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ONTARIO REGULATION 153/04 AND INTERIM PROCEDURE FOR BROWNFIELDS IN YORK REGION

The Planning and Economic Development Committee recommends the adoption of the recommendations contained in the following report, September 13, 2005, from the Commissioner of Planning and Development Services and the Commissioner of Transportation and Works:

1. RECOMMENDATIONS

It is recommended that:

1. Regional Council endorse the Interim Procedure formulated by Regional staff for dealing with Ontario Regulation 153/04 and contained in *Attachment 1* to this report.
2. Regional staff monitor the review process over the next year to determine the amount of staff time and costs associated with the reviews and prepare a subsequent report for Committee and Council consideration if fees for this service are warranted.
3. The Regional Clerk circulate this report to the local municipalities for their information.

2. PURPOSE

The purpose of this staff report is to inform Committee and Council of Ontario Regulation 153/04 (Records of Site Condition Part XV.1 of the Act) under the *Environmental Protection Act* as filed in June 2004 and to advise Committee and Council of the interim procedure formulated by Regional staff to deal with requests made under this Regulation.

3. BACKGROUND

In 2001, the Province introduced the *Brownfields Statute Law Amendment Act* in order to encourage the revitalization of former industrial and commercial sites, and to address the legal, land use planning and financial barriers to revitalization. The Ontario Ministry of Environment defines brownfields as “lands on which industrial or commercial activity took place in the past and that may need to be cleaned up before they can be redeveloped.”

Regional Council at its meeting of September 6, 2001 endorsed Clause 3 of Report 7 of the Regional Planning and Economic Development Committee. This report reviewed the proposed changes introduced by Bill 56 - *Brownfields Statute Law Amendment Act, 2001* and supported the legislative changes in principle subject to several changes including requesting that the Record of Site Condition be sent to the area/regional municipality at the same time as the Ministry of the Environment. The *Brownfields Statute Law Amendment Act, 2001* was given Royal Assent on November 2, 2001.

On October 1, 2004 the Province enacted Ontario Regulation 153/04 (Record of Site Condition Part XV.1 of the Environmental Protection Act) which requires property owners to provide specific information to the Ministry of Environment regarding the environmental condition of a property before a Record of Site Condition may be submitted and acknowledged by the Ministry. A Record of Site Condition may be filed voluntarily if no change in land use will occur, but is mandatory if the land use will change to a more sensitive use (e.g. commercial or industrial to residential or parkland).

Regulation 153/04 also requires property owners to notify both the local and Regional levels of government when seeking permission to assume that groundwater will not be used as a source of drinking water (also referred to as non-potable) during the selection of appropriate clean-up standards or when a risk assessment will be conducted.

The Region and the area municipality then have a 30-day window in which to object to the request. Failure to object (with appropriate reasons) or failure to respond to the Notice results in an automatic approval of the non-potable standard with no option for the Region (or area municipality) to object later.

The regulatory scheme and amendments to the Act provide property owners with general protection from environmental cleanup orders for historic contamination after they have appropriately remediated or addressed a site and filed a Record of Site Condition.

4. ANALYSIS AND OPTIONS

Development and redevelopment of lands is a key part of the Region's Centres and Corridors Strategy. There are some properties that, because of prior use, could be considered brownfields.

To encourage redevelopment, the Province's brownfields legislation provides general protection from environmental orders for historic contamination to municipalities, creditors and others in Ontario. In addition, Ontario's new Record of Site Condition Regulation (O. Reg. 153/04) details requirements related to site assessment and clean up.

More specifically, O. Reg. 153/04 requires that when a landowner/applicant wishes to use less stringent non-potable remediation standards to a site or, when conducting a risk

assessment, assume that groundwater is not or will not be used as a raw source of drinking water, they must advise the Clerk of both the Region and the local municipality of their intent to do so in writing (the Notice). There is no obligation on the part of the applicant to supply any background testing results with the Notice.

Under O. Reg. 153/04, municipalities may object to a landowner's request to remediate a site to non-potable standards. However, the Province has not set out any rules or guidelines for municipalities to follow in making this decision. To date, municipalities in Ontario have been reviewing these requests on a case by case basis and must rely on their own groundwater data along with peer reviews of any detailed information available on the site. If the information provided is not adequate, municipalities may request that more specific information be provided in order to make a decision.

Remediating a site to drinking water standards would generally mean taking the steps required to deal with site contaminants that could lead to contamination of water resources used for drinking water supplies (referred to as "potable" i.e. safe for human consumption).

Generally speaking, remediation to non-potable standards would be allowed in areas where there is no threat to municipal wellheads and where all homes and businesses within the area are connected to municipal drinking water supplies.

Under the Regulation, the Region and the local municipality have a 30-day window in which to respond to the request.

Failure to object (with appropriate reasons) or failure to respond to the Notice within 30 days results in an automatic approval of the request with no option for the Region or local municipality to object later. There is no penalty under O.Reg. 153/04 if the Region does not respond to a request within the 30-day comment period. However, if the lack of a response contributes to adverse impacts to water quality in an area where groundwater is used or may be used as a source of drinking water, there is the potential for liability to be imposed on the Region and/or the possibility that the Region may have to incur costs to remedy the situation.

The Regulation does not provide proponents with any appeal rights to the municipality's decision, however as with any other decision, made by the Region, the proponents may seek relief through Divisional Court.

While staff are proceeding to develop a more comprehensive policy that address several similar regulations around brownfields, drinking water sources, wellhead protection, and watershed management, it was necessary to develop an interim procedure (*Attachment 1*) to protect the Region's interests in ensuring safe drinking water supplies and to encourage a coordinated approach with our nine local municipalities until a more comprehensive policy is available.

4.1 Overview of Interim Procedure

Regional staff (Water and Wastewater, Legal Services, Property Services, and Planning and Development Services) has reviewed available information regarding the implications of the new regulations and reviewed the approach being followed by other municipalities. In general, in municipalities where groundwater is used for municipal potable water, policies are being established which object to use of the “non-potable standard” under all circumstances.

In York Region, with the three southerly municipalities supplied by a lake-based water system and the majority of northerly municipalities supplied from groundwater systems, Regional staff has formulated an interim procedure which objects to use of non-potable standards for all areas north of the serviced areas of Richmond Hill, Vaughan, and Markham. The simplified reasons for this approach are:

- The northerly area of the Region has numerous private and municipal wellheads.
- Wellhead protection areas cover most of the built-up areas of our communities.
- Zones of contribution for municipal wells extend well beyond wellhead protection areas.
- The majority of groundwater in the subsurface beneath York Region is naturally potable.

In the serviced areas of Richmond Hill, Vaughan, and Markham while it is unlikely that there are remaining wells used for drinking water, Regional staff will review each request on a case by case basis to consider factors such as:

- Proximity to residential dwellings.
- Potential for undocumented wells.
- Understanding of type or nature of contaminants.
- Groundwater flow patterns.

Regional staff has used this Interim Procedure to respond to the nine requests for site remediation received since the approval of the regulation last October. All requests have met the 30-day timeframe. Of the eight requests to remediate to non-potable standards, seven of these have been allowed to proceed based on information submitted by the applicant. One request was refused pending further information.

The full version of the interim procedure is appended to this report as *Attachment 1*.

4.2 Next Steps

Development of the interim procedure allows Regional staff to respond to requests that may be generated in the near future. However, there is a need to undertake more detailed policy development to ensure continued ability to respond. Further steps are:

4.2.1 Detailed Policy Development and ROP Mapping

Regional Legal Services has drawn together staff from the involved Regional Departments and are spearheading further research and policy development.

It is anticipated that the majority of this work can be undertaken as part of on-going groundwater and source water protection work, within the existing staff complement and allocated budgets of the Legal Services, Transportation and Works and Planning and Economic Development Departments.

Mapping of wellhead protection areas, both on and outside of the Oak Ridges Moraine is well underway. Regional Council at its meeting of September 23, 2004 adopted Clause 3 of Report 8, adopting Map 14 to the Regional Official Plan showing Wellhead Protection Areas on the Oak Ridges Moraine and received Figure 1 which showed proposed wellhead protection areas outside the ORM. Work is continuing to review the assumptions made in delineating these off-Moraine areas and to determine the appropriate policies for protection within these zones.

Figure 1 to this report is a Composite Map that shows the locations of the adopted wellhead protection areas on the ORM as well as proposed wellhead protection areas outside of the Oak Ridges Moraine. Map 14 to the Regional Official Plan is currently before the Ministry of Municipal Affairs and Housing for approval as part of the Region's ORMCP conformity exercise.

York Region staff anticipates that further direction regarding requirements for wellhead protection outside of the Moraine will come from the Province in conjunction with proposed Drinking Water Source Protection legislation and is working toward a schedule for planning and implementation in York Region that will ensure compliance with Provincial initiatives. Inclusion of off-moraine wellhead protection areas into the Official Plan will proceed as part of these initiatives.

4.2.2 Fee for Review Service

The costs of reviewing requests by owners or applicants to use less stringent remediation standards or assumptions based on non-potable groundwater conditions has not resulted in a financial impact at this time to the Region. However, as more of these sites are proposed for development these requests have the potential to become a loss leader expense for the Region.

To offset costs, the Region could consider applying a fee to be paid prior to review. Within this option, there are several issues that could impact successful fee collection, however. Chief among them is the very limited 30-day comment period which would be in effect regardless of whether the fee had been received or not. A more significant financial expense would likely be incurred by the Region if there were a challenge to a Regional decision denying the use of less stringent remediation standards or assumptions based on non-potable groundwater conditions, or a review of a risk assessment was required.

Since this is a new review function, it is recommended that Regional staff monitor the process over the next year to determine the amount of staff time and costs associated with the reviews. Further, staff will also canvass other jurisdictions to determine whether they

have a fee collection system in place. If it appears that the Region should be considering fees for this service, a report will be prepared for Finance and Administration Committee recommending an amendment to the Regional Fee By-law for Review and Processing of Requests pertaining to Records of Site Condition.

Committee and Council will be advised of progress of all of these aspects in future reports.

5. FINANCIAL IMPLICATIONS

The development of the Interim Procedure as well as any policy that follows will be done within the existing staff complement and current allocated budget of the Legal Services, Transportation and Works, and Planning and Economic Development Departments. Consideration of imposing a fee will be undertaken as discussed in the previous section.

6. LOCAL MUNICIPAL IMPACT

Staff of York Region and the nine area municipalities recognize the importance of working closely together in responding to requests under O.Reg. 153/04. This includes responding promptly to review requests to use non-potable clean-up standards and also to site specific risk assessments.

In January of 2005, Regional Staff organized a workshop for area municipalities in York and municipalities across the GTA, Hamilton and Waterloo Region to share information on experiences to date. The Ministry of the Environment and environmental lawyers from Willms and Shier were invited to make presentations on O. Reg. 153/04 and its implications for municipalities. This was a useful education component and continued contact with adjacent municipalities in brown field's administration has resulted.

The interim policy has been circulated to area municipal staff involved in brownfields issues for their information and the Region will continue working closely with municipal staff in the formulation of more detailed policies.

7. CONCLUSION

York Region has developed an interim procedure to protect the Region's interests while development of a more comprehensive policy is underway. This interim procedure is intended to ensure that a higher standard of environmental clean up or review is required in areas where groundwater is used as the primary source of drinking water and ensure that responses to requests for remediation to non-potable water standards are appropriately addressed in a coordinated manner within the mandatory 30-day period.

Staff will continue to work with staff of the nine area municipalities to ensure a coordinated approach to addressing notifications under Ontario Regulation 153/04 that allow the Region and local municipalities to respond appropriately to requests for remediation to non-potable water standards within the mandatory 30 day response period. Further work to formulate a more comprehensive Regional policy on site remediation will be required and will be developed with our municipal partners.

Since the review of Records of Site condition is a new function, it is recommended that Regional staff monitor the procedure over the next year to determine the amount of staff time and costs associated with the reviews. If it appears that collection of a fee for this service is warranted, a report will be prepared for consideration of Finance and Administration Committee and Council recommending an amendment to the Regional Fee By-law for Review and Processing of Requests pertaining to Records of Site Condition.

The Senior Management Group has reviewed this report.

(The attachments referred to in this clause are included with this report.)