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NEW DEVELOPMENTS IN CONTAMINATED LANDS

1. 1996 CONTAMINATED SITES CLEAN-UP GUIDELINES

In May, 1996, the Ministry of Environment & Energy released long-awaited revised guidelines for the clean-up of contaminated sites. Some of the notable points about the new guidelines are:

- The guidelines cover many **more contaminants** than did the previous 1992 draft guidelines.
- The guidelines provide for "stratified" clean-up, depending on the **proposed use** of the land. In other words, different clean up standards to various depths may be selected, depending on whether the land is intended to be used for residential, park, commercial or industrial purposes.
- There are various standards for soil and for groundwater, depending upon whether the groundwater could be used in drinking wells.
- If anything less than a "full" clean up is selected, **caveats** may have to be registered on the title to the land, so as to advise future potential purchasers, lenders, owners and others that the site was not completely cleaned up, and there may still be some residual contamination at depth.
- The MOEE will not be certifying the clean-ups or giving any assurances about them. It will be entirely **up to the land owner** and its professional consultants to select the appropriate clean up level. However, there are requirements for the engineers to prepare sworn statements as to the clean-up that was completed.

2. MOEE "GLOBAL AGREEMENTS" FOR LENDERS AND OTHER PARTIES

As of the spring of 1997, the Ministry of Environment & Energy, Ontario has approved and is now entering into "global agreements" with lenders and certain other parties concerning their entry onto contaminated lands.

Lenders and others have long been concerned that they may be constrained from investigating the feasibility of a site clean-up in preparation for resale when their

customer defaults on a mortgage involving contaminated land. The justifiable fear is that they would then fall into the definition of **"person in control"** under the Environmental Protection Act and thus open themselves to the possibility of a full clean up order from the Ministry of Environment & Energy for the land. Many lenders, therefore, would not make even the most cursory of inspections whenever there was a suspicion of contamination. Obviously, this was detrimental, not only to the lenders who were unable to realize on their collateral, but also to the general public, since many contaminated lands have been sitting idle, untreated and unproductive.

The Ministry of Environment & Energy has provided a partial solution to this problem, by agreeing to enter into the above mentioned "global agreements" in certain circumstances.

These agreements are available to **other parties,** too, such as **municipalities,** and possibly to **insurers** and prospective **purchasers**.

The global agreements provide:

- The Lender or other party **shall not be a "Responsible Person"** under the Ontario environmental laws with respect to any property, nor be subject to any orders, proceedings, etc. with respect to environmental contamination or violations that is already in existence or has already occurred simply by having entered on the land, or having taken action as Lender (or other) to investigate the environmental or other condition of the property.

- Similarly, protection is available for action taken by the Lender (or other) to **preserve or protect the value** of the property, including paying services, taxes etc., and dealing with **immediate danger** or threat of immediate danger to public health and safety.

- It is not necessary to enter into the agreement for every property; in fact it is intended to be global and to cover **all such properties** that the Lender (or other) may thus deal with.

- It is not necessary to notify the MOEE regarding every such entry; the only **notification** requirements are:

    - if the Lender becomes aware of an **immediate danger** or threat of immediate danger to public health and safety

- if the Lender decides **NOT to proceed** with any further actions or steps because of adverse environmental conditions at the site.

- The Lender must **disclose** to any person who acquires an interest in the property

through the Lender, the nature of any environmental problems with the property of which the Lender has knowledge.

- The Lender will provide copies to the MOEE of any **reports** prepared by the Lender with respect to any particular property, upon written request by the MOEE.

These agreements are being negotiated by some, but not all of the major financial institutions in the province. Each bank's head office must be contacted to ascertain whether it has signed such a global agreement with the MOEE.

For **non-lender parties,** the MOEE is amenable to similar agreements, but their applicability must be specifically negotiated on behalf of such parties.

For lenders and non-lenders, **site-specific agreements** may be negotiated with the MOEE. However, the MOEE will only entertain such site-specific agreements if "there is something in it for them". Examples include some defined minimum level of clean up; possibly some financial reserves; or other obvious public environmental benefit to be obtained in exchange for the protection granted to the contracting party.

If you have a situation which may call for such agreements, please don't hesitate to contact me.