CCME

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Recommended Principles on Contaminated Sites Liability

2006

PN 1361

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This document incorporates and replaces "Contaminated Site Liability Report: Recommended Principles for a Consistent Approach Across Canada" CCME 1993, PN 1122, ISBN 0-919074-41-3

I BACKGROUND

In 2003 the Canadian Council of Ministers of the Environment (CCME) undertook a study to determine:

- the relevance of the existing 13 CCME principles for contaminated site liability[1], and
- the need for further work on principles to address the potential liability issues associated with brownfields. Brownfields are considered to be a subset of the contaminated site issue and can be described using the definition employed by the National Round Table on the Environment and the Economy: "abandoned, idle or underutilized commercial or industrial properties with known or suspected historical contamination, but where there is active potential for redevelopment."[2]

It was concluded that the CCME principles, although not uniformly adopted across Canada, continued to be appropriate for addressing contaminated sites.

Contaminated site liability is an issue causing difficulty in our attempts to achieve a sustainable environment and a sustainable economy. Contaminated sites must be properly managed, but who should pay? In some cases, the responsible person is clearly determined. In others, the responsible person or persons may be more difficult to identify or to locate. Further complications result when responsible persons are unable to pay.

A major concern is unpredictability. Unpredictability may lead to inaction or to inappropriate action on the part of the commercial and industrial sectors. Future responsibilities are unclear and consequently future care of the environment is not assured.

While sensitivity and general awareness of environmental pollution issues are growing in all sectors of our population, there is a need to keep the nature of this issue in perspective. Many contaminated site problems are associated with industrial activity in the past, such as abandoned mining and milling operations, factories, landfills, and processing plants. Long forgotten activities of the past can come back suddenly to create an environmental problem when least expected. This is raising concerns in both the private and public sectors about increased exposure to liability resulting in significant unforeseen expenditures. The private sector wants to minimize costs to maintain commercial viability, and governments want to ensure that the general taxpayer is not burdened with costs associated with poor environmental practices of the past. They are now working together to try to develop a system that would be compatible with both objectives.

While many potential environmental hazards are anticipated and prevented by owners and operators of lands and businesses, a considerable number are discovered after the fact or by accident once environmental damage has occurred. Sometimes, contamination is contained and stays on site, while other times it spreads and pollutes soil and water, including groundwater which may be the source of drinking water.

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[1] Canadian Council of Ministers of the Environment (1993), *Contaminated Site Liability Report: Recommended Principles for a Consistent Approach Across Canada*, CCME, Winnipeg, 1993.
[2] National Round Table on the Environment and the Economy (2003), *Cleaning Up the Past, Building the Future: A National Brownfield Redevelopment Strategy for Canada*. NRTEE, Ottawa, 2003.

Industry is concerned about this issue and is beginning to respond in a positive manner. Environmental audits are frequently conducted as a part of their environmental management practices. These practices improve compliance and prevent pollution. There is also growing evidence that pollution prevention efforts lead to considerable cost savings. Lenders now routinely conduct a review of environmental management and practices with many classes of commercial borrowers prior to approving credit facilities, and, as the degree of risk warrants, may require independent environmental audits. The purpose of these measures is to avoid the potential impact of poor environmental practices and site contamination on creditworthiness. Another factor is that comprehensive environmental insurance is not yet a common commodity, although the insurance industry is in the preliminary stages of developing products to cover cleanup costs. Presently, insurance is mostly limited to sudden and future events. Questions continue to persist as to how the person or persons responsible for the contamination can be held more accountable for remediation of contaminated sites.

One of the concerns of developers and owners of real property that is or may be contaminated, which hinders potential redevelopment, is that of liability uncertainty. A principle that provides for the transfer of environmental regulatory liability between parties, if implemented together with the current CCME principles, could help to address environmental regulatory liability issues with respect to both contaminated sites and brownfield sites. By helping to transfer liability, governments will be addressing one of the three key barriers to brownfield redevelopment. The other two key barriers are financial and lack of awareness.

II INTRODUCTION

The CCME Task Group on Contaminated Site Liability came about because of pressure from a couple of sources. Firstly, environment ministries across the country are encountering this issue with increasing frequency. Secondly, certain business organizations urged CCME to lead a national exercise of resolution to reduce the unpredictabilities of liability. All interested persons agreed with the need for early action.

So many organizations and individuals are keenly concerned about liability issues that it was recognized early on that everyone could not be involved in every aspect of the work. A core group consisting of five CCME jurisdictions - Nova Scotia, Ontario, Canada, Manitoba and Alberta - and five stakeholder organizations - Canadian Bankers Association, Canadian Environmental Law Association, Canadian Chemical Producers Association, West Coast Environmental Law Association and the Canadian Petroleum Products Institute - was formed under the guidance of Manitoba and Alberta as co-chairs. This core group was charged with planning the process to be used to bring the interested persons together and with assessing and reporting on the results of the work accomplished.

A broader advisory group was then established to engage in the discussion of the specific issues to ensure that a variety of perspectives were on the table and that the broadest possible support for the outcomes was in place. The Core Group and the Advisory Group were brought together in a workshop setting in Winnipeg on October 8 and 9, 1992. Each organization was invited to bring up to two individuals to the event. Reimbursement was offered to ENGOs for their travel and accommodation expenses to ensure their participation. Approximately 55 people spent about ten hours in small working groups and about three hours in plenary sessions at the workshop.

It was not possible to discuss every issue in detail at the workshop, due to time limitations. Therefore, subsequent to the workshop, the Core Group held two additional meetings and three conference calls, and communicated by correspondence to not only review and summarize the issues which had received thorough discussion at the workshop, but also to discuss the remaining issues and make recommendations that would be reviewed by the Advisory Group prior to being brought forward to deputy ministers and ministers. This report details the notable results of those deliberations.

It is important to note that the focus of the Task Group has been on the responsibility for remediation of existing contaminated sites. It is recognized that equally important is the ability to prevent future occurrences of contamination, and further work is required to address this issue. (See Part IV of this report.)

In September 2003, CCME added the allocation of liability for contaminated sites and so-called “brownfields” to its forward agenda. CCME conducted consultations with a broad cross-section of stakeholders and performed a review of related situations in other jurisdictions. This work helped inform the principle of transfer of environmental regulatory liability, developed to complement CCME’s 1993 principles on contaminated site liability. The principle will facilitate the redevelopment of vacant or underutilized commercial properties where there is real potential for redevelopment, but where liability issues around former or perceived contamination have limited action.

III RECOMMENDED PRINCIPLES

The following "Recommended Principles" have been developed to provide a model framework upon which individual member governments can develop legislation and regulations, but which will promote and facilitate a consistent approach to the issue of environmental liability across the country. These Recommended Principles have not been drafted in the form of legislative provisions; rather, they are statements of the policy options adopted by the Task Group, and on the basis of which specific legislative provisions should be enacted.

The first five Recommended Principles are categorized as "Underlying Principles". They contain the general policies which should form the basis of this type of legislation. The next eight Recommended Principles are categorized as "Specific Principles", as they relate to specific substantive issues that must be dealt with in such legislation. The Task Group believes there is consistency between the "Underlying Principles" and the "Specific Principles", and that in their entirety the Recommended Principles provide a solid and effective framework for the drafting of legislation respecting liability for contaminated sites. The last Recommended Principle provides for the transfer of environmental regulatory liability between parties.

RECOMMENDED PRINCIPLES 1 to 5 - "UNDERLYING PRINCIPLES"

1 The principle of "polluter pays" should be paramount in framing contaminated site remediation policy and legislation.

2 In framing contaminated site remediation policy and legislation, member governments should strive to satisfy the principle of "fairness".

- This principle is recommended with the understanding that there are some stakeholders who believe this principle is more fundamental than the “polluter pays” principle.

- In designing a “process” to allocate liability, it should be possible for governments to satisfy both the principles of "polluter pays" and "fairness" by building appropriate mechanisms into the scheme so that cleanup costs are allocated fairly. (See Recommendations 6 and following.)

- The principle of "fairness" incorporates, among other things, the concepts of certainty of process, effectiveness, efficiency, clarity, consistency, and timeliness in achieving environmental objectives.

While these concepts all relate to "process", it is also felt that "fairness" relates to substantive issues, and is associated with the principles of "polluter pays" and "beneficiary pays".

"Deep pockets", as a determinant of liability, should be rejected. Although there was broad support for this point, there were some stakeholders who did not support its rejection as a determinant of liability.

3 The contaminated site remediation process should enshrine the three concepts of "openness, accessibility, and participation".

- Accessible information and opportunity for public input are considered fundamental to the development and operation of policy and legislation related to contaminated site liability.

4 The principle of "beneficiary pays" should be supported in contaminated site remediation policy and legislation, based on the view that there should be no "unfair enrichment".

- The meaning of this principle can be explained as follows: those who will benefit from the cleanup of a contaminated site should not be "unfairly enriched". They should contribute according to the benefit that they derive from the remediation. For example, a present owner of a contaminated site may have purchased an already-contaminated site at a significant discount; s/he should not be allowed to profit unfairly by selling the remediated site at a premium - unless of course s/he contributed to the costs of remediation in proportion to increases in the property value generated by remediation.

- A second aspect of "beneficiary pays" is the notion that a person who benefited from the activity resulting in the contamination should share liability for its cleanup with other

responsible persons. However, there was no consensus reached on defining the term beneficiary. To pursue this aspect of "beneficiary pays" would require additional time and effort.

5 Government action in establishing contaminated site remediation policy and legislation should be based on the principles of "sustainable development", integrating environmental, human health and economic concerns.

RECOMMENDED PRINCIPLES 6 to 13 - "SPECIFIC PRINCIPLES"

6 There should be a broad net cast for the determination of potential responsible persons. However prior to entering the actual liability-allocation stages of the process, the following persons should have a conditional "exemption" based upon clearly defined statutory exemptions: (a) Lenders; lenders who hold a security interest in the property of a borrower should be granted a pre-foreclosure exemption from personal liability, beyond the outstanding balance of the debt, unless the lender had actual involvement in the control or management of the business of the borrower; and (b) Receivers, Receiver-Managers, Trustees (including trustees acting in a fiduciary capacity); these persons should be exempt from personal liability for pre-existing contamination, and only be liable if they fail to take reasonable steps to prevent further contamination, or otherwise fail to satisfactorily address ongoing environmental concerns at the site.

- The two statutory exemptions protect only the personal liability of a lender or receiver, etc. The lender must still contend with the fact that the security (which is a contaminated site) may be significantly devalued, and that the borrower's cash-flow may be insufficient to pay for both the cleanup and debt-servicing. As well, Recommended Principle 7 ("environmental priority", see next page) will not be affected. In addition to allowing the claim for cleanup costs to supersede the priority of a lender's prior-registered security, this also means that such claims will supersede the claims of secured creditors on the estate being administered by a trustee.

- There is also a suggestion that there be a condition of exemption for receivers and trustees only if they contact the appropriate environmental agency for their concurrence prior to transferring funds to secured creditors.

- Based upon an examination of the structure of remediation legislation presently existing in some jurisdictions, the most effective manner by which to cast this "broad net" of liability is to list specific classes of persons who may be identified as potential responsible persons. These classes could include: present owners, previous owners, tenants and other occupiers (both previous and present), *lenders, *receivers/receiver-managers/other trustees, manufacturers, distributors, generators, transports, corporate directors and officers, parent corporations and a "catch-all clause" to catch other potentially responsible persons who would not otherwise be caught in the liability net. Some of the stakeholders felt it important to note that government can fall into many of the above categories. [* These classes of persons are only responsible persons if they do not fall within the exemption.]

- Industry members voiced strong concerns regarding the inclusion of corporate directors and officers, especially without the qualification that their actions contributed to the contamination. They are concerned that it will become difficult to recruit good people to fill these roles. Other members felt that the courts would apply the criteria related to responsibility, and that there appeared to be little difficulty in the U.S. as a result of this policy.

- Industry representatives also made the point that parent corporations should remain in the net only if the subsidiary corporation was established primarily to avoid responsibility.

The two exemptions contained in this recommended principle are the only two statutory exemptions recommended. It is noted that some participants wanted to extend the list of statutory exemptions to include innocent present owners, municipalities who take ownership through tax sale, etc., while others wanted no statutory exemptions. No other class of potential responsible person was identified as having involvement with contaminated sites in circumstances similar to these two groups. (Other classes of potential responsible persons may have their liability limited (wholly or partially) at a later stage in the process, based upon the "limitation criteria" described in Recommended Principle 9.)

Some noted that lender exemption should apply only where the lender had reasonably assessed the environmental consequences of the loan prior to making it.

7 Remediation legislation should provide the necessary authority and means to enable the recovery of public funds expended on the remediation of contaminated sites from those persons deemed to be responsible for such sites. Furthermore, member governments should strive to achieve environmental priority over all other claims or charges on an estate that has entered receivership or bankruptcy.

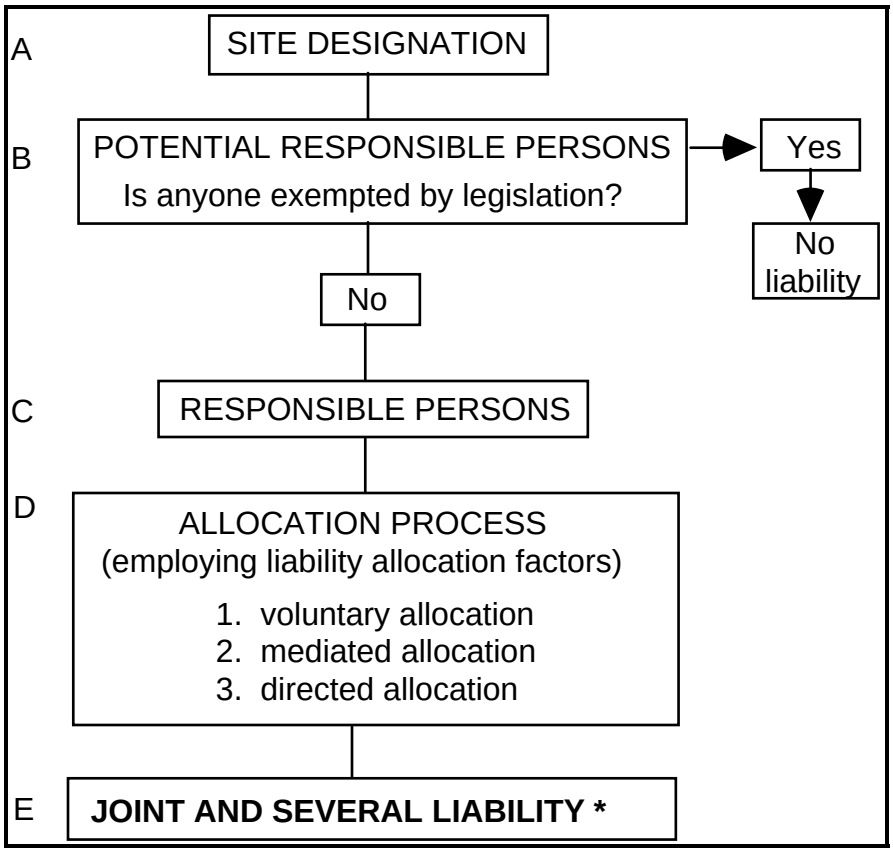
- Any provincial legislation establishing a priority in this area will be subject to federal priority in such matters as bankruptcy and other areas of federal jurisdiction.

- The reason for this recommended principle is to ensure that cleanup costs have the best likelihood of being recoverable, so as to encourage the cleanup of contaminated sites, and not unfairly burden the general taxpayer.

- Some lending institutions have suggested that this priority should extend to just the contaminated assets.
- More work related to the implementation of this recommendation needs to be done, due to the complex legal and constitutional issues, and perhaps could be done as part of a review of methods for resourcing remediation. (For discussion, see Part IV of this report.)

8 Member governments should pay particular attention to the design of a process which will facilitate the efficient cleanup of sites and the fair allocation of liability. Further, this process should discourage excessive litigation to the maximum extent possible by promoting the use of alternative dispute resolution procedures.

- An example of a process that would accommodate this principle follows:



***** There was significant disagreement as to whether joint and several liability should be a component of this process. Those in favour of its retention as a fall back in this process see it as serving two purposes: (a) as an incentive to promote resolution by ADR procedures; and (b) as a device to minimize the frequency of litigation. Those who oppose its retention see it as promoting deep pockets and in opposition to "fairness" and "polluter pays".

- This example process can be described as consisting of several separate but connected stages, as follows: (A) Site designation; (B) Determination of potential responsible persons; (C) Exclusion of specific potential responsible persons based upon clearly-defined statutory exemptions; (D) Entry of the remaining responsible persons into a 3-step liability-allocation process: (1) voluntary allocation between the responsible persons themselves; (2) mediated allocation by an independent body or person; (3) directed allocation, (E) failure of D1, D2 and D3 would result in liability becoming joint and several. Allocation efforts in D would be required to consider various statutorily-prescribed liability allocation factors. (See Recommendation 9.)

- The example process is sufficiently flexible to allow member governments to adapt it, with minor modifications, to their own particular needs.

- An option which received broad support was the idea of using an independent tribunal or other independent body for Steps D2 and D3 in the example process. This would allow liability to be fairly and impartially allocated.

- Each of these above stages of the example process will be more fully described in the Recommended Principles and discussions below. It was felt necessary to first set out an example process, as above, in order to effectively discuss such liability allocation issues as limiting liability, the use of alternative dispute-resolution procedures, etc. These issues are unavoidably linked to the design of a process, and cannot effectively be discussed apart from process.

9 A list of factors should be established for use in the liability-allocation process to allocate the liability of responsible persons depending upon the specific circumstances of their involvement, and in relation to the involvement of other responsible persons. The following list of "liability allocation factors" is suggested for use in cases where there is more than one responsible person to be considered in the allocation process. The list may not be exhaustive. Liability allocation factors:

a **when the substance became present at the site;**

b **with respect to owners * or previous owners, including, but not limited to:**

i **whether the substance was present at the site when he took ownership;**

ii **whether the owner ought to have reasonably known of the presence of the substance when he took ownership;**

iii **whether the presence of the substance ought to have been discovered by the owner when he took ownership, had he taken reasonable steps to determine the existence of contaminants at the site;**

iv **whether the presence of the substance was caused solely by the act or omission of an independent third person;**

v **the price the owner paid for the site and the relationship between that price and fair market value of the property had the substance not been present at the site at the time of purchase;**

c **with respect to a previous owner, whether that owner sold the property without disclosing the presence of the substance at the site to the purchaser;**

d **whether the person took reasonable steps to prevent the presence of the substance at the site;**

e **whether the person dealing with the substance followed the accepted industry standards and practices of the day;**

f **whether the person dealing with the substance followed the laws of the day;**

g **once the person became aware of the presence of the substance, did he contribute to further accumulation or the continued release of the substance;**

h **what steps did the person take on becoming aware of the presence of the substance, including immediate reporting to and cooperation with regulatory authorities;**

i **whether the person benefited from the activity resulting in the contamination, and what was the monetary value of their benefit;**

j **the degree of a person's contribution to the contamination, in relation to the contribution of other responsible persons; and**

k **the quantity and toxicity/degree of hazard of the substance that was discharged or otherwise released into the environment.**

*** Includes lessees and other occupiers.**

These liability allocation factors borrow heavily from the list of factors contained in Section 114 of the Alberta *Environmental Protection and Enhancement Act*, passed in 1992.

- With reference to the example process outlined in Recommended Principle 8, these factors would be employed in Step D of the process, in the apportionment of liability.

- It is preferable to specifically list liability allocation factors in this manner, rather than relying upon more general terms such as "due diligence" or "mitigating circumstances".

- There was some support for making the disclosure of contamination by a previous owner a "mandatory duty", in addition to its being a liability allocation factors.

10 Alternative Dispute Resolution (ADR) procedures should be made available by member governments as a means to resolve issues of liability for contaminated sites. For example, a four-step allocation process could be implemented as follows:

Step 1 - Voluntary allocation - Upon designation of a contaminated site, and designation of responsible persons, the affected persons should be given a reasonable time-bound opportunity to allocate the cost of cleanup among themselves.

Step 2 - Mediated Allocation - Failing Step 1, the persons will be required to enter into an allocation process whereby an independent person or body will mediate a settlement.

Step 3 - Directed Allocation - Failing Step 2, the persons will be required to enter into an allocation process whereby an independent person or body will make an arbitrated apportionment of liability based upon its findings.
Step 4 - Failing Steps 1, 2 and 3, liability will default to joint and several liability among all responsible persons.

- Steps 2 and 3 could be designed in many different ways to fit the needs of individual jurisdictions. It may even be possible in some jurisdictions to adapt existing environmental commissions or boards to fulfill the ADR roles of Steps 2 and 3.

- Discretion must be retained, whereby the Government authority can on a reasonable basis accept or reject any particular liability allocation scheme resulting from Steps 1, 2 or 3 (e.g., where the responsible persons agree, without proper justification, to allocate the greatest percentage of liability to an insolvent company). Clear criteria may be required for the use of this authority where government is one of the responsible parties.

- Governments will be required to carefully draft these provisions to protect responsible persons who enter into an allocation settlement in good faith, from the actions of unscrupulous responsible persons who may enter into an agreement, and subsequently without just cause breach the agreement - causing the allocation to become joint and several by default.

- It was suggested by industry and financial institutions that persons entering into an allocation settlement in good faith who carry out the terms of that settlement in full should be excluded from any future application of joint and several liability.

  Note: The U.S. has "de minimis" agreements whereby parties whose liability is five percent or under may pay double in order to get out of this process, subject to new findings of contamination.

11 Discretion should be retained by member governments to designate sites as contaminated sites; however, for the purposes of better predictability, governments should clarify their policies for determining which sites are to be designated, with a view to eventually harmonizing their site-designation processes. These site-designation policies should designate sites based upon (a) risk to human health; and (b) extent of environmental risk. In addition, there should be public input into the evaluation of significant sites being considered for designation, as well as public notice when a site designation occurs.

- As this is the initial step in the example process outlined in Recommended Principle 8, and which sets all other steps in the process into motion, it is important that the site designation process be open and fair.

- In March 1992, CCME published a report entitled *National Classification System for Contaminated Sites* (CCME EPC-CS39E). This report provides scientific and technical assistance in identifying sites as high, medium or low risk - based upon their current or potential adverse impact on human health or the environment. This report may serve as a useful document in assisting governments to adopt improved site-designation procedures, and might in addition lead to some degree of harmonization.

12 A "responsible person", who completes the cleanup of a contaminated site to the satisfaction of the regulatory authority, should be issued an official "certificate of compliance" by that authority, certifying that the site has been remediated to the required standards. These certificates, however, should expressly state that they are based on the condition of the contaminated site as at the date of issuance and that the remediation undertaken met the standards of the day; and that the responsible person may be liable for future cleanup ("prospective liability"), should further contamination subsequently be discovered.

- Re-designation of a remediated site would be tied to health and environmental risk as in number 11, not simply revised standards or enhanced analytical capability.

- This compromise between the competing issues of "certificates of compliance" and "prospective liability" should permit member governments to hold responsible persons accountable to the fullest reasonable extent for contamination in situations where all effects 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.

- In addition to the "final" certificates of compliance referred to above, there was some support for the providing of "provisional" certificates of compliance. This would serve the purpose of allowing a financial institution the comfort to advance funds to the responsible person, prior to the completion of site remediation, which in turn will have the environmental benefit of providing the responsible person with the necessary funding to continue the cleanup. This was not a unanimous suggestion.

- Some industry representatives expressed concern that a limited certificate of compliance would result in significant commercial uncertainty.

13 Benchmarks should be developed for the remediation of contaminated sites, which will vary depending upon the land usage and site location of a particular site. The use of such benchmarks will allow remediation plans or orders to be tailored on a site-specific basis. There should be full public input into the development of these benchmarks.

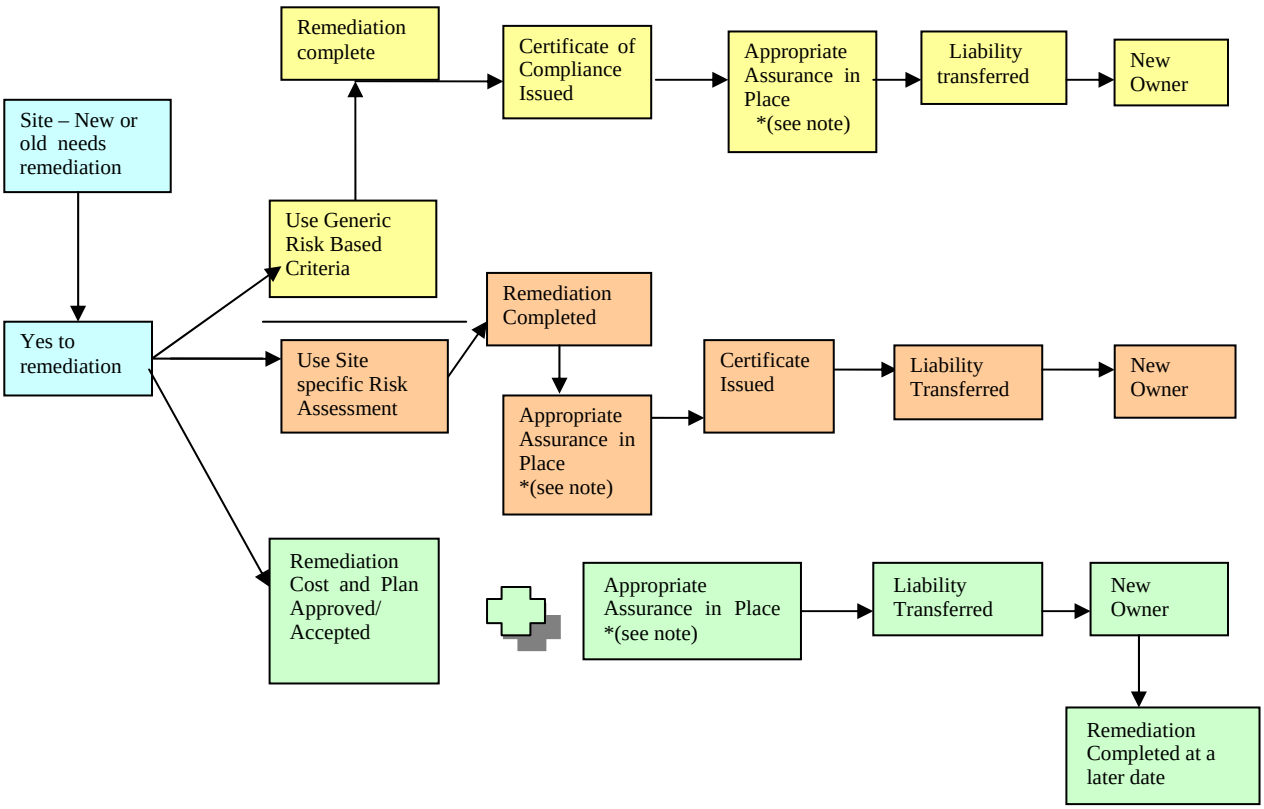
- The Task Group recognizes the work that has been done, and continues to be done, by the CCME Sub-Committee on Environmental Quality Criteria for Contaminated Sites. In September 1991, this sub-committee published a report entitled *Interim Canadian Environmental Quality Criteria for Contaminated Sites* (CCME EPC-CS34). The purpose of these criteria are to establish a common scientific basis for the establishment of remediation objectives for specific sites. The Task Group supports the continuing work of this sub-committee, and believes that its work could form the basis of the "benchmarks" referred to in the above recommended principle.

RECOMMENDED PRINCIPLE 14 "Transfer of Liability"

14 For the purpose of facilitating the appropriate remediation of a site, the regulatory environmental liability associated with a contaminated site may be transferred between parties (e.g. buyer and seller) in accordance with applicable federal, provincial and/or territorial legislation and with full disclosure of all information regarding the site.

- **Legislation, regulations or site specific agreements could set out the requirements for such a transfer.**
- **The transfer could be recognized by government subject to requirements, including assurances that the site has been or will be remediated; and the receiving party(ies) has the capacity to carry out the remediation and any regulatory requirements related to that remediation.**

Figure 1. Examples of How Environmental Regulatory Liability Could be Transferred



NOTE:
"Appropriate Assurance in Place" refers to a plan which covers:

Top Stream:
any possible future costs resulting from necessary further cleanup (e.g. induced by change of criteria or by civil law suits).

Middle Stream:
a) any possible future costs resulting from necessary further cleanup (e.g. induced by change of criteria or by civil law suits) as well as
b) any necessary maintenance or needed improvement of the risk management measures (contamination is still in place) in the case that the responsible person is not financially able to do it.

Bottom Stream:
a) the approved initial clean-up (which is still pending)
b) any possible future costs resulting from necessary further cleanup (e.g. induced by change of criteria or by civil law suits) as well as
c) if site specific risk assessment and risk management measures have been taken any necessary maintenance or needed improvement of the risk management measures (contamination is still in place) in the case that the responsible person is not financially able to do it.

Implementation Options

To implement the transfer of environmental regulatory liability principle, legislatures could establish a site-specific approval mechanism for an agreement or a regulated set of conditions under which liability transfer would operate. Conditions might include:

- A requirement that the actual environmental regulatory liability transfer be effected only after remediation is completed;
- A requirement for financial or other assurance that the receiving party has the financial capacity to undertake that remediation, such as:
  - irrevocable letters of credit;
  - security deposits including short term deposits;
  - registered bonds;
  - treasury bill notes;
  - bank drafts;
  - money orders;
  - certified cheques;
  - cash;
  - payments under a self funding security alternative (requiring approval).
- Full and complete disclosure to the purchaser and the relevant government agency of all known aspects of the property's history and real or potential onsite and offsite impacts – such that the consent to transfer of environmental regulatory liability is informed consent in the complete legal sense, and the government recognizing the environmental regulatory liability transfer does so with full information;
- Time requirements on the agreement to coincide with the perceived efficacy of the assurances, such that insurance/assurance mechanisms form seamless protection;
- Understanding that environmental regulatory liability with respect to historical off-site contamination discovered after completion of remediation is not extinguished by the agreement;
- A mechanism that provides a fallback to an effective assurance contingent, in the event that the receiving party cannot undertake the required tasks; and
- After return of the brownfield to the economy, a government may become aware of information that would call into question the remediation of historical contamination at or on the brownfield site and that would require notification to the transferor and/or transferee of the requirement to re-assume environmental regulatory liability that had already been transferred to the transferee. In general, the liability would be allocated as follows:
  - To the transferor in case of:
    - Fraud or negligence in assessing or remediating the property;
    - Failure to pay any administrative fees to the government;
    - Failure to maintain assurance/insurance fees (depending on who is responsible under the applicable legislation or site-specific agreement).
  - To the transferee in cases when:
    - Mitigation of risk associated with pre-existing or new contamination found after certificate of compliance issued;
    - Failure to adhere to terms and conditions of the site remediation approval;

- Failure to maintain assurance/insurance fees (depending on who is responsible under the agreement);
- Change in property use to a more sensitive land use (e.g., industrial to residential).

In order for governments to consider environmental regulatory liability transfer in the case of remediation based on site specific risk assessment, governments could require the parties to meet financial requirements as set out above or to provide other guarantees in relation to potential future risks arising from the project following completion. Detailed information could also be required from the parties related to:

- Type/availability of private assurance/insurance options;
- The nature and role of long-term assurance funds;
- Definition of the roles and responsibilities of the parties;
- Knowledge of the site;
- Levels of existing contamination;
- Terms and conditions for long-term control and care.

IV ADDITIONAL COMMENTS

Prevention

The problem of contaminated sites is really a two-sided problem: on one side is the problem of existing contaminated sites, while the other side of the issue involves the prevention of future site contamination. Both sides of this issue are of equal significance, however, the approaches to resolving these related aspects of the issue will be very different. The Task Group has viewed its mandate as requiring it to focus on the problem of existing contaminated sites, rather than directly upon prevention. In other words, the Task Group has viewed contaminated sites in a historical, rather than in a forward-looking perspective. Even so, the adoption by member governments of the Recommended Principles will have spill-over effects into the area of prevention, as governments and stakeholders grow in their appreciation of the negative consequences of poor environmental practices. However, the importance of environmental liability in the context of preventing contaminated sites should not be minimized (in accordance with the internationally accepted "precautionary principle"), and it is deserving of a separate and complete examination in itself.

APPENDIX A

SUMMARY OF RECOMMENDED PRINCIPLES

1 The principle of "polluter pays" should be paramount in framing contaminated site remediation policy and legislation.

2 In framing contaminated site remediation policy and legislation, member governments should strive to satisfy the principle of "fairness".

3 The contaminated site remediation process should enshrine the three concepts of "openness, accessibility, and participation".

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   b with respect to owners * or previous owners, including, but not limited to:

i whether the substance was present at the site when he took ownership;

ii whether the owner ought to have reasonably known of the presence of the substance when he took ownership;

iii whether the presence of the substance ought to have been discovered by the owner when he took ownership, had he taken reasonable steps to determine the existence of contaminants at the site;

iv whether the presence of the substance was caused solely by the act or omission of an independent third person;

v the price the owner paid for the site and the relationship between that price and fair market value of the property had the substance not been present at the site at the time of purchase;

c with respect to a previous owner, whether that owner sold the property without disclosing the presence of the substance at the site to the purchaser;

d whether the person took reasonable steps to prevent the presence of the substance at the site;

e whether the person dealing with the substance followed the accepted industry standards and practices of the day;

f whether the person dealing with the substance followed the laws of the day;

g once the person became aware of the presence of the substance, did he contribute to further accumulation or the continued release of the substance;

h what steps did the person take on becoming aware of the presence of the substance, including immediate reporting to and cooperation with regulatory authorities;

i whether the person benefited from the activity resulting in the contamination, and what was the monetary value of their benefit;

j the degree of a person's contribution to the contamination, in relation to the contribution of other responsible persons; and

k the quantity and toxicity/degree of hazard of the substance that was discharged or otherwise released into the environment.

* Includes lessees and other occupiers.

10 Alternative Dispute Resolution (ADR) procedures should be made available by member governments as a means to resolve issues of liability for contaminated sites. For example, a four-step allocation process could be implemented as follows:

Step 1 - Voluntary allocation - Upon designation of a contaminated site, and designation of responsible persons, the affected persons should be given a reasonable time-bound opportunity to allocate the cost of cleanup among themselves.

Step 2 - Mediated Allocation - Failing Step 1, the persons will be required to enter into an allocation process whereby an independent person or body will mediate a settlement.

Step 3 - Directed Allocation - Failing Step 2, the persons will be required to enter into an allocation process whereby an independent person or body will make an arbitrated apportionment of liability based upon its findings.

Step 4 - Failing Steps 1, 2 and 3, liability will default to joint and several liability among all responsible persons.

11 Discretion should be retained by member governments to designate sites as contaminated sites; however, for the purposes of better predictability, governments should clarify their policies for determining which sites are to be designated, with a view to eventually harmonizing their site-designation processes. These site-designation policies should designate sites based upon (a) risk to human health; and (b) extent of environmental risk. In addition, there should be public input into the evaluation of significant sites being considered for designation, as well as public notice when a site designation occurs.

12 A "responsible person", who completes the cleanup of a contaminated site to the satisfaction of the regulatory authority, should be issued an official "certificate of compliance" by that authority, certifying that the site has been remediated to the required standards. These certificates, however, should expressly state that they are based on the condition of the contaminated site as at the date of issuance and that the remediation undertaken met the standards of the day; and that the responsible person may be liable for future cleanup ("prospective liability"), should further contamination subsequently be discovered.

13 Benchmarks should be developed for the remediation of contaminated sites, which will vary depending upon the land usage and site location of a particular site. The use of such benchmarks will allow remediation plans or orders to be tailored on a site-specific basis. There should be full public input into the development of these benchmarks.

14 For the purpose of facilitating the appropriate remediation of a site, the regulatory environmental liability associated with a contaminated site may be transferred between parties (e.g. buyer and seller) in accordance with applicable federal, provincial and/or territorial legislation and with full disclosure of all information regarding the site.

- Legislation, regulations or site specific agreements could set out the requirements for such a transfer.
- The transfer could be recognized by government subject to requirements, including assurances that the site has been or will be remediated; and the receiving party(ies) has the capacity to carry out the remediation and any regulatory requirements related to that remediation.