Business Council
of British Columbia

# Submission on the Contaminated Sites Legislation

**April, 1999**

**Vancouver, BC**

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The Business Council of British Columbia, established in 1966, is an association representing approximately 165 large and medium-sized enterprises. Our members are active in all major sectors of the provincial economy, including forestry, mining, oil and gas, petro-chemicals, utilities, financial services, transportation, telecommunications, information technology, hospitality, construction, manufacturing, retail, healthcare, education and the professions. Taken together, the corporate members and the associations affiliated with the Business Council account for approximately one quarter of all jobs in British Columbia.

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# OUTLINE

**PROBLEMS REQUIRING AMENDMENTS TO THE ACT**

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# EXECUTIVE SUMMARY

## 1. The Submission

The purpose of this submission is to evaluate the main features of British Columbia's Contaminated Sites Legislation and to make recommendations on a broad range of issues. (The Contaminated Sites Legislation consists of Part 4 of the *Waste Management Act* and the accompanying Contaminated Sites Regulation). The submission is organized as follows: Part 2 highlights problems with the implementation of the Contaminated Sites Legislation which can be resolved without formal amendments to the Act. Part 3 examines problems with the Legislation which can only be corrected by amendments to the Act (and in most cases, to the Regulation as well). Where possible, comparisons are made in Part 2 and Part 3 to the legislation and processes of other jurisdictions, including the 'superfund laws' of various American states. The recommendations outlined in Parts 2 and 3 are applicable to all provincial industry sectors. Part 4 examines problems and solutions specific to the mining industry.

The Business Council believes that the suggested reforms are consistent with the overall environmental objectives underlying the Contaminated Sites Legislation, and in some cases will actually provide a better result than the Legislation in its current form from an environmental protection perspective, while at the same time ensuring that the Legislation does not continue to have unduly costly and unfair impacts on industry stakeholders.

## 2. The Review Process

The submission is based in large part on a series of interviews conducted with companies and other organizations familiar with the Contaminated Sites regime.[1] An initial list of business and other stakeholder groups was developed through discussions with the Business Council. In addition, notices requesting input were circulated to the Urban Development Institute and the Industrial, Commercial, Institutional Environmental Managers Association ("iciEMA"). Nineteen companies and other groups were interviewed. Another eight stakeholders contributed written submissions. A total of two mining companies, one forestry company, one company engaged in chemical production, three companies in the oil and gas industry, two provincial Crown corporations, two railways, two landfill operators, five environmental consultants, five developers, two municipalities and personnel from two Government ministries were interviewed or submitted written comments which contributed to the preparation of the submission. However, the opinions and recommendations contained therein are those of the Business Council of British Columbia and do not necessarily accord with the views of all of those interviewed.

[1] The law firm of Ladner Downs was contracted to undertake the research and conduct the interviews for this submission.

## 3. Summary of Recommendations

The following is a list of recommendations for improving the environmental regulatory process and the Contaminated Sites Legislation. Details are contained in the body of the submission. ***It is the Business Council's position that recommendations marked with an asterix (*) should be given the highest priority.***

### Business Task Force on Red Tape and Regulation

**Recommendation #1:** The current B.C. government Business Task Force on Red Tape and Regulation should become a permanent Task Force. All proposed amendments to environmental legislation as well as proposed major regulatory changes should be reviewed by that Task Force before being introduced or implemented by government. This would provide a formal process for securing a broad-based review of the potential short and long-term impacts of proposed legislation and regulations.

### Delays

***Recommendation #2:** MELP should develop a 'fast track' approach under the Contaminated Sites Legislation for simple matters to reduce the backlog and time frames for reviews. An initial screening should be conducted to determine if the matter is simple. If the matter is simple, it should be subject to a simplified fast track review. To a certain extent, the fee structure, which is based on the size of the site and whether a site is a 'simple site' or a 'complex site', could be used as the basis for determining whether a matter should be fast tracked.

***Recommendation #3:** MELP should establish fixed timelines for all stages in the review process. These timelines should be inserted into the Regulation by way of amendment. For example, the Business Council recommends that MELP aim to process applications for Approvals in Principle ("AiP") and Certificates of Compliance within 30 to 45 days after receipt of the application. There are already some timelines in the Regulation, such as those in relation to the processing of site profiles (although we have been advised that MELP is not adhering to even these legislated timelines). In addition, other provincial environmental laws, such as the *Environmental Assessment Act*, impose time limits on each of the key steps in the process. Any proposed time limits should be circulated to members of the Contaminated Sites Implementation Committee for comment before finalization.

***Recommendation #4:** MELP should maintain review time information for all reviews (including the status of those in progress) and make that information publicly available to improve accountability and to provide realistic baselines to assess how long a review will take.

**Recommendation #5:** To encourage MELP to adhere to the existing timelines in the Legislation (e.g. for processing site profiles) as well as the proposed timelines (assuming Recommendation #3 is accepted), the Contaminated Sites Regulation should be amended to provide for fee rebates in the event MELP fails to adhere to a legislated timeline. The amount of

the rebate should be based on a graduated scale so that the rebate increases with the length of the delay. Such a provision would send a clear message that British Columbia 'means business' when it says it is committed to timely delivery of regulatory services.

**Recommendation #6:** Applicants already in the Contaminated Sites Legislation process who are required to submit further or amended information should maintain their original position in the queue.

**Recommendation #7:** The Government should allocate the appropriate level of financial resources to enable MELP to deliver its legal and regulatory obligations under the Contaminated Sites Legislation in a timely manner.

**External Review Process**

**Recommendation #8:** MELP should expedite its own processing time for external reviews so that the external review option can realistically be used for time sensitive projects. MELP should set strict benchmarks for its own review time (for example, MELP must choose the external reviewer within 7 days of receiving a request for external review). These time limits should be inserted into the Contaminated Sites Regulation by way of amendment. Any proposed time limits should be circulated to members of the Contaminated Sites Implementation Committee for comment before finalization.

**Recommendation #9:** Authority to issue formal approvals should be given to MELP external reviewers. In this regard, the Business Council supports the proposed amendments with respect to site profiles, preliminary site investigations and detailed site investigations outlined in the MELP document entitled 'Proposed Immediate Amendment changes to the Contaminated Sites Regulation' dated 20 November 1998 and the more recent proposal which contemplates the use of truly independent remediation at 80% of the contaminated sites in British Columbia. The Legislation should be amended to allow municipalities to issue development approvals based on such approvals by external reviewers.

**Fees**

***Recommendation #10:** The fee structure contained in Schedule 3 of the Contaminated Sites Regulation should be amended to reduce fees across the board. The fees charged by MELP should not exceed fees charged by other Canadian and American jurisdictions.

**Recommendation #11:** The fee structure should be revised so that a relatively nominal flat fee is charged for review of a preliminary site investigation. After that all fees should be based on the area of contamination rather than legal parcel boundaries (ie. if contamination spreads across six legal parcels, this should be treated as one site for fee purposes. Similarly, if a 30 acre site has one UST and minimal related contamination it should be treated as a small site).

**Independent Remediation**

***Recommendation #12:** MELP should issue two policies: one for the truly independent remediation option (the "Independent Remediation Option") and one for the integration of the independent remediation option with the municipal approval process (the "Interface Option"). Both the Independent Remediation Option and the Interface Option should be vetted with the Contaminated Sites Implementation Committee prior to circulation.

***Recommendation #13:** Under both the Independent Remediation Option and the Interface Option MELP should ensure that its involvement is restricted to overseeing remediation of off-site contamination where the person undertaking remediation has been unable to come to an agreement with all the potentially affected adjacent land owners.

***Recommendation #14:** The Independent Remediation Option would clarify under what circumstances independent remediation will be available without any MELP involvement. In the introductory remarks to the Independent Remediation Option, MELP should make it clear that it wishes to encourage and facilitate independent investigation and remediation wherever practical. All of the comments in the current Policy which suggest that independent remediation is not as good as the MELP process should be deleted (e.g. statements such as '[an independent] cleanup, upon completion, may not meet legislated requirements'). The Independent Remediation Option should apply to all sectors, and to both simple and large, complex sites. The use of risk assessment and risk management as a remediation option should not preclude the use of independent remediation. In addition, the Independent Remediation Option should apply to the situation where there is off-site contamination but the person undertaking the independent remediation has come to agreement with all potentially affected adjacent land owners.

***Recommendation #15:** In situations where a responsible person is proposing to undertake independent remediation and there is some off-site contamination impacting adjacent municipal land holdings, MELP should treat municipal landowners in the same way it treats private landowners (i.e. refuse to become involved unless there is an 'environmental impact' such as potential contaminant migration to a stream) and encourage municipalities to come to an independent agreement with the responsible person.

***Recommendation #16:** The Interface Option should also be available to all sectors (and not just the retail petroleum sector). In addition, there should be no requirement for a person planning to undertake independent remediation using the Interface Option to provide in writing to MELP a statement that he, she or it is a 'responsible party.' There should be no requirement that the person undertaking the independent remediation meet with MELP after providing a closure report. We assume that subsections 3.2.1.1, 3.2.1.2 and 3.2.1.3 in the current Policy deal with soil removal, demolition and some development permits (ie. land use does not change) and that subsection 3.2.1.4 in the current Policy is aimed at development permits where there is a land use change, rezoning and subdivision. Subsection 3.2.1.4 should be clarified to

restrict its application to certain development permits, rezoning and subdivision approvals. Under no circumstances should a Certificate of Compliance be required. The Legislation provides only that an AiP is required. In addition, the references to changes of ownership contained in subsections 3.2.1.1 and 3.2.1.4 should be deleted.

**Permitted Landfills**

***Recommendation #17:** As a preliminary step, MELP should develop, on a fast track basis, of a list of authorized disposal sites for contaminated soil. The development of such a list could be quickly accomplished with the aid of outside consultants. This list should be posted on the Internet when completed.

**Recommendation #18:** MELP should continue to grant Operational Certificates in a timely fashion to facilities along the lines of the Ecowaste Industries Ltd. model.

**Recommendation #19:** The provincial government should consider subsidizing the establishment of facilities that will accept certain wastes such as metals if no private soil treatment facilities in the Lower Mainland region are prepared to accept such wastes.

**Recommendation #20:** MELP should develop a policy to encourage the use of alternative disposal options, such as the use of cement incinerators and other existing industrial processes, and old mine sites.

**Site Registry**

**Recommendation #21:** MELP should make entries onto the Site Registry more quickly, and such entries should be accurate and complete. Entries should be updated on a regular basis so that entries accurately reflect a site's status. In addition, no fee should be incurred for submissions made to MELP Managers to update the entry of a particular site. Non-contaminated site information such as permits and approvals should be included in the Registry so that a single search regarding a property can be performed. MELP must also process paper registry requests in a more timely manner. If these objectives cannot be met, MELP should consider dismantling the Registry and reallocating resources.

**Recommendation #22:** The Site Registry referral process should allow maps of the site to be attached to site entries.

**Recommendation #23:** The various site status codes should be more transparent so that there is no need to refer to the Site Registry Users Guide. Many of the codes, such as 'Inactive - No Further Action Required', are misleading on their face.

**Recommendation #24:** MELP should develop a policy document which clearly articulates the relationship between the paper registries and the *Freedom of Information and Protection of Privacy Act*.

**Uniformity of Administration**

**Recommendation #25:** MELP should implement a more extensive training programme for its regional offices, particularly those outside the Lower Mainland. Business interests should participate at such training sessions to educate MELP staff about business concerns (ie. delays). MELP should consider instituting a program of secondments of personnel to the MELP Lower Mainland Regional Office.

**Recommendation #26:** MELP should ensure that there is a hierarchy of reviewers based on experience such that simple sites are handled by more junior staff while complex sites are handled by MELP personnel with suitable levels of expertise and experience.

**Availability of Supporting Documents**

**Recommendation #27:** The free accessibility of all policy, protocol, procedure, technical guidance and other related documents should be guaranteed by way of postings on the Ministry's website. It is inappropriate for MELP to charge a fee for such information. The documents and other information posted on its website should be up-to-date.

**Recommendation #28:** MELP should ensure that there is adequate stakeholder input prior to the release of any draft policies, protocols, procedures, technical guidance and other related documents such as those containing new standards. Drafts should be finalized as quickly as possible and should not be 'put into play' by the Regional Offices until finalized. In particular, report reviews and certificate of compliance decisions should not be based on unpublished, non-final standards. Information concerning the status of drafts should be readily accessible on the MELP website. Such information should include the date of the most recent draft and the current stage in the revision process (ie. 'Out for stakeholder review', 'Stakeholder review complete', 'MELP review of stakeholder input ongoing' or 'Further draft expected').

**Standards**

**Recommendation #29:** MELP should develop a protocol for establishing background concentrations as soon as possible.

***Recommendation #30:** MELP should act on its proposal to delete aluminium, iron and manganese as remediation standards for groundwater. In addition, MELP should delete aluminium, iron and manganese as remediation standards for soil. Pending implementation of those amendments a special category of report and risk assessment review process and fee should apply to sites where iron, manganese and aluminium in groundwater and/or soil are the only issues.

**Recommendation #31:** The need for the two lowest zinc soil pH standards (ie. 150 ppm and 250 ppm) should be carefully reviewed.

**Recommendation #32:** MELP should act on its proposal to update the schedule 5 and 6 standards for chlorophenols.

**Recommendation #33:** The Workers' Compensation Board and MELP should harmonize their respective definitions of a 'carcinogen.'

**Site Profiles**

**Recommendation #34:** Part 4 of the Site Profile form should be reviewed by the Contaminated Sites Implementation Committee to determine if some of the questions should be removed, or narrowed to limit the number of site profiles required to be forwarded to MELP for review.

**Recommendation #35:** Part 2 of the Contaminated Sites Regulation should be amended to provide a legal obligation for MELP to review site profiles in the absence of specific 'triggers' for the site profile requirement under the Legislation. The right to submit such site profiles should be limited to the property owner.

**Contractor Liability**

**Recommendation #36:** Section 24 of the Contaminated Sites Regulation should be amended to include the decommissioning of buildings and facilities.

**Certificates of Compliance**

**Recommendation #37:** The Contaminated Sites Regulation should be amended to make it clear that MELP can issue both substance and area-specific Certificates of Compliance.

**Recommendation #38:** MELP should develop a policy setting out the circumstances in which and the conditions on which MELP will issue such limited Certificates of Compliance.

**Definition of Site**

**Recommendation #39:** The Contaminated Sites Regulation should be amended to clarify what constitutes the site for purposes of decommissioning and most importantly, for purposes of site profiles and site investigations in the context of development approvals.

**Federal/Provincial Jurisdiction**

**Recommendation #40:** The Business Council recommends that MELP enter into a Memorandum of Understanding ("MOU") with DFO and Environment Canada respecting the division of responsibilities for contaminated sites which border fish bearing waters. Such an

MOU would specify the standards to be applied to sediments and the process for securing DFO and Environment Canada input.

**Definition of Contaminated Site**

**Recommendation #41:** Section 26 of the Act should be amended to provide that a site will only be considered to be a contaminated site where substances exceed the specified standards and there is a demonstrated adverse effect on human health or the environment. The default risk assessment/risk management standards found in section 18 of the Contaminated Sites Regulation could be used to determine what constitutes an 'adverse effect on human health or the environment.'

**Recommendation #42:** The Business Council recommends the deletion of the reference to 'special waste' contained in the definition of 'contaminated site' found in section 26 of the Act. This would help resolve conflicts between the Legislation and the Special Waste Regulation.

**Reopeners, Liability Shields and Voluntary Remediation Agreements**

**Recommendation #43:** The Legislation and in particular sections 27.6 and 28.7 of the Act should be amended to provide for the issuance of 'liability shields' as part of the certificate of compliance document. Such 'liability shields' would state that where a site has been remediated in accordance with then-prevailing standards, the person performing the clean-up and future site owners, developers, occupants, and successors and assigns are released from all statutory clean-up liability (including private cost recovery actions) and liability under other provincial legislation and under common law, and that no future remediation can be required unless (a) the responsible person fraudulently obtained the 'liability shield'; (b) the responsible person contributes to contamination at the site after completion of the remedial work; or (c) the responsible person failed to carry out work as agreed upon in a remediation plan.

**Recommendation #44:** Section 27.4 of the Act should be amended to provide that a voluntary remediation agreement discharges a person from all liability, including private cost recovery actions and remediation orders, common law liability and liability pursuant to other provincial legislation. In addition, section 27.4 should be clarified to provide that no future remediation can be required unless one of the circumstances set out in (a) - (c) above in recommendation #43 occurs.

**Recommendation #45:** MELP should develop a standard form voluntary remediation agreement with stakeholder input. The standard form voluntary remediation agreement would be issued by way of policy to allow for flexibility.

**Recommendation #46:** Section 27(4) of the Act should be amended to provide that cost recovery actions can not be brought where a responsible person has entered a voluntary remediation order or has obtained a Certificate of Compliance.

**Contaminated Soil Relocation Agreements**

***Recommendation #47:** Subsections 28.1(1) - (4) of the Act and Part 8 of the Regulation should be revoked. To replace these CSRA provisions, the Business Council recommends a notice provision which would require the person relocating soil with contaminants above industrial levels to notify MELP and the recipient municipality of the movement of the soil. Failure to follow these notification requirements would result in a penalty. In this way, MELP and municipalities could still keep track of the movement of soils from contaminated sites. MELP would have the opportunity to step in and control such movements in particular cases if necessary through other regulatory powers (eg. the permitting function and pollution prevention orders).

**Recommendation #48:** Subsections 28.1(6) and (7) of the Act should be retained. These provisions provide that a municipality will not be liable as a 'responsible person' for authorizing the removal or deposit of contaminated soil if its bylaws or permits are not in conflict with the Legislation. These provisions also provide that a municipal bylaw that prohibits the deposit of soil and makes reference to the quality of the soil or contamination will have no effect unless approved by MELP. In this way, there will be no incentive for municipalities to revert to earlier practices whereby acceptance of contaminated soil above certain levels from regions outside the boundaries of a particular municipality was prohibited.

**Additional Municipal Requirements**

**Recommendation #49:** The Business Council recommends the insertion of a provision into the Act to the effect that any local government policy, bylaw or other instrument which imposes more stringent requirements than those contained in the Legislation must be approved by the Minister of Environment, Lands & Parks with the concurrence of the Minister of Municipal Affairs. Any such ministerial approval should be vetted with the Business Task Force on Red Tape and Regulation before it is granted.

**Conflict with Special Waste Regulation**

**Recommendation #50:** MELP should implement the changes proposed in the document recently circulated to stakeholders entitled should 'Proposal to Reconcile Regulatory Processes of Contaminated Sites Regulation and Special Waste Regulation for Petroleum Hydrocarbons in Water.' The Business Council also supports the continuing work of the Contaminated Sites Implementation Committee's Water Quality Taskforce.

**Recommendation #51:** Reference to 'special waste' contained in section 26 of the Act should be deleted. See above, recommendation #42.

**Recommendation #52:** The Business Council recommends that MELP initiate the review and overhaul of the Special Waste Regulation to reduce the scope of the Special Waste Regulation to more of a waste handling role with less of a relationship to contaminated

sites. For example, the definitions of 'facility' and 'historical special waste contaminated site' contained in section 1 of the Special Waste Regulation should be revised.

**One Window Approach**

**Recommendation #53:** Section 27.6 of the Act should be amended to provide that any AiP constitutes a 'permit' for all purposes of the *Waste Management Act* (i.e. no separate *Waste Management Act* approvals or permits of any kind are required) and all local government bylaws and that the Public Notification Regulation does not apply to any application for an AiP, including those related to special waste treatment facilities or disposal projects.

**Risk Assessment**

**Recommendation #54:** Section 28.2 of the Act should be deleted. In its place, the following should be inserted:

> 28.2 A contaminated site is satisfactorily remediated if the contamination is handled through risk assessment/risk management such that health and environmental risks of the contamination are at a satisfactory level as provided for in the Contaminated Sites Regulation.

**Recommendation #55:** Even if recommendation #54 is rejected, the Waste Reduction Protocol issued on 9 January 1998 should be revoked.

**Conditional Certificates of Compliance**

**Recommendation #56:** MELP should issue Certificates of Compliance for all sites regardless of whether the site is remediated using numeric or risk-based standards. Sites remediated using the risk assessment/risk management approach should not be stigmatised with the issuance of Conditional Certificates of Compliance. Subsections 27.6(3), (5) and (6) of the Act should be amended by deleting references to 'Conditional Certificates of Compliance'.

**Recommendation #57:** Even if Recommendation #56 is not accepted, subsection 27.6(4) of the Act should be deleted in its entirety. There is no reason why Conditional Certificates of Compliance should not be effective prior to entry on the Site Registry.

**Recommendation #58:** MELP should develop a standard form Certificate of Compliance. Any standard form of Certificate of Compliance developed by MELP should be circulated to the Contaminated Sites Implementation Committee for review and approval.

**Delegation to Environmental Consultants**

***Recommendation #59:** MELP should implement the proposed devolution of authority as outlined in the 'New Proposal' circulated to the Contaminated Sites Implementation Committee in early December 1998.

**Development Approvals**

**Recommendation #60:** Subsection 26.1(b)(iii) of the Act should be deleted. The requirement for a soil removal permit should not trigger the contaminated sites process.

**'Responsible Persons'**

**Recommendation #61a:** The Act should be amended by deleting the current categories of responsible persons and replacing them with the single category of 'persons who caused the contamination'. This would more clearly align B.C.'s contaminated sites regime with the polluter pay principle. Some American states, such as Michigan and Connecticut, have adopted this approach. In Britain, the *Environment Act, 1995* allows liability to be primarily imposed only on persons who actually caused or knowingly permitted the contamination.

**Recommendation #61b:** If recommendation #61a is not accepted, the Business Council recommends that the 'contractor' liability provision in the Regulation be clarified as set out in recommendation #36.

**Recommendation #61c:** The 'producer' exemption from liability provisions in the Regulation should be modified so that a producer is only liable where he, she or it controls the disposal of a substance in a manner that causes the site to become a contaminated site. The term 'disposal' must be carefully defined so as to avoid the situation which has developed in the United States. At the very least, such a definition must make clear that 'disposal' does not extend to activities such as recycling, re-manufacturing or re-processing.

**Recommendation #61d:** Section 19 of the Regulation should be clarified to provide that requiring compliance with environmental laws, standards, policies and codes of practice of government and industry will not result in liability. Currently the exemption appears only to extend to government documents.

**Retroactive Liability**

***Recommendation #62:** The Act should be amended to provide that the Act is retroactive only to the date of 1 April 1997, the date of implementation of the Legislation. The implementation date has been chosen because potentially responsible persons knew that as of that date, the rules governing clean-ups had changed. This recommendation recognizes that in principle, the taxpayers and citizens at large who enjoyed substantial benefits from past industrial production – and many of whom will indirectly be paying the costs associated with the liability

provisions of the Act as currently drafted – should bear the cost of remediating those few historically contaminated sites that pose a genuine risk to public health or the environment.

**Absolute Liability**

***Recommendation #63:** The Business Council recommends that notion of absolute liability be replaced with one of strict liability, so that those who exercised reasonable care to avoid contamination would not be liable under the Act. Evidence of reasonable care would include compliance with current legislation, industry standards and discharge permits. The provision of a due diligence exemption is not without precedent in Canadian legislation in the non-offence context.

**Joint and Several Liability**

***Recommendation #64a:** The Business Council believes that joint and several liability should be replaced with a system in which the amount payable toward a clean-up by each party would be fixed as a percentage and limited to that percentage, based on the application of various apportionment factors. Joint and several liability is not in accordance with the principle of 'polluter pays'. It is appropriate that orphan shares resulting from a mandatory apportionment process be borne by society at large.

The Act should be amended to make the decision of the allocation panel binding on the regional manager. This is in line with the recommendations contained in the 1993 CCME report on contaminated site liability. This recommendation requires careful consideration of many issues, including allocation panel financing, constitution, independence and procedures. 'Contaminated sites stakeholders' and the Government jointly should name to a roster the individuals to sit on such allocation panels. An appeal procedure should be included in the Act by which a decision of the allocation panel may be appealed directly to the British Columbia Supreme Court. The allocation panel provisions should be revised to include a provision similar to section 27.3(3) of the Act limiting a responsible person's liability to the amount determined by the allocation panel.

**Minor Contributors**

If recommendation #64a is adopted, section 27.3 of the Act, the 'minor contributor' provisions may be deleted.

**Recommendation #64b:** If the recommendation set out in #64a is not accepted, the Business Council recommends the deletion of subsection 27.3(1)(c) of the Act.

**Allocation Panels**

**Recommendation #64c:** Section 27.2(5) of the Act should be amended to provide that a manager is bound by any allocation panel opinion.

**Recommendation #64d:** Allocation panel advisors should be appointed only after consulting with and obtaining approval from members of the Contaminated Sites Implementation Committee.

**Recommendation #64e:** The 'Procedure for the Allocation Panel Process' should be redrafted to provide for a refinement of procedural issues, such as the issue of third party participation, costs and billing procedures and supporting information. The allocation panel procedure document should only be finalized after review and approval by the Contaminated Sites Implementation Committee.

**Recommendation #64f**: The Business Council recommends the establishment of a process under which those who receive a bill from an allocation panel can require an independent assessment and review of the bill.

**Remediation Orders**

**Recommendation #65:** The Legislation should be amended to clarify who must be consulted before an Order is issued (ie. is it only those who will potentially be named in the Order or does it include all parties affected by the Order such as the owner of property contaminated by migrating contamination), when that consultation must occur, the nature of that consultation and the timing for that consultation (eg. a party served with notice of a potential remediation order has 30 days to submit written comments to MELP). The amendments could provide that advance consultation is not required where the Minister declares an emergency.

**Recommendation #66:** Section 27.1 of the Act should be amended to provide that an order made under section 27.1 may authorize a person or persons designated by a manager to enter land on 'reasonable terms' as determined by the manager. Reasonable terms would include for example provisions relating to insurance obligations, termination, release and indemnities, prior notice and compliance with laws.

**Recommendation #67:** Subsection 28.4(2)(a) of the Act should be deleted, or in the alternative, the exercise of that power should be limited to emergency situations and should be subject to the appeal provisions set out in Part 7 of the *Waste Management Act*.

**Mines**

***Recommendation #68:** Mines should be specifically exempt from the provisions of the Contaminated Sites Legislation and should remain under the jurisdiction of the *Mines Act*. Mines are unique from other sites. Most are in remote, isolated areas with which the public has no direct contact. The *Mines Act* is the statutory mechanism best suited to deal with contamination of a mine site. MELP has extensive involvement in mine closure through its representation on the Mine Development Review Committees. MELP would still have the ability to control adverse environmental impacts from mine sites through the issuance of pollution abatement and pollution prevention orders. The exemption of 'mines' from the

provisions of the Contaminated Sites Legislation accords with the Government's recent initiatives to attract investment and create jobs in the mining sector, including legislation recognizing the right to mine and measures to make 'mineral exploration and development an easier and more certain process in th[e] Province.'

The new application section would read as follows:

> Part 4 of this Act does not apply to a mine which is subject to a permit issued under section 10 of the *Mines Act*.

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# INTRODUCTION

## 1. Background

An Order in Council was deposited on 16 December 1996 proclaiming British Columbia's Contaminated Sites Legislation in force effective 1 April 1997. The Contaminated Sites Legislation consists of Part 4 of the *Waste Management Act*[1] (the "Act") and the accompanying Contaminated Sites Regulation[2] (the "Regulation").

According to the Government, the Contaminated Sites Legislation is intended to provide certainty, clarity and fairness in the assessment and remediation of contaminated sites. To achieve the goal of fair and equitable cost assignment, the Government sought to base the Legislation on the 'polluter pays' principle[3], whereby persons responsible for the contamination of a site are held accountable for that contamination. The Government expected that the Legislation's extensive provisions defining responsible persons and the general principles for allocation of liability among responsible persons would lead to greater certainty in resolving liability issues. It also believed that the framework of liability in the Legislation would establish a better system[4] for allocating the cost of remediation and protecting innocent landowners who own or occupy historically contaminated sites.

The Legislation as a whole is intended by the Government to provide improved protection of human health and the environment by facilitating the clean-up of contaminated sites. It is also intended to implement a more flexible, scientifically sound system of environmental quality standards for defining contamination and clean-up requirements. Other

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[1] R.S.B.C. 1996, c.482. The *Waste Management Amendment Act, 1993*, S.B.C. 1993, c.25 was passed by the British Columbia legislature in June, 1993.

[2] B.C. Reg. 375/96.

[3] BC Environment, 'Updates on Contaminated Sites' (No.1), December 1996 at 2; BC Environment, 'Updates on Contaminated Sites: Remediation Liability Overview' (No.16), April 1998 at 1; and British Columbia, Debates of the Legislative Assembly, 8 June 1993, where the then-Minister of Environment, Lands & Parks John Cashore described the Legislation as follows: '[t]he proposed amendments will maintain the principle of "Polluter Pays" but introduce fair and consistent administrative processes. This will insure to the greatest extent possible that innocent persons and the government do not have to bear the costs and liability associated with the identification and remediation of these sites.'

[4] The system which existed prior to 1 April 1997 included the *Environment Management Act*, R.S.B.C. 1996, c.118 (under which the Minister of Environment, Lands & Parks is specifically given authority to deal with environmental emergencies and with activities that have, or may have, a 'detrimental environmental impact'); Sections 31 and 33 of the *Waste Management Act*, supra, note 1 (which provide authority for the issuance of Pollution Abatement and Pollution Prevention Orders); section 392 of the *Land Title Act*, R.S.B.C. 1996, c.250 (which provides the Ministry of Environment, Lands & Parks with authority to register a notice against title to a property on which there is 'special waste' that poses a threat to public health; and common law causes of action (such as nuisance, trespass, strict liability based on the case of Rylands v. Fletcher (1866), L.R. 1 Ex.265, aff'd (1868), L.R. 3H.L. 330 and negligence, commonly referred to as the 'toxic torts').

benefits anticipated by the Government include less expensive alternatives to the courts for settling clean-up disputes, better protection from liability for municipalities, and a simple system for accessing available information on specific sites across the Province.[5] Finally, the Government expected the Legislation would help to prevent unnecessary urban sprawl and erosion of the property tax base.

In practice, the Contaminated Sites Legislation is one of several pieces of environmental legislation contributing to the current difficult economic situation in the Province. In some cases it has also played a role in deterring investment.[6] The current Legislation is perceived by many investors and business operators as increasing the costs and risks of doing business in B.C. relative to other jurisdictions. For this reason, the Legislation has been included in the regulatory review being conducted by the Business Task Force on Red Tape and Regulation.[7] Representatives of the Business Council of British Columbia (the "Business Council") met with the Minister of Environment Lands & Parks in November 1997 to enumerate the ways the Contaminated Sites Legislation adversely impacts business through increased costs and delays and at the same time frustrates the Government objectives outlined above. At that meeting, the Minister invited the Business Council to prepare a submission evaluating the Contaminated Sites Legislation and containing recommendations for improvements. The Minister indicated that amendments to the Legislation would likely be introduced in 1999.[8]

## 2. The Submission

The purpose of this submission is to evaluate the main features of the Contaminated Sites Legislation and to make recommendations on a broad range of issues. The submission is organized as follows: Part 2 highlights problems with the implementation of the

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[5] Province of British Columbia, 'News Release: New Contaminated Sites Regulations to Benefit Both Environment and Economy', 18 December 1996 at 1.

[6] There are many examples. Atlantic Industries Limited ("AIL") in a letter dated 27 January 1999 addressed to Cassie Doyle, the Deputy Minister of MELP, highlights the 'inequities and injustices' resulting from the retroactive application of the Contaminated Sites Legislation. AIL states in that letter that if 'retroactivity is not corrected…investors like our shareholders…would never again acquire shares in British Columbia companies'. AIL concludes that the Contaminated Sites Legislation is a 'big disincentive to investment in British Columbia'. See also note 7.

[7] The Task Force's mandate is defined broadly to 'make recommendations on how to reduce the cost of doing business in British Columbia, by streamlining and eliminating unnecessary provincial legislation, processes and procedures': Ministry of Finance & Corporate Relations, 'Legislative Changes to Reduce Red Tape, Support Business Growth' (News Release No. 26, 8 July 1998) at 2. The Task Force's Second Report (dated 23 October 1998) at 8 and the accompanying chart entitled 'Status of Proposals Made During Business Task Force Consultations' contain a number of entries in relation to the Legislation from the BC Chamber of Commerce, the 'Mining Industry', the Union of British Columbia Municipalities, the Certified General Accountants Association of British Columbia and Coopers & Lybrand.

[8] This would be in addition to the evaluation contemplated by section 66 of the Regulation which provides that the Ministry of Environment, Lands & Parks is required to evaluate the management of the Regulation on or before 1 April 2000 to determine if any modifications are appropriate based on advances in science, law and the management of contaminated sites. See letter from L.T. Hubbard (then Manager of Environmental Remediation & Integrated Pest Management) to the various 'contaminated sites stakeholders' dated 17 December 1996.

Contaminated Sites Legislation which can be resolved without formal amendments to the Act. Part 3 examines problems with the Legislation which can only be corrected by amending the Act (and in most cases, to the Regulation as well). Where possible, comparisons are made in Part 2 and Part 3 to the legislation and processes of other jurisdictions, including the 'superfund laws' of various American states. The recommendations outlined in Parts 2 and 3 are applicable to all provincial industry sectors. Part 4 examines problems and solutions specific to the mining industry.

In general, the most important recommendations made in this submission relate to the following aspects of the current legislative regime: delays, fees, external reviews and independent remediation, landfills, contaminated soil relocation agreements, the definition of "responsible persons" under the Act, and the rules and principles governing the assignment of liability.

The Business Council believes that the suggested reforms are consistent with the overall environmental objectives of the Contaminated Sites Legislation, and that in many cases implementing the recommendations outlined below will actually provide a better result compared to the status quo from an environmental protection perspective, while at the same time ensuring that the Legislation's costly and unfair impacts on stakeholders are reduced.

## 3. Preparation of the Submission

To a significant extent, this submission is based on the views of industry stakeholders. An initial list of business and other stakeholder groups was developed through discussions with the Business Council. In addition, notices requesting input were circulated to the Urban Development Institute and the Industrial, Commercial, Institutional Environmental Managers Association ("iciEMA"). Nineteen companies and other groups were interviewed. Another eight stakeholders contributed written submissions. A total of two mining companies, one forestry company, one company engaged in chemical production, three companies in the oil and gas industry, two provincial Crown corporations, two railways, two landfill operators, five environmental consultants, five developers, two municipalities, and personnel from two Government ministries were interviewed or submitted written comments which contributed to the preparation of the submission.

## PROBLEMS NOT REQUIRING AMENDMENTS TO THE ACT

The recommendations set out in this section do not require formal amendments to the Act. In many cases, the problems relate to the Ministry of Environment, Lands & Parks' ("MELP") implementation of the Contaminated Sites Legislation and do not require an amendment to the Regulation. In other cases, an amendment to the Regulation is required.

### 1. Business Task Force on Red Tape and Regulation

#### 1.1 Problem

One of the principal problems with environmental legislation in British Columbia in recent years has been the process by which such legislation has been developed and implemented. There appears to be little if any detailed cost/benefit analysis conducted prior to implementation of new environmental legislation (and regulations) or amendments to existing legislation and regulations. Nor is much consideration given to the long-term impacts of such legislation on the business climate in British Columbia. In some cases, there is little or no consultation with the business community.[9] These problems are particularly apparent in the case of the Legislation. The Business Task Force on Red Tape and Regulation has been established to review existing legislation. However, the key for British Columbia is to develop, on a going-forward basis, a positive regulatory environment that will encourage new investment.

#### 1.2 Recommendation

**Recommendation #1:** The Business Task Force on Red Tape and Regulation should become a permanent Task Force. All proposed amendments to environmental legislation and significant new regulatory proposals should be reviewed by that Task Force before being introduced. This would provide a formal process for securing a broad-based review of the potential short and long-term impacts of proposed legislation and regulation.

### 2. Delays

#### 2.1 Problem

MELP issued a discussion paper in January 1991 containing a brief description of the Government's objectives and a general description of the principal elements of a new

[9] A good example is the introduction of Bill 40, the *Environment Management Amendment Act, 1998* in July, 1998. Many business stakeholders were never consulted in the development of Bill 40. After much criticism, MELP agreed to undertake additional consultations with the Business Council and other groups before proceeding further: BC Environment, 'News Release: Government to Consult Further on Stewardship Legislation', 23 July 1998.

contaminated sites regime.[10] That discussion paper in turn relied heavily on the analysis contained in a report commissioned by MELP in 1989. That report listed a number of principles that shaped the recommendations for changing the process for managing contaminated sites. One of these principles provided that any newly devised process should not interfere with the timely clean-up of contaminated sites.[11]

Yet the current Contaminated Sites Legislation review processes are unanimously criticized by the business community as unduly time-consuming. These delays interfere with business transactions and hurt British Columbia's competitiveness. In some cases the delays also endanger the environment.

As of early October 1998, the Lower Mainland Regional Office's self-reported time for processing approvals under the Contaminated Sites Legislation is a minimum of 5 months. In some cases, the Lower Mainland significantly exceeds this estimate: in one consultant's recent experience, it took the Lower Mainland seven months to provide initial comments in relation to a request for a determination.[12] Nor are these delays confined to the Lower Mainland Regional Office. For example, the Vancouver Island Regional Office in Nanaimo is reporting that the current time frame for MELP to review any preliminary site investigation ("PSI") is a minimum of six months, even in cases where the PSI uncovers no evidence of contamination. Under the Legislation, development approvals cannot be issued until such reviews are completed. These time frames do not recognize the realities of site redevelopment or property transfer.

Nor do these time frames compare well with other jurisdictions. A recent study comparing the times involved in decommissioning typical urban service station sites in Alberta, British Columbia and Ontario found that it takes approximately six times as long to decommission a service station using an excavation and replacement approach to remediation in British Columbia, due to the time required to secure regulatory approvals.[13] If onsite treatment is used to remediate a site, the time required is approximately 60% greater in British Columbia than in Alberta, again due to regulatory approval requirements. The time required to decommission an urban service station site when groundwater pumping and treatment is required is approximately 2.5 times greater in British Columbia than in the other two provinces. Finally, the decommissioning time required for an urban service station with offsite contamination is approximately 50% greater in British Columbia than in Alberta or Ontario, primarily due to the time required to obtain regulatory approvals.

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[10] BC Environment, New Directions for Regulating Contaminated Sites: A Discussion Paper (Victoria: Ministry of the Environment, January 1991) at 2.

[11] Contaminated Sites Management In The Province Of British Columbia: A Review of Provincial Roles And Responsibilities (February 1990) at 35.

[12] See Pottinger Gaherty Environmental Consultants Ltd., 'Dirty Deeds' (3 September 1998) at 4.

[13] See O'Connor Associates Environmental Inc., Cost of Decommissioning of Typical Service Station Sites, study for the Canadian Petroleum Producer Institute, dated 24 April 1998 at 6.

In the opinion of the Business Council, such delays result not just from understaffing[14], but more importantly from an overly bureaucratic and rigid implementation of the Legislation. MELP staff are not encouraged to provide pro-active assistance to the public. It appears that applications for review are simply queued with no thought as to whether a relatively simple and straightforward matter should be 'fast tracked'. In addition, any report considered deficient by MELP must be resubmitted for review (and in many cases, sent to the back of the queue). In many cases, these deficiencies are minor. Finally, the practice of local offices referring reports and other matters to Victoria after conducting lengthy local reviews appears to be widespread. This only lengthens the time frame for review completion. While MELP maintains that the external review option can be used for time sensitive projects, currently this in fact does not significantly reduce review times and therefore is rarely used (see below, paragraph 3).

## 2.2 Recommendations

To address the delay problems, the Business Council makes the following recommendations:

**Recommendation #2:** MELP should develop a 'fast track' approach for relatively simple matters that would reduce the backlog and time frames for other reviews. An initial screening should be conducted to determine if the matter is simple. If the matter is simple, it should be subject to a simplified, fast track review. To a certain extent, the fee structure, which is based on the size of the site and whether a site is a 'simple site' or a 'complex site', could be used as the basis for determining whether a matter should be fast tracked (for a discussion of fees, see below, paragraph 4). (MELP's 'New Proposal' of early December 1998, which contemplates certification by qualified professionals in certain situations, appears to partially fulfill this recommendation. See below, at paragraph 10.1).

**Recommendation #3:** MELP should establish fixed timelines for all stages in the review process. These timelines should be inserted into the Regulation by way of amendment. For example, the Business Council recommends that MELP process applications for Approvals in Principle ("AiP") and Certificates of Compliance within 30 to 45 days after receipt of the application. There are already some timelines in the Regulation such as those in relation to the processing of site profiles (although we have been advised that MELP is not adhering to even these legislated timelines).[15] In addition, other provincial environmental laws, such as the

[14] MELP appears to concur with this statement. Correspondence from the Lower Mainland Region of MELP in relation to an approval in principle review states that '… based on current workloads and limited staff resources, current [MELP] review times are a minimum of five months.'

[15] For example, municipalities and approving officers must forward site profiles with a 'yes' response to any of the questions on environmental concerns to a manager of MELP and other site profiles to the Site Registry within 15 days after receiving the site profile (Regulation, section 6). Managers, division heads and district inspectors must assess the profiles they receive and within 15 days, or if extended, 30 days, notify the person who provided the site profile if they intend to order a site investigation. The manager must also notify the municipality or approving officer of this decision within the same time frame (Regulation, section 7).

*Environmental Assessment Act*[16], impose time limits on each of the key steps in the process. Any proposed time limits should be circulated to members of the Contaminated Sites Implementation Committee for comment before finalization.

**Recommendation #4:** MELP should maintain review time information for all reviews (including the status of those in progress) and make that information publicly available to improve accountability and to provide realistic baselines to assess how long a review will take.

**Recommendation #5:** To encourage MELP to adhere to the existing timelines in the Legislation (e.g. for processing site profiles) and the proposed timelines (assuming Recommendation #3 is accepted), the Regulation should be amended to provide for fee rebates in the event that MELP fails to adhere to a legislated timeline. The amount of the rebate should be based on a graduated scale so that the rebate increases with the length of the delay. Such a provision would send a clear message that British Columbia 'means business' when it says it is committed to timely delivery of regulatory services.

**Recommendation #6:** Applicants already in the Contaminated Sites Legislation process who are required to submit further or amended information should maintain their original position in the queue.

**Recommendation #7:** The Government should allocate the appropriate level of financial resources to MELP to enable MELP to deliver its legal and regulatory obligations under the Contaminated Sites Legislation in a timely manner.

In addition, implementation of a number of the other recommendations in this submission should also assist in reducing timelines.

## 3. External Review Process

### 3.1 Problem

One of the more innovative features of the Regulation is found in section 10(2), which provides an option of requesting external report reviews. These external report reviews are performed by consultants hired by MELP.[17] Where a request is made for an external consultant, MELP will select a consultant from its roster. The fees for external reviews vary according to the size and complexity of the site. In addition to the fee charged by the external review team, MELP charges an additional fee of 20% of the fee normally charged if MELP were to do the review. The Government expected the use of this option to result in faster

[16] R.S.B.C. 1996, c.118 and Environmental Assessment Prescribed Time Limits Regulation, B.C. Reg. 278/95.
[17] The list of external reviewers is found at page 2 of the BC Environment 'Fact Sheet No. 22: External Report Review Option - Summary of Fees and Time Schedule', October 1998.

contaminated site report reviews and provide applicants with greater certainty concerning the review time involved.[18]

While the external review process is intended to provide an option for faster service with a more certain completion date, in some cases requests for external reviews have entailed longer rather than shorter review periods. In many cases, the stated turnaround time for the review was extended by several weeks at the start and at the end of the service request, as MELP involvement was still required and was not in any way expedited. In one case, it took MELP almost a month to simply request the external review. As this process is more costly than a 'normal' MELP review and does not appear to offer any benefits with respect to timeliness or certainty of completion, most stakeholders interviewed stated they have not used the process and did not intend to in the future.

### 3.2 Recommendations

**Recommendation #8:** The Business Council recommends that MELP expedite its own processing time for external reviews so that the external review option can realistically be used for time sensitive projects. MELP should set strict benchmarks for its own review time (for example, MELP must choose the external reviewer within seven days of receiving a request for external review). These time limits should be inserted into the Regulation by way of amendment. (See above, paragraph 2.2). Any proposed time limits should be circulated to members of the Contaminated Sites Implementation Committee for comment before finalization.

**Recommendation #9:** Authority to issue formal approvals should be given to MELP external reviewers. In this regard, the Business Council supports the proposed amendments with respect to site profiles, preliminary site investigations and detailed site investigations outlined in the MELP document entitled 'Proposed Immediate Amendment changes to the Contaminated Sites Regulation,' dated 20 November 1998, and the more recent proposal (the 'New Proposal' of early December 1998) which contemplates the use of truly independent remediation and consultant certification at 80% of the contaminated sites in British Columbia. The Legislation should be amended to allow municipalities to issue development approvals based on such approvals by external reviewers. Further comments on this issue are contained in Part 3 of this submission.

## 4. Fees

### 4.1 Problem

Schedule 3 of the Regulation sets out the fees charged by MELP for its various services. The fees vary, depending on the service provided by MELP, and the size and complexity of a site. Fees are levied for three general services: fees for reviewing reports and

[18] BC Environment, 'Facts on Contaminated Sites: Highlights for Developers' (No. 9), April 1997 at 3; BC Environment, 'Contaminated Sites Updates: New Criteria, Definition, Fees and Certificate of Compliance in Effect' (No. 19), September 1995 at 2.

plans; fees for issuing approvals and certificates; and fees for information request responses. In addition, Schedule 3 contains a list of fees applicable to a variety of situations, such as requests for an allocation panel, determination of minor contributor status, determination of whether a site is a contaminated site, contaminated soil relocation agreements and voluntary remediation agreements. The Government maintains that the Contaminated Sites Legislation fees are 'cost recovery fees' designed to 'offset contaminated sites regulatory and administrative costs'.[19]

The fees can be considerable. They range from $250 for reviewing a preliminary site investigation for a small, simple site to $28,000 for the review of a remediation plan which includes a risk assessment for a large complex site. Other fees in addition to the sum of $28,000 will be required to take a large complex site to completion of remediation. In fact, these fees can amount to a substantial portion of total remediation costs, and in some cases, the review fees approach the cost of preparing the remedial report.[20]

Currently, the Legislation does not define the term 'site'. This has caused problems in relation to the levying of fees. For example, recently a consultant applied for MELP approval of a remediation plan in relation to a contaminated site which encompassed six separate legal parcels of land. MELP levied a fee in relation to each of the six parcels, despite the fact that all six were in reality one contaminated site. In addition, many stakeholders report that an

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[19] BC Environment 'Facts on Contaminated Sites' (No. 3), January 1997 at 1.

[20] For example, take the situation of an old warehouse on industrial property formerly heated by oil in an underground storage tank ("UST") and built on an area historically elevated with fill. An environmental investigation has revealed that the UST has contaminated soil and groundwater, and the fill contained 3 metals with concentrations above residential criteria. The prospective purchaser wants to demolish the old warehouse and build a community centre. The remedial plan envisages a tank pull accompanied by bioremediation of soil with limited pump and treatment of contaminated groundwater, and excavation and off-site disposal of metals contaminated fill at a nearby industrial development for an estimated cost of $87,000. This site is defined by MELP as 'large' because it occupies over 12,000$m^2$ and 'complex' because it is contaminated with more than one substance (i.e. hydrocarbons and metals) and groundwater (and not just soil) is contaminated. It is estimated that MELP fees would total $42,150 (plus GST). Example provided by Dr. Harm Gross of Next Environmental Inc. for a presentation dated 10 January 1997. Harm Gross arrived at this figure as follows:

| | | |
|---|---|---|
| Site Profile | | 50 |
| Determination of Contaminated Sites (determined by consultant) | | n/a* |
| Review of Consultants Reports | - Preliminary Site Investigation | 2,000 |
| | - Detailed Site Investigation | 10,000 |
| | - Remedial Plan | 16,000 |
| Contaminated soil relocation agreement | | 3,000 |
| Inspection, monitoring and verification | | 500 |
| Approval in principle for remediation | | 600 |
| Certificate of compliance | | 10,000 |
| | **TOTAL:** | **42,150** |
| | | **plus GST** |

* fee is $750

** excludes fees from municipality for assessment of site profile, consultant engineering, drilling, laboratory analyses and remediation.

entire area of a site is used for MELP's fee calculation even though the area with potential contamination comprises a fraction of the total area (the example frequently given was that of a UST removal).

### 4.2 Recommendations

**Recommendation #10:** The Business Council recommends the amendment of the fee structure contained in Schedule 3 of the Regulation to reduce fees across the board. The fees charged by MELP should not exceed fees charged by other Canadian and American jurisdictions.[21]

**Recommendation #11:** The fee structure should be revised so that a relatively nominal flat fee is charged for review of a preliminary site investigation. After that all fees should be based on the area of contamination rather than legal parcel boundaries (i.e. if contamination spreads across six legal parcels, this should be treated as one site for fee purposes. Similarly, if a 30 acre site has one UST and minimal related contamination, it should be treated as a small site).

## 5. Independent Remediation Procedures

### 5.1 Problem

Section 28 of the Act allows a person to independently remediate a site (i.e. without the need for MELP review and approval). However, section 28(3) of the Act provides that MELP can choose whether or not to impose conditions in respect of the remediation.

The Government has stated that procedures for independent remediation are provided so that developers and others can clean-up sites with 'minimal supervision by BC Environment'.[22] The provisions of the Contaminated Sites Legislation providing for the option of independent remediation were developed so that investigations could begin without delay and clean-ups could be undertaken without having to wait for approval from MELP officials. In particular, it was recognized that many industrial and commercial groups, such as the petroleum industry, have developed their own expertise for dealing with contaminated sites issues, or have access to private sector experts. In fact, MELP practice with respect to independent remediation varies widely as the Ministry struggles to develop a process.

On 26 November 1997, MELP released a draft document entitled 'Guidance Document No. 4: Investigation and Remediation Processes and Local Government Permit Process' (the "Policy"). The Policy is intended to allow the petroleum industry to proceed with

[21] Oregon, for example, charges on an actual cost accounting basis, including salary and expense costs incurred with overhead as defined by the state general accounting office. Their fees are significantly lower than British Columbia's for complex matters. Letter from Keystone Environmental Ltd. to Ladner Downs, 10 December 1998.
[22] Supra, note 18 'Highlights for Developers' at 1.

gas station clean-ups while avoiding many of the municipal approval bottlenecks. This aspect of the Policy is to be commended.

The Policy, however, contains a number of restrictions on the ability to use the independent remediation option. For example, at paragraph 3.0, entitled 'Independent Remediation and Variations', MELP contends that

> [t]o use the independent remediation option, it must be recognized that the approval of the regional pollution prevention manager is usually required. This requirement is not fully transparent within the [Regulation] and occurs because of the duties of the manager to protect the environment and because of the relationships between the [Regulation] and other acts such as the *Municipal Act*, the *Vancouver Charter* etc.

In the context of the truly independent remediation option (i.e. no requirement to obtain municipal approvals), MELP takes the position that, as a general rule, a manager will require the responsible person undertaking the independent remediation to enter at least in part into the MELP process when the site is large and complex; risk assessment and risk management is the selected remediation option; or there is significant off-site migration of contaminants (or there is significant risk that off-site contaminant migration will occur). Many stakeholders reported that MELP forces responsible persons into the Contaminated Sites Legislation process where there is <u>any</u> off-site contamination. This occurs even if the responsible person has concluded agreements with those parties affected by the off-site contamination.

Paragraph 3.2 of the policy deals with situations where someone wishes to use the independent remediation option but a local government permit is required (for demolition work or soil removal, for example). It contains a number of restrictions. Subparagraph 3.2.1 provides that this portion of the Policy is limited to the 'retail petroleum industry.' Subparagraph 3.2.1.1 provides that a company in the retail petroleum industry should confirm that it is a 'responsible party for any contamination associated with the site.' This appears to be a precondition to the right to proceed with the independent remediation option. Subparagraph 3.2.1.2 provides that within 90 days of completion of independent remediation, the company must provide MELP with a closure report. The closure report must demonstrate that legislated remediation standards have been achieved. The company must also make an appointment with MELP to discuss the contents of the closure report, for which an inspection fee will be levied. Pursuant to subparagraph 3.2.1.3, MELP requires the company to commit to making an application for an AiP.

The Policy document has been applied by different MELP regional offices in different ways. In some regional offices, the effect of the Policy is that it is not possible to remediate a site without the involvement of MELP. For example, even where contamination is contained on the site and there is low potential for migration of the contaminants from the site in future, certain MELP regional offices require that a person undertaking independent remediation provide MELP with a closure report within 90 days of completion of independent remediation. The person must then make an appointment with MELP to discuss the contents of the closure report, for which an inspection fee is levied. After these discussions, MELP reserves the right to

require further work. This is problematic for good corporate citizens who wish to clean up their sites without incurring the delays and costs of obtaining MELP approvals when experienced and reputable consultants are otherwise involved.

## 5.2 Recommendations

**Recommendation #12:** MELP should issue two policies: one for the truly independent remediation option (the "Independent Remediation Option") and one for the integration of the independent remediation option with the municipal approval process (the "Interface Option"). Both the Independent Remediation Option and the Interface Option should be vetted with the Contaminated Sites Implementation Committee prior to circulation.

**Recommendation #13:** Under both the Independent Remediation Option and the Interface Option, MELP should ensure that its involvement is restricted to overseeing the remediation of any off-site contamination in the situation where the person wishing to undertake remediation has been unable to come to an agreement with all the potentially affected adjacent land owners.

**Recommendation #14:** The Independent Remediation Option would clarify under what circumstances independent remediation will be available without <u>any</u> MELP involvement. In the introductory remarks to the Independent Remediation Option, MELP should make clear that it wishes to encourage and facilitate independent investigation and remediation wherever practical. Comments in the current Policy which suggest that independent remediation is not as good as the MELP process should be deleted. (e.g., statements such as '[an independent] cleanup, upon completion, may not meet legislated requirements'). The Independent Remediation Option should apply to all sectors, and to both simple and large, complex sites. The use of risk assessment and risk management as a remediation option should not preclude the use of independent remediation. In addition, the Independent Remediation Option should apply to a situation where there is off-site contamination but the person wishing to undertake the independent remediation has reached agreement with all potentially affected adjacent land owners.

**Recommendation #15:** In situations where a responsible person is proposing to undertake independent remediation and there is some off-site contamination impacting adjacent municipal land holdings, MELP should treat municipal landowners in the same way it treats private landowners (i.e. refusal to become involved unless there is an 'environmental impact' such as potential contaminant migration to a stream), and should encourage municipalities to come to an independent agreement with the responsible person.

**Recommendation #16:** The Interface Option should also be available to all sectors (and not just the retail petroleum sector). In addition, there should be no requirement for a person planning to undertake independent remediation using the Interface Option to provide in writing to MELP a statement that he, she or it is a 'responsible party.' Nor should the person undertaking the independent remediation be required to meet with MELP after providing a

closure report. We assume that subsections 3.2.1.1, 3.2.1.2 and 3.2.1.3 in the current Policy deal with soil removal, demolition and some development permits (i.e., land use does not change) and that subsection 3.2.1.4 in the current Policy is aimed at development permits where there is a land use change, rezoning and subdivision. Subsection 3.2.1.4 should be clarified to restrict its application to certain development permits, rezoning and subdivision approvals. Under no circumstances should a Certificate of Compliance be required (the Legislation provides only that an AiP is required). In addition, the references to changes of ownership contained in subsections 3.2.1.1 and 3.2.1.4 should be deleted.

## 6. Permitted Landfills

### 6.1 Problem

At present, there are very few waste disposal facilities in British Columbia that will accept contaminated soil.

One of the problems in assessing the number of waste disposal facilities is the lack of MELP information. While each MELP region maintains a general list of all permitted landfills, this list does not indicate whether or not the particular landfill accepts (and is authorized to accept) contaminated soil. The Contaminated Sites Unit of MELP in Victoria is presently collating information from regional staff on the status of landfills in each MELP region, particularly as it relates to the acceptance of contaminated soil. This task, however, is far from completion.[23]

Despite the inability of MELP to develop such a list, it appears from interviews with various environmental consultants that there are five operating facilities in the Lower Mainland[24] which can accept soils containing hydrocarbons and that meet the criteria specified in section 41.1 of the Special Waste Regulation.[25] To date, only the Sumas operation is permitted to accept soils with other organic compounds (PAH and chlorophenols) for treatment and

[23] Correspondence from John Jungen to Ladner Downs, 6 October 1998.

[24] The five facilities are: The Richmond Landfill, owned and operated by Ecowaste Industries Ltd.; facilities for bioremediation at the Richmond Landfill operated by Hazco Environmental Services Ltd. and Remedicon: Remediation Consultants Ltd.; Sumas Soil Recycling Inc., with a treatment facility located on an Indian Reserve near Abbotsford, treats and recycles hydrocarbon and petroleum contaminated soils through the use of bioremediation (see footnote 64 for further information); the Quantum Environmental Group (B.C.) Inc. facility in Delta; and a recently established facility near Princeton operated by Envirogreen Technologies Ltd. A sixth facility is planned for the north-eastern region of the Province. The Babkirk Special Waste Land Treatment Facility will treat hydrocarbon contaminated sites. The Babkirk facility was granted a Project Approval Certificate pursuant to the *Environmental Assessment Act*, supra, note 16 on 13 April 1998. The Babkirk facility will be largely restricted to treatment of hydrocarbon contaminated soil from oil and gas facilities situated in the northeastern corner of the Province. See the Application document produced by Babkirk Land Services Ltd., available from the B.C. Environmental Assessment Office.

[25] B.C. Reg. 63/88.

disposal. There are no facilities that dispose of metals above industrial/commercial limits.[26] The result is that most contaminated soil is shipped either to Alberta or the United States. The need to ship outside of the Province can double the cost of most projects due to the high cost of transportation. In the case of disposal in the United States, there is also the threat that the business shipping waste across the border will be named in its capacity as a 'generator' of waste as a 'potentially responsible party' under U.S. 'Superfund' legislation - the *Comprehensive Environmental Response Compensation and Liability Act* ("CERCLA").[27] Moreover, the ability to ship contaminated soil to Alberta and the United States depends on the continued willingness of these jurisdictions to accept such shipments. This may not be the case in future.[28]

It appears that this situation stems from both MELP's decision-making process and the general reluctance on the part of the soil treatment industry situated in the Lower Mainland region to accept certain contaminated soils due to concerns over future development plans and property values.

## 6.2 Recommendations

**Recommendation #17:** As a preliminary step, MELP should move quickly to develop a list of authorized disposal sites for contaminated soil, a task that can be facilitated with the aid of outside consultants. This list should be posted on the Internet when completed.

**Recommendation #18:** MELP should continue to grant Operational Certificates in a timely fashion to facilities along the lines of the Ecowaste Industries Ltd. model.

**Recommendation #19:** The provincial government should consider subsidizing the establishment of facilities prepared to accept certain wastes such as metals in the event that no private soil treatment facilities in the Lower Mainland region are prepared to accept such wastes.

**Recommendation #20:** MELP should also develop a policy to encourage the use of alternative disposal options, such as the use of cement incinerators and other existing industrial processes, and old mine sites.

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[26] Recently, Ecowaste's Operational Certificate has been amended to allow the Richmond Landfill to accept soil contaminated with metals up to industrial levels. To date, the Richmond Landfill does not accept such wastes.

[27] Pub. L. No. 95-5110, 94 Stat. 2767 (codified as 42 U.S.C. ss. 9601-57 (1982)).

[28] For example, soon after the Canadian government passed the PCB Export Regulations, SOR/97-108, which permitted the export of PCB wastes to the United States for thermal or chemical destruction, the U.S. Circuit Court of Appeal in San Francisco overturned a Clinton administration program that had allowed private operators of incinerators to import PCBs from Canada and into the United States for destruction. Following news of the Court decision, the U.S. Environmental Protection Agency informed officials at Environment Canada that the U.S. border would be closed to Canadian PCB wastes as of 20 July 1997. The result is that owners or persons responsible for PCB waste in British Columbia have fewer options for the disposal of PCB waste: see Guy Crittenden, 'The Border Closes … Again' (September 1997) Hazardous Materials Management at 51.

## 7. Site Registry

### 7.1 Problem

The Legislation provides for the establishment of a Site Registry. The Government expected the Site Registry to provide better public information about site investigations and clean-ups. The Government has also argued that the Site Registry is the 'best place to start a due diligence search for information held by the [Government] on the environmental conditions of land'.[29] The Government has emphasized many times that the Site Registry is not a registry of contaminated sites. There are some sites on the Site Registry which are contaminated, but most sites are simply investigated and require little, if any clean-up, or have already been cleaned-up to Government standards.[30] The Legislation does not provide for the removal of a site from the Site Registry if it is determined not to be a contaminated site or after the site has been cleaned-up.

The usefulness of the site registry is significantly impaired by the length of time required for MELP to update information contained in the Registry and the inaccuracy of much of that information. The Business Council understands that MELP has taken steps to streamline the internal process for adding information to the Registry. However, there are still numerous cases where a site has been remediated and the status still reads 'active.' In such cases, in order to expeditiously change the status of a site, the onus is on the property owner to have the status updated through the submission of a written request, together with supporting documentation, to a regional MELP office. The status of a site can be changed only with the consent of the regional Pollution Prevention Manager. This process takes time, and may incur a fee.[31] Delays in entries onto the Site Registry can have very real consequences. Section 27.6(4) of the Act provides that a 'Conditional Certificate of Compliance' does not take effect until the Registrar has made the entry in the Site Registry.

In addition, it appears that information contained in the Registry is less than complete. For example, a search by PID number in relation to a property in Prince George revealed no entry for that property. However a search by civic address found that there was indeed an entry for that particular property. A search in relation to a property used as a gas station in Prince Rupert revealed no entries on the Registry, even though MELP volunteered that it had environmental reports pertaining to the property. These are not isolated examples.

Many stakeholders interviewed for this submission considered the form of summary of preliminary site investigation reports, detailed site investigation reports and remediation plans required for entry onto the Site Registry pursuant to Protocol No. 5:

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[29] BC Environment, 'Facts on Contaminated Sites: Why Search on the Site Registry' (No. 24), October 1998 at 2.
[30] BC Environment, 'Facts on Contaminated Sites: The Site Registry' (No. 20), March 1997 at 1.
[31] BC Environment, 'Facts on Contaminated Sites: Common Questions and Answers on the Manager's Site Registry Report' (No. 21), October 1997 at 3-4.

Establishing a Format for Summaries of Site Investigation Reports and Remediation Plans as highly technical and likely unintelligible to many users of the Site Registry.

On a more fundamental level, many 'contaminated sites stakeholders' have questioned the usefulness of the Registry. To date, the Business Council has found that there has not been widespread use of the Registry. Most stakeholders continue to conduct a search with the so-called 'paper registries' situated in each of the seven MELP regional offices. These paper registry searches must be conducted because in addition to much of the information contained on the Site Registry, they disclose non-Contaminated Site Legislation permits, approvals, orders, charges, special waste registrations and charges (to the extent known by MELP). As this information is not included on the Site Registry, some stakeholders believe that one search with the paper registry will avoid multiple searches and search fees. Having said that, there is often a lengthy delay in processing paper registry requests. Again, these requests commonly form part of the due diligence process in business transactions. Quick turnaround of responses is often critical in moving a transaction forward.

Furthermore, there appears to be some confusion about the interplay between the legislation and the *Freedom of Information and Protection of Privacy Act* ("FOIPPA").[32] It is not clear what information is and is not available to the public without the need to pursue a formal request under FOIPPA. Clarification of this issue would provide greater certainty for all parties.

Overall, to be useful and reliable the information in the Site Registry must be complete, accurate, up-to-date and transparent (i.e., without the need for interpretive guidebooks). If this objective cannot be achieved, consideration should be given to dismantling the Site Registry and allocating the administrative funds to more productive purposes.

## 7.2 Recommendations

**Recommendation #21:** MELP should make entries onto the Registry more quickly. Entries on the Registry should be accurate and complete, and be updated on a regular basis so that entries accurately reflect a site's status. In addition, no fee should be incurred for submissions made to MELP Managers to update the entry of a particular site. Non-contaminated site information such as permits and approvals should be included in the Registry so that a single search regarding a property can be performed. MELP must also process paper registry requests in a more timely manner. If these objectives cannot be met, MELP should consider dismantling the Registry and reallocating resources.

**Recommendation #22:** The Site Registry referral process should allow maps of the site to be attached to site entries.

[32] R.S.B.C. 1996, c. 165.

**Recommendation #23:** The various site status codes should be more transparent so that there is no need to refer to the Site Registry Users Guide. Many of the codes, such as 'Inactive - No Further Action Required', are misleading on their face.

**Recommendation #24:** MELP should develop a policy document which clearly articulates the relationship between the paper registries and FOIPPA.

## 8. Uniformity of Administration

### 8.1 Problem

The Government maintains that the Legislation brings uniformity to the administration of contaminated sites.[33] For many businesses this has not been the case in practice.

Various 'contaminated sites stakeholders' and consultants have complained that some MELP regional and sub-regional offices do not have the technical competency to administer the Contaminated Sites Legislation, and that interpretation of the Legislation and supporting documents varies from region to region. There is no question that the provisions in the Legislation are complex. In addition, to date, training has been rather limited.

### 8.2 Recommendations

**Recommendation #25:** The Business Council recommends the implementation of a more extensive training programme for MELP regional offices, particularly those outside the Lower Mainland. Business interests should participate at such training sessions to educate MELP staff about business concerns (i.e. delays). MELP should consider instituting a program of secondments of personnel to the MELP Lower Mainland Regional Office.

**Recommendation #26:** MELP should ensure that there is a hierarchy of reviewers based on experience so that simple sites are handled by more junior staff while complex sites are handled by MELP personnel with suitable levels of expertise and experience.

## 9. Availability of Supporting Documents

### 9.1 Problem

Since the Contaminated Sites Legislation came into effect on 1 April 1997, MELP has issued a series of policies, protocols, procedures, technical guidance documents and fact sheets to clarify various aspects of the Legislation. As of late November 1998, there were some six procedures, eleven policies, five protocols, fifteen guidance documents, and six documents

[33] BC Environment, 'Facts on Contaminated Sites: Highlights of New Legislation and Regulations', January 1997 at 1.

relating to analytical methods for VPHs, LEPHs and HEPHs. In addition, several documents have been released in draft form and have not been updated in many months.

A number of stakeholders have raised concerns over the lack of availability of certain policy documents, the difficulty of determining the status of various documents and the implementation of documents which are still in draft stages. Some of these policies contain standards MELP uses to review reports submitted by environmental consultants. MELP is on record as being committed to providing the public 'with easy access to current information' relating to the Contaminated Sites Legislation.[34] Yet the MELP web site provides access to only one MELP policy and procedure, and only six of fifteen guidance documents. For complete access to policy and other related documents, one must purchase the 'BC Environmental Issues Searchable Reference Guide Contaminated Sites' CD-Rom. The CD-Rom is rather costly, ranging from $345 each for 1-5 users, to $245 each for over 100 users.

### 9.2 Recommendations

**Recommendation #27:** The free accessibility of all policy, protocol, procedure, technical guidance and other related documents should be guaranteed by way of postings on the MELP website. In particular, it is crucial that environmental consultants have timely access to all new standards contained in policy documents which MELP is using to review environmental reports. The Business Council does not believe that it is appropriate for MELP to charge a fee for such information. The documents and other information posted on the MELP website must be up-to-date.

**Recommendation #28:** MELP should ensure stakeholder input prior to the release of any draft policies, protocols, procedures, technical guidance and other related documents such as those containing new standards. Drafts should be finalized as quickly as possible and should not be 'put into play' by the Regional Offices until finalized. In particular, report reviews and certificate of compliance decisions should not be based on unpublished, non-final standards. Information concerning the status of drafts should be readily accessible on the MELP website. Such information should include the date of the most recent draft and the current stage in the revision process (i.e. 'Out for stakeholder review', 'Stakeholder review complete', 'MELP review of stakeholder input ongoing' or 'Further draft expected').

## 10. Standards

### 10.1 Problem

There are two standards by which a contaminated site may be remediated. The first is by numeric standards. Different standards apply to (a) soil and (b) surface water and groundwater at a site. The second is by risk-based standards which are historically known as risk assessment/risk management.

[34] Letter from Ron Driedger to Contaminated Sites Stakeholders, dated 20 July 1998.

The Government conducted a survey of 61 government agencies across North America to assess the numeric standards and risk-based standards' practicability and consistency. The Government has stated that this survey confirmed that the numeric standards are practical in the context of years of regulatory experience with contaminated sites; are similar to those used in other North American jurisdictions; and are protective of human health and the environment.

10.1.1 Background Concentrations

A method for determining background concentrations is critical on many sites and development of an established process would expedite the review of many sites. Nearly two years after the Regulation came into effect, MELP has not provided guidance for assessing background concentrations in relation to groundwater,[35] despite attempts by the Urban Development Institute's environment committee and others to initiate such a process.

10.2 Comments on Particular Standards

- Iron, Manganese and Aluminum in Groundwater. One of the most common complaints relates to the iron, manganese and aluminium in groundwater standards contained in Schedule 6 of the Regulation. These standards are routinely exceeded in natural groundwater in the Lower Mainland. The standards are also routinely exceeded due to non-native but generally benign organic fill materials, such as hog fuel, and as a result of degradation of soils contaminated with petroleum. It is estimated that up to 30% or more of Lower Mainland sites exceed the iron, manganese and aluminium standards as a result of natural background levels.

- Zinc in soil. Various consultants participating in the preparation of this submission have found that the lowest soil pH standard for zinc is very stringent.

- Chlorophenols in soil and water. The Business Council has been told by representatives of the forestry industry that the calculation of standards for chlorophenols in soil and water may have had errors.

- Chromium in soil. Background levels of chromium in the Williams Lake region routinely exceed the lowest matrix numerical soil standards for chromium (i.e. 60 mg/kg).

10.3 **Recommendations**

**Recommendation #29:** MELP should develop a protocol for establishing background concentrations as soon as possible.

**Recommendation #30:** MELP should act on its proposal to delete aluminium, iron and manganese as remediation standards for groundwater.[36] In addition, MELP should

[35] With regard to soil, see 'Protocol 4: Determining Background Soil Quality', Draft No. 5 (16 February 1998).
[36] Letter from MELP, 'Stakeholder Comment Solicited on Proposed "Immediate Amendments" Changes to the Contaminated Sites Regulation', 20 November 1998 at 1.

delete aluminium, iron and manganese as remediation standards for soil. Pending implementation of those amendments, the Business Council recommends that a special category of report and risk assessment review process and fee should apply to sites where iron, manganese and aluminium in groundwater and/or in soil are the only issues.

**Recommendation #31:** The need for the two lowest zinc soil pH standards (i.e. 150 ppm and 250 ppm) should be carefully reviewed.

**Recommendation #32:** MELP should act on its proposal to update the schedule 5 and 6 standards for chlorophenols.

**Recommendation #33:** The Workers' Compensation Board and MELP should harmonize their respective definitions of a 'carcinogen.'

## 11. Site Profiles

### 11.1 Problem

The Legislation creates a new document called a 'site profile.' It is four page form attached as Schedule 1 to the Regulation. Schedule 1 interacts with Schedule 2, which defines those commercial and industrial uses and activities for which a site profile will be required. Part IV of the site profile form, entitled 'Areas of Environmental Concerns', contains a series of questions requiring yes or no answers. A decision on whether to send a site profile to MELP will be based on answers to these questions. Any 'yes' answers will result in a site profile being forwarded by a municipality to MELP for review. This again results in delays on transactions. Many contaminated sites stakeholders feel that the questions contained in Part 4 of the site profile form are overly broad given the implications of a 'yes' answer. For example, one question asks whether there have previously been on the site any discarded barrels, drums or tanks. Almost every site that is or was used for the industrial or commercial purposes and activities described in Schedule 2 will have had at one time or another 'discarded barrels, drums or tanks.'

Several contaminated sites stakeholders raised the issue of whether it is possible to prepare and file a site profile with MELP in the absence of a specific 'trigger' for the site profile requirement under the Legislation. Several businesses indicated that they would like to submit site profiles in the absence of a development permit or other 'triggering application' with a view to having MELP make a determination as to whether a site investigation is required before the project proceeds. The ability to obtain 'pre-clearance' would expedite projects. Currently, there is no provision in the Act or Regulation which contemplates voluntary submission of site profiles by a property owner. An excerpt from MELP's 'Searchable Reference Guide - Contaminated Sites' indicates that MELP's position is that site profile submissions must be triggered and that site profiles 'cannot be submitted at a whim.' We understand that MELP's concern is that without such a limitation on the obligation to review site profiles, MELP 'would

be swamped with site profiles.' The answer contained in the 'Reference Guide' refers to a policy being developed on who can submit a site profile. No such policy has been developed to date.

### 11.2 Recommendations

**Recommendation #34:** Part 4 of the Site Profile form should be reviewed by the Contaminated Sites Implementation Committee to determine if some of the questions should be removed, or narrowed to limit the number of site profiles required to be forwarded to MELP for review.

**Recommendation #35:** Part 2 of the Regulation should be amended to provide for a legal obligation to review site profiles in the absence of specific 'triggers' for the site profile requirement under the Legislation. The right to submit such site profiles should be limited to the property owner. In the absence of a legal obligation to review site profiles, the decision to review or not to review site profiles is a discretionary matter and is one which cannot be easily challenged.[37]

## 12. Contractor Liability

### 12.1 Problem

The Legislation establishes broad categories of potential responsibility and provides a host of exemptions from liability. As a result of concerns that the exemption in the Act are narrow in scope, provisions were added to the Regulation to clarify the scope of the exemptions. In relation to contractors, section 24 of the Regulation provides that a person is not responsible for remediation if the person only provided contracting or consulting services related to the construction of buildings and facilities at a contaminated site. This exemption may not apply to contractors involved in the decommissioning of buildings and facilities.

### 12.2 Recommendation

**Recommendation #36:** The Business Council recommends the amendment of section 24 of the Regulation to include the decommissioning of buildings and facilities.

## 13. Certificate of Compliance

### 13.1 Problem

The Legislation permits MELP to issue a Certificate of Compliance for a portion of a site. However, the Ministry has no clearly articulated policy concerning when it will issue such certificates. In addition, where a property is contaminated by migrating contamination from

[37] In fact, the Environmental Appeal Board has held that a refusal by MELP to issue a pollution abatement order is not a 'decision' which can be appealed under the *Waste Management Act*: see Darcy McPhee v. Deputy Director of Waste Management (unreported), Appeal No. 95/08 - Waste (Environmental Appeal Board, 14 December 1995).

an adjacent site, MELP has taken the position that the 'innocent owner' cannot obtain a Certificate of Compliance with respect to the migrating contamination unless the 'innocent owner' undertakes a comprehensive site investigation on its own site.

13.2 **Recommendations**

**Recommendation #37:** The Regulation should be amended to make it clear that the Ministry can issue both substance and area-specific Certificates of Compliance.

**Recommendation #38:** MELP should develop a policy setting out the circumstances and conditions under which MELP will issue such limited Certificates of Compliance.

## 14. Definition of Site

14.1 **Problem**

The fact that there is no definition of the term 'site' has caused uncertainties in interpretation in relation to the exemption contained in section 4(9) of the Regulation, which provides an exemption from the duty to provide a site profile if the person seeks to demolish or dismantle buildings or structures not associated with decommissioning a 'site'. Where several types of facilities are contained on a single site, does the decommissioning of one of those facilities trigger the site profile requirement? Similarly, if a development permit is required in relation to one area of a large legal parcel does that trigger the need to file a site profile and carry out site investigations on the whole legal parcel or just on the area subject to the development permit? The answer appears to be that a site profile is required for the entire site. In one situation, the owner of four parcels of land comprising an old refinery wished to lease a small part of the site to a party who wanted to build a truck rack. MELP took the position that this transaction would trigger a site profile in relation to the entire refinery site. As a result, the transaction did not proceed.

14.2 **Recommendation**

**Recommendation #39:** The Regulation should be amended to clarify what constitutes the site for purposes of decommissioning and most importantly, for purposes of site profiles and site investigations in the context of development approvals.

## 15. Jurisdictional Issues With the Federal Government

15.1 **Problem**

A number of stakeholders have indicated that where contaminated sites abut fish bearing waters, there is confusion as to where provincial jurisdiction ends and federal jurisdiction begins. For example, where sediments are involved, the federal Department of Fisheries and

Oceans ("DFO") and Environment Canada may have jurisdiction pursuant to the *Fisheries Act*.[38] Sometimes federal regulators have asserted jurisdiction only where the contamination affects areas below the high water mark. In other circumstances, the assertion of jurisdiction has been more aggressive and has been applied to areas further inland. There is also uncertainty as to what standards apply to sediments.[39]

In addition, any remediation plans involving sediments in fish bearing waters require DFO/Environment Canada input before MELP can issue an approval. There are no timelines governing the decision-making of DFO or Environment Canada in these circumstances. The result is increased delays and costs.

### 15.2 Recommendation

**Recommendation #40:** The Business Council recommends that MELP enter into a Memorandum of Understanding ("MOU") with DFO and Environment Canada respecting the division of responsibilities for contaminated sites which border fish bearing waters. Such an MOU would specify the standards to be applied to sediments and the process for securing DFO and Environment Canada input.

[38] R.S.C. 1985, c. F-14.

[39] Environment Canada has issued a document entitled 'Interim Sediment Quality Guidelines' (September, 1995). In addition, there are 'Canadian Sediment Quality Guidelines' for Cadmium (draft, September 1996) and Mercury (draft, February 1997). Environment Canada also plans to issue 'Canadian Sediment Quality Guidelines'. A brochure issued in April 1997 states that 'the threshold effect levels (TELs) calculated using the modified National Status and Trends Program approach are most likely to be adopted…'

# PROBLEMS REQUIRING AMENDMENTS TO THE ACT

## 1. Definition of Contaminated Site

### 1.1 Problem

The definition of what constitutes a 'contaminated site' is critical because liability under the Legislation only applies to those sites that fall within that definition. Under the Legislation, a 'contaminated site' is any site which contains a prescribed substance in excess of a prescribed quantity or concentration.

The use of prescribed criteria for defining contaminated sites is in contrast to most other Canadian jurisdictions in which the determination of what constitutes a contaminated site is left to the discretion of a government official. Typically, the exercise of this discretion is tempered by the fact that the government official must be satisfied that there is some adverse environmental effects as a result of the presence of the contaminant on the site. For example, in Manitoba, the director must determine if a site poses a threat to human health, safety or the environment before the site may be designated as contaminated.[40] The use of numerical-based standards has the advantage of introducing some certainty to the process. However, many representatives of industry continue to be concerned about the 'wide net' cast by these standards, which have resulted in a number of sites being declared 'contaminated sites' even though they pose absolutely or virtually no risk to human health or the environment.

### 1.2 Recommendations

**Recommendation #41:** In light of the fact that this definition determines the applicability of the Contaminated Sites Legislation, the Business Council recommends a revision to section 26 of the Act to provide that a site will only be considered to be a contaminated site where substances exceed the specified standards and there is a demonstrated adverse effect on human health or the environment. The default risk assessment/risk management standards found in section 18 of the Regulation could be used to determine what constitutes an 'adverse effect on human health or the environment.'

**Recommendation #42:** The Business Council recommends the deletion of the reference to 'special waste' contained in the definition of 'contaminated site' found in section 26 of the Act. This would help resolve conflicts between the Legislation and the Special Waste Regulation (see below, paragraph 5).

[40] *Contaminated Sites Remediation Act*, S.M. 1996, c.40, section 7 (in force 19 May 1997). This designation may be revoked when the director is satisfied that the site no longer poses a threat to human health, safety or the environment.

## 2. ‘Reopeners’, Liability Shields & Voluntary Remediation Agreements

### 2.1 Problem

Section 28.7 of the Act permits MELP to take steps in the future even if a person has properly remediated a site if additional information about the site comes to light, the activities on the site change or the standards in the Regulation are revised so that the site subsequently contravenes the new standards. Section 28.7 is an example of how the Contaminated Sites Legislation priorizes establishing liability for remediation costs over re-development of sites. The provisions of section 28.7 mean that further remediation may be required in the future, notwithstanding the fact that a certificate of compliance has been issued for a site. This creates material uncertainty for owners, tenants, lenders and anyone else dealing with a particular site.

The Government makes the argument that various organizations, such as the Canadian Council of Ministers of the Environment (the “CCME”), advocate that any certificate issued by a governmental authority should expressly state that the responsible person may be liable for future clean-up under certain conditions, for example if further contamination is subsequently discovered. While the CCME suggested that regulators should retain the (limited) ability to re-open liability once a certificate of compliance has been issued, it did so on qualified terms:

> Th[e] compromise between the competing issues of ‘certificates of compliance’ and ‘prospective liability’ should permit member governments to hold responsible persons accountable to the fullest extent for contamination in situations where all of the contamination cannot immediately be known. At the same time, this limited use of prospective liability should not cause widespread commercial uncertainty or significantly impair the ability of responsible persons to obtain credit.[41] [Emphasis added].

In addition, the Government points to the legislation of various jurisdictions in the United States which provides that clean site determinations can be reconsidered in certain circumstances.

In fact, while a number of states do have legislation which provides that clean site determinations can be reconsidered or ‘reopened’[42], in most cases the state can only reconsider determinations on narrow grounds, such as where the responsible person obtains a release on fraudulent grounds or the response action by the responsible person is not sufficiently protective to allow the contemplated use of the site to proceed safely from a human health perspective. Recently, in Saskatchewan, a government-appointed ‘Contaminated Sites Liability Advisory Group’ delivered a report which stated that there should only be two situations that result in a sign-off being re-evaluated: failure of the remediating party(ies) to carry out work as agreed to in

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[41] CCME, Contaminated Site Liability Report (Winnipeg, 25 March 1993) at 10.

[42] See for example, Colorado (*Voluntary Cleanup and Redevelopment Act*, H.B. 94-1299, codified at COLO.REV.STAT. ss.25-16-301 et seq.); Rhode Island (RI Dep’t Envt’l Management, Model Agreement, art.VIII, 1996); and New York (Voluntary Cleanup Program, which is New York Department of Environmental Conservation policy only).

a remediation plan, and determination of new risk as agreed upon in a remediation plan. The Group specifically stated that sign-offs should be upheld and not re-evaluated when new standards are established after sign-offs and when land use change is proposed.[43]

In addition, the 'reopener' provisions contained in American state 'superfund' legislation are in relation to the issuance of covenants-not-to-sue, releases and no-further-action letters, and not mere certificates of compliance. Many American jurisdictions have moved beyond the certificate of compliance concept and have introduced 'covenants-not-to-sue' and other similar mechanisms as a measure to encourage voluntary site clean-ups.[44] These releases vary from state to state in terms of scope (sometimes the release is restricted to public liability; in other, more limited cases, it also extends to immunity from further private party civil action). The following states authorize their respective regulatory agencies to confer 'covenants-not-to-sue' and other forms of releases in one variety or another: Arizona[45]; Connecticut[46]; Delaware[47]; Illinois[48]; Indiana[49]; Maine[50]; Massachusetts[51]; Michigan[52]; New York[53]; Ohio[54]; Oregon[55];

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[43] Contaminated Sites Liability Advisory Group, Report (May, 1997), Recommendation Nos. 30 and 31.

[44] Todd S. Davis & Kevin D. Margolis, Brownfields: A Comprehensive Guide To Redeveloping Contaminated Property (American Bar Association, Section of Natural Resources, Energy & Environmental Law, 1997), chpt. 21 et seq.

[45] *Water Quality Assurance Fund*, Voluntary Program, codified at A.R.S., ss.49-281, which authorizes the Arizona Department of Environmental Quality to confer 'covenants-not-to-sue' and contribution protection (immunity from further private party civil action) to prospective purchasers who perform remedial work.

[46] Under *Public Act 95-190*, the Connecticut Department of Economic Development ("CTDEP") may enter into a covenant-not-to-sue with the owner or lessor of a site for which the CTDEP has approved a final remediation report prepared by a licensed environmental professional who has determined in his or her sole discretion that continued monitoring of the site is not required. Connecticut does not provide for any 'reopeners' or any other mechanisms for rescinding a covenant-not-to-sue.

[47] The *Hazardous Substances Clean Up Act*, DEL.CODE Ann.tit.7, ch.9 (1991) provides that a person who operates or owns a facility after the Department of Natural Resources and Environmental Control ("DNREC") has issued a certificate of completion will not be liable for any past releases that are addressed in the approved clean-up plan, or any future releases attributable to conditions existing before the clean-up. Liability protection is also available to any person who, in connection with the sale, lease or acquisition of a facility, enters into an agreement with DNREC to perform a clean-up at the facility. To obtain the protection, the purchaser, etc. must actually complete the clean-up and receive a certificate of completion.

[48] The 1995 amendments to the *Illinois Environmental Protection Act*, 415 ILCS 5/58.1-58.12 (West 1995) offers remediation applicants who complete an approved clean-up the ability to obtain a 'no further remediation' letter from the Illinois Environmental Protection Agency, which constitutes a release from further responsibilities under the Act.

[49] The key feature of Indiana's *Voluntary Remediation Act*, codified at section 13-25-5 of the Indiana Code is that on successful completion of a voluntary clean-up the State of Indiana provides those undertaking such clean-ups with a covenant-not-to-sue. These covenants bar all public or private claims in connection with the release or threatened release that was the subject of the work plan. The covenant does not furnish protection against claims by the federal government based on federal law.

[50] Under Maine's Voluntary Response Program, ME.REV.STAT.ANN.tit.38, ss.343-E (West 1995), a person who undertakes and completes a clean-up in accordance with an approved voluntary response action plan is protected from liability under Maine environmental statutes.

[51] Chapter 21E of the *Massachusetts General Laws* (the *Massachusetts Oil and Hazardous Material Release Prevention and Response Act*) provides that the covenant-not-to-sue program covers those releases described in the remedial plan. Such releases are void if false statements are made or if the applicant fails to perform any obligations contained in the remedial plan.

[52] Infra, note 77.

Pennsylvania[56]; Rhode Island[57]; Texas[58]; Vermont[59]; and Virginia.[60] In addition, while Manitoba does not issue covenants not-to-sue, parties may seek apportionment orders from a binding commission, or enter into regulator-approved private apportionment agreements; both mechanisms extinguish statutory and common law liability. Alberta's statute, the *Alberta Environmental Protection and Enhancement Act*[61] offers a substantial degree of finality in that responsible parties who adhere to an approved remediation plan are protected from regulatory orders.

The Contaminated Sites Legislation does provide for 'voluntary remediation agreements' in section 27.4. We believe the intent was that such an agreement would discharge the responsible person from further liability under the Legislation, without discharging other responsible person(s) (except to the extent of the amount assumed by the person entering into the agreement) and without affecting any person's right to obtain relief under other legislation or the common law. This provision appears to have the effect of insulating the responsible party or parties who have entered into the agreement from the remediation order and the private cost recovery action provisions in the Legislation. This is not free from doubt and will have to be settled by the courts or legislative amendment. In addition, as discussed above, the provisions leave open the issue of liability under other legislation or common law (such as claims for negligence and nuisance). Moreover, as discussed above, section 28.7 of the Act gives MELP the right to take future action with respect to a site in certain circumstances even if a voluntary

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[53] Supra, note 42. New York's Voluntary Cleanup Program provides for the issuance of 'no further action' letters, which include a declaration that the New York Department of Environmental Conservation 'does not contemplate further action needing to be taken at the time' and a release from liability for past damages. The benefits of a no-further action letter run to successors and assigns.

[54] The Ohio Voluntary Action program, officially codified at Chapter 3746 et seq. requires that the Director of Ohio Environmental Protection issue a covenant-not-to-sue to an eligible volunteer who has received a no further action required document from a certified professional. The covenant releases the volunteer from all civil liability to the state except for claims for cleanup costs if the United States Environmental Protection Agency takes an action at the site, and as a result, Ohio incurs costs.

[55] If a party satisfactorily performs its obligations under an agreement, it will receive a letter from the Oregon Department of Environmental Quality for future clean-up liability: see OR.REV.STAT., ss.465.327.

[56] PA.STAT.ANN.tit.35, ss.6026.501(b). The release applies to all state statutory clean-up liability for the person doing the clean-up and future site owners, developers, occupants, successors and assigns, and public utilities.

[57] Supra, note 42.

[58] TEX.HEALTH & SAFETY CODE.ANN. ss.361.610. The release does not apply to a person who changes the land use from that specified in the certificate, if the new use may result in increased risks to human health or the environment.

[59] The *Hazardous Waste management Act*, V.T.STAT.tit.10,ch.159,ss.6615a provides protection from further liability under the Act. This protection extends to successor-in-interests as well.

[60] Chapter 622 provides liability protection for parties receiving certifications of satisfactory completion of remediation from the Virginia Department of Environmental Quality. This protection provides immunity from enforcement actions under Virginia environmental laws, but provides no protection against third-party contribution liability or common law liability.

[61] S.A. 1993, c.E-13.3.

remediation agreement has been entered into. The effectiveness of the discharge under the voluntary remediation agreement is therefore very limited and, with respect to private cost recovery actions, uncertain.

2.2 **Recommendations**

**Recommendation #43:** The Legislation and in particular sections 27.6 and 28.7 of the Act should be revised to provide for the issuance of 'liability shields' as part of the certificate of compliance document. Such 'liability shields' would state that where a site has been remediated in accordance with then-prevailing standards, the person performing the clean-up and future site owners, developers, occupants, and successors and assigns are released from all statutory clean-up liability (including private cost recovery actions) and liability under other provincial legislation and under common law and that no future remediation can be required unless (a) the responsible person fraudulently obtained the 'liability shield'; (b) the responsible person directly or indirectly contributes to contamination at the site after completion of the remedial work; or (c) the responsible person failed to carry out work as agreed upon in a remediation plan.

**Recommendation #44:** Section 27.4 should be amended to provide that a voluntary remediation agreement discharges a person from all liability, including private cost recovery actions and remediation orders, common law liability and liability pursuant to other provincial legislation. In addition, section 27.4 should be clarified to provide that no future remediation can be required unless one of the circumstances set out in (a) - (c) above in recommendation #43 occurs.

**Recommendation #45:** MELP should develop a standard form voluntary remediation agreement with stakeholder input. The standard form voluntary remediation agreement would be issued by way of policy to allow for flexibility.

**Recommendation #46:** Section 27(4) should be amended to provide that cost recovery actions can not be brought where a responsible person has entered a voluntary remediation order or has obtained a Certificate of Compliance.

3. **Contaminated Soil Relocation Agreements**

3.1 **Problem**

Under the Contaminated Sites Legislation, no person is permitted to relocate soil from a contaminated site without entering into a 'contaminated soil relocation agreement' ("CSRA"), subject to certain narrow exemptions described below. For the purposes of the CSRA provisions, 'contaminated site' is defined as a site from which the soil that is to be relocated contains any substances with concentrations greater than or equal to what are in effect residential standards. Exemptions from the requirement for a CSRA include:

- relocation of soil to an authorized special waste storage or treatment facility;

- relocation of contaminated soil to a destination outside British Columbia; and

- relocation to an authorized landfill. If MELP authorization for the landfill does not expressly allow the deposit of contaminated soil, this exemption may only be relied upon if the owner of the landfill site has filed a written statement with a manager of MELP indicating the intended future use of the site. If the site will be used for agricultural, urban park, commercial or industrial use, the concentration of any substance in the contaminated soil must not be greater than or equal to the applicable generic numeric concentration or the lowest matrix concentration for that substance in Schedules 4 and 5. If the written statement indicates the site will be used only for waste disposal, the contaminated soil must not be a special waste unless specifically authorized under the Special Waste Regulation. In order to satisfy the landfill exemption, it is therefore necessary to determine the nature of soil that the landfill is expressly authorized to take or is authorized by the Regulation to take by virtue of the written statement filed by the landfill owner with MELP. According to MELP, only one such statement has been filed to date.

The use of CSRAs was intended to facilitate the free movement of soil between municipalities, thereby alleviating the long standing problem of disposing of industrial and commercial soils and to provide notice to MELP of the movement of such soil. In fact, there is a near universal views that the CSRA application review process is too long, that there is too much uncertainty as to whether a CSRA will issue at the end of the review process and that review fees are excessive. It can take anywhere from one to eight weeks and in some cases longer to obtain a CSRA. In at least one situation it took over three months to obtain a CSRA. Many developers cannot afford to delay a construction or other project for that length of time while waiting for a CSRA. These delays result in developers sending commercial quality soil to permitted landfills to expedite projects, which creates unnecessary costs, fills up the limited permitted landfills with unnecessary materials, and places a burden on the environment in the form of wasted fossil fuel energy and emissions associated with the trucking of soil.

The number of permitted landfill operators who have filed written statements with MELP indicating the future use of their sites is very limited and most are situated in the Lower Mainland. The result is that persons and industries in northern and central British Columbia have few alternatives to the CSRA process. For example, many Regional Districts outside the Lower Mainland have not filed written statements with MELP and are not including contaminated soil in their waste management programs. Additionally, these Regional Districts believe CSRAs expose them to increased liability. As a result, several Regional Districts refuse to sign CSRAs.[62] In addition, many municipalities appear reluctant to give up fees generated by municipal soil relocation permits and therefore require the movement of contaminated soil to be

[62] Pottinger Gaherty Environmental Consultants Ltd., 'Dirty Deeds' (December 1998) at 3.

accompanied by a re-named permit, such as a road use permit.[63] This situation results in a costly and unnecessary duplication of authorization.

The CSRA requirement is also considered to be unfair vis-à-vis 'federal' facilities such as Sumas Soil Recycling Inc.[64] The result is that most contaminated soil is shipped either to Sumas or out of the province (to Alberta and the United States) to avoid the CSRA requirement. This has a significant adverse impact on British Columbia soil treatment operations.

In addition, there has been an inconsistent application of the CSRA requirement across the Province. For example, while the MELP Kootenay and Vancouver Island Regions maintain that landfills accepting contaminated soil up to special waste levels are exempt, the Lower Mainland Region interprets the CSRA requirement differently. The Lower Mainland Region has required at least one landfill operator to have its treatment technology approved prior to the issuance of a CSRA. The Lower Mainland Region in this case appeared to be regulating soil relocation and treatment through the CSRA requirement.

### 3.2 Recommendations

**Recommendation #47:** The Business Council recommends the deletion of subsections 28.1(1) - (4) of the Act and Part 8 of the Regulation. To replace these CSRA provisions, the Business Council recommends the insertion of a notice provision. This notice provision would require the person relocating soil with contaminants above industrial levels to notify MELP and the recipient municipality of the movement of the soil. Failure to follow these notification requirements would result in a penalty. In this way, MELP and municipalities could still keep track of the movement of soils from contaminated sites. MELP would have the opportunity to step in and control such movements in particular cases if necessary through other regulatory powers (e.g. the permitting function and pollution prevention orders).

**Recommendation #48:** Subsections 28.1(6) and (7) of the Act should be retained. These provisions provide that a municipality will not be liable as a 'responsible person' for authorizing the removal or deposit of contaminated soil if its bylaws or permits are not in conflict with the Legislation. These provisions also provide that a municipal bylaw that prohibits the deposit of soil and makes reference to the quality of the soil or contamination will have no effect unless approved by MELP. In this way, there will be no incentive for municipalities to revert to earlier practices whereby acceptance of contaminated soil above certain levels from regions outside the boundaries of a particular municipality was prohibited.

[63] Letter from Morrow Environmental Consultants Inc. to Ladner Downs, 12 November 1998.

[64] Sumas Soil Recycling Inc. operates a facility near Abbotsford which is situated on the Upper Sumas Indian Reserve No. 6 and is therefore regulated by the federal government. See note 24.

## 4. Additional Municipal Requirements

### 4.1 Problem

The Government has embraced a policy of devolution of authority from Victoria to local governments. This delegation is particularly apparent in the process designed by the Government to identify contaminated sites. This creates the possibility that at the local level, the level of experience of the officials and their particular enforcement practices may vary significantly from area to area.

Many municipalities have imposed obligations above and beyond those contained in the Contaminated Sites Legislation. For example, the City of Port Moody requires that a developer or other person obtain a certificate of compliance before it will issue a development permit. Such a requirement is particularly onerous given the time delays to obtain such certificates from MELP. The Legislation requires only that an approval in principle be issued. The City of Surrey is withholding building permits unless the Legislation is complied with. The City of Vancouver has a policy not to proceed with building permit/development reviews until it has received an approval in principle. This can lead to significant delays and corresponding increased costs for many projects. Further, the City of Vancouver requires its lengthy, complex and onerous 'soils contamination and monitoring agreements' to be executed and security posted thereunder when off-site contamination in the roads has occurred. These agreements contain many unreasonable provisions, such as the requirement to indemnify the City against its own negligence and the assumption of liability related to all contamination, regardless of its origins.

There are clearly difficulties at the interface between the municipal and MELP processes. While section 25(2) of the *Waste Management Act* provides that municipal bylaws, permits, licences or approvals that 'conflict' with the *Waste Management Act* are without effect to the extent of the conflict, nothing in that section prohibits a municipality from imposing more stringent requirements than those contained in the Contaminated Sites Legislation.[65]

### 4.2 Recommendation

**Recommendation #49:** The Business Council recommends the insertion of a provision into the Act to the effect that any local government policy, bylaw or other instrument which imposes more stringent requirements than those contained in the Legislation must be approved by the Minister of Environment, Lands & Parks with the concurrence of the Minister of Municipal Affairs. Any such ministerial approval should be vetted with the Business Task Force on Red Tape and Regulation before it is granted.

[65] Many cases have held that there is no conflict if a municipal bylaw is more stringent than provincial legislation: see for example, Propane Gas Association of Canada Inc. v. North Vancouver (City) (1989), 42 M.P.L.R. 29 (B.C.S.C.); and additional cases cited by Felix Hoehn, Municipalities and Canadian Law: Defining the Authority of Local Governments (Saskatoon: Punich Publishing, 1996), 10-12.

## 5. Conflict With Special Waste Regulation

### 5.1 Problem

The Government has recognized that there are conflicts between the Legislation and the Special Waste Regulation.[66] The most glaring example of a conflict between the two involves the water quality values for gasoline components such as BTEX, LEPH and VPH. Under the Regulation, a site can meet the aquatic standards and still exceed the Special Waste Regulation standard and therefore constitute a 'contaminated site' for purposes of the Legislation.

### 5.2 Recommendations

**Recommendation #50:** MELP should implement the changes proposed in the document recently circulated to stakeholders entitled 'Proposal to Reconcile Regulatory Processes of Contaminated Sites Regulation and Special Waste Regulation for Petroleum Hydrocarbons in Water.' The Business Council also supports the continuing work of the Contaminated Sites Implementation Committee's Water Quality Taskforce.

**Recommendation #51:** Reference to 'special waste' in section 26 of the Act should be deleted. See above, recommendation #42.

**Recommendation #52:** The Business Council recommends that MELP initiate the review and overhaul of the Special Waste Regulation to reduce the scope of the Special Waste Regulation to more of a waste handling role with less of a relationship to contaminated sites. For example, the definitions of 'facility' and 'historical special waste contaminated site' contained in section 1 of the Special Waste Regulation should be revised.

## 6. AiPs & The 'One Window' Approach

### 6.1 Problem

Currently, section 47(6) of the Regulation provides that

> [a]n [AiP] for a remediation plan issued under this section is a permit within the meaning of the [*Waste Management Act*] for any facility which
>
> (a) is located on the site to which the remediation plan applies,
>
> (b) is specifically identified in the remediation plan, and

[66] See letter to the Contaminated Sites Implementation Committee from Ron Driedger, dated 15 September 1998 where one of the tasks of the Water Quality Regulatory Taskforce is the 'remov[al] or reduct[ion] of conflicts between the Contaminated Sites Regulation and the Special Waste Regulation'.

(c) is used to manage any contamination which is located on the site for which the remediation plan applies.

Section 47(7) of the Regulation goes on to provide that in relation to an application for an AiP described in section 47(6), the Public Notification Regulation[67] does not apply with respect to the facility, except for a special waste treatment facility or disposal project.

The Business Council is of the opinion that these exemptions, which relate to the requirements of the Public Notification Regulation, are too limited.

### 6.2 Recommendation

**Recommendation #53:** Accordingly, the Business Council recommends amending section 27.6 of the Act to provide that any AiP constitutes a 'permit' for all purposes of the *Waste Management Act* (i.e. no separate WMA approvals of permits of any kind are required) and all local government bylaws[68], and further that the Public Notification Regulation does not apply to any application for an AiP, including those related to special waste treatment facilities or disposal projects.

## 7. Risk Assessment

### 7.1 Problem

Section 28.2 of the Act provides that a contaminated site may be satisfactorily remediated if the contamination is handled on a risk basis such that the health and environmental risks of the contamination are at a satisfactory level. As a practical matter, this type of remediation involves leaving some or all of the contamination at the site and containing it using concrete, liners or other acceptable methods, or otherwise managing the contamination to reduce the health and environmental risks to a satisfactory level. The Legislation thus recognizes that at some sites it is not possible or practical to remove substances due to technological, physical or financial constraints.

However, under section 28.2(1) of the Act, a person responsible for cleaning-up a contaminated site must give preference to remedial alternatives that provide permanent solutions. MELP's preference for permanent remedial solutions has been an operational policy for some years.[69] As a result, MELP issued a draft 'Waste Reduction Protocol' (the "Protocol") on 9 January 1998. The Protocol provides that if substances to be managed on-site are waste, 'a Waste Reduction Plan acceptable to [MELP] may be required as a condition of MELP approval of the risk management remediation plan …' The Protocol lists the lengthy requirements for a

[67] B.C. Reg. 202/94.
[68] Such as Greater Vancouver Regional District's Air Quality Bylaw No. 725 in relation to air emissions permits and Sewer Use Bylaw No. 164 in relation to effluent permits.
[69] BC Environment, 'Facts on Contaminated Sites: Demystifying Risk Assessment' (No. 14), April 1997 at 1.

Waste Reduction Plan. The requirement to submit a Waste Reduction Plan is in addition to the provision of a remediation plan.

Criticism of this Protocol centres on the fact that the Protocol is contrary to the principles of risk assessment and risk management, that it is too costly, too complicated and too time consuming, and that the application of the Protocol is uncertain. In response, MELP has told the Contaminated Sites Implementation Committee that the Protocol will be revised.

### 7.2 Recommendations

**Recommendation #54:** Section 28.2 of the Act should be deleted. In its place, the following should be inserted:

> 28.2 A contaminated site may be satisfactorily remediated if the contamination is handled through risk assessment/risk management such that health and environmental risks of the contamination are at a satisfactory level as provided for in the Contaminated Sites Regulation.

**Recommendation #55:** Even if the above recommendation #54 is rejected, the Protocol should be revoked.

## 8. Conditional Certificates of Compliance

### 8.1 Problem

Section 27.6(3) provides that a 'conditional certificate of compliance' may be issued if the site has been remediated based on the risk-based standards (i.e. substances remaining on site) subject to certain conditions. The term 'conditional' again connotes the negative perception of the risk assessment/risk management approach. It also confuses the nature of a Certificate of Compliance which typically has 'conditions' in it.

### 8.2 Recommendations

**Recommendation #56:** The Business Council recommends that MELP issue Certificates of Compliance for all sites, regardless of whether the site is remediated using numeric or the risk-based standards. Sites remediated using the risk assessment/risk management approach should not be stigmatised with the issuance of Conditional Certificates of Compliance. Subsections 27.6(3), (5) and (6) of the Act should be amended by deleting references to 'Conditional Certificates of Compliance'.

**Recommendation #57:** Even if Recommendation #56 is not accepted, subsection 27.6(4) of the Act should be deleted in its entirety. There is no reason why Conditional Certificates of Compliance should not be effective prior to entry on the Site Registry.

**Recommendation #58:** MELP should develop a standard form Certificate of Compliance. Any standard form of Certificate of Compliance developed by MELP should be circulated to the Contaminated Sites Implementation Committee for review and approval.

## 9. Delegation of Functions to Environmental Consultants

### 9.1 Problem

Currently, MELP reviews and approves site profiles under various circumstances, and preliminary and detailed site investigation reports, and remediation plans. There is a need to simplify and streamline processes for cleaning up contaminated sites.[70] The Business Council understands that MELP is currently looking at ways to reduce its involvement in those cases where risks to the environment or human health are relatively low; we support this initiative.

Due to delays, costs and other problems documented in this submission, MELP has recently proposed changes that would authorize 'qualified professionals' to certify the remediation of certain sites. Under proposals presented to the Contaminated Sites Implementation Committee in early December 1998, MELP staff would delegate uncomplicated assessments to environmental consultants. A simple protocol would be set up based on a point score system. The point system would be designed jointly by MELP and 'contaminated sites stakeholders'. The point system would be used to determine which sites qualify for independent remediation (MELP estimates that 80% of contaminated sites in British Columbia, considered to be low risk, would qualify). Those sites which qualify could be certified by qualified professionals with no requirement for MELP review at any stage. When the qualified professional reports to MELP that the site has achieved compliance, the professional will certify the report and MELP will issue a Certificate of Compliance.

### 9.2 Recommendation

**Recommendation #59:** The Business Council recommends that MELP implement the proposed devolution of authority as outlined in the 'New Proposal' circulated to the Contaminated Sites Implementation Committee in early December 1998.

## 10. Development Approvals

### 10.1 Problem

The Legislation prohibits a municipality from issuing certain development permits and approvals for a current or former industrial site unless: (a) MELP indicates that a site investigation is not required because the site is not contaminated; or (b) where the site is contaminated, MELP has issued an AiP for the remediation plan or a Certificate of Compliance

[70] As recognized by Don Fast in a letter to Bill Levy of the Canadian Petroleum Products Institute dated 23 November 1998. The letter states that '[i]n general, [MELP] support[s] [the] view that its involvement with many of the cleanup operations could be significantly reduced'.

on completion of the remediation. The type of municipal permits and approvals that are affected include:

- subdivision approval;
- rezoning approval;
- development permit or development variance permit which involves any disturbance or excavation of the soil;
- soil removal permit; and
- demolition permit associated with decommissioning a site.

Many stakeholders feel that the restriction on the issuance of certain municipal permits and approvals in the absence of MELP certification occurs at too early a stage in the development process.

### 10.2 Recommendation

**Recommendation #60:** Accordingly, the Business Council recommends deletion of subsection 26.1(b)(iii). The requirement for a soil removal permit should not trigger the contaminated sites process.

## 11. Concept of Responsible Person

### 11.1 Problem

Section 26.5 of the Act lists a number of broad categories of persons responsible for remediation at a contaminated site. Section 26.6 then provides 13 exemptions to the general categories in section 26.5. Part 7 of the Regulation also provides numerous additional clarifications and exemptions. One commentator has maintained that the broad 'responsible persons' categories reflect a policy concern on the part of the Government that all persons who contributed to the contamination should be candidates for liability.[71] The Government has also stated that the designation of classes of 'responsible persons' imports a degree of certainty.[72]

In fact, many of the categories of persons who are responsible for remediation are unclear. For example, 'producers' are responsible persons when they 'by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site'. A great deal of concern was expressed about this potential liability. The result was the inclusion in the Regulation of an exemption from liability. Under the exemption, producers are not liable for remediation of a contaminated

[71] See Waldemar Braul, 'Liability Features of Bill 26' (1994), 4 J.E.L.P. 137 at 149.
[72] Supra, BC Environment, New Directions, note 10 at 16.

site if they did not control the disposal, handling or treatment of the substance. However, it is unclear what activities constitute 'control'. For example, does 'control' mean an ability to carry out activities, or an ability to restrain or prevent activities, or a mere capacity to influence?[73] This problem has already arisen in relation to at least one contaminated site.[74] The provisions designating producers as responsible persons, and the limitations on liability set out in the Regulation, will no doubt require extensive litigation to determine such issues as what constitutes controlling disposal, handling or treatment.

The Contaminated Sites Legislation's classification of producers as responsible persons appears to be based on the United States CERCLA legislation. The only things immediately apparent from an overview of American case law interpreting producer/generator liability in the CERCLA context are the myriad of different approaches taken by the different circuit courts and, indeed, by district courts within the same circuit, as well as the incoherence of the decisions interpreted as a whole. One commentator has written that except for those cases in which producer liability is nearly impossible to dispute, 'the question of what constitutes [producer/generator liability] is anyone's best guess'.[75]

In addition, the categories of responsible persons do not appear to be based on the notion of 'polluter pays,' which industry has been told is the guiding principle of this legislation. The categories of responsible persons, combined with such definitions as 'owner'[76] and 'operator,' could result in the imposition of liability on those who have only indirect charge or minimal control of a polluting substance or site. One example is persons who acquired property knowing it was contaminated, did nothing to add to the contamination, and subsequently sold the property. Other examples are producers and generators. While persons with no or limited involvement in contaminating a site may be able to limit their liability through the use of

[73] See R. v. Placer Developments Ltd. (1983), 13 C.E.L.R. 42 (Y.T. Terr. Ct.) (ability to influence may be taken as indication of control); R. v. Fibreco Pulp Inc. (19 December 1990), Fort St. John Registry No. 13132c (B.C. Prov. Ct.) (partial control enough); R. v. City of Sault Ste. Marie [1978] 2 S.C.R. 1299 (ability to restrain may be taken as indication of control).

[74] At 9250 Oak Street there are allegations that BC Hydro as the original producer of the contaminating substance should be added to the remediation order. MELP has refused to add BC Hydro to the order. The matter is under appeal to the Environmental Appeal Board. See 'Ruling Regarding Responsible Persons: Statement of Reasons', dated 20 May 1998 (Ron Driedger, Deputy Director of Waste Management).

[75] L. Neil Ellis and Charles D. Case, Toxic Tort and Hazardous Substance Litigation (Charlottesville, Va: Michie Butterworth, 1995), 364.

[76] It is unclear who is encompassed by the term 'owner'. For example, in the recent Allocation Panel Opinion #1 (In the matter of Chardale Enterprises Ltd. and Petro Canada), the allocation panel noted that '[t]he definition of 'Owner' found in the [L]egislation embraces a number of legal interests in the land - for instance, a tenant with a registerable interest in the land, particularly one that is the holder of a right of first refusal to purchase would appear to qualify on an 'Owner' of the property, notwithstanding the fact that they are not the holder of the fee simple interest in the property.' The allocation panel found Petro Canada to be an 'Owner' even though it had a lease with the original owner of the subject property but subleased the property back to the original owner. In addition, the panel found Petro Canada to be an owner due to the provisions in the cross-lease arrangement permitting Petro Canada to enter the subject property and conduct repairs.

allocation panels and requests for minor contributor status, this is likely to be a lengthy and expensive process.

## 11.2 Recommendations

**Recommendation #61a:** The Business Council proposes that the Act be amended by deleting the current categories of responsible persons and replacing them with the single category of those persons who caused the contamination. This would more clearly align the Act with the polluter pay principle. We note that some American states, such as Michigan and Connecticut, have adopted this approach.[77] In Britain, the *Environment Act, 1995*[78] allows liability to be primarily imposed only on persons who actually caused or knowingly permitted the contamination.

**Recommendation #61b:** If recommendation #61a is not accepted, the Business Council recommends clarification of the 'contractor' liability provision in the Regulation as set out in recommendation #36.

**Recommendation #61c:** The Business Council recommends the modification of the 'producer' exemption from liability provisions in the Regulation so that a producer is only liable where he, she or it controls the disposal of a substance in a manner that causes the site to become a contaminated site. The term 'disposal' must be carefully defined so as to avoid the unfortunate and costly situation which has developed in the United States. At the very least, such a definition should make clear that 'disposal' does not extend to activities such as recycling, re-manufacturing or re-processing.

**Recommendation #61d:** Section 19 of the Regulation should be clarified to provide that requiring compliance with environmental laws, standards, policies and codes of practice of government and industry will not result in liability. At present the exemption appears to extend only to government documents.

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[77] CONN. GEN. STAT. ANN s. 22a - 451(a); MICH. GEN. STAT. ANN. s. 299.608. The 1995 amendments to the *Michigan Environmental Response Act*, codified in part 201 of the *Natural Resources and Environmental Protection Act* (Public Act 451 of 1994, section 324.101 et seq. of Michigan Compiled Laws) implemented a major overhaul of the liability structure applicable to environmentally contaminated property in Michigan. No longer under Michigan law is mere ownership of property sufficient to impose liability on those who had nothing to do with any activity causing a release of contamination. The 1995 amendments limit liability, except in certain instances, to those parties that are responsible for an activity causing a release of contamination. In a report issued by the Michigan Department of Environmental Quality in July, 1996 (The Part 201 Amendments: One year later, an interim evaluation of the effectiveness of the 5 June 1995 amendments to part 201), it was reported that there had been an increase in 'brown field' development. Davis & Margolis, supra note 44 at 461 attribute this increase to increased liability protection for new buyers.

[78] Section 57.

## 12. Retroactive Liability

### 12.1 Problem

The government has stated that the principle of retroactive liability is necessary to ensure that the goal of 'polluter pays' is achieved.[79] However, the Business Council submits that it is conceptually incorrect to address the problem of contamination simply by attempting to identify responsible parties who are notionally at fault for historical contamination and hence are currently liable to bear the enormous financial burden of present clean-ups. A more honest and sensible approach would be to acknowledge that society as a whole bears at least some responsibility for allowing contamination to occur in the past and that it also reaped benefits from past economic and industrial activity.

Retroactive liability in the context of contaminated sites does not necessarily achieve the goal of 'polluter pays'. In many cases the 'polluter' is long gone: either bankrupt, wound up or gone from the jurisdiction. That leaves successful, remaining entities to bear the cost of remediating contamination they did not cause. In addition, in most cases, the directors, officers, shareholders, employees and consumers of the 'polluter' will today be very different than when the contamination occurred. These stakeholders, who will pay for remediation through reduced wages, a lower return on investment and increased costs, can hardly be called 'polluters'. It has been noted that retroactive liability amounts to an uncertain tax on current and future profits.[80]

Apart from not achieving the goal of 'polluter pays,' the notion of retroactivity – or, to be more precise in the case of the Act, retrospectivity – violates some of the most fundamental principles of fairness, notably the right to know in advance the standards by which conduct will be judged. An example of this is apparent in the context of the 'Big Bend' site (8335 Meadow Avenue, Burnaby). In that case a company leased the Big Bend site and operated a wood treatment plant there from 1930 to 1982. In 1982, the company surrendered its lease of the site. MELP determined in 1983 that the site was adequately remediated. In 1988 Border Enterprises Limited (AIL's parent corporation), a small, family-owned company, purchased the shares of the company. Border did not know of the former lease arrangement and shortly after the share purchase Border amalgamated the company with AIL. The amalgamated company has been named on a Remediation Order. This share purchase occurred in 1988 when the company no longer had any interest in the property, there was no hint of potential retroactive liability and therefore no reason to investigate historic property ownership by a company. Moreover, had such an investigation occurred in this case, the purchaser would have discovered the letter in which MELP indicated it was satisfied with the remediation of the site. AIL states in a letter to the Deputy Minister of Environment that due to the retroactive application of the Contaminated

[79] BC Environment, New Directions, note 10 at 18.
[80] Steven Globerman and Richard Schwindt, 'Economics of Retroactive Liability for Contaminated Sites,' (1995), 29 U.B.C. Law Review 27 at 37.

Sites Legislation, its shareholders 'would never again acquire shares in British Columbia companies'.

Retroactivity is unfair because there is no opportunity to adjust behaviour to meet the new standards and so avoid liability. For this reason, the courts traditionally have been reluctant to find that a statute has retroactive or retrospective effect unless the words of the statute clearly indicate that intent.[81] It has been stated that in a 'free, dynamic society, creativity in both commercial and artistic endeavours is fostered by a rule of law that gives people confidence about the legal consequences of their actions'.[82]

Retroactive liability is also problematic from an economic perspective because those responsible for planning activities are unable to factor in the costs of potential liability associated with the activity in establishing the price for the article produced and in setting wages and shareholder returns. The result is that wages and shareholder profits may have been higher, and consumer prices lower, than they would have been had the cost of remediating all contamination caused by the activity been considered.

This also raises the issue of who really benefited from those activities that (subsequently) are deemed to have caused contamination. Underlying the notion of 'polluter pays' in the Act is the concept that large corporations have routinely flouted standards and polluted at will, while the helpless public suffered the consequences. This is a distorted view of past industrial activity and its role in causing contamination. Studies suggest that only four per cent of sites on the U.S. National Priority List were contaminated as a result of illegal actions.[83] Leaving aside the relatively rare cases of illegal or improper past conduct, it is important to recognize that the public at large has benefited in one way or another from past industrial activity. In some cases, the public – through the actions of elected and accountable governments – even chose to waive or relax the then applicable environmental standards in order to encourage industrial activity. In light of this, as well as the fact, discussed above, that true 'polluters' do not necessarily pay under a retroactive liability model, it would not seem unreasonable for the general public (i.e. society) to bear some or all of the cost of remediating historically contaminated sites. As discussed earlier, it is likely that there are relatively few historically contaminated sites in British Columbia that pose a real health or environmental risk. The cost to the taxpayers of this proposal therefore would likely be minimal.

Finally, some proponents of retroactive liability argue that such liability would operate as an incentive to improve corporate behaviour. This is flawed reasoning. It may be true in the case of prospective liability, but logically it cannot be correct for retroactive liability.

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[81] Elizabeth Edinger, 'Retrospectivity in Law', (1995), 29 U.B.C. Law Review 5 at 11 and 25 and cases cited therein.
[82] George Cleman Freeman, 'A Public Policy Essay: Superfund Retroactivity Revisited', (1995) 50 Business Lawyer 663 at 681.
[83] Ruth Crowley and Fred Thompson, 'Retroactive Liability, Superfund and the Regulation of Contaminated Sites in British Columbia', (1995), 29 U.B.C. Law Rev. 94.

There is nothing a person can do to adjust the activities that have already occurred to avoid retroactive liability.

12.2 **Recommendation**

**Recommendation #62:** The Business Council recommends the amendment of the Act to provide that the Act is retroactive only to the date of 1 April 1997, the date of the implementation of the Legislation. This date has been chosen because potentially responsible persons knew that as of that date, the rules governing clean-ups had changed. This recommendation recognizes that in principle, the taxpayers and citizens at large who enjoyed substantial benefits from past industrial production – and many of whom will indirectly be paying the costs associated with the liability provisions of the Act as currently drafted – should bear the cost of remediating those few historically contaminated sites that pose a genuine risk to public health or the environment.

## 13. Absolute Liability

13.1 **Problem**

Many of the problems associated with absolute liability are essentially the same as those discussed above in the context of retroactivity. Another consideration is that environmental legislation should encourage the use of innovative solutions and best commercially available technology to prevent contamination from occurring. Strict liability fosters that objective, but absolute liability does not. A company is less likely to be willing to incur the often high cost of implementing the best technology where a defence of due diligence is not available, notwithstanding this investment. Absolute liability does not really promote appropriate behaviour, in that no matter what action a party takes to prevent or mitigate a problem, the mere fact that the problem exists will make the party liable. It wrongly places the emphasis on clean-up after the fact rather than on prevention of contamination.

13.2 **Recommendation**

**Recommendation #63:** It is the Business Council's position that the notion of absolute liability should be replaced with one of strict liability, so that those who exercised reasonable care to avoid contamination would not be liable under the Act. Evidence of reasonable care would include compliance with current legislation, industry standards and discharge permits. It should be noted that the provision of a due diligence exemption is not without precedent in Canadian legislation in the non-offence context.[84]

[84] See section 13(4) of Saskatchewan's *Environmental Management and Protection Act*, s.s. 1983-84, c E-10.2 which provides immunity from cost recovery where a person took all reasonable steps to prevent a discharge. Similarly, section 4(1) of the Saskatchewan Act provides that the Minister's order power, which can be used to require remediation, is subject to 'the terms of any licence, permit or other privilege granted pursuant to [the] Act.' Immunity based on due diligence is implied in section 39(1) of the *Canadian Environmental Protection Act*, R.S.C. 1985 (4th Supp.), c. 16 which states that when the Minister recovers costs for remedial or mitigative measures

## 14. Joint and Several Liability

### 14.1 Problem

Joint and several liability is particularly harsh where it is combined with retroactive liability. Again, responsible persons cannot adjust their business relationships to deal with retroactive, joint and several liability. There is no opportunity to address this issue through mechanisms such as training programs offered to contractors or in contractual provisions outlining responsibility for issues such as work supervision.

A major concern raised by joint and several liability (whether retroactive or prospective) is that it fosters a 'deep pockets' approach to apportioning liability. MELP's response is that this risk is alleviated by the provisions dealing with allocation panels and minor contributor status. However, these provisions are not mandatory - the allocation panel's opinion is advisory only. In addition, it is difficult to understand why those with deep pockets who may have contributed little to the contamination at a site should be forced to incur the substantial expense that will likely be involved in attempting to extricate themselves from liability.

Mandatory apportionment of liability is increasingly popular in the United States. For example, recently Illinois repealed joint and several liability under its superfund program.[85] The Ohio and Michigan statutes expressly specify liability based on relative fault. In Manitoba, Part 5 of the *Contaminated Sites Remediation Act* sets out a mechanism for the apportionment of responsibility among potentially responsible persons.[86] In Saskatchewan, the 'Contaminated Sites Liability Advisory Group' recently delivered a report rejecting the notion of joint and several liability.[87] Instead, the Advisory Group advocated the adoption of allocated liability.

### 14.2 Recommendation

**Recommendation #64a:** The Business Council's position on joint and several liability is that this concept should be replaced with a system in which the amount payable

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respecting 'toxic substances', liability of a person 'who caused or contributed to the [release of a toxic substance]' is limited to the 'extent of the person's negligence in causing or contributing to the release'. Alberta's *Environmental Protection and Enhancement Act*, supra, note 61 uses 'due diligence' as a factor in allocating liability. See section 114(2) which states that the director, prior to issuing an order to a particular responsible person 'shall give consideration' to specified due diligence factors.

[85] 4lS ILCS 55/1-9.

[86] The Manitoba Act provides that PRPs are to be given a specified length of time to agree upon the apportionment of costs for remediation of the site and submit the agreement to the Director for approval. If no voluntary agreement can be reached, or at the request of the parties, the Director may appoint a mediator to assist in the development of an apportionment agreement. Failing this, or if requested by the parties, the Director will direct the Clean Environment Commission to apportion the costs at an apportionment hearing: see John D. Stefaniuk, 'Manitoba', chpt. 6 of Leonard J. Griffiths' (ed.) Contaminated Property in Canada (Toronto: Carswell, loose-leaf) at 6-7.

[87] Supra, note 43, Recommendation No. 18.

toward a clean-up by each party would be fixed as a percentage and limited to that percentage, based on the application of various apportionment factors. Joint and several liability is not in accordance with the principle of 'polluter pays'. Therefore, orphan shares resulting from a mandatory apportionment process should be borne by society at large. The arguments in favour of this approach are similar to those put forward in the section on retroactive liability.

The Business Council recommends that the Act should be amended to make the decision of the allocation panel binding on the regional manager. This is in line with the recommendations contained in the 1993 CCME report on contaminated site liability.[88] The Business Council acknowledges that this recommendation requires careful consideration of many issues, including allocation panel financing, constitution, independence and procedures.[89] The Business Council recommends that 'contaminated sites stakeholders' and the Government jointly name to a roster the individuals to sit on such allocation panels. An appeal procedure should also be included in the Act by which a decision of the allocation panel may be appealed directly to the British Columbia Supreme Court. The allocation panel provisions should be revised to include a provision similar to section 27.3(3) of the Act limiting a responsible person's liability to the amount determined by the allocation panel.

If recommendation #64a is adopted, section 27.3 of the Act, the 'minor contributor' provisions, may be deleted.

## 15. Minor Contributor Status

### 15.1 Problem

This section need only be considered if MELP rejects recommendation #64a discussed above.

A manager of MELP may determine that a responsible person is a minor contributor in certain circumstances. In order to obtain minor contributor status, under subsection 27.3(1)(c) the applicant must show that the application of joint and several liability to a responsible person is 'unduly harsh'. This requirement creates uncertainty and derogates from the concept of 'polluter pays'.

### 15.2 Recommendation

**Recommendation #64b:** If the recommendation set out in #64a is not accepted, the Business Council recommends the deletion of subsection 27.3(1)(c).

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[88] Supra, note 10 at 8-9.

[89] As noted by Chris Tollefson and Diana Betersky in their report entitled External Review of Remediation Liability Provisions: The Waste Management Amendment Act, 1993 (31 July 1996) at 46.

## 16. Allocation Panels

### 16.1 Problem

The Legislation provides for MELP-appointed allocation panels to help determine if a person is a responsible person, if they are a minor contributor, and the amount that a responsible person has contributed or should be responsible for in cleaning up a site. Several stakeholders consulted in the course of preparing this submission indicated that they will not participate in an allocation panel because the process is uncertain and the matter 'will end up in court anyway'.

The biggest concern is that allocation panel opinions are not binding on MELP. In response MELP has issued a draft document entitled 'Procedure for the Allocation Panel Process' which contemplates that managers will accept the opinion of the allocation panel.

Another concern relates to cost. Panel fees are $800 per day per panel member. The panel consists of three members and accordingly will cost $2400 per day, plus an initial $500 fee. There is no definition of what constitutes a 'day' in the legislation (i.e. if a panel member works for 2 hours in a day is that a 'day' or is it some portion of the $800 fee). In addition to those costs, there may be legal and consulting costs. The bill for a one-day hearing at Chemanius involving Chardale Enterprises Ltd. and Petro Canada came to approximately $18,000. This figure does not include the parties' respective legal costs. There is no guidance on what information must be included in a 'bill' from an allocation panel proceeding. Unlike lawyers' bills, the bills submitted by allocation panel members can not be challenged. There is no time limit specified for an allocation panel deliberation. Furthermore, third party notification of other potentially responsible person(s) is mandatory on allocation panel requests. Those other persons have a right to participate.[90] A third party who participates in an allocation panel proceeding is, under the Legislation, not required to pay the costs.

A final concern relates to the roster of potential panel members and the selection process for that roster.

### 16.2 Recommendations

The Business Council recommends the following:

**Recommendation #64c:** An amendment to section 27.2(5) of the Act to provide that a manager is bound by any allocation panel opinion.

[90] See Allocation Panel Opinion No. 1: In the Matter of a Request for an Opinion by Chardale Enterprises Ltd. and Petro Canada Regarding Site 3124 at p. 4: 'Prior to the hearing, the panel directed that "non-requesting parties" (i.e. persons who did not request an opinion) would have the right to observe the proceeding and make written submissions after the hearing…'

**Recommendation #64d:** The appointment of allocation advisors only after consulting with and obtaining approval from members of the Contaminated Sites Implementation Committee.

**Recommendation #64e:** A redraft of the 'Procedure for the Allocation Panel Process' to provide for a refinement of procedural issues, such as the issue of third party participation, costs and billing procedures and supporting information. The allocation panel procedure document should only be finalized after review and approval by the Contaminated Sites Implementation Committee.

**Recommendation #64f:** Establishment of a process under which those who receive a bill from an allocation panel can require an independent assessment and review of the bill.

## 17. Amendments Relating to the Remediation Order Provisions

### 17.1 Problem

Remediation orders are governed by section 27.1 of the Act and sections 36 and 37 of the Regulation. A remediation order can be issued by a manager to any responsible person. Unlike a number of the dispute mechanisms in the Legislation, the remediation order provisions do not provide for third party notice and participation.[91] Recent case law has stated that MELP must engage in pre-order consultations. However, the nature, extent and timing of those consultations remains unclear. In addition, unlike the sections of the *Waste Management Act* in relation to pollution abatement and pollution prevention orders, there is no provision granting MELP authority to grant access for the purpose of implementing the terms of a remediation order.

### 17.2 Recommendations

**Recommendation #65:** The Legislation should be amended to clarify who must be consulted before an Order is issued (i.e., is it only those who will be potentially named in the Order or does it include all parties affected by the Order such as the owner of property contaminated by migrating contamination), when that consultation must occur, the nature of that consultation and the timing for that consultation (e.g. a party served with notice of a potential remediation order has 30 days to submit written comments to MELP). The amendments could provide that advance consultation is not required where the Minister declares an emergency.

[91] To date MELP has generally followed a procedure similar to their policy for issuing pollution abatement orders and has contacted parties who would be named in a remediation order in advance of issuing the order, seeking their position on a potential remediation order. Where MELP has not followed such a procedure, courts have set aside the administrative order. See Imperial Oil Limited v. Oldham (unreported), Vancouver Doc. A970564 (B.C.S.C.), 16 January 1998).

**Recommendation #66:** We further recommend the enactment of an amendment to section 27.1 of the Act to provide that an order made under section 27.1 may authorize a person or persons designated by a manager to enter land on 'reasonable terms' as determined by the manager. Reasonable terms would include provisions relating to insurance obligations, termination, release and indemnities, prior notice and compliance with laws.

## 18. Section 28.4 Order-Making Power

### 18.1 Problem

Section 28.4 of the Act provides that the Minister of Environment, Lands & Parks may declare that it is necessary for the protection of human health or the environment for the Government to undertake remediation of a contaminated site which is not otherwise being adequately remediated or is a high risk orphan site. The ability to use this power in circumstances where the Minister considers that a site is 'not being adequately remediated' again creates uncertainty. This broad, uncertain discretion is of particular concern given that the exercise of this power is not subject to appeal.

### 18.2 Recommendation

**Recommendation #67:** Subsection 28.4(2)(a) should be deleted, or in the alternative, the exercise of that power should be limited to emergency situations and should be subject to the appeal provisions set out in Part 7 of the *Waste Management Act*.

## PROBLEMS SPECIFIC TO THE MINING SECTOR

1. **Problem**

Recently the mining industry in British Columbia has suffered big losses.[92] Annual exploration spending in British Columbia is at the lowest levels experienced in the past 20 to 25 years. In 1997, exploration spending totalled $75 million, with only $5 million spent on primary or grassroots work. The Mining Association of British Columbia estimates that between $150 million and $200 million in annual exploration spending is required to sustain the mining industry.[93] Quite simply, the economic and political risks in British Columbia are perceived to be unacceptably high. According to the Fraser Institute Survey of Mining Companies Operating in Canada: Fall 1997, British Columbia was rated by mining companies as the least attractive province in Canada in which to invest.[94]

Part of this negative climate has resulted from the costly overlap and duplication associated with past environmental policies. It is clear that the Contaminated Sites Legislation process has not been well integrated with the mine closure process pursuant to the *Mines Act*.[95] Unfortunately, within B.C. practice varies widely from region to region. Harmonization has been achieved in certain regions, such as the Skeena Regional Office, where the two processes are combined into one assessment. In the Kootenay Sub-Regional Office region, however, MELP is enforcing a separate assessment from the mine closure process. This means that MELP is requiring separate documentation from the documentation filed as part of the mine closure process, is imposing remediation requirements separate from the mine reclamation requirements and may pursue a separate public consultation process. Such duplication significantly increases the costs of the process. In some cases, the lack of harmonization is delaying remedial action.[96]

A Memorandum of Understanding between the Ministry of Energy & Mines ("MEM") and MELP is being drafted. We understand that this Memorandum is currently on hold. Under the Memorandum administration of certain administrative provisions of the Contaminated Sites Legislation in the mining context will largely be delegated to MEM. However, MELP reserves the right to get involved in any contaminated site situation in the mining context. Again, the degree of involvement of MELP in any mine closure situation will likely vary from region to region even after the Memorandum of Understanding is completed.

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[92] 'BC Mine Earnings Decrease', Vancouver Sun, 14 May 1998.
[93] 'Mining Industry in British Columbia - 1997 Highlights', Mining Association of British Columbia, Mining Quarterly, Volume 5, No. 1 (Summer 1998) at 7.
[94] Laura Jones 'Mining Policy: The Good, The Bad and the Ugly' in the Fraser Institute's The Dos and Don'ts of Resource Policy: Some North American Examples (Vancouver: The Fraser Institute, December 1998) 5 at 7.
[95] R.S.B.C. 1996, c.293.
[96] In relation to the Mt. Washington minesite, see letter of the Tsolum River Task Force to the Honourable Dan Miller, Minister of Energy & Mines, 20 August 1998.

The *Mines Act* and the accompanying Health, Safety and Reclamation Code for Mines in British Columbia[97] (the "Code") are the principal pieces of legislation applicable to mine closure and reclamation in British Columbia. Planning for mine closure and reclamation begins long before a mine opens:

- Section 10 of the *Mines Act* requires an owner, agent or manager to obtain a permit from the Chief Inspector of Mines before the commencement of any work in, on or about a 'mine.'[98] An application for a permit under section 10 must include details of the proposed work and a program for protection and reclamation of the land and watercourses affected by the proposed work. The applications typically include a conceptual closure plan. Applications under section 10 result in the issuance of a work system approval and a reclamation permit. Reclamation permits can be issued subject to conditions the Chief Inspector of Mines considers necessary (*Mines Act*, section 10(3)). Permit conditions can be varied from time to time (*Mines Act*, section 10(6)).

- The Code sets standards with respect to mine reclamation and for on-going clean-up and monitoring. These standards aim to return the land and watercourses to their historic levels of productivity (see sections 10.6.2 to 10.6.17 of the Code).

- The Chief Inspector is empowered to ensure that reclamation objectives are achieved. Under section 36 of the *Mines Act*, an inspector may order the owner, manager or agent to comply with the Code. The inspector may apply to the Supreme Court of British Columbia for an injunction restraining the person from disobeying the order. Section 37 of the *Mines Act* makes it an offence to contravene a provision of the *Mines Act*, the regulations, the Code or an order issued under any of them. A person who commits an offence is liable to a fine of not more than $100,000 or imprisonment for not more than one year or both. Directors and officers who authorize, permit or acquiesce in an offence are personally liable to similar penalties. Clearly, current owners of a mining property will be liable for reclamation work that is not completed.

- The owner, agent or manager of a mine can be required to post security as a precondition to obtaining a permit under section 10 of the *Mines Act*. This security must be 'in the amount, form and subject to the conditions specified by the Chief Inspector.' This security is to cover mine reclamation and to provide for the protection of and mitigation of damage to watercourses affected by the mine (*Mines Act*, section 10(4)). The owner, agent or manager can be required to increase the amount of security on an annual basis (*Mines Act*, sections 10(5) and 10(6)).

Moreover, MELP has input into the issuance of reclamation permits. Under the Code, the district inspector may (and in certain cases, must) refer an application for a reclamation permit to a Regional Mine Development Review Committee for review. The Regional Mine

[97] (Victoria: Regional Operations, Health and Safety Branch, Ministry of Energy and Mines, 1997).

[98] The definition of 'mine' found in section 1 of the *Mines Act* is broad and includes: (1) a place where mechanical disturbance of the ground or any excavation is made to explore for or to produce coal, mineral bearing substances, placer minerals, rock, limestone, earth, clay, sand or gravel; and (2) all activities including exploratory drilling, excavation, processing, concentration, waste disposal and site reclamation.

Development Review Committees are composed of representatives of various provincial and federal ministries and departments, including MELP. In the rare circumstance where an application is not forwarded to a Regional Mine Development Review Committee, the district inspector is required to circulate the application to various ministries and agencies, including MELP. Based on the comments received, the district inspector or the chief inspector will then decide whether or not to issue a reclamation permit and what conditions should attach to the reclamation permit.

MELP also has input into closure procedures. A final closure plan is submitted to the Chief Inspector prior to the shut down of a mine. The closure plan will typically include background information on the environmental setting of the mine including topography, geology, climate, vegetation, wildlife, watercourses and fisheries resources and a description of the mine and associated facilities, and of the environmental impacts of the mine. It will also include a summary of the steps to be taken prior to decommissioning and a closure and reclamation program. If there are significant environmental concerns or public concerns, the plan will be referred to the appropriate Regional Mine Development Review Committee (on which MELP will have a representative). Public input will be sought on an informal basis. Following completion of the review, the approved plan will be incorporated by reference into a revised reclamation permit. In addition, many of the significant mine closure projects are obligated to obtain or retain permits under the *Waste Management Act*, even following closure. MELP may impose a number of conditions, including monitoring and reporting provisions. In addition, MELP has an on-going regulatory role with respect to mines through MELP's ability to issue pollution prevention and pollution abatement orders. MELP thus has a significant, on-going role.

In addition, under BCEAA the dismantling and abandonment of mines are issues that must be addressed in the environmental assessment of any new mining project. The Reviewable Projects Regulation[99] provides that a mining project is a 'reviewable project' if the mine is within certain categories (coal mines, mineral mines, sand and gravel pits, placer gold mines, construction stone and industrial mineral quarries and off-shore mining activity) and above the minimum size thresholds (for example, any new mineral mine with 75,000 tonnes of mineral ore production per year).[100] The Reviewable Projects Regulation provides that a review of the construction of a new mine includes a review of the construction, operation, dismantling and abandonment phases of the new mine. Plans for the abandonment or closure of a mine are developed at the early stages of the environmental impact assessment required under the process.

[99] B.C. Reg. 276/95.

[100] The review thresholds for certain mines (coal mines, mineral mines and industrial mineral quarries) have recently been raised: see Order-in-Council No. 1392, approved 12 November 1998; Environmental Assessment Office, 'News Release: Province to Streamline Environmental Assessment Regulation', 4 November 1998 at 1; and Environmental Assessment Office, 'Fact Sheet: Amendments to Reviewable Projects Regulations', 4 November 1998 at 1.

A conceptual plan for closure and reclamation must be included in a company's application for a Project Approval Certificate.[101]

It is apparent that the *Mines Act*, the Code and BCEAA together provide a comprehensive framework for mine reclamation in British Columbia. MELP has input into the issuance of reclamation permits and the mine closure process through its participation on the Regional Mine Development Review Committees.

2. **Recommendation #68**

The Business Council recommends that mines be specifically exempt from the provisions of the Contaminated Sites Legislation and remain under the jurisdiction of the *Mines Act*. Mines are unique and differ in significant respects from other industrial sites. Most are in remote, isolated areas with which the public has no direct contact. The *Mines Act* is the statutory mechanism best suited to deal with contamination of a mine site. MELP would still have the ability to control adverse environmental impacts from mine sites through the issuance of pollution abatement and pollution prevention orders. We note that there is precedent for exempting mines from clean-up legislation. The Manitoba *Contaminated Sites Remediation Act*[102] does not apply to properties governed by Manitoba mining legislation. Finally, the exemption of 'mines' from the provisions of the Contaminated Sites Legislation accords with the Government's recent initiatives to attract investment and create jobs in the mining sector, including legislation recognizing the right to mine[103] and measures to make 'mineral exploration and development an easier and more certain process in th[e] Province.'[104]

The new application section would read as follows:

> Part 4 of this Act does not apply to a mine which is subject to a permit issued under section 10 of the *Mines Act*.

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[101] For example, the Project Report prepared by Princeton Mining Corp. during the recent assessment of the Huckleberry open pit copper and molybdenum mine dealt with key contamination issues relating to acid rock drainage, the leaching of heavy metals and a plan for tailings management.
[102] Supra, note 40, section 3(3).
[103] *Mining Rights Amendment Act*, S.B.C. 1998, c.10 which states in the preamble that ' … it is in the best interests of British Columbians that the mining industry be economically viable and globally competitive.'
[104] Government of British Columbia, 'New Release: Government Announces New Mining Initiatives To Spur Jobs and Investment' (21 April 1998), quoting Premier Glen Clark.