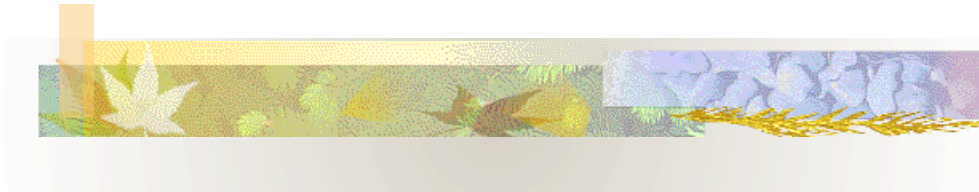


Tricks & Traps on Contaminated Sites



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Overview

- **How clean is clean?**
 - Changing standards
 - Transition
 - Risk Assessment
 - Offsite plumes
- Who's responsible?
- What can you do with a contaminated site?



How Clean is "Clean"?

- Background
- Generic
 - Potable / Non-Potable
 - Land Use
 - Stratified
- Risk Assessment



Generic

- Soil, Sediment, Water
- Potable / Non-Potable
- Land Use
 - Residential / Industrial / Agricultural / etc.
- Stratified



Tables

- 1: Background / Sensitive
- 2 / 3: Full Depth, potable / non-potable
- 4 / 5: Stratified, potable / non-potable
- 6: Shallow soil



Which Generic?

- *Guideline for Use at Contaminated Sites in Ontario (1994 to 2004)*
- *Reg. 153/04: Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the Environmental Protection Act, March 9, 2004*
- 2008 draft standards



How do you know if it's clean?

- Record of Site Condition
 - Date?
 - Phase I / II?
 - Environmental Site Registry
- Certificate of Property Use
- Other documents?



Will it stay clean?

- When the standards change?
- When contaminants degrade?
- When contaminants migrate?



Changing standards

- Current generic standards:
 - obsolete science
 - incoherent
- New standards
 - usually more stringent
 - e.g. 1900 to 44 ppb
 - more parameters



Changing standards

- How soon?
- Existing cleanups- file now?
- MOE transition period
- Will lenders wait?
- Who will trust an old RSC?



If you can't meet generic

- Exemption?
- Live with it
- Change landuse
- Piecrust
- Risk assessment
- CBRA



Risk it away

- For deep pockets with lots of time
- Impact on mortgage ability
- How to enforce CPU conditions?
- Who maintains documents / FA if subdivided?



Steps in risk assessment

- Hazard identification
- Dose-response assessment
- Exposure assessment
- Risk characterization
- Risk management plan
- Certificate of Property Use



Getting RA approved

- MOE review / acceptance
- Slow
- Unpredictable
- Expensive
- Financial Assurance



Tier 2 RA

- Cookie-cutter RA
- Less discretion, less delay
- May partially offset new standards
- Available during transition?



Are MOE standards enough?

- *Tridan v. Shell*
- Impact on value
- What is “pristine”?



If it's not clean

- Hazardous to occupants / neighbours?
- S. 14
- Cleanup obligations (spills)
- Change of land use
- Building permits
- Impact on value



Overview

- How clean is “clean”?
- **Who’s responsible?**
 - Orders
 - Protections from orders
- What can you do with a contaminated site?



MOE Orders

- *Environmental Protection Act*
 - Also OWRA, TSSA, CWA, SDWA, etc.
- Stop orders, Control orders
- Preventive orders, Cleanup orders
- Orders to Pay

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MOE derives most of its formal authority from EPA, OWRA

MOE can order you to clean up – 4 types of orders – stop orders, control orders, preventive orders, cleanup orders

Municipalities responsible for land use planning, drinking water, household waste/sewage

Orders: Liability Bomb

- No fault
- No limitation period
- No cost limit
- No fairness limit
- Retrospectivity
- Uncontrolled MOE discretion



Who can be ordered?

- Owns or owned or has or had management or control of an undertaking or property, s. 18, 97, 157.1
- Has or had charge, management, control of source of contaminant, s. 7, 8, 14
- Has or had charge and control of land, building or waste, s. 43



Anyone with “control”

- Past or present
- Includes non-polluters:
 - Owner, occupant
 - Officers, directors
 - Anyone in possession
 - Receivers, trustees
 - Individual / corporate
- Control without possession?



Protection from Orders?

- Record of Site Condition (RSC)
- *Bankruptcy and Insolvency Act*
- *Environmental Protection Act*, protection for fiduciaries
 - S.168.23 to 168.26
 - Reg. 298/02



Demolition & Recycling

- Defendants bought major PCB contaminated site
- Breached OWRA orders to stop escape
- Dec. 08: \$659,000 fine & president 4 months jail
- Appeal - Aug. 2009
 - Reduced fines to \$519,000, upheld jail

Protection by RSC?

- No MOE signoff
- No protection during cleanup
- No protection against civil suits
- No protection against prosecution or EPs



Reopeners where

- Contaminant moves off-site
- RSC based on false / misleading information
- Certificate of Property Use or s.18 risk management order contravened
- Danger to health or safety



Other weaknesses of RSCs:

- The invalidators:
 - Change of use
 - False information
 - Migration across the property line
 - What if the property line moves?
 - Improvements in detection technology?



What isn't control?

- S. 168.26 EPA
- Some commercially reasonable acts of secured creditor \neq control:
 - Investigate conditions
 - Reduce contamination
 - NOT
 - Secure site
 - Pay taxes, insurance
 - Respond to emergencies



Overview

- How clean is “clean”?
- Who’s responsible?
- **What can you do with a contaminated site**



What can you do with it?

- Clean it
- Abandon it
- Sell it



Clean it?

- Dig and dump
- Land farming
- *In situ*:
 - Chemical oxidation
 - Bioremediation
 - Air sparge, etc.
- Risk Assessment



Not everything can be cleaned

- Engineers are optimists
 - Cost
 - Time
 - Result
- Lawyers must be pessimists



Contaminants are different

- The big three:
 - Petroleum
 - Heavy metals
 - Chlorinated solvents



...So are Site Characteristics

- Geography
- Hydrogeology
 - Soil type
 - Sand, clay
 - Bedrock
 - Water
 - Surface, groundwater, aquifers

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Abandon it?

- Note short deadlines in BIA, EPA
- Don't miss the deadline



Sell it?

- Agreement of Purchase and Sale
 - Disclosure
 - Warranty / reliance
 - Deceit
 - Latent / Patent Defect



Agreement of Purchase & Sale

- Identify Risks
 - ESA, inspection
- Allocate Known Risks
- Allocate Unknown Risks
 - Insurance?
 - Escrow?
 - Price?

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(From Envirolaw newsletter) In *Neste Chemicals v. Reichold*, a misunderstanding over an agreement of purchase and sale cost Neste \$8 million. Neste had purchased a chemical plant from Reichold, knowing there was some buried waste and that the site had not been fully investigated. Reichold agreed to remove buried drums in one location and to pay other cleanup costs “to the extent required by law”. Neste thought this meant that Reichold would pay for all cleanups required by the Quebec environment ministry. It was wrong. The site turned out to have hundreds of buried drums and other dangerous wastes that Neste spent \$10,000,000 cleaning up. The court held that Reichold only had to remove drums in the one specified location plus do the minimum needed to keep contamination from migrating off-site. Even though Neste couldn’t expand its plant without remediating the soil and groundwater, this cleanup was not “required by law”.

Vendor must

- Truthfully answer questions
- Obligation to disclose?
 - latent defects
 - buried tanks
 - danger v. value



Will it come back to bite you?

- Will the cleanup work?
- Will the buyer be solvent?
- Will more contamination be found?
- Did anything go wrong on your watch?



The Consultant

- *Qualified Person?*
- Does she know what she's doing?
- Insurance
 - What does it cover?
 - When does coverage expire?
 - Are there current / future claims against her?
 - Claims-made policies
- Proving negligence



Trusting a Consultant

- The retainer letter
- Limitations on liability
- Legal right to rely on the report
- Quality of the work / benchmarks
- Changes in scope



Conclusions

- Contaminated sites still risky, technical, cost extra time and money
- Rules and numbers keep changing
- Some protection for very careful fiduciaries
- Sometimes they're worth it.



Questions?

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