CSAP TECHNICAL REVIEW COMMENTS

Protocol 6 (draft 7, v9): Eligibility of Applications for Review by Approved Professionals

CSAP Technical Review # 40

Aug 1, 2014

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At the request of the Ministry the CSAP Society has engaged a qualified professional to review the protocol and provide written comments. The objective of the review is to pose questions and provide comments that may prove useful to the Ministry in finalizing the revisions to the protocol.

CSAP would like to thank Standards Assessment Specialist, John Wiens Ph.D., P.Ag. and Risk Assessment Specialist Ross Wilson M.Sc. DABT for completing the review.

COMMENTS FORM THE STANDARDS PERSPECTIVE

1.0 INTRODUCTION

Protocol 6 designates the classes of activities, reports, and recommendations which are required to be performed, prepared or made by Approved Professionals.

Changes to the Protocol are proposed and revised Version 9, Draft 7 has been provided for review and comment.

We note that Version 9, Draft 7 incorporates provisions and makes further changes to a Draft(s) and versions after the current website posted Protocol 6 (March 11, 2013) but before the proposed Version 9, Draft 7. Revisions since Version 9.0, Draft 6B have been high for particular attention by CSAP. This review therefore focuses on the version at-hand rather than changes to a Version 9, Draft 6B as provided.

2.0 SCOPE OF THE CHANGES TO MOST RECENT DRAFT FROM EARLIER VERSIONS AND DRAFTS

In summary, substantive changes to the Protocol are summarized by the following points:

- It references Administrative Guidance 15 (*Approvals Not to Delineate or Remediate the Entire Area of Contamination at a Site*) and associated references to responsible persons and relies on this AG#15 to define applicable situations. (AG#15 had not yet been prepared when the current posted Version was prepared.)
- It removes the requirement for approval before an Approved Professional can make a recommendation for a legal instrument for a site “Where the applicant is a not responsible person for the site which is the subject of the application and the entire area of contamination at the site would not be delineated and/or remediated” (Table 2).
- It adds “*(c) endorsement of a performance verification plan*“ to the section 3.2 list (required submissions as a condition of contaminated sites legal instruments)

3.0 QUALIFICATIONS - SECTION 3.0 IN VERSION 9, DRAFT 7

We note regarding the scope of the discussion of qualifications that:

- The section references qualifications in regard to Approved Professional submissions:
    - For legal instrument recommendations

    - Of documents that are required as a condition of legal instruments
- Whereas Section 3.2 lists and addresses qualifications of persons preparing and submitting recommendations for legal instruments and documents (or endorsements for documents) that are conditions of legal instruments (Section 5.1) it does not list and address qualifications of persons making additional recommendations, reports and opinions (Section 5.2). Questions arise such as:
    - Is there any reason the activities / responsibilities listed in Section 5.2 should not also be addressed in Section 3.2?
    - Section 5.2 states "…Approved Professionals may provide recommendations, reports and opinions to a Director in relation to the following:", so is it to be inferred that no qualification statements are needed or appropriate in regard to the submissions listed in section 5.2?

4.0 APPLICATIONS FOR CONTAMINATED SITES LEGAL INSTRUMENTS

Several changes from earlier versions and Drafts are included in Section 4.0. Comments and questions are included below on changes, but also on provisions which have existed in previous versions but which on review now have raised questions.

4.1 Section 4.3

Section 4.3(b) indicates that a Director may require that an application for a high risk site must be accompanied by a recommendation of an Approved Professional. The following questions arise:

- Despite the definition for "high risk site" and "non-high risk site" indicated in Section 2, paragraph 2 of this Protocol (but not in Procedure 8 in terms of "low or moderate risk") has MOE determined that this is consistent with authority provided in CSR Sections 43, 47 and 49?

4.2 Section 4.4 and Table 1

The focus of Section 4.4 and Table 1 is mandatory (vs. optional) submissions by Approved Professionals. Therefore, changing the reference, making 4.4 subject to Section 4.3 rather than to Table 2 and its lead-off statement (Section 4.6?) is supported.

We note the following regarding Section 4.4 and the entries in Table 1 and mandatory Approved Professional submissions:

- Applications for two instruments (i.e., Determination of Contaminated Site; and, Contaminated Soil Relocation Agreement) for high risk sites must be submitted with by Approved Professionals
- Section 2, paragraph 2 of this Protocol 6 states:

    "In this protocol, sites referred to as low or moderate risk sites in sections 43, 47 and 49 of the Contaminated Sites Regulation (the Regulation) are considered non-high risk sites, while sites considered medium, intermediate or high risk sites under sections 47 and 49 of the Regulation are considered high risk sites."
- Has MOE determined that even though Sections 43, 47 and 49 of the CSR give authority to the Director (i.e., "the Director may require"; and, "Classified under a Director's Protocol") only for:

- Contaminated Soil Relocation Agreements
- Approvals in Principle, and
- Certificates of Compliance

(and Section 15(6) &(7) Determination of Contaminated Site) and only for:

- "a low or moderate risk site" that in section 2, paragraph 2 of this Protocol is defined as a "non-high risk site"

that Section 4.4 and Table 1 can require that:

- applications for high risk sites be accompanied by the recommendation of an Approved Professional?

- Regarding the requirement in Section 4.4 and Table 1 for applications for Determinations and CSRAs to be accompanied by a recommendation of an Approved Professional:
  - Is the definition in Section 2, paragraph 2 and the provision in Section 4.3(b) of this Protocol considered to provide the authority required authority despite CSR Sections 43, 47 and 49?
  - Does MOE consider that Approved Professionals are not in conflict with the CSR and that the Indemnity Agreement is still valid due to provisions and requirements of Protocol 6 if recommendations are made for high risk sites?
  - Does MOE consider EMA Section 64 (e.g. 64(2)(i)?) to provide the authority for Section 4.3 as well as 4.4 and Table 1 provisions despite CSR Sections 43, 47 and 49? (Note: CSR Section 15 appears silent on risk levels in regard to recommendations for Determinations)

4.3 Sections 4.5 and 4.6

- Rewording of Section 4.5 is supported. The substance and intent remains the same and clarity is improved.
- Including (a) and (b) in section 4.6 improves clarity and is supported
- Wording of the 2nd bullet of Section 4.6 is supported.
- It is recommended that the 1st bullet of Section 4.6 be reviewed for consistency. We understand that a Determination can only be applied for if no contamination is present (unless it is for an application for Determination that a site is contaminated); therefore, to refer to requirements for delineating contamination at a site for which a Determination is applied for seem inconsistent. Perhaps alternate wording might be considered, for example as below:

> 4.6 Subject to section 4.7,
>
> (a) with respect to an application for a Determination of Contaminated Site[1], any applicant who is not a responsible person for any contamination that may be present at the site need only have satisfactorily investigated ~~delineated~~ the entire area of potential contamination at the site which is the subject of the application for the Determination, and

- The footnote reference (#1) that refers to the EMA Section 53(6) provision allowing for an AIP or COC for part of a site is attached in both part (a) (i.e., Determination) and part (b) (i.e., AIP and COC). Unless it is intended to emphasize that the provision does not apply to applications for a Determination, the footnote reference in part (a) could be deleted.

4.4 Sections 4.7 and 4.8

Section 4.7 indicates two options if approval is not given for applications with any of the approaches in Table 2, Section 4.9. (i.e., seek approval again; or, amend the application for a legal instrument so the approval is not required). Section 4.7 does not make reference to

Section 4.4 and Table 1. If approval for an approach in Table 2 is not granted is another option applicable (i.e., submission directly to the ministry for review, as per current Section 4.9)?

4.5 Section 4.9

Section 4.9 relocation to immediately following Table 1 and Section 4.4 might be considered. Section 4.3 and 4.4 deal with mandatory submissions by Approved Professionals. Since 4.9 addresses the alternate, mandatory submissions to the ministry, relocating it would seem to 'close off' that issue before addressing the issues of investigation of part of a site (Sections 4.5 and 4.6) and (pre)approvals (Sections 4.7 and 4.8). The current location of Section 4.9 seems to be a temporary diversion into another topic the text of Section 4.8 and Table 2.

4.6 Table 2

Table 2 has been simplified (e.g., especially relative to earlier Drafts of Version 8.0).

- The reduced list of approaches requiring approval is generally supported, especially since Protocol 6 is applicable to low or moderate risk (non-high risk) sites
- Several questions arise that would benefit from clarification in regard to approach 1 and particularly the sequence of approvals for situations addressed by AG#15 (referenced in a note to)Table 2, Site Profile release applications by Approved Professionals, and the relation to Protocol 6. Administrative Guidance #5 (p. 2 under states the following*: "As with Protocol 6 approvals, site profile release notice approvals must be obtained in advance of making a request for a release notice. The release notice approval must be included with the release notice request package."*
    - Does one reference to "release notice approval" refer to approval per Protocol 6 and one "release notice approval" refer approval per AG#6?
    - Is it correct (as would seem logical) that an approval per Protocol 6 would be a prerequisite to a request for a Site Profile release notice? (The AG#15 statement does not seem clear in this regard.)
    - For each of Situation 1 to 7 in Appendix 1 of AG#15, under the subheading "For a site profile notice approval" it is stated that a "A site profile release notice is required" which is expected (if a site profile release is intended). Can a statement be made regarding <u>prior</u> approval under Protocol 6 (either in AG#15 of Protocol 6)

5.0 APPENDIX 1 – APPROVAL APPLICATION FORM

5.1 Instruction Statement Before Section 1

- The instruction sentence at the top of the form refers to Table 2, section 4.7, whereas in the text of Protocol 6, Version 9, Draft 7, Table 2 is within section 4.9. The section reference should be corrected.

5.2 Section VI Approval Requested

Several aspects are noted regarding Section VI of the form:

- The lead sentence refers to Table 2, section 4.7, whereas in the text of Protocol 6, Version 9, Draft 7, Table 2 is within section 4.9

- The items listed and to be checked in this part of the Approval Application Form do not appear to have been updated and so do not match Table 2. Item 2 has been removed in Version 9, Draft 7

COMMENTS FROM THE RISK PERSPECTIVE

The revisions will increase the number of sites that are eligible for review by risk-based standards AP. In this version, there is no longer a restriction preventing review of sites that involved: (1) probabilistic RA techniques; (2) hazardous waste in situ facilities; or (3) toxicity tests. Although it is anticipated that not many sites will be benefit from the removal of the restrictions on probabilistic RA or hazardous waste facilities (i.e., these may not have been key restrictions), we support that risk-based standards APs are sufficiently experienced to review submissions with these components. Since toxicity tests have been used relatively frequently in ecological risk assessments in BC, it is anticipated that this change will have the greatest affect in increasing the number of sites for review by APs. It is anticipated that APs with ecological focus will have sufficient expertise to review such submissions.

Recommendations with Respect to Probabilistic RA

In the future, it may be useful for the MOE and the risk-based standards APs to discuss probabilistic RA requirements. Currently, most RA guidance from the MOE and Health Canada is focussed on deterministic RA. If probabilistic RA is to be utilized in a manner that is consistent with MOE requirements, it would be useful to determine if there are recommended probability distribution functions for the most important input parameters. In addition, it would also be important to have MOE input on how the output of probabilistic RA is recommended to be interpreted (e.g., if the 95^{th} percentile HQ in a HHRA is less than 1, does this meet the CSR definition of acceptable risk?). There are a variety options to develop these recommendations such as a CSAP white paper or perhaps an MOE technical bulletin. CSAP should likely be pleased to assist with either.

Recommendations with Respect to Toxicity Tests

It is clear that the MOE recommends that Protocol 20 would need to accompany any risk-based submission that uses toxicity tests. Nevertheless, if the MOE has any specific concerns or common errors that occur in the use and interpretation of toxicity tests, these could be communicated in a CSAP white paper or perhaps an MOE technical bulletin. CSAP should likely be pleased to assist with either.