



Ministry of
Environment

Remediation Liability Transfer in BC

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Overview of presentation

- Remediation liability
 - Principles
 - Responsible persons

- Existing liability allocation / capping / transfer mechanisms in EMA

- Some questions we are considering

- Some options we are considering

Remediation liability - principles

British Columbia's principles of remediation liability are based on the CCME national principles including 'polluter pays':

- **Absolute** (strict): liability may exist without fault
- **Joint and separate**: if two or more parties contributed to the release and unless a party can show that the injury or harm at the site is divisible, any one or more of the parties may be held liable for the entire cost of the clean up
- **Retroactive**: liability may exist even if contamination occurred before 1997 (law in effect)

Remediation liability – responsible persons

- The *Environmental Management Act* (EMA) initially “**casts a wide net**” in defining who is an RP.
- RPs can include current and previous **owners** or **operators** of a site, **producers** or **transporters** of contaminating substances at a site.
- Persons may be **exempted from responsibility** in numerous circumstances such as:
 - “innocent acquisition”
 - migration of contamination from offsite
 - government acquisition through tax default

Existing Liability Allocation/Capping/Transfer Mechanisms in EMA include...

- **Allocation panel** (ref. EMA s. 49)
 - Provides opinion on whether responsible, whether a minor contributor, and what share of responsibility
 - Director “may consider... not bound by opinion”
- **Minor contributor** (ref. EMA s. 50)
 - “only a minor portion... attributable to the person”
 - Application of joint/separate “unduly harsh”
- **Voluntary remediation agreement** (VRA; ref. EMA s. 51)
 - “If a responsible person enters into and performs a voluntary remediation agreement... the responsible person is discharged from further liability”
 - **BUT**... “Government retains right to take future action” (ref. EMA s. 60) “despite any VRA”

Existing Liability Allocation/Capping/Transfer Mechanisms in BC's *EMAct* include... (cont'd)

- EMA Part 5 **transfer agreements/indemnifications** (mineral exploration sites and mines)
- **Private agreement** (ref. EMA s. 48)
 - for the purposes of a remediation order, a director shall "... take into account private agreements between or amongst responsible persons respecting liability for remediation..."
- Note: EMA **Certificates of Compliance** generally do not provide liability protection (except, e.g., EMA 46(1)(m), remediation "upgrade")
- Clearly, the existing liability relief mechanisms in EMA are not very attractive to the marketplace as allocation panels, minor contributors, and VRAs have been rarely used in the 15 years the legislation has been in effect.

Some questions we continue to consider

- To what extent are liabilities perceived as opposed to real? Would actions to increase knowledge about remediation liability lessen prevailing fears?
- What are the key shortcomings of existing liability capping and transfer mechanisms? Would adjustments to these be helpful, or are new mechanisms necessary?
- Are there circumstances and conditions under which the Province should consider taking on a calculated amount of additional risk in order to encourage more brownfield redevelopment and the environmental, economic, and societal benefits that result?
- How do we best balance the following?
 - Upholding the polluter-pay principle
 - Stakeholder desire for greater certainty and closure

Some options we are considering

- A closer look at those existing, rarely used, mechanisms
- Having ministry instruments (e.g., CoCs) and any conditions run with the land;
- Implementation of CCME 14th liability principle facilitating transfer of liability from brownfield vendor to purchaser subject to “assurances”
- If it is felt that implementation of the CCME 14th alone does not achieve the desired objective of further reducing barriers to brownfield redevelopment, we may need to look at other complementary measures



<http://www.env.gov.bc.ca/epd/remediation>