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## TRIECA CONFERENCE- PRESENTATION SUMMARY

### Stormwater Management Facilities: Municipal Liability and Sediment Disposal

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The purpose of today's presentation is to address two major questions in the context of stormwater management facilities ("SWMF"):

1. What are the legal obligations and potential liabilities of municipalities with respect to the repair, maintenance and removal of sediment from SWMF?
2. Once sediment has been removed from SWMF, where can it legally be disposed, and how can it be used, depending on the classification of the sediment?

#### Question 1: Municipal Obligations and Liabilities - Brief Overview

##### *Statutory Obligations and Liabilities*

The legal obligations and liabilities of municipalities, in the context of SWMF, are expressly set out in the *Ontario Water Resources Act* ("OWRA"). Pursuant to the OWRA, municipal obligations arise in two circumstances. The first municipal obligation arises if an Environmental Compliance Approval ("ECA") was issued by the Ministry of Environment and Climate Change ("MOECC") at the time the SWMF was constructed. Depending on the language and scope of the obligations in an ECA, a municipality may be required to inspect, maintain, repair and replace a SWMF. A municipality may be convicted of an offence under the OWRA, and face fines of up to \$500,000, if it fails to comply with its obligations under an ECA.

The second municipal obligation arises if a municipality is directed or ordered by a MOECC Director to maintain, repair, or operate a SWMF in a specific manner. Depending on the facts, if the municipality fails to comply with an order, an external body may conduct the necessary work on the SWMF, and the associated costs can be recovered directly from the municipality.

##### *Obligations and Liability at Common Law*

Municipalities may also face liability under the common law tort of negligence, where they fail to adequately maintain a stormwater management pond, and subsequent property damage occurs. To date, it is *not certain* whether a tort action based in negligence could be brought in this context, as there have been no court decisions on these issues. However, the case law suggests that this is possible, as successful negligence actions have been brought against municipalities for property damage relating to insufficient maintenance of storm water and sanitary sewage systems.

## Question 2: Disposal and Utilization Options for Sediment - Brief Overview

Legally permissible options for the disposal and utilization of sediment ultimately depend on how sediment is classified in legislation and regulations. Various classification systems and criteria are derived from scientific analyses of sediment. Moreover, whether sediment must be disposed in a landfill, or can be used beneficially in on-site and off-site applications, ultimately depends on whether the sediment is exempt or not exempt from waste management, treatment, and disposal obligations in regulations and legislation. Unfortunately, the relevant legislation and regulations do not contain any clear provisions on disposal and utilization options for sediment. Therefore, the following analysis is a possible way that legislation and regulations may apply in determining disposal and utilization options.

The general waste regulation - *Ontario Regulation 347* ("Reg. 347"), defines categories of waste that are and are not exempt from its regulations on management, treatment and disposal obligations. Reg. 347 should be consulted on a case-by-case basis and compared with scientific analyses of sediment, to determine whether sediment must be disposed in a landfill. Particular attention should be paid to the term "inert fill" in the regulation, which is exempt from the above-noted obligations. Conversely, the definition of "leachate toxic waste" should also be reviewed, as it is not exempt from Reg. 347 and must be disposed at appropriate landfill facilities. Guidance documents exist from the MOECC but are not supported by the regulations.

When sediment meets an exempt classification under Reg. 347, options for beneficial use should be considered. The selected beneficial use will primarily be driven by the classification of the sediment according to Table Standards for soil toxicity, outlined in Ontario Regulation 153/04 ("Reg. 153/04"). Before proceeding with beneficial on-site uses, additional considerations should be reviewed including: sufficient space for top-soil spreading, classification of on-site land (residential, parkland.), grading, and whether the land is a regulated "floodplain" under the *Conservation Authorities Act* or by other regulations, legislation or by-laws.

## Conclusions

To date, Ontario does not have a clear legal framework which addresses permissible options for sediment disposal and utilization. From a legal perspective, this requires a conservative approach, such that sediment should be treated as potentially harmful and disposed in landfills. On the contrary, recent scientific studies carried out in Ontario by Dr. Francine Kelly-Hooper demonstrate that in many cases, sediment from SWMF did not exceed Table 2 Standards under Reg. 153/04. This type of sediment is unlikely to be considered harmful, and does not need take up valuable landfill space. Therefore, legislative change is required, and should clearly define various classification criteria for sediment.

Based on scientific classification, appropriate options for disposal and utilization, including beneficial use should be expressly enumerated. In this way, municipalities will be appropriately guided and legally permitted to use sediment for beneficial and cost-effective applications, whenever possible. In turn, legislative change can help municipalities avoid costly disposal of sediment in landfill facilities. In most cases, it is anticipated that selecting a cost-effective and legally permissible option for sediment disposal or re-use will contain complex legal questions. When appropriate, municipalities should consult legal counsel to maximize cost savings while complying with their legal obligations.

*The information contained in this article is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The views and comments contained in this article are those of the author alone, and do not necessarily reflect the views of Blaney McMurtry LLP or other members of the firm. The information and views expressed are not intended to provide legal advice. For specific advice, please contact us.*

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