

ITEM	09
MANAGER'S REPORT #	08
COUNCIL MEETING	96/03/11

TO: CITY MANAGER 1995 MARCH 06

FROM: CHIEF ENVIRONMENTAL HEALTH OFFICER

SUBJECT: B.C. WASTE MANAGEMENT ACT 1993 (BILL 26)  
CONTAMINATED SITES REGULATION (DRAFT 3)

PURPOSE: A) TO INFORM COUNCIL OF STAFF CONCERNS REGARDING  
BILL 26 AND ITS ASSOCIATED CONTAMINATED SITES  
REGULATION (DRAFT 3) AND RECOMMEND ACTIONS IN  
ADDRESSING THEM;

B) TO RESPOND TO CORRESPONDENCE FROM THE CITY OF  
NEW WESTMINSTER REGARDING BILL 26 AND ITS  
ASSOCIATED CONTAMINATED SITES REGULATION (DRAFT 3).

**RECOMMENDATIONS:**

1. **THAT** Council forward a letter to the Honourable Moe Sihota, Minister of Environment, Lands, and Parks (BCMOELP), recommending that adoption of the Contaminated Sites Regulation (Draft 3) be deferred until:
  - a) section 20.94 of Bill 26 is amended to incorporate the recommendations contained in the Canadian Bar Association's report to BCMOELP and the UBCM;
  - b) there is a satisfactory resolution of other outstanding City concerns regarding the legal implications noted in this report;
  - c) the proposed ecological standards are reviewed by an independent panel with members acceptable to both the Ministry and the Municipalities, and that any proposed revisions by the panel be forwarded to the stakeholders; and

d) the soil numbers are included as guidelines rather than regulatory requirements in the proposed Regulation.

2. **THAT** a copy of this report be forwarded to:

a) City Clerk, City of New Westminster, B.C., V3L 1H9.

**REPORT**

**1.0 INTRODUCTION:**

At the 1996 February 19 Council Meeting, Council received correspondence from the City of New Westminster requesting support of their resolution on Draft 3 of the Contaminated Sites Regulation and referred the same to staff for a report prior to considering a resolution.

At the 1996 March 04 Council Meeting, Council received correspondence from Mr. Don Fast, Executive Director, Environmental Protection Department, BCMOELP, on the latest status of the Contaminated Sites Regulation (Draft 3) and referred the same to the Environment and Waste Management Committee for their consideration.

The following report outlines the benefits of the proposed legislation, outstanding staff concerns and recommends actions in addressing these concerns.

**2.0 B.C. WASTE MANAGEMENT ACT 1993 (BILL 26) AND ITS ASSOCIATED CONTAMINATED SITES REGULATION (DRAFT 3):**

**2.1 Purpose of Bill 26**

Contaminated sites in British Columbia have been broadly controlled under the Waste Management Act. On 1993 June 15, this statute was amended by Bill 26, the Waste Management Amendment Act, to deal specifically and more comprehensively with contaminated sites.

The provisions in Bill 26 will come into force by regulation which is expected to occur at the same time when the proposed Contaminated Sites Regulation is brought into force.

The BCMOELP is expected to have the final draft of the Regulation ready for submission to the Cabinet for their consideration by spring of 1996.

2.2 Benefits of Bill 26

The existing Waste Management Act is unclear about municipal responsibilities as they relate to administration of contaminated sites in B.C. As such, it potentially exposes local governments to liability when they approve zoning or development of contaminated sites.

Bill 26, in conjunction with the proposed Contaminated Sites Regulation, is therefore intended to provide a comprehensive administrative, technical and legal framework for the:

- identification of contaminated sites;
- determination of responsibility for remediation and the extent of remediation; and
- compliance with remediation requirements.

Bill 26 also provides a broader municipal immunity than is available under existing legislation.

**3.0 OUTSTANDING STAFF CONCERNS REGARDING THE PROPOSED REGULATION:**

After reviewing Draft 3 of the Contaminated Sites Regulation and meeting with an official of the BCMOELP to better understand the intended use of the proposed Regulation, staff from Engineering, Planning & Building, Legal, Parks and Health Departments still have reservations in supporting the implementation of the proposed Regulation. Staff concerns primarily relate to the proposed Regulation's legal implications to the City and the level of conservatism of the proposed ecological standards.

3.1 Legal implications to the City

3.1.1 Liability Protection

Section 20.94 of Bill 26 is intended to provide immunity for local governments in carrying out contaminated sites administrative functions under the Act.

However, in response to some concerns raised about completeness of the immunity provisions during consultation on Draft #2 of the Contaminated Sites Regulation, the Union of British Columbia Municipalities (UBCM) and the BCMOELP developed eight key questions requiring clarification. It was agreed by both parties that these questions would be submitted to an independent legal expert for advice.

The Canadian Bar Association (B.C. Chapter) agreed to arrange for a panel of independent experts from their municipal and environmental law sections to advise both the UBCM and BCMOELP on these issues.

The key conclusions of the panel were as follows:

- that the immunity provisions in Bill 26 are better than the status quo;
- section 20.94 be expanded to provide local government corporate and personal immunity not only in the Waste Management Act, but also to the Municipal Act, the Land Title Act and the Vancouver Charter;
- that immunity be provided to local governments when giving advice during their administration of contaminated sites under the Waste Management Act;
- not all approving officers are local government employees. As such, it was suggested that the approving officers be added to the list of those protected from liability in the bill;
- immunity be provided to local governments which rely on the BCMOELP determination that a site is contaminated and that this be included with the certificates and approvals from BCMOELP;
- clarification was needed regarding the relevance of the Freedom of Information and Protection of Privacy Act to the disclosure of the site profiles;
- the immunity provisions in Bill 26 be revised to incorporate the above findings.

While the BCMOELP generally agrees with the observations and recommendations of the panel, they have forwarded the suggestions to the B.C. Ministry of Attorney General for review.

### 3.1.2 City As A Regulator

One of the critical issues which the City will need to address is the development of a process to administer the site profiles. In addition, the response timelines from the BCMOELP on site profiles and related impacts on the development application approval process need to be clearly addressed.

3.1.3 City As An Owner

As an owner of the land, the City will have to fulfill the site profile requirements on its own rezoning, subdivision and demolition and building permit applications. In the case of a rezoning application, however, the site profile must in all cases be forwarded to the BCMOELP Manager.

Rezoning as a part of general rezoning associated with the implementation of the Official Community Plan or where the City applies to rezone land which it does not own it does not have to file a site profile.

The legislation provides certain exemptions from responsibility for remediation, the most important of which would appear to be the "innocent purchaser" exemption. Under this exemption, an owner who acquires a contaminated site without knowledge or reason to know or suspect that the site was contaminated, undertook all appropriate inquiries as to previous ownership and use consistent with good commercial or customary practice at that time, and did not cause or contribute to the contamination, is not responsible for remediation.

It is noted that the standard of site investigation is that which was customary practice at the time of acquisition. Given that site contamination is a relatively recent issue, it is hoped that little or no site investigation will be accepted as the standard for older acquisitions. However, the regulations specify that consideration shall be given to any specialized knowledge or experience of the owner respecting contamination. As the City has in its possession information relating to past land usage and in its employment environmental health professionals, it may be that the City will be held to a fairly high standard in this regard.

Another exemption of particular importance to the City is the "involuntary acquisition" by a government body of a contaminated site. This would apply to properties acquired on tax sale where no private bids were received. It may be that on certain badly contaminated sites the remediation costs would exceed the value of the site and the owners would simply abandon the site with the City ultimately acquiring it on a tax sale.

Further exemptions apply to public highways and to easements and right-of-ways provided that the contamination was not placed or deposited below the highway by the government body or the use of the easement or the right-of-way did not cause contamination.

It is possible to have, and the legislation contemplates situations where more than one person is responsible for remediation of a site. The general rule under the legislation is that the responsible persons are jointly or severally liable for the costs of remediating the site.

However, the BCMOELP Manager has the authority to determine that a responsible person is a "minor contributor" to the contamination and limit the amount of the remediation cost for which that person is responsible.

This part of the legislation may have serious implications for the City in respect of current and old City dump sites. It is to be noted that liability for remediation applies even though the land was contaminated under a permit or waste management plan that authorized the activities that caused the contamination.

This part of the legislation may also have implications for land acquired by the City that was contaminated by earlier industrial or commercial use and land sold by the City in past that was at that time contaminated.

#### 3.1.4 City As Vendor/Purchaser

The legislation requires a vendor of land who knows or reasonably should know that the lands were used for an industrial or commercial purpose or for a purpose or activity prescribed in the regulations to provide a site profile to the purchaser.

The site profile must be submitted to the purchaser not later than 30 days before the transfer or, where closing is to occur in less than 30 days before the agreement is signed, and to the BCMOELP Manager within 15 days after it is provided to the purchaser. The BCMOELP Manager has 15 days after receipt of the site profile (which he can extend by notice) within which to order a site investigation.

It should be noted that this provision also applies to a lease of land for a term equal to or exceeding 30 years.

This provision will impact the City's current land acquisition and sales procedures. The following matters should be considered:

- as vendor (or lessor for longer than 30 years) the City will have to conduct an historical land use review and, if that indicates a previous industrial, commercial or other prescribed use, provide the purchaser (or lessee) and the BCMOELP with a site profile;
- if the BCMOELP Manager orders the City, as vendor, to provide a site investigation report and, potentially, to carry out remediation, the sale itself would be jeopardized;
- as purchaser, the City should carry out its own investigations including, where deemed necessary, site testing prior to acquisition (or require the vendor to provide the same). It is doubtful that mere reliance on a site profile provided by the vendor would qualify the City for the "innocent purchaser" exemption;
- where the City, as purchaser, identifies the possibility of a previous industrial, commercial or other prescribed use it should be made a condition of sale that the vendor provide a site profile identifying this use and carry out any site investigation and remediation required by the BCMOELP Manager before the sale is completed. The City should also seek a covenant from the vendor to be responsible for all remediation costs and to identify the City in that regard.

One matter which is not clear is whether the City tax collector, when conducting tax sales, is a "vendor" within the meaning of the legislation. Staff do not feel that the legislation was intended to have this effect but it would be helpful if this was clarified in the legislation.

### 3.1.5 City As A Tax Collector

Bill 26 remains silent on the effect it will have on local government's tax base. There is nothing that protects against the downward reassessment of a site based on a decrease in value as a result of the presence of contamination.

### 3.2 Proposed Ecological Standards

The proposed ecological standards were developed by the Contaminated Sites Soil Task Group (CSSTG) with members from the Health Officers Council, Chief Environmental Health Officers Council and the ministries of Environment and Health using criteria developed by national experts for the Canadian Council of Ministers of the Environment (CCME). These standards were subsequently reviewed by 40 experts from various disciplines at a 2 day workshop.

There are disagreements in the scientific community on the policy decisions and the methodology employed by the CSSTG in developing these ecological standards which included the following areas: bioavailability of contaminants, solubility of metals, dilution of contaminants, and subsurface modeling of metals and organics in the development of groundwater protection standards.

The Health Officers Council (HOC) and the Chief Environmental Health Officers Council (CEHOC) have reviewed Draft 3 of the Contaminated Sites Regulation with respect to its implication for human and environmental health, and have forwarded their comments to the BCMOELP.

Key comments of the HOC and the CEHOC are noted respectively as follows:

"There are large uncertainties associated with the soil numbers. There will be a need to constantly update and revise the numbers. Rigid application of any set of numbers could lead to more harm than good being done in some cases. While acknowledging the legislative reality that makes guideline soil concentrations difficult to implement in the province, HOC continues to prefer that these soil numbers remain outside the regulation as guidelines. The difficulties associated with placing numbers of this type in Regulation appears to be recognized in other jurisdictions. For example, Section 55 of the proposed Manitoba Contaminated Sites remediation Act appears to call for soil guidelines of the type we would recommend. The guidelines contemplated by the Manitoba legislation would not be binding unless it was incorporated into an order under the Act. We feel this approach has considerable merit and warrants further consideration."



"Finally, we continue to have concerns related to the stringency of the ecological standards, which in many cases would appear to drive the remediation, irrespective of the lack of public health risk. We urge the BCMOELP to reconsider how the ecological standards are arrived at and ensure that they in fact reflect a realistic estimate of ecological risk, accounting for pathways, exposure and uptake."

Staff therefore recommend that the proposed ecological standards be reviewed by an independent panel with members acceptable to both the Ministry and the Municipalities, and that any proposed revision by the panel be forwarded to the stakeholders.

**4.0 CONCLUSION:**

BCMOELP has taken an important positive step with the introduction of Bill 26 to deal specifically and more comprehensively with contaminated sites in B.C. In conjunction with the proposed Contaminated Sites Regulation, Bill 26 is to provide a comprehensive administrative, technical and legal framework for the identification of contaminated sites, determination of responsibility for remediation and the extent of the remediation and compliance with remediation requirements. It also provides a broader immunity to local governments than is available under existing legislation.

However, staff still have reservations in supporting the proposed Regulation because of its implications to the City in the areas of liability protection and to the City as a regulator, an owner, a vendor, a purchaser and a tax collector. In addition, there is an apparent lack of credibility in the proposed ecological standards in part due to the complex policy decisions and methodology used in developing these standards and also because of the lack of consensus in the scientific community with respect to some of the criteria used such as the bioavailability of contaminants, solubility of metals and dilution of contaminants. Finally, there is still considerable uncertainty associated with all the soil criteria in all the Schedules which means the need to constantly validate, update and revise these soil standards whenever new scientific information, epidemiological data, or analytical methodologies become available. As such, it would be more applicable to include these soil numbers as guidelines rather than regulatory requirements in the proposed Regulation.

Before finalizing the proposed Contaminated Sites Regulation, the BCMOELP should be recommended to review and address the City's outstanding concerns as well as adopting the recommendations contained in this report.



T. Shum  
CHIEF ENVIRONMENTAL HEALTH OFFICER

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- cc: ( ) Director Planning & Building
- ( ) Director Engineering
- ( ) Director Recreational & Cultural Services
- ( ) Director Finance
- ( ) Medical Health Officer
- ( ) City Solicitor
- ( ) Chief Building Inspector