325

COMMENTS ON THE MINISTRY OF ENVIRONMENT AND ENERGY'S PROPOSED AMENDMENTS TO COMPLIANCE GUIDELINE EBR REGISTRY NO. PA7E0005.P

Publication #325
ISBN#978-1-77189-402-9

Prepared by:

Canadian Environmental Law Association

August 21, 1997

TABLE OF CONTENTS

page

1. INTRODUCTION 1

2. GENERAL 2

3. SPECIFIC COMMENTS 3
Factors relevant to the issuance of a control document 3
1. Factors must be environmentally relevant 3
2. Fault and apportionment of liability 4
3. Making exceptions of persons named 5

4. APPENDIX A 5
1. Innocent previous owner 5
2. Victimized current owner 5
3. Buyer Beware 6
4. Financial Constraints 7
5. Lender or other person who takes "charge and control" 7

1. INTRODUCTION

The Canadian Environmental Law Association (CELA) is a public interest group founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization, and law reform activities.

The purpose of this brief is to respond to the Proposed Amendments to Compliance Guideline (proposed amendments). The proposed amendments were posted on the Environmental Bill of Rights Registry on July 8, 1997, EBR Registry No. PA7E0005.P with approximately a six week comment period.

CELA's comments and concerns may be summarized as follows:

1. The Director of the Ministry of Environment and Energy (MoEE) should exercise his or her power to issue a control order on a case-by-case basis.

2. The MoEE should define what type of factors the Director will consider to be "environmentally relevant" when exercising his or her power to issue an order.

3. The MoEE should explore means to assist bringing parties to the table and provide incentive for these parties to reach an agreement on their respective share of responsibility for clean-up. Joint and several liability should be maintained as the backdrop of any allocation scheme.

4. An "innocent previous owner" should be entitled to the innocent landowner defence.

5. The use of the term "victimization" involves the application of an inherently subjective criteria. Moreover, there is no established jurisprudence which provides an adequate interpretation of the term. Instead of using the term "victimization," it is recommended the MoEE allow a "current victimized owner" to be entitled to the due diligence defence.

6. A purchaser, like a "victimized current owner" should be entitled to the defence of due diligence. In addition, a vendors's disclosure obligations should be strengthened by making the transfer of property contingent on discovery, clean-up and disclosure of existing contamination.

7. Financial constraints, in and of itself should not be a basis for not issuing a control order. However, financial constraints should be a factor in assessing the timing and content of the order.

2. GENERAL

As a result of the enactment of Bill 220 on June 28, 1990, the scope of potential liability under administrative orders was greatly extended in Ontario's Environmental Protection Act (EPA). Since then, there has been a dire need for the government to formulate a principled approach to imposing liability.

Although the proposed amendments attempt to do this to some degree, it still falls short of providing the public with sufficient clarification about the circumstances when the MoEE will provide relief from liability from administrative orders. Under the proposed amendments the MoEE has made it evident that it will impose liability on a number of parties who neither caused nor were in a position to prevent the pollution at the site. For example, innocent purchasers and victimized owners may still find themselves liable for the clean-up of contaminated sites. The MoEE's approach is fundamentally at odds with established theories of liability and equitable notions of fairness.[1] Moreover, such an approach has been consistently rejected by the Environmental Appeal Board, the administrative tribunal which hears appeals of the orders issued by the MoEE's Directors.[2]

The MoEE approach seems to be largely based on a perception that the public purse will be jeopardized if liability cannot attach a potentially responsible party. For example, one rationale for imposing a control order on a "victimized current owner" is based on concern that the illegal actor may default on the control document. While this is a valid concern, casting a wide net to capture parties who did not cause the contamination and had no ability to prevent it, is to unfairly impose liability based on funding needs rather than fault. Instead of imposing liability on the most convenient person the MoEE should examine the magnitude of the orphan site problem in Ontario and develop proposals on how to most fairly, effectively and efficiently fund their remediation. Moreover, the issue of funding for the clean-up of orphan sites is one that needs to be addressed in conjunction with other issues of liability by the MoEE's Environmental Liability Working Group.

---

[1] For example, section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act 42 U.S.C. 9601-9675 imposes liability on a party who owned or operated the site at the time of disposal of any hazardous substance. This linkage limits the liability of actors for contamination which occurred in the past. There is no similar limitation in the EPA. The B.C Waste Management Act also contains provisions for exemption of a potentially responsible party who has no causal connection to the contamination and who is not in a position of influence and control. In particular, there are exemptions for innocent purchasers, owners and operators who had no causal connection with the contamination and an exemption for landlords under certain circumstances.

[2] See A. Levy, "*The Scope of Liability*" (1992) 6 J.E.L.P. 271. In his article Mr. Levy states that the Environmental Appeal Board" has struggled to find a satisfactory balance between the need for more environmentally responsible behaviour and a desire to treat those made subject to Director's orders with a reasonable degree of fairness."

CELA has consistently taken the position that questions of allocation of liability, the establishment of clean-up standards and the avoidance of future problems are closely linked and should be addressed through a comprehensive policy framework, rather than a piece-meal fashion. It is our understanding that the proposed amendments are only an interim approach and that the MoEE is now considering taking a comprehensive approach to the issue of environmental liability through the Ministry's Environmental Liability Working Group. We welcome such an approach and hope that the MoEE will look to establishing a comprehensive structure for the issues of environmental liability based on clearly articulated principles, goals and objectives.

3. SPECIFIC COMMENTS

Factors relevant to the issuance of a control document

The MoEE's position to have the Director exercise his or her discretion to issue a control order on a case-by-case basis is supported. However, CELA would urge the Ministry to provide guidance to Directors so that they take a consistent and uniform approach in similar situations. This would provide the public with a greater degree of certainty and predictability in terms of how the Ministry will regulate certain activities.

CELA Recommendation #1: CELA supports the MoEE's proposed approach that a Director should exercise his or her powers to issue a control order on a case-by-case basis. However, the MoEE should provide Directors with guidance to ensure some degree of consistency and uniformity in addressing similar situations.

1. Factors must be environmentally relevant

Despite the examples provided in Appendix A of the proposed amendments it is not sufficiently clear precisely what type of factors the MoEE considers to be environmentally relevant. To simply state that the Director is to only consider those factors which are relevant to "protection and conservation of the natural environment" does not provide adequate certainty and predictably to the public as to when liability may attach. Whilst it will be difficult to provide an exhaustive list of all the factors, the proposed amendments should provide further articulation of what constitutes "environmentally relevant" factors. This would ensure that the public is provided with guidance regarding the type of information and evidence which should be provided in their submissions to the Director.

CELA Recommendation #2: The MoEE should provide clarification of what type of factors the Director considers to be "environmentally relevant" when exercising his or her discretion in issuing an order.

2. Fault and apportionment of liability

As a matter of public policy, the EPA's broad imposition of liability must be maintained to ensure that environmental degradation is addressed by responsible parties rather than the Ontario taxpayer. CELA recognizes that while the several liability approach may have the potential to be fairer to responsible parties, it can be extremely difficult to allocate responsibility precisely among a group of parties since contamination often occurs as a result of many contaminants being released through the activities of numerous actors over a number of years. Resolving issues of liability and apportionment in an equitable manner is difficult and may be impossible at times.[3]

Opponents of the joint and several liability model have commented that it has been partially responsible for the high level of litigation associated with clean-up under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. 9601-9675 (CERCLA also known as Superfund). In addition, joint and several liability schemes have been criticized for failing to recognize different degrees of responsibilities among parties, and thus are less equitable.

Other jurisdictions such as British Columbia have recently sought to refine the joint and several liability model to allow for a more fair allocation of liability. The BC Waste Management Act S.C.B 1993, c.25 permits and facilitates efforts by responsible parties to negotiate an allocation of liability among themselves whilst maintaining joint and several liability as the necessary backdrop to any allocation arrangement. The MoEE should explore similar options as this would not only assist in bringing parties to the table, but would also provide these parties with an incentive to reach an agreement on their respective shares of responsibility for clean-up.

Such an approach would also be consistent with the CCME principles which endorsed a four-step process for allocating liability among the responsible parties. This process involves allocation liability through voluntary, mediated or directed means, failing which, joint and several liability will be imposed as a last resort.

CELA Recommendation #3: It is recommended that joint and several liability be maintained as the "backdrop" to any allocation scheme. It is also recommended that the MoEE explore means of assisting to bring all the parties to the table and to provide these parties with incentive to reach agreement on their respective share of responsibility for clean-up.

---

[3] See Consequences of the Bill 220/90 Amendments to the Environmental Protection Act: Defining responsible persons and their liability under Administrative Orders (Toronto: Canadian Institute of Environmental Law and Policy, 1992) at 14.

3. Making exceptions of persons named

See comments on paragraphs to 2 and 3 above.

4. APPENDIX A

1. Innocent previous owner

CELA supports the MoEE's position that previous owners who sold the site before any contaminating substances became present and who have no other connection to the problem leading to the contamination should not be held liable under an administrative order. CELA notes however, that imposing liability on a current owner or purchaser for past contamination under an administrative order where the party had no knowledge and no means of acquiring knowledge of the contamination, may be just as unfair. Where the contamination occurred prior to the period of ownership, the owner should be entitled to the innocent landowner defence. In order to meet the test the owner must have made the appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice at that time and not have caused or contributed to the contamination of the site.

CELA Recommendation #4: An owner should be entitled to the innocent landowner defence.

2. Victimized current owner

It is not apparent why the MoEE would make distinction between "victimized current owners" whose properties have on-site contamination and those whose properties became contaminated by off-site migration. In Appendix A, section 2, the MoEE notes, it will be necessary to name the owner in the control document to ensure that the Director may recover costs for work done by the MoEE under its cost recovery provisions of Part XIV of the EPA. Appendix A then states that some relief may be provided for owners whose properties have become contaminated by off-site migration. However, even in instances where the contamination was caused by off-site migration, it may still be necessary to name the victimized current owner to allow the Director to recover costs for work done by the MoEE. In both instances, however it would be contrary to all notions of fairness and established principles of liability to impose liability on the owners who have no causal connection with the polluting activity and were not in a position to prevent it.

CELA recommends that if the only purpose of naming the victimized current owner is to allow the MoEE to recover costs or to require registration on title, this should be specifically stipulated

in the order. It would be blatantly unfair to impose clean-up requirements on innocent owners simply for the purpose of allowing the MoEE to recover clean-up costs.

An additional concern with this provision is the use of the term "victimized current owner." The proposed amendments fails to provide any details as to what "constitutes victimization". The term involves the application by the Director of an inherently subjective criteria. Furthermore, there is no established jurisprudence which provides adequate interpretation or guidance as to the meaning of that term.

Instead of using the term "victimization" it would be more appropriate if the MoEE allowed the owner to be entitled to the defence of "due diligence" i.e the owner establishes that he or she exercised all reasonable care to prevent the contamination. This would be more consistent with the established principles of liability for environmental contamination.

For example, CERCLA provides a defence of liability for clean-up of contaminated sites where a person can show that the release of the hazardous substance and the resulting damages were caused solely by an act or omission of a third party, if the person can establish by a preponderance of evidence that (1) due care was exercised with respect to the hazardous substance, taking in consideration the characteristics of the substance in light of all the relevant facts and circumstances and (2) precautions were taken against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. This provision ensures that the owner of the site continues to exercise due diligence in managing the property to avoid foreseeable acts or omissions of third parties.

CELA Recommendation #5: Instead of using the term victimization, it is recommended the MoEE allow a current owner to be entitled to the defence of due diligence. It is recommended that if the MoEE issues a control order to victimized current owners merely for the purpose of fulfilling a procedural requirement i.e recover clean-up costs, it should stipulate this in the control order.

3. Buyer Beware

It is not evident why the MoEE would provide some relief to current owners who were victimized, but not to innocent purchasers. From a public policy standpoint there does not appear to be a sound rationale for proving some relief to the former but none to the latter. The purchaser is essentially in the same position as the current owner and should be liable under an administrative order on the same basis, i.e. where there was influence and/or control or benefit from the contamination. In addition, CELA recommends that the purchaser should not be liable if the purchaser, like the current owner, can establish the defence of due diligence set out in Recommendation #4.

The MoEE should also consider strengthening a vendor's disclosure obligation in a manner

similar to that adopted by a number of states in the U.S. The provisions in these laws makes the transfer of property contingent upon the discovery, clean-up and disclosure of the existence of contamination. In fact, a number of states require complete or near complete cleanup before a transfer can occur. The experience in the US with property transfer laws is that they have been an effective tool in identifying and initiating voluntary clean-up of contaminated lands.

CELA Recommendation #6: A purchaser, like a "victimized current owner" should be entitled to the innocent landowner and due diligence defence. A vendor's disclosure obligations should be strengthened by making the transfer of property contingent on discovery, clean-up and disclosure of existing contamination.

4. Financial Constraints

CELA supports the MoEE's position that financial constraints should not be accepted as a reason for not issuing a control order. However, financial constraints can and should be a factor in assessing the timing and content of an order. CELA notes that section 6.6 of the Compliance Guideline F-2 already makes provisions for these considerations.

CELA Recommendation #7: Financial constraints, in and of itself should not be a basis for not issuing a control order. However, financial constraints should be a factor in assessing the timing and control of the order.

5. Lender or other person who takes "charge and control"

Both CELA and the Canadian Institute of Environmental Law and Policy provided comments to the MoEE on the Standard Agreement with Lenders. Subject to those comments CELA has no further comments on these provisions.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
517 College Street • Suite 401 •Toronto • Ontario • M6G 4A2
Telephone 416/960-2284 • Fax 416/960-9392 • E-Mail cela@web.net