

## Expectations and Requirements for Contaminant Migration

### Introduction

This guidance focusses on the ministry's communication requirements and expectations for persons responsible for parcels that are the source of migration of contaminants (source parcels). It also contains important guidance for owners of parcels which have likely or actually been affected by the migration of contaminants onto their parcels (affected parcels). See Appendix 1 for a summary of the key requirements and expectations.

### Administrative fairness requirements

When administering provisions under the *Environmental Management Act* (the Act), a Director of Waste Management must ensure that the principles of administrative fairness are followed. In the context of migration, the Director must ensure that those who may be significantly affected parties (such as owners of affected parcels) have an opportunity to review and comment on relevant site investigation information and on any proposed remediation in relation to contamination migrating onto their lands. The Director must allow adequate time for affected parties to review information and must carefully consider any comments received before making any decisions.

### Discovering contaminant migration

#### Notifications of Migration (NOMs)

Under sections 57 and 60.1 of the Contaminated Sites Regulation (the Regulation) if, during any stage of investigation or independent remediation at a parcel, it has been found that one or more substances has migrated or is likely

to have migrated to a neighbouring parcel and is causing or is likely causing contamination at that parcel, the affected neighbouring parcel owner(s) and ministry must be notified in writing.

#### ***Who is responsible for sending notification?***

The responsible person for the source parcel might be a parcel owner, operator of a business, leaseholder, spiller, or anyone else responsible for a release of a substance that results in the contamination or likely contamination of a neighbouring parcel. The responsible person for the source parcel must provide the notification.

#### ***Who must be provided notification?***

An owner of a neighbouring parcel that is likely or actually contaminated by the migration of substances must be provided notification. A copy must also be sent to the Director. The Act defines an owner as a person who possesses, has the right of control or occupies or controls the use of real property. Owners could include lessees, tenants and owners of neighbouring roadways, easements and utility corridors. They could include municipalities and the Provincial government.

#### ***How and when must the notification be provided?***

The required notification form is contained in [Protocol 17, "Forms for Notifications of Independent Remediation and Migration."](#) The [NOM form](#) is also available on our website under the "Forms" heading. The affected parties and the ministry must be notified within 15 days of the responsible person becoming aware of the likely or actual migration.

### **Information on site risk classification**

Under [Protocol 12, "Site Risk Classification, Reclassification and Reporting,"](#) Site Risk Classification Reports (and when required Exposure Pathway Questionnaires) must be sent to the Director with copies of NOMs. The ministry expects that any Site Risk Classification Report associated with the submission of a NOM for an affected parcel will also be provided to the affected parcel owner.

### **Duty to provide site profiles**

A vendor of a parcel of land which has been used for a purpose or activity listed in Schedule 2 of the Regulation must provide a site profile to a prospective purchaser, subject to the exemptions listed in the Regulation. Schedule 2 lists as item E10 "sites which have been or likely have been contaminated by substances migrating from other properties," so a prospective purchaser must be provided a site profile for lands contaminated by the migration of substances. Consult our key topics on [real estate](#) and [site profiles](#) for further information.

### **Investigating contaminant migration**

#### **Full delineation of contamination**

The ministry's [Protocol 6, "Eligibility of Applications for Review by Approved Professionals"](#) requires persons responsible for contaminant migration to obtain ministry preapproval if they don't intend to address the entire area of contamination associated with migrating contaminants (including both source and affected parcels) when they seek a [contaminated sites instrument](#) (instrument).

When the full extent of contamination at an affected parcel has not been delineated, persons responsible for source parcels are expected to arrange for delineation of the extent of migrated contamination at the affected parcel.

#### **Access to land**

Often a source parcel owner needs access to affected parcels to enable soil, water, sediment and vapour to be sampled and analyzed. Source

parcel responsible persons are expected to request of owners of affected or likely affected parcels to provide access to the affected or likely affected lands for appropriate site investigations. Without access, the source parcel owner may need to characterize potentially contaminated environmental media more intensively at the perimeter of the affected parcel or at the boundaries of the source parcel where contaminants are likely migrating to a neighbouring parcel. Under section 48 (14) of the Act, the Director may order access to an affected parcel to assess the situation. In making a decision to issue such an order, a Director would typically want to know if the affected parcel is classified as high risk.

#### **Note**

A Certificate of Compliance can be obtained for an affected parcel by the source parcel responsible person, where investigations and remediation are carried out by the source parcel responsible person at or adjacent the affected parcel. Also, a Certificate can be obtained by the affected parcel owner who has remediated the affected parcel. This might occur if the affected parcel owner decides not to allow access to the affected parcel by the source parcel owner. If a Certificate is not obtained for the affected parcel, it could result in future difficulties, for example, in selling the parcel or in a future court action initiated by the affected parcel owner to recover cleanup costs from the source parcel owner.

#### **Information provided by source parcel owners to affected parcel owners**

As applicable, when substances are or are likely causing contamination at a neighbouring parcel, the source parcel responsible person is expected to convey information (typically in a site investigation report) to the affected parcel owner with respect to the actual or likely contamination at the affected parcel originating or associated with the source parcel including:

- the nature and extent of any contamination at the affected parcel;
- the human health and ecological risks from exposure to the contamination at the affected parcel under present and reasonably anticipated future uses; and
- any safety issues and impacts on utilities (e.g., water mains) at the affected parcel.

Appendix 2 contains a complete list of items which should be provided for affected parcels by those responsible for source parcels.

### **Advice for affected parcel owners**

#### ***Seek competent advice***

Since the contaminated sites provisions under the Act and Regulation are complex, the ministry recommends that affected parcel owners obtain advice from experts familiar with B.C.'s contaminated sites requirements. Affected parcel owners are advised to consider carefully retaining the services of a qualified environmental consultant such as an [Approved Professional](#) as well as a lawyer with experience with provincial contaminated sites laws. Note that the ministry does not provide legal advice.

#### ***Source parcel information not provided***

If the source parcel owner does not take the initiative, those responsible for affected parcels should contact the source parcel owner to request site investigation reports and information on his or her intentions for remediating the source and affected parcels.

#### ***Information in ministry records***

Affected parcel owners may want to obtain any information held by the ministry on the source and affected parcels. Consult our [key topic on site information](#) for further details.

#### **Note**

Notations are recorded in the Site Registry for every Notification of Migration. They may be listed under the record for the source parcel and indicate that neighbouring parcels for which these notifications have been sent are potentially contaminated. Also, they may be listed under a Site Registry record for an affected parcel.

The Registry may be accessed through [BC OnLine](#) or a [Site Information Request](#) – fees apply to both types of query. B.C.'s *Freedom of Information and Protection of Privacy Act* (FOI Act) disallows FOI requests for site information because it is sold under the Act.

#### ***Information on rights, obligations and liability***

We also recommend that affected parcel owners review information on their rights, obligations and liabilities with respect to contamination at and nearby their parcels – [Fact Sheet 16, "Remediation Liability Overview"](#) and [Fact Sheet 34, "Requirements for Responding to Contaminant Migration"](#) contain some information on those topics.

#### **Note**

Owners of parcels contaminated by the migration of substances should be aware of their liability arising from the combination of parcels with different owners into one site, as could occur under a Contaminated Sites Legal Instrument. Consult [Fact Sheet 48, "Remediation Liability and Combining Parcels with Different Owners"](#) for further details. The ministry suggests that instruments be issued for parcels and groups of parcels with the same owners, to avoid these unintended remediation liability concerns.

Under section 46 (1) (j) of the Act, an affected parcel owner is not responsible for remediation of contamination at his or her parcel if that contamination was caused solely by the migration of substances from another person's parcel. In addition, under section 33 (1) of the Regulation, a person is not responsible for remediation of a parcel contaminated only by substances being managed in accordance with a wide area remediation plan, as long as those substances did not originate from the affected parcel.

### **Remediating contaminants at affected parcels**

#### **Approaches to remediation**

A contaminated parcel may be cleaned up by independent remediation or under a contaminated sites legal instrument or order, where the ministry has a greater degree of oversight.

#### ***Independent remediation***

According to ministry records, about two thirds of the contaminated sites in B.C. remediated annually are cleaned up by independent remediation. The ministry does not usually

review the quality of site cleanups done by that method, and the use of independent remediation does not guarantee that the cleanup has met the applicable remediation standards and other requirements. Owners of remediated affected parcels would be wise to undertake their own due diligence reviews if their sites were cleaned up by independent remediation performed by or for other owners. For detailed information on independent remediation, please consult [Administrative Guidance 9, "Independent Remediation of Contaminated Sites."](#)

#### ***Remediation with ministry involvement***

The remaining third of the contaminated sites cleaned up yearly in B.C. are remediated under the oversight of the ministry and usually an Approved Professional. Typically the ministry becomes involved when it receives a service request to issue a [contaminated sites legal instrument](#). Note that preapproval to issue the instrument sometimes must be obtained.

#### **Both numerical and risk-based approaches to remediation acceptable**

Under the Regulation either the numerical or the risk-based remediation standards may be used to determine when a cleanup is complete – the choice is up to the responsible person. Agreement with affected parcel owners on the type of standards used is recommended but not required. When a parcel is cleaned up to the risk-based standards, it will continue to be contaminated after it is remediated, so affected parcel owners are advised to inform themselves of the implications. [Technical Guidance 3, "Environmental Quality Standards,"](#) describes how both types of standards are used.

#### **Note**

The ministry may approve a risk-based remediation strategy or issue a Certificate of Compliance for remediation to the risk-based standards for an affected parcel in spite of preferences of the affected parcel owner for remediation to the numerical standards. Such ministry decisions are informed primarily by the measures needed for ecological and human health protection instead of financial interests.

## **Communications between source parcel and affected parcel owners**

### **Communication methods**

Source parcel owners are responsible for carrying out appropriate communication with affected parcel owners. While written communication records will need to be kept, face-to-face and telephone communications can also be valuable, especially where the parties involved do not have good writing (usually English) skills.

### **General review of remediation plan**

When a responsible person for a source parcel wants to remediate or is remediating an affected parcel, he or she is advised to contact the affected parcel owner to provide and discuss the remediation strategy, plans and schedules. This applies both to cleanups under independent remediation and those where the ministry will be involved and will issue an instrument. Source parcel responsible persons should also provide to the affected parcel owner with respect to the migrating substances:

- copies of any Notifications of Independent Remediation for the source and affected parcel; and
- any Site Risk Classification Reports and Exposure Pathway Questionnaires submitted to the ministry for both parcels.

#### **Note**

The following information applies to the typical situation where a source parcel responsible person (such as a source parcel owner) is applying for an instrument for a parcel affected by contaminants migrating from a neighbouring source parcel. The information does not apply where, for example, an affected parcel owner is applying for an instrument for his or her own parcel for contaminants migrating from a neighbouring source.

## **Requirements and expectations for instrument applications for affected parcels**

### ***Information for affected parcel owners***

A source parcel applicant for an instrument for a parcel affected by contaminants migrating from the source parcel is expected to provide specific information to the affected parcel owner with a

request for comments and concerns about work done and proposed at the affected parcel.

The source parcel owner is expected to provide to the affected parcel owner in writing by registered letter, the information shown in Appendix 2 item 2). If a written response is not received by the source parcel responsible person within 30 days, the ministry expects the source parcel responsible person to contact the affected parcel owner again, this time by telephone, e-mail or in person requesting a response to the original communication. If contact is made, a request must be made by the source parcel responsible person for a response to the registered letter within an additional 30 days from the time of the telephone, e-mail or personal contact.

#### **Communication records**

The source parcel applicant (usually the owner) must provide a record of communications for all applications for instruments where there was migration of contamination to a neighbouring parcel. The communication record must:

- confirm that the information described in Appendix 2 was provided to each affected parcel owner, with the format, dates and times it was provided ,
- if the information was not provided, indicate why it was not;
- summarize responses from each affected parcel owner including how concerns raised were addressed, or not. (If concerns were not addressed the reasons should be provided); and
- identify whether or not each affected parcel owner agrees with the issuance of each, as applicable, of:
  - ⇒ an instrument that combines the affected parcel with the source parcel;
  - ⇒ a separate instrument for the affected parcel;
  - ⇒ a separate instrument for the source parcel.

#### **Note**

This document is not binding on a Director of Waste Management appointed under the *Environmental Management Act*. Parcels and sites typically present unique circumstances which a Director must consider when making a decision about an application to issue an instrument. The guidance below suggests how a Director might respond in general situations. Note that a Director's decision ultimately is expected to reflect all the information he or she receives and considers relevant.

Section 52 of the Act "Public consultation and review" provides authority for a Director to order a responsible person to provide for public consultation on proposed remediation or a public review of remediation activities. In determining how and when to apply these powers, a Director would typically review communications records provided in support of an application for an instrument.

#### **Director's decisions**

When source parcel applicants do not satisfy one or more of these communication requirements, the Director would typically contact the applicant indicating that the application would be reconsidered when information addressing the deficiencies is provided.

When the Director is satisfied that the communication requirements have been met, the Director would typically make a decision on issuing instruments based on the specifics of the situation and comments received from a range of persons representing those who could be affected by the Director's decision. Such persons could include, for example, operators at the affected site and mortgage holders.

Depending on the situation, the Director may decide to provide a copy of the draft instrument to some or all of the persons who could be affected by the Director's decision for a 30-day comment period.

To assist the Director in making such a decision, applicants for instruments are advised to ensure that any risk assessment and/or remediation

plan developed for the affected parcel meets the requirements of the Act. Also, if the affected parcel owner objects to the issuance of, or details in proposed instruments for the affected and/or source parcel, the reasons for any objections by the affected parcel owner must be clearly documented and provided to the Director.

### **Expectations for preventing recontamination**

During remediation and after contamination from a source parcel at an affected parcel has been remediated, the ministry expects that measures necessary to prevent recontamination or additional contamination of the affected parcel have been, in the case of a Certificate of Compliance, or would be, in the case of an Approval in Principle, put in place with the following:

- (i) a written statement by an Approved Professional, that the design of any works or implementation of other measures required in the opinion of the Approved Professional to prevent recontamination or additional contamination of the affected parcel from the source parcel would, if implemented, operated and maintained as specified by the Approved Professional, prevent recontamination or additional contamination of the affected parcel; and

- (ii) a written commitment by the current owner or operator of the source parcel, that any works or measures intended to prevent recontamination or additional contamination of the affected parcel will be implemented, operated, and maintained according to the Approved Professional's specifications and any requirements in a Certificate of Compliance or Approval in Principle issued for the source parcel; or
- (iii) a written commitment by the current owner or operator of the affected parcel, that any works or measures intended to prevent recontamination or additional contamination of the affected parcel will be implemented, operated, and maintained according to an Approved Professional's specifications and any requirements in a Certificate of Compliance or Approval in Principle issued for the affected parcel.

*This guidance does not contain and should not be construed as legal advice. Current legislation and regulations should be consulted for complete contaminated sites legal requirements.*

*For more information, contact the Environmental Management Branch at (250) 387-4441.*

Version 1.1

## Appendix 1

### Key Requirements and Expectations for Source Parcel Responsible Persons and Affected Parcel Owners

| Requirements and Expectations for<br>Source Parcel Responsible Persons  | Advice and Expectations for<br>Affected Parcel Owners  |
|---|--|
| <ul style="list-style-type: none"> <li><input type="checkbox"/> Delineate and remediate the full extent of contamination both at the source parcel and migrating from the source parcel to affected parcels.</li> <li><input type="checkbox"/> Provide <a href="#">Notifications of Migration</a> as required under the Contaminated Sites Regulation.</li> <li><input type="checkbox"/> Provide copies to affected parcel owners of any Notifications of Independent Remediation for contamination which has migrated or is likely to migrate from the source parcel to affected parcels.</li> <li><input type="checkbox"/> Provide copies to affected parcel owners of any Site Risk Classification Reports required under <a href="#">Protocol 12, "Site Risk Classification, Reclassification and Reporting"</a> for contamination which has migrated or is likely to migrate from the source parcel to affected parcels.</li> <li><input type="checkbox"/> Request that the owners of neighbouring parcels likely or actually affected by migration of contaminants from the source parcel provide access to allow appropriate site investigations, and if needed remediation.</li> <li><input type="checkbox"/> Provide in writing to affected parcel owners the information in Appendix 2 of this guidance.</li> <li><input type="checkbox"/> Contact affected parcel owners to discuss any proposed remediation strategy, plan and schedule.</li> <li><input type="checkbox"/> For affected parcels where contaminated sites instruments are to be obtained, provide to the ministry a record of communications with affected parcel owners as described in this guidance.</li> <li><input type="checkbox"/> Provide to affected parcel owners copies of any contaminated sites legal instruments obtained for affected parcels.</li> <li><input type="checkbox"/> Implement, operate, and maintain any works or measures intended to prevent recontamination of the affected parcel according to an Approved Professional's specifications and any requirements in a Certificate of Compliance or Approval in Principle issued for the source parcel.</li> </ul> | <ul style="list-style-type: none"> <li><input type="checkbox"/> Obtain legal and technical advice from professionals experienced with B.C.'s contaminated sites requirements.</li> <li><input type="checkbox"/> If your land may be contaminated by the migration of substances from a neighbouring parcel, and the source parcel responsible person has not communicated with you about it, contact the source parcel responsible person and request site investigation reports and information on his or her plans for remediating contamination at the source and affected parcels.</li> <li><input type="checkbox"/> Review information on your rights, obligations and liability exposure as the owner of land which may be contaminated by the migration of substances from a neighbouring parcel.</li> <li><input type="checkbox"/> Undertake an independent review of investigation and remediation work at your affected parcel to verify site investigations and independent remediation which were undertaken but which were not performed under your direction or control.</li> <li><input type="checkbox"/> If the source parcel responsible person has not done so, implement, operate, and maintain any works or measures intended to prevent recontamination of the affected parcel according to an Approved Professional's specifications and any requirements in a Certificate of Compliance or Approval in Principle issued for the affected parcel.</li> </ul> |

## Appendix 2

### **Communication Requirements for Source Parcel Responsible Persons Seeking Contaminated Sites Legal Instruments for Source and Affected Parcels**

These requirements apply where a source parcel responsible person is applying for a Determination of Contaminated Site, Approval in Principle or Certificate of Compliance for the source parcel and for one or more affected parcels. The requirements vary depending on the type of contaminated sites legal instrument (instrument) anticipated for the affected parcel. They do not replace the conditions a Director may require for public consultations under section 52 of the Act.

- 1) A satisfactorily completed Notification of Likely or Actual Migration must have been provided to the affected parcel owner and the ministry where required under sections 57 and 60.1 Contaminated Sites Regulation.
- 2) The responsible person for the source parcel must send a registered letter to each affected parcel owner with the following:
  - a) A request for comments on, and concerns about the results obtained to date, the work done and proposed work at the source and affected parcels relevant to the source parcel.
  - b) A declaration that the source parcel owner intends to seek instrument(s) for the source and affected parcels and a description of the types of instruments sought and to which parcels they apply.
  - c) The name of the firm preparing the draft instrument(s) as well as the contact at the firm (name, address, phone number, e-mail address, etc.).
  - d) Who will be working with the affected parties (i.e., the owner, operator, their agent (consulting firm), etc.) and their names, addresses, phone numbers, e-mail addresses, etc.).
  - e) A summary description of the work done and results obtained to date at the source and affected parcels relevant to the affected parcel, e.g., in a Stage 2 preliminary site investigation, in a detailed site investigation, or an original summary of work completed and results obtained with respect to the affected parcel and work at and results for the source parcel relevant to the migration. The summary should provide information on and describe:
    - the nature and extent of any contamination at the affected parcel;
    - the human health and ecological risks from exposure to the contamination at the affected parcel under present and reasonably anticipated future uses;
    - any safety issues and impacts on utilities (e.g., water mains) at the affected parcel.



If the source parcel is to be remediated or is being remediated, the type of remediation standards used (numerical or risk-based) must be described.

- f) A list of the reports and plans and their availability relating to the presence of substances at the affected parcel which migrated from the source parcel.
- g) A list of the substances to which the proposed instruments apply for each parcel and instrument.
- h) A description of the applicable standards and criteria for contaminants in each environmental medium for each parcel. The type of remediation standards to be used must be described (numerical, risk-based or both).
- i) A statement for both the source and affected parcel as to whether the source and affected parcel is classified or would likely be classified as high risk or non-high risk.
- j) A description of the boundaries of the source and affected parcels (with attached figures) and the way in which each affected parcel would be addressed with respect to site boundaries as described in the proposed instruments.
- k) A copy of the draft instrument for the affected parcel.
- l) The following requirements regarding combining the source parcel with the affected parcel into one site (only where each parcel has different ownership) or combining any other affected parcel with different ownership with the source parcel:
  - i) The ministry requires the proposal to be submitted for approval if remediation of contamination is to be, or has been carried out either under the numerical or risk-based remediation standards.
  - ii) A reference to ministry information on the remediation liability implications of combining parcels into sites (as described in [Fact Sheet 48, "Remediation Liability and Combining Parcels with Different Owners"](#) ).
  - iii) A written request for agreement between the source parcel and affected parcel owners with any proposal to combine parcels with different ownership.
  - iv) A request for a response in writing with comments from each affected parcel owner within 30 days of delivery of the letter which requests written agreement described in iii) above. (Note, the written comments by the source and affected parcel owners may be required to be provided to the ministry in a standard format.)

*<Use only if the source parcel has contaminated several neighbouring parcels and some, but not all of the affected parcel owners have been cooperative>*

- m) A statement indicating that if the source parcel has contaminated several neighbouring parcels and some, but not all of the affected parcel owners have allowed access to their lands for site investigations, that an instrument is

expected to be issued for the source parcel and any affected parcel with owners who have allowed such access.

*<Use only if an Approval in Principle is requested. For each affected parcel to receive an Approval in Principle provide the following.>*

- n) A summary description of the remediation strategy (e.g., excavation and disposal, monitored natural attenuation, risk management, etc.), plan and schedule proposed. Also include:
  - i) the assumptions of any risk assessment (e.g., exposure pathway assumptions for soil, water and vapours) for the affected parcel under present and reasonably anticipated future uses; and
  - ii) risk assessment conclusions.
- o) A statement of the risk classification expected for the affected parcel after remediation (non-high risk, or risk managed high risk)
- p) A request for agreement between the source parcel responsible person and affected parcel owners with the approach proposed for remediating the affected parcel.

*<Use if either an Approval in Principle or Certificate of Compliance will be requested. For each affected parcel to receive an Approval in Principle or Certificate of Compliance provide the following additional information.>*

- q) Any restrictions and parcel access requirements which would apply upon issuance of the instrument for the affected parcel related to ongoing risk management activities necessary to satisfy risk-based remediation requirements (e.g., restrictive covenants, drinking water use restrictions, commitment to operate and maintain works, other conditions).