



CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

PUBLICATION #443

April 29, 2003

Chris Lompart  
Program and Development Section  
Land Use Policy Branch  
135 St. Clair Avenue West  
6<sup>th</sup> Floor  
Toronto, ON  
M4V 1P5

By Fax 416-314-0461

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION COMMENTS ON  
BROWNFIELDS DRAFT REGULATION – RELATING TO THE FILING OF A  
RECORD OF SITE CONDITION  
EBR REGISTRY NUMER: RA03E0002  
TYPE OF POSTING: REGULATION  
MINISTRY: ENVIRONMENT  
STATUS OF POSTING: PROPOSAL  
DATE PROPOSAL LOADED 2003/02/28  
COMMENTS DUE: APRIL 29, 2003**

Dear Mr. Lompart:

CELA appreciates the opportunity to provide our comments on the Draft Brownfields Regulation relating to the Filing of a Record of Site Condition.

We wish to express our appreciation for the opportunity to attend the briefing held by Mr. Lompart and other Ministry staff on April 10, 2003. CELA encourages broad consultations with adequate time for response for all EBR postings and we are of the view that the objective was met in this consultation. Again, as with the phase I regulation posting, we also wish to commend the Ministries of Environment for consulting widely on the proposed regulation, for providing plenty of time for written comment, and for providing extensive background material in the posting and at the consultation sessions.

CELA reiterates its strong support of the need for effective and enforceable legislation and regulatory reform as embodied in the Brownfields legislation to address the several issues pertaining to Brownfields in Ontario.

The Canadian Environmental Law Association (“CELA”) is a public interest law group founded in 1970 for the purpose of using and improving laws to protect the environment and public health

and safety. Funded as a legal aid clinic specializing in environmental law, CELA lawyers represent individuals and citizens' groups in the courts and before tribunals on a wide variety of environmental protection and resource management matters.

CELA has previously provided various submissions on the subject of land use in general, and contaminated soils and groundwater in particular. For example, CELA submitted a Brief concerning the Management of Excess Soil, EBR Notice RA8E0030 in November, 1998, and co-authored a report, Key Issues in and Policy Options for the Remediation of Contaminated Sites in Canada and the Prevention of Future Problems in 1997. In addition, CELA staff have attended consultation meetings with Ministry staff and others during the preparation of the Brownfields legislation and its first phase regulations. CELA's policy concerns include: ensuring the return to productive use of contaminated sites, taking advantage of existing serviced lands, avoiding unnecessary development on greenfields, and first and foremost, ensuring protection of public health and safety, including that of future owners, occupants and users of lands in Ontario.

## **Recommendations**

CELA has some comments which would improve the draft regulation.

### **CHANGE OF PROPERTY USE – PART IV**

Clauses 10 and 11 refer to the prior 10 year period in determining when the change of use rules come into play for certain commercial uses being changed to agricultural, institutional, parkland or residential. CELA submits that this period should be extended to thirty years since the contaminants of concern will remain in the soil or groundwater and continue to pose a hazard to human and ecosystem health long beyond 10 years if they have not been remedied. CELA submits that it is not difficult to track the use for that length of time and this is commonly done for phase one site assessments in any event.

### **RECORD OF SITE CONDITION – PART V**

The Record of Site Condition will play an essential role with respect to providing public disclosure of the condition of lands at a certain point in time. If owners, broadly defined, are to receive the benefits provided by the new amendments to the legislation, the quid pro quo must be full and frank, accurate disclosure of the condition of the land at the time of the filing of the record of site condition.

Clause 14 refers to the retention period for qualified persons to retain a report under the Act as seven years. This is an inadequate time frame. Qualified persons should be required to retain the reports indefinitely, or in the alternative, if they are retiring or relocating their practice, the regulation should provide for an archive system whereby the reports are retained in an archive funded by the province. Future questions concerning the land, any evaluation and any remediation will arise for many years into the future, far beyond a seven-year time frame.

## **SITE CONDITION STANDARDS AND RISK ASSESSMENTS – PART VIII**

CELA supports clause 28 which provides for consultation with the local municipality before applying the non-potable ground water site condition standards.

Clause 34, site condition standards for environmentally sensitive areas should not be limited to areas of provincial significance as outlined in subsection (3); rather those categories should be expanded to include areas of local or regional significance as reflected in Official Plans, and as reflected in the yet to be developed watershed source protection plans.

## **CERTIFICATE OF PROPERTY USE – PART IX**

Clause 40 is unclear with respect to whether certificates of property use will be filed in the land registry in which the land is registered.

## **OTHER**

CELA recommends that the Ministry should maintain a list of currently qualified persons both as to Environmental Site Assessments and as to Risk Assessments. Many persons who will require the services of such persons will have little ability to evaluate the qualifications of those offering the services. For example, I recently spoke to a group of Community Futures Associations, who are governed by volunteer boards of directors in directing federal and some provincial community development monies and programs into small businesses and community projects. It may be very difficult for such organizations to evaluate appropriate qualifications to ensure that the qualified persons meet the statutory requirements.

In addition, the system as designed puts all of the onus for evaluation and judgement on the qualified person. Both the general public and future owners and users will be affected by these decisions. Because of the importance to public health and safety of the integrity of the evaluations and statements made by qualified persons, the regulation should provide for a provincially sponsored audit and/or peer review system to ensure the quality of evaluations, decisions, remediations and judgements made leading the registration of records of site condition. Examples of these judgements include whether to test for groundwater contamination, whether a phase II ESA is even needed, what type of remediation is appropriate and how many and location of sampling sites to verify that the site meets the regulatory standards.

Thank you for the opportunity to provide these comments. CELA staff would be happy to discuss any of these concerns further.

## **CANADIAN ENVIRONMENTAL LAW ASSOCIATION**

per  
Theresa A. McClenaghan  
Counsel