MARC McAREE'S SPEECH TO
THE CANADIAN ENVIRONMENTAL AUDITING ASSOCIATION
October 9, 2003 - Ottawa

Thank you very much, John. Welcome everybody. Thank you also, Todd Latham, for your invitation. It's an absolute pleasure to be back to my home town, Ottawa, so here we go.

I'm going to talk about environmental site assessments. In particular, I will focus on Phase I environmental site assessments. I think it's instructive and helpful for you folks to hear something about Phase II environmental site assessment and a little bit about remediation. I say that because the Phase I assessments that some or many of you folks are undertaking lay the foundation for the work that follows.

One of the messages that I want to convey to you today is about your own liability out in the field and how it is that you may face claims. I'm an Ontario lawyer and so the law that I am going to talk about today is Ontario law.

When I am speaking specifically about environment site assessments I'm going to deal first with those that are intended to determine the likelihood of an environmental risk, or an environmental concern. And second, I'm going to talk about environment site assessments that are intended to determine the location of, if there is any, contamination, and the breadth and depth of that contamination.

I want to leave you today with three themes.

My first theme, and if you want to pick up your pen, maybe this is the time to do it. My first theme is that environmental site assessments are being conducted for a variety of clients and for a variety of reasons. How many of you folks have experience in Phase I environmental site assessment reporting? Could we just have a show of hands – that would be instructive – great – excellent! You've probably heard your client ask you questions along the way like "Am I going to be able to sell my property? Am I going to be able to finance my property or re-finance my

property? Will I be able to get insurance? Can I lease it and can I develop it?" And as part of this first theme for my talk this afternoon, I want you to think about the market forces that are driving the environmental work that you folks are doing. It's the market forces, certainly in my practice, that I see driving my ability to act on behalf of contaminated land owners or often those that live next door.

My second theme is that there is a changing landscape in Ontario currently. Derek has mentioned the *Brownfields Statute Amendment Act* that amends the *Environmental Protection Act* and other statutes in this province, and that was passed in November of 2001. It's not yet in force and effect but for two exceptions relating to secured creditors and municipalities. For the most part, we are still waiting for regulations from the Ministry two years later. The regulations will give some teeth to the Brownfields amendments, some of which I am going to talk about.

My third theme relates to the fact that those people that pay your accounts may not be the only individuals who may sue you. In other words, your risk and your exposure to liability arises when you are doing Phase I environmental site assessments from a variety of parties. So, how do you safeguard yourself against liability? Three points. First, quality control. Second, contractual protections. Third, make sure that you have appropriate insurance coverage and insurance limits.

Who can give me a war story? Who can tell me a story about what triggered a particular client of yours to call you to do a Phase I environmental site assessment? Anybody work in the context of a transaction?

Refinancing. Refinancing, absolutely, absolutely, let's talk about transactions for a minute. What do we see out there in the real world? We see purchasers these days that are smarter than ever. And those purchasers that aren't as smart as maybe they ought to be on environmental issues have banks that are extremely sophisticated these days. And if it's not the purchaser compelling the Phase I environmental site assessment, it may well be the bank. So certainly in the context of transactions, we see transactions as a trigger to Phase I environmental site assessments.

Environmental management systems - due diligence systems - some of you may work at corporations doing auditing and from time to time, as part of an inventory exercise, the corporation will say "you know what, we have 400 facilities across this country and we are not sure, but we should probably start to peel away some of the layers of the onion and think about environmental risks at those properties". Good corporate citizens are doing this these days, certainly in my experience, because they don't want to lose the goodwill that they have built up over the years in their communities. One environment concern can move them back many decades in terms of community resolve and community consciousness.

Re-development. Some of you may have prepared a Phase I environmental site assessment in the context of a re-development and what we are seeing these days in some of the more sophisticated and larger municipalities, is the requirement for a Record of Site Condition to be filed with the municipality as part of the planning application process for example. Maybe your client is looking for a zoning by-law amendment or official plan amendment so they can re-develop a property. The City says "I want to know, and I want your environmental consultants to put their signature on the bottom line to advise us, the City, that your property is fine and that there are no environmental concerns".

Under the Brownfields legislation in Ontario, where there is to be a change of land use from, for example, an industrial or commercial use to a residential use there will be a requirement that a Record of Site Condition be provided to the municipality.

In the event the Chief Building Official does not receive a record of site condition, the Chief Building Official will be precluded in law from issuing the building permit. So, the Province is stepping up the requirements.

Regulatory requirements. Some of you may have been involved in a situation where the Ministry of the Environment or your local regulator, or provincial regulator, has stepped in and said we are mandating you, we are requiring you or ordering you to do the investigation, and we want you to study and report the findings to the Ministry. That's a section 18 *Environmental*

Protection Act order in Ontario. And, once the study is complete and the report is done, a subsequent order may come down the line that says "clean it up". So, we see the government getting involved and there are other regulators, not just the provincial ministry. Ontario's Technical Standards and Safety Authority, for example, are interested in underground storage tanks and how they are managed. The TSSA can issue orders as well which, in turn, trigger environmental site assessments.

So what about lawsuits. This is one of my favourite topics. Somebody comes to me and says "but Marc, that oil tank across the street just discharged 1,000 litres of heating oil". When I think about the market forces that I referred to a few minutes ago I think to myself, well if there is migration of heating oil onto my client's property next door, my client will not be able to sell, or maybe if they do sell it will be at a huge discount. My client will be unlikely to get financing or re-financing. Insurance companies these days are getting smarter and they are starting to ask questions. Mortgage and insurance contracts these days may have a "material change" in the environmental condition of the property clause that says that "thou shall report such material change". So, lawsuits trigger site assessments. I'm working on a matter now, a brand new matter that has come to me from a dry cleaner. This gentleman has been in business for 40 years. He had a spill and discharge in 1994. The insurance company at the time cleaned up the interior of the building. Do you think anybody decided to take a look in the subsurface, absolutely not. So I said let's set up a meeting with the client's own business insurer to present the facts in order to get the insurer on board. One piece of information that I'm taking to that insurer is the proposed work plan for the next phase of investigation.

So these are some of the kinds of forces that can trigger an ESA, and there are lots of them.

The next question I suggest is "so how do we actually undertake the Phase I environmental site assessment?" Well many of you folks in the audience know a whole lot more about this than I ever will. But, let me throw out a few ideas for you and in particular let me draw your attention to a couple of documents that will assist in this. I will also identify some of the authorities that have an interest in making sure that environmental site assessments are done properly. In particular, the Ontario Ministry of the Environment, in its new draft regulation on Phase I

environmental site assessments and Phase II environmental site assessments, is starting to get into the game. They are starting to regulate for the first time in this province how site assessments are to be undertaken. In addition, in terms of the actual clean-up work, there is a Ministry guideline document called *The Guideline for Use at Contaminated Sites in Ontario* that you can download from the Ministry of the Environment's website that provides background about how clean-ups are to be done. It's written in English as opposed to legalese and it's quite comprehendible. There are other organizations that have published on the "how do we do this" and one of the items in your green bags from this conference is a CHMC publication that outlines, at least in general terms, how to go about undertaking a site assessment. Other organizations that have taken an interest include Canada Mortgage and Housing Corporation, Canadian Council of Ministers of the Environment, Consulting Engineers of Ontario, National Groundwater Association, Ontario Ministry of Housing and the American Society for Testing and Materials.

The Brownfields legislation that I have mentioned defines Phase I environmental site assessment and Phase II environmental site assessment, keeping in mind please that it is a draft regulation. It's not in force and effect but we're hoping, particularly in light of the election that the government will implement the regulation into law. A Record of Site Condition must be certified by a "qualified person". The draft regulation also describes what must be contained in a Record of Site Condition which may be posted one day to an environmental site registry in this province. That document must set out that the required site assessments were prepared, that they were conducted in accordance with the regulation, again we are waiting for that regulation, and that the property meets all applicable Ministry standards for its intended property use. It might meet the industrial/commercial standard or the residential/parkland standard. In a nutshell, the Record of Site Condition sets out the nature of the clean-up work that has been completed. And I think it is imperative that your clients understand that at the end of the day, at the end of the Phase I and maybe Phase II and maybe remediation, they may need this Record of Site Condition. Your clients need to think about it up front. So please download the draft regulation from the internet, the E-Laws website, and acquaint yourself with the Record of Site Condition.

A Phase I and Phase II environmental site assessment will only be able to be undertaken by "qualified persons". There is set out in the draft regulation reference to the CSA Standard and also in the draft regulation, there are modifications to the strict application of the CSA Standard. So it's not good enough to read the Regulation and not read the CSA Standard. It's not good enough to read the CSA Standard and not read the Regulation. They must be read in concert. This applies for both Phase I and Phase II ESAs.

So who is a "qualified person"? Well, all persons under the draft regulation fall into three categories: a professional engineer under the *Professional Engineers Act* in Ontario; a professional geoscientist under the *Professional Geoscientists Act, 2000* and a certified engineer and technician and technologist under the *Ontario Association of Certified Engineering, Technicians and Technologists Act, 1998*. And according to the draft regulation, if you are not one of those individuals you are not, or will not be (once that Regulation is promulgated into law) a "qualified person" for the purpose of undertaking Phase I and Phase II environmental site assessments in the province.

So let me just outline for you what a Phase I environmental site assessment might involve. I'm giving you this preamble about many of the features of the Brownfields statute but I want to move on to some specifics on what are Phase I ESAs. Then I really want to talk to you about reliance letters. Then I want to talk to you about the CH2M case that is germaine to the issue of assessor liability.

Again, Phase I environmental site assessments - we are looking at the likelihood of contamination at a particular property. I might add that not only are we looking these days at what might cause subsurface contamination, but more and more site assessors are looking at buildings. We have a new issue, it's very new, it called zonolite or vermiculite and it is a form of insulation that has been used in attics and walls for years and years. There are estimates of some many thousands of homes in this country that have this particular product in an insulation capacity. The problem is that zonolite or vermiculite has an asbestos component to it. Also, think about mould, friable asbestos, and asbestos in floor tiles and on piping, and the like. But a Phase I is non-intrusive. It certainly involves a site visit. You are looking for baseline

conditions. It might involve historical title searches, and a review of aerial photographs and fire insurance plans. These are old plans that insurers would have sent their risk management folks out to draw up once upon a time and there is often fabulous information in fire insurance plans dating back decades. Often we are finding that fire risks and insurance risks that are detailed on these plans relate to storage tanks, storage of fuels, storage of chemicals and the like. Property use records. We may be requesting information from the Ministry of the Environment, we are going to review any previous Phase I environmental site assessment report that might exist. We are going to review geotechnical reports. We may interview whomever we can interview about the former use and even the current use of a particular property.

Out in the lobby is EcoLog Eris and I recommend that you pick up their literature. Todd Latham is here and Todd is with EcoLog Eris. It's a starting point. In fairness EcoLog is not necessarily always the answer, but it gives you very good historical data, very often, on properties at a reasonable cost.

Phase I environmental site assessments are a snapshot in time. So they are not the be all and end all. It's not always possible to get the best information. Sometimes tenants won't allow the assessors in. Sometimes there is snow on the ground and you can't see the underground storage tank fill-pipe. But, at the end of the day, the Phase I environmental site assessment is intended not to confirm whether there is contamination but again it merely sets out the possibility of there being contamination. Often Phase I environmental site assessors are evaluating probabilities of environmental risk.

Phase II environmental site assessments go the next step. At this point we are into an intrusive investigation. We may be doing electromagnetic scans. We may be drilling boreholes. We may be digging test pits. The Phase II is often done as a consequence of information that comes out of the Phase I. So when you are doing a Phase I environmental site assessment, you are establishing the foundation for the next stage of work and it is critical that you get it right.

Assessors can invite legal trouble when they speculate. I've just been defending a $32M lawsuit. I only act for the good guy, by the way, just in case you were wondering! When we first did our

initial Phase II drilling we thought that the solvent was coming from the neighbour's property. We had minimal information. When we got into it, we discovered that the probability was very high that the contamination was coming from our own land. So, we must be very careful not to speculate, particularly when we have sketchy information. An assessor that gives legal advice can land a client in serious trouble and we've come across this many, many times. Or, the assessor may simply fail to identify the issue. What about the underground storage tank that is missed? And it's a problem and that's where your liability can arise very, very quickly.

Here's an excerpt from an environmental consulting firm's newsletter. It say's that "the discovery of a soil or groundwater guideline exceedence need only be reported to the Ministry of the Environment if the exceedence occurs at, or near, property boundaries and the contamination has the potential to migrate off the property." I'd love to get into a discussion of this. Depending upon the circumstances folks that's wrong, it's dead wrong, on the legal analysis but it was published by a reputable environmental consulting firm. Be very careful not to step outside of the four corners of your expertise. I am very careful not to step outside of the four corners of my expertise.

So when does an assessor have a legal duty to report contamination to the Ministry? Two examples. Under the *Professional Engineers Act* and under the *Professional Geoscientist Act, 2000*, there is potentially, in every Phase I something that may trigger a reporting obligation. Professional engineers must report where the situation may endanger the safety or the welfare of the public. That's it folks, so if you are an engineer, that's the extent of your legal reporting obligation. Geoscientists shall at all times act with due regard for public needs. Well, that may, depending on the circumstances, relate to a reporting requirement. But just because we find contamination on a property doesn't mean we go to the Ministry, in fact, most times, depending on the circumstances, depending on the legal analysis, we try to keep the regulator out of it as best we can. When the client must report, we tell the client that you've got to go with the best information in hand and take along a strategy.

<u>Report Reliances</u> - I want to talk briefly about reliance. There are two cases in Canada on this issue. One case is from the Nova Scotia Court of Appeal and the other case is from the Ontario

Court of Appeal. They both stand for this proposition – A consultant cannot be found liable where the party that sues them is not the party upon which the consultant indicated could rely on the report. Let me say that differently with an example. If you prepare a report - Phase I Environmental Site Assessment report - and you address it to me, Marc McAree, Willms & Shier Environmental Lawyers, I get to rely on it and if you are wrong I can sue you. If I, in turn, give your report to a third party, and the third party relies on that report to their detriment, the third party cannot successfully sue you for damages. So be very careful, be very careful in addressing and directing your reports. Know who your client is, identify that client and limit your liability by scoping to whom the report is addressed. Now, from time to time you will be asked for a reliance letter. So, the party that I have just given your report to says "you know, I want to rely on this report and is there any way in which we can make a deal such that I too can rely on the report". Some consultants give reliance letters; some consultants don't. The consultants that give them ask questions and they want to understand their legal exposure in advance. So I will leave you to think about this.

Contractual Protection - scope your retainer in writing. Figure out what the job is that you are going to do, scope it to what you are going to do, make sure that whatever you say that you are going to do is within the four corners of your expertise and scoped retainer. If there are things that the client has asked you to do that you are not prepared to do, then you must put that in writing as well. Get rights of access in writing and limit your liability as best you can in your report.

Insurance - You need errors and omissions insurance. You need to absolutely make sure that you have coverage for the work that you are doing. Don't assume. I have a number of dry cleaning clients that thought when they bought the "Fabric Care" insurance policy that they were going to have environmental protection and let me tell you, it's not always the case. Know what your coverage is, review your policy and understand your limits. The amount of insurance coverage you need should be evaluated in the context of the nature of the projects that you are working on.

Todd, I just have to tell this story. Alright, here it is – *Ministry of Transportation of Ontario v. CH2M*. One year ago this case goes to trial. Let me give you some facts. The Ministry of Transportation is developing a highway exchange. There is a former gas station site. The Ministry wants the property. The Ministry approaches the property owner. They enter into an agreement of purchase and sale. The agreement of purchase and sale is conditional on an environmental investigation. The Ministry puts out to tender that investigation. CH2M bids. They are the lowest bidder. CH2M goes on the property and they sort of, kind of, maybe do a Phase I environmental site assessment but not really and then do a Phase II and drill some holes. They prepare a report and the report says "you know what Ministry of Transportation, you are good to go, there is no exceedence on this property and you are absolutely fine". The Ministry says "great…we are going to rely on the consultant's report to close the deal", and so they do. The Ministry pays full market price. Here's what the court found. I'm going to cut to the quick. I'll tell you if you haven't been under a microscope wait until you engage in litigation. The report that you prepare is going to be looked at and every word that is in that report is going to be assessed and analysed. I can assure you of that. The Court commented that :

1) CH2M relied exclusively on a 1986 drawing of the "as built" tanks. CH2M didn't check the fire insurance plans to discover that there were a previous set of tanks on the property.

2) Boreholes should have been placed south of the property on the southern edge of the property around the tank nests because the groundwater flows southerly but those boreholes were not placed on the southern portion of the property. So folks let's drill downgradient! Yes.

3) Vapour testing was the screening tool that was to be used. But, it was wintertime, the ground was frozen, it didn't help. With the greatest of respect to this particular consultant, according to the judge's decision, they were flying a little blind.

4) They didn't test for PAH's, polycyclic aromatic hydrocarbons as they said they would in their contract.

5) There were fewer soil and groundwater samples taken then as agreed in the contract and the problem here was the court said that may have been fine, but CH2M didn't explain it in the report. If you only take four samples and you said you were going to take eight, you better explain it to your client. CH2M didn't retain their field notes.

6) CH2M didn't retain their borehole log as required under the agreement. And the list goes on.

So whatever you do folks, please be incredibly, incredibly careful about your own due diligence. Get your contract and work program scoped in writing. Get appropriate insurance. Make sure there is some rationale basis for your coverage and limits. Put these protections in place. Finally, think up-front about your clients longer term objectives for the property and particularly whether a Record of Site Condition will be needed at some point in the future.

Thank you very very much. You have been terrific. John you have been awesome because I didn't quite get the hook, but thank you.

Document #: 2191