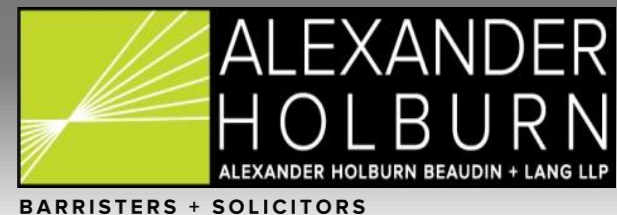


# Regulatory Update 2014 - 2015: New and Upcoming Developments of Note

Environmental Managers Association  
of British Columbia

Legal Update Session – Thursday, January 15, 2015

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# Agenda

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- Follow-up on Bill C-38 and C-45 Changes
- New and Upcoming Contaminated Sites Regulations
- Changes to Water Licensing Regime
- Changes to Ambient Air Quality Regulations
- Updated Packaging Recycling Regulations
- Summary

# Bill C-38 and C-45 Follow-up

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- Two omnibus budget bills introduced by the federal government in 2012.
- Contained major changes to environmental legislation:
  - *Fisheries Act*
  - *Canadian Environmental Assessment Act*
  - *Navigable Waters Protection Act*

# Bill C-38 and C-45 Follow-up

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- Bill C-38 received Royal Assent June 29, 2012
- Bill C-38 received Royal Assent December 14, 2012
- Some provisions came into effect almost immediately, some were left to be phased in over time.

# Bill C-38 and C-45 Follow-up

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- Immediate changes:
  - Repeal and replacement of existing *Canadian Environmental Assessment Act*.
  - Some amendments to fish habitat provisions in the *Fisheries Act*.
  - Increase in fines for offences under the *Fisheries Act*.
  - Provisions for agreements between federal and provincial governments to delegate roles, powers and functions under *CEAA* or *Fisheries Act*.

# Bill C-38 and C-45 Follow-up

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- Additional changes came into force as of November 25, 2013.
- Federal government also implemented new regulations governing applications for authorization to carry on activities or work affecting fish habitat.
- DFO also issued a new Fisheries Protection Policy and Operational Approach

# Bill C-38 and C-45 Follow-up

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- The prohibitions on harmful alteration, disruption or destruction of fish habitat (HADD) in s. 35 were replaced with a single prohibition against causing “serious harm” to fish that are part of a commercial, recreational or Aboriginal fishery.
- Probably the most controversial change to the *Fisheries Act*.

# Bill C-38 and C-45 Follow-up

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- Two key changes:
  - “Serious harm to fish”
  - “Commercial, recreational, and Aboriginal fisheries”
- DFO Fisheries Protection Policy defines “serious harm to fish” as:
  1. Death of fish
  2. Permanent alteration of habitat that limits or diminishes ability of fish to use such habitats in order to carry out one or more of their life processes.
  3. Destruction of fish habitat of a spatial scale, duration or intensity that fish can no longer rely on such habitats in order to carry out one or more of their life processes.



# Bill C-38 and C-45 Follow-up

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- DFO Fisheries Protection Policy also comments on “commercial, recreational and Aboriginal fisheries”:
  - Include fish falling within the scope of federal and provincial fisheries regulations
  - Include fish that “can be fished” by Aboriginal people for food, social, ceremonial purposes
  - Also includes “fish that support fisheries” – may include fish residing in water bodies connected to water bodies that support fishery

# Bill C-38 and C-45 Follow-up

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- DFO Fisheries Protection Policy sets out hierarchy of goals where activities may cause serious harm to fish:
  - Avoid
  - Mitigate
  - Offset
- Only offsetting requires an authorization under the *Act*.
- Implication is that DFO considers that mitigation means there will not be serious harm to fish and therefore prohibition in s. 35 will not apply.

# Bill C-38 and C-45 Follow-up

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- Still many unanswered questions:
  - To what extent will DFO be prepared to accept opinions of third-party experts with respect to determining potential for serious harm to fish or adequacy of mitigation efforts?
  - What constitutes sufficient mitigation?
  - Will DFO provide approval of mitigation measures?
  - How will existing authorizations be treated under the new regime?

# Contaminated Sites

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- What were some of the significant new or revised regulations, technical guidances, protocols, etc from the last year?
- What changes are being considered to site profile requirements and soil relocation regulations?
- What sort of regulatory changes might be forthcoming in the near future?

# Contaminated Sites - Protocols

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- Protocol 6 – Eligibility of Applications for Review by Approved Professionals
  - Latest draft of Version 9.0 just released by MOE this week.
  - Sets out requirements for applications for contaminated sites legal instruments.
  - Major change appears to be requirement to obtain Director's pre-approval before submitting application where the instrument does not address the entire area of contamination.

# Contaminated Sites – Protocols

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- MOE has issued draft new Administrative Guidance 15 to explain the intent and scope of requirement to delineate and/or remediate the entire extent of contamination at a site.
- Subject to exceptions, a Responsible Person applying for an Approval in Principle or Certificate of Compliance must delineate the entire extent of contamination for the site for which legal instrument is sought.

# Contaminated Sites – Protocols

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- AG-15 also states that remediation of the entire extent of contamination must be completed for CofC application, or planned or scheduled for Approval in Principle applications.
- Where the applicant is not a Responsible Person under EMA, delineation and remediation only required for parcel for which the instrument is sought.

# Contaminated Sites - Protocols

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- Protocol 11 – Upper Cap Concentrations for Substances Listed in the CSR
  - Version 2.1 issued February 2014.
  - Sets out revised upper cap concentrations for soil, water, sediment and vapour
  - Generally derived from the numerical environmental quality standards and criteria in the CSR and applying multiplication factors or “upper cap multipliers”



# Contaminated Sites - Protocols

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- Protocol 21 – Water Use Determination:
  - New protocol which supersedes former Technical Guidance 6 “Water Use Determination” dated July 2010
  - Latest draft issued January 12, 2015
  - Provides criteria for determining groundwater uses at a site.
  - Includes a provision permitting an application to the Director to make a site-specific determination of water use, eg a determination of no drinking water use.

# Contaminated Sites - Protocols

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- Applications for site-specific determination must be accompanied by technical report by qualified professional
- Numerical standards in the CSR apply to each of the water uses – where there are multiple uses at a site, presence of contamination must be determined on the basis of all applicable numerical water standards.
- Technical guidance supporting application of this protocol in revised TG 6 “Assessment of Aquifer Use” and TG 8 “Groundwater Investigation and Characterization”

# Contaminated Sites - Protocols

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- TG-6 mandates *in situ* field investigations to assess aquifer yield and hydraulic properties.
- MOE has also issued draft TG-22 “Using Monitored Natural Attenuation and Enhanced Attenuation for Groundwater Remediation” to provide guidance on the use of MNA or EA.

# Contaminated Sites - Procedures

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- Procedures are used by MOE staff to guide their administration of the EMA and the CSR
- Procedure 8 – Definitions and Acronyms for Contaminated Sites:
  - latest draft of Version 2.2 issued January 12, 2015
  - Provides consolidation acronyms and definitions relating to contaminated sites in the EMA, CSR, protocols, guidances, etc.

# Contaminated Sites - Procedures

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- Procedure 9 – Procedures for Processing Site Profiles
  - Revised February 1, 2014
  - Latest draft of Version 2.2 issued January 12, 2015
  - Provides guidance to MOE staff processing site profiles and making decisions on the requirements for site investigations

# Contaminated Sites - Procedures

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- Procedure 12 – Procedures for Preparing and Issuing Contaminated Sites Legal Instruments
  - Revised February 2014
  - Latest draft of Version 3.0 issued January 12, 2015
  - Provides guidance to MOE staff and Approved Professionals who prepare draft legal instruments and act on behalf of the Director in processing them.
  - Main changes appear to be consequential on proposed changes to Protocol 6.

# Contaminated Sites – Other New Items

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- MOE also issued two new Administrative Guidances in 2014:
  - AG-14 – “Performance Verification Plans, Contingency Plans, and Operations and Maintenance Plans”
  - AG-17 – “Completing Summaries of Site Condition”

# Contaminated Sites - Proposals

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- MOE is currently seeking feedback on two discussion papers:
  - Identification of Potentially Contaminated Sites (Site Profile Process)
  - Prevention of Site Contamination from Soil Relocation
- Deadline for public comment has been extended to February 2, 2015.



# Contaminated Sites - Proposals

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- Discussion paper on site profile process has noted concerns with existing system:
  - Confusing, inefficient multi-step process
  - Local governments able to “opt out”, resulting in patchwork system across the province.
  - Too many triggers to initiate the process, often at inopportune times.
  - Existing site profile exemptions not always clear, some are outdated.
  - Consequences of submitting a site profile to MOE are not clear and require response from the Director.

# Contaminated Sites - Proposals

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- MOE looking at changes to three aspects of the contaminated site identification process:
  - Activities triggering site profile requirements
  - Site profile forms
  - Local government process for site profiles

# Contaminated Sites - Proposals

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- Possible changes to local government application triggers:
  - Remove some or all of: soil removal, demolition, subdivision and zoning
  - Leave triggers as is but amend the exemptions so that the triggers only apply in certain circumstances (eg redevelopment to new use)

# Contaminated Sites - Proposals

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- Possible changes to site decommissioning triggers:
  - Clarify definition of site decommissioning
  - “Hardwire” requirements to submit to the director site investigation reports and site risk classification reports within specified time following decommissioning
  - Repeal requirement to submit site profile on decommissioning, or alternatively, introduce provisions requiring perimeter monitoring at higher-risk operating sites.

# Contaminated Sites - Proposals

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- Possible changes to site profile forms:
  - For commercial or industrial use, require completion of the site profile form by qualified professional
  - Require basic searches for historical site use
  - Require site profile records to be updated if new information becomes available
  - Remove the 'question sections' from the form and base requirements for site investigation on the presence of high-risk activity.

# Contaminated Sites - Proposals

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- Currently local government authorizations and permits are “frozen” once the site profile process is triggered, subject to being “released” by the Director – this can be a cumbersome process.
- Possible changes to site profile “freeze and release” provisions for local government applications:
  - Only legal instruments (AIP or CofC) would release “frozen” applications – would require amendment to site profile triggers and exemptions

# Contaminated Sites - Proposals

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- Require submission of site profiles when triggered by local government applications, but the application would no longer be “frozen”.
- Site investigation requirements would be “hardwired” into the legislation – eg on change of use, owner would have to complete PSI, followed by DSI if contamination is identified. (Remediation of entire area might also be required.)
- Owner would have to obtain either negative Determination of Contaminated Site or CofC before a certain endpoint (eg occupancy) or within specified timeframe.

# Contaminated Sites - Proposals

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- MOE has also issued discussion paper on soil relocation provisions.
- Increase in remediation of contaminated sites since 1990s, however dramatic decrease in soil relocation agreements
- Concern that soil is being relocated without an agreement



# Contaminated Sites - Proposals

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- Discussion paper on soil relocation has identified concerns with current soil relocation provisions:
  - System is unnecessarily complicated – particularly trigger provisions
  - Requirements for soil investigation and application for agreement are expensive
  - Obtaining an agreement takes too long
  - Definition of “contaminated site” in the context of relocation of contaminated soil is awkward, may be overly conservative

# Contaminated Sites - Proposals

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- Clarity is needed with respect to the interface between local government soil removal and deposit bylaws and provincial relocation requirements
- Additional exemptions are needed
- Substance concentrations that trigger requirement for agreements may be overly stringent (eg, background concentrations may exceed trigger values)
- Application with respect to sediment and vapours unclear and not considered when legislation drafted
- Soils not considered contaminated at source site may be considered contaminated at receiving site – depending on land use – and vice versa

# Contaminated Sites - Proposals

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- Possible changes being considered by MOE to notification provisions:
  - Changes to triggers for MOE notification – eg soil containing substances not already found on receiving site, soil with concentrations greater than applicable land use standards at receiving site
  - Notification process similar to existing notification of commencement of independent remediation

# Contaminated Sites - Proposals

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- Soil leaving source site must be documented in Site Risk Classification report where already required
- Notification concurrent with application for legal instrument
- Notification direct to local governments but not the province
- Public posting of notification of soil relocation on ministry web page
- No notification required

# Contaminated Sites - Proposals

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- Possible changes to requirements for management of soil relocation:
  - Require a source site soil management plan
  - Require a soil transportation plan
  - Require receiving site soil management plan
  - Impose Director's requirements for independent remediation

# Contaminated Sites - Proposal

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- Information regarding source and receiving site locations and contacts and chemical quality of soil to accompany each load shipped to deposit site.
- Require ability to facilitate testing of soil at deposit site pending test results to confirm suitability for long term deposit

# Contaminated Sites - Proposals

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- Other changes being considered by MOE:
  - Prior notice to local governments based on remediation plans
  - Clarify the definition of “contaminated site” in the context of relocation of contaminated soil
  - Improve regulatory provisions addressing sediment and vapours
  - Clarify scope / application of exemptions

# New Water Sustainability Act

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- Existing *Water Act* implemented in 1909
- MOE recognized need for modernization with “Living Water Smart” strategy
- First discussion paper issued in early 2010, followed by public consultation
- Formal policy proposal for new *Water Sustainability Act* issued in December 2010.



# New Water Sustainability Act

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- Draft legislation expected to be introduced in 2012, however the process stalled until last spring.
- March 2014: new *Water Sustainability Act* (WSA) introduced in the legislature.
- Received Royal Assent May 29, 2014, however not yet in force.
- Expected to come into force in April 2015, once supporting regulations finalized.

# New Water Sustainability Act

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- Reaction to the Act has been mixed:
  - Gwen Barlee of Wilderness Committee: WSA “has good intentions, but doesn’t have the necessary enforceable language and mandatory standards to actually protect freshwater”
  - Deborah Curran of UVic Environmental Law Centre: “Overall, one of the best pieces of environmental legislation in the past 15 years”

# New Water Sustainability Act

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- West Coast Environmental Law: “After reviewing the Act, we’re actually fairly impressed. ... That being said, there are also concerns and disappointments”
- POLIS Water Project: “It is critical that the WSA and its regulations are brought into force and implemented in a timely manner, as the changes articulated in the legislation are long overdue”

# New Water Sustainability Act

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- Once fully implemented, the WSA will effectively repeal and replace the existing licensing scheme in the *Water Act*.
- Authorizes establishment of water objectives to be considered in decision-making under WSA and other enactments
- Mandates consideration of environmental flow needs of streams in licensing decisions

# New Water Sustainability Act

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- Provides new powers to modify existing precedence of water use where streams at risk of falling below flow thresholds
- Creates new regulatory powers to enforce water sustainability plans, including administrative monetary penalty scheme.
- Preserves existing “first-in-time, first-in-right” system of water licenses.

# New Water Sustainability Act

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- Requirement for “beneficial use” of diverted water:
  - Allows government to define “beneficial use” by regulation
  - Requirement for efficient use of water
  - Additional powers for government staff to require water conservation

# New Water Sustainability Act

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- Where decision-makers consider that diversion or use of water, or changes in and about a stream, proposed by application for an authorization are likely to have significant adverse impact on water quality, quantity or aquatic ecosystems, may require applicant to propose mitigation procedures and impose terms and conditions requiring mitigation.

# New Water Sustainability Act

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- Perhaps the most significant change is the extension of the water licensing regime and WSA provisions to ground water.
- Ground water currently unregulated under existing *Water Act*
- Note that “first-in-time, first-in-right” regime still applies – well owners will retroactively be given licenses to time they started using well



# New Water Sustainability Act

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- Precise mechanisms for granting licenses to groundwater users will be developed through regulations
- WSA contains provision allowing government to issue repeat short-term authorizations to use water to same person, for same purpose, in respect of the same place.

# New Water Sustainability Act

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- Notable because less information required for short-term approvals and short-term approvals cannot be appealed.
- Critics have suggested this was likely done to facilitate fracking and results in less transparency.

# Changes to Ambient Air Quality Requirements

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- In October 2014, B.C. adopted interim ambient air quality objectives for nitrogen dioxide (NO<sub>2</sub>) and sulphur dioxide (SO<sub>2</sub>).
- Previous standards established in 1970s.
- Canadian Ambient Air Quality Standards (CAAQS) being updated for NO<sub>2</sub> and SO<sub>2</sub> but not expected to be finalized until late 2015 at the earliest.

# Changes to Ambient Air Quality Requirements

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- Interim standards implemented to bridge the gap.
- Sets out data monitoring requirements to ensure compliance with interim standards.
- Statutory decision makers, including Oil and Gas Commission, are “encouraged” to adopt these objectives when making statutory decisions under the EMA.

# Changes to Ambient Air Quality Requirements

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- Note that the ambient air quality objectives are non-statutory limits and are not legal requirements unless referenced directly in regulation or authorization

# Updated Packaging Recycling Regulations

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- Recycling in BC governed by the *Recycling Regulation* which is made pursuant to the EMA.
- Creates a scheme of extended producer responsibility – industry expected to take responsibility for recycling products they produce, for eg, through industry-led product stewardship programs.

# Updated Packaging Recycling Regulations

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- In May 2011, *Recycling Regulation* amended to create new “packaging and printed paper” (PPP) product category
- Imposed requirements on ‘producers’ to have approved product stewardship plan or appoint an agency to fulfill its obligations
- All producers required to have recycling program in place by May 2014.

# Updated Packaging Recycling Regulations

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- Failure to do so could result in \$200,000 fine or being banned from selling or distributing products in B.C.
- Organization called Multi-Material B.C. (MMBC) formed to fulfill stewardship requirements of producers – most obligated producers signed on with MMBC.



# Updated Packaging Recycling Regulations

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- Note very broad definition of ‘producer’ – not restricted to businesses resident in B.C.
- Includes businesses that offer for sale or distribute products in B.C., who import products for sale or distribution in B.C., or owns the trademark under which a product is sold or distributed in B.C.

# Updated Packaging Recycling Regulations

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- Companies appointing MMBC as their agent for the purpose of the *Recycling Regulation* have to report quantities of PPP and pay fees to fund recycling programs
- Program now fully in effect – unclear to what extent government will investigate/enforce non-compliance

# Updated Packaging Recycling Regulations

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- Not all municipalities have signed on
- Generally only smaller communities without existing comprehensive curbside recycling have signed with MMBC
- Only Coquitlam, Langley and Anmore in Lower Mainland
- Can still bring PPP materials to depots where curbside recycling programs not available

# Summary

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- Questions?
- Comments?

**Thank you for attending!**

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