BRITISH COLUMBIA
Ministry of Water, Land and Air Protection

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UPDATE ON CONTAMINATED SITES

Contaminated Sites Provisions of the *Waste Management Act* Amended

INTRODUCTION

The *Waste Management Act* (*WMA*) was amended on May 9, 2002, to eliminate duplication in regulating mine sites, to remove disincentives to the transfer of mine ownership, and to clarify the requirements for recovering site cleanup costs in court.

At the same time, amendments were made to several other statutes to clarify the requirements for authorizations sought for various activities generally associated with development on land that may be contaminated.

This update describes these amendments, why they were needed, and how they will affect contaminated sites stakeholders. All of the amendments maintain the strong human health and environmental protection standards which were part of the contaminated sites regime.

DUPLICATION IN THE REGULATION OF MINES ELIMINATED

In BC, the regulation of the remediation and restoration of mines has been subject to two different legal regimes, administered by two ministries. This has resulted in conflicting and duplicate requirements. In addition, imposing liability on past owners and operators of mines under the *WMA* produced disincentives to sell mines and re-open former mine sites under the *Mines Act*.

Mines Framework Agreement

These issues were resolved by an interministry Mines Framework Agreement which forms the basis of these amendments. The agreement was developed from a report by consultants Jim Titerle and Patricia Houlihan entitled "External Review of Mine Reclamation and Environmental Protection Under the *Mines Act* and *Waste Management Act*" (January 31, 2001).

How Did the *Mines* and *Waste Management Acts* Differ?

A key difference between the *Mines Act* and the *WMA* regimes on site remediation was the allocation of liability for contamination. Under the *WMA,* those responsible for contamination, even if they no longer owned or operated a site, could be ordered to remediate the site and be held liable. Under the *Mines Act*, only the current owner of a mine can be required to restore and remediate the site, or be held liable for such costs.

How do the Amendments for Mines Work?

The amendments remove mines — in a number of specified circumstances — from the application of key contaminated sites provisions of the *WMA*. They establish a single window for cleaning up those contaminated mine sites

under a *Mines Act* permit— to be administered by the Ministry of Energy and Mines.

The contaminated sites provisions under the *WMA* have been amended by creating a new Part 4.1 of the *Act* which addresses four areas:

- liability for remediation of contamination,
- powers of ministry officials to issue orders,
- powers of ministry officials to require security, and
- payment of fees.

These new provisions vary depending on the type of mine site involved.

Key Protection Provisions Maintained

The duties of ministry managers to issue and enforce permits for discharges associated with mines, and to deal spills has not been changed. Also, the human health and environmental protection standards of the Contaminated Sites regime are unchanged, although the way they are applied to mine sites has been amended.

"Fact sheet 12. Highlights for the Mining Industry," has been updated to explain these amendments in some detail. The following summarizes the amendments for mines relating to cleanup liability and orders under the *WMA*:

Exploration Sites (New Section 28.9)

These sites have minimal disturbance of soil and bedrock, and are likely not contaminated. The changes:

- exempt previous owners and operators, as well as current owners and operators who hold a valid bond under the *Mines Act* for the site, from liability for site cleanups. Current owners and operators without a valid bond are not exempted.
- restrict order powers of ministry managers to issue pollution prevention and pollution abatement orders to current owners and operators of exploration sites.

Advanced Exploration Sites (New Section 28.91)

These sites, where significant quantities of bedrock or coal have been moved as a part of exploration, have more complex amendments.

Key amendments for these sites:

- exempt a previous, but not a current owner or operator from liability for cleanup, if this is conferred through a *Mines Act* permit transfer agreement signed by the two ministries, or through indemnification provided under the *Financial Administration Act (FAA).*
- prohibit a ministry manager from issuing a remediation order to a current or previous owner of the core area of such a site. The manager could still issue a remediation order for a non-core area. Also, the manager's ability to issue a pollution prevention or pollution abatement order under the *WMA* has not been changed.

Producing or Past Producing Mine Sites

These sites have valid permits under the *Mines Act* and they are currently producing or have produced minerals or coal in significant quantities. The key changes:

- exempt a previous, but not a current owner or operator from liability for cleanup, if conferred by a transfer agreement signed by the two ministries, or by indemnification provided under the *FAA.*
- prohibit a manager from issuing a remediation order to a current or previous owner of the core area of such a site, unless:
  - requested by the Chief Inspector of Mines;
  - required in a dispute resolution agreement between the two ministries; or

- necessitated by a formal change in the land or water uses at the site from those in the mine reclamation plan.

A manager may still issue a remediation order for a non-core area at a producing or past producing mine site, and still could issue a pollution prevention or pollution abatement order for both core and non-core areas.

Historic Mine Sites

The regulation of historic mine sites, where there is no valid *Mines Act* permit, is mostly unchanged. A manger continues to have the authority to issue remediation, pollution prevention and pollution abatement orders.

There are two new exemptions from liability for persons under the *WMA* for these sites if:

- indemnification is provided under the *FAA,* or
- the current holder of the mineral rights does not exacerbate any existing contamination.

REQUIREMENTS FOR THE RECOVERY OF SITE CLEANUP COSTS IN COURT

Section 27 (4) of the *WMA* allows persons who incur costs of cleaning up sites to file an action in court to recover those costs from other persons who caused the contamination.

This procedure became ineffective due to conflicting decisions of the BC Supreme Court. Key areas of disagreement concerned what determinations must be made by a ministry manager before one could file an action to recover cleanup costs.

Since this section only applies to "contaminated sites" the main questions are who determines if a site is contaminated and under what process?

When is a Site Contaminated?

Under the *WMA,* a contaminated site is defined as a site containing special waste or substances exceeding standards in regulations

Section 26.4 still contains provisions dealing with the status of a site as a contaminated site. Subsections 26.4 (1) through (3) deal with an optional procedure where a ministry manager may, most often on request, formally determine that a site is, or is not contaminated. Subsection 26.4 (4) indicates that if a determination by a manager has not been done, this does not mean that a site is not a contaminated site.

However, the courts did not interpret these provisions uniformly, so additional clarification was needed.

Clarifying When a Manager Considers a Site to be Contaminated

Section 26.4 of the *WMA* has now been amended by adding new subsection 4.1. It now indicates that a manager considers or considered a site to be or have been contaminated if the manger:

- appointed an allocation panel under section 27.2,
- determined that a person is or was a minor contributor to contamination under section 27.3,
- entered into a voluntary remediation agreement under section 27.4 , or
- issued an approval in principle, certificate of compliance, or conditional certificate of compliance under section 27.6.

The rationale is that the manager never would have done any of the above, without deciding that the site was contaminated. This has been further emphasized in new subsections 27.2 (4.1), 27.3 (4), 27.4 (4), and 27.6 (1.1) and (3.1).

When a Manager Must Provide Decisions and Opinions for a Legal Action to Proceed

Section 27 of the *WMA* has been amended by adding four new subsections. They key changes are included in subsections 27 (6) through 27 (8).

Requirement for a Manager to Consider a Site to be Contaminated

New subsection 27 (6) indicates that a manager must have always considered a site to be contaminated, before the courts can proceed to hear a case about the recovery of cleanup costs.

Under Independent Remediation, Courts Must Determine if a Site was Contaminated

An exception to subsection 27 (6) is provided in new subsection 27 (7), where if independent remediation has been carried out at a site, and a manager has not already considered or determined the site to be contaminated under section 26.4, then the courts must determine if the site is or was contaminated. In this case, the court cannot refer the file back to a manager for a decision about the site being contaminated — it must make that determination itself.

Further Constraints on Courts

Finally, new subsection 27 (8) has been provided to reduce litigation on these types of cost recovery cases. It indicates that if a manager has not already done so, the courts may determine:

- if a person is a responsible person,
- if cleanup costs have been reasonably incurred, and
- if the apportionment of cleanup costs among responsible persons is in accordance with the liability principles of the *WMA*.

If a manager has already made one of these determinations, the courts may not make such a determination, unless the court is carrying out a judicial review of the manager's decision.

APPROVALS FOR DEVELOPMENTS

The last item addressed by these amendments concerns a number of other statutes that were amended in 1997 to prevent the granting of specified approvals, until a ministry manager was satisfied about possible contamination of a site. The provisions include the:

- *Island Trusts Act* subsection 34.1*;*
- *Land Title Act* subsection 85.1*;*
- *Local Government Act* subsection 946.2*;*
- *Petroleum and Natural Gas Act* subsection 84.1;
- *Vancouver Charter* subsection 571B.

The wording of the sections of these statutes was confusing and incomplete, and resulted in the imposition of unnecessary requirements.

These amendments streamline development by clarifying the language, and by providing new ways for managers to indicate that their concerns about contamination have been addressed. The officials named in these statutes may now proceed to approve a relevant application if the manger has:

- determined that a site is not contaminated,
- determined that a site would not pose a significant threat or risk if the application were approved,
- received and accepted a notice of independent remediation of the site, or
- entered into a voluntary remediation agreement for the site.

These amendments supplement the previous provisions where a manager could release the official to approve the application if the official:

- is not required to forward a site profile to a manager,
- has forwarded a site profile to a manger, and the manager has decided that a site investigation is not required, or

- has been received from the manager:
  - an approval in principle,
  - a certificate of compliance, or
  - a conditional certificate of compliance.

Note: *This summary is solely for the convenience of the reader. The current legislation and regulations should be consulted for complete information.*

For more information, contact the Environmental Management Branch, at (250) 387-4441.

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