

Highlights for Developers

During the development of the provincial contaminated sites regime, the development industry expressed concerns about uncertain legal requirements for cleaning up contaminated sites. This uncertainty increases the risks developers face, and translates into project delays, higher project costs, and fewer redevelopment projects being completed. In response, the *Environmental Management Act* and Contaminated Sites Regulation were written to set clear rules for contaminated sites management, enhancing business predictability. A number of flexible provisions help developers minimize remediation costs.

Meaning of “contaminated site” and “remediation” clarified

The Act and Regulation provide certainty by specifying standards to define “contaminated site” and acceptable “remediation.” Developers may use a variety of generic and site-specific factors to decide whether a site is legally considered to be contaminated. They also have the right to choose from a variety of standards when undertaking remediation.

Screening development applications

In the absence of legislative guidance in recent years, local governments adopted a wide range of methods to screen development applications for possible contamination. The *site profile* system is designed to bring uniformity to local government reviews.

What is a site profile?

A site profile is a screening form for identifying potentially contaminated sites. It is a summary

created from readily available information about a site – including its past and present uses and basic land descriptions – and should not require the assistance of a consultant to complete. Developers must provide site profiles in specified instances, most notably when applying for zoning, subdivision, demolition, and relocation of soil.

When is a site profile required?

Specific industrial or commercial land uses trigger site profile submissions. Those uses, as listed in the Regulation, are ones that tend to leave contamination (for example, service stations). The list is sometimes attached to the site profile form for those individuals needing to complete and submit a site profile.

Site profile exemptions

Under the Contaminated Sites Regulation, developers are exempt from providing site profiles for several situations, such as where:

- an accurate site profile already exists in the Site Registry (see Fact Sheet 20);
- the site has already been determined to be a contaminated site;
- the site’s remediation has already been approved (for example, by a Certificate of Compliance); or
- a local government has opted out of administering the site profile system.

Site investigations

Site investigations are the key means of gathering information to determine if a site is contaminated. They must be done by experienced consultants. Developers can have them done without government involvement.

Under the contaminated sites legislation, a Director of Waste Management from the ministry may order a site investigation, prompted by a site profile or other information the Director may receive.

The Site Registry

The Site Registry was created to provide the public with easy access to reported information about sites, including their basic characteristics, legal events that have occurred, and milestones in the remediation process. The registry is, in part, a “record of decisions” about sites that have been evaluated, whether or not they are clean or contaminated. Anyone may access the registry by computer through BC OnLine.

Independent remediation

Procedures for independent remediation are in place so developers can clean up sites with minimal supervision by the ministry.

Independent remediation may occur where liability is not in dispute, investigation and remediation procedures are routine, and engineering or environmental consultants have been engaged to apply the regulations and any additional guidelines or requirements. The ministry must be notified at the start and at the completion of remediation, and this information will be entered on the Site Registry. A developer who uses independent remediation may still apply for a Certificate of Compliance at a later date.

Liability for developers

A current owner or operator – including developer – of a site may be responsible for remediation at a contaminated site. However, there are several exemption situations which could be relevant to developers who may be “responsible persons”:

Innocent acquisition exemption – On acquisition, a person diligently undertook inquiries, did not

find contamination, and did not contribute further to the contamination.

Migration of a substance from offsite – A person is immune when a site has been contaminated, because the migration of a substance occurred from offsite.

Environmental consultant immunity – Consultants acting for a developer are immune from liability where they assist the developer in the remediation of the site, provided they are not negligent in their actions.

Immunity from future liability – A person who remediates and obtains a Certificate of Compliance can use the certificate as a defence in private cost-recovery lawsuits. This immunity applies where another person subsequently proposes to change the use of a remediated site or undertake further cleanup.

The Contaminated Sites Regulation provides further exemptions that may be relevant to developers. Of note are those exemptions pertaining to sureties, construction contractors, and transporters of contaminated soil.

Cost recovery provisions

The Act and Regulation authorize a person to recover costs from a responsible person (or persons) where those costs are associated with remediation. That is, a developer who undertakes remediation may recover costs from other responsible persons – for example, past polluters.

Minor contributor status

If a developer cannot obtain an exemption from liability, as described above, he or she may be entitled to obtain *minor contributor status*. The Province recognizes the need to treat people who only contributed a minor portion of the contamination on site in a fair and expeditious manner. Minor contributor status can also cap

and shield a person against private cost recovery lawsuits, also limiting liability.

Voluntary Remediation Agreement

This type of agreement with the ministry may be particularly attractive to a developer who wishes to settle liability expeditiously. Under such an agreement, the developer accepts the terms of remediation, including scheduling and a cap on remediation costs. A Voluntary Remediation Agreement can also form the basis for private financial transactions.

Approval in Principle

Developers urged the ministry to provide interim approval, or Approval in Principle, to enable them to seek appropriate financing and municipal development approvals. A Director may grant an Approval in Principle by approving a remediation plan which, if implemented, would lead to remediation that meets applicable standards. Investigation results, an evaluation of remediation options, public consultation input, and remediation plans would be reviewed and, if satisfactory to a Director, may lead to an Approval in Principle being issued.

Certificate of Compliance

A developer can seek approval of remediation in the form of a Certificate of Compliance. Such a certificate may be issued by a Director when a site has been cleaned up according to a remediation plan and meets numerical remediation standards in the Contaminated Sites Regulation.

The ministry recognizes that, at some sites or for some types of contamination, remediation that meets numerical standards may not be technically feasible or financially justified. The legislation allows onsite management of contaminants, provided these contaminants are managed according to prescribed risk standards.

A Director may also issue a Certificate of Compliance where the remediation meets risk-based standards in the Regulation.

Security

The *Environmental Management Act* and Contaminated Sites Regulation establish a hierarchy of security: restrictive covenants under the *Land Titles Act* can be imposed only where an entry on the Site Registry is not adequate to achieve effective remediation; and financial security can only be imposed where restrictive covenants are not adequate. The Regulation specifies circumstances under which a Director must discharge the relevant security.

Contaminated Soil Relocation Agreement

Such an agreement regulates the movement of soils from contaminated sites, taking into account the soil quality and environmental conditions at the deposit site. While local bylaws to regulate soil deposit are allowed, they must not conflict with provincial standards if immunity provisions under this legislation are to apply to those local governments.

Public review

Not all contaminated sites raise significant public concerns. However, a Director may require a responsible person to carry out public consultation and review of remediation in cases where there is significant public interest. For those sites, public consultations could achieve better public understanding of proposed remediation, as well as provide useful commentary with which to evaluate remediation alternatives.

Addressing industry concerns, the Regulation bars a Director from ordering public consultation for remediation for which an Approval in Principle or Certificate of Compliance have already been issued.

Contaminated sites fees

The contaminated site legislation authorizes the provincial and local governments to collect fees to offset their costs of contaminated sites regulation and administration. See Fact Sheet 25, "Fees for Contaminated Sites Services," for more information on fees.

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 site@gov.bc.ca