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CONTAMINATED SITES: A LOCAL GOVERNMENT'S ROLE

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I. INTRODUCTION

Contaminated sites exist in every community in British Columbia. The role various levels of government play in the identification, remediation, and prevention of contaminated sites is complicated but important. The legal regime is intended to ensure that appropriate site investigation and any necessary remediation occur before a contaminated site is redeveloped. The regime is also intended to protect human health and the environment and prevent the creation of new contaminated sites. However, redevelopment of a contaminated site in one community may result in contaminated soil being relocated to another community creating a new contaminated site or making redevelopment of another site unlikely. This paper explores the current regime, proposed changes to the regime and a local government's role and powers in this area.

II. IDENTIFICATION AND REMEDIATION

A. Existing Mechanism for Identifying Contaminated Sites

The existing mechanism for identifying contaminated sites under the *Environmental Management Act* ("EMA") and the *Contaminated Sites Regulation* ("Regulation") is the site profile system.

Section 40(1) of the EMA requires a person to provide a site profile to the approving officer if the person is seeking approval for subdivision and to the applicable local government if the person is seeking approval for zoning, a development permit, a development variance permit, a demolition permit, or the removal of soil. A site profile is required if a site has been used for industrial or commercial activities listed in Schedule 2 of the Regulation.[1] In addition, a local government or approving officer may request a person who makes any type of application for zoning, a development permit, a development variance permit, a demolition permit, or the removal of soil to complete certain sections of the site profile form and provide it to the local government or approving officer.

Section 556 of the *Local Government Act* provides that local governments must assess site profiles and provide site profiles to a director of waste management with the Ministry. Section 557 of the LGA prohibits a local government from approving an application for zoning, a

[1] See s. 2 of the Regulation. The activities listed in Schedule 2 include: chemical industries and activities; electrical equipment and activities; metal smelting, processing or finishing industries and activities; mining, milling or related industries and activities; miscellaneous industries, operations or activities; petroleum and natural gas drilling, production, processing, retailing, distribution and storage other than the storage of residential heating fuel in tanks; transportation industries, operations and related activities, waste disposal and recycling operations and activities; and wood, pulp and paper products and related industries and activities.

development permit, a development variance permit, a demolition permit or the removal of soil, and s. 85.1 of the *Land Title Act* prohibits an approving officer from approving a subdivision, unless at least one of the following applicable conditions is satisfied:

- The local government or approving officer has received a site profile and is not required to forward the site profile to a director;
- The local government or approving officer has received a site profile, has forwarded the site profile to a director and has received notice from the director that a site investigation will not be required by the director;
- The local government or approving officer has received a final determination that the site is not a contaminated site;
- The local government or approving officer has received notice from a director that the local government may approve an application because in the opinion of the director the site would not present a significant threat or risk if the application were approved;
- The local government or approving officer has received notice from a director that the director has received and accepted a notice of independent remediation with respect to the site;
- The local government or approving officer has received notice from a director that the director has entered into a voluntary remediation agreement with respect to the site; and
- The local government or approving officer has received a valid and subsisting approval in principle or certificate of compliance with respect to the site.

Local governments and approving officers are protected from liability for reviewing site profiles under s. 61 of the EMA. Furthermore, local governments or approving officers can opt out of the site profile review process by filing written notice with the Minister that the local government or approving officer does not wish to receive site profiles under s. 4(4) of the Regulation.

B. Proposed Changes for Identifying Contaminated Sites

The BC Ministry of Environment intends to update the legal regime for the identification and remediation of contaminated sites. The Ministry's Intentions Paper regarding the Identification of Contaminated Sites published in April 2016[2] indicates that local governments will continue to play an important role in the identification of contaminated sites.

Under the proposed changes, the site profile form will no longer exist in its current state. A modified short form will be used to identify industrial or commercial activities listed in Schedule 2 of the Regulation. Furthermore, there will no longer be a director's decision regarding site investigation or remediation. The triggering requirements will be stated in the Regulation. The Ministry indicates that the intent is to identify sites when they will be redeveloped for a new use.

Of particular significance, local governments will no longer be able to opt out of the contaminated site identification process. Zoning amendment, development permit and development variance permit applications will continue to trigger contaminated site identification. Building permit applications will also trigger contaminated site identification. Subdivision, demolition permit and soil removal permit applications will no longer trigger the site identification process. According to the Intentions Paper, this is because these activities aren't necessarily precursors to the redevelopment of a site.

Also of significance, local government approvals will no longer be put on hold at the zoning, development permit or development variance permit stages. Developers will be free to continue with their developments while concurrently completing site investigation and remediation requirements. Compliance with remediation requirements will be policed by local governments at the final building inspection or occupancy permit stage of redevelopment.

The Intentions Paper indicates that the current immunity provisions in the EMA for the involvement of local governments in the contaminated site identification process will remain.

III. PREVENTION

A. Existing Mechanism for Preventing Contaminated Sites from Soil Relocation

The relocation of contaminated soil is governed, in part, by s. 55 of the EMA. Section 55 prohibits the relocation of contaminated soil unless a person has entered into a contaminated soil relocation agreement. A soil relocation agreement is made between the owner/operator of the source site, the owner/operator of the receiving site and a director of waste management.

[2] The Intentions Paper can be located at http://www2.gov.bc.ca/assets/gov/environment/air-land-water/site-remediation/docs/requests-for-comments/site_id_intentions_paper.pdf

The local government is notified after the soil relocation agreement is signed and a minimum of 96 hours before soil is transported.

Under s. 55(2), the director is required to give consideration to the suitability of the receiving site, the quality of the contaminated soil to be relocated, and the existing and future uses of the receiving site. Of note, the existing and future uses of a site are determined by a local government through its land use bylaw.

A contaminated soil relocation agreement is required when soil contamination exceeds the standards set out in Schedule 7 (among other Schedules) of the Regulation. A person is exempt from the requirement for a soil relocation agreement if, among other things, a landfill facility is authorized by a waste discharge permit under s. 14 of the EMA to receive the contaminated waste soil.

B. Proposed Changes for Prevention of Contaminated Sites

The BC Ministry of Environment intends to update the legal regime for the prevention of contaminated sites from soil relocation. The Ministry's Intention Paper regarding Prevention of Site Contamination From Soil Relocation published in June 2016[3] indicates local governments will continue to have a role to play in the regime although with less Ministry oversight.

Under the proposed process for any source site where a Schedule 2 activity under the Regulation has been present, a soil relocation notification will be triggered when the volume of soil is greater than a specified minimum, or soil has originated from a high risk site as defined in Protocol 12[4] and soil meets the numeric land use standards for the receiving site. The Intentions Paper indicates that the Ministry is also considering an approval process for risk-based soil relocation for soil that does not meet the numeric land use standards for the receiving site.

Under the proposed changes, a soil relocation agreement will no longer be required for soil that meets numeric land use standards for the receiving site. Instead, the proponent will complete a notification and certification form and submit the form to the Ministry for inclusion on the site registry. When the proponent proposes to move soil, notification will be provided to the local government for both the source site and the receiving site. The Intentions Paper indicates that notification will be possibly two weeks or more before relocation to allow the Ministry, the local government and the public time to identify any concerns they may have and request information to ensure all applicable requirements have been met such as local government bylaws. The Intentions Paper further indicates that the notification process is not intended to be a consultation process.

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[3] http://www2.gov.bc.ca/assets/gov/environment/air-land-water/site-remediation/docs/requests-for-comments/2016-06-29_soil_relocation_intentions_paper.pdf

[4] BC Ministry of Environment. Protocol 12 for Contaminated Sites, "Site Risk Classification, Reclassification and Reporting," Version 2.0 March 12, 2013

IV. LOCAL GOVERNMENT POWERS

A. Land Use Power

Local governments have the power under s. 479(1)(c) of the *Local Government Act* to regulate within a zone "the use of land, buildings and other structures". Section 37 of the EMA specifically acknowledges and addresses local government land use jurisdiction. Section 37(6) states, in part:

> (6) Despite the Local Government Act and the Vancouver Charter, if
>
> (a) A bylaw of a municipality purports to zone land for a use…
>
> … that would not allow the land to be used for the purpose allowed under a permit, approval or order issued in respect of the land or an approved waste management plan respecting the land, the Lieutenant Governor in Council may, by order, suspend the operation of the bylaw or contract to the extent the Lieutenant Governor in Council considers necessary to enable the rights given by the permit approval or order to be exercised.

B. Soil Deposit Power

In addition, local governments have the power under s. 327(3) of the LGA and s. 8 of the *Community Charter* to regulate, prohibit and impose requirements in relation to the removal of soil and the deposit of soil or other material. Section 327(4) of the LGA and 9(1) of the *Community Charter* provides that s. 9 (spheres of concurrent authority) of the *Community Charter* applies to a bylaw that: 1) prohibits soil removal; or 2) prohibits the deposit of soil or other material, making reference to quality of the soil or material or to contamination.

Section 9(3) states, in part, that council may not adopt a bylaw to which s. 9 applies unless the bylaw is approved by the minister responsible.

However, of significance s. 9(2) of the *Community Charter* states in part, s. 9 does not apply to:

> (c) A bylaw that is authorized under another Act…
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> … even if the bylaw could have been made under an authority to which this section does apply.

Section 9(2) of the *Community Charter* as well as s. 37(6) of the EMA therefore acknowledge a local government's land use jurisdiction in s. 479 of the LGA in relation to soil deposit activities that constitute land uses.

Section 10 of the *Community Charter* addresses the relationship between local government and provincial laws. Section 10 provides that a provision of a municipal bylaw has no effect if it is inconsistent with a Provincial enactment. A municipal bylaw is not inconsistent with another enactment if a person who complies with the bylaw does not, by this, contravene the other enactment.

C. Jurisdiction

Recently, the BC Court of Appeal considered a local government's land use and soil deposit powers in relation to a contaminated soil landfill in *Cowichan Valley Regional District v. Cobble Hill Holdings et al*. 2016 BCCA 432.

In that case, in 2006, the Ministry of Mines issued a permit to operate a quarry on the property. In 2013, the Ministry of Environment issued a waste discharge permit under s. 14 of the EMA to allow the discharge of "refuse" consisting of contaminated soil and ash from a "landfill facility" and "contaminated soil treatment facility" to be constructed on the property. Of significance, the MOE permit authorizes imported waste soil to be discharged on the property beyond any productive land use standard under the Regulation (above the industrial land use standard) and therefore triggering the requirement for the landfill facility on the property. The Ministry of Mines permit was later amended to authorize the landfill facility.

Of note, the landfill facility is essentially the same design as all modern landfills. The works described in the MOE permit for the landfill facility include:

> Landfill, engineered lined landfill cells, perimeter ditches, erosion and sedimentation control infrastructure, primary and secondary containment detection and inspection sumps and associated cleanout ports, catch basins, groundwater monitoring wells, management works and related appurtenances.

The proponents argued the Province has exclusive jurisdiction over mining, which includes quarries. The activities constitute "mine reclamation" and a local government has no jurisdiction to control such activities, which are integral to mining. The proponents further argued that a local government cannot under its land use power control or regulate soil deposit without ministerial approval under s. 9 of the *Community Charter*.

The CVRD argued that the activities authorized by the MOE permit are not related to mining at all. The proponents are undertaking a completely separate and highly lucrative landfill business on the property under the guise of mine reclamation. The landfill facility is a permanent land use on the property that will remain on the property indefinitely and is not permitted by the CVRD's zoning bylaw.

The BC Supreme Court found that the permanent encapsulation of imported waste soil in engineered cells on the property is a landfill that is properly characterized as a land use under s. 903 (now s. 479) of the LGA which is not permitted on the property under the CVRD's zoning

bylaw. The Court further found (based on the original quarry permit that did not require such a facility for the reclamation of the quarry and the expert evidence) that it was entirely possible for the proponents to reclaim the quarry without carrying on the present activities and that reclamation must restore the land to the potential land uses permitted by the zoning bylaw. The Court concluded that there was no conflict with relevant provincial legislation and that the enactments are capable of existing together harmoniously as an integrated regulatory scheme.

The BC Court of Appeal disagreed and overturned the decision of the BC Supreme Court. The Court found that the Province has exclusive jurisdiction to regulate the operation of a quarry and its site reclamation "provided the reclamation activity is integral to restoring the affected landform".

The Court acknowledged that a landfill is a land use that is subject to local government zoning. However, the Court found that the facility on the property is not a landfill. The Court narrowly construed a landfill to mean "a municipal waste dump where all types of refuse are deposited" but does not include a facility where only soil is deposited. The Court concluded that it was incorrect to characterize the proponents' "reclamation activities" as a "landfill" subject to local government zoning. The Court found that the CVRD cannot regulate or prohibit the deposit of soil (at least with respect to quality) on the proponents' land absent a soil deposit bylaw.

V. CONCLUSION

Local governments have an important role to play in the identification, remediation, and prevention of contaminated sites. Of particular significance is a local government's role in determining the permitted land uses of a site, which will determine the standard that any contaminated soil relocated to a site will have to meet. Unfortunately for local governments, that role has recently been diminished by the BC Court of Appeal resulting in landfills consisting of waste soil being immune from any land use regulation as to their location and compatibility with neighbouring properties.

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