If

tougher standards are needed to ensure that protection, then the private sector will adapt as it always has when tough new regulations are introduced.

What the private sector needs is a reasonable degree of certainty, predictability, clearly understood standards, and a sufficient period of time to transition to the new standards. For its part, MOE needs to produce technically defensible numeric soil and groundwater clean-up standards so as to ensure implementation of best science and engineering principles and practices that will protect the public and the environment.

Even if it takes another year to engage stakeholders and the public on the revised standards it will be well worthwhile. Ultimately, the goal of revised standards should be aimed at reducing risks to the public and the environment, improving performance and also reducing overall remediation costs and schedules. There should be another EBR posting and consultation round on the proposed new standards.

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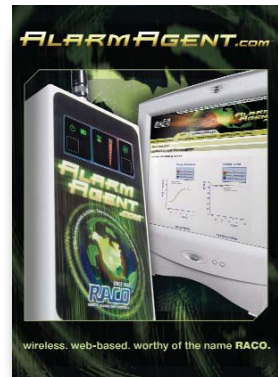


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