

Contaminated Site Legislation In B.C.

West Coast Environmental Law Association



One legacy of British Columbia's past reliance on hazardous substances is widespread contamination of land. [(1) -- 1. . "Contaminated Land," by William J. Andrews, Waldemar Braul, James Russell and Calvin Sandborn in Law Reform for Sustainable Development in British Columbia etc.] Eighteen contaminated sites are listed as "pollution concerns" to the Ministry of Environment in December 1990.

Neither B.C. nor federal legislation is aimed specifically at dealing with contaminated land, although the province has the power to order a person to conduct a clean-up under the *Waste Management Act*. [(2) -- 2. . Waste Management Act, s.22.] This power was recently amended to make it abundantly clear that it includes the power to order a clean-up by a person who caused the contamination in the past, even prior to the enactment of modern pollution control legislation. [(3) -- 3. . Waste Management Amendment Act, SBC 19??] At the same time, the B.C. government indicated its intention to introduce more-comprehensive legislation respecting contaminated sites.

In January 1991 the provincial government released a discussion paper "New Directions for Regulating Contaminated Sites." [4 -- 4. "New Directions for Regulating Contaminated Sites: A Discussion Paper", prepared for Environmental Protection Division, B.C. Ministry of Environment, by Waldemar Braul, January 1991.

] It states:

The Ministry discussion paper makes two additional points relevant to the identification of contaminated sites:

- "contaminated material from industrial sites can presently be relocated to other sites as 'fill' without any reporting requirement;" and
- "there is no present duty to disclose to government (or subsequent owners) how contamination is managed when an industrial plant is decommissioned or how contamination is dealt with in the process of plant modernization or expansion." [5 -- 5. supra, p 6.

]

A key factor motivating the government to adopt legislation in this area is that the B.C. and federal governments have signed an agreement [(6) -- 6. . cite] for partial federal funding of clean-ups of "orphaned" contaminated sites in B.C., contingent on B.C. having legislation -- which has not yet been enacted -- implementing the "polluter pays principle." Exactly what such legislation would entail is not spelled out in the agreement. However, in 1990 the West Coast Environmental Law Research Foundation published a draft statute for the prevention and clean-up of pollution in British Columbia (the WCELRF draft statute) [(7) -- 7. . tre 3] funded by the Real Estate Foundation of British Columbia. The following discussion is from the Overview of that draft statute.

Responsibilities and Liability

One of the key features of the reform of provincial legislation governing contaminated lands must be to clarify exactly **who** is responsible for paying for clean-up of contaminated sites. Under the common law, there is the possibility -- but no certainty -- that a wide variety of parties will be liable for the cost of clean-up. The United States has set the statutory trend in this area through the 'Superfund' legislation which imposes liability for clean-up of contaminated sites on a wide range of parties, including the generator of the pollutant, the transporter, the disposer and the owner of the contaminated site. The WCELRF draft statute imposes liability on a similarly broad range of "responsible persons." This is somewhat tempered by exceptions for an 'innocent' past owner and for a person whose responsibilities stem from the act of a third party despite the person having exercised due diligence.

The following are the key details:

- Responsible persons must clean up a contaminated site and restore the environment.
- Responsible persons are encouraged to propose a "remedial action agreement" which allocates liability among them. It becomes a binding agreement when it is approved by a manager, likely at the same time as he or she approves a permit for a remedial action at the site.
- Responsible persons are encouraged to propose a "remedial action agreement" which allocates liability among them.
- Responsible persons may be granted minor contributor status and ordered to contribute a limited amount toward the cost of a remedial action.
- Subject to a remedial action agreement, responsible persons except minor contributors are absolutely liable, jointly and severally, for the costs of remedial action at the site. And they are strictly liable for damages due to the contamination.

Identification of Contaminated Sites

Currently in B.C. there is no centralized information on contaminated sites in the province. The WCELRF draft statute establishes a contaminated sites registry -- a combination of computerized and 'hard copy' information on contaminated sites and remedial actions.

The WCELRF draft statute addresses the lack of a systematic method for identifying contaminated sites in the province by instituting a province-wide reporting requirement. Responsible persons are required to report specific information on contaminated sites to the Ministry of Environment. The Ministry is then required -- subject to certain exceptions -- to conduct an inspection and assessment of the site to determine whether it is contaminated and, if so, what remedial action, if any, should be taken. Remedial action is defined to include the following:

- a site hazard report, to be done by a responsible person, to determine in detail the characteristics of the site and the advisability of particular follow-up steps;
- a routine clean-up, where the type of clean-up required is straightforward and the Ministry has had experience with it;
- a minor clean-up, where the scale of the clean-up is minor but the methods to be used are not commonplace;
- a major clean-up, in which case an environmental assessment would be required;
- environmental restoration, meaning removal of the effect of pollution and, where that is not possible, provision of compensation in the form of restoration of another area or creation of a trust fund for pollution research; and

The WCELRF draft statute provides that one of the triggers for a Ministry site inspection and assessment is a simple request from any person. This would allow a municipality to require a person seeking municipal approval regarding land which may be contaminated to request a site inspection and assessment by the Ministry. Thus, the site would be properly assessed and remedial action, if necessary, would be undertaken prior to development or redevelopment of the land.

Clean-up

The WCELR draft statute provides that a person is a responsible person where that person meets the criteria, and thus the responsibility to initiate or help pay for a clean-up exists without the need for an initiative by the government. This is a key point that is not reflected in the Ministry's discussion paper.

The draft statute provides that before a person can be ordered to take a remedial action, the Ministry shall go through a fair procedure to identify and **designate** responsible persons in relation to the site. An appeal to the Environmental Appeal Board would be available. The Ministry discussion paper also proposes that an appeal be available regarding a Ministry order that a responsible party clean up a site.

The WCELR draft statute establishes a Crown corporation to conduct remedial actions where there is no responsible person willing or able to do so. The Crown corporation will also conduct remedial actions where the Crown itself is a responsible person.

Where a remedial action is necessary, the draft statute provides that the Ministry will name a "lead party" to take charge of the clean-up. The Ministry will also name "supporting parties" -- volunteers or designated responsible persons who are required to contribute financially or otherwise to the remedial action.

One key question is the extent to which new legislation for contaminated lands should regulate the **conduct** of clean-up actions. On the one hand, improperly conducted clean-ups can cover up or even exacerbate a contamination problem. On the other hand, overly stringent regulation could discourage persons from initiating clean-ups. The WCELR draft statute attempts to strike a balance. It provides that, in general, a person must have a permit from the Ministry or be ordered by the Ministry before conducting a remedial action. However, it also provides exceptions for emergency clean-ups and routine clean-ups.

The draft statute provides that a person conducting a remedial action must obtain a certificate of completion before the person's responsibilities are discharged. The decision regarding whether to grant the certificate will be based on the clean-up standards set by regulation. The certificate of completion would normally be conditional upon successful follow-up monitoring reports. Unsatisfactory monitoring reports would trigger a Ministry site assessment which could, if necessary, lead to further remedial action and revocation of the certificate of completion.

Public Participation

It is essential that there be full opportunities for public participation in decision-making regarding solutions to the contaminated land problems in British Columbia. The challenge is to provide enough certainty so that everyone knows the basic 'rules of the game', while at the time incorporating enough flexibility that remedial actions are not encumbered by procedures that are more elaborate than the degree of public concern warrants. The WCELR draft statute provides as follows:

- Key steps, such as proposed regulations, an application for a permit for a remedial action, or the intention of the Ministry to order a remedial action (other than an emergency clean-up or a routine clean-up), are subject to public notice and an opportunity for public comment.
- The lead party or any member of the public can propose a public participation plan regarding decision-making under the Act.
- In the event of a dispute, a public participation plan will be approved by a Public Participation Committee.
- The Committee will also have the authority to grant funding to members of the public to allow them to participate effectively in decision-making processes. Persons ordered or permitted to conduct remedial actions would pay levies or fees that would cover the costs of this funding as well as other aspects of the regulatory system.

- The Committee's decision will be final, but decisions of the Ministry will be appealable to the Environmental Appeal Board.

The draft statute also provides for the formation of a Remedial Action Advisory Council, a permanent body with balanced representation to provide advice to the Minister of Environment. One of the key issues on which this council would advise is the standards used to determine the point at which a clean-up is complete. The draft statute provides that these would be set by regulation. Public participation in the formulation of these clean-up standards is a critical element of their ultimate acceptance. The draft statute provides that the council would hold public hearings on draft clean-up standards and that there would be an opportunity for public comment on revised draft clean-up standards prior to their adoption as regulations.

Enforcement

The draft statute widens the public role in enforcement of the Act by providing that any person -- not just the Minister, as in the *Waste Management Act* -- may seek an injunction in the Supreme Court against a person contravening the Act. The draft statute would also allow any person to bring an action in Supreme Court to compel the Ministry to comply with any mandatory provision of the Act. In addition, the draft statute strengthens the powers of officers to enter works or land, and provides that a manager may order -- subject to an appeal to the Environmental Appeal Board -- a landowner to provide access to a person authorized to carry out a remedial action.

Miscellaneous

In miscellaneous provisions, the WCELR draft statute requires the Minister to submit annual reports to the Legislature, it establishes a Crown corporation and it allows Cabinet to make regulations for:

- establishing regional Citizens' Advisory Councils;
- setting requirements for public participation funding;
- establishing requirements for the conduct of remedial actions of particular types, such as site hazard assessments, which are not currently subject to standardized procedures;
- linking the information in the proposed contaminated sites registry to the Land Title Office;
- requiring a person who moves material from a contaminated site to another location to provide the relevant details for the contaminated sites registry; and
- establishing systems for registering and for certifying experts regarding remedial actions.

Recommendation 2.#. We recommend that the government of B.C. enact legislation to govern the identification and clean-up of contaminated sites in the province. The new legislation should:

- (1) assign absolute, joint and several liability for clean-up costs on a wide range of parties who caused or profited from an activity that caused contamination of a site;
- (2) require responsible persons to initiate or help pay for a clean-up without the need for an initiative by government;
- (3) impose strict liability on responsible persons for damages caused by contamination;
- (4) establish a method for identifying and assessing contaminated sites and a registry for information regarding contaminated sites and clean-ups;
- (5) set rules to ensure that clean-ups are conducted safely and monitored afterward;

(6) ensure that the public has notice of and an opportunity to participate in decision-making regarding clean-ups of contaminated sites; and

(7) establish mechanisms to encourage responsible parties to agree among themselves regarding their respective liability and roles in relation to clean-up and damages.

NON-POINT SOURCES

Regulating large point-sources of pollution such as smokestacks and effluent discharge pipes is relatively easy compared to the difficulties of regulating smaller, more diffuse sources. These hard-to-regulate sources are often called **non-point sources**, but actually they are usually typified by a large number of small point sources. Key examples in B.C. include: [(8) -- 8. . Much of this section is from "Pollution Prevention in B.C.," by William J. Andrews, James Russell, Waldemar Brault and Calvin Sandborn, in *Law Reform for Sustainable Development in British Columbia*, Sustainable Development Committee, British Columbia Branch, Canadian Bar Association, Calvin Sandborn, ed., Vancouver, 1990.]

- vehicle emissions, which disperse pollutants to the air and to the ground;
- urban stormwater runoff, which collects pollutants from vehicles and other sources and carries it to bodies of water;
- agricultural fertilizers and pesticides, which leach into groundwater and surface water;
- dredging, which can disturb previously buried contaminated sediments;
- landfills, from which pollutants often leach;
- woodstoves and fireplaces, which emit particulate, toxics and 'greenhouse' gases;
- logging and roadbuilding, which can damage streams by siltation, temperature change (loss of shade) and altered timing of flow (faster melting of snow pack); and

Many of these non-point sources of pollution, such as urban stormwater runoff, agricultural fertilizers and pesticides, dredging, landfill leachate, and woodstoves, are not usually subject to environmental standards. [(9) -- 9. . The application of most pesticides on Crown land is covered by the *B.C. Pesticide Control Act*. The pesticides themselves are registered for use under the federal *Pesticide Control Products Act*.] Theoretically, the general anti-pollution provisions of the federal *Fisheries Act* and the B.C. *Waste Management Act* apply to these pollution sources. But these statutes are rarely effective in eliminating non-point sources of pollution because the sources are usually too numerous and too small to warrant the devotion of scarce enforcement resources.

Logging and roadbuilding are sometimes covered by environmental standards (usually as conditions of a permit) or guidelines [(10) -- 10. . The Forestry Fisheries Guidelines set out logging practices intended to protect fish habitat.]. These can be effective, but they are not applicable in all instances and compliance is not universal. The Forest Resources Commission noted that:

Unfortunately, secondary roads, spur roads, and other temporary roads have sometimes been poorly constructed, poorly located, poorly drained with inadequate culverts, poorly maintained, and poorly 'put to bed' for the period of several decades between their use for silviculture or other management activities. [(11) -- 11. . *The Future of Our Forests*, Forest Resources Commission, A.L. Peel, Chairman, Victoria, April 1991, p. 94.]

Of all the types of non-point sources of pollution, motor vehicle emissions are the most closely regulated. Emission standards for **new** motor vehicles are set by the federal government [(12) -- 12. . Motor Vehicle Safety Regulations, CRC 1978, c.1038, as amended by SOR 89-279, under the Federal *Motor Vehicle Safety Act*.]. Emissions from in-use vehicles are regulated by the province. [(13) -- 13. . Motor Vehicle Regulations -- Part 29, Air Pollution Controls on Motor Vehicles, B.C. Reg. 229/70, as amended by B.C. Reg. 343/77 under the B.C. *Motor Vehicle Act*, R.S.B.C. 1979, c.288.] The federal standards need to be tightened and work on this is underway. At the provincial level, the government has announced plans to

reintroduce provisions for vehicle **testing** following the closure of provincial motor vehicle testing stations in the early 1980s. The main problem is that the new testing requirements and facilities are not yet fully implemented.

Recommendation . We recommend that the B.C. pollution prevention strategy incorporate a range of approaches aimed at preventing pollution from non-point sources.

POLLUTANTS ENTERING MUNICIPAL WASTE SYSTEMS

Municipal sewers, landfills and incinerators are major sources of pollution in B.C. Municipal landfills and sewer systems comprised 3 of the 33 waste discharge permits in significant non-compliance and 32 of the 97 permittees listed in December 1990 as being a "pollution concern" to the Ministry of Environment. [(14) -- 14. . *Report of Significant Non-Compliance Evaluation of Waste Management Permits and Waste Discharges, Special Waste Sites and Contaminated Sites Not in Report 1 -- and Report 2 -- Report of Significant Non-Compliance Evaluation of Waste Management Permits and Waste Discharges, Special Waste Sites and Contaminated Sites Not in Report 1 -- But That Are A Pollution Concern to the Ministry*, B.C. Ministry of Environment, Victoria, B.C., December 10, 1990.] The provincial government's regulatory focus is on the discharge of pollutants as they **leave** municipal waste systems. A chronic weakness has been the failure or inability of municipalities to control the **entry** of pollutants into municipal systems. Households, commercial establishments and light industrial operations contribute contaminants such as heavy metals, pesticides, and solvents to municipal landfills, incinerators and sewers.

Municipal landfills, incinerators, sewage outfalls and biomedical waste are regulated under the *Waste Management Act*. The operators of these facilities must obtain a waste discharge **permit** under the Act for each of these operations. Alternatively, one or more municipalities may obtain approval by the Minister of Environment of a **waste management plan**, which takes the place of a permit. The standards contained in a permit or, presumably, an approved waste management plan are determined in accordance with *Pollution Control Objectives for Municipal Type Waste Discharges in British Columbia*, [(15) -- 15. . *Report on Pollution Control Objectives for Municipal Type Waste Discharges in British Columbia, as a Result of a Public Inquiry Held by the Director of Pollution Control*, Department of Lands, Forests, and Water Resources, Victoria, B.C., 1975.] which have not been updated since 1975.

In 1989, the Act was amended [(16) -- 16. . *Waste Management Amendment Act*, S.B.C. 1989, Chapter 62.] to **require** regional districts and municipalities not within a regional district to submit a waste management plan for **solid waste** by the end of **1995** and for **biomedical waste** by the end of **1992**. The Ministry of Environment has published *Requirements* [(17) -- 17. . *Requirements for Regional Solid Waste Management Plans*, B.C. Ministry of Environment, Victoria, B.C., June 1990.] for solid waste management plans and a *Guide* [(18) -- 18. . *Guide to the Preparation of Solid Waste Management Plans by Regional Districts*, B.C. Ministry of Environment, Victoria, B.C., June 1990.] to their preparation. The *Requirements* and the *Guide* obligate regional districts to follow the '5 Rs' (reduction, reuse, recycling, recovery and residual management) and to incorporate the provincial goal of a 50% reduction in solid waste by weight by 2000 over 1990 levels. [(19) -- 19. . *Requirements for Regional Solid Waste Management Plans*, B.C. Ministry of Environment, Victoria, B.C., June 1990, p. 1.] In the development of the plan, information must be gathered on the hazardous waste component of the waste stream. [(20) -- 20. . *Guide to the Preparation of Solid Waste Management Plans by Regional Districts*, B.C. Ministry of Environment, Victoria, B.C., June 1990, p. 17.] The *Requirements* specify that management strategies shall address **household** hazardous waste, [(21) -- 21. . *Requirements for Regional Solid Waste Management Plans*, B.C. Ministry of Environment, Victoria, B.C., June 1990, p. 1, p. 3.] but for some reason commercial and industrial sources of toxic pollutants are not mentioned in the same context.

The *Waste Management Act* [(22) -- 22. . *Waste Management Act*, s.17.] does allow the B.C. Cabinet to designate an area as a **sewage control area**, which authorizes the relevant municipality to prohibit or

regulate pollutants entering a sewage system. It also allows regional districts and the Greater Vancouver Sewerage and Drainage District (GVSD) to make bylaws controlling the direct or indirect discharge of sewage into sewers. The GVSD has recently adopted a modern 'source control' sewer use bylaw [(23) -- 23. . Greater Vancouver Sewerage and Drainage District, Sewer Use By-law No. 164, June 27, 1990.] and other regional districts are following suit, often in conjunction with preparing waste management plans for liquid waste. But the inadequacy of mechanisms for controlling the **entry** of pollutants into municipal waste systems remains a major problem in B.C.

Recommendation 2.#. We recommend that the B.C. government take additional steps to curtail the entry of pollutants, especially persistent toxic contaminants, into municipal waste systems by:

- (1) requiring that regional districts and municipalities not in a regional district submit waste management plans for sewage;
- (2) requiring that municipal waste management plans include rigorous controls against the entry of pollutants, especially persistent toxic contaminants, into municipal waste systems; and
- (3) considering the adoption of province-wide regulations governing the entry of persistent toxic pollutants into municipal waste systems.

End of Contaminated Site Legislation In B.C.

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