

ENVIRONMENTAL LIABILITY TRANSFER IN BRITISH COLUMBIA

EVALUATION AND RECOMMENDATIONS FOR OPTIONS TO IMPLEMENT THE 14TH PRINCIPLE

FINAL REPORT

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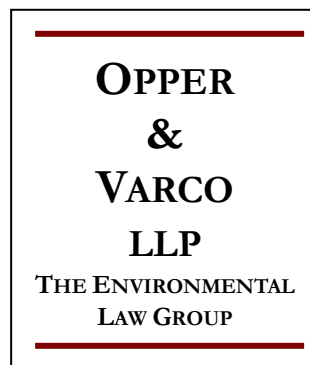


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ACRONYMS

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| AiP | APPROVAL IN PRINCIPLE |
| AP | APPROVED PROFESSIONAL |
| BFPP | BONA FIDE PROSPECTIVE PURCHASER |
| CoC | CERTIFICATE OF COMPLIANCE |
| CCME | CANADIAN COUNCIL OF MINISTERS OF THE ENVIRONMENT |
| EC | ENGINEERING CONTROL |
| EMA | ENVIRONMENTAL MANAGEMENT ACT |
| EMAA | ENVIRONMENTAL MANAGEMENT ACT AMENDMENTS |
| IC | INSTITUTIONAL CONTROL |
| MOE | MINISTRY OF ENVIRONMENT |
| O&M | OPERATION AND MAINTENANCE |
| UECA | UNIFORM ENVIRONMENTAL COVENANTS ACT |
| U.S. | UNITED STATES OF AMERICA |
| US EPA | UNITED STATES ENVIRONMENTAL PROTECTION AGENCY |

INTRODUCTION

This report addresses liability under British Columbia's Environmental Management Act ("EMA")¹. More specifically, this report evaluates and suggests options for transferring EMA's statutory liability (which is also commonly referred to as "regulatory liability") from sellers of contaminated property to buyers.

Environmental regulatory liability comes in all shapes and sizes. On one extreme, a site may contain significant high risk contamination which has not yet been fully characterized. In these cases, the question does not concern whether liability exists but, rather, how much. On the other extreme, a site that has been fully remediated under, for example, a dig and dump approach might only carry a remote chance of future regulatory liability. Many sites lie somewhere in the middle of the liability spectrum. For example, sites cleaned to risk-based standards, requiring monitoring and maintenance of engineering controls (a.k.a. "works"), and limited to only certain types of future uses would typically carry more risk of future liability than dig and dump sites, but less than high risk sites which have not yet been fully characterized.

Two views tend to exist towards regulatory liability. First, it might be viewed as an irrevocable obligation of a responsible person, that he or she must carry forever or, in legal jargon, in perpetuity. Another view tends to see regulatory liability as a commodity that might be transferred, traded, bought, and sold. The Canadian Council of Ministers of the Environment's ("CCME") Recommended Principles on Contaminated Sites Liability (hereafter "CCME Principles") show some inclination towards both views. The CCME's 14th Principle, however, endorses the transfer of regulatory liability between parties. Thus, the 14th Principle tends to embrace the view that regulatory liability may be transferred, traded, bought, and sold.

In light of the CCME's 14th Principle, British Columbia's Ministry of Environment has sought an analysis and evaluation on how the 14th Principle might be implemented in British Columbia, given the current structure of the Environmental Management Act ("EMA") and the Regulations, Protocols, and guidance that implement it.

The following section provides a summary of the report's conclusions and recommendations. Chapter 1 overviews the 14th Principle, highlights the remaining CCME principles as well as the salient points of EMA, in order to summarize the policy views held in the CCME Principles as well as the current structure of EMA. Chapter 2 reviews regulatory liability transfer regimes under federal and state law of the United States ("U.S."), and the private schemes that have evolved to shift liability between parties. In light of EMA's current regime and informed by the experience of other jurisdictions, Chapter 3 suggests and evaluates options that would provide for the transfer of environmental liability from sellers to buyers in British Columbia.

¹ This report only addresses regulatory liability imposed under the Environmental Management Act, and not liability that may be imposed under common law (such as nuisance or trespass) or other statutes that might impose liability for environmental cleanup.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Summary of Conclusions

CCME's 14th Principle envisions a process that would release sellers from environmental liability upon transfer to site buyers, but the 14th Principle appears open to alternative liability transfer options. Part 4 of EMA, which covers contaminated site cleanup, does not authorize liability transfer nor does it otherwise release sellers from liability. While MOE often certifies cleanup completion through its Approval in Principle and Certificate of Compliance, Section 60 of EMA provides broad re-opener provisions that tend to undermine the certainty that MOE certifications would provide.

In order to facilitate redevelopment, United States jurisdictions tend to provide liability protections to buyers, rather than sellers. But even so, property owners continue to withhold contaminated properties from the real estate market or, in other words, "mothball" properties. Thus, evolving approaches and new proposals in the United States tend to address seller liability. Under recent legislation enacted in many of the United States jurisdictions, liability for institutional controls and engineering controls tends to shift to buyers. At least one state provides liability immunities to sellers who complete cleanups, with no re-openers. Other novel approaches include state-subsidized environmental insurance, and liability immunity that triggers at the remedial action plan stage (rather than at cleanup completion). Finally, a federal legislative proposal would transfer future liability to a government-owned liability transfer entity.

Private parties commonly engage in private agreements to transfer liability, but these agreements do not affect the liability of either party to the government. Thus, the benefit that such agreements provide to sellers is limited by the ability of the buyer to actually assume and address liability. Clear regulatory liability rules help private parties fashion private agreements "around the regulatory liability."

The combination of varied liability characterizations set forth in the CCME's 14th Principle, EMA, and those that have evolved within private risk sharing tools tends to divide regulatory liability under EMA into the following categories.

Cleanup Cost Liability. The cost to achieve the cleanup contemplated by an Approval in Principle and required for issuance of a Certificate of Compliance.

Operation & Maintenance Liability. The cost to maintain non-permanent "works," which continue to perform remedial action functions after CoC issuance.

3rd Party Cost Recovery under EMA. The risk of future liability for cost recovery under EMA, that might be brought against responsible persons by new owners or off-site owners.

Institutional Control and Engineering Control Liability. The cost of maintaining ICs and ECs, as well as the risk of additional liability that might arise if such controls fail.

Government Re-Opener Liability. The risk of future liability that might arise from currently unknown conditions, such as undiscovered releases or from new information related to contaminant risk.

Summary of Liability Relief and Transfer Recommendations

The following liability transfer options provide independent means to transfer liability away from sellers. Options 1 through 4 build upon one another. Option 1 focuses on institutional control and engineering control ("IC/EC") liability, while option 4 provides for a wholesale immunity of all future environmental liability, while also leveraging risk transfer measures. Finally, option 5 covers the option most directly contemplated by the 14th Principle, whereby British Columbia would approve site-specific liability transfer agreements.

Option 1: Improve Institutional Control and Engineering Control Enforcement

This option would allow the direct enforcement of IC/EC restrictions through injunction or civil penalties, without the need to re-open cleanup decisions. Because ICs impose future use restrictions and require EC compliance, this option would cover IC/EC liability. Depending on how this option were implemented, it could either immunize responsible party/sellers from liability or, if it did not provide immunize, it would dilute their long term liability by providing a direct means to enforce IC/ECs against subsequent owners. Thus, sellers and buyers (because EMA holds both liable as responsible persons) would remain liable for all other elements of regulatory liability - cleanup costs liability; government re-opener liability; 3rd party cost recovery; operation and maintenance. But this option would provide a direct path to enforce IC/ECs against subsequent parties and, thus, tend to shift that liability to subsequent owners.

Option 2: Seller Released From Liability after Cleanup Completed

This option builds upon Option 1. In addition to making IC/ECs enforceable against subsequent parties, this option would provide responsible party/sellers with liability immunity after such sellers come forward to complete cleanup. This option would require the polluter to pay for cleanup, but once completed, it would allow polluters to go free from liability. Because EMA holds buyers as responsible person, any remaining post-cleanup liability would transfer to the buyer. The government would bear the risk that future liability would arise if the buyer would be unable to assume the liability. Depending on how this option is implemented, responsible persons/sellers might be eligible for immunity at the Approval in Principle or, rather, not until the Certificate of Compliance stage.

Option 3: Seller Released from Liability After Cleanup Completed; Buyer Liability Also Released But Buyer Must Exercise Due Care.

This approach builds upon Options 1 & 2. In addition to making IC/ECs more enforceable and in addition to relieving sellers of liability after cleanup is completed, this option would relieve buyers of any non-IC/EC liability. It would, however, retain contingencies on buyer immunity. Under this option, buyers would be required to exercise due care. MOE would bear the risk of liability for future re-opener and 3rd party cost recovery liability, because this option would potentially relieve all responsible parties from future liability. But because this option would impose a due care requirement on buyers, buyers would possess an obligation to keep the property safe (an ostensibly much easier requirement than remediation) in light of newly discovered contamination. Thus, even though MOE would bear the risk for future cleanup, this option would tend to limit the possibility of uncontrolled dangerous site uses.

Option 4: Sellers and Buyers Released from Liability if Liability Can Be Transferred to Environmental Insurance (or Another Qualified Assurance Mechanism); Buyers Must Exercise Due Care; Land Remediation Fund to Cover Any Additional Liability

This option builds upon Options 1, 2, and 3, but this option would add an element to reduce the liability risk to the government. Option 3 would transfer post-CoC re-opener and 3rd party cost recovery to the government. This option, Option 4, would require the seller to shift re-opener and 3rd party cost recovery liability to an environmental insurer (or another type of qualified assurance mechanism) rather than to the government. The government, therefore, would not assume the full re-opener and 3rd party cost recovery liability until expiration of the term of the environmental insurance policy. During the period when the liability would be covered by insurance, the government's ability to recover future liability would be limited by the limits of the insurance policy.

This option envisions the use of the EMAA's Land Remediation Fund, though not yet in force, to provide monies for future liability that would not be covered by environmental insurance.

Option 5: Government Approval of Private Liability Transfers

This option would establish the implementation example provided by the 14th Principle as well as the draft Transfer Agreement process established under Part 5 of EMA (for mining sites). This option would authorize MOE to offer Transfer Agreements to shift the environmental liability between parties, under conditions acceptable to the MOE and tailored to site-specific circumstances. The draft Transfer Agreement Procedure for mining sites provides a good template, and a similar Part 4 process may benefit from the thinking put into this draft Transfer Agreement Procedure. This flexible approach may compliment any of the approaches laid out in options 1 through 4, and might be reserved for use when site circumstances demand additional clarity on liability transfer, notwithstanding the implementation of options 1 through 4.

CHAPTER 1 THE 14TH PRINCIPLE AND EMA

I. CCME's 14th Principle

In 2006, CCME updated its 1993 effort to establish Recommended Principles on Contaminated Sites “to provide a model framework upon which individual member governments can develop legislation and regulations ... [and] to promote and facilitate a consistent approach to the issue of environmental liability across the country.”² The CCME's 14th Principle addresses the transfer of environmental liability between parties. According to the CCME, “[b]y helping to transfer liability, governments will be addressing one of the three key barriers to brownfield redevelopment.”³

The 14th Principle provides:

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.⁴

In addition, the 14th Principle sets forth a flow chart which suggests a liability transfer framework. The framework contemplates varying scenarios including a scenario where liability shifts after cleanup and a scenario where liability shifts prior to cleanup completion. Under each scenario, the 14th Principle envisions the transfer of liability from sellers to “new owners.”⁵ The framework identifies three categories of future liability:

- 1) *Cleanup Cost Liability* or, in the words of the CCME, “approved initial cleanup (which is still pending).” This liability would transfer under the scenario where the property transfer occurs prior to cleanup completion.

² CANADIAN COUNCIL OF MINISTERS OF THE ENVIRONMENT, RECOMMENDED PRINCIPLES ON CONTAMINATED SITES LIABILITY (2006) (avail. at http://www.ccme.ca/ourwork/soil.html?category_id=68#345) (hereafter CCME PRINCIPLES).

³ *Id.* at 2. According to CCME, “[t]he other two key barriers are financial and lack of awareness.”

⁴ *Id.* at 11.

⁵ *Id.* at 12.

2) *Re-opener Liability* or, in the words of the CCME, “any possible future costs resulting from necessary further cleanup (e.g. induces by change of criteria or by civil law suit);” and

3) *Residual Contamination Liability*, which the CCME describes as liability arising “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)”

The 14th Principle does not directly address operation and maintenance liability or "institutional control" and "engineering control" liability. Rather, it seems to capture both under the heading "residual contamination liability." Nor does the 14th Principle address regulatory liability causes of action brought by 3rd parties (especially off-site owners) for cost recovery under EMA. These liability concepts are discussed in more detail in Chapters 2 and 3. And, as discussed in Chapter 3, this report suggests a slight variation to the 14th Principles regulatory liability characterization.

The 14th Principle also suggests, but does not demand, an implementation option. The implementation option contemplates government approvals, on a site specific basis, of liability transfer agreements negotiated between private parties. “[L]egislatures could establish a site specific approval mechanism for an agreement or a regulated set of conditions under which liability transfer would operate.”⁶ The implementation option further provides conditions which governments might set forth as pre-requisites to proper or approvable liability transfer agreement. The CCME suggests the following conditions, which governments “might include” when implementing the 14th Principle:

- 1) A requirement that remediation has been completed.
- 2) A requirement that the party receiving liability provides financial assurances, and an effective “fallback” mechanism.
- 3) A requirement that the transferor fully discloses all known site history, and real and potential impacts onsite and offsite.
- 4) An understanding that the agreement does not extinguish liability for off-site contamination discovered after remediation.
- 5) An understanding that the government retains a right to “re-open” liability even after it approves remediation, but the liability transfer agreement could allocate such re-opener liability in a way that makes the transferor liable for fraudulent or negligent remediation and makes the transferee liable when they did not abide by future use restrictions or otherwise changed the property use to a more sensitive one.

⁶ *Id.* at 13.

- 6) In the case where risk based remediation allows residual contamination to remain in place, details about the residual contamination; future use prohibitions, roles of the parties to assure the viability of future use prohibitions, the reliance on long-term assurance funds, and the reliance on private financial assurance or insurance.⁷

On one hand, this implementation option provides a good framework for legislation that would approve private liability agreements. But, as the 14th Principle recognizes, it is only one option. As discussed in Chapter 3, this report also suggests other options which, in addition to the option set forth in the 14th Principle, envision an entirely different mechanism for shifting liability. These additional options take instruction, however, from the six pre-requisite factors listed above. In addition, the recommended options remain mindful of the remaining 13 CCME Principles.

Indeed, the 14th Principle does not operate in a vacuum. Many of the other 13 Principles, though not directly, also relate to liability transfer. The 1st Principle sets forth the principle of “polluter pays” and the 6th Principle recommends a broad net to be cast for responsible persons. The 2nd Principle, however, recognizes that the principle of fairness should cover EMA’s liability scheme, and that such fairness could be achieved through liability allocation among responsible parties. The 8th and 9th Principles recommend factors for allocating liability, including the liability of responsible prior owners and responsible current owners. Generally, these Principles tend to shift liability to previous owners who caused contamination and away from current owners if the current owners did not contribute to a further release, and followed the accepted industry standards and practices of the day when dealing with the released substance. The 2nd Principle provides that public funds should have the best likelihood of being recovered so as to not unfairly burden the taxpayer, and thus tends to dissuade government funding of cleanups. Finally, the 11th Principle states that governments should issue Certificates of Compliance to certify that remediation has been properly completed, but that such certificates should expressly state that the person receiving the certificate will be liable for re-opener or, in the words of the Principle, “prospective liability, should further contamination subsequently be discovered.”

II. British Columbia’s Environmental Management Act

While EMA contains many parts, Part 4 covers the remediation of contaminated sites which EMA defines as any contaminated area of land, including soil, water, groundwater and sediment.⁸ EMA authorizes the MOE to issue cleanup orders, and it also authorizes parties to undertake independent cleanup. Thus, in some respects, Part 4 of EMA combines the role of CERCLA⁹ and state voluntary cleanup programs (as

⁷ See CCME PRINCIPLES at 13-15.

⁸ EMA § 39(1).

⁹ Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601 et seq.

employed in the U.S.) into one legislative regime. A wide variety of reports, protocols, and procedures summarize Part 4 of EMA.¹⁰ The following summary provides a streamlined overview of EMA, seeking to highlight the points of EMA related to liability and liability transfer.

A. EMA's Current Liability Regime

The manner in which EMA assigns cleanup liability, of course, directly affects the transfer of such liability between parties. The following sections highlight EMA's liability scheme, related issues and, in some cases, identifies distinctions between EMA's liability provisions and those employed in U.S. jurisdictions.

1. Regulatory Liability under EMA

EMA casts a wide liability net. Under EMA, "responsible persons" are "absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site."¹¹ "Responsible persons" include both past owners and operators and current owners and operators.¹² EMA, however, provides numerous exceptions to this broad rule, by defining many categories of "persons not responsible."¹³ While many of these exceptions may prove relevant to a liability transfer between parties, the following liability exceptions would tend to prove most prominent.

Property Purchasers. Unlike the bona fide prospective purchaser liability protection provided under the federal law of CERCLA in the U.S., EMA does not provide liability protections to persons who *knowingly* buy contaminated property. EMA does, however, relieve innocent purchasers from liability if they conducted appropriate inquiries yet had no reason to know of contamination.¹⁴ EMA also relieves property owners of liability when a third party caused the contamination.¹⁵ But this liability protection only exists where a "contractual relationship" did not exist between the person seeking liability protection and the responsible person. Because the sale of property includes a contractual relationship, EMA's third party liability protection does not seem to protect buyers from becoming responsible persons when they purchase contaminated property. Thus, with the exception of innocent purchasers, buyers of contaminated property qualify as "responsible owners" under EMA.

Future Land Use Changes. EMA excludes from liability "a responsible person for a contaminated site for which a certificate of compliance was issued and for which another

¹⁰ See British Columbia Ministry of Environment, Land Remediation (providing protocols, policies, procedures, guidance, discussion papers, and reports) (avail. at <http://www.env.gov.bc.ca/epd/remediation/>).

¹¹ EMA § 47(1).

¹² EMA § 45(1)(a)-(b).

¹³ See EMA § 46(1) (enumerating the exceptions).

¹⁴ EMA § 46(1)(d).

¹⁵ EMA § 46(1)(c).

person subsequently proposes or undertakes to: (i) change the use of the contaminated site, and (ii) provide additional remediation.¹⁶ This language appears to relieve sellers from liability for the costs of cleanup that would arise because future owners change the use beyond the use contemplated by the Certificate of Compliance ("CoC"). Thus, when a buyer seeks to use property in a way that CoC conditions would not allow, the seller appears to be relieved of any liability for the additional cleanup costs that would be required to support the new use. Stated another way, buyers take property subject to the conditions imposed by MOE (see Section 5, *infra*, discussing institutional controls).

Off-Site Property Owners. EMA squarely excludes "a person who owns or operates a contaminated site that was contaminated only by the migration of a substance from other real property not owned or operated by the person."¹⁷ In contrast to U.S. law (as discussed more below), EMA's off-site property exclusion does not contain conditions or contingencies.

Liability Relief to Minor Contributors. In addition to providing exceptions to "responsible person," EMA also caps the liability of responsible parties who qualify as minor contributors at the amount necessary to remediate the minor contribution.¹⁸

Liability Relief to Persons Acting Under Voluntary Remediation. When responsible persons perform voluntary remediations according to the terms of remediation agreements, the responsible person is discharged from liability.¹⁹ This provision of EMA is very rarely sought by parties, and has only been invoked in a few cases. The reason for this may lie in Section 60 of EMA, which grants broad authority to the MOE to re-open its prior decisions. Section 60, some would argue, undermines the potential liability clarity that might be provided by voluntary remediation agreements.

2. Approvals in Principle & Certificates of Compliance Provide Only Limited Future Liability Relief

EMA authorizes responsible persons to request and, and MOE to grant, Approvals in Principle ("AiPs").²⁰ AiP requests must include site investigation reports and remediation plans.²¹ "Remediation plan" includes remediation methods to meet cleanup standards and a date for completion, *but not cost estimates*.²² Indeed, MOE rarely receives cost estimates with an AiP application and, when they do, the estimates only provide "ball park" estimates.²³ AiPs provide government approval of site cleanup plans. In doing so, AiPs provide comfort to the responsible parties, lenders, local government development permit issuers, and other land transaction parties, that the site

¹⁶ EMA § 46(1)(m).

¹⁷ EMA § 46(1)(j).

¹⁸ EMA § 50.

¹⁹ EMA § 51(2).

²⁰ EMA § 53(1); CSR § 47(1).

²¹ CSR § 47(1)(a)-(c).

²² CSR § 1.

²³ Telephone Conversation between Michael Sowinski, Opper & Varco and John Ward, Ministry of Environment (Feb. 25, 2008).

is proceeding in a government-approved manner. Certificates of Compliance (“CoCs”) can be issued to any person, not only responsible persons.²⁴ CoCs provide an MOE statement that the site has been remediated to cleanup standards.²⁵

The AiP and CoC provisions of EMA remain silent on whether their issuance releases parties from future liability.²⁶ Rather, section 60 of EMA allows the Director to exercise any of his or her powers or functions even though they have previously been exercised for enumerated "re-openers," including:

- 1) new information;
- 2) changed conditions or uses;
- 3) responsible party's failure to exercise due care; and
- 4) future direct or indirect contamination.

In addition to these re-openers, EMA authorizes MOE to rescind an AiP or CoC if their conditions are violated or any fees have not been paid. EMA § 53(5). While AiPs and CoCs help to demonstrate MOE's approval of assessment and cleanup, neither AiPs nor CoCs limit future liability to any party. Even after MOE has issued either AiPs or CoCs, future liability remains. And because EMA captures both prior and current owners, future liability exists for both sellers and buyers.

3. Liability Transfer Under EMA

While Part 4 of EMA lays out a comprehensive liability regime, nothing in Part 4 addresses the transfer of liability between parties or the government approval of such transfers. Unlike Part 5 (covering mines, discussed below) which directly authorizes Transfer Agreements, Part 4 does not.

At least one judicial opinion, *Antrosia Investments Ltd. v. 172965 Canada Ltd.* (Ontario Superior Court of Justice) addresses contractual transfers of liability.²⁷ In *Antrosia*, the buyer entered a contract in which it assumed all liability for the condition of property it purchased and gave a comprehensive indemnity to the seller.²⁸ The buyer, however, later sought to recover cleanup costs under common law tort theories from the seller.²⁹ There, the court upheld the contractual liability agreement between the seller and buyer in that case, relying on the "as is" clause of the contract "buyer beware" doctrine to help reach its conclusion.³⁰

But the court identified conditions that should be met before contractual liability transfers are held to valid, and they include:

²⁴ CSR § 49(1).

²⁵ EMA § 53(3)(a).

²⁶ See EMA § 47 & 53.

²⁷ Tony Crossman and Amy Chapman, *Contaminated Sites Legal Update: Legislation and Case Law* 8-10 (May 16, 2007).

²⁸ *Id.* at 10 (citing *Antrosia Investments Ltd. v. 172965 Canada Ltd.* at para. 80).

²⁹ *Id.* at 8.

³⁰ *Id.* at 9 (citing *Antrosia Investments Ltd. v. 172965 Canada Ltd.* at para. 75).

- 1) buyer should be commercially sophisticated;
- 2) the contract should be clear that the buyer is assuming all liability;
- 3) the seller must not make any untrue representations; and
- 4) ideally, the buyer should have the opportunity to conduct due diligence.³¹

As one commenter explained:

This case is interesting because it addresses the scenario in which parties essentially contract out of liability for contaminated site cleanup. This case is an Ontario case, so the result may be different in British Columbia if a plaintiff brought a claim pursuant to the EMA. However, the case emphasizes the importance of comprehensive environmental due diligence and careful contract drafting.³²

Thus, it appears that Canadian courts might approve a liability transfer where the terms were clear, but the party's sophistication could prove relevant. EMA, however, does not address such transfers and how the issue might be resolved in the British Columbia courts is difficult to predict.

4. Liability of Source Properties and Off-Site Properties; Off-Site Migration

When contamination has moved off-site, liability transfer mechanism becomes potentially more complicated. As discussed above, EMA holds responsible persons liable for off-site contamination. But EMA flatly excludes owners of off-site property from contamination that has migrated to their property. EMA excludes such off-site property owners from the meaning of "responsible person."³³ Unlike U.S. federal law or the law in many U.S. states (as discussed below), EMA's exclusion to off-site owners does not impose contingencies, such as the off-site owner's duty to exercise due care with respect to the contamination, provide notifications of the release, or comply with institutional controls.

When source property owners perform remediation, MOE "expects" that they deal with off-site issues, and MOE encourages discussions with off-site owners "so that a mutually satisfactory remediation plan can be implemented."³⁴ Even though this expectation exists, off-site owner's unconditional immunity raises the potential that these off-site owners might impede source site efforts by seeking to require an alternative remedy or by refusing to cooperate. And even though MOE expects full cleanups, MOE issues AiPs and CoCs for partial source property cleanups.³⁵ Two Environmental Appeals Board decision, commonly known as *Super Save* and *Squamish Terminal*,

³¹ *Id.* at 10.

³² *Id.* at 10.

³³ EMA § 46(1)(j).

³⁴ BRAUL ENVIRONMENTAL LAW AND FRANZ ENVIRONMENTAL INC., OFF-SITE MIGRATION OF CONTAMINATION IN BRITISH COLUMBIA: REVIEW AND RECOMMENDATIONS 18 (Jun. 16, 2006).

³⁵ *Id.* at 25.

suggest that *in the interest of the expeditious remediation of source properties* off-site owners have no standing to influence source zone remediation unless their interests would be prejudicially affected.³⁶ These cases tend to put the interest in property development above the interest of off-site owners and, thus, tend to foster an environment allowing source zone properties to be remediated without fully addressing off-site contamination.

If CoCs are issued for source property cleanups while off-site contamination remains, the future liability related to off-site contamination will also remain and must be calculated into any risk transfer regime. This point is further discussed in Chapter 3.

5. Residual Contamination: Institutional Controls, Engineering Controls, and Operation & Maintenance

CCME's 14th Principle identifies residual contamination among environmental liabilities. Like the 14th Principle, EMA contemplates that residual contamination may remain after cleanup. Under section 53(1) of EMA, the MOE may approve AiPs "in accordance with any conditions specified by the director."³⁷ Further, MOE may issue CoCs where cleanups attain risk based standards and "a plan has been prepared for the purpose of monitoring any substances remaining on the site and "works" have been installed to implement the plan" and, if desired by MOE, a restrictive covenant limits future land use.³⁸ The regulations provide further authority.³⁹ Thus, EMA authorizes the MOE to issue CoCs where waste remains in place.

In practice, "Schedule B" of MOE's typical CoC imposes post-cleanup conditions for residual contamination. First, Schedule B provides that changes to risk assessment assumptions could invalidate the CoC and provide grounds for rescission. This requirement restricts the future use of the site to that provided for in risk assessment documents and, thus, operates as an "institutional control." Second, Schedule B provides that inspection and maintenance of "works" shall be undertaken as specified in the risk management plan. This requirement to inspect and maintain "works" appears to cover efforts to monitor "engineering controls" as well as "operation and maintenance" efforts.

As the following paragraphs explain, institutional control ("IC"), engineering control ("EC") and operation and maintenance ("O&M") could be more discretely delineated in CoCs. This, in turn, would more precisely characterize future environmental liability and, therefore, facilitate environmental transfer mechanisms.

Institutional Controls. While neither EMA or the Contaminated Sited Regulation ("CSR") use the phrase "institutional controls," the conditions MOE sets within CoCs to limit future use s qualify as institutional controls as that term has come to be known

³⁶ *Id.* at 29.

³⁷ EMA § 53(1).

³⁸ EMA § 53(3)(c).

³⁹ *See* CSR § 47(3) (broadly authorizing conditions for AiPs) and CSR § 49(2)(c) (requiring compliance with conditions set within AiPs).

throughout most of North America. According to the U.S. EPA ("Environmental Protection Agency"), "[i]nstitutional controls are non-engineered instruments, such as administrative and/or legal controls intended to minimize the potential for human exposure to contamination by limiting land or resource use."⁴⁰ The requirements to monitor and maintain "works" may also qualify as institutional controls, when "works" include "engineering controls." A report prepared by DPRA,⁴¹ at the request of MOE, concluded that conditions within CoC (institutional controls) do not appear to bind new owners. The report, therefore, recommended measures that would allow CoC conditions to run with the land and, in turn, to be directly enforceable against new owners. Chapter 3 provides additional discussion on this point.

Works. While EMA and MOE's Schedule B conditions use the term "works," neither defines it. The use of the term "works" appears to capture any type of physical cleanup apparatus, regardless of whether it might be meant to operate permanently or temporarily. As discussed immediately, permanent measures tend to qualify as "engineering controls" and temporary measures tend to fall under the meaning of "operation and maintenance," as those terms are used in the U.S.

Engineering Controls. According to U.S. EPA, engineering controls mean "engineered or physical barriers or structures designed to limit exposure to the contamination."⁴² Common examples include landfill caps and liners, and vapor barriers. These types of "works" often require monitoring and maintenance, and it is common for institutional control provisions to require such monitoring and maintenance. But the monitoring and maintenance fulfills a different purpose than "operation and maintenance." Monitoring and maintenance of engineering controls seeks to ensure that physical barriers to contamination remain competent. "Operation and maintenance" seeks to keep remedial actions operating over time, for the purpose of continuing remediation.

Operation and Maintenance. O&M, according to CERCLA's regulations, includes measures initiated after the remedy has achieved an operation and functional status.⁴³ Generally, O&M activities exist where treatment remedies must be operated for a long time, prior to reaching cleanup goals (e.g., bio-remediation or soil vapor extraction remedies).⁴⁴ Typical O&M activities, according to EPA, include site inspection of wells, piping, treatment facilities; sampling, monitoring

⁴⁰ US EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, EPA 500-R-05-001, LONG-TERM STEWARDSHIP: ENSURING ENVIRONMENTAL SITE CLEANUPS REMAIN PROTECTIVE OVER TIME, CHALLENGES AND OPPORTUNITIES FACING EPA'S CLEANUP PROGRAMS 6 (Sept. 2005) (hereafter LTS REPORT)

⁴¹ See DPRA, Institutional Controls in British Columbia: A Review of Current Practices and an Evaluation of Program Amendment Options (Mar. 31, 2006) (avail. at <http://www.env.gov.bc.ca/epd/remediation/reports/index.htm>).

⁴² *Id.*

⁴³ See 40 Code. Fed. Reg. § 300.435.

⁴⁴ EPA O&M GUIDANCE at 2-3.

and analysis of groundwater, leachate, or surface water; routine operation and maintenance of remedy components.⁴⁵

Generally, institutional control and engineering control liability packages together because when ECs exist, institutional control conditions will typically require the maintenance of such engineering controls. For example, CoC conditions might require the future maintenance of contamination cap. Operation and maintenance liability, however, typically operates separately. Liability transfer regimes should recognize the distinction between IC/EC liability and O&M liability.

B. Various Elements of EMA's Cleanup Regime Indirectly Affect or Influence Potential Liability Transfer Options

1. Voluntary, Independent, and Ordered Cleanups

While EMA provides MOE with the authority to order cleanups, MOE rarely exercises this authority. The overwhelming majority of cleanups in British Columbia occur as independent cleanups, which EMA directly authorizes. For independent cleanups, the party must simply notify the MOE at the beginning and end of the cleanup.⁴⁶ The MOE may, upon request, issue an AiP or a CoC for the independent remediation.⁴⁷ As of March, 2006, 3723 independent cleanups were completed or underway.⁴⁸ In addition to ordered and independent cleanups, as discussed above, EMA authorizes voluntary cleanups but such cleanups rarely occur.

The tendency of cleanups to occur as CoC-approved independent cleanups would tend to make CoCs play a central role in liability assurances and liability transfer.

2. High Medium and Low Risk Sites: Approved Professionals

MOE must provide direct oversight of high risk cleanups. MOE has not yet, however, completed a guidance defining high risk but it is actively engaged in finishing such guidance. When completed, the guidance will provide a framework for distinguishing high risk sites from other sites. While estimates are difficult, MOE supposes that approximately 10 % of contaminated sites in British Columbia would qualify as high risk sites.⁴⁹

⁴⁵ EPA O&M GUIDANCE at 3.

⁴⁶ BRAUL ENVIRONMENTAL LAW AND FRANZ ENVIRONMENTAL INC., OFF-SITE MIGRATION OF CONTAMINATION IN BRITISH COLUMBIA: REVIEW AND RECOMMENDATIONS 12 (June 16, 2006) (avail. at <http://www.env.gov.bc.ca/epd/remediation/reports/index.htm>).

⁴⁷ *Id.* at 12-13.

⁴⁸ *Id.* at 13.

⁴⁹ Telephone Conversation between Michael Sowinski, Opper & Varco, and John Ward, Ministry of Environment (Feb. 25, 2008).

For non-high risk sites, EMA authorizes Approved Professionals ("APs") to submit recommendations for MOE approval of an AiP or CoC.⁵⁰ Thus, the BC cleanup regime relies heavily on APs. And, indeed, a Contaminated Sites Approved Professional Society exists to govern the affairs of APs. As a practical matter, MOE managers place a high degree of reliance on AP recommendations and will normally issue a requested document without further review by MOE staff.⁵¹

The division between high risk and non-high risk sites may impact policies to transfer environmental liability.

3. Numerical and Risk-Based Standards

Pursuant to the CSR, cleanups may attain either numerical standards or risk-based standards. The 14th Principle contemplates liability transfer in both cases.

Numerical standards set forth cleanup criteria for soil, sediment, surface water and groundwater under five future land use scenarios – agricultural, commercial, industrial, urban park, and residential.⁵² Alternatively, numerical standards allow cleanup to local background level.⁵³ Finally, for cleanup below 3 metres, numerical standards only require cleanup to commercial use levels (subject to MOE's discretion that more action is necessary) regardless of the actual future land use.⁵⁴ When a cleanup meets numerical standards, no additional cleanup or site management is necessary for the future land use scenario attained.

Risk-based cleanups attain cleanup levels that, in light of site specific conditions, meet risk levels or hazard indexes pre-established as safe levels.⁵⁵ Like numerical standards, risk-based cleanups also allow cleanup to local background levels, even if such levels would pose a risk above pre-established safe levels.⁵⁶ A person seeking risk-based standards must prepare a risk assessment report which identifies: 1) risks of substances "causing contamination before and after remediation"; and 2) procedures, including monitoring, designed to mitigate risks.⁵⁷

Generally, risk based cleanups will more closely target the immediate future use and, thus, rely on more specific future use scenarios and contaminant exposure pathways, as compared to numerical standards. Thus, risk-based cleanups will tend to require more onerous future management of contaminant risk and they will also tend to allow

⁵⁰ See BRITISH COLUMBIA MINISTRY OF ENVIRONMENT, PROTOCOL 6 FOR CONTAMINATED SITES (Sept. 1 2007).

⁵¹ Waldemar Braul and Owen James, *BC's New Contaminated Sites Approved Professional System: Liability*, in CONTAMINATED SITES LEGAL UPDATE 2007 (Pacific Business & Law Institute ed., 2007)

⁵² CSR § 17(1)(a).

⁵³ CSR § 17(2).

⁵⁴ CSR § 17(3)-(4).

⁵⁵ CSR § 18(1).

⁵⁶ CSR § 18(5).

⁵⁷ CSR § 18(6).

contamination to remain in place to a greater extent than numerical cleanups. While not a blanket rule, future liability would tend to be more likely at risk-based cleanups.

4. Financial Security at High Risk Sites

BC's Protocol 8 addresses financial security in detail.⁵⁸ Under the Protocol, MOE may only require financial security at high risk sites. As a practical matter, MOE has not yet completed a guidance defining high risk, but it is actively engaged in finishing such guidance. To date, MOE has only required financial security at very few sites.⁵⁹ Protocol 8 summarizes EMA's broad authority for requiring financial security at high risk sites. EMA provides, among other authority, that financial security may be required as a condition to CoC, AiPs, or at any time during independent remediation.⁶⁰

Under Protocol 8, financial security may be required at high risk sites for the following purposes: 1) to ensure that responsible persons properly complete remediation (cleanup cost liability); 2) to provide funds for future costs of contamination treatment, management, or monitoring (operation and maintenance liability); 3) to address risks that may remain at partially remediated sites where an environmental covenant does not effectively address those risks (IC/EC liability).⁶¹ Thus, Protocol 8 addresses these three categories of future liability but Protocol 8 does not appear to address re-opener liability or 3rd party cost recovery liability.

Protocol 8 identifies acceptable financial assurance mechanisms, including "any other type of security acceptable" to MOE as well as enumerated types of financial security including letters of credit, security deposits, bonds, treasury bill notes, bank drafts, money orders and certified cheques.⁶² Because it allows "any other type of security acceptable," Protocol 8 appears to authorize environmental insurance as a financial assurance mechanism. Thus, for high risk sites, Protocol 8 provides a framework under which responsible persons/sellers or buyers could assure cleanup, operation and maintenance, and IC/EC liability. This point is discussed further in Chapter 3.

C. EMA's Mining Transfer Agreements Draft Procedure

Section 5 of EMA, titled Remediation of Mineral Exploration Sites and Mines, expressly provides for government-issued transfer agreements, transferring liability away from prior owners. "[A] previous owner or operator of a producing or past producing mine site is not responsible for remediation of the site if ... the owner or operator obtains

⁵⁸ BRITISH COLUMBIA MINISTRY OF ENVIRONMENT, PROTOCOL 8 FOR CONTAMINATED SITES: SECURITY FOR CONTAMINATED SITES (Nov. 19, 2007) (avail. at http://www.env.gov.bc.ca/epd/remediation/policy_procedure_protocol/protocols/pdf/protocol_8.pdf) (hereafter PROTOCOL 8).

⁵⁹ Telephone conversation between Michael Sowinski, Opper & Varco and John Ward, Ministry of Environment (Feb. 25, 2008).

⁶⁰ PROTOCOL 8 at 14-15.

⁶¹ *Id.*

⁶² *Id.* at 2.

a transfer agreement that excludes the owner or operator from liability....”⁶³ Pursuant to this authority, the Ministry of Environment and the Ministry of Energy, Mines and Petroleum Resources prepared a draft Procedure which establishes “an administrative process to guide provincial agencies on applications for waivers of remediation liability by Transfer Agreements...”⁶⁴

This Transfer Agreement Procedure follows the implementation option contemplated by the 14th Principle, and establishes guideposts to help navigate the process of securing government-approved Transfer Agreements, on a site specific basis. Among other eligibility requirements, the Procedure limits the eligibility of sites to those that in the opinion of the Energy, Mines, and Petroleum Resources Ministry: 1) do not pose unacceptable risks; and 2) where environmental insurance is not sufficient to manage the risks.⁶⁵ In addition, persons seeking a Transfer Agreement must also describe the site’s future use and provide a detailed estimate of environmental liability.⁶⁶ Applications must also demonstrate the transferee’s financial strength and abilities to manage environmental liabilities, and may require financial assurances (security).⁶⁷ The Ministry of Environment and the Ministry of Energy, Mines, and Petroleum Resources must each agree to the transfer, and they must circulate the agreement to the parties affected for their review and comment. Nothing in the Procedure addresses timelines between Transfer Agreement application and issuance.

The Transfer Agreement Procedure envisions that the government will release responsible persons/sellers⁶⁸ from regulatory liability when the government feels comfortable that a new party will address the liability. The government limits its risk, to some extent, by providing for limited re-openers in the Procedure. Transfer Agreement may be rescinded if the transferor regains control of the mine, if the Transfer Agreement relied on false, misleading, or incomplete information (arguably, the incomplete information re-opener could work broadly to capture any site where new information becomes uncovered), and if the end land use changes from that approved.⁶⁹ The Procedure expressly states, however, that if transferees cannot or will not meet a condition within Transfer Agreements, and future action is required, the Ministry of Energy, Mines and Petroleum Resources assumes responsibility for unfunded response actions.⁷⁰

With close cooperation with the government and under conditions acceptable to the government, the draft Transfer Agreement allows liability to shift from responsible

⁶³ EMA § 68(1).

⁶⁴ MINISTRY OF ENVIRONMENT & BRITISH COLUMBIA MINISTRY OF ENERGY, MINES, AND PETROLEUM, TRANSFER AGREEMENT PROCEDURES FOR MINING PROPERTIES DRAFT (Jan. 22, 2007) (hereafter TRANSFER AGREEMENT PROCEDURE).

⁶⁵ *Id.* at 4.

⁶⁶ *Id.* at 5-6.

⁶⁷ *Id.* at 6, 9.

⁶⁸ The Transfer Agreement Procedure would not affect the liability of other, non-seller, responsible persons. It only extinguishes the liability under EMA Part 4 for the seller.

⁶⁹ *Id.* at 10.

⁷⁰ *Id.* at 10.

persons to a new party. The Transfer Agreement Procedure sets guideposts but not bright line rules to describe when a Transfer Agreement may be issued. As this Procedure remains in draft form, no Transfer Agreements have yet been issued.

D. 2004 Amendments to the Environmental Management Act, Though Not Yet Brought Into Force, Provide for the Establishment of a Land Remediation Fund

The Environmental Management Act Amendments of 2004 (“EMAA”), among other things, provides broad authority for the establishment of a Land Remediation Fund.⁷¹ The EMMA, however, have yet to be brought into force.

Under the EMMA, the object of the Land Remediation Fund is to provide funding for the purposes of government programs in relation to the following:

- (a) brownfield development
- (b) orphan site remediation
- (c) domestic and commercial underground tank remediation.⁷²

Thus, the fund appears to possess broad authority. Further, the Minister of Environment may make regulations respecting the Land Remediation Fund “without limitation,” and may include regulations (1) establishing policies and procedures for the administration of the fund; and (2) regulations establishing a council to administer the fund.⁷³ The fund may pay money in accordance with the MOE's regulations, and the approved policies and procedures of the council.⁷⁴

As discussed in more detail in Chapter 3, the fund might play a role in liability transfer regimes.

⁷¹ Environmental Management Act Amendments § 6.1 (avail. at http://www.leg.bc/37th5th/3rd_read/gov13-3.htm) (hereafter EMMA).

⁷² EMMA § 61.1(4).

⁷³ EMMA § 63(1)(s).

⁷⁴ EMMA § 61.5(5).

CHAPTER 2 LIABILITY TRANSFER IN THE UNITED STATES

U.S. federal or state environmental statutes do not expressly authorize the transfer of environmental liability from one party to another. To the contrary, responsible persons remain liable to the government regardless of whether they have entered into private agreements to transfer liability. Rather than sellers, U.S. jurisdictions generally tend to provide buyers with protection from environmental liability, when they did not cause contamination. Generally, institutional control and engineering control liability however, shifts to buyers. And at least one state has developed a means to immunize responsible party/sellers from future liability.

The experience of U.S. federal and state cleanups provides instructive examples of liability transfer issues, as the U.S. continues to grapple with environmental issues related to contaminated property liability relief. The following sections discuss federal cleanup law and, then, state cleanup laws.

I. Federal Law

CERCLA covers any site where a hazardous substance was released into the environment, and it holds site owners and operators, both former and current, as well as transporters and arrangers liable for cleanup costs.⁷⁵ CERCLA grants the EPA with broad enforcement powers to issue cleanup orders or to undertake cleanup and then seek cost recovery from responsible parties.⁷⁶ EPA limits its enforcement under CERCLA to the worst sites, which EPA has deemed to qualify for the “National Priority List” of sites. Approximately 1,635 National Priority List sites exist.⁷⁷ This is only a small fraction of the estimated 1 million brownfield sites in the United States.⁷⁸

CERCLA's broad liability scheme does not only apply to government actions. Any person who incurs costs due to the release of hazardous substances into the environment may seek to recover those costs from responsible parties.⁷⁹ The risk of CERCLA liability, to either government or private parties, has been widely recognized as a deterrent to property sellers who fear “exposing” their site to liability. CERCLA's broad liability scheme also has deterred buyers, but amendment to CERCLA have sought to address these concerns.

The following sections describe various risk-sharing measures and related issues that exist or have arisen under CERCLA.

⁷⁵ See 42 U.S.C.A. § 9607(a).

⁷⁶ See 42 U.S.C.A. §§ 9604, 9606, & 9607; see also Superfund Enforcement Authorities (avail. at <http://www.epa.gov/compliance/cleanup/superfund/super-authority.html>).

⁷⁷ See Superfund Information Systems (avail. at <http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm>).

⁷⁸ NATIONAL ASSOCIATION OF LOCAL GOVERNMENT ENVIRONMENTAL PROFESSIONALS, SUPERFUND LIABILITY: A CONTINUING OBSTACLE TO BROWNFIELDS REDEVELOPMENT 1 (Nov. 9, 2006) (avail. at <http://www.nalgep.org/publications/PublicationsDetail.cfm?LinkAdvID=72956>).

⁷⁹ 42 U.S.C.A. 9607(a)(4)(B).

A. Private Parties Commonly Enter Liability Shifting Agreements, But CERCLA Liability to the Government Cannot Be Contracted Away

When buying and selling contaminated properties, as discussed further below in Section III, sellers and buyers often enter into agreements to transfer some or all cleanup liability. The majority of courts allow parties to transfer CERCLA liability under such agreements, but these agreements in no way restrict the federal government's right to seek recover under CERCLA for cleanup costs.⁸⁰ As one court summarized, "parties may not contract out of liability vis-à-vis the government, but may contract out of liability vis-à-vis other private parties."⁸¹

Thus, under CERCLA, sellers cannot simply contract away their CERCLA liability. The government remains free to enforce CERCLA against any responsible person, regardless of the liability-shifting contracts entered into by responsible persons.

B. Rather than Seller Relief, CERCLA Provides Conditional Liability Relief to Non-Responsible Buyers and Contiguous Property Owners, Even When Such Parties Knowingly Purchase Contaminated Property

Rather than sellers, CERCLA liability relief tends to focus on reducing the risk of liability for buyers and neighboring property owners who did not cause the contamination. In 2002, the U.S. Congress amended CERCLA to, among other things, establish the Bona Fide Prospective Purchaser (BFPP)⁸² and the Contiguous Property Owner ("CPO")⁸³ liability protections. BFPPs may knowingly purchase contaminated property, yet still not qualify as a responsible party as long as they conduct "all appropriately inquiry" as to environmental releases prior to purchase and, after purchase, properly manage the contamination by taking "reasonable steps" with respect to the contamination, complying with institutional controls, providing full cooperation, assistance and access to persons authorized to undertake response action, and other so-called continuing obligations.⁸⁴

Similarly, adjacent property owners who, as the legislative history explains, "are essentially victims of pollution incidents caused by their neighbor's actions" receive similar protection.⁸⁵ But like buyers (and unlike the way British Columbia's EMA treats

⁸⁰ ELIZABETH GLASS GELTMAN, *SHIFTING ENVIRONMENTAL RISK: A GUIDE TO DRAFTING CONTRACTS AND STRUCTURING TRANSACTIONS* 254 (1999).

⁸¹ *Id.* (citing *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F.Supp. 1022, 1026-1027 (N.D. Cal. 1990)).

⁸² See 42 U.S.C.A. § 9607(q).

⁸³ See 42 U.S.C.A. § 9607(r).

⁸⁴ See 42 U.S.C.A. § 101(40); see also UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, INTERIM GUIDANCE REGARDING CRITERIA LANDOWNERS MUST MEET IN ORDER TO QUALIFY FOR BONA FIDE PROSPECTIVE PURCHASER, CONTIGUOUS PROPERTY OWNER, OR INNOCENT LANDOWNER LIMITATIONS ON CERCLA LIABILITY ("COMMON ELEMENTS") (Mar. 2003) (hereafter COMMON ELEMENTS GUIDANCE) (providing detailed discussion of BFPP and CPO liability protections).

⁸⁵ UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, INTERIM GUIDANCE REGARDING CRITERIA LANDOWNERS MUST MEET IN ORDER TO QUALIFY FOR BONA FIDE PROSPECTIVE PURCHASER, CONTIGUOUS PROPERTY OWNER, OR INNOCENT LANDOWNER LIMITATIONS ON CERCLA LIABILITY ("COMMON ELEMENTS") 3 (Mar. 2003) (citing S. Rep. No. 107-2, at 10 (2001)).

adjacent property owners), in order to retain their non-responsible party status, off-site owners must perform the same continuing obligations as BFPPs.⁸⁶ Thus, both buyers of contaminated land and off-site owners remain non-responsible parties as long as, generally speaking, they manage their property responsibly and cooperate with persons attempting to perform cleanup.

The liability relief afforded to buyers and off-site owners continues to be an attractive approach, and no strong calls for a different liability scheme appear to exist. In recent remarks to the United States House of Representatives, one of the largest brownfield stakeholder groups, the National Brownfields Coalition, set forth recommendations for the upcoming reauthorization of the 2002 Brownfield Amendments.⁸⁷ While the group provided many recommendations, none concerned the current liability scheme.⁸⁸

C. CERCLA Provides Limited Responsible Party Relief – But Only After the Parties Settle Their Liability or Agree to Perform Cleanup

EPA offers covenants not to sue to parties who enter into consent decree agreements where they either promise to perform cleanup (Remedial Design/Remedial Action Consent Decrees)⁸⁹ or where parties agree to pay the government the cost incurred by the government when performing the cleanup (Cost Recovery Settlements).⁹⁰ In the case of RD/RA Consent Decrees, EPA offers covenants not to sue at the stage where the site has been assessed, remedial option alternatives have been evaluated, the remedy selected, and its price estimated (but before remediation). Even though EPA grants the covenant at a pre-remedial stage, the covenant does not go into effect until the EPA certifies that the cleanup has been completed.⁹¹ For Cost Recovery Settlements, EPA offers the covenants when the party agrees to pay for EPA's incurred cost.

The covenants not to sue include re-openers. For Cost Recovery Settlements, EPA reserves the right to recover costs or to issue cleanup orders for any liability not specified within the agreement's definition of past response costs.⁹² Thus, newly discovered conditions or new information would often not be covered under the covenant. For RD/RA Consent Decrees, EPA's covenants expressly exclude unknown conditions or

⁸⁶ See COMMON ELEMENTS GUIDANCE at 3.

⁸⁷ NATIONAL BROWNFIELD COALITION, STATEMENT FOR HEARING ON REAUTHORIZATION OF THE SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT (Feb. 14, 2008) (avail. at <http://www.nemw.org/Brownfields%20Coalition%WRE%20Statement.pdf>)

⁸⁸ *Id.*

⁸⁹ See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MODEL RD/RA CONSENT DECREE (May 2001) (hereafter MODEL RD/RA CONSENT DECREE) (avail. at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/mod-rdra-cd.pdf>).

⁹⁰ See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REVISED MODEL CERCLA SECTION 122(H)(1) AGREEMENT FOR RECOVERY OF PAST RESPONSE COSTS (Feb. 6, 2003) (hereafter MODEL PAST COSTS AGREEMENT) (avail. at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rev-mod-122h-past.pdf>)

⁹¹ MODEL RD/RA CONSENT DECREE at 23.

⁹² MODEL PAST COSTS AGREEMENT at 9.

liability that may arise from information previously unknown to EPA.⁹³ The covenants are also subject to broad “general reservation of rights” which allow the EPA to re-open the remedy for a number of reasons, generally covering any liability that was not expressly covered by the consent decree.⁹⁴

EPA tends to re-open covenants very infrequently, but nonetheless the threat exists and responsible parties do not enjoy full immunity from liability. EPA’s memo titled “Enforcement First to Ensure Effective Institutional Controls at Superfund Sites” discusses the prospect of re-opening consent decrees when additional IC-related work becomes necessary. As the memo explains, “[i]f the decree has a reopener provision and the need for the additional institutional controls is based on new information or unknown conditions, the case team will likely be able to require the [responsible party] to implement the additional institutional controls ... [or] bring an enforcement action against the PRP.”⁹⁵ This language tends to suggest that EPA would consider reopening consent decrees if new information showed that institutional controls were required. While EPA provides covenants not to sue to responsible parties, the covenants do not fully immunize the parties from future government enforcement.

D. CERCLA Liability for Institutional Controls Stretches to Both Sellers and Buyers, But Tends to Shift the Liability to Buyers

CERCLA's implementing regulations (the National Contingency Plan or “NCP”) sets forth a clear expectation that ICs may comprise part of a cleanup remedy.⁹⁶ Nothing in CERCLA, however, relieves responsible parties from future liability associated with the failure to comply with the future conditions in ICs.

Generally, EPA imposes future use conditions within the provisions of RD/RA Consent Decrees (decrees where responsible parties agree to complete remediation according to prescribed plan).⁹⁷ But these provisions do not bind subsequent owners. Thus, the RD/RA Consent Decrees often include provisions that require responsible parties to take additional steps by recording environmental restrictions pursuant to state law, so that the necessary restrictions run with the land to future owners.⁹⁸

State law increasingly provides clarity that environmental restrictions actually do run with the land. For example, recent state enactments of the model Uniform Environmental Covenant Act (“UECA”) expressly provide that environmental covenants

⁹³ *Id.* at 40-41.

⁹⁴ *Id.* at 41-42.

⁹⁵ UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ENFORCEMENT FIRST TO ENSURE EFFECTIVE INSTITUTIONAL CONTROLS AT SUPERFUND SITES 4 (Mar. 17, 2006) (avail at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/enf-first-ics.pdf>).

⁹⁶ See 40 CFR 300.430(a)(1)(iii)(C) and (D).

⁹⁷ See MODEL RD/RA CONSENT DECREE at 16.

⁹⁸ See *id.* at 16.

run with the land.⁹⁹ In the case of UECA enactments, environmental restrictions may be enforced by a host of parties – including the agency who authorized the cleanup, any party to the covenant, and local jurisdiction in which the site lies, and any party affected by the covenant – and UECA authorizes these parties to bring actions for injunctive relief.¹⁰⁰ Over 20 states have enacted UECA, and in 2008 nine additional states introduced the legislation.¹⁰¹ Some states have taken different approaches to help ensure that covenants run with the land (for example, Kansas, California, and Wisconsin are discussed further below).

This evolving clarity in state law makes new owners liable for complying with future use limitations. And these covenants, as negotiated instruments, may set any number of future requirements. Thus, this tends to shift long term stewardship obligations to new owners. Nothing in CERCLA, however, relieves the original owners from liability, and thus such owners and sellers remain liable. While sellers may find some comfort knowing that future owners carry long term stewardship liability, original responsible parties remain open to some risk of future liability.

E. CERCLA's Trust Fund Pays for Orphan Share Cleanups, But it Does Not Fund Operation and Maintenance of Cleanups or Institutional Control Stewardship

CERCLA created the federal Superfund Trust Fund to pay for site investigation and cleanup of contaminated sites where no responsible parties could be found, or where the responsible parties did not cooperate.¹⁰² Where responsible parties do not cooperate, trust funds may pay for cleanup and, in turn, CERCLA authorizes the federal government to recover costs.¹⁰³

When the Superfund Trust Fund covers costs, it only pays for investigation and cleanup, not long term stewardship. Rather than the Superfund Trust Fund, CERCLA requires states to pay for "operation and maintenance."¹⁰⁴ O& M, according to CERCLA's regulations, includes measures initiated after the remedy has achieved an operation and functional status.¹⁰⁵ Generally, O&M activities exist where treatment remedies must be operated for a long time, prior to reaching cleanup goals (e.g., bio-

⁹⁹ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ENVIRONMENTAL COVENANT ACT § 2 (avail. at <http://www.environmentalcovenants.org>) (hereafter UECA).

¹⁰⁰ See UECA § 11

¹⁰¹ See <http://www.environmentalcovenants.org>.

¹⁰² Carl Bauer and Katherine N. Probst, *Long Term Stewardship of Contaminated Sites: Trust Funds as Mechanisms for Financing and Oversight* 12 (Dec. 2000) (hereafter Trust Fund Study).

¹⁰³ *Id.*

¹⁰⁴ UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, OPERATION AND MAINTENANCE IN THE SUPERFUND PROGRAM (May 2001) (avail. at <http://www.epa.gov/superfund/cleanup/postconstruction/operate.htm>) (hereafter EPA O&M GUIDANCE).

¹⁰⁵ See 40 Code. Fed. Reg. § 300.435.

remediation or soil vapor extraction remedies).¹⁰⁶ Typical O&M activities, according to EPA, include site inspection of wells, piping, treatment facilities; sampling, monitoring and analysis of groundwater, leachate, or surface water; routine operation and maintenance of remedy components.¹⁰⁷ But EPA (some would argue, confusingly) also includes institutional control maintenance within the meaning of O&M. "O&M measures also may include the requirements for maintaining institutional controls."¹⁰⁸ Thus, EPA's Trust Fund does not pay for O&M or institutional control activities.

The idea of establishing a trust fund for long term stewardship, such as O&M and ICs, has been an ongoing topic of cleanup policy discussion. In 2000, a Washington D.C. "think tank," Resources for the Future, prepared an exhaustive study of the idea. The report concluded that federal trust fund would not assure the security of long term stewardship. This conclusion was largely based on the fact that federal trusts are not actually trusts in the traditional sense, but rather are record keeping devices, and the government can unilaterally change the terms of the trust without consent from the beneficiaries.¹⁰⁹ The report also concluded that state trusts suffer from the same shortfalls, but if created by constitutional amendments they offer more security, and for that reason among others the report concluded that state trusts offer a promising option.¹¹⁰ Finally the report concluded that private trusts also offer a promising option, but the report expressed concern about the ability of private trusts to secure necessary funding.¹¹¹

Indeed, a U.S.-based company established the private Guardian Trust, and it actively markets the trust to responsible parties who face long term stewardship. For a fee, the Guardian Trust accepts all obligations for IC and EC future compliance, and it accepts liability for any remedy failure due to ICs or ECs.¹¹² In addition, as discussed in more detail below, one U.S. state, Kansas, established a trust for the purpose of paying for the monitoring and other administrative expenses of its institutional control program.

The idea of establishing a trust (or trusts) for long term stewardship has been debated in the U.S. for some time. It has only caught on to a limited extent, however. As discussed further below, however, a new legislative proposal for the establishment of a federal liability transfer trust appears to have gained some momentum in trust-related policy debates.

¹⁰⁶ EPA O&M GUIDANCE at 2-3.

¹⁰⁷ *Id.* at 3.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ Trust Fund Study at ix.

¹¹⁰ *Id.* at xi.

¹¹¹ *Id.* at xi.

¹¹² See Daniel A. Alper and Bruce-Sean Reshen, *The Guardian Trust*, in IMPLEMENTING INSTITUTIONAL CONTROLS AT BROWNFIELDS AND OTHER CONTAMINATED SITES 39-47 (Amy L. Edwards ed., 2003)

F. Proposed Amendments to Federal Brownfield Law Address the "Mothballing" Issue

CERCLA's Brownfields amendments have come due for re-authorization which, in turn, has prompted stakeholders to suggest new changes. The National Brownfields Coalition, a broad-based stakeholder group, summarized its recommendations in a recent statement to the U.S House of Representatives. Many of the group's recommendations covered ideas for additional incentive-related grant funding – a topic beyond the scope of this paper. But the group also set forth ideas to add "tools to help free the mothballed brownfield sites."¹¹³

"Mothballed" properties are those which sellers will not or cannot sell because of environmental issues. Estimates of mothballed properties range as high as \$1 to \$2 trillion in the U.S.¹¹⁴ The National Brownfield Coalition recommends an approach to address mothballed properties that differs from the liability transfer trust approach described below.

The National Brownfield Coalition's primary recommendations pertain to local government liability, contaminated sites, and institutional controls, and environmental insurance. With respect to local government liability, the coalition recommends that the law provide clarity that local governments who own contaminated sites, including those acquired by eminent domain or expropriation, are not liable under CERCLA as long as they did not cause the contamination and as long as they exercised due care with regard to any contamination on site.¹¹⁵ This issue was described in much more detail in a recent report published by the National Association of Local Government Environmental Professionals ("NALGEP"). According to NALGEP, local governments can bring their powerful development tools, including their ability to assess, cleanup, border, and combine parcels for development, if the governments were less fearful of liability. The NALGEP report also explains, in some detail, that the liability scheme as it pertains to local governments is confusing, uncertain and, in turn, dissuades local governments from brownfield redevelopment. By removing this barrier, NALGEP concludes, otherwise "mothballed" properties would be redeveloped.

Concerning institutional controls, the National Brownfields Coalition recommended that the federal law "should encourage effective use of institutional controls at brownfields sites by requiring states to develop a plan for establishing, monitoring, and enforcing appropriate institutional control mechanisms designed to assure that all future uses of brownfields sites are consistent with any restrictions placed on such sites."¹¹⁶ This recommendation echoed a similar one made by the National

¹¹³ NATIONAL BROWNFIELDS COALITION, STATEMENT FOR HEARING ON REAUTHORIZATION OF THE SMALL LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT 9 (Feb. 14, 2008) (avail. at <http://www.nemw.org/Brownfields%20Coalition%20WRE%20Statement.pdf>).

¹¹⁴ Elliot Laws, *The Recovered Property Protection and Assurance Trust*, Presentation to the RTM Conference on Contaminated Property Transactions-Promoting Sustainable Deals and Redevelopments (Nov. 2007).

¹¹⁵ *Id.* at 9.

¹¹⁶ *Id.*

Brownfields Association.¹¹⁷ It recognizes that institutional control compliance assurance and enforcement regimes have not matured in the states and, because of this, sellers fear that sites relying on institutional controls will become re-opened if the institutional controls fail. Since sellers remain as responsible parties under CERCLA, some practitioners believe that this potential scenario dissuades sellers from relying on institutional controls. Thus, they argue, makes cleanup unaffordable and, therefore, contributes to mothballing.

Concerning insurance, the National Brownfields Coalition recommended that federal law should "foster the use of environmental insurance at brownfield sites" by providing moneys to states so that the states could subsidize 50% of environmental insurance premiums, as Massachusetts has done.¹¹⁸ This recommendation recognizes that environmental insurance on one hand works as a powerful risk management mechanism to sellers and buyers but, on the other, often proves unaffordable for small and medium sized brownfield deals. The increased access to affordable insurance, according the National Brownfield Coalition's recommendations, would help to bring otherwise "mothballed" properties to market.

G. A Legislative Proposal for Liability Relief: The Recovered Property Protection and Assurance Trust (R-PAT)

The R-PAT proposal offers a different approach for freeing mothballed properties. Under the R-PAT model, federal legislation would establish a federal trust and assurance entity to cover pre-existing environmental liabilities forever. This mechanism would allow either or both sellers and buyers to, if they wished, pay a fee to transfer environmental liability forever to R-PAT. R-PAT would be a federally created entity with powers granted by Congress and, in that sense, would be similar to the Federal Deposit Insurance Corporation (FDIC)¹¹⁹ and other federally-created entities.¹²⁰

R-PAT would cover sites that have completed cleanup as well as sites where a remedy has not been implemented. At completed sites (or CoC sites under MOE's terminology), the seller would pay a Risk and Liability Transfer Fee (RLTF) to R-PAT and R-PAT would release the seller from all liability (regulatory liability and private tort liability) arising from pre-existing contamination.¹²¹ R-PAT would determine the fee on

¹¹⁷ See NATIONAL BROWNFIELD ASSOCIATION, BRINGING CORPORATE BROWNFIELD PROPERTIES TO MARKET 3 (Dec. 2004).

¹¹⁸ NATIONAL BROWNFIELDS COALITION, STATEMENT FOR HEARING ON REAUTHORIZATION OF THE SMALL LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT 9 (Feb. 14, 2008) (avail. at <http://www.nemw.org/Brownfields%20Coalition%20WRE%20Statement.pdf>).

¹¹⁹ The FDIC is a federally owned corporation, created by federal legislation in 1933, to insure individual deposits in private banks up to \$100,000. See http://en.wikipedia.org/wiki/Federal_Deposit_Insurance_Corporation.

¹²⁰ Elliot Laws, *The Recovered Property Protection and Assurance Trust*, Presentation to the RTM Conference on Contaminated Property Transactions-Promoting Sustainable Deals and Redevelopments (Nov. 2007) (listing the Tennessee Valley Authority, Commodity Credit Corporation, and the Federal Financing Bank).

¹²¹ *Id.*

a site-specific basis depending on the nature of the future risk. Fee estimates range as low as \$25 thousand for a "corner gas station" site to much higher amounts for large, complex sites.¹²²

R-PAT would also accept liability, on a contingent basis, at sites where a remedy had not yet been implemented. In this case, R-PAT would require the seller and/or the buyer to secure, and R-PAT to approve, a qualified assurance mechanism (QFAM), which would be defined under forthcoming R-PAT rules but might include self certification, environmental insurance policies, annuities, or other means to provide assurances to cover cleanup costs, cost over-runs, plus 3rd party coverage for a period of time during cleanup.¹²³ With the QFAM in place and upon payment of a Risk and Liability Transfer fee, the R-PAT would then release the seller from liability arising from pre-existing contamination.¹²⁴ During cleanup, the qualified assurance mechanism and the buyer would be responsible for cleanup. At the end of the QFAM's term or upon the issuance of a CoC, the R-PAT would assume liability.¹²⁵

R-PAT would broadly cover environmental liability, but not completely. R-PAT would cover nearly all liabilities, known or unknown, arising from pre-existing contamination, including remedy failure, regulatory changes, newly discovered contamination, 3rd party regulatory claims, IC inspections and failures, operation and maintenance, and even toxic tort claims.¹²⁶ R-PAT would not cover claims related to asbestos and lead contamination of buildings.¹²⁷ Nor would it cover intentional non-compliance with ICs by future owners (the presumption is that the intentionally non-complying party would be liable). Finally, R-PAT would not cover new releases.¹²⁸

R-PAT would be governed by a board of directors, appointed by the President of the United States. It would be staffed by risk management and financial specialists. R-PAT would possess authority to engage in "green investments" of its funds, and to leverage financial and insurance vehicles from the private sector to spread risk, minimize losses, and maximize investments.¹²⁹ R-PAT would also perform duties. It would conduct IC inspections and monitoring of enrolled sites, it would construct a public data base of ICs, and it would report to federal and state authorities on the status of sites enrolled.

A growing coalition of companies has signed on to the R-PAT idea, and supporters hope for legislative enactment in 2009 or shortly thereafter.¹³⁰

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Telephone conversation between Michael Sowinski, Opper & Varco, and Kevin Matthews, AIG (March 6, 2008).

¹³⁰ *Id.*

II. State Approaches Provide Some Novel Means to Liability Relief and Transfer

While the federal CERCLA program tends to cover the most complex and most high risk sites, State programs also accomplish many cleanups. The liability schemes followed by the states, however, tends to follow the federal approach. That is, states tend to provide limited liability protections to buyers, but not to sellers. Also like the federal scheme, institutional control liability under state cleanups tends to shift to buyers.

States, however, have experimented with new approaches and the state programs differ from CERCLA in varying respects. The following sections first summarize general trends among the states and, next, summarize specific approaches to cleanup and cleanup liability.

A. General Trends Among State Cleanup Laws

1. Liability Relief

States offer voluntary cleanup programs (“VCPs”) where state agencies provide oversight to parties who voluntarily seek such oversight. Upon completion of the cleanup, state agencies provide some type of closure assurance, usually a comfort letter, no further action letter or covenant not to sue, which provide some degree of clarity of the party’s future liability obligations.¹³¹ In most states, however, this type of future liability clarity does not attach to the responsible party who caused the release (even if they have performed the voluntary cleanup).¹³² Even where the liability relief does attach, it is generally subject to re-opener provisions. As a recent National Brownfields Association report concludes, “[b]uyers and sellers are still concerned that the level of environmental liability relief may not be meaningful, and that lingering third party liability issues remain.”¹³³ “The lack of liability clarity is causing a number of corporate property owners to hold on to sites.”¹³⁴

2. Institutional Controls

Over the past ten years, and especially recently, the issue of institutional control has gained prominence among state cleanup programs. States have made tremendous progress on two fronts. First, many have developed robust computer systems to identify sites where institutional controls operate, providing easy public access to the restrictions imposed on those sites. Second, many states have enacted new legislation to make institutional controls “run with the land” to new property owners, and to authorize environmental agencies to directly enforce such restrictions. To do this, approximately twenty states have enacted legislation modeled after the Uniform Environmental

¹³¹ NATIONAL BROWNFIELDS ASSOCIATION, WHAT WORKS: AN ANALYSIS OF STATE BROWNFIELD AND VOLUNTARY CLEANUP PROGRAMS (avail. at www.brownfieldsassociation.org).

¹³² *Id.* at 1.

¹³³ *Id.* at 2

¹³⁴ *Id.*

Covenants Act.¹³⁵ Other states, such as Wisconsin and Kansas, passed different legislation which sought to achieve the same purpose. As discussed in more detail below, Wisconsin's law provides that environmental agency closure reports (including any future conditions) run with the land.

Because institutional controls increasingly run with the land, the future restrictions (e.g., industrial use only), conditions (e.g., no excavation below ten feet), and affirmative obligations (e.g., monitor and maintain cap) that they impose can be directly enforced against subsequent owner. This enforcement regime tends to shift the obligation for IC compliance to buyers.

B. Specific Examples of State Approaches To Cleanup and Cleanup Liability

1. Michigan Provides Buyer Immunity for Pre-Existing Contamination But Imposes Civil Penalties Upon Buyers for Failure to Exercise Due Care

Michigan provides a novel approach, which it calls causation-based liability. Michigan excludes contaminated property purchasers from environmental liability for any pre-purchase condition, as long as they perform a study to “baseline” the site in order to distinguish pre-existing contamination from any new contamination that the buyer might cause in the future. Unless they caused the pre-existing contamination, new owners only become liable for pre-existing contamination if they fail to comply with baseline environmental assessment (“BEA”) procedures.¹³⁶ BEAs define the existing contamination for the purpose of distinguishing existing contamination from new contamination that the new purchaser might release.¹³⁷ Michigan’s environmental agency has set forth administrative rules and guidance for performing BEAs.¹³⁸ Once buyers properly perform the BEA, they become immune from any pre-existing contamination.

While BEAs relieve buyers of liability, buyers must exercise due care measures “to ensure that existing contamination on a property does not cause unacceptable risks and is not exacerbated.”¹³⁹ In contrast to the federal BFPP approach (see above discussion), the failure to exercise due care does not affect the buyers status as a liable party under Michigan law – such buyers would remain non liable for pre-existing contamination.¹⁴⁰ Rather, such due care failures expose buyers to civil penalties.¹⁴¹

¹³⁵ See www.environmentalconvenants.org (showing the UECA states and providing the model act).

¹³⁶ See Mich. Comp. Laws §§ 324.2016(1)(c); 324.2016(2).

¹³⁷ Personal communication between Michael Sowinski, Opper & Varco LLP and Rhonda Klann, Michigan Department of Environmental Quality (Mar. 05, 2008).

¹³⁸ See Michigan Department of Environmental Quality, Land Cleanup (avail. at www.michigan.gov/deq/0,1607,7-135-3311_4109---,00.html)

¹³⁹ Michigan Department of Environmental Quality, Due Care Requirements for Owners and Operators of Contaminated Property 1 (avail. at www.deq.state.mi.us/documents/deq-rrd-duecare-citizenguide.pdf)

¹⁴⁰ Telephone conversation between Michael Sowinski, Opper & Varco LLP and Rhonda Klann, Michigan Department of Environmental Quality (Mar. 05, 2008).

¹⁴¹ *Id.*

2. Recent California Legislation Offers Limited Cleanup Immunity to Buyers But Also Tends to Shift Institutional Control Liability to Buyers

In 2004, California enacted the California Land Reuse and Revitalization Act of 2004, more commonly known as AB 389. The law follows an approach similar to those in CERCLA's 2002 amendments, but it offers distinctions.

AB 389 provides, in the words of the Act, "immunities" to purchasers and adjacent property owners (off-site owners) who did not cause the contamination.¹⁴² The liability immunity covers immunity from state enforcement as well as from private actions that might be brought under state environmental statutes and state common law (i.e., nuisance and trespass).¹⁴³ The immunity attaches when the buyer or off-site owner enters into an agreement with the state environmental agency to conduct a site assessment and, if necessary, a response action.¹⁴⁴ Once it triggers, the liability immunity remains in effect unless the buyer or off-site owner "materially deviates" from the agreement it executed with the state environmental agency.¹⁴⁵

But the liability immunity is conditioned on additional performance. The buyer or off-site owner, similar to the federal BFPP approach, must perform all appropriate inquiries prior to purchase.¹⁴⁶ Further, among others, immunity seekers must exercise appropriate care with respect to existing contamination, comply with institutional controls, and provide full cooperation with persons authorized to conduct response actions.¹⁴⁷ Failure to do so could cause buyers to lose their liability immunity.

California regulations impose additional institutional control requirements. These regulations require the preparation of institutional control assurance plans, for the purpose of identifying the persons and methods to be employed for institutional control compliance. Finally, these regulations authorize the imposition of institutional control fees, to be charged annually, to cover the state's cost of monitoring ICs and otherwise administering an IC program. Such fee estimates range from \$500-\$2,500 per year but fees could range outside of the estimates, depending on site specifics.¹⁴⁸ The model agreement used by the state for institutional controls requires owners to submit annual institutional control inspection reports. Thus, in addition to the risk of losing liability protections, owners who fail to comply with institutional controls provide "grounds to the [state] to require modification or removal of any improvements constructed or placed ...[and] to pursue administrative, civil, or criminal actions, as provided by law."¹⁴⁹

¹⁴² See Cal. Health & Safety Code § 25395.81 & See § 25395.66.

¹⁴³ *Id.* at § 25395.66.

¹⁴⁴ *Id.* at §§ 25395.81 (c) and 25395.92.

¹⁴⁵ *Id.* at § 25395.81(c)(1).

¹⁴⁶ *Id.* at § 25395.80(a).

¹⁴⁷ *Id.* at (a)-(e).

¹⁴⁸ Telephone conversation between Michael Sowinski, Opper & Varco, and Robert Elliott, Department of Toxic Substances Control (Mar. 6, 2008).

¹⁴⁹ CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCE CONTROL, MODEL COVENANT (Oct. 2007) (on file with author).

AB 389 also provides re-openers. When the agency discovers new “unreasonable risk,” the liability seeker would remain protected if they “did not cause or contribute to the release,” and the person appropriately resolves the release.¹⁵⁰ While this re-opener imposes an arguably vague burden on buyers to appropriately resolve future-discovered release, AB 389 suggest that, even if such buyers lost their immunity, the state would only bring an enforcement action against it if “conditions on the property pose an endangerment” *and* the agency diligently, but unsuccessfully, seeks other responsible parties *or* the Agency “reasonably determines” that no other responsible parties exist with sufficient financial resources.¹⁵¹

3. Wisconsin Releases Sellers and Buyers from Liability, Provides a Balanced Approach to Off-Site Contamination Issues, Imposes Institutional Control Liabilities on Subsequent Owners, and Encourages Environmental Insurance

Wisconsin provides the option to parties, including responsible party/sellers or buyers, to receive liability immunity when they perform cleanup and receive a certificate of completion from the Wisconsin DNR.¹⁵² Wisconsin's liability release continues to remain even if laws or regulations change, and even if additional pre-existing contamination is later discovered or if the remediation later proves to have been unsuccessful.¹⁵³ Thus, no re-openers exist. This novel approach provides final liability immunity to persons performing cleanup.

Wisconsin's future liability protections also address ICs. If the person performing the cleanup remains as the owner, that person must not "engage in activities that are inconsistent with the maintenance of that property."¹⁵⁴ If the person performing cleanup sells the property, such sellers remain protected from liability even if the new owner fails to comply with ICs. Rather, subsequent owners are responsible for compliance with ICs.¹⁵⁵ Instead of relying on property law (as is the case for states that enacted UECA states), Wisconsin simply requires the state environmental agency to post ICs on a public database and, in turn, holds subsequent owners responsible for IC compliance with those ICs.¹⁵⁶

Wisconsin also expressly addresses the case of off-site migration. First, Wisconsin releases off-site owners from liability as long as they: 1) do not interfere with actions to clean the property; 2) do not worsen the damage, and; 3) agree to any other reasonable and necessary condition required for responding to the discharge.¹⁵⁷ Even though

¹⁵⁰ *Id.* at § 25395.82(b)(2).

¹⁵¹ *Id.* at 25395.81(a)(2) (emphasis added).

¹⁵² WIS. STAT. § 292.15(2)(a).

¹⁵³ *See* WIS. STAT. § 292.15(2)(b).

¹⁵⁴ WIS. STAT. § 292.15(2)(a)(5).

¹⁵⁵ WIS. STAT. § 292.12(5).

¹⁵⁶ WIS. STAT. § 292.12(3).

¹⁵⁷ WIS. STAT § 292.13(1).

released from liability, off-site owners must still maintain and comply with ICs.¹⁵⁸ One exception exists to this rule: if the off-site owner and the source property owner have entered into a legal agreement whereby the source property owner would maintain the IC (i.e., maintain a cap), Wisconsin would honor that agreement under the statutory authority that allows it to exempt off-site owners from IC duties when "another person has a legally enforceable responsibility to comply with the requirements."¹⁵⁹ Thus, Wisconsin law appears to allow off-site owners to contract away their obligation to maintain ICs.

Finally, Wisconsin law encourages off-site owners to cooperate and agree to any reasonable and necessary remedy proposed by the source property, even if the off-site owner would prefer a different approach (e.g., one that fully remediated the property without the need for ICs). Refusal to agree to a reasonable and necessary remediation approach could cause off-site owners to lose liability protection.¹⁶⁰ Thus, "if the [Wisconsin] Department determines that the remedial action is reasonable and necessary, the off-site property owner is responsible for maintaining the [IC]."¹⁶¹ Failure to do so puts the off-site owner at risk of losing the liability protection.¹⁶² Finally, if the off-site property owner desires to change the future land use to one not permitted by an IC (e.g., industrial to non-industrial), the off-site owner must pay for the additional cleanup.¹⁶³

In addition to the liability clarity and IC program that Wisconsin provides, it also helps to reduce the cost of environmental insurance. Wisconsin developed an insurance program in cooperation with AIG.¹⁶⁴ The program provides a model policy tailored to Wisconsin's liability regime, and a 10% discount on the cost of the premium.¹⁶⁵ Insurance is optional under the Wisconsin program except in one circumstance. Wisconsin will not issue a certificate of completion for a cleanup that relies on monitored natural attenuation (a remedy that allows contamination to remain in the ground until it naturally degrades) unless the party seeking the certificate first secured environmental insurance.¹⁶⁶ This requirement helps to limit to risk to Wisconsin, when they certify monitored natural attenuation cleanups and, therefore, relieve the responsible party of liability.¹⁶⁷

¹⁵⁸ Mark F. Giesfeldt, Wisconsin Department of Natural Resources, *Guidance on the Overlap of the New Land Use Controls Statute, s. 292.12, Wis. Stats., and the Off-site Exemption, s. 292.13, Wis. Stats.* 2 (Feb. 21, 2007) (avail. at <http://www.dnr.state.wi.us/org/aw/rr/archives/pubs/RR589.pdf>).

¹⁵⁹ *Id.* at 2.

¹⁶⁰ *Id.* at 2.

¹⁶¹ *Id.* at 3.

¹⁶² *Id.* at 4.

¹⁶³ *Id.* at 5.

¹⁶⁴ See Wisconsin Brownfields Insurance Program (avail. at <http://www.dnr.state.wi.us/org/aw/rr/brownfields/wbip.htm>).

¹⁶⁵ See *id.*

¹⁶⁶ Telephone conversation between Michael Sowinski, Opper & Varco, and Mark Giesfeldt, Wisconsin Department of Natural Resources.

¹⁶⁷ *Id.*

4. Massachusetts Pays Up To Fifty Percent of Private Insurance Premiums

While the Wisconsin program offers environmental insurance at a 10% discount, Massachusetts subsidizes environmental insurance up to 50%. Since 1999, Massachusetts has run its Brownfield Redevelopment Access to Capital Program ("BRAC Program"), which was authorized by statute, and subsidizes the price of private environmental insurance up to fifty percent.¹⁶⁸ Massachusetts allows nearly any party, as they wish, to receive subsidized insurance under the BRAC Program. The BRAC program's eligibility reaches broadly to nearly any brownfield property being developed with the help of the insurance, irrespective of whether the party seeking insurance qualifies as a responsible person.¹⁶⁹ Through the affordability of environmental insurance, Massachusetts seeks to allow parties to shift the risk to insurers and, therefore, reduce seller and buyer concerns of future liability.

In the beginning of the BRAC program, Massachusetts contracted with one insurer, AIG, to provide insurance under the BRAC program (though no rule would prohibit parties from securing environmental insurance outside of the BRAC program). More recently, the BRAC program has broadened its carriers to include four insurers, including AIG Environmental, ACE Environmental Risk, XL Insurance, and Chubb Environmental Solutions.¹⁷⁰ Each carrier has agreed to offer its policies with a BRAC-specific endorsement, tailored to the state-specific brownfield requirements in Massachusetts.¹⁷¹

Massachusetts reports that the BRAC insurance program has assisted with 300 brownfield cleanups, backed by \$1 billion of insurance.¹⁷² At these cleanups, \$200 million in cleanup investment and over \$3 billion of redevelopment investment occurred.¹⁷³ For this benefit, Massachusetts has paid \$5 million.¹⁷⁴

5. Kansas Established an Institutional Control Fund

Without distinguishing between past owners and new purchasers, the Kansas EUC law allows any "owner" of contaminated property to apply for an "Environmental Use Control" which the state may approve as a component of remedial action. If approved, the state enters into an EUC agreement with the owner which limits future land use.¹⁷⁵ The owner must record the EUC agreement in the local register of deeds.¹⁷⁶ The EUC

¹⁶⁸ See Brownfields Insurance (avail. at <http://www.mass-business.com/site/site-massbiz/content/brownfields/>).

¹⁶⁹ See Benefits/Eligibility (avail. at <http://www.mass-business.com/site/site-massbiz/content/brownfields/program-eligibility.asp>).

¹⁷⁰ See Products/Insurers (avail. at <http://www.mass-business.com/site/site-massbiz/content/brownfields/products.asp>)

¹⁷¹ *Id.*

¹⁷² See Brownfields Insurance (avail. at <http://www.mass-business.com/site/site-massbiz/content/brownfields/>).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ K.S.A. § 65-1,224; K.A.R. § 28-73-3.

¹⁷⁶ K.S.A. § 65-1,225.

runs with the land until the state removes the EUC.¹⁷⁷ The EUC law authorizes enforcement actions against subsequent owners to either cure deficiencies or further clean the property to meet residential standards.¹⁷⁸ Thus, the EUC law tends to shift IC liability to new owners, and away from sellers.

Kansas charges a fee to persons seeking EUCs. The EUC law divides EUC sites into three categories, depending on size and risk. For Category 1 sites, the state charges a one time IC fee of \$2,000.¹⁷⁹ For Category 2 sites, the state charges a one time IC fee of up to \$10,000.¹⁸⁰ For Category 3 sites, the EUC law requires the state and owner to enter into a long term care agreement, which include provisions for reimbursement of state IC-related expenses and may also require financial assurance in an amount that would cover increased remediation if the EUC were to fail.¹⁸¹ EUC fees are deposited into an EUC fund, which the EUC law expressly established.¹⁸² The fund is intended to cover future monitoring and tracking of ICs, enforcement, and related costs.¹⁸³ The fund does not, however, cover future liabilities. Rather, it simply pays for administration of the states IC program.

III. Liability Transfers Among Private Parties

Private parties often enter into agreements to share or transfer environmental liability as part of property transaction deals. Such private risk sharing, and the barriers such arrangement face, proves instructive to legislative and policy decision making on environmental liability release and transfer.

A. Contractual Agreements Between Transacting Parties

During land transactions, private parties often transfer environmental liability between themselves. For example, transacting parties enter into covenants where one party promises to perform all of some of the required cleanup. Or, sellers might set aside funds into an escrow account to pay for environmental cleanup. Additionally, transacting parties may enter into indemnification agreements, where one party agrees to accept any liability the other might face from, for example, government regulators. Indemnification agreements might cover a “full transfer” of liability, a “basket” transfer covering a fixed cost or fixed timeline, a transfer of enumerated items only, or other forms. Transacting parties might also include conditions in their contracts allowing one (or both) to terminate the deal within a set timeframe if, for example, site cleanup cost estimates prove too high. Parties can mix these and other mechanisms together. And increasingly, transacting parties employ various types of environmental insurance to help fix or manage, or in the parlance of the industry “backstop,” the risk faced by the parties.

¹⁷⁷ K.S.A. § 65-1,227(b).

¹⁷⁸ K.S.A. § 65-1,229.

¹⁷⁹ K.S.A. § 65-1,226(c)(1).

¹⁸⁰ K.S.A. § 65-1,226(c)(2).

¹⁸¹ K.S.A. §§ 65-1,226(c)(3); 65-1,224(b)(3).

¹⁸² K.S.A. § 65-1,231.

¹⁸³ K.S.A. § 65-1,231.

Various publications comprehensively cover private mechanism to shift environmental risk.¹⁸⁴

The success of these agreements, and ultimately the transaction, largely depends on the parties' ability to identify the risks. Because environmental regulators play a pivotal role in determining the type of cleanup to perform and who the responsible parties are, practitioners commonly make the point that the relationship with the regulator is a critical part of the contaminated property transactions. When regulatory liability becomes more certain or even quantifiable, parties are typically better equipped to devise agreements to shift the risk in a way that works for the transaction.

Sellers, not surprisingly, tend to prefer mechanisms that would permanently transfer the liability for environmental risks to the buyer.¹⁸⁵ "In practice, this has proven to be hard to accomplish outside of obtaining an impenetrable indemnity from a rock solid buyer (of which there are few)..."¹⁸⁶

B. Liability Transfer to 3rd Parties Provides a Relatively New Tool for Contaminated Property Risk Transfer, And Appears Especially Well Suited to "Upside Down" Properties

An increasing private company trend of environmental liability transfers allows sellers to convey their contaminated property and all environmental liabilities to a buyer whose business it is to do just this – buy contaminated properties and their associated environmental liability. Specialty developers, with real estate and brownfield expertise, take sites from owners and assume all past, present, and future liabilities.¹⁸⁷

These transactions generally occur well before cleanup. Indeed, the buyer typically agrees to perform the cleanup and accept all liability. The buyers typically calculate the price/cost of the property by first adding the: 1) investigation and cleanup cost; 2) the carrying and repositioning cost; 3) the price of environmental insurance; and 4) the estimated cost to assume all future liabilities, known and unknown.¹⁸⁸ Second, the market value of the property, after cleanup, is subtracted.¹⁸⁹ Even in the common event of "upside down" properties where the market value does not outweigh the environmental liability, sellers often continue to feel motivated to move forward and to actually pay the buyer to accept their contaminated property. This occurs, for example,

¹⁸⁴ See, e.g., ELIZABETH GLASS GELTMAN, *SHIFTING ENVIRONMENTAL RISK: A GUIDE TO DRAFTING CONTRACTS AND STRUCTURING TRANSACTIONS* (1999).

¹⁸⁵ Dean A. Calland, *Environmental Liability Transfer Projects: A Seller's/Owners Perspective*, ENV'T'L TRANSACTION AND BROWNFIELDS COMMITTEE NEWSLETTER, Feb. 2008, at 1.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 2.

¹⁸⁸ Mike McCartney, *Environmental Liability Transfer Projects: A Buyer's Perspective*, ENV'T'L TRANSACTION AND BROWNFIELDS COMMITTEE NEWSLETTER, Feb. 2008, at 5.

¹⁸⁹ *Id.*

when sellers wish to eliminate the property's carrying cost and permanently rid themselves of the liability.¹⁹⁰

This transaction does not relieve sellers of regulatory liability, but rather the buyer agrees to accept all such liability. Thus, the buyer's actual ability to assume the liability holds crucial importance. These deals often require the owner to set aside money in an escrow account to fund cleanup.¹⁹¹ In addition to the seller's funds, the buyer's net worth and their promises to secure insurance to cap future liabilities, provides assurances to sellers that the buyer's can actually take on the liability.¹⁹² Sellers tend to demand that buyers secure regulatory approval which, in turn, also helps to limit the risk of additional government liability.¹⁹³

The private sector has devised a means to fully shift the liability to buyers, but its strength depends on the buyer's ability to actually address the liability. Addressing the liability takes expertise and money. Specialty buyers often possess both expertise and net worth, but they also rely on environmental insurance to backstop the deal.

C. Environmental Insurance Increasingly "Backstops" Private Risk Sharing Arrangements

Environmental insurance plays a large an increasing role in contaminated property transactions in the U.S. In Canada, the reliance on environmental insurance has become increasingly common more recently, over the past year. Contaminated property transactions rely on two primary insurance products, though many others exist. First, either buyers or sellers (or both may be covered) may purchase environmental insurance to cap the cost of the cleanup. Thus, regardless of whether the seller or buyer is performing cleanup, the risk of remedy failure shifts to the insurer. Cost cap policies, therefore, provide financial assurance that monies exist to complete the remedy. Indeed, EPA allows private insurance to provide financial assurance for completion of NPL (high risk) cleanups.¹⁹⁴

Costs cap policies, however, typically only prove economically viable for cleanups that cost approximately \$2 million or more.¹⁹⁵ This is because the minimum premium for such policies costs \$330,000 – and this minimum cost generally requires a \$2 million cleanup before most insureds consider the cost justified.¹⁹⁶ And, prior to issuing

¹⁹⁰ Dean A. Calland, *Environmental Liability Transfer Projects: A Seller's/Owners Perspective*, ENV'T'L TRANSACTION AND BROWNFIELDS COMMITTEE. NEWSLETTER, Feb. 2008, at 1.Calland at 3.

¹⁹¹ *Id.*

¹⁹² *Id.* at 4.

¹⁹³ *Id.*

¹⁹⁴ MODEL RD/RA CONSENT DECREE, FINANCIAL ASSURANCE REVISIONS (Apr. 9, 2005) (avail. at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/mod-rdra-fa.pdf>).

¹⁹⁵ Telephone conversation between Michael Sowinski, Opper & Varco, and Kate Dodge, AON (March 4, 2008); Telephone conversation between Michael Sowinski, Opper & Varco, and Kevin Matthews, AIG (March 6, 2008).

¹⁹⁶ Telephone conversation between Michael Sowinski, Opper and Varco, and Kevin Matthews, AIG (March 6, 2008).

policies, insurers will typically require site assessments and well-researched and reasoned remediation cost estimates. Thus, for large well assessed sites, cost cap policies may provide a good means to shift cleanup completion risks to an insurer and, therefore, assure monies exist for cleanup.

Second, transactions commonly utilize the more general coverage offered by Pollution Legal Liability (PLL) policies.¹⁹⁷ PLL policies include "flexible" coverage that can often be tailored to site specifics. The coverage most relevant to the scheme envisioned by the 14th Principle includes coverage for pre-existing conditions. This coverage would accept the liability that would arise if it was later discovered or decided that more cleanup was required. This coverage also covers regulatory liability claims made by off-site parties. The minimum premium for PLL policies can be as low as \$10,000. Thus, PLL policies sometimes provide economically justified solutions for even small cleanups.

¹⁹⁷ Tanya C. O'Neill, *Environmental Insurance: Insurance as a Means of Transferring Risks in Environmental Liability Transfers*, ENVIRONMENTAL TRANSACTIONS AND BROWNFIELDS COMMITTEE NEWSLETTER, Feb. 2008, at 10.

CHAPTER 3 CONCLUSIONS AND RECOMMENDATIONS

EMA and its implementing regulations, protocols, procedures, and guidance establish a comprehensive and mature framework for contaminated site remediation in British Columbia. Nonetheless, EMA does not implement CCME's 14th Principle which, according to CCME, would remove a significant barrier to property redevelopment by allowing responsible parties/sellers to transfer and/or be released from liability after cleanup has been completed.

Other jurisdictions, especially in the U.S., have grappled with similar policy questions related to environmental liability relief and contaminated property redevelopment. No legislative approach in the U.S. appears to provide for the direct transfer of liability from sellers to buyers. Nonetheless, the approaches employed to clarify liability issues prove instructive.

Section I lists the liability-transfer conclusions related to CCME's 14th Principle and EMA, as well as those that can be drawn from similar efforts in U.S. jurisdictions. Section II recommends policy options that might be implemented in British Columbia to improve upon EMA by providing liability clarity.

I. Conclusions

A. The 14th Principle & the Environmental Management Act Set Guideposts for Future Liability Transfer Policies

CCME's 14th Principle endorses provincial laws and regulations that would release sellers from liability. The 14th Principle seems to favor an approach where the government would approve site-specific liability transfer agreements between sellers and buyers. But the 14th Principle appears open to alternative approaches.

EMA casts a wide liability net and, among other parties, holds both sellers and buyers liable as responsible parties for contaminated sites. Unlike U.S. federal law, EMA does not offer protection to "bona fide prospective purchaser" buyers. EMA does, however, relieve off-site neighbors from cleanup liability and this liability immunity attaches regardless of whether off-site owners exercise due care with respect to the contamination or cooperate with responsible parties wishing to perform cleanup. EMA also relieves responsible parties/sellers from future liability for cleanup costs that subsequent owners incur when they change the future use beyond that contemplated in the original cleanup.

Under EMA, the government approves remediation plans by issuing AiPs and, when cleanup is complete, CoCs. Under EMA, the government may also enter into voluntary remediation agreements with responsible parties who would, upon completing the terms of the agreement, receive liability immunity. Section 60 of EMA, however, provides powerful re-opener authority which tends to undermine the liability clarity that might be provided within AiPs, CoCs, or voluntary remediation agreements.

EMA authorizes AiPs and CoCs to impose future use conditions and other obligations to monitor "works," and such conditions operate as MOE's primary means to establish "institutional controls," "engineering controls," and "operation and maintenance" procedures. Other than re-opening CoCs, EMA does not provide a means to directly enforce these future obligations against subsequent owners. Rather than directly characterizing its future obligations as institutional controls, engineering controls, and operation and maintenance, MOE's typical CoCs refers to risk assessment conditions and maintenance of "works."

Protocol 8 provides a framework for financial assurance for high risk sites. Protocol 8's financial assurance rules address cleanup liability, operation and maintenance liability, and IC/EC liability. Because the Protocol authorizes any means of assurance acceptable to MOE, it appears to authorize the use of environmental insurance.

Part 5 of EMA, which covers mining sites, expressly excludes parties from liability if the government has issued a Transfer Agreement, which would transfer liability to a new party. Under this authority, the MOE and the Ministry of Energy, Mines, and Petroleum Resources jointly published a draft Transfer Agreement Procedure. The Procedure provides guidepost but not bright-line rules for site-specific evaluations where, in close cooperation with the government and under conditions acceptable to the government, liability may shift from a responsible party to a new party.

Part 4 of EMA, covering contaminated sites, does not provide statutory authority for Transfer Agreements.

Recent amendments to EMA, though not yet brought into force, establishes a Liability Remediation Fund with apparent broad authority to provide funding for brownfield development, orphan site remediation, and domestic and commercial underground tank remediation.

B. U.S. Jurisdictions Tend to Provide Buyer Liability Protections, Rather Than Seller Protections, But Mothballing Issues Remain And Evolving Approaches and New Ideas Would Provide Seller Liability Relief and/or Tend to Shift Institutional Control Liability to Buyers

U.S federal law does not release responsible parties/sellers from liability but, rather, U.S. federal law provides buyers with qualified liability protections even when buyers knowingly purchase contaminated property. This qualified immunity requires buyers to exercise due care with respect to the contamination to, among other things, stop continuing releases, prevent future releases, and to provide access and cooperate with persons authorized to perform cleanup.

Recent clarity in U.S. law provides that institutional controls run with the land. Because of this, the future restrictions (e.g., industrial use only), conditions (e.g., no

excavation below ten feet), and affirmative obligations (e.g., monitor and maintain cap) that they impose can be directly enforced against subsequent owner. This enforcement regime tends to shift the obligation for IC/EC compliance to buyers.

State voluntary cleanup programs generally offer cleanup certifications, similar to CoCs, which offer varying degrees of liability protections. State law re-opener authorities, however, tend to undermine the clarity provided by such cleanup certifications.

Stakeholders recognize that property "mothballing" remains an issue in the U.S. Legislative proposals call for local government liability exemptions, improved institutional controls, and improved access to environmental insurance. A different legislative proposal would create a federally-owned liability transfer trust to accept post-cleanup environmental liabilities forever.

At least one state, Wisconsin, provides more final liability protection to sellers by issuing liability immunity, with no re-openers, to sellers who complete cleanup. Michigan releases buyers from liability if they successfully distinguish pre-existing contamination, but it would impose civil penalties on buyers who do not exercise due care with respect to the contamination. California offers liability protection to buyers who perform cleanup, but such buyers could lose the protection if they fail to comply with institutional controls.

U.S. States have begun to experiment with programs to reduce the cost of environmental insurance. Prior to approving a cleanup that employs monitored natural attenuation techniques, Wisconsin requires parties to secure environmental insurance.

C. Parties Commonly Engage in Private Mechanisms for Environmental Risk Sharing or Transfer During Property Transactions

Contaminated property transactions commonly employ a wide range of risk sharing techniques. Such risk sharing techniques, however, do not relieve a party's liability to the government. Thus, the comfort that responsible parties/sellers may gain is limited by the financial capabilities of the buyer who has agreed to accept future liability. Sellers tend to prefer mechanisms that would permanently transfer the liability for environmental risks to the buyer. In practice, this has proven to be hard to accomplish outside of obtaining an impenetrable indemnity from a rock solid buyer (of which there are few).

Because environmental regulators play a pivotal role in determining the type of cleanup to perform and who the responsible parties are, practitioners commonly make the point that the relationship with the regulator is a critical part of the contaminated property transactions. When regulatory liability becomes more certain or even quantifiable, parties are typically better equipped to devise agreements to shift the risk in a way that works for the transaction.

Because both sellers and buyers rarely possess unlimited financial capacity and because the regulatory environment makes future liability hard to predict, environmental insurance has increasingly played a key role to help facilitate contaminated property transactions.

D. Regulatory Liability Divides into Discrete Categories

As discussed above, CCME's 14th Principle characterizes environmental liability into three categories: cleanup liability, re-opener liability, and residual contamination liability. For the purpose of identifying financial assurance requirements, Protocol 8 appears to provide a different characterization. Protocol 8 divides future liability into cleanup liability, operation and maintenance liability, and IC/EC liability. MOE's typical CoC identifies future liability by reference to risk management assumptions and maintenance of "works," where "works" appear to include both operation and maintenance activities as well as engineering controls. In addition to these characterizations, private transaction experience has also tended to divide future liability into discrete categories.

The combination of these varied characterizations tends to divide regulatory liability under EMA into the following categories.

- 1) Cleanup Cost Liability. The cost to achieve the cleanup contemplated by an AiP and required for issuance of a CoC.
- 2) Operation & Maintenance Liability. The cost to maintain non-permanent "works," which continue to perform remedial action functions after CoC issuance.
- 3) 3rd Party Cost Recovery under EMA. The risk of future liability for cost recovery under EMA, that might be brought against responsible persons by new owners or off-site owners.
- 4) Institutional Control and Engineering Control Liability. The cost of maintaining ICs and ECs, as well as the risk of additional liability that might arise if such controls fail.
- 5) Government Re-Opener Liability. The risk of future liability that might arise from currently unknown conditions, such as undiscovered releases or from new information related to contaminant risk.

Note, none of these categories cover new releases caused by buyers. Such new releases would not fall within the scope of liability addressed by legislative schemes to provide for liability relief and/or transfer.

II. Recommendations for Liability Transfer Options

The following liability transfer options provide independent means to transfer liability away from sellers. Options 1 through 4 build upon one another. Option 1 pertains solely to IC/EC liability, while option 4 provides for a wholesale immunity of all future environmental liability that also leverages risk transfer measures. Finally, option 5 covers the option most directly contemplated by the 14th Principle. Under this option, British Columbia would approve site specific liability transfer agreements.

Any one or all of these recommendations could be implemented and, depending on which were implemented and the details of their implementation mechanisms, British Columbia could significantly alter EMA's current liability regime to one that provides greater post-cleanup immunity, as contemplated by the 14th Principle.

A. Option 1: Improve Institutional Control and Engineering Control Enforcement

This option would allow the direct enforcement of IC/EC restrictions through injunction or civil penalties, without the need to re-open cleanup decisions. Because ICs impose future use restrictions and require EC compliance, this option would cover IC/EC liability. Depending on how this option were implemented, it could either immunize responsible party/sellers from liability or, if it did not provide immunity, it would dilute their long term liability by providing a direct means to enforce ICs against subsequent owners. Thus, sellers and buyers (because EMA holds both liable as responsible persons) would remain liable for all other elements of regulatory liability - cleanup costs liability; government re-opener liability; 3rd party cost recovery; operation and maintenance. But this option would provide a direct path to enforce IC/ECs against subsequent parties and, thus, tend to shift that liability to subsequent owners.

This option would affect risk-based cleanups most directly, but it would also affect cleanups completed to numerical standards. Risk-based cleanups assume particular land use scenarios and, thus, IC/EC restrictions are commonly imposed through conditions in AiPs or CoCs. As discussed above, numerical standards set forth cleanup criteria for soil, sediment, surface water and groundwater under five future land use scenarios – agricultural, commercial, industrial, urban park, and residential. Thus, numerical standards may also assume that future site uses will be limited to a particular use. In order to assure compliance with such a future uses, ICs may be required.

A recent DPRA¹⁹⁸ report provided a detailed analysis and recommendations for improved IC enforcement. The report offered two alternative recommendations for making ICs enforceable by the government against subsequent parties. The first alternative would require the use of covenants whenever site cleanup does not allow for

¹⁹⁸ See DPRA, Institutional Controls in British Columbia: A Review of Current Practices and an Evaluation of Program Amendment Options (Mar. 31, 2006) (avail. at <http://www.env.gov.bc.ca/epd/remediation/reports/index.htm>).

unrestricted use. The second alternative would amend EMA to make AiP or CoC conditions enforceable against subsequent owners.

While both of these alternatives would have the same effect, the choice of one over the other seems to turn on administrative preference. In the U.S., most states have followed the covenant approach but one state, Wisconsin, follows an approach similar to one that would make CoC conditions run with the land. Since either option would have similar effect, either would tend to shift IC/EC liability away from responsible party/sellers by providing a direct means to enforce IC/EC liability against future owners.

The remaining recommendations made in the DPRA report sought to improve compliance assurance through inspections, tracking, improved site profiles, and the establishment of an IC fee. By improving compliance assurance, these additional mechanisms would tend to reduce IC/EC non-compliance and, thus, would tend to further reduce future risks of IC/EC liability to responsible persons/sellers.

1. Implementation Details and Considerations

Because the DPRA report comprehensively covers implementation details, here we focus only on the implementation mechanisms required to make ICs enforceable against subsequent owners. Depending on which implementation options were exercised, responsible persons/seller's IC and EC liability could be simply diluted or responsible persons/sellers could become immune from IC/EC liability.

Legislative or Regulatory Amendment The covenant approach would require regulatory amendments. Currently, Section 53(3) of EMA authorizes MOE to require responsible persons to register a restrictive covenant in "prescribed circumstances or for prescribed purposes." The regulation lays out these prescribed purposes, and allows MOE to require a covenant only if these purposes are "unlikely to be satisfactorily met by the entry of notations in the site registry." If the regulation simply deleted this phrase, MOE would possess wider authority to require restrictive covenants. The approach to make a CoC or AiP enforceable against subsequent parties would require a legislative amendment, because (as DPRA's report discusses) EMA does not currently provide for such enforcement. The legislative amendment might include language such as "MOE may bring enforcement actions against owners of contaminated sites who violate the conditions imposed within certificates of compliance or approvals in principle. Such enforcement actions may include injunctive relief to cease the violating activity, civil penalties, or an order requiring the owner to perform additional remediation."

Amendments to "Schedule B" Schedule B of MOE's typical CoCs and AiPs does not directly refer to and/or distinguish institutional controls, engineering controls, and operation and maintenance. MOE's typical schedule B could be amended to directly address ICs, ECs, and operation and maintenance, rather than referring more generally to risk assessments and maintenance of "works." This would allow future owners to clearly

identify the requisite IC/EC restrictions, and it would increase the visibility of such restrictions when CoC and AiPs are posted on MOE's Site Registry.

Relation to EMA § 46(1)(m) This section of EMA provides that "[A] responsible person for a contaminated site for which a certificate of compliance was issued and for which another person subsequently proposes or undertakes to: (i) change the use of the contaminated site, and (ii) provide additional remediation.¹⁹⁹ This language appears to relieve sellers from liability for the costs of cleanup that would arise because future owners choose to change the future use beyond the use contemplated by the Certificate of Compliance. An amendment to this language could also make it clear that responsible persons/sellers are not liable for any non-compliance of IC/EC by subsequent owners. Such language may add sub-section (iii) language to provide that "or violates the condition imposed within a certificate of compliance." Such additional language would immunize sellers from any liability arising from IC/EC non-compliance.

2. Summary of Strengths and Weaknesses

This approach would only address IC/EC liability and, thus, responsible persons/sellers might remain liable for other elements of liability. At sites where the other elements of liability appear remote, this option would provide powerful comfort to responsible persons/sellers. At the same time, it appears to provide a fair allocation of liability to buyers who must simply abide by the environmental conditions that exist for their property. This option also supports the polluter pays principle because it would not relieve responsible persons/sellers from performing cleanup.

In the case where other elements of liability remain as significant risks, this option could be less effective. In these cases, this option would impose all non-IC/EC liability on sellers and buyers and, therefore, non-clarity on future liability would remain.

B. Option 2: Seller Released From Liability after Cleanup Completed

This option builds upon Option 1. In addition to making ICs/ECs enforceable against subsequent parties, this option would provide responsible party/sellers with liability immunity after such sellers come forward to complete cleanup. This option would require the polluter to pay for cleanup, but then once completed, it would allow polluters to go free from liability. Because EMA holds buyers as responsible persons, any remaining post-cleanup liability would transfer to the buyer. The government would bear the risk that future liability would arise, but that the buyer would be unable to assume the liability.

Depending on how this option is implemented, responsible persons/sellers might be eligible for immunity at the AiP stage or, rather, not until the CoC stage.

¹⁹⁹ EMA § 46(1)(m).

1. Implementation Details and Considerations

AiP or CoC Trigger Two implementation options exist. First, the liability release could be triggered at the AiP stage. In this case, the seller would receive a conditional release from liability at the AiP stage, conditioned upon successful completion according to the terms of the AiP and completed upon issuance of a CoC. Thus, the immunity would not finally attach until the seller actually completed the cleanup. But the seller's liability would be bounded by the terms of the AiP as soon as the AiP issued. This AiP option would model after California's AB 389 approach, which triggers liability immunity upon cleanup plan approval and conditions the immunity on the promise to not "materially deviate" from the cleanup plan. Thus, this option would allow the immunity to remain as long as the responsible person/seller did not deviate from the agreement embodied in the AiP. Under this option, responsible persons/sellers could transfer property at the AiP stage and agree to perform cleanup even after the buyer takes ownership, with the comfort and incentive of knowing that once completed their immunity will attach.

Alternatively, the liability release could trigger at the CoC stage. Under this option, the AiP would not provide any liability release. Responsible persons/sellers might still transfer property prior to CoC issuance, but their liability would not be bounded by the AiP.

Effect on Current AiP/CoC Process This option need not change the current process, unless parties expressly seek liability immunity. Parties could seek a conventional AiP or CoC, without liability immunity, if they choose. But this option would allow parties to also seek AiP and CoCs "with immunity protection." When doing so, this option would require amended AiP procedures. Under current practice, AiP applications typically provide only general descriptions of remediation approaches and rarely include cost estimates. If parties seek AiPs "with immunity protection," remediation plans that support AiP issuances should provide more detailed analyses and cost estimates. Such analyses and estimates would allow Approved Professionals and MOE to craft AiP agreements such that their potential "deviation" could be measured. Because CoCs certify that cleanup was performed in accordance with the AiP, amended or additional AiP guidance or procedures would probably suffice and amended CoC procedures do not appear necessary.

Application at High Risk Sites The AiP "with immunity protection" might prove risky at high risk sites, because estimating cleanup costs would tend to be most difficult and uncertain at these sites. Thus, this option could leverage Protocol 8 as necessary to require financial assurances for cleanup completion, prior to issuing an AiP "with immunity protection" at high risk sites. Other than the extra financial assurance protection to assure cleanup becomes completed, this option appears suited for high risk sites.

Operation & Maintenance Liability Operation and maintenance includes efforts necessary to maintain cleanup operations as they continue to perform cleanup over time. As a matter of policy, operation and maintenance might be characterized as a component

of cleanup and, therefore, sellers would remain liable (and not receive immunity) until completion. Or, operation and maintenance might be characterized as a post-cleanup measure and, in turn, responsible parties/sellers would not be responsible but, rather, operation and maintenance would transfer to buyers. Keeping in mind the 14th Principles tendency to shift liability away from the sellers, the better option might push any operation and maintenance obligations to the buyer and, accordingly, issue CoCs to responsible party/sellers even though operation and maintenance remains ongoing. In any case, AiPs and CoCs should expressly identify IC, EC, and operation and maintenance obligations.

Off-Site Plumes Under EMA, off-site property owners do not qualify as responsible persons and, therefore, they do not carry liability. When off-site plumes exist, the policy question becomes raised of whether completion of cleanup might be attained when only the source parcel has been remediated, but off-site properties remain contaminated. Under this option, responsible person/seller immunity could be granted on a property-specific basis and, thus, immunity for source parcels could be granted even though off-site contamination remains. But allowing implementation in this manner would keep sellers liable for off-site contamination. In the combined spirit of both the polluter pays Principle and the 14th Principle, the better option might provide responsible persons/sellers with liability immunity only when they address both the source parcel and off-site parcels.

Legislative Amendments Required This option would require an amendment to Part 4 of EMA. Part 4's section listing "persons not responsible" could be amended to include a provision that would make persons not responsible once they have received an AiP unless they materially deviate from the AiP. Alternatively, Part 4 could be amended to make persons not responsible when they receive a CoC. Such amendments would provide liability release to responsible person/sellers who actually receive AiPs or CoCs, but it would not affect other responsible persons who did not actually receive the AiP or CoC. Thus, this amendment would tend to only cover responsible person/sellers. In order to implement this option, legislative amendments would also need to make Section 60 re-openers not available for such AiP/CoC liability protection. Section 48 of EMA grants authority to order remediation against "responsible persons." Because this option would exclude responsible persons/sellers from the meaning of "responsible person" after CoC issuance, the director could not issue a remediation order to a responsible person/seller.

2. Summary of Strengths and Weaknesses

This approach provides a clear liability release to responsible party/sellers. Thus, it would provide responsible party/sellers with a clear path towards liability immunity and, in turn, shift post-CoC regulatory liability to buyers. These clear rules would enable private deals for liability shifting to be crafted with more certainty "around the regulatory drivers." For example, liable sellers and buyers would still be free to share the costs of cleanup however they desired, but the law would simply be more clear that post-CoC sellers no longer remain liable. By limiting seller liability, this option would pose some

risk to the government that new liability would arise but that the buyer, who would remain liable, would be unable to pay. At high risk sites, cleanup completion could be assured through Protocol 8's financial assurance requirements. To the extent that seller fears of liability limit property redevelopment, this option would help redevelopment. This option, however, would do nothing to encourage buyers. Indeed, all future liability risks would shift to the buyers. Thus, this option runs the risk of providing incentives to sellers only at the expense of buyers and, therefore, continuing to face the same type of redevelopment barriers that the 14th Principle sought to overcome.

C. Option 3: Seller Released from Liability After Cleanup Completed; Buyer Liability Also Released But Buyer Must Exercise Due Care.

This approach builds upon Options 1 & 2. In addition to making ICs/ECs more enforceable and in addition to relieving sellers of liability after cleanup is completed, this option would also relieve buyers of all future liability, except for IC/EC liability (and operation and maintenance obligations, if applicable). This option would, however, provide contingencies on such buyer immunity. Under this option, buyers would be required to exercise due care. MOE would bear the risk that future liability would arise, because this option would potentially relieve all responsible parties from future liability. But because this option would impose a due care requirement on buyers, buyers would possess an obligation to keep the property safe (an ostensibly much easier requirement than remediation) in light of newly discovered contamination. Thus, even though MOE would bear the risk for future cleanup, this option would tend to limit the possibility of uncontrolled dangerous site uses.

1. Implementation Details and Considerations

The implementation details and considerations for this option include the same issues as discussed for option 2. In addition, this option's implementation details must consider the important issue of buyer due care.

Due Care Protocol or Procedure EMA already imposes a due care requirement as a condition to its innocent purchaser liability protection. For the purpose of this option, however, additional protocol or procedure will be required to address due care. Based on the U.S. experience with the bona fide prospective purchaser liability protection under CERCLA, due care criteria tend to be difficult to establish in general rules because due care analysis tends to be site specific. When new contamination or post-CoC issues are discovered, due care tends to require something less than remediation and something more than doing nothing. Because this report focuses on seller issues, and because subsequent MOE-sponsored discussion papers are expected to focus on buyer issues, the details of due care fall outside the scope of this report.

Legislative Amendments In addition to the amendments discussed under option 2, this option would require an amendment to Part 4 of EMA. Part 4's provisions covering "persons not responsible" could be amended to include buyers who did not cause contamination and who exercise due care with respect to contamination. CERCLA

provides similar language and could be looked to as a model. Like the case for option 2, legislative amendments must also make Section 60 of EMA not applicable to the immunity. Also like the case for option 2, this option would exclude persons from the meaning of "responsible persons" and, therefore, would appear to immunize them from remediation orders under Section 48 of EMA.

Off-Site Plumes The off-site plume issue applies differently to the seller releases and the buyer releases from liability. For sellers, as discussed above under option 2, liability releases for sellers could be granted on a parcel specific basis, or only if the responsible party/seller addressed all off-site properties affected by the source parcel's contamination. As also discussed under option 2, the combined spirit of both the polluter pays principle and the 14th principle tends to suggest that liability immunity to responsible persons/sellers should only occur when such persons address both the source parcel and off-site parcels. This recommendation reflects the fact that responsible persons/sellers might have contaminated more than one property. Buyers, on the other hand (assuming they did not cause the contamination), do not possess responsibility. Thus, the liability protection provided to buyers under this option should be granted on a parcel specific basis, even if off-site contamination exists.

2. Summary of Strengths and Weaknesses

This option would continue to make responsible persons/sellers liable until CoC issuance and, thus, it would not violate the polluter pays principle. After CoC completion, this option would provide full liability relief to sellers, and shift some post-CoC liability to buyers (IC/ECs and operation and maintenance as applicable), and also impose a general due care standard upon buyers. Thus, this option would immunize all parties from re-opener liability and 3rd party cost recovery liability. It would both clarify liability rules and also provide liability protection and redevelopment incentives to both sellers and buyers. Therefore, it would tend to support the redevelopment incentive policies contemplated by the 14th Principle. The government, however would bear the risk that post-CoC liability would arise. Buyers would only be liable for issues arising from IC/EC failures and their general obligation to exercise due care. No parties would be liable for future cleanup, if it were to be required.

D. Option 4: Sellers and Buyers Released from Liability if Liability Can Be Transferred to Environmental Insurance (or Another Qualified Assurance Mechanism); Buyers Must Exercise Due Care; Land Remediation Fund to Cover Any Additional Liability

This option builds upon Options 1, 2, and 3, but would add an element to reduce the liability risk to the government. Option 3 would transfer the seller's post-CoC re-opener liability and 3rd party cost recovery liability to the government, while limiting the buyer's liability to only due care and IC/EC liability. This option, Option 4, would require the seller to shift re-opener liability and 3rd party cost recovery liability to an environmental insurer (or another type of qualified assurance mechanism), rather than to the government. The government, therefore, would not assume the full re-opener and 3rd

party cost recovery liability until expiration of the term of the environmental insurance policy. During the period when the liability would be covered by insurance, the government's ability to recover future liability would be limited by the limits of the insurance policy.

This option envisions the use of the EMAA's Land Remediation Fund, though not yet in force, to provide monies for future liability that would not be covered by environmental insurance.

1. Implementation Details and Considerations

Qualified Assurance Mechanism Implementation of this option would face the considerable task of identifying acceptable assurance mechanism to which future liability may be transferred. Environmental insurance provides the most apparent assurance mechanism, and a simple implementation (like Wisconsin's approach to monitored natural attenuation) would simply identify environmental insurance as the single acceptable assurance mechanisms. Different environmental insurance entities exist, however, and thus this option would require some type of process to set minimum qualifications for both insurance companies and the insurance policies that would be acceptable. In addition to environmental insurance, other assurance mechanisms exist and could be approved for use under this option. Liability transfer companies and annuities provide examples of other assurance mechanisms.

Time-Frame This option contemplates the temporary transfer of liability before the MOE and the Land Remediation Fund eventually accept it. This option could build in flexibility, through regulation, that would allow MOE to set varied time-frames for risk transfer. For example, low and medium risk sites may require ten years of environmental insurance, while high risk sites may require more.

Remediation Fund Regulations or Protocols EMAA's Land Remediation Fund contemplate MOE regulations, and this option would require the regulations to address the use of the fund to pay for environmental regulatory liability that had been previously released from responsible parties. Such released liability could simply be defined as "orphan" liability, and be grouped together with other orphan share liability that exists, for example, where no viable responsible person ever existed in the first instance. In addition to addressing how the fund would pay when future liability arose, new rules must be established to address capitalization of the fund. The Land Remediation Fund may, in theory, receive monies from any variety of taxes, fees, bonds, government appropriations, or other sources.

Legislative Amendment This option would require amendments to Part 4 of EMA. Such amendments would need to include those listed under options 1 through 3, as well as language that conditioned seller liability release on the temporary transfer of liability to a qualified assurance mechanism.

2. Summary of Strengths and Weaknesses

This option allows the government to reduce its risk by temporary transferring future liability risks to qualified entities. This option relies on the strength of qualified entities to assume the risk, however, and it may require non-trivial new rules covering qualified entities and qualified risk transfer products. In addition, this option relies on the use of a Land Remediation Fund that, although contemplated by EMAA, has not been brought into force. Capitalizing the fund and establishing rules for the payment of monies from the fund could prove burdensome. But this option would provide meaningful liability relief to sellers and buyers and could, therefore, do much to help redevelop contaminated properties.

E. Option 5: Government Approval of Private Liability Transfers

This option would establish the implementation example provided by the 14th Principle as well as the draft Transfer Agreement process established under Part 5 of EMA (for mining sites). This option would authorize MOE to offer Transfer Agreements to shift the environmental liability between parties, under conditions acceptable to the MOE. The draft Transfer Agreement Procedure for mining sites provides a good template, and a similar Part 4 process may benefit from the thinking put into this draft Transfer Agreement Procedure. This flexible approach may compliment any of the approaches laid out in options 1 through 4, and might be reserved for use when site circumstances demand additional clarity on liability transfer, notwithstanding the implementation of options 1 through 4.

1. Implementation Details and Considerations

AiP or CoC Stage Just as in the case for the previous options, this Transfer Agreement contemplated by this option could be granted at the AiP stage or the CoC stage. However, as discussed under option 2, a more comprehensive "AiP with immunity" would be required, providing more detailed cleanup plans and cost estimates than And "AiP with immunity" guidance should be developed.

Legislative Amendment Required Although Part 5 of EMA provides statutory authority for Transfer Agreements, Part 4 does not. Thus Part 4 would require amendment to include Transfer Agreement provisions similar to those provided in Part 5.

Transfer Agreement Procedure. A Transfer Agreement Procedure, for Part 4 contaminated sites, would be required. Such a procedure could largely adopt the concepts and flexible approach already laid out in the Part 5 Transfer Agreement Procedure.

2. Summary of Strengths and Weaknesses

This approach allows a flexible approach for transferring environmental liability, and such flexibility provides strengths and weaknesses. On one hand, Transfer Agreements can be tailored to any site and transaction circumstance. Even if the liability options outlined as options 1 through 4, cases would almost certainly exist that would call for the additional liability transfer clarity that this approach could provide. Thus, this Transfer Agreement tool could prove useful. But, as a practical matter, Transfer Agreements require a three-party negotiation between the MOE, property seller, and buyer. Since each party stands to be meaningfully impacted by the actual agreement, lengthy negotiations seem likely to be the rule rather than the exception. Negotiating and signing such agreement could pose a strain on MOE resources, but nonetheless the power of this approach's flexibility could prove valuable in some cases.