



Legal interests in the pipeline

You are in-house counsel for a petroleum processing company with some properties to sell and some environmental issues to address. How do you guide your company safely through these matters?

- 1** Your company is selling a processing facility that it no longer requires. The facility is known to be contaminated so the agreement of purchase and sale provides that the purchaser assumes all liability for the contamination and indemnifies the vendor for any claims that may arise from the contamination and covenants to clean up the contamination. The purchase price is discounted significantly because of the contamination. Is the company protected from future orders by the Ministry of the Environment?
a) Yes
b) No
- 2** A purchaser offers to purchase one of your industrial properties, which is contaminated, and to convert it to another industrial use. The purchaser inserts as a condition of closing that the vendor provide a record of site condition asserting that the vendor is obligated to provide one. You, as the vendor, refuse, taking the position that an RSC is not required. Who is correct?
a) The purchaser
b) The vendor
- 3** The property is sold relying on the purchaser's assumption of liability and the indemnity, but the purchaser goes bankrupt two years after the closing without cleaning up the contamination. An order to clean up the property is issued to the vendor by a director of the Ministry of the Environment. As in-house counsel, you are also a director and officer of the vendor company. Do you have any personal responsibility for ensuring that the order is complied with?
a) Yes
b) No
- 4** A process engineer calls you and tells you he has come up with a modification to a process that will not only save the company money but will reduce air emissions. He explains that the company has a Certificate of Approval that was issued 10 years ago for the process and there have been no amendments to the Certificate of Approval. He proposes to go ahead with the modification without obtaining from the Ministry of the Environment an amendment to the approval or a new approval since the modification will reduce emissions. The process engineer is correct, no approval for the modification is necessary.
True or False?
- 5** Your company has an environmental management system in place, designed and implemented by its management consultants. The company has a spill, arising from the failure of one of the components of a wastewater treatment system for which the company holds an environmental compliance approval. The MOE imposes an administrative monetary penalty. The company seeks a reduction in the size of the AMP because, at the time of the spill, it had an EMS in place. Does the company qualify for such a reduction?
a) Yes
b) No
- 6** After the spill, reports to senior management describe the circumstances causing the spill, the measures taken to clean it up, and the measures taken to prevent a recurrence. Has the company done enough?
a) Yes
b) No



1 NO. Under the Ontario Environmental Protection Act, a director of the Ministry of the Environment has the power to issue orders to former owners of the property. Consequently, if the contamination migrates off-site or otherwise poses a health or safety risk, the director can, and usually does, issue orders to the former owners, even though the current owner has assumed all liability. The only recourse for the vendor is to seek to recover any costs incurred in complying with the order under the indemnity. If the purchaser has not cleaned up the property, chances are there will be no recovery under the indemnity.

2 (B) The vendor. The question highlights the dilemma posed by RSCs for many parties to real estate transactions. The Ontario Environmental Protection Act only requires an RSC in limited circumstances, specifically circumstances involving certain categories of change of use. This transaction is not one of those. But purchasers, and lending institutions, increasingly require an RSC as a form of insurance policy. RSCs are expensive and time-consuming to obtain, with the result that many vendors are reluctant to provide them unless legally required to do so. As a practical matter, however, in order to complete a transaction, vendors may be required to provide an RSC even if the EPA does not require one.

3 YES. Under the Environmental Protection Act, every officer and director of a corporation has a duty to take all reasonable care to prevent the corporation from contravening an order under the act. Failure to carry out that duty is an offence. Consequently, if the company does not comply with the cleanup order, officers and directors can be personally prosecuted. The director can also issue the cleanup order to the officers and directors of the company.

4 FALSE. Under the Environmental Protection Act, no plant, structure, equipment, apparatus, mechanism, or thing that may discharge a contaminant into the air can be altered or replaced without an approval. This prohibition applies even if the proposed modification will reduce emissions. Often, current approvals will allow some flexibility, but a certificate of approval issued 10 years ago is highly unlikely to permit such changes

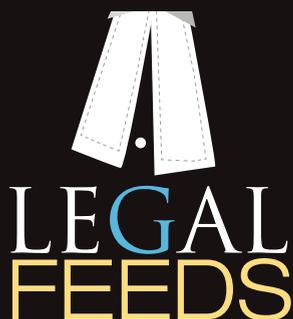
without obtaining an amendment or a new environmental compliance approval.

5 NO. O. Reg. 222/07 provides that the MOE may grant a reduction in one component of an AMP if, at the time of the contravention, there was an EMS in place. However, that regulation requires that the EMS meet the standard specified in the regulation, and that the EMS has been audited, within the preceding three years, by an independent auditor who meets the standards specified in the regulation.

6 NO. The report should have been provided to the company's directors as well. In the absence of a report, the directors may be exposed to a charge, under s. 194 of the EPA, for breach of their duty to take all reasonable care to prevent the company from discharging or causing or permitting the discharge of a contaminant in breach of the environmental compliance approval.

YOUR RANKING?

- **One or less correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three or four correct:** *very well done, but not perfect*
- **Five correct:** *impressive*
- **Six correct:** *excellent*



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