

Highlights for Lenders

The primary goal of the *Environmental Management Act* is to protect the environment and human health. Another goal is to provide greater certainty and fairness to all contaminated sites stakeholders. The clarity the legislation and Contaminated Sites Regulation bring to liability issues is particularly important for lenders and their agents.

Recognition of lenders' concerns

Under the previous *Waste Management Act*, lenders had several concerns:

- The broad language raised uncertainty for lenders, who feared they would be held liable simply by exercising their rights as lenders.
- If targeted as "deep pockets," lenders faced being unfairly called upon to contribute financially to remediation because of the actions of others.
- Uncertainty over what constituted a "contaminated site" and "remediation" produced a high degree of risk when lenders evaluated a borrower's financial viability.

When are lenders exempt from liability for cleanup?

The contaminated sites provisions create an exemption from remediation liability for lenders who act primarily to protect their security interest. Lenders are not liable when they:

- participate in purely financial matters of a borrower to protect a security interest;
- have the capacity to influence a borrower's operation in a way that could contribute to contamination, but they do not do so;

- impose requirements on a borrower that do not contribute to contamination (for example, lenders are allowed to insist on environmental conditions within a security agreement); or
- appoint a person to inspect or investigate a site to determine what future action the lenders might take, when such an action has been approved by the ministry.

When are lenders held liable?

Lenders can become liable for remediation in two instances:

- if, in exercising control over a site, they impose requirements that cause the site to become contaminated (the Regulation, however, clarifies that certain types of control, including undertaking realization proceedings, do not attract liability); and
- if they become the registered owner of contaminated property – for example, as the result of foreclosure (again, however, the Regulation notes that lenders who become owners can be held liable only for the time that they own the site, and therefore remediation liability cannot be assigned by a Director of Waste Management's order or a private lawsuit after a lender disposes of the property).

Remediation orders

Lenders must take special precautions when dealing with sites that are subject to a remediation order from a Director. A person who receives a remediation order must not, without written consent of the Director, diminish assets that could be used to satisfy the

terms and conditions of the remediation order. The Contaminated Site Regulation sets out the types of transactions deemed not to diminish assets. Exemptions on satisfying liabilities as they become due, making or accepting payments on loans or advances, and actions of receivers and trustees are particularly important for lenders.

Special provisions for receivers and trustees

The Regulation provides guidance for receivers and trustees in bankruptcy. It:

- establishes the circumstances under which receivers and trustees become personally liable;
- requires them to comply with remediation orders to the extent of available assets;
- provides alternative means of terminating their duties at a contaminated site; and
- grants them protection against liability when ascertaining future actions.

Reporting requirements in a foreclosure

When receivers, acting on behalf of a lender, foreclose on a property, the lender must provide a site profile to a Director at the start of foreclosure proceedings. Site profiles give the Director the necessary information to determine if further steps should be taken, such as ordering a site investigation or issuing a remediation order. A lender who provides a site profile must not diminish the value of assets at that site until notice is obtained from the Director stating that a remediation order will not be issued.

Approval in Principle

The contaminated sites legislation authorizes a Director to issue an Approval in Principle for a remediation plan. Requiring loan applicants to obtain such approval provides the lender with a degree of certainty that site remediation, if implemented, will proceed according to ministry requirements.

Certificate of Compliance

A Director may issue a Certificate of Compliance for sites where remediation has met the standards provided in the Regulation. The ministry recognizes that remediation to levels required by numerical remediation standards is not always financially or technically feasible. The legislation therefore allows for onsite management of contaminants, if they are managed according to risk-based standards set out in the Regulation. Certificates of Compliance are issued for both approaches to site remediation.

Meaning of “contaminated site” and “remediation” clarified

The legislation provides certainty by specifying standards to define “contaminated site” and acceptable “remediation.”

As defined in the Contaminated Sites Regulation, “contaminated site” means an area of the land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains

- (a) a hazardous waste (as defined in the Hazardous Waste Regulation), or
- (b) another prescribed substance

in quantities or concentrations exceeding prescribed risk based or numerical criteria or standards or conditions.

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