

**Liability Protection for Approved Professionals in British Columbia:  
Report to the B.C. Ministry of Water, Land and Air Protection**

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3 May 2005

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# Liability Protection for Approved Professionals in British Columbia: Report to the B.C. Ministry of Water Land and Air Protection

## Executive Summary

### Introduction

The Province implemented comprehensive legislation and regulations for contaminated sites in 1997 under the *Waste Management Act*. In 1999, the Contaminated Sites Regulation was amended to create a roster of professional experts whose recommendations could be relied upon by the Ministry of Water, Land and Air Protection (“MWLAP”) in deciding whether or not to issue legal instruments such as approvals in principle and certificates of compliance. In 2004, the terminology for these professionals was changed to “approved professional” under the new *Environmental Management Act* (the “EMA”). Currently, approved professionals make recommendations to the MWLAP staff about whether or not a site is contaminated, if soil can be safely relocated, if a remediation plan should be approved or if a certificate of compliance should be issued. In carrying out these activities, approved professionals have voiced concerns about their liability risks.

At the same time, the MWLAP is considering options for devolving to approved professionals greater responsibility for the review and approval of contaminated sites reports, plans and legal instruments such as those mentioned above. In order to assist in its deliberations, the MWLAP asked Birchall Northey for an independent review of the liabilities and liability protections that environmental professionals have in British Columbia as well as in fourteen other jurisdictions. The MWLAP also requested that the review and analysis be applied to the following three options concerning the future activities of approved professionals in British Columbia: (1) the current system; (2) a hybrid system that shares the responsibility for contaminated site remediation between the government and approved professionals; and (3) a complete devolution of responsibility to approved professionals for investigating, remediating and signing-off on low and moderate risk sites. Birchall Northey was asked to provide comments and recommendations for each of the options.

### The Three Options Considered

- **Option 1** involves retaining the current system in British Columbia. The system is enabled by section 42 of the EMA and paragraph 49.1 of the *Contaminated Sites Regulation*, Reg. 375/96 (the “CSR”).<sup>1</sup> Currently, environmental consultants can be appointed to the Roster of Approved Professionals (the “Roster”) by the Director of Waste Management (the “Director”) who acts on the advice of the Roster Steering Committee (the “Committee”). MWLAP officials rely on the opinions of approved professionals when making decisions about the issuance of instruments under the EMA.

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<sup>1</sup> 49.1 For the purpose of determining the manner and extent of the review that must be undertaken of the work on which an application referred to in section 15 (6), 43 (3), 47 (1.41) or 49 (7), a director may consider whether the application includes the recommendation of an approved professional in respect of the decision requested in the application.

- **Option 2** involves the creation of a hybrid system that shares the responsibility for contaminated site remediation between the government and approved professionals. Based on earlier studies and reports reviewed in Appendix 2 to the report, we have assumed that the hybrid system will involve the creation of a Licensed Environmental Professional (“LEP”) system using a Society as the legal entity to regulate approved professionals, which will replace the existing Roster of Approved Professionals system. In reviewing Option 2, we have considered two variations: Option 2A where the MWLAP retains legal sign-off on regulatory instruments and Option 2B whereby sign-off is devolved to Licensed Environmental Professionals (“LEPs”).
- **Option 3** involves the creation of an independent self-regulated system for approved professionals which takes on all of the responsibility for addressing low and moderate risk contaminated sites. Under this Option, a new profession of “licensed environmental professionals” would be created under enabling legislation, establishing an independent legal body to govern the profession. The legislation would empower a supervisory board to set registration and professional standards and enforce such standards through a disciplinary process. Under this Option, licensed environmental professionals would be given legal authority to sign regulatory instruments relating to low and moderate risk sites. Option 3 shares characteristics with the models in place in Massachusetts and Connecticut.

As one moves from Options 1 to 3, approved professionals are given greater independence and responsibility while the role of government becomes increasingly less prominent.

### **Objectives of a Contaminated Site Regime**

For the purposes of arriving at our recommendations, we used the following objectives as a tool to evaluate each of the three Options.

1. Protects the public interest by providing transparency and accountability;
2. Encourages the cleanup and redevelopment of contaminated properties, including brownfields which pose a low or moderate risk;
3. Reduces the reliance on MWLAP staff in reviewing contaminated site submissions, thereby reducing MWLAP’s costs of program administration while enhancing the participation of approved professionals with respect to low and moderate risk sites;
4. Results in efficient, timely and cost effective cleanups;
5. Does not encourage litigation due to its structure and operation;
6. Ensures that the risks of liability for approved professionals are clear and manageable;
7. Attracts and maintains highly skilled and qualified professionals;
8. Produces instruments that can be relied upon by the business community and other stakeholders;
9. Provides clear and complete professional standards that are easy to understand and apply;
10. Ensures that sites are remediated in a manner that protects human and environmental health; and
11. Leaves room for the exercise of professional judgment.

## **Option 1**

### **Conclusions**

The current B.C. regime, described in Option 1, seems to be working well, as approved professionals have become familiar and accustomed to its requirements. This Option poses the lowest liability risk to approved professionals of the three Options considered, encourages the cleanup and redevelopment of contaminated sites, attracts and maintains highly skilled and qualified professionals, protects the public interest, and produces instruments that can be relied on by the business community and other stakeholders. Further, approved professionals, professional associations and insurers reported being most comfortable with the liability risks associated with this Option coupled with the ability to obtain insurance to protect against those risks at affordable rates.

However, the MWLAP has indicated that the objectives of lower costs and reducing reliance on the MWLAP staff so that it can focus on high-risk sites should trump the other stated objectives for a contaminated sites regime. Option 1 does not result in the desired reduction of costs for the MWLAP, nor does it address the delays associated with the current requirement for government sign-off. From the MWLAP's perspective, selecting Option 1 would not enhance efficient, timely and cost effective approvals. Further, selecting Option 1 would not permit the devolution of sign-off on regulatory instruments to approved professionals that the MWLAP stated it was seeking in the Terms of Reference for this project.

## **Option 2**

### ***Option 2A***

### **Conclusions**

A hybrid system whereby the MWLAP staff sign-off on regulatory approvals after receiving recommendations from licensed environmental professionals, for low and moderate risk sites, does not pose any more liability concerns for approved professionals than under the current system. Further, this Option does not seem to pose any difficulty for approved professionals obtaining reasonably priced liability insurance.

### **Advantages**

The comparative advantages as between Options 1 and 2A would remain much the same as follows:

- (i) lower administrative cost for the MWLAP
- (ii) would still attract and maintain highly skilled and qualified professionals;
- (iii) would still encourage the clean-up and rehabilitation of brownfield sites;
- (iv) would produce instruments that the business community and other stakeholders could rely on; and
- (v) would leave room for the exercise of professional judgment.

Option 2A builds incrementally on the current system and would therefore be familiar to all contaminated site stakeholders. Further, the LEP system would not require significant statutory or regulatory changes to the EMA, as it could largely build on the existing regulatory framework. This would enable a timely and cost effective transition between the two regulatory models. We note that the main difference between Option 1 and Option 2A is the creation of an LEP society.

### **Disadvantages**

This new hybrid model does, however, pose some increased director and officer liability risks for members of the LEP Board because this Board would no longer be appointed by the MWLAP's Director and government immunity from liability would no longer be transferred to Board members.

Another disadvantage with this Option is that the MWLAP would continue to expend human and financial resources associated with signing off on regulatory instruments.

### **Option 2B**

#### **Advantages**

Option 2B retains all of the advantages of Option 2A with the added benefit that it facilitates the devolution of regulatory approval to LEPs. Further, it meets the MWLAP's objective of reducing the reliance on MWLAP staff in reviewing contaminated site submissions, thereby reducing the costs of program administration while enhancing the participation of approved professionals with respect to low and moderate risk sites.

#### **Disadvantages**

With devolution comes the concomitant problems of increased liability exposure and the potential for increased difficulty in obtaining insurance at a reasonable price.

### **Recommendations**

#### ***LEP Board***

- To deal with the increased liability of the LEP Board, the MWLAP should consider whether it will appoint LEP Board members in order to provide them with liability protection. In this regard, we note that in Massachusetts and Connecticut, two jurisdictions with highly devolved regimes, the State Department of Environment appoints the Chair of the Board and the Governor appoints the remaining 10 members of the Board. In both of these regimes members are granted government immunity as long as the environmental professional is acting within the scope of his or her office. Should any litigation be started naming the Board member, he or she will be defended by the Attorney General's office. Alternatively, the LEP Board could address liability concerns by obtaining directors and officers insurance, which is reported as being widely available.

## **Option 3**

### **Conclusions**

Option 3 has some key disadvantages and uncertainties relating to the potential for increased liability exposure for environmental professionals as well as to the availability of affordable insurance. There are also some concerns, in light of the Australian examples, that Option 3 will not produce efficient, timely and cost effective cleanups if approved professionals insist on extra sampling or refuse to sign-off on instruments if they are uncomfortable with the wording of those instruments. There is also the concern of putting into place a legislated regime, including the establishment of a self-regulating body, in a timely fashion. It is estimated that this process would take a least 2 years. Based on our conversations with approved professionals and the insurance industry, there is little appetite for a move to Option 3 at the present time.

### **Advantages**

Option 3 would appear to achieve the key MWLAP objective of cost reduction through devolution of responsibilities to approved professionals. Of the Options considered, this Option reduces the reliance on the MWLAP staff and lowers costs for the MWLAP the most while enhancing the role of approved professionals to the greatest extent. This Option would allow the MWLAP to focus on high-risk sites, which could, in turn, facilitate protection of human and ecosystem health through the clean up of the most polluted sites in B.C. Like the other Options, Option 3 would also encourage the cleanup and rehabilitation of low and moderate risk sites while producing instruments through approved professional sign-off that could be relied on by the business community.

### **Disadvantages**

The most significant disadvantage associated with Option 3 is the potential for increased liability exposure for approved professionals. Of the three Options considered, Option 3 poses the highest risk potential for LEPS. This is because the instruments signed by approved professionals are public documents, posted on the environmental site registry and will be relied upon by a number of interested parties including municipalities, purchasers, and lenders. Under Option 3, approved professionals could be exposed to lawsuits by third parties as well as lawsuits resulting from any errors and omissions.

Insurance could be difficult to obtain at an affordable rate, particularly for members who have not previously required insurance, such as the agrologists and biologists. The possibility of creating a program or group insurance plan should be investigated as a way of increasing availability and lowering costs. However, we have been cautioned that the practices of approved professions are too varied to support such a program. Further, there is concern that the number of approved professionals in B.C. is not high enough to cover the costs of establishing a self-regulating profession. American jurisdictions with self-regulating professions in place have membership numbers in the hundreds whereas B.C. does not have nearly that many involved in the profession.

Pursuing Option 3 would involve a significant overhaul of the current regime. This could result in some uncertainty among stakeholders in the short term while at the same time imposing higher set-up costs than those associated with the other two Options. It also

seems very unlikely that a self-regulating profession enshrined in legislation could be created by the target date of April 2006.

## **The Preferred Option: A Staged Process**

### **Option 2A**

We suggest that the MWLAP start with Option 2A, while continuing to sign-off on regulatory approvals as the LEP system gets up and running. Option 2A would accomplish a number of the objectives that are prompting a regime change. This Option would: lower administrative costs for the MWLAP to a certain extent as it would no longer appoint the Roster Steering Committee or be as involved in the Roster Audit Process; attract and maintain highly skilled and qualified professionals; encourage the clean-up and rehabilitation of low and moderate risk sites; and produce instruments that the business community and other stakeholders can rely on. If the MWLAP retains the function of final sign-off on legal instruments, there would likely not be a need for significant changes to insurance policies and premiums.

Most stakeholders interviewed for the purposes of this report were not uncomfortable with the liability and insurance risks posed by Option 2A as the MWLAP would retain the function of final sign-off on legal instruments. The implementation of Option 2A would also meet the key timeline of April 2006 that has been set by the MWLAP and afford all parties the opportunity of building a regime on a step-by-step basis that can address key issues and problems as they arise.

Once some key, articulated conditions have been met, the MWLAP could implement Option 2B, if desired, in order to attain its stated objective of devolving regulatory sign-off to approved professionals. This transition should only be done once the LEP system is well established and running smoothly. If and when the MWLAP decides to move to Option 2B, the government would need to address issues such as the availability of affordable insurance as well as the increased liability exposure associated with this transition. Should the MWLAP determine that Option 2B would not satisfactorily attain the objectives associated with a regime change, then Option 2A could remain in place. On the other hand, if the MWLAP should determine that the advantages of Option 3 outweigh its disadvantages, then Option 2B could be a useful transition stage towards achieving Option 3.

### **Recommendations while Devolving Sign-off to Approved Professionals**

These recommendations are applicable if the MWLAP decides to implement either Option 2B or Option 3.

#### ***The Wording of the Approval***

- It is our view that the wording of the approval signed by approved professionals would be a key tool for managing their liability. We strongly suggest that consideration be given to changing the wording of the instruments that are currently signed by the MWLAP officials so that they do not resemble guarantees or warranties. In our view, it is not reasonable to expect approved professionals,

without the immunity protection given to government, to sign certificates with the same wording as those currently being issued by the MWLAP.

- We note that:
  - Approved professionals, who are members of APEGBC, are forbidden by their Codes of Ethics to sign guarantees with respect to site condition. A professional can only attest to the fact that he or she has met the standard of care practiced by the profession;
  - If the liability issues are not properly managed, some approved professionals may choose to leave the profession or not abide by the rules if they are being asked to take on what they see as excessive liability risks. This has happened in other jurisdictions. In Ontario, for example, when the wording of Records of Site Condition was interpreted as amounting to a guarantee, many environmental consultants refused to sign them. In the Australian states of Victoria and New South Wales, where the certificates that environmental auditors are asked to sign are guarantees, many environmental auditors insist on more site sampling, thus driving up the cost of site remediation. In some cases, environmental auditors are refusing to sign certificates that state that the site is “clean”;
  - An approval that contains a warranty or a guarantee would likely void an approved professional’s insurance; and
  - Almost all of the other jurisdictions which require environmental consultants to sign regulatory approvals have approvals that are not worded as guarantees or warranties.
- We do not see the change in certificate wording as creating uncertainty for the development community. Similar wording exists in and Massachusetts and has not prompted concerns. Ontario has recently changed the wording of its Records of Site Condition so that it no longer amounts to a guarantee. This move has not prompted concern within the development or lending community.
- Limiting approved professional's sign-off to Approvals in Principle, Soil Relocation Agreements and Determinations and reserving the sign-off on Certificates of Compliance to the MWLAP is another way of reducing an approved professional’s liability risk.

### ***Other Methods for Limiting or Reducing Liability***

#### *Granting Approved Professionals Government Immunity or Protected Person Status:*

- The MWLAP officials we interviewed were very clear that the liability of approved professionals ought not be limited by granting them immunity similar to that enjoyed by the government or naming them as “protected persons” under section 61 of the EMA. To do otherwise would mean that third parties affected by a negligent assessment or cleanup would be unable to recover for their losses thus

undermining public confidence in the responsibility and accountability of approved professionals. We note that only one of the 14 other jurisdictions reviewed for the purposes of this report grant immunity to the equivalent of an approved professional.

- It is our view that changing the wording of the certificate is a preferable solution to granting approved professionals immunity. However, should the MWLAP decide not to change the wording of certificates, it should consider some form of protected person status to ensure continued participation of approved professionals in the regulatory process.

## **Other Recommendations**

### *Insurance*

- The MWLAP should enter into discussions with key players in the insurance industry in British Columbia to clarify the scope of insurance coverage available for approved professionals. To this end we note:
  - Errors and omissions insurance is designed to cover losses due to the insured consultant's negligence, and any suggestion that errors and omissions insurance will, in *all* cases, extend to cover damages resulting from a consultant's status as a "responsible person" under the *EMA* is optimistic. Coverage will depend on the specific language of the insurance policy and the origin of any judgment against the consultant, i.e., damages in negligence versus damages resulting due to a consultant's status as a "responsible person."
  - Of particular importance, is whether insurers will continue to apply design/build exclusion clauses, (originally intended for structural engineers), to the work of environmental consultants. Insurers are taking the position that an approved professional who conducts a site investigation, designs a remediation program, implements the program and advises the MWLAP on behalf of his or her client would void the insurance policy. As many environmental consultants are currently undertaking the three practices, it would be prudent for all parties to confirm the scope and application of design/build exclusion clauses.
  - The MWLAP and the professional associations should also encourage approved professionals to review their insurance policies with their respective insurers to determine the extent of coverage.
- The MWLAP (or one of the professional associations) should enter into discussions with key players in the insurance industry in British Columbia to investigate the potential of setting up a program to manage insurance premiums. We were told that getting insurance coverage as part of a program would generally save the insured at least 30 % in premiums.
- While a requirement to disclose insurance coverage in lieu of mandatory insurance could help ensure that LEP work does not become the exclusive

domain of environmental consultants working at larger firms, it is our view that a disclosure requirement would result in a two-tiered system. Most owners may still prefer to hire an LEP that has insurance coverage. Therefore, LEPs without insurance (generally those that work with smaller firms) would still be disadvantaged by the system. We therefore recommend that the MWLAP work with the insurance industry to ensure that all LEPs have access to affordable insurance.

- Before making any final decision with respect to the implementation of a new regime, the MWLAP should meet with major insurers in British Columbia to discuss the implications of specific regulatory proposals and wording. Every person we spoke to in the insurance industry informed us that they could only provide useful and detailed feedback on the three Options if they were provided with copies of the legislative or regulatory wording. The three Options, as defined in the Terms of Reference, were not detailed enough for them to offer detailed advice.
- The liability problems associated with regime change must be addressed independently from the insurance issues posed by the new regime. It is important that insurance not be used as a back-stop, by asking the insurance industry to take on all the additional liability risks associated with a new contaminated sites regime. We have been advised that using insurance in this manner could undermine future availability of insurance for approved professionals in B.C.

#### *MWLAP Guidance*

- Low, moderate and high risk sites need to be better defined to eradicate confusion over which sites are subject to the LEP Process.
- Ensure that government guidelines and standards are complete and include the full range of contaminants in the published numeric standards so that a site can be addressed by approved professionals with minimal need to consult the MWLAP for advice.
- Clarify Protocol 6 to ensure that it is clear which sites approved professionals can offer recommendations to the MWLAP or sign-off on, depending on the option selected by the government.

#### *Process*

- The new regime should not focus on process at the expense of accurate, complete and thorough site investigations and clean-ups. There must be room left for the exercise of professional judgment because the profession of approved professionals is relatively new, and professional competence must be fostered and encouraged.

*Overall*

- The preferred option should be structured in such a way as to maximize the eleven stated objectives in this report, and should, most importantly, minimize the risks of litigation involving approved professionals. It is our view that the best way to do this is by ensuring that any contaminated sites regime is properly funded (publicly and/or privately) with sufficient administrative resources.

## TERMINOLOGY AND ABBREVIATIONS<sup>1</sup>

AIP	Approval in Principle
APEGBC	Association of Professional Engineers and Geoscientists of British Columbia
Approved professional	Refers to members of the Roster of Approved Professionals in B.C.
BCIA	British Columbian Institute of Agrologists
BLG Report	Craig Godsoe and Tracey Sandgathe, Borden Ladner Gervais LLP, "Contaminated Site Administration in British Columbia: Report to B.C. Ministry of Water, Land and Air Protection," May 16, 2002.
Bull, Housser and Tupper legal opinion	Bull Houser & Tupper, Letter to Roster Steering Committee "BC Ministry of Water, Land and Air Protection - Experts Roster," November 16, 2001.
CAB	College of Applied Biology of BC
CCME	Canadian Council of Ministers of the Environment
Committee	Roster Steering Committee
COC	Certificate of Compliance
CSR	Contaminated Sites Regulation
Determination	Determination that a Site is/is not contaminated
Director	Director of Waste Management
E & O insurance	Errors & Omissions Insurance. This is also referred to as Professional Liability insurance.
EMA	Environmental Management Act
Environmental consultant	Generic term referring to person who is not

<sup>1</sup> This list of Terminology and Abbreviations defines words and acronyms used in the body of the main report.

## TERMINOLOGY AND ABBREVIATIONS<sup>1</sup>

AIP	Approval in Principle
APEGBC	Association of Professional Engineers and Geoscientists of British Columbia
Approved professional	Refers to members of the Roster of Approved Professionals in B.C.
BCIA	British Columbian Institute of Agrologists
BLG Report	Craig Godsoe and Tracey Sandgathe, Borden Ladner Gervais LLP, "Contaminated Site Administration in British Columbia: Report to B.C. Ministry of Water, Land and Air Protection," May 16, 2002.
Bull, Housser and Tupper legal opinion	Bull Houser & Tupper, Letter to Roster Steering Committee "BC Ministry of Water, Land and Air Protection - Experts Roster," November 16, 2001.
CAB	College of Applied Biology of BC
CCME	Canadian Council of Ministers of the Environment
Committee	Roster Steering Committee
COC	Certificate of Compliance
CSR	Contaminated Sites Regulation
Determination	Determination that a Site is/is not contaminated
Director	Director of Waste Management
E & O insurance	Errors & Omissions Insurance. This is also referred to as Professional Liability insurance.
EMA	Environmental Management Act
Environmental consultant	Generic term referring to person who is not

<sup>1</sup> This list of Terminology and Abbreviations defines words and acronyms used in the body of the main report.

	part of a licensed or regulated profession both in B.C. and the other jurisdictions reviewed. (e.g. in B.C. an “environmental consultant” is a professional who is not a member of the Roster of Approved Professionals).
Environmental professional	Generic term referring to a person who is a part of a licensed or regulated profession (e.g. when referring to an environmental professional this would include an approved professional in B.C., a qualified professional in Ontario and a Licensed Site Professional in Massachusetts).
EPA	Environmental Protection Agency
Framework Report	Waldemar Braul, McDonald & Company, "British Columbia's New Licensed Environmental Professional Framework," September 1, 2004.
GCL	General Commercial Liability
IBC	Insurance Bureau of Canada
LEP	Licensed Environmental Professional
LEP Board	The Licensed Environmental Professional Board is the hybrid model that B.C. is proposing to implement by April 2006. This model forms the basis for the second option considered in this report.
LRS	Licensed Remediation Specialists (approved professional equivalent in Illinois)
LSP	Licensed Site Professionals (approved professional equivalent in Massachusetts Regime).
MWLAP	Ministry of Water Land and Air Protection
NSW	New South Wales, Australia
Omnibus insurance requirement	A requirement to have a defined amount of insurance coverage in order to be a member of the LEP (i.e. \$2 million).

Parent organizations	The term “parent organizations” refers to the three organizations that will have seats on the LEP Board. They are APEGBC, BCIA and CAB.
RPE	Roster of Professional Experts
RSC	Record of Site Condition
SRA	Soil Relocation Agreement
Terms and Conditions	The Terms and Conditions contained in the Request for Proposal (See Appendix 5)
Victoria	Victoria, Australia

## LIABILITY PROTECTION FOR APPROVED PROFESSIONALS

### Introduction:

We have been asked by the Ministry of Water Land and Air Protection (“MWLAP”) to prepare a report reviewing and analyzing the benefits and drawbacks of possible options regarding the role of environmental professionals working on contaminated sites in British Columbia. In particular, we have been instructed to focus this analysis on three scenarios or options: the current system that is in place in British Columbia, a hybrid system and a self-regulated system.

We understand that the MWLAP is specifically interested in considering these options from the perspective of the devolution of government responsibility for issuing instruments such as approvals in principle and certificates of compliance. During the last few years, approved professionals have indicated concern about incurring increased risk of liability and cost associated with increased devolution. Several reports have been written about this subject. We have summarized those reports in Appendix 2 of this report.

We have also reviewed liability and liability protection issues under the current system in British Columbia for approved professionals in Appendix 1 of this report. A review of liability and liability protection for environmental professionals<sup>1</sup> in other jurisdictions is also set out in Appendix 3.

The purpose of this report is to make recommendations with respect to the different devolution options we have been asked to consider. We have arrived at our recommendations through interviews with key stakeholders regarding the liability protection of approved professionals (see Appendix 4 for a list of the persons interviewed), through comparison with other jurisdictions and by applying the objectives that MWLAP seeks to achieve in connection with the Province’s contaminated site regime.

### **Objectives of the New Contaminated Site Regime:**

As a result of our research and interviews regarding the role of environmental professionals in dealing with contaminated sites in British Columbia, the following objectives underpinning a desirable regime emerged as follows:

1. Protects the public interest by providing transparency and accountability.
2. Encourages the cleanup and redevelopment of contaminated properties, including brownfields which pose a low or moderate risk;
3. Reduces the reliance on MWLAP staff in reviewing contaminated site submissions, thereby reducing MWLAP’s costs of program administration while increasing the participation of approved professionals with respect to low and moderate risk sites;

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<sup>1</sup> We use the term “environmental professionals” to refer to those consultants and other professionals that are providing services respecting contaminated sites under regulatory regimes in other jurisdictions. For the purposes of British Columbia, we use the term “approved professionals” for those persons who are on the Roster of Approved Professionals. The term “environmental consultant” is used to describe consultants working in B.C. who are not members of the Roster of Approved Professionals.

4. Results in efficient, timely and cost-effective approvals;
5. Does not encourage litigation due to its structure and operation;
6. Ensures that the risks of liability for approved professionals are clear and manageable;
7. Attracts and maintains highly skilled and qualified professionals;
8. Produces instruments that can be relied upon by the business community and other stakeholders;
9. Provides clear and comprehensive professional standards that are easy to understand and apply;
10. Ensures that sites are remediated in a manner that protects human and environmental health; and
11. Leaves room for the exercise of professional judgment.

In this report we will be using the foregoing objectives as a tool to evaluate each of the options we have been asked to consider. It bears noting, however, that certain of the objectives are neutral or apply more or less equally regardless of the option selected. For example, in our view, objectives 1, 6, 8, 9, and 11 would fall into this category. On the other hand, we note that depending upon the option selected, certain objectives will be enhanced or highlighted. For example, objective 3 is enhanced by using Option 3.

Pursuant to the Terms and Conditions contained in the Request for Proposal (“Terms and Conditions”) we begin the analysis by citing some key observations from other jurisdictions.

### **Observations From Other Jurisdictions:**

#### ***Degree of Devolution***

The current regime in place in British Columbia is more independent of government than many of the other contaminated sites regimes in Canada and the United States. The pursuit of Options 2 and 3 would result in a regime that is even more devolved than other regimes in Canada and Australia as well as most regimes in the U.S.

In most of the regimes that we studied, the government retains a role: (i) in the signing off on regulatory instruments<sup>2</sup>, or (ii) providing an Acknowledgement, a No Further Action Letter based on the recommendation of an environmental professional<sup>3</sup> or a Certificate of Compliance issued by the government.<sup>4</sup> There are exceptions such as Massachusetts which has the most devolved model of the jurisdictions studied. There, Licensed Site Professionals sign-off on all regulatory instruments on all sites regardless of the risk posed. In Connecticut, Licensed Environmental Professionals sign-off on Environmental Condition Assessments and verify that clean-ups are done correctly. Qualified professionals in Ontario conduct Phase I, II and III Environmental Site Assessments and site remediations and then provide Records of Site Condition

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<sup>2</sup> The following provinces or states sign off on regulatory instruments as follows: the Ontario Ministry of the Environment signs off on certificates of property use and Quebec signs off on all regulatory instruments.

<sup>3</sup> The following states will sign No Further Action Letters: Illinois, Ohio, North Carolina. In Canada, Newfoundland and Labrador provide a Site Closure Letter, after an environmental professional submits a Record of Site Condition. The following provinces provide Acknowledgements: Nova Scotia and New Brunswick.

<sup>4</sup> In West Virginia, after receiving a report from a Licensed Remediation Specialist, the party undertaking remediation may seek a Certificate of Completion from the Director.

("RSCs"). The Ministry of the Environment accepts the RSC and it is posted on the Environmental Site Registry. There is also a Ministry audit team that reviews the work that supports or underpins 1 in every 10 RSCs. This audit function is not legislated nor mandated in any Ministry guidelines. However, the RSC is the only instrument that qualified professionals can sign-off on; Certificates of Property Use are then issued by the Ministry. In addition, the Ministry extensively reviews risk assessment applications and RSC's issued for properties where risk assessment is the method used to remediate the site.

### ***Similarity of B.C. Regime to Other Regimes Studied***

All of the regimes studied have some kind of "approved professional" who operates with some degree of independence from government. In almost every jurisdiction we studied, devolution to environmental professionals is only permitted on low or moderate risk sites. Jurisdictions that place sign-off responsibility on environmental professionals include Victoria, Australia; New South Wales ("NSW"), Australia; Massachusetts, U.S.A and Ontario, Canada

### ***Differences between B.C. Regime and Other Jurisdictions***

#### ***Licensing:***

Very few regimes studied have licensing regimes for environmental professionals that are similar to the Roster system or the proposed Licensed Environmental Professional ("LEP") system in British Columbia. Many regimes simply provide that an environmental professional can act if he or she is a member of a licensed profession, such as the Association of Professional Engineers and Geoscientists of British Columbia ("APEGBC"). In Canada, no other jurisdiction licenses environmental professionals such as is done in B.C, although Nova Scotia, New Brunswick and Newfoundland and Labrador are considering doing so in the future. In the U.S. only Massachusetts and Connecticut have a licensing system in place that is at arm's length of government. The only government roles are performed by the Governors who appoint the Boards of the licensing bodies as well as the State Environment Departments who appoint the Chairs of such bodies. In all other jurisdictions that license or register environmental professionals (Victoria, NSW, California, Ohio) the government performs the licensing function. In the following jurisdictions, government appoints environmental professionals: Victoria, Australia; New South Wales, Australia; California.

Almost all regimes reviewed have very carefully worded instruments, which do not require environmental professionals to provide a guarantee if they are signing off on a site. See the discussion in Option 3 for a more detailed discussion.

#### ***Insurance:***

No U.S. jurisdiction requires environmental professionals to hold professional liability insurance by statute or as a licensing requirement. Only Illinois requires that Review and Evaluation Licensed Professional Engineers disclose their insurance status to clients. However, we learned that most environmental professionals hold insurance for their own comfort and in some cases because their clients insist on it. In Canada, only Ontario and Newfoundland and Labrador require all environmental professionals to hold insurance. In Nova Scotia, only environmental professionals working with oil spills are

required to hold insurance. In each case where insurance is required, environmental professionals must hold insurance of \$1 million or more.

### ***Mechanisms for Managing Liability***

A number of the regimes studied provide some form of government sign-off. Either governments sign regulatory instruments, as is currently the practice in B.C., or governments issue an acknowledgement, a legal release, a No Further Action Letter or a certificate of compliance after the government has received a recommendation, report or signed certificate of completion from an environmental professional. In all jurisdictions that offer these forms of assurances, we have been told that they provide comfort to site owners who engage in remediation activities. Further, we have been advised that it is these mechanisms that have been credited with the low rates of litigation associated with the contaminated site systems. In all of these regimes, environmental professionals do not seem greatly concerned with their exposure to liability. The liability of environmental professionals is limited to their own negligence on a site, which is covered by errors and omissions insurance.

Only one jurisdiction, Illinois, provides immunity to environmental professionals. In Illinois, Licensed Remediation Specialists (“LRS”) sign and issue a final report on a site to the government. The Director then issues a Certificate of Completion, which states that the LRS is relieved from liability to the state and from citizen’s suits.

In Ontario, Massachusetts, and Connecticut, where environmental professionals do sign-off on instruments and governments do offer a written acknowledgement or a comfort letter, there is another method of managing liability: the wording of the certificate. In all three of these jurisdictions, regulatory instruments signed by environmental professionals are carefully worded so that they do not provide a guarantee or a warranty. In each of these jurisdictions we have been told that this has been done to ensure that environmental professionals do not face undue liability exposure. In the case of Ontario, the wording was changed because environmental professionals were refusing to sign RSCs. In all three of these jurisdictions, the people we spoke with could not think of a case where an environmental professional has faced a lawsuit as a result of signing off on a regulatory instrument. This issue is discussed in greater detail in Option 3.

The only regimes where environmental professionals are asked to provide a guarantee are Victoria and NSW. However, we learned that there are some problems with these regimes, which are also discussed immediately below.

### ***Problems In Other Regimes:***

Our conversation with the Victoria, Environmental Protection Agency (“EPA”) in Australia revealed that British Columbia would have some difficulty adopting the system in place there. Victoria has an Environmental Audit system in place whereby Environmental Auditors are appointed by the EPA. Environmental Auditors are hired to provide an independent review to the EPA of the work carried out at sites by other environmental consultants. Environmental Auditors are not permitted to engage in any planning, design or remediation work at a site they review.

An Environmental Auditor is required to hold professional liability insurance in the amount of at least \$5 million per occurrence. This insurance must include run-off

insurance<sup>5</sup> that provides professional indemnity coverage for work conducted during the period of appointment for a minimum of seven years, the length of the limitation period. Further, the insurance must not contain any environmental exclusions or exclusions that would prevent an Environmental Auditor from carrying out his or her required duties under the *Environmental Protection Act, 1970*.<sup>6</sup> Environmental Auditors have reported a great deal of difficulty in obtaining the requisite levels of insurance. Very few insurers offer this type of insurance.<sup>7</sup> Most Environmental Auditors are insured by large British companies such as Lloyd's of London. The cost of insurance is approximately \$40,000 - \$60,000 per person per year and premiums are rising each year. We have been advised that obtaining insurance at the level of \$5 million per occurrence is nearly impossible to obtain in British Columbia. The maximum amount of available coverage is not much higher than \$2 million.<sup>8</sup>

The high cost of insurance means that only environmental professionals working for large to mid-size firms can become Environmental Auditors.<sup>9</sup> NSW has a very similar program in place and similar insurance requirements (the professionals are called Site Auditors). We were told of one instance where one individual, who was a sole practitioner, was unable to find insurance with all of the features required by the NSW's EPA. He finally found an insurer who was willing to insure him at a premium of \$250,000/year. This individual decided not to go through with his accreditation.<sup>10</sup> The result of the insurance requirements in both Victoria and NSW has been that only environmental professionals working in large, and in many cases, global environmental consulting firms are able to afford the insurance premiums required to become Environmental Auditors and Site Auditors (collectively referred to as "Auditors").

As a result, there are very few Auditors who are appointed in either jurisdiction. We have been told that site owners often have trouble hiring an Auditor in Victoria and NSW. This problem is exacerbated by the fact that Auditors can only review work of environmental consultants who do not work at the same firm they do, in order to preserve the integrity of the system. This has resulted in a slow down in site investigations and remediation.

It bears noting that in spite of the significant responsibilities placed on the shoulders of Environmental Auditors, the Victoria EPA still plays a very central role in the regulation of the system through the appointment and disciplinary process. As such the program still requires a significant number of EPA staff and is quite costly to administer.

Finally, the following guarantee is offered by Environmental Auditors:

I HEREBY CERTIFY that I am of the opinion that the condition of the site is neither detrimental nor potentially detrimental to any beneficial use of the site.

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<sup>5</sup> Run-off insurance is designed for professionals who are retired or no longer practicing. This insurance is professional indemnity insurance, but is usually cheaper, subject to market conditions, than full insurance, at least after the first year, with the premiums reducing over a period of time during which the member is no longer practicing.

<sup>6</sup> Act No. 8056/1970.

<sup>7</sup> Telephone communication with representative from the Environmental Protection Agency, Victoria (the "Victoria EPA").

<sup>8</sup> Telephone communication with representatives of the insurance industry, 22.

<sup>9</sup> Telephone communication with a representative from the Victoria EPA, *supra* note 7.

<sup>10</sup> *Ibid.*

We were told quite candidly by a project manager at the EPA, that if he were to design the regime in Victoria again, he would not include sign-off on certificates by Environmental Auditors. These certificates have resulted in “over-testing” and an increase to the cost of investigation and remediation.<sup>11</sup> Further, many Environmental Auditors refuse to issue these statements because of the associated liability exposure.<sup>12</sup>

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

## OPTION 1: CURRENT ROSTER OF APPROVED PROFESSIONALS

### Overview

Currently environmental consultants can be appointed to the Roster of Approved Professionals (the “Roster”) by the Director of Waste Management (the “Director”) who acts on the advice of the Roster Steering Committee (the “Committee”). MWLAP officials rely on the opinion of approved professionals when making decisions about the issuance of instruments under the Environmental Management Act (the “EMA”). The current system is enabled by section 42 of the EMA and paragraph 49.1 of the *Contaminated Sites Regulation*, Reg. 375/96 (the “CSR”).<sup>13</sup> The Director may appoint approved professionals to a roster established under subsection 42(2) of the EMA as follows: “the Director may develop a roster of persons described in subsection 42(1)”. Subsection 42(1) provides, “a director may designate classes of persons who are qualified to perform classes of activities, prepare classes of reports and other documents or make classes of recommendations that by or under this Act may be or are required to be performed, prepared or made by an approved professional”.

Approved professionals can be appointed as a Professional Expert: Risk Assessment Specialist and can then conduct risk assessments or they can be appointed as a Standards Assessment Specialist. Approved professionals are appointed for a term of three years, with the option of a two year extension and must:

- be a registered professional or licensee, in good standing, with the Association of Professional Engineers and Geoscientists of the Province of BC (the “APEGBC”), the British Columbian Institute of Agrologists (“BCIA”) or the College of Applied Biology of BC (CAB).
  - (a) For both the category of Standards Assessment Specialist and the category of Risk Assessment Specialist, candidates must possess a minimum of eight (8) years of documented experience, post- registration with either the Association, the Institute or the College, in the areas of contaminated site assessment, management and remediation, and
  - (b) For Risk Assessment Specialists, a minimum of four (4) years of the eight or more years as described in “(a)” must be of relevant, significant documented experience in environmental risk assessment. Such experience will normally include the following:
    - (i) participation as a lead risk assessor in quantitative environmental risk assessments that address either human or ecological receptors and involve quantitative assessment of risks to receptors;
    - (ii) formal regulatory review of environmental risk assessments submitted to the Province, or to another jurisdiction in which a formal contaminated sites or related regulatory process exists; or

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<sup>13</sup> 49.1 For the purpose of determining the manner and extent of the review that must be undertaken of the work on which an application referred to in section 15 (6), 43 (3), 47 (1.41) or 49 (7), a director may consider whether the application includes the recommendation of an approved professional in respect of the decision requested in the application.

(iii) participation as a lead in the derivation of soil, sediment and water quality guidelines or standards that have subsequently been adopted; for example, under the CSR or CCME framework

- have successfully written and passed, in the year of appointment, the contaminated sites professional expert examination (members appointed by the Director to serve on the Roster Steering Committee are exempt from the contaminated sites professional expert examination requirement during their term of appointment),
- have been recommended for inclusion on the Roster by the Roster Steering Committee, and
- have obtained the required professional liability insurance as specified by the Director. Currently, candidates must have submitted proof to the Director that they have at least two million dollars of professional liability insurance.<sup>14</sup>

The EMA was recently amended to strengthen the provisions involving approved professionals so that government can rely on their services to a greater extent.<sup>15</sup> Since 1 November 2004, all applications for low or moderate risk sites must be submitted as Roster submissions by an approved professional.<sup>16</sup> Protocol 6 for Contaminated Sites: Eligibility of Applications for Review by Approved Professionals, clarifies the types of sites and approvals that approved professionals can provide advice on. Under Protocol 6, approved professionals can make recommendations to the Director with respect to the issuance of a determination that a site is or is not contaminated, irrespective of the risk it poses after a preliminary and/or detailed site investigation has been reviewed. Approved professionals can also make recommendations regarding the granting of an approval in principle or a certificate of compliance, as well as contaminated soil relocation agreements for low or moderate risk sites, after a remediation plan or a confirmation of remediation report has been evaluated. The system currently permits self-review by approved professionals as well as review of others work done with respect to the site assessment and remediation work for the purposes of advising the Director.

Provided the conditions of sections 15 (for determinations), 43 (for soil relocation agreements), 47(1) and (4) (for Approvals), and 49(1) (for Certificates) of the CSR and Protocol 6 are met to the satisfaction of the MWLAP Director, the Director *may* endorse the recommendation of the approved professional or decline to process an application incorporating a recommendation by an approved professional. If the Director declines to endorse the view of the approved professional, he or she must provide written reasons to the applicant and the professional association of which the approved professional is a member.<sup>17</sup>

We have been informed by MWLAP staff that the MWLAP conducts an administrative and not a substantive review of the submission by an approved professional before the

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<sup>14</sup> MWLAP, Procedures for the Roster of Professional Experts under the Contaminated Sites Regulation, 11 February 2005.

<sup>15</sup> British Columbia Ministry of Land, Air and Water, Update on Contaminated Sites: Improvements to Contaminated Site Legislation in Effect (1 December 2004).

<sup>16</sup> *Ibid.*

<sup>17</sup> See MWLAP, Protocol 6 For Contaminated Sites: Eligibility of Applications for Review by Approved Professionals, signed 28 July 2004.

instrument is issued.<sup>18</sup> Therefore, if the paper work is in order, the approved professional's submission is accepted.

### **The Roster Steering Committee (the "Committee"):**

The Committee is responsible for the administration and management of the Roster.<sup>19</sup> The Committee works on audits and has the authority to conduct spot audit checks. The Committee also has the authority to conduct investigations of approved professionals when necessary. Where the Committee works on an audit it can make recommendations to the Director with respect to the appropriate course of action to take. The Director generally accepts the recommendations of the Committee. One in every ten Roster Submissions is audited.<sup>20</sup> The purpose of conducting an audit is to ensure that professional experts maintain the high standards of work required. Our conversations with approved professionals revealed that the purpose of the audit has shifted in focus from being disciplinary to educational in nature.<sup>21</sup>

### **Implications for Liability Protection**

The provincial government has extended liability protection to consultants in order to reduce their potential exposure for clean-up activities on contaminated sites and to limit the circumstances under which they could be named a responsible person. The term "responsible person" is defined in section 39 of the EMA as "a person described in section 45". Section 45 provides a list of classes of persons who would be found responsible for the remediation of contaminated sites, subject to the exceptions found in section 46 of the EMA.

Two of these exceptions are relevant for environmental consultants. Paragraphs 46(1)(h) and (i) of the EMA state that an environmental consultant who provides advice respecting remediation work at a contaminated site will be exempt from being named a "responsible person" unless he or she has assisted or provided advice in a negligent fashion.

Paragraphs 46(1)(h) and (i) state:

The following persons are not responsible for remediation of a contaminated site:

- (h) a person who provides assistance respecting remediation work at a contaminated site, unless the assistance is carried out in a negligent fashion
- (i) a person who provides advice respecting remediation work at a contaminated site unless the advice is negligent

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<sup>18</sup> Telephone communication with MWLAP Staff, Legislative and Finance Unit. See also: [http://wlapwww.gov.bc.ca/epd/epdpa/contam\\_sites/roster/rosterauditfindings.html](http://wlapwww.gov.bc.ca/epd/epdpa/contam_sites/roster/rosterauditfindings.html).

<sup>19</sup> MWLAP, Procedures for the Roster of Professional Experts under the Contaminated Sites Regulation, 11 February, 2005.

<sup>20</sup> Waldemar Brault, McDonald & Company, "British Columbia's New Licensed Environmental Professional Framework," September 1, 2004, at p. 43.

<sup>21</sup> Telephone communication with Roster members.

Approved professionals could fall within both of these exemptions as they both provide assistance respecting remediation work and provide advice respecting the remediation done at a site to the Director.

Subsection 47(1) of the EMA states the liability consequences of such a finding as follows: "A person who is responsible for remediation of a contaminated site is 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".

Subsection 46(3) states that "a person seeking to establish that he or she is not a responsible person under subsection (1) has the burden to prove all elements of the exemption on a balance of probabilities. This is quite an onerous requirement. A consultant who falls under the consultant exemption could still be drawn into a lengthy court battle to establish that he or she falls within subsections 46(1)(h) or (i). If the Director proposes to name a consultant in a remediation order, the onus is on the consultant to prove: (1) that his or her only role at the site was to provide assistance or advice respecting remediation work; and (2) that the assistance or advice was not carried out in a negligent fashion. If it is determined that a consultant has been negligent in either carrying out remediation work or negligent in providing advice with respect to remediation work, he/she will not be covered by the exemption in the EMA.

If an approved professional loses the section 46 exemption, under the current system an approved professional can face exposure to liability under three different scenarios. First, he or she could be held liable to the client for inadequate performance either for breach of contract or for negligence. Second, the approved professional who advises the government could be exposed to third party liability if his or her negligent acts cause harm to other parties such as site owners, neighbouring property owners, local governments, former and subsequent purchasers of contaminated sites and lenders.<sup>22</sup> Third, an approved professional could face the risk of being found to be an operator "who is or was in control of or responsible for an operation located at a contaminated site" and named as a responsible person and sued civilly by a third party<sup>23</sup> or he or she could be named as a "responsible person" by the Director in a remediation order issued under the EMA. If an approved professional is named as a responsible person he or she could face joint, several, absolute, and retroactive liability for the whole of the site's contamination, regardless of his or her role in causing the contamination on-site. The EMA permits the bringing of a cost recovery action (under subsection 47(5) the EMA).

Finally, it should be noted that all of the approved professionals we spoke to pointed out that a lawsuit is not only costly to defend, but costly in terms of the time that they are away from their practice.<sup>24</sup> In fact, environmental consultants or approved professionals

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<sup>22</sup> Craig Godsoe and Tracey Sandgathe, Borden Ladner Gervais LLP, "Contaminated Site Administration in British Columbia: Report to B.C. Ministry of Water, Land and Air Protection," May 16, 2002 (the "BLG Report"); Braul Report, 2004, *supra* note 20; and Shelley O'Callaghan, Bull Houser & Tupper, Letter to Roster Steering Committee "BC Ministry of Water, Land and Air Protection - Experts Roster," November 16, 2001 (the "Bull Houser & Tupper Opinion").

<sup>23</sup> Richard E. Bereti and Jonathan Corbett of Harper Grey Easton have written an opinion "Consultant Liability: Are Environmental Consultants Really "Exempt" from Liability when Working on Contaminated Sites?" (October, 2004) (the "Harper, Grey Easton Opinion").

<sup>24</sup> Telephone communications with Roster members, *supra* note 21.

who work independently or for a small firm, could face bankruptcy if they were to face a lawsuit.<sup>25</sup>

For a more thorough discussion and analysis of the current system in B.C., including liability issues facing approved professionals, please see Appendix 1 of this report.

### **Protection Against Liability**

Of the three scenarios that we were asked to consider, Option 1 poses the lowest liability risk for approved professionals. Almost everyone we talked to had neither been sued nor had any knowledge of an approved professional facing a lawsuit.<sup>26</sup> It was pointed out by several people, however, that lack of litigation targeting approved professionals is a direct consequence of the fact that the MWLAP currently signs-off on every instrument issued under Part IV of the EMA and that the MWLAP is protected by immunity provisions in the EMA. As a result, it is very unlikely that the government or the approved professionals who make a recommendation to the MWLAP will be sued.<sup>27</sup>

Subsections 61(1) and 61(2) of the EMA provide for immunity in relation to contaminated sites. These subsections name the “government”, “a current or former elected official of the government” and “a current or former employee or agent of the government” as a “protected person”. No action lies and no proceedings may be brought against a protected person because of any (i) act, advice, including pre-application advice, or recommendation, or (ii) failure to act, failure to provide advice, including pre-application advice, or failure to make recommendations or a purported exercise or failure to exercise powers, duties or functions under Part IV of the EMA or the CSR, as long as the conduct of the protected person was not dishonest, malicious or amounting to willful misconduct. The government and its agents also receive further protection by the doctrine of Crown immunity and the *Crown Proceedings Act* [RSBC 1996] C. 89.

Currently, the members of the Roster Steering Committee are indemnified from any and all claims, actions or proceedings for any acts or omissions done in good faith in the performance or intended performance of any duty as member of the Committee.

### **Comparisons With Other Jurisdictions:**

#### ***Degree of Devolution***

The current regime in place in British Columbia is more devolved from government than many of the other regimes in Canada and the United States. Its uniqueness lies with the Roster Steering Committee as well as the current insurance requirements. Very few regimes studied have a Committee or Board that licenses and audits environmental professionals and that is arm’s length from government. Only Massachusetts and Connecticut have such a Board, albeit, their Boards are further removed from government than the current Roster Steering Committee. In most jurisdictions studied, licensing and auditing functions are performed by government.<sup>28</sup> Other jurisdictions

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<sup>25</sup> Telephone communication with Roster members, *supra* note 21.

<sup>26</sup> See Appendix 1 of this Report for a more detailed discussion of the state of the case law in British Columbia and Canada.

<sup>27</sup> Telephone communication with representative from the insurance industry, *supra* note 8.

<sup>28</sup> See discussions of Quebec, Victoria, NSW, California, North Carolina, West Virginia and Ohio in Appendix 3.

have no system for licensing environmental professionals.<sup>29</sup> All other jurisdictions have some degree of government audit of the work conducted by approved professionals.

### ***Insurance***

British Columbia's current requirement that approved professionals hold \$2 million in professional liability insurance is rare when compared to other jurisdictions. For instance, no U.S. jurisdiction requires environmental professionals to hold professional liability insurance by statute or as a licensing requirement. Illinois is the only state that requires environmental professionals to disclose their insurance status. In Canada, only Ontario and Newfoundland and Labrador require environmental professionals to hold insurance. In Nova Scotia, only environmental professionals working with oil spills are required to hold insurance. In each province, environmental professionals must hold insurance in the value of \$1 million. Australia and NSW are at the other end of the insurance spectrum with their requirement of \$5 million per occurrence in insurance coverage.

### ***Liability***

Most regimes studied had created similar liability exposure for environmental professionals as in Option 1. There is a reasonably low liability exposure for environmental professionals in a number of regimes because of the involvement of government. In most of the regimes studied, the government retains the ultimate sign-off on regulatory instruments,<sup>30</sup> or will provide an Acknowledgement, a No Further Action Letter based on the recommendation of an approved professional<sup>31</sup> or a Certificate of Compliance issued by the government.<sup>32</sup>

### **Advantages of Option 1:**

Option 1 achieves a number of the MWLAP's objectives. It encourages the cleanup and redevelopment of contaminated sites, attracts and maintains highly skilled and qualified professionals, protects the public interest, and produces instruments that can be relied on by the business community and other stakeholders. However, Option 1 is not the only option that supports these objectives.

### **Liability Implications:**

As discussed above, this Option poses the lowest liability risk to approved professionals. Almost everyone we talked to had neither been sued nor had any knowledge of an approved professional ever facing a lawsuit. This is a significant advantage of the current system.

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<sup>29</sup> See discussion of Ontario, New Brunswick, Nova Scotia, Newfoundland and Labrador and Illinois in Appendix 3.

<sup>30</sup> The following provinces sign off on regulatory instruments: the Ontario Ministry of the Environment (certificates of property use), and Quebec. .

<sup>31</sup> The following States will sign No Further Action Letters: Illinois, Ohio, North Carolina. In Canada, Newfoundland and Labrador provide a Site Closure Letter, after an environmental professional submits an RSC. The following Provinces provide Acknowledgements: Nova Scotia and New Brunswick.

<sup>32</sup> In West Virginia, after receiving a report from a Licensed Remediation Specialist, the party undertaking remediation may seek a Certificate of Completion from the Director.

A number of individuals we spoke to credit the low liability risks they associate with Option 1 to the fact that MWLAP staff sign-off on all approvals. Notwithstanding this observation, however, there does not appear to be a direct causal relationship between government sign-off and rates of litigation involving approved professionals. Rather this relationship is indirect. Government sign-off provides assurance as to the fitness of the land and provides lenders and owners with comfort that no subsequent regulatory action will occur, allowing transactions to be completed in a timely manner.

Recently, the MWLAP has changed the approvals that they issue so that the approved professional, whose advice the MWLAP is relying on in issuing the approval is expressly named in the approval. It is our view that this does not affect the liability of an approved professional. Liability flows from the adequacy of an approved professional's work measured against the standard of care they ought to exercise in practicing their profession.

### **Insurance Implications:**

Currently, none of the approved professionals we interviewed reported having trouble obtaining the \$2 million insurance coverage that is required for environmental consultants who are members of the Roster of Approved Professionals.<sup>33</sup> Nevertheless, some of the approved professionals did report that their premiums had risen since the Roster System had been implemented in B.C.<sup>34</sup> This increase, however, is likely not attributed to the establishment of the Roster System but rather to trends in the insurance market. Over the last few years, the insurance market has been correcting for too many years with negative underwriting results.<sup>35</sup> Further, many of the people we spoke with indicated that there were significant discrepancies in one's ability to get insurance at a reasonable cost. While this is generally not a problem for consultants working at mid-size or large firms, it appears to occur for consultants working at small firms or practicing on their own.<sup>36</sup>

In light of these difficulties, it is our recommendation that the MWLAP meet with key players in the insurance industry to assist smaller firms, who have difficulty obtaining insurance, or to discuss the options of setting up a program or group plan that could include these consultants. Insurance plays a useful role by providing the approved professional and his or her clients with protection from unsatisfied judgments in the event that the approved professional is found to be negligent in the delivery of professional services. We do not recommend that B.C. follow the lead of jurisdictions that do not require approved professionals to hold some type of insurance.

### **Preferences of Stakeholders**

The insurance brokers and insurers that we interviewed had a clear preference for the current regime when we presented them with the three options that the MWLAP is considering. They felt most comfortable with the current regime because of the central role of played by the MWLAP. In this regard, Roster members indicated that they were

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<sup>33</sup> Telephone communication with Roster members, *supra* note 21.

<sup>34</sup> *Ibid.*

<sup>35</sup> Comment from Ministry of Finance, Risk Management Branch staff.

<sup>36</sup> Telephone communications with representative from the B.C. Institute of Agrology (the "BCIA"); telephone communication with representative from the College of Applied Biologists (the "CAB"); telephone communication with Roster members, *supra* note, 21.

not taking on an unacceptably high level of risk since the MWLAP has the ultimate sign-off on all approvals. It was recognized that the development community is also comfortable relying on a government-endorsed certificate.<sup>37</sup> Further, members of the Roster Steering Committee are not concerned about liability associated with their positions, because they are currently being indemnified by MWLAP.<sup>38</sup> Of the three options, this Option poses the fewest problems in terms of insurance being offered to members of the profession at a reasonable cost.

All the approved professionals that we spoke with are far more comfortable with the liability risk posed by the current regime when compared to the other two Options, which could require them to sign off on regulatory approvals.<sup>39</sup> The parent organizations, which we spoke with also have a preference for the current system and are very worried about the liability associated with their members signing off on regulatory instruments, which could occur under Option 3 and Option 2B.<sup>40</sup>

### **Disadvantages of Option 1:**

Retaining the status quo constrains the MWLAP from achieving a number of its objectives. Option 1 does not reduce the reliance on the MWLAP staff, as it does not permit the devolution of sign-off from MWLAP to approved professionals. Selecting Option 1 also fails to reduce the costs of program administration for the MWLAP.

### **Availability of Insurance:**

While members of large firms have little difficulty obtaining insurance, a number of approved professionals as well as the College of Applied Biologists (the "CAB") and the British Columbian Institute of Agrologists (the "BCIA") are concerned about the availability of insurance for all members of the profession. Currently members of the CAB and BCIA are not required to hold insurance and as a result, only members whose clients insist on insurance have obtained it. This works out to be approximately 20% to 30% of professional biologists and agrologists.<sup>41</sup> Further, many people we interviewed reported that insurance is perceived to be too costly for environmental consultants who work in small firms and who do not generate high yearly revenues.<sup>42</sup> As a result, some consultants are currently working without insurance and are taking on a significant level of risk.

### **Current Exclusions on Insurance:**

All Errors & Omissions (E & O) policies contain exclusions for pollution, design/build and the liability of others when an environmental consultant contracts directly with another environmental consultant for the provision of services on a contaminated site.<sup>43</sup> For a detailed discussion of the exclusionary clauses that are currently in place, please refer to Appendix 1 of this report.

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<sup>37</sup> Telephone communication with representatives from the insurance industry, *supra* note 8.

<sup>38</sup> Telephone communication with representatives of the insurance industry.

<sup>39</sup> Telephone communication with Roster members, *supra* note 21.

<sup>40</sup> Telephone communications with representatives of the BCIA and the CAB, *supra* note 36.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, and telephone communication with Roster members, *supra* note 21.

<sup>43</sup> Telephone communication with representatives of the insurance industry, *supra* note 8, *supra* note 38; and representative of Marsh Canada.

Marsh Canada, an insurance broker, offers an E & O policy that does not currently exclude all pollution. We understand that this practice is about to change as Marsh Canada plans to introduce a sub-limit of \$100,000 per occurrence to its policy and is considering excluding pollution entirely, in the future, depending on the number of claims received.<sup>44</sup>

We note that currently much of the work that is done in British Columbia by approved professionals and environmental consultants may not be covered by their existing insurance policies, even though it is their belief that they are covered. The best example of this is the design/build exclusion that is a part of some E & O Policies for Environmental Consultants.

A design/build exclusion is specifically aimed at environmental consultants who conduct a site investigation, design a remediation plan and then do the site remediation. The specific wording of the exclusion is as follows:

“Claims resulting from services rendered by the insured where:

b) decommissioning, remediation, clean-up, removal, containment, detoxification, or neutralization of any property, pollutants or contaminants

is also performed by or on behalf of the insured or by or on behalf of an associated business enterprise in which the insured either directly or indirectly has an interest, or that directly or indirectly has an interest in the insured.”

On the basis of the foregoing, it is our understanding that if an environmental consultant were to “design” the remediation plan and then carry it out, the insurance policy would not cover any claim made in relation to such work. The problem also arises when an environmental consultant designs a remediation plan and contracts with a firm that is not at arms length to do remediation work. Our conversations with approved professionals revealed that frequently, many environmental consulting businesses do most or all of the design and execution of remediation work in-house.<sup>45</sup> Environmental consultants have attempted to explain to insurance companies that including this exclusion in an E & O policy for environmental consultants shows a deep misunderstanding of the practice of environmental consulting.<sup>46</sup>

We understand that larger environmental consulting firms avoid the problem by designing the remediation plan and then contracting out the remediation work to a contractor who is at arms length from the consultant. In those cases, the consultant would continue to oversee the remediation work to ensure that his or her client’s interests are represented. We have been advised that such a practice would not fall under the design/build exclusion.<sup>47</sup>

Another exclusion of concern is the “work of others exclusion”. This exclusion applies when an environmental consultant acts as a sub-contractor and hires other environmental consultants to work on a specific aspect of remediation and enters into a

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<sup>44</sup> *Ibid.*

<sup>45</sup> Telephone communication with Roster members, *supra* note 21.

<sup>46</sup> *Ibid.*

<sup>47</sup> Telephone communication with Roster members, *supra* note 21 and 24; telephone communication with Ontario based environmental consultant.

contract with this second environmental consultant. Any claim that results from the liability of the sub-contractor will be denied by the contractor's insurance policy. Again, we have been advised that the exclusion does not apply if an environmental consultant manages a team of independent environmental consultants working on a project that have direct contractual relationships with the client.<sup>48</sup> Thus, for liability reasons, it is important that sub-contractors either enter into an agreement with the owner or operator of the site or that environmental consultants ensure that all sub-contractors they hire have sufficient insurance in their own right.

### **Recommendations:**

These uncertainties and misunderstandings regarding insurance could have negative ramifications for environmental consultants under the current regime as well as under a regime based on the other two options we consider in this report. The insurers and brokers that we spoke to feel that the insurance products on the market are not completely understood by the profession, the professional associations and the government. At the same time, the consultants feel that insurers don't understand their practices. In our view, it is important that these misunderstandings be addressed immediately regardless of which regime is selected by the MWLAP. Each professional must be able to make an informed decision about the degree of risk he or she is willing to take on in their practice. Complete information about what one's insurance does and does not cover is essential for such informed decision-making.

Another concern we heard frequently about the current regime was that low, moderate and high risk sites are poorly defined. This has led to concerns relating to which sites are subject to the Roster process and which ones are not.<sup>49</sup> There is also a concern about "definitional creep" whereby high risks sites merge into moderate risk sites or when moderate risk sites merge into high risk sites<sup>50</sup> It is important that the definitions be clearly defined and applied because approved professionals are not permitted to provide advice to the Director on high risk sites. This issue was underscored by the fact that we have heard two different definitions of high risk sites during the course of our work. The first definition of high risk is a site that has multiple types of contaminants.<sup>51</sup> The second definition is a site that poses imminent danger to human health or fish habitat/wildlife.<sup>52</sup> Since the concepts of low or moderate vs. high risk sites will continue to be applied regardless of which option is chosen, it is therefore our recommendation that this issue be addressed.

Several of the approved professionals we spoke with expressed concerns that the current regime focuses too much on process when its focus should be on accurate, complete and thorough site investigations and clean-ups.<sup>53</sup> They feel that there isn't enough room for professional judgment and they expressed concern that because the profession is so new, it might be difficult to develop professional competence if "process" continues to occupy the predominant position under the current audit regime.<sup>54</sup> At the

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<sup>48</sup> Telephone communication with representatives from insurance industry, *supra* note 38 and *supra* note 8.

<sup>49</sup> Telephone communication with Roster members, *supra* note 21.

<sup>50</sup> Telephone communication with representative of the, Insurance Bureau of Canada.

<sup>51</sup> Telephone communication with Dr. Glyn Fox, MWLAP Member of the Roster Steering Committee and MWLAP, Science and Standards Unit.

<sup>52</sup> Telephone communication with Roster members, *supra* note 21.

<sup>53</sup> Telephone communication with Roster members, *supra* note 21.

<sup>54</sup> *Ibid.*

same time, two approved professionals spoke of the need to have better and more complete government guidelines and standards.<sup>55</sup> For instance, one engineer spoke to us about a site where there were no MWLAP published standards for a contaminant that was found at the site. Protocol 6 specifies that approved professionals can only use the Roster submission process when there are published numeric standards. This resulted in a significant delay for site cleanup because it took several months for the MWLAP to determine if the site could be addressed through the Roster submission and how the contaminant in question ought to be handled.<sup>56</sup> Again, this problem of incomplete guidelines and delay in clarifying the process for approved professionals should be addressed regardless of which option is selected by the MWLAP.

## **OPTION 2: HYBRID SYSTEM**

### **Overview**

We have been asked to consider a scenario where a new supervisory board, (which has representatives from relevant professional bodies, and other stakeholders), and the MWLAP (to a lesser extent), are both involved in the cleanup of contaminated sites. Legislation for a new type of approved professional would not be required, and the supervisory board (referred to in the background documents described in Appendix 2 as the Licensed Environmental Professional Board (the “LEP Board”)) would govern such persons providing environmental services. We have sub-divided our discussion of Option 2 into two parts: under Option 2A, the MWLAP would retain the function of formal sign-off on legal instruments such as approvals in principle and certificates of compliance, while under Option 2B MWLAP would devolve the sign-off of regulatory instruments to LEPs.

Waldemar Braul, in his report "British Columbia's New Licensed Environmental Professional Framework" dated 15 December 2004 proposes a framework for a new LEP system for British Columbia's contaminated sites regulatory scheme that would replace the existing Roster of Professional Experts (“RPE”) system on 1 April 2006. The new system would be a “hybrid” system, which would operate more independently from the MWLAP than the current system. The LEP Board would coordinate its work with its three parent organizations, the APEGBC, BCIA, and CAB. Under Option 2, the classes of persons eligible for membership would be widened by including the CAB for the first time as well as also possibly extending its membership to individuals who are not members of one of the three parent organizations

There are some significant differences between this proposed LEP model and the current system. First, the LEP Board would be entirely independent of the MWLAP. The Director would no longer have a role in LEP Board appointments with LEPs electing their Board of Directors.<sup>57</sup> Second, the government immunity from liability, which is currently granted to the Roster Steering Committee, would not be available to the LEP Board. The only involvement of the MWLAP would be that one of its representatives would have a seat on the LEP Board. It is currently proposed that this position be a non-voting position. Third, the audit function would be completely arm's length from government

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<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> Waldemar Braul, 2004 Report, *supra* note 20, at pp. 24-25.

(although currently, audits are conducted by two Roster Steering Committee members and no MWLAP staff). The MWLAP would retain the right and responsibility to audit the audits conducted by the LEP Board. Fourth, under Option 2, the LEP Board would be created as a Society under the British Columbia *Society Act*.<sup>58</sup> Fifth, we understand that the LEP Board is considering dropping the current requirement of \$2 million in professional liability insurance in favour of 'mandatory disclosure'. This change would require that the LEP disclose, in writing, his or her professional liability insurance status (or lack of insurance) to clients prior to entering into an agreement or commencing work.<sup>59</sup>

The role of the LEP could evolve as suggested by the MWLAP's Advisory Panel Report at page 66:

“Once the LEP system is established, the Government may decide to delegate more responsibility to LEPs, such as issuing “no further action” letters for Category I – III sites. Such delegation will further decrease the need for regulatory involvement, allowing regulators to focus on high-risk sites (Category IV), increase the timelines of decision-making and decrease the overall costs associated with the process”.

This statement caused us to evaluate Option 2B which is a scenario involving MWLAP delegation of regulatory sign-off.

### **Implications for Liability Protection**

#### ***Option 2A:***

A hybrid system whereby MWLAP staff sign-off on regulatory approvals after receiving recommendations from licensed environmental professionals, for low and moderate risk sites, does not pose any more liability concerns for approved professionals than the current system does. This new hybrid model does, however, pose some increased director and officer liability risk for members of the LEP Board because this Board will no longer be appointed by the Director and government immunity from liability will no longer be transferred to Board members.

From the perspective of an approved professional, the incorporation of the LEP Board under the *Society Act* (the “Act”)<sup>60</sup>, does not change his or her liability exposure when compared to their exposure under the current regime. An approved professional can still potentially face all of the liabilities described in Appendix 1 of this report. Section 5 of the Act provides that:

“A member of a society is not, in the member's individual capacity, liable for a debt or liability of the society.”

It should be noted that this liability protection is limited; it protects individual members from the liability or debt of the society, but it does not protect members of the society from the liabilities of other members of the society.

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<sup>58</sup> [RSBC 1996] c. 433.

<sup>59</sup> Waldemar Brault, 2004 Report, *supra* note 20.

<sup>60</sup> [RSBC 1996] C. 433.

### **Option 2B:**

If approved professionals are to sign off on regulatory instruments under Option 2, the liability concerns could be quite significant depending on how the system is implemented. In the BLG Report<sup>61</sup> the authors considered a regime whereby approved professionals would be signing regulatory instruments. The author's commented:

"In our view, the liability of consultants would be significantly higher under [this Option] than under the British Columbia current system. Consultants will be exposed to third party liability solely as a result of issuing Approvals and Certificates. There will be a broad range of parties who will rely on consultant-issued Approvals and Certificates, including local governments, lenders and purchasers. Currently, consultants may shield themselves against liability to third parties through the use of disclaimer clauses in environmental reports. Under [this Option], this will not be possible."

Our interviews with relevant stakeholders have led us to the same conclusion with respect to a scenario whereby the MWLAP asks approved professionals to issue approvals and certificates. We have included a detailed discussion of the liability risks associated with approved professionals signing regulatory instruments and the various methods of managing that liability in our discussion of Option 3 below.

### **Insurance implications:**

#### **Option 2A:**

Our conversations with the insurance industry revealed that a hybrid system where the MWLAP still signs off on all contaminated site instruments, would not cause any concerns with respect to their ability to continue insuring environmental consultants at reasonable rates.<sup>62</sup> Representatives do not see any significant difference in terms of their risk exposure between the current system and a hybrid system with LEPs providing advice to the MWLAP with respect to the issuance of approvals.

The Report entitled, British Columbia's New Licensed Environmental Professional Framework (the "Framework Report"), recommended that the current use of a \$2 million insurance coverage criterion as a basis for LEP membership should be discontinued. The Report concluded that imposing an omnibus insurance requirement on all LEPs may have the perverse effect of blocking entry to new professionals whose participation would be necessary in LEP reviews (i.e. biologists, chemists, health risk assessors etc.).<sup>63</sup> The interviews we conducted for the purposes of this report revealed similar concerns. First, it was felt that omnibus insurance requirements have the effect of limiting membership on the current Roster as well as on the proposed LEP Board to environmental consultants working for larger firms. This is because obtaining \$ 2 million in insurance has proven too costly for some environmental consultants who practice as 'sole practitioners' or work in smaller offices or who are not members of the three parent

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<sup>61</sup> The BLG Report, *supra* note 22.

<sup>62</sup> Telephone communication with representatives from insurance industry, *supra* note 38 and *supra* note 8.

<sup>63</sup> Waldemar Braul, 2004 Report, *supra* note 18 at pp. 34-35.

organizations.<sup>64</sup> Second, BCIA and CAB members are not required to carry insurance today and it may take some time for insurers to determine whether to provide insurance to these LEPs. The insurers we spoke to indicated that insurance for these two classes of individual would likely be more costly to obtain (see discussion in Appendix 1 of this report).

To address these problems, the Framework Report recommended that ‘mandatory disclosure’ be considered. In other words, the LEP would be required to disclose, in writing, his or her professional liability insurance status (or lack of insurance) to clients prior to entering into an agreement or commencing work.<sup>65</sup> Such a requirement would be in line with the requirements of one of the parent organizations, APEGBC. British Columbia’s architects and engineers/geoscientists are currently required by their respective codes of ethics and bylaws to make such a disclosure; engineers and geoscientists are further required to obtain the client’s signed acknowledgement that this status has been communicated.<sup>66</sup>

While a requirement to disclose insurance coverage in lieu of mandatory insurance could help ensure that LEP work does not become the exclusive domain of environmental consultants working at larger firms, it is our view that a disclosure requirement would result in a two-tiered system. Most owners may still prefer to hire an LEP that has insurance coverage. Therefore, LEPs without insurance (generally those that work with smaller firms) would still be disadvantaged by the system. This can be seen through a comparison with U.S. jurisdictions where insurance is not required though clients are more inclined to hire environmental professionals that have obtained professional liability insurance. We therefore recommend that the MWLAP work with the insurance industry to ensure that all LEPs have access to affordable insurance.

### ***Option 2B:***

We were informed by the insurance industry that, as a general rule, the more independent the approved professional and the further removed the system is from government, the more difficult it will be for approved professionals to obtain professional liability insurance at a reasonable rate.<sup>67</sup>

### **Preferences Of Stakeholders:**

Approved professionals, their parent organizations, and members of the insurance industry stated that if the contaminated sites regime is going to change, they would prefer that it change to Option 2A: a hybrid model without LEP sign-off. Once again, all stakeholders are worried about the increased risk of liability, increased cost of insurance and increased difficulty in getting insurance associated with the task of signing off on regulatory instruments.

We note that the Roster Steering Committee and the LEP Steering Committee conducted a survey, with the objective of determining the preferences of the members of

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<sup>64</sup> Telephone communication with Roster members, *supra* note 21 and 24. It was communicated that consultants who are employed at smaller firms have difficulty participating in the current Roster system and that this is a significant weakness of the current regime.

<sup>65</sup> Waldemar Brault, 2004 Report, *supra* note 18.

<sup>66</sup> *Ibid.*

<sup>67</sup> Telephone communication with representatives of the insurance industry, *supra* note 38.

the APEGBC, government and land owners/ developers.<sup>68</sup> The survey results indicated a clear preference for a hybrid system as opposed to a self-regulated system. One of the most important factors identified was the ability to limit liability exposure for the future LEP. The majority of those surveyed felt it was the MWLAP's responsibility to ensure that LEPs are protected against undue liability risks. With respect to the issuance of regulatory instruments, the majority of responses indicated that the function should be completed only or mostly by the MWLAP, particularly with respect to certificates of compliance.

### **Comparisons with other jurisdictions:**

#### ***Insurance:***

No U.S. jurisdiction had a requirement for mandatory insurance. Only Illinois had a requirement that insurance be disclosed to clients by environmental professionals. However, all of the U.S. jurisdictions studied had very high levels of insurance coverage, because most professionals are uncomfortable with the risk of operating without insurance or because site owners will not hire an environmental professional unless he or she has insurance coverage. Very few of the Canadian regimes studied require mandatory insurance. Those who do (Ontario, Newfoundland and Nova Scotia) require insurance coverage in the amount of \$ 1 million. As discussed above, it is our view that the MWLAP should assist LEPs in finding insurance rather than move to a disclosure regime in the first instance.

#### **Advantages of Option 2A:**

The comparative advantages as between Options 1 and 2A (where MWLAP staff continue to sign-off on approvals) would remain much the same as follows:

- (i) lower administrative cost for the MWLAP
- (ii) would still attract and maintain highly skilled and qualified professionals;
- (iii) would still encourage the clean-up and rehabilitation of brownfield sites;
- (iv) would produce instruments that the business community and other stakeholders could rely on; and
- (v) would leave room for the exercise of professional judgment.

Almost all stakeholders interviewed for the purposes of this report indicated that from a liability perspective, they favour a LEP hybrid system almost the same as the current system, provided there is no change in signoff authority. The LEP system would not require significant statutory or regulatory changes to the EMA, as it could largely build on the existing regulatory framework, however, it would require the creation of a society under the *Society Act*. The MWLAP could likely achieve a move to Option 2 before April 2006 since no enabling legislation would be required and the creation of a society under the *Society Act* could be achieved relatively rapidly. The system would retain its flexibility, as by-laws could be changed with relative ease under the *Society Act*. This Option builds incrementally on the current system and is therefore quite familiar to all contaminated site stakeholders. This would enable the system to evolve while

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<sup>68</sup> APEGBC, Background Document and Questionnaire for Development of a New Contaminated Site Review Process in B.C., 23 February 2004 and APEGBC, Summary of Survey Results: Development of a New Contaminated Site Review Process in BC, 16 April 2004.

continuing to run smoothly thus minimizing uncertainty for key stakeholders such as insurers or lenders. If the MWLAP retains the function of final sign-off on legal instruments, there would likely not be a need for significant changes to insurance policies and premiums. We also note that the costs associated with a move to Option 2A are modest compared to the higher costs associated with a move to Option 3.

#### **Disadvantages of Option 2A:**

The key disadvantage associated with Option 2A is that the liability of members of the LEP Board will likely increase should the Board lose its government immunity protection. Further, some stakeholders are very concerned with the complexities associated with the audit and review of LEP members by the LEP Board who could hail from quite different professional backgrounds.<sup>69</sup>

These disadvantages, however, are offset by the key reason for the MWLAP moving to Option 2, which is that it would provide a good interim step for the MWLAP to test the conditions for a subsequent move to an Option 3 regime. We note that the MWLAP may decide not to move to Option 3 if it is able to attain all of its objectives under option 2A or 2B.

#### **Liability Associated With The LEP Board**

Even though interest has been expressed concerning this liability issue<sup>70</sup>, a detailed evaluation is beyond the strict scope of the Terms and Reference of this report and would require further investigation. Nevertheless, the following preliminary observations can be made. It is our view that liability risks can be minimized by the MWLAP by continuing to appoint Board members thus extending government immunity through government appointment. We note that this practice is carried out in both Massachusetts and Connecticut, where the Departments of Environment appoint the Chairs of the LSP and LEP Boards respectively and the Governors appoint the other members of the Boards. Should government appointment not be desirable from MWLAP's perspective, director and officer liability insurance can be purchased and is readily available.

#### **Advantages of Option 2B:**

Option 2B retains all of the advantages of Option 2A with the added benefit that it facilitates the devolution of regulatory approval to LEPs. Further, it meets the MWLAP's objective of reducing the reliance on MWLAP staff in reviewing contaminated site submissions for low and moderate risk sites, thereby reducing the costs of program administration and enhancing the participation of approved professionals with respect to such sites.

#### **Disadvantages of Option 2B:**

With devolution comes the concomitant problems of increased liability exposure and the potential for increased difficulty in obtaining insurance at a reasonable price. We will

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<sup>69</sup> Telephone communication with a representative of the CAB, *supra* note 36, and a representative of the insurance industry, *supra* note 38.

<sup>70</sup> Telephone communication with representatives from the CAB and the BCIA, *supra* note 36.

address these disadvantages more thoroughly in our discussion of Option 3, which devolves the responsibility of sign-off to approved professionals.

### **OPTION 3: A SELF-REGULATED PROFESSION**

#### **Overview**

Option 3 creates a class of independent approved professionals who are not a part of government or a delegated part of government. Under this model a new profession, of “licensed environmental professionals”, would be created by legislation, establishing an independent legal body to govern the profession. This legislation would empower a supervisory board to set registration and professional standards and enforce such standards through a disciplinary process. Under this Option licensed environmental professionals would be given legal authority to sign regulatory instruments relating to low and moderate contaminated sites such as certificates of compliance issued under the EMA.

One of the key differences between Option 2 and Option 3 is that Option 3 creates a self-regulating profession rather than a Society. A self-regulating profession has greater disciplinary capacities and tends to have more extensive codes of ethics and by-laws. In terms of discipline, under the *Society Act*, only current members can be disciplined. As a result, a member could leave the Society thereby avoiding disciplinary action. This avoidance of disciplinary action could not occur under a self-regulating professional model. A self-regulated profession can also restrict or remove the right of professionals to practice.

Option 3 is very similar to the Licensed Site Professional (“LSP”) program that is in place in Massachusetts. Under that program, an LSP Board of eleven members is appointed. The Governor appoints ten members while the Department of Environment (the “DEP”) appoints one member. The LSP Board is independent of government and licenses qualified “licensed site professionals”, or LSPs. The LSP Board is empowered by its enabling legislation to create by-laws, disciplinary rules and codes of ethics. While the LSP Board has a disciplinary function, there is also a significant role for the DEP in the auditing the process. Twenty percent of all submissions are reviewed by the DEP as part of their audit process.<sup>71</sup> Government regulators may also advance concerns over LSP performance to the LSP Board. The Massachusetts model shares some similarities with self-regulating bodies such as the Association of Professional Engineers and Geoscientists of British Columbia as well as the Law Society of British Columbia.<sup>72</sup>

#### **Preferences Of Stakeholders:**

This Option was not enthusiastically embraced by the parent organizations, approved professionals or insurers we interviewed for the purposes of this report. The BCIA and the CAB expressed concerns about the liability risks that could confront their members under this Option and were particularly worried that their members would have difficulty

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<sup>71</sup> Telephone communication with Executive Director, LSP Program.

<sup>72</sup> This description of the LSP Program is taken from Waldemar Brul, McDonald & Company, “Considerations for Establishment of a Licensed Environmental Professional System for Contaminated Sites in British Columbia: Final Report,” October 28, 2003 (the “Brul, 2003 Report”).

getting insurance at rates they could afford, in light of the fact that many of their members do not currently carry insurance.<sup>73</sup>

The approved professionals we interviewed all ranked this Option last, in terms of their preferences. They are concerned that since this model would have no government “backstop”<sup>74</sup> in the form of issuing permits and approvals that insurance premiums would likely increase significantly.<sup>75</sup> They also viewed this Option as potentially being the most litigious of the options due to increased exposure to third party liability.<sup>76</sup> It was also thought that this Option could be very costly for approved professionals to fund, particularly in light of the relatively small number of professionals who will be participating. One approved professional we spoke with suggested that if the government creates a contaminated site regime that poses a high level of liability risk to approved professionals, many professionals may decide to leave the profession or refuse to sign-off on regulatory instruments.<sup>77</sup>

Insurers generally feel that the more independent approved professionals are and the less government is involved in the contaminated sites cleanup and approval regime, the higher the cost of insurance will be and the more difficult it will be to obtain for certain professionals.<sup>78</sup> Some representative from the insurance industry were of the view that Options 3 and 2, where approved professionals signed off on regulatory instruments, would be problematic given the degree of independence from government. It was this representative’s view that the insurance industry at large, would have a strong preference for Option 1.<sup>79</sup> However, we discovered that there are divergent opinions on this issue. Other representatives of the insurance industry we spoke with, indicated that the industry derives comfort from by-laws, codes of ethics and a stringent licensing and disciplinary regime. It derives comfort from these measures, because then there are mechanisms to address and remove the “bad actors” from the profession and that this task is not being left to the insurance industry through the denial of coverage.<sup>80</sup> It was recognized that a self-regulating profession is a superior forum for creating by-laws and disciplinary measures, because of the increased capacity to take disciplinary action. As the Braul Report comments: “the legal foundation of a society under the British Columbia *Society Act* is an imperfect vehicle, although the society model incorporates all of the fundamental procedures such as establishing a governing Board, setting qualifications for membership, developing a tailored conduct and discipline process and adopting practice guidelines.”<sup>81</sup>

### **Necessity for Regime Change**

A number of people we spoke with are concerned with the length of time it would take to write the legislation necessary to create a self-regulating profession and the costs associated with its set up and operation.<sup>82</sup> The Background Document and

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<sup>73</sup> Telephone communication with representatives of the BCIA and the CAB, *supra* note 36.

<sup>74</sup> Telephone communication, Roster members, *supra* note 24.

<sup>75</sup> Telephone communication with Roster members, *supra* note 21.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> Telephone communication with representatives of the insurance industry, *supra* note 38.

<sup>79</sup> Telephone communication with representative of the insurance industry, *supra* note 38.

<sup>80</sup> Telephone communication with Insurance Bureau of Canada representative, *supra* note 50.

<sup>81</sup> Braul Report, 2004 *supra* note 20 at 78.

<sup>82</sup> Telephone communications with representatives from CAB and BCIA, *supra* note 36; and Roster members, *supra* note 21 and 24.

Questionnaire for the Development of a new Contaminated Site Review Process in B.C., developed by APEGBC<sup>83</sup>, concurred with these concerns and also pointed out that since this Option would require the development of a new framework from the ground up, it would be the Option most likely to face start-up issues and uncertainty in the contaminated sites community. It was suggested that this uncertainty could result in fewer contaminated sites being investigated and remediated<sup>84</sup>, which would be contrary to the objectives of the government.

### **Implications for Liability Protection**

Of the three options we were asked to consider, Option 3 poses the greatest potential of liability for approved professionals. This is because the instruments signed by approved professionals are public documents, posted on the environmental site registry and will be relied upon by a number of interested parties including municipalities, purchasers, and lenders. Under Option 3, approved professionals could be exposed to lawsuits by third parties as well as lawsuits resulting from any errors and omissions.

The BLG Report suggests including environmental consultants as “protected persons” under the EMA, as a method for limiting liability. This would protect them from any claim with respect to the signing and issuing of approvals and certificates except where the consultant is dishonest, malicious or guilty of willful misconduct. Such consultants would continue to have liability exposure to third parties if they are responsible persons or to their clients if they are negligent in the preparation of reports or conduct of remedial work. The authors of the BLG Report could “see no reason why consultants issuing Approvals and Certificates ... should not be afforded the same level of protection as government employees currently issuing Approvals and Certificates.”

The Bull, Housser and Tupper legal opinion,<sup>85</sup> suggests that consultant liability be limited to the amount of the consultant’s professional liability insurance, with immunity for claims in excess of such insurance. The BLG Report pointed out that this would be unhelpful in circumstances where an environmental consultant did not have professional liability insurance coverage. The way around this problem, of course, would be to require insurance coverage for all LSPs.

We asked the government employees who we interviewed about the probability of the two solutions described above being implemented. We were informed that the government is unwilling to provide additional liability protection to approved professionals as a part of the regime change. We were also told that the government was unlikely to provide liability protection beyond a variety of fixed insurance caps as suggested by the Insurance Bureau of Canada because this could be seen as the government paying for some one else’s error or omission.<sup>86</sup> We were also told that the government would likely not be comfortable with either providing approved professionals with full indemnification or with liability protection as a “protected person” under section 61 of the EMA because to do so would mean that third parties affected by a negligent cleanup would be unable to recover for their losses.<sup>87</sup> Finally, the government is of the view that providing approved professionals with liability protection or indemnification sends the wrong

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<sup>83</sup> *Ibid.*

<sup>84</sup> Telephone communication with representative of the insurance industry, *supra* note 38.

<sup>85</sup> Bull, Housser & Tupper Opinion, *supra* note 22.

<sup>86</sup> Telephone communication, Ministry of Finance Staff, *supra* note 35.

<sup>87</sup> *Ibid.*

message to the public with respect to the responsibility and accountability of approved professionals.<sup>88</sup>

In addition, a number of people we spoke with stated that in their view, focusing on securing either “protected person” status or full indemnification status was approaching the liability/insurability problems associated with certain scenarios in the wrong way.<sup>89</sup> In particular, the Insurance Bureau of Canada regards the transfer of immunity to approved professionals as “not the key issue and should not be a stumbling block”.<sup>90</sup>

We also note that only one of the other jurisdictions reviewed offers any form of immunity from liability. Illinois provides immunity to Licensed Remediation Specialists (“LRS”) who are responsible for signing and issuing final reports on sites to the government. Upon receipt of a report, the Director then issues a Certificate of Completion, which states that the LRS is relieved from liability to the state and citizens suits

## **Insurance Implications**

### ***Need for the MWLAP to Present Industry with More Specific Proposals:***

Every person we spoke to in the insurance industry informed us that they could only provide meaningful and detailed feedback on the three Options once they are provided with copies of the legislative or regulatory wording. They stressed that the best way to structure a regime that is insurable would be for the MWLAP to consult with each of the key insurers in British Columbia, once they have proposed statutory wording. In the absence of such wording insurance representatives could only provide us with general comments on each option. With specific wording they could speak to the implications for the cost, availability and exclusions that would need to be written into the insurance. Insurers have done this with environmental consultants in Ontario and with Building Code Inspectors in Ontario and expressed a willingness to be involved in the process in B.C. Involving the insurance industry in the Ontario contaminated sites process, resulted in compromise and the creation of a regime that the government, engineers and the insurer were prepared to endorse.

### ***Insurance Could Be Difficult to Obtain for Certain Professionals:***

We have been advised that insurance will likely be difficult to obtain for members who have not previously required insurance, such as the agrologists and biologists. If these professionals are required to write instruments, this could make finding insurance even more difficult for them.<sup>91</sup> An inability for certain environmental consultants to obtain insurance puts both consultants and their clients at risk. Without insurance many individuals or smaller firms will not be able to indemnify their clients in the event of a loss arising out of negligence on their part.

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<sup>88</sup> Telephone communication, MWLAP Staff, *supra* note 51.

<sup>89</sup> Telephone communication with representative of the Insurance Bureau of Canada, *supra* note 50 and Ministry of Finance Staff, *supra* note 35.

<sup>90</sup> Telephone communication with representative of the Insurance Bureau of Canada, *supra* note 50.

<sup>91</sup> Telephone communication with representative of the insurance industry, *supra* note 38 and telephone communication with environmental lawyer.

## ***Insurance Pooling***

Creating an insurance pool or program is an effective way to provide affordable insurance to the members of a profession. Our conversation with representatives of the insurance industry revealed that getting insurance coverage as part of a program would generally save the insured at least 30 % in premiums, and often more than this.<sup>92</sup> However, in order to create an insurance pool two conditions must be met. The first is that there must be at least 100 members in the pool. This is the absolute minimum and successful pools tend to have more members.<sup>93</sup> The second condition is that there must be similarities in professional practices among members of the pool.<sup>94</sup> Both of these conditions could prove difficult for the approved professionals in B.C. Even if insurance is made mandatory for all approved professionals, it is questionable whether there would be a sufficient number of professionals to meet the minimum size requirements for insurance pooling. Currently, there are 50 members on the Roster of Approved Professionals. Even with the addition of the CAB and BCIA, it seems unlikely that there would be over 100 approved professionals in the short term. Also, if mandatory insurance is no longer a requirement for membership in the LEP, and there is a move to require disclosure, it will be even more difficult to ensure there are adequate numbers for a pool. We note again that we are not advocating a move to disclosure of insurance status for the reasons explained above. However, the larger hurdle to establishing a pool, is the requirement that there be consistency in practice among approved professionals. Environmental professionals currently have varied practices: some only do site investigations, some do site investigations and remediation, some are qualified to apply numeric standards while others are qualified to do risk assessments etc. As the membership of the LEP broadens to include biologists, chemists, environmental health assessors etc. there will be increased variation in what approved professionals do. These factors could make it difficult for insurers to establish an insurance pool for either an LEP under Option 2 or a self-regulating profession under Option 3.

Our conversation with the B.C. Ministry of Finance, Risk Management Branch revealed that it may be possible for the government to come up with a risk pool should environmental professionals be unable to find insurance.<sup>95</sup> However, we were informed that this option would be a last resort and only used if:

- Adequate insurance is not available on a consistent and cost effective basis throughout the insurance industry;
- The government determined that establishing a risk pool would be the only way to move forward; and
- The pool would become completely funded by approved professionals in a relatively short period of time.<sup>96</sup>

We note that the government of B.C. was prepared to obtain pooled insurance when it was devolving the responsibility for the delivery of safety inspection services to the BC Safety Authority (“BCSA”), established under the *Safety Authority Act* (April 1, 2004)<sup>97</sup>. This process involved transferring the responsibility for the inspection of boilers and

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<sup>92</sup> Telephone communication with representative of the insurance industry, *supra* note 8.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> Telephone communication with Ministry of Finance Staff, *supra* note 35.

<sup>96</sup> *Ibid.*

<sup>97</sup> [SBC 2003] Chapter 39.

boiler systems; electrical systems and equipment; elevating devices and other safety services in the province from the government to the BCSA under subsection 84(1) of the *Safety Standards Act* (“SSA”). During this process, safety officers, who would be appointed under section 11 of the SSA were very worried that they would not be able to get insurance that would cover these delegated duties, which were traditionally associated with government. The proposed solution to this problem was the establishment of a risk pool. It should also be noted that before this scheme was established, the safety officers were able to find appropriate insurance and the government abandoned its plans to assist with the formation of the pool. However, the process that was proposed could be helpful in this context. The first step in establishing the pool was the provision of a loan by the government to cover the amount of necessary coverage. The second step was to get an indemnity from government for any claims exceeding the necessary coverage. The indemnity was designed to expire when the risk pool was fully funded.

### ***Insurance Ought Not Be Used As A Back-stop***

The third key insurance issue that emerged from our conversations was that it would be inappropriate to rely on insurance to address the liability risks associated with the creation of a new contaminated sites regime. All of the insurance stakeholders we spoke with were unanimous in their view that the liability problems must be addressed independently from the insurance issues posed by the new regime. These stakeholders stated that there is a view within B.C. that if insurance could be found to insure any changes to the regime, this would alleviate concerns relating to the liability of approved professionals. All insurance stakeholders stressed that using insurance as a backstop was inappropriate and could have very dangerous implications for the future availability of insurance for approved professionals in B.C.

Approved professionals were also of the view that insurance ought not to be used as a backstop.<sup>98</sup> From their perspective, once there is litigation and an insurance claim, it can be very damaging to a professional's business, particularly for those working in small or sole practices, who could face bankruptcy as a result of litigation (even if that litigation is ultimately unsuccessful). Approved professionals want a system that proactively minimizes litigation up front.

### ***Voiding Insurance Coverage:***

Representatives from the insurance industry indicated that providing express warranties and guarantees in an approval (i.e. such as a certificate of compliance) that a site is clean or meets prescribed standards would likely void an approved professional's insurance coverage.<sup>99</sup> Further, there is the larger problem of approved professionals performing services, which are not usual or customary for environmental consultants, thus falling within insurance exclusions. Our conversation with insurance representatives indicated that certificates would have to be worded carefully to avoid these problems.

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<sup>98</sup>Telephone communications with Roster members, *supra* note 21.

<sup>99</sup> Telephone communication with representative of the insurance industry, *supra* note 38. Once again, it was suggested that insurers would need to see the proposed wording of a certificate before they could determine how they would view it.

### **Tools for Managing Liability:**

As discussed, earlier in this report, we were told by government that it is unlikely that the recommendations contained in the Minister's Advisory Panel Report (indemnification, liability protection as a protected person or liability protection above a variety of fixed insurance caps) would be implemented as a means for managing liability. The recommended measures are not regarded as an appropriate means to manage liability over the long term.

Our conversations with the insurers of environmental consultants in B.C., illustrated that they are wary of the increased risk of exposure presented by Option 3. However, their largest concern relates to wording of the certificates that approved professionals would be signing. They are not alone in feeling this way. The Insurance Bureau of Canada stated that the more closely the statements in the Certificate of Compliance resemble guarantees, the more likely it would be that an approved professional would be sued and be forced to call on their insurance. This would likely cause insurance companies concern about providing approved professionals with ongoing insurance.<sup>100</sup>

### ***The Language of the Certificate***

Based on the foregoing, we suggest that consideration be given to changing the wording of the instruments that are currently signed by the MWLAP so that they do not resemble guarantees or warranties. This solution was agreeable to everyone we spoke with for the purposes of this report: approved professionals, parent organizations, members of the insurance industry, and government stakeholders. Approved professionals, who are members of the APEGBC, explained that they are forbidden by their Codes of Ethics to sign such guarantees with respect to site condition.<sup>101</sup> A professional can only attest to the fact that he or she has met the standard of care practiced by their profession. The Ministry of Finance, Risk Management Branch also described the language of the approval as the key method to managing liability. It was suggested that it is not reasonable to expect approved professionals, without the immunity protection given to government, to sign certificates with the same wording as those currently being issued by the MWLAP. Finally, almost all of the other jurisdictions we were asked to research for this report, which rely on environmental consultants to sign certificates, ensure that such consultants are not signing guarantees or warranties.

It is our conclusion that the wording of the Certificates of Compliance is one of the key issues in considering the merits of Option 3.

### ***Current Wording of the Certificate of Compliance:***

**“THIS IS TO CERTIFY** that as of the date indicated below, the lands identified below have been satisfactorily remediated to meet prescribed standards for **<land use> soil** and **<water use> water**, **<sediment use> sediment** criteria **<and Hazardous Waste Regulation standards>**. The substances for which remediation has been satisfactorily completed are as follows...”

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<sup>100</sup> Telephone communication with representative of the Insurance Bureau of Canada, *supra* note 50.

<sup>101</sup> Telephone communication with Roster members *supra* note 21.

The above statement most likely amounts to a guarantee even though the Certificate goes on to state:

“I, however, make no representation or warranty as to the accuracy or completeness of this information. ... This certificate should not be construed as an assurance that there are no hazards present on the site described above.”

The wording of this Certificate is problematic even in light of this last statement, claiming it is not a guarantee. The insurance industry was quick to point out that claiming that a statement that constitutes a guarantee is not a guarantee, does not make it so.<sup>102</sup>

### **Comparison to Other Jurisdictions:**

Of the jurisdictions reviewed, only five permit environmental professionals to sign-off on regulatory instruments without providing some form of government backstop (in the form of an acknowledgment or a comfort letter). These jurisdictions are Ontario, Massachusetts, Connecticut, Victoria and NSW. Three of these jurisdictions ensure that regulatory instruments signed by environmental professionals are carefully worded so that they do not provide an express guarantee or a warranty. These jurisdictions are: Ontario, Massachusetts and Connecticut. In all three of these jurisdictions we have been told the wording has been explicitly chosen to ensure that environmental professionals do not face undue liability exposure. In all three of these jurisdictions, the people we spoke with could not think of a case where an environmental professional has faced a lawsuit as a result of his or her sign-off on a regulatory instrument.

On the other hand, the Australian regimes posed some problems, discussed earlier in this report. In light of these problems, we do not recommend that B.C. follow either of the Australian precedents we canvassed.

For comparison purposes, we have included the wording of certificates in Massachusetts, Ontario and Connecticut.

Ontario is particularly interesting because the wording of the Record of Site Condition (“RSC”) (the term for a document analogous to a Certificate of Compliance) has changed considerably at the insistence of environmental consultants and insurers. Initially, the wording was so problematic that environmental consultants refused to sign RSCs.

The consultant affidavit portion of the former wording of an Ontario RSC was:

“The assessment activities and restoration activities at the site have been completed in accordance with the [MOE Guideline]. Generally accepted geoscience practices and/or environmental practices and/or engineering practices were also followed where appropriate. None of the verification test results exceed the applicable criteria allowed for in the site assessment and/or restoration approach indicated in Part 3 of the RSC. Although the information represents the site conditions at the test locations at the time of sampling only, and conditions between and beyond the test locations may vary, I have collected sufficient information and taken all reasonable steps to form the opinion that the site meets the criteria for the land use set out in Part 3.2 of this RSC.”

<sup>102</sup> Telephone communication with representative of insurance industry, *supra* note 38.

I have prepared and/or reviewed the report(s) identified in Part 2, Table 1 of this RSC and am not aware of any soil, groundwater or sediment contamination on or within the site which would interfere with its use for the categories of land use(s) and groundwater condition, set out in Part 3.2 of this RSC.

I acknowledge that public authorities, parties acquiring or intending to acquire an interest in this site, current occupants and their consultants may rely on the statements in this RSC. Reliance on the statements contained herein is subject to the limitations and qualifications contained in the [MOE Guideline] and further subject to the actual use of the site since the date of this RSC". (Emphasis added)

The revised current wording is as follows:

"The qualified person shall make the following statements in the RSC, using the language set out in this section, in relation to the part of the RSC that includes the information, certifications and statements required by this Part:

1. I am a qualified person, as defined in section 168.1 of the Act and have the qualifications required by section 5 of the regulation.
2. I have in place an insurance policy that satisfies the requirements of section 7 of the regulation
3. I acknowledge that the RSC will be filed in the Environmental Site Registry, that records of site condition that are filed in the Registry are available for examination by the public and that the Registry contains a notice advising users of the Registry who have dealings with any property to consider conducting their own due diligence with respect to the environmental condition of the property, in addition to reviewing information in the Registry.
4. The opinions expressed in this RSC are engineering or scientific opinions made in accordance with generally accepted principles and practices as recognized by members of the environmental engineering or science profession or discipline practising at the same time and in the same or similar location.
5. To the best of my knowledge, the certifications and statements in this part of the RSC are true as of [insert certification date].
6. By signing this RSC, I make no express or implied warranties or guarantees."<sup>103</sup> (Emphasis added)

In Massachusetts, the wording of certificates does not constitute a guarantee or warranty. According to the Executive Director of the Licensed Site Professional ("LSP") program in Massachusetts, LSP's have not faced increased liability or lawsuits as a result of the move to an LSP program where LSPs sign off on all regulatory instruments, because the forms they sign-off on clearly state that the LSP is only providing an opinion.<sup>104</sup>

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<sup>103</sup> Section 35 of Schedule A of the Record of Site Condition Regulation O. Reg 153/04.

<sup>104</sup> Telephone communication with the Executive Director, *supra* note 71.

Every instrument that an LSP issues (such as a waste site cleanup activity opinion) must be accompanied by a transmittal form. Each transmittal form contains the following statement:

"I attest under the pains and penalties of perjury that I have personally examined and am familiar with this transmittal form, including any and all documents accompanying this submittal. In my professional opinion and judgment based upon application of (i) the standard of care in 309 CMR 4.02(1)<sup>105</sup>, (ii) the applicable provisions of 309 CMR 4.02(2)<sup>106</sup> and (3)<sup>107</sup>, and 309 CMR4.03(2)<sup>108</sup>, and (iii) the provisions of 309 CMR 4.03(3)<sup>109</sup>, to the best of my knowledge, information and belief that the response action(s) that is (are) the subject of this submittal:

- (i) has (have) been developed and implemented in accordance with the applicable provisions of the regulations,
- (ii) is (are) appropriate and reasonable to accomplish the purposes of such response action(s) as set forth in the applicable provisions of provisions of the regulations, and
- (iii) comply(ies) with the identified provisions of all orders, permits, and approvals identified in this submittal."

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<sup>105</sup> 309 CMR 4.02(1) - In providing Professional Services, a licensed site professional shall act with reasonable care and diligence, and apply the knowledge and skill ordinarily exercised by licensed site professionals in good standing practicing in the Commonwealth at the time the services are performed.

<sup>106</sup> 309 CMR 4.02(2) - An LSP shall not provide Professional Services outside his or her areas of professional competency, where this competency is based on his or her education, training, and/or experience, unless that LSP has relied upon the technical assistance of one or more professionals whom the LSP has reasonably determined are qualified in such area or areas by education, training and/or experience.

<sup>107</sup> 309 CMR 4.02(3)- In providing Professional Services, an LSP may rely in part upon the advice of one or more professionals whom the LSP reasonably determines are qualified by education, training and/or experience.

<sup>108</sup> 309 CMR4.03(2) - A licensed site professional shall render a waste site cleanup activity opinion only when he or she has either:

(a) in the case of an opinion related to an assessment:

- 1.managed, supervised or actually performed such assessment, or
- 2.periodically reviewed and evaluated the performance by others of such assessment; or

(b) in the case of an opinion related to a containment or removal action:

- 1.managed, supervised, or actually performed such action, or
- 2.periodically observed the performance by others of such action.

<sup>109</sup> 309 CMR4.03(3)- In providing professional services, a licensed site professional shall:

(a)exercise independent professional judgment;

(b)follow the requirements and procedures set forth in applicable provisions of M.G.L. c. 21E, and 310 CMR 40.0000;

(c) make a good faith and reasonable effort to identify and obtain the relevant and material facts, data, reports and other information evidencing conditions at a site that his or her client possesses or that is otherwise readily available, and identify and obtain such additional data and other information as he or she deems necessary to discharge his or her professional obligations under M.G.L. c. 21A, §§ 19 through 19J, and 309 CMR; and

d) with regard to the rendering of waste site cleanup activity opinions, disclose and explain in the waste site cleanup activity opinion the material facts, data, other information, and qualifications and limitations known by him or her which may tend to support or lead to a waste site cleanup activity opinion contrary to, or significantly different from, the one expressed.

The LSP must also sign the following certification:

**Certification of Person Making Submittal:**

I, \_\_\_\_\_, attest under the pains and penalties of perjury (i) that I have personally examined and am familiar with the information contained in this submittal, including any and all documents accompanying this transmittal form, (ii) that, based on my inquiry of those individuals immediately responsible for obtaining the information, the material information contained in this submittal is, to the best of my knowledge and belief, true, accurate and complete, and (iii) that I am fully authorized to make this attestation on behalf of the entity legally responsible for this submittal. I/the person or entity on whose behalf this submittal is made am/is aware that there are significant penalties, including, but not limited to, possible fines and imprisonment, for willfully submitting false, inaccurate, or incomplete information.

We point to the wording in Ontario and Massachusetts as examples of wording that reduces the liability exposure of environmental consultants while at the same time providing other stakeholders with a sufficient level of assurance of the environmental status of the site. Both of these jurisdictions have devolved a great deal of what was formerly the responsibility government to environmental consultants. It is our view that if the wording of instruments in British Columbia is similar to the wording used by either Ontario or Massachusetts, there will be reduced concern and calls for the need to transfer immunity to approved professionals. However, if such wording is not possible, it is our view that the government may want to consider other methods of limiting liability such as those recommended by the Minister's Advisory Panel (the "Panel"). The Panel recommended that where LEPs perform delegated government functions they should be afforded the same protection against liability as their government counterparts would have received. This would involve granting LEPs "protected person status". The Panel also recommended that civil liability should be made subject to a clearly defined limitation period. A period between 5-10 years was suggested.<sup>110</sup>

In Connecticut, Licensed Environmental Professionals ("LEPs") sign-off on two types of documents: Verifications and Environmental Condition Assessment Forms.

**Verifications:**

LEPs can sign verifications for a number of different types of documents; however, the wording in all documents is very similar. LEPs must sign below the following wording and affix their seal:

"I verify in accordance with Section 22a-133x(b) of the Connecticut General Statutes, that an investigation has been performed at the parcel in accordance with prevailing standards and guidelines and that the parcel has been remediated in accordance with the remediation standards, Sections 22a-133k-1 through 22a-133k-3 of the Regulations of Connecticut State Agencies."

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<sup>110</sup> Advisory Panel on Contaminated Sites, "Final Report of the Minister's Advisory Panel on Contaminated Sites," January 2003 (the "Minister's Advisory Panel Report") at page 66.

### ***Environmental Condition Assessment Forms:***

Environmental Condition Assessment Forms must be prepared under the supervision of a LEP. LEPs must sign below the following statement:

"I have personally examined and am familiar with the information submitted in this document and all attachments, and certify that based on reasonable investigation the submitted information is true and accurate to the best of my knowledge and belief. I certify that this form is complete and accurate as prescribed by the Commissioner without alteration of the text."

### **Advantages of Option 3:**

Option 3 achieves a number of the MWLAP's objectives. Of the Options considered, this Option reduces the reliance on the MWLAP staff and lowers costs for the MWLAP the most while enhancing the role of approved professionals to the greatest extent. This Option would allow the MWLAP to focus on high-risk sites, which could facilitate protection of human and ecosystem health by cleaning up the most polluted sites in B.C. This Option could also encourage the cleanup and redevelopment of low and moderate risk brownfield sites with the services of approved professionals.

### **Disadvantages of Option 3:**

The most significant disadvantage associated with Option 3 is the potential for increased liability exposure for approved professionals. Of the three Options we have been asked to consider, Option 3 poses the highest potential liability risk to LEPs. This is because the instruments signed by approved professionals are public documents, posted on the environmental site registry and will be relied upon by a number of interested parties including municipalities, purchasers, and lenders. Under Option 3, approved professionals could be exposed to lawsuits by third parties as well as lawsuits resulting from any errors and omissions.

Insurance will likely be more difficult to obtain at an affordable rate, particularly for members who have not previously required insurance, such as the agrologists and biologists. Further, our discussions with insurance companies revealed that the current number of professionals who would qualify in B.C. is not enough to support the creation of an insurance pool.

We would add, however, that many of the liability concerns can be addressed and minimized by wording the instruments that LEPs sign so that they are not guarantees. This would also likely address some of the concern respecting availability of affordable insurance.

On the other hand, if the liability issues are not managed, we have heard from some approved professionals that they may chose to leave the profession if they are being asked to take on what they see as excessive liability.

Some have also argued that changing current wording in the certificates could create uncertainty for the development community. This argument should be tempered by the fact that similar wording exists in Ontario and Massachusetts and has not prompted concerns within the development community. Further, in Ontario, environmental

consultants were once asked to sign Records of Site Condition that amounted to guarantees. When environmental consultants started to refuse to sign such certificates, for liability reasons, the Ministry of the Environment changed the wording of the certificates to remove the guarantees. This move has not prompted concern within the development community.

Finally, Option 3 has the highest set-up costs of any of the regimes. There is also uncertainty with respect to the long-term financial independent sustainability of a stand-alone system. The costs of supporting a licensing, testing and disciplinary process, office space, administrative staff and legal representation are quite high and could initially (at least) be greater than could reasonably be expected to be recovered from the annual dues paid by the members of the profession on an annual basis. By contrast, American jurisdictions with self-regulating professions have membership numbers of several hundreds of professionals to support the costs associated with such self-regulation. For example, Massachusetts' professional self-regulating body has 549 professional members and an annual operating budget of \$500,000 U.S.<sup>111</sup> On the other hand, B.C. currently has less than 50 approved professionals upon which to run a self-regulating system.

Pursuing Option 3 would involve a significant overhaul of the current regime. This could result in some uncertainty among stakeholders in the short term and undermine some of the objectives for changing the regime. It seems very unlikely that a self-regulating profession enshrined in legislation could be created by the target date of April 2006. Based on our conversations with approved professionals and the insurance industry, there is little appetite for a move to Option 3.

### **Conclusions:**

The current regime, described in Option 1, seems to be working well, as approved professionals have become familiar and accustomed to its requirements. However, the MWLAP has indicated that the twin objectives of lower costs and reducing reliance on the MWLAP staff so that they can focus on high-risk sites trump the other stated objectives. Option 1 does not result in the desired reduction of costs for the MWLAP, nor does it address the delays associated with the current requirement for government sign-off.<sup>112</sup> From MWLAP's perspective, selecting Option 1 would not enhance efficient, timely and cost effective cleanups.

Option 3 has some key disadvantages and uncertainties relating to the potential for increased liability exposure for environmental professionals and availability of affordable insurance. There are also some concerns, in light of the Australian examples, that Option 3 will not produce efficient, timely and cost effective cleanups if approved professionals insist on unwarranted extra sampling or refuse to sign-off on instruments if they are uncomfortable with the wording of those instruments. There is also the concern of putting into place a legislated regime, including the establishment of a self-regulating body before April 2006.

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<sup>111</sup> Telephone Communication with Executive Director of LSP, *supra* note 71.

<sup>112</sup> The delays have been reported by a Roster members *supra* note 24.

## Preferred Option

We suggest that the MWLAP start with Option 2A, the hybrid LEP model (without sign-off by approved professionals) because it will accomplish many of the objectives that are prompting a regime change.

This Option will:

- (i) lower administrative costs for the MWLAP;
- (ii) attract and maintain highly skilled and qualified professionals;
- (iii) encourage the clean-up and rehabilitation of low and moderate risk brownfield sites; and
- (iii) produce instruments that the business community and other stakeholders can rely on.

If the MWLAP retains the function of final sign-off on legal instruments, there would likely not be a need for significant changes to insurance policies and premiums.

Most stakeholders interviewed for the purposes of this report were not uncomfortable with the liability and insurance risks posed by Option 2A because the MWLAP retains the function of final sign-off on legal instruments. The implementation of Option 2A would also meet the key timeline of April 2006 that has been set by the MWLAP and afford all parties the opportunity of building a regime on a step-by-step basis that can address key issues and problems as they arise.

We are of the view that any further change to the regime should be implemented gradually in a stepped fashion to minimize the uncertainty that would result from a drastic and sudden regulatory change.<sup>113</sup> Once the LEP system is established and running smoothly, and MWLAP guidance documents are in place and the MWLAP has had conversations with the insurance industry addressing affordable insurance as well as the appropriate wording of certificates and approvals, then the MWLAP could contemplate moving to Option 2B, which would involve the devolution of responsibility for the signoff of contaminated sites legal instruments.

Should the MWLAP find that Option 2B does not attain all the objectives of regime change it is looking for, Option 2B could transition into Option 3. We note that a final transition to Option 3 is not inevitable or even desirable, in light of the disadvantages associated with Option 3. Therefore, if MWLAP feels that its objectives are met by Option 2B, a transition to Option 3 would be unnecessary.

There is support for the notion of a stepped process within the government and the report of the Minister's Advisory Panel. The Ministry Discussion Paper, "A New Contaminated Sites Regulatory Process Investigation, Classification and Remediation Process Overview", 22 October 2003 states:

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<sup>113</sup> This possibility has brought mixed reviews from approved professionals. We have been told by some that it would be preferable to move immediately to the desired model to minimize prolonged uncertainty associated with constantly changing regimes. It is also thought that continuing uncertainty and change could adversely affect the efficiency and timing of remediating contaminated sites. We have also been told that others prefer the notion of gradual change and careful evaluation before new steps are taken.

“As the experience and comfort level of stakeholders, licensed professionals and the public with the new regulatory process increases over time, the Ministry anticipates the eventual delegation of the full regulatory process, including issuance of regulatory authorizations, for sites that are not high risk or under risk-based remediation to an independent, self-regulated body of licensed environmental professionals”.<sup>114</sup>

This passage indicates a gradual roll out of the process, whereby Option 2 develops into Option 3. In this regard, the MWLAP staff advised us that the by-law under the *Society Act* would be drafted in such a way that it could easily be re-drafted as stand alone legislation under Option 3.<sup>115</sup>

### **Recommendations For Implementing The Preferred Option**

We recommend that when implementing Option 2, the MWLAP consult with the insurance industry early to ensure that its plans will not result in any adverse insurance consequences. Further, we urge that the MWLAP address any problems that smaller firms or the agrologists and biologists could have finding insurance rather than moving to the practice of disclosure of insurance status. Failure to do so could result in a two-tier regime where LEPs with insurance coverage are able to find more work while LEPs, without insurance coverage, are either exposed to liability or unable to find work because site owners would prefer to hire someone with insurance coverage. Having said that, if the government determines that it is not feasible that insurance be universally required, there must be a requirement that all professionals disclose their insurance status, in order to protect the public interest.

Finally, we recommend that in implementing the preferred option that the MWLAP develop the most complete environmental standards and protocols possible, address the misunderstandings with respect to insurance exclusion clauses and the work of approved professionals and better define what is meant by low, moderate and high risk sites. It is our view that these three key steps will improve the efficacy of any new contaminated sites regime.

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<sup>114</sup> Minister's Advisory Panel, *supra* note 111.

<sup>115</sup> Telephone communication with MWLAP staff, *supra* note 51.

## APPENDIX 1

### Summary of Current Practice

#### Introduction

The Ministry of Water, Land and Air Protection (“MWLAP”) asked us to review and discuss the current liability protection required and afforded approved professionals appointed to the Roster of Approved Professionals<sup>1</sup> as well as to canvass the currently available insurance coverage for approved professionals in B.C.

The purpose of this review is to create a base-line for the legislative review that the MWLAP is currently undergoing. The MWLAP is looking to continue to devolve government functions to qualified private sector professionals. Recent amendments resulting from Bill 57 to the *Environmental Management Act* [SBC 2003] Chapter 53 (the “EMA”) have already significantly advanced this project of devolution and the MWLAP is looking to have a new regime in place by April 2006.<sup>2</sup>

#### Historic Overview

A brief look at the legislative history is important before summarizing the current regime.

Prior to the issuance of the “Criteria for Managing Contaminated Sites in British Columbia” on 20 July 1995 (and the subsequent availability of MWLAP-issued Certificates), environmental consultant reports and letters certified that remedial work had been completed in accordance with remediation plans and constituted the primary evidence in British Columbia that contaminated property had been satisfactorily remediated.<sup>3</sup> MWLAP staff also managed and oversaw the remediation of contaminated sites. However, this process involved some uncertainty and long delays, because many local governments insisted that the Province be highly involved in the oversight of the remediation of contaminated sites in their respective jurisdictions in order to ensure the implementation of quality control measures respecting environmental consultants.<sup>4</sup>

The problems of delay, uncertainty and cost led to the introduction of a precursor of the current system. In 1996, a system quite similar in structure to the system in place today came into force in British Columbia, under Part 4 of the Waste Management Act (the “WMA”)<sup>5</sup> and the Contaminated Site Regulation (the “Regulation”).<sup>6</sup> The WMA and the Regulation introduced a new civil cause of action for the recovery of remediation costs and tied liability to absolute, retroactive, joint and several principles. These amendments

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<sup>1</sup> MWLAP has changed its terminology for the roster over the last 6 years. The terms “professional expert” and “rostered professional” were formerly used to describe what are now referred to as “approved professionals”.

<sup>2</sup> Telephone communication with MWLAP Representative on Roster Steering Committee; W. Brault. “British Columbia’s New Licensed Environmental Professional Framework” Prepared for: Roster Steering Committee LEP Sub-committee (December 15, 2004), at p. 41. [Hereinafter Brault Report, 2004].

<sup>3</sup> Craig Godsoe and Tracey Sandgathe, Borden Ladner Gervais LLP, “Contaminated Site Administration in British Columbia: Report to B.C. Ministry of Water, Land and Air Protection,” May 16, 2002 [hereinafter: The BLG Opinion].

<sup>4</sup> *Ibid.*

<sup>5</sup> R.S.B.C. 1996, c. 482.

<sup>6</sup> BC Reg. 375/96.

meant that a person found to be a “responsible person” under the WMA could be held liable for the clean-up of the entire site.

With the advent of this legislation, rezoning, subdivision, purchase and sale, financing, and demolition of current and former commercial or industrial properties were delayed until site contaminants could be identified, remediated, and a Certificate of Compliance issued.<sup>7</sup> However, this system relied on government oversight of all remediation and government staff, in many cases performed or sub-contracted out much of the remediation. As a result, there were still long delays in receiving government approvals and the system was quite time consuming and administratively inefficient. As a result, in 1999, the start of devolution began.

That year a roster system (the “Roster”) was established to expedite the review process for low and medium risk sites in British Columbia.<sup>8</sup> The Roster system was also designed to create regulatory efficiencies in terms of lower costs for reviews and approvals. Expert professionals were appointed to the Roster under the WMA and the Director of Waste Management was permitted to rely on the recommendations of a qualified professional with respect to Approvals in Principle of a remediation plan (“AiP”), Certificates of Compliance with human health and environmental protection standards (“CoC”), determinations whether a site was contaminated (a “determination”), and Contaminated Soil Relocation Agreements, only for low to moderate risk sites.<sup>9</sup> Expert professionals could make recommendations for all sites that posed a low and moderate risk, except for those sites:

- being addressed under the risk-based standards of the Regulation;
- under a WMA order, except as agreed to by a manager;
- using site-specific numerical standards or local background concentrations, except where pre-approved by the MWLAP;
- where only a part of the contamination was being remediated; or
- where remediation under an AiP would take longer than two years.

Owners of contaminated sites had three options they could pursue to obtain the approvals they needed. They could: (i) use the Roster submission process (described above) and hire an expert professional; (ii) undergo an external contract review (using a non-roster professional); (iii) or rely on Ministry review, which was considerably more costly. The Ministry strongly encouraged clients to use the Roster submission option for all sites that qualified as low and moderate risk sites, in accordance with Protocol 6 (signed in 2002).

However, there were still problems with this system. Many stakeholders described it as an administrative “bottle neck” that had increased investigation costs and had slowed the process down. Delays of six to 18 months in reviewing reports and approving remedial

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<sup>7</sup> Advisory Panel on Contaminated Sites, “Final Report of the Minister’s Advisory Panel on Contaminated Sites (January 2003). [Hereinafter the Minister’s Advisory Panel Report].

<sup>8</sup> It should be noted that although the MWLAP use the terminology “low to moderate risk sites” approved professionals can only advise MWLAP officials about low risk and/or moderate risk sites.

<sup>9</sup> British Columbia Ministry of Land, Water and Air, Administrative Guidance on Contaminated Sites: Professional Expert recommendations relating to low to moderate risk sites (January 2003) and British Columbia Ministry of Land, Water and Air, Ministry of Water, Land and Air Protection, Protocol 6 for Contaminated Sites: Eligibility of Applications for Review by Expert Professionals (April 10, 2002).

plans were reported, and in one case, a delay of four years was noted.<sup>10</sup> There was also a consensus among stakeholders that the Ministry audit process was unduly prescriptive and limited the exercise of professional judgement by expert professionals.<sup>11</sup>

This led to the latest round of legislative change that culminated in the 2004 amendments to the EMA. The current EMA reflects the additional duties that approved professionals can perform with a view to increasing the efficiency of the system both in time and cost.

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<sup>10</sup> See the Minister's Advisory Panel Report, *supra* note 7 at page 53.

<sup>11</sup> *Ibid.*

## Current Practice

### **Description of the current role of approved professionals in contaminated site remediation**

The current system is enabled by section 42 of the EMA<sup>12</sup> and paragraph 49.1 of the *Contaminated Sites Regulations*, Reg. 375/96 (the "Regulations").<sup>13</sup> The Director may appoint approved professionals to a Roster established under subsection 42(2) of the EMA. In this regard, subsection 42(2) states, "the Director may develop a roster of persons described in subsection 42(1)". Subsection 42(1) provides, "a director may designate classes of persons who are qualified to perform classes of activities, prepare classes of reports and other documents or make classes of recommendations that by or under this Act may be or are required to be performed, prepared or made by an approved professional".

Approved professionals are appointed for a term of three years and must:

- be a registered professional or licensee, in good standing, of the Association of Professional Engineers and Geoscientists of the Province of B.C. ("APEGBC"), or the Institute of Agrologists ("BCIA");
- possess a minimum of eight (8) years of documented experience, post registration with either APEGBC or BCIA, in the areas of contaminated site assessment, management and remediation, or possess a minimum of ten (10) years of documented post graduate experience in the areas of contaminated site assessment, management and remediation of which eight (8) years must be at a professional level,
- have successfully written and passed, in the year of appointment, the contaminated sites professional expert examination (members appointed by the Director to serve on the Roster Steering Committee are exempt from the contaminated sites professional expert examination requirement during their term of appointment),
- have been recommended for inclusion on the Roster by the Roster Steering Committee, and

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<sup>12</sup> 42 (1) A director may designate classes of persons who are qualified to perform activities that under the regulations or a protocol may be or are required to be performed by a qualified professional.

(2) The director may establish a roster of persons who are in a class designated under subsection (1).

(3) A director may

(a) make changes to the roster that are necessitated by the removal of a designation, and

(b) add and remove names from the roster.

(4) If a qualified professional has performed activities in a manner that a director has reasonable grounds to believe does not satisfy the applicable protocol established under section 64 [*director's protocols*], the director may suspend the qualified professional from the roster on terms and conditions.

Under section 39 "approved professional" means a person who is named on a roster established under subsection 42 (2)

<sup>13</sup> 49.1 For the purpose of determining the manner and extent of the review that must be undertaken... , a director may consider whether the application includes the recommendation of an approved professional in respect of the decision requested in the application.

- have obtained the required liability insurance as specified by the Director. Currently, candidates must have submitted proof to the Director that they have at least two million dollars of liability insurance.<sup>14</sup>

The exam slated for spring 2005 consists of three parts. The first is the regulatory section that is to be completed by all candidates. The second is known as the Standards Assessment Technical, which is to be completed by candidates who want to be qualified as Standards Assessment Specialists. The third is Risk Assessment Technical for candidates who wish to be qualified as Risk Assessment Specialists. A candidate can write all three parts and if successful, would be qualified to perform both risk assessment and standards assessment on contaminated sites. However, most professionals elect to be qualified in only one of these fields of expertise.<sup>15</sup>

The EMA was recently amended to strengthen the provisions involving approved professionals so that government could rely on their services to a greater extent.<sup>16</sup> A significant change was that as of November 1, 2004 all applications for low or moderate risk sites must be submitted as Roster submissions by an approved professional.<sup>17</sup> The option of external contract review and MWLAP review is no longer an option for site owners for low to moderate risk sites. This change was made by the MWLAP to deal with the backlog of applications and to redirect MWLAP resources to high-risk sites that pose a threat to human and/or ecological health.

Recommendations can be made to the Director in two ways. The first involves only one approved professional. That professional approves the planning and directs the work done with respect to the site, interprets the site data, draws conclusions and makes recommendations to the MWLAP regarding the site.<sup>18</sup> The second involves peer review of another approved professional's work. This can be done by a co-worker or can be entirely at arm's length.<sup>19</sup> The site owner determines which of these forms of review to use.<sup>20</sup> Our discussions with current approved professionals illustrated that the prevailing view is that there are no rules or legislation in place to prevent an approved professional from peer reviewing the work of another approved professional that works at the same firm. Some approved professionals expressed concern with this practice as they felt that it was a conflict of interest and could result in public perception that the system is not as fair or transparent as it could be.

When making a recommendation to the Director, the approved professional submits a report along with a recommendation to issue an approval. The recommendation takes the form of a 'Recommendation Letter' issued to the MWLAP Director on consultant letterhead. The Recommendation Letter provides that "it is [the consultant's] *opinion* that the conditions of [the applicable Regulation] have been met".

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<sup>14</sup> MWLAP, Procedures for the Roster of Professional Experts under the Contaminated Sites Regulation, 11 February 2005.

<sup>15</sup> Telephone communication with MWLAP staff, *supra* note 2.

<sup>16</sup> British Columbia Ministry of Land, Air and Water, Update on Contaminated Sites: Improvements to Contaminated Site Legislation in Effect (December 1, 2004).

<sup>17</sup> *Ibid.*

<sup>18</sup> Braul Report, 2004, *supra* note 2.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* Our conversation with MWLAP staff, *supra* note 2 confirmed that this is the current accepted practice.

## Involvement of approved professionals in the remediation of contaminated sites

Approved professionals are involved in a number of aspects of contaminated site remediation. First, they can conduct work on contaminated sites that are low/medium or high-risk sites. They can create site profiles, conduct preliminary or detailed site investigations, create remediation plans, and conduct remediation under either an ordered, voluntary or an independent remediation.<sup>21</sup> Acting in this capacity, approved professionals are akin to typical environmental consultants.

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<sup>21</sup> Independent remediation is site remediation carried out without the involvement and oversight of the MWLAP. The only requirements are to notify the MWLAP when it starts and ends and to provide notice about off-site migration of substances. Section 54 of the EMA provides:

- (1) A responsible person may carry out independent remediation whether or not
  - (a) a determination has been made as to whether the site is a contaminated site,
  - (b) a remediation order has been issued with respect to the site, or
  - (c) a voluntary remediation agreement with respect to the site has been entered into.
- (2) Any person undertaking independent remediation of a contaminated site must
  - (a) notify a director in writing promptly on initiating remediation, and
  - (b) notify the director in writing within 90 days of completing remediation.
- (3) A director may at any time during independent remediation by any person
  - (a) inspect and monitor any aspect of the remediation to determine compliance with the regulations,
  - (b) issue a remediation order as appropriate,
  - (c) order public consultation and review under section 52 [*public consultation and review*], or
  - (d) impose requirements that the director considers are reasonably necessary to achieve remediation.
- (4) On request of a person carrying out independent remediation and on receiving adequate information respecting the independent remediation, a director may
  - (a) review the remediation in accordance with the regulations and any requirements imposed under subsection (3) (d), and
  - (b) issue an approval in principle or a certificate of compliance under section 53 [*approvals in principle and certificates of compliance*].
- (5) The director may assess against a person, in accordance with the regulations, the prescribed fees for carrying out the actions referred to in subsection (4).

Section 57 of the Regulations provide:

- (1) A responsible person who carries out independent remediation of a site pursuant to section 54 (1) of the Act must, if the responsible person knows that one or more substances has migrated or is likely to have migrated to a neighbouring site and is or is likely causing contamination of the neighbouring site, provide the notification described in subsection (1.1).
  - (1.1) The responsible person must provide written notification to the person or persons who own the neighbouring site and a copy of the notification to a director, within 15 days after the responsible person becomes aware of the migration or likely migration of each substance to the neighbouring site, giving
    - (a) the name and address of the person or persons who own the site or sites to be remediated,
    - (b) the name, address and telephone number of the person to contact regarding the remediation activities to be undertaken at the site, and
    - (c) a general description of the nature of the migration or likely migration of each substance.
  - (1.2) A person who has a duty to provide notification to a director of commencement of independent remediation under section 54 (2) (a) of the Act must provide written notice to a director within 3 days after the commencement of any remediation activity involving handling, management or treatment of contamination, other than activity which has the purpose of obtaining results for investigation purposes, giving
    - (a) the legal description, including parcel identifier numbers and latitudinal and longitudinal references, and civic address of the parcel or parcels of land at the site to be remediated,
    - (b) the name and address of the person or persons who own the parcel or parcels of land at the site to be remediated,
    - (c) the name, address and telephone number of the person to contact regarding the remediation activities to be undertaken at the site, and

Approved professionals are unique in that only they can provide advice to the Director regarding the issuance of various instruments. Subsection 49(1) of the Regulations provides that, “[f]or the purpose of determining the manner and extent of the review that must be undertaken of the work on which an application referred to in section 15 (6), 43 (3), 47 (1.41) or 49 (7), a director may consider whether the application includes the recommendation of an approved professional in respect of the decision requested in the application.”

Section 10 of the Regulation also states that:

A director may enter into a contract with an approved professional to assist in the review of reports or plans, listed under items 2 (a) to (e) and (g) of Column 1 of Table 2 of Schedule 3, by making a report to the director containing the external contract reviewer's professional opinion in respect of

- (a) the adequacy of the report or plan,
- (b) the need for remediation of the site in respect of which the report or plan is submitted, and
- (c) whether the report or plan complies with Provincial laws and ministry policy.

Column 1 of Table 2, include the following items:

- < Review of a preliminary site investigation report;
- < Review of a detailed site investigation report;
- < Review of a remediation plan which does not include a risk assessment and/or environmental risk assessment report;
- < Review of a remediation plan which includes a risk assessment and/or environmental risk assessment report;
- < Review of a confirmation of remediation report; and
- < Review of a risk assessment and/or environmental risk assessment report not included in a remediation plan.

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(d) a general description of the nature of the contaminated site and the remediation being conducted.

(2) In the case of independent remediation arising from emergency response to a spill of a polluting substance, the duty to provide notification under subsection (1) is deemed to have been met if the spill has been reported in accordance with the requirements of section 79 of the Act and the Spill Reporting Regulation.

## Types of approvals that approved professionals can advise on<sup>22</sup>

Approved professionals can offer advice to the Director with respect to the issuing of Approvals in Principle of a remediation plan (“AiP”) (under subsections 53(1) & (2) of the EMA and section 47 of the Regulations), Certificates of Compliance with human health and environmental protection standards (“CoC”) (under subsections 53(3) & (4) of the EMA and section 49 of the Regulations), determinations whether a site is contaminated (a “determination”) (section 44 of the EMA and section 15 of the Regulations), or Contaminated Soil Relocation Agreements (under section 55 of the EMA and Part 8 of the Regulations) for low and moderate risk sites, in accordance with sections 15, 43, 47 and 49 of the Regulations. Approved professionals can make recommendations to a Director relating to determinations for all sites irrespective of the risks they pose (that is sites that pose high risks as well as low and moderate risk sites). However, approved professionals can only make recommendations respecting AiPs, CoC and contaminated soil relocation agreements for low and moderate risk sites.<sup>23</sup>

Provided the conditions of sections 47(1) and (4) (for Approvals) or 49(1) (for Certificates) of the Regulations and Protocol 6 are met to the satisfaction of the MWLAP Director, the Director *may* endorse the recommendation of the approved professional or decline to process an application incorporating a recommendation by the approved professional. If the Director declines to endorse the view of the approved professional, he or she must provide written reasons to the applicant and the professional association of which the approved professional is a member.<sup>24</sup>

Notwithstanding the foregoing, we were informed by MWLAP staff that the MWLAP conducts an administrative and not a substantive review of the submission of an approved professional before the instrument is issued.<sup>25</sup>

It should be noted that there are some provisions of the EMA that have not yet been brought into force, relating to summaries of site condition. When these sections come into force, approved professionals will also prepare summaries of site condition.

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<sup>22</sup> AiPs are usually required before financing or local government development approvals of sites with contamination will be granted. An AiP is given after a satisfactory review of: site investigation results, remediation options, public consultation input and a remediation plan. The legislation provides a framework for two broad types of remediation. Contamination may be: 1) removed so that it no longer remains at a site (via a soil relocation agreement) or 2) treated onsite. Remediation completion documents can be provided for these two types of remediation. CoCs can be issued if numerical standards in the regulations have been satisfied or if a clean-up has been carried out using risk assessment. Terms and conditions can be stated in the CoC, including conditions for the use of the site and any required monitoring. A CoC is therefore, analogous to the Record of Site Condition issued in Ontario. A CoC can be rescinded if the terms and conditions are not complied with. A CoC can no longer be revoked if environmental clean-up standards change in the future. Prior to issuing a determination, a preliminary and/or detailed site investigation must be reviewed. Preliminary site investigations assess the probability of site contamination through archival records, site visits and knowledge of historical activities conducted on site. Detailed site investigations confirm or refute the potential of site contamination by sampling and chemical analysis of soils, sediments, surface water and groundwater. Before issuing an AiP or a CoC, a site investigation report, a remediation plan and a confirmation of remediation report must first be reviewed by the Director. For a CoC to be issued, confirmatory sampling and analysis must also be submitted.

<sup>23</sup> MWLAP, Protocol 6 for Contaminated Sites: Eligibility of Applications for Review by Approved Professionals, 28 July 2004.

<sup>24</sup> See Ministry of Land, Air and Water, Protocol 6, signed 28 July 2004.

<sup>25</sup> Telephone communication with MWLAP staff, Legislative and Finance Unit. See also: [http://wlapwww.gov.bc.ca/epd/epdpa/contam\\_sites/roster/rosterauditfindings.html](http://wlapwww.gov.bc.ca/epd/epdpa/contam_sites/roster/rosterauditfindings.html).

Subsections 39(1) and (3) define a summary of site condition as a document that must be prepared and signed by an approved professional, in the form established by a protocol (under subsection 64(2)(m)), and in accordance with the Minister's requirements. Summaries of site condition can be relied upon by the Director to make a determination whether a site is contaminated and when issuing AiPs and CoCs (section 53).

### **The Roster Steering Committee**

The Roster Steering Committee is responsible for the administration and management of the Roster of Professional Experts.<sup>26</sup> The Roster Steering Committee shall consist of members appointed by the Director as follows:

- i. four (4) members from APEGBC,
- ii. one (1) member from the Institute of Agrologists,
- iii. two (2) members from the MWLAP, and
- iv. one (1) lay representative.

A member, other than a MWLAP or lay representative, to be eligible for appointment to the Roster Steering Committee must meet the qualifications for an approved professional and have a minimum of ten (10) years of experience in the areas of contaminated site assessment, management and remediation.

The duties of the Roster Steering Committee include:

- i. administrative functions related to the upkeep and maintenance of the Roster,
- ii. advising potential professional expert candidates of the requisite qualifications, examining procedures, duties, responsibilities, obligations and disciplinary procedures associated with appointment to the Roster,
- iii. setting the contaminated sites professional expert examination,
- iv. determining the passing grade for the contaminated sites professional expert examination,
- v. examining potential professional expert candidates,
- vi. marking the contaminated sites professional expert examination and informing candidates of their successful completion or failure of the contaminated sites professional expert examination,
- vii. checking and documenting qualifications related to the professional membership and work experience of potential candidates,
- viii. providing written recommendation to the Director of a candidate's final suitability for inclusion on the Roster,
- ix. reporting the results of audits and investigations of professional experts to the Director, and
- x. providing written recommendations and rationale to the Director in the case where a professional expert should be removed from the Roster.

The APEGBC, on behalf of the Roster Steering Committee, has been given the responsibility to provide administrative support to the Roster Steering Committee. They

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<sup>26</sup> MWLAP, Procedures for the Roster of Professional Experts under the Contaminated Sites Regulation, 11 February 2005.

are responsible for establishing, collecting and administering professional expert annual fees.

### **The audit system**

Audits are conducted for 10% of the Roster submissions. The Roster Steering Committee is now responsible for conducting audits and when necessary investigations of professional experts. In the past the audits were conducted by the MWLAP and more recently the system used a two-person audit team, normally one representative from the MWLAP and the Roster Steering Committee.<sup>27</sup>

The purpose of conducting an audit is to ensure that professional experts maintain the highest standards of work required. Our conversations with approved professionals revealed that the purpose of the audit has shifted in focus from disciplinary to educational.<sup>28</sup> Audits are conducted in the manner prescribed in the Roster Audit Framework, approved 1 January 2002. The Framework states that the audit is to focus on:

1. Technical competency of site investigation/characterization (Preliminary Site Investigation /Detailed Site Investigation/Remedial Plan/Confirmation)
2. Technical competency of site remediation (performed for CoC or proposed for AiP)
3. Competency of documentation – for all aspects of work and reports submitted in support of recommendation
4. Accuracy/appropriateness of final conclusion/recommendation by expert

The Consequences of Audit Findings are:

- Pass or fail. Pass – issue CoC/AiP: no disciplinary action. Fail – do not issue CoC/AiP: disciplinary action; or
- Submission of corrected or new site reports; or
- Complaint referred to Roster Steering Committee – mandatory Roster investigation;
- Removal from Roster (fixed periods) – mandatory re-examination; or
- Complaint referred to APEGBC.

An investigation may be conducted in response to a complaint from either the MWLAP or the public related to the quality of the work of a professional expert, or as otherwise believed necessary by the Roster Steering Committee. The purpose of the investigation is to determine the manner in which work by a professional expert is performed, and to determine if the contaminated sites work performed by a professional expert warrants removal from the Roster.

In situations where an investigation is required, the Roster Steering Committee will conduct its investigation through a “professional expert investigation team”. A professional expert investigation team shall be comprised, at a minimum, of:

- one (1) member of the Roster Steering Committee,

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<sup>27</sup> Braul Report, 2004, *supra* note 2, at p. 43.

<sup>28</sup> Telephone communication with Roster members.

- one (1) member drawn from the Roster of the whole, who is not a member of the Roster Steering Committee, and
- one (1) member in good standing drawn from the same parent organization as the person being investigated

A report, detailing the findings of a professional expert investigation team will be provided to the Chair of the Roster Steering Committee. The Roster Steering Committee will review the team's findings and where warranted will provide written recommendations and rationale to the Director advising on the issue of removal of the professional expert from the Roster.

### **Indemnity of RSC members**

The Ministry will indemnify and save harmless the members of the Roster Steering Committee from any and all claims, actions or proceedings for any acts or omissions done in good faith in the performance or intended performance of any duty under this procedure. The MWLAP will also indemnify and save harmless APEGBC, and its officers, directors and employees for any acts or omissions done in good faith in the performance or intended performance of administrative or secretariat services for the Roster Steering Committee.

### **Site registry**

The Site Registry was launched under the *Waste Management Act* and Contaminated Sites Regulation on 3 November 1997. It provides public computer access to information on sites which have been investigated and cleaned up since the MWLAP began recording this activity. The Site Registry lists the nature as well as legal and regulatory steps that have been taken to identify, manage and administer these sites. Under section 43 of the EMA the Director must establish a site registry that is accessible to the public and appoint a registrar to manage the registry.<sup>29</sup> The Site Registry includes the following information (described in section 43):

- formal determinations as to whether a property is contaminated
- all orders, approvals, voluntary remediation agreements and decisions
- environmental screening information from site profiles
- site investigation reports
- site cleanup plans
- certificates of compliance with provincial site cleanup requirements
- neighbouring sites, which can be used to assess the potential for migration of contaminants onto a subject site
- sites to which substances from a parent site have been transported
- any pollution abatement orders under section 83
- any notifications under section 54 respecting independent remediation
- decisions of the appeal board

The public nature of the Site Registry, makes it foreseeable that the public will rely on the CoCs posted on the Registry.

## Liability

### **The current liability protections afforded under the Environmental Management Act for approved professionals**

The provincial government has extended protections to consultants in order to reduce their potential liability for clean-up activities on contaminated sites. Subsections 46(1)(h) and (i) of the EMA limit liability to a person who provides assistance/advice respecting remediation work at a contaminated site as follows:

The following persons are not responsible for remediation of a contaminated site:

(h) a person who provides assistance respecting remediation work at a contaminated site, unless the assistance is carried out in a negligent fashion

(i) a person who provides advice respecting remediation work at a contaminated site unless the advice is negligent

Subsection 46(3) states that “a person seeking to establish that he or she is not a responsible person under subsection (1) has the burden to prove all elements of the exemption on a balance of probabilities.

Approved professionals could fall within both of these exemptions as they both provide assistance and advice respecting remediation work.

Therefore, if the Director proposes to name a consultant in a remediation order, the onus is on the consultant to prove that: (1) his or her only role at the site was to provide assistance or advice respecting remediation work; and (2) the assistance or advice was not carried out in a negligent fashion. It has been suggested that making out this second leg of the test might be quite difficult.<sup>30</sup> If it is determined that a consultant is negligent in either carrying out remediation work or negligent in providing advice with respect to remediation work, they will not be covered by the exemption in the EMA.

Richard E. Bereti and Jonathan Corbett of the law firm Harper Grey Easton<sup>31</sup> have written an opinion (the “Harper Grey Easton Opinion”), that, *inter alia*, explains the logic of the consultant exemption in the following manner:

Responsibility for the cleanup of a contaminated site lies with what the *EMA* terms “responsible persons.” Current and previous owners and operators of a contaminated site are responsible persons, unless they can avail themselves of an exemption. The consultant exemption is necessary because, absent the exemption, the activities of environmental consultants at a contaminated site could bring them within the broad-sweeping definition of “operator” found in section 39(1) of the *EMA*. That section states that:

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<sup>30</sup> Richard E. Bereti and Jonathan Corbett of Harper Grey Easton have written an opinion “Consultant Liability: Are Environmental Consultants Really “Exempt” from Liability when Working on Contaminated Sites?” (October, 2004).

<sup>31</sup> *Ibid.*

**“operator”** means, subject to subsection (2), a person who is or was in control of or responsible for any operation located at a contaminated site...

As an “operator,” the consultant would be a “responsible person”, and thus be potentially liable for the total cost of cleaning up the site. The consultant exemption would never have been included in the *EMA* if the legislature did not recognize that activities carried out at a contaminated site by environmental consultants could very likely bring those consultants within the definition of operator.

If an approved professional is found to be negligent while working on a contaminated site, he or she would no longer fall within the exemption under sub-sections 46(h) and (i) and could face exposure to liability in several ways.

First, approved professionals who are retained to conduct an environmental assessment or cleanup of property could be held liable to his or her client for inadequate performance either for breach of contract or for negligence.

Second, approved professionals who advise the government could be exposed to third party liability if their negligent acts cause harm to other parties such as site owners, neighbouring property owners, local governments, former and subsequent purchasers of contaminated sites and lenders.<sup>32</sup>

Third, approved professionals may be named as a “responsible person” by the Director in a remediation order issued under the *EMA*.

In all of these instances, the negligent approved professional may face joint, several, absolute, and retroactive liability for the whole of the site’s contamination, regardless of his or her role on the site, if found to be a responsible person in a cost recovery action under the *EMA*.

Finally, it should be noted that all of the approved professionals we spoke to pointed out that a lawsuit is not only costly to defend, but costly in terms of the time that it takes for them to be away from the practice.<sup>33</sup> Environmental consultants or approved professionals who work independently or for a small firm, could face bankruptcy if they were to face such a lawsuit.<sup>34</sup> This would result largely from the time that they would be required to be away from their work.

### **The current liability protections required by approved professionals**

All of the approved professionals with whom we spoke were concerned with the potential for third party liability under the current scheme. No one we spoke to had been sued for their errors or omissions, however, some knew colleagues who had been. Most people we spoke to had been threatened, at least once, with the possibility of legal action. While it can be concluded that under the current scheme that liability concerns are

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<sup>32</sup> BLG Report, *supra* note 3; Brault Report, 2004, *supra* note 2; and Bull, Housser & Tupper dated 16 November 2001 (the “BHT Opinion”) for the APEGBC.

<sup>33</sup> Telephone communications with Roster members.

<sup>34</sup> Telephone communication with Roster members.

present, they are not significant enough to discourage environmental consultants from becoming qualified as an approved professional.

Following on the foregoing, approved professionals and environmental consultants can face the following forms of liability in their respective practices.

### ***Liability in Negligence***

#### **Approved professionals acting in their capacity as an environmental consultant**

The BLG opinion outlines the situations under which an approved professional could be found to be negligent:

Environmental consultants, like other professionals, may be liable for their negligent actions and negligent misstatements that are relied upon by purchasers of land and other consumers of environmental consulting services. Examples of consultant negligence include inaccurate estimates of costs, negligent site testing and examinations,<sup>35</sup> negligently prepared proposals, designs, plans and specifications,<sup>36</sup> and negligent supervision and inspection.<sup>37</sup>

The BLG opinion also lays out the requirements for a cause of action based in negligence:

To succeed in a claim for negligence, a person relying on an approved professional's assessment or cleanup is required to establish that: (a) based on the nature of the relationship between the parties, the consultant owed a duty to take care to protect him or her from the kind of harm that was suffered (whenever there is a contractual relationship between the consultant and client to perform work, the consultant will owe the client a duty of care<sup>38</sup>); (b) the consultant breached that duty; and (c) the breach caused the injury suffered.<sup>39</sup> The fact that a consultant may be inexperienced will not protect him or her from being found negligent if he or she did not perform in accordance with the degree of skill and care expected of a consultant of ordinary competence.

Both the BLG opinion and the Bull, Houser and Tupper opinion point out that an approved professional will be held up to a higher standard of care than a member of the general public. This is because they hold themselves out to the public as being possessed of some extra skill and experience. Therefore, in all work done for clients, the consultant owes a duty to exercise the skill, care and diligence which may reasonably be expected of a person of ordinary competence in that profession, measured by the professional standard at the time.

Further, approved professionals will likely be held to an even higher standard than other environmental consultants by virtue of their appointment to the Roster. Appointment to

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<sup>35</sup> See *Surrey (District) v. Carroll-Hatch & Associates Ltd.*, (1979), 14 B.C.L.R. 156 (C.A.).

<sup>36</sup> *Fidias Consulting Engineering Ltd. v. Thymaras*, [1985] 1 W.W.R. 752 (Alta. Q.B.).

<sup>37</sup> *Willis, Cunliffe, Tait & Co. v. Harmony Estates (1977) Ltd.* (1984), 11 C.L.R. 154 (B.C.S.C.).

<sup>38</sup> Steven Ferner, "Environmental Consultant's Liability" (1997), 7 *Journal of Environmental Law and Policy* 403, 405.

<sup>39</sup> M. Brazier and J. Murphy, *Street on Torts* (London: Butterworths, 1999) at 171 and L.N. Klar, *Tort Law* 2<sup>nd</sup> ed. (Scarborough: Carswell, 1996), 129-30.

the Roster indicates that an environmental consultant has at least 8 years or experience and has passed a stringent examination.

The BLG opinion goes on to note that causes of action in both contract and negligence can be sustained together:

If a contract exists between the parties (i.e. the person pursuing the claim engaged the consultant to undertake the assessment or cleanup), it is possible for the injured party to maintain an action in both contract and negligence.<sup>40</sup> Where the person claiming injury has suffered purely economic loss, as opposed to property damage or personal injury, a claim may be pursued on the basis that the consultant made negligent statements. The following requirements are necessary for liability to be found in these circumstances: (a) a duty of care exists because of a special relationship between the consultant and the party claiming injury; (b) the statement or advice provided by the consultant is untrue, inaccurate, or misleading; (c) the consultant acted negligently in making the misrepresentation; (d) the person making the claim must have reasonably relied on the misrepresentation; and (e) the person's reliance on the statements resulted in financial detriment.<sup>41</sup>

On this point, the BLG opinion concludes:

As described in the BHT Opinion with respect to Roster members, generally speaking the consultant performing the services will be found to be personally liable for his or her personal negligence, notwithstanding the provision of consulting services through a company.

### **Approved professionals acting in their capacity as an advisor to government**

Approved professionals who advise the government, where they are reviewing the work of other environmental professionals or reporting directly to the MWLAP on behalf of their own clients, could be exposed to third party liability if their negligent advice causes harm to other parties such as site owners, neighbouring property owners, local governments, former and subsequent purchasers of contaminated sites and lenders. This liability is based on the theory that approved professionals owe these third parties a duty of care.

The Bull Housser and Tupper Opinion identifies the possible types of claims as including: negligent failure to warn, negligent performance of testing, negligent investigation practices, negligent review of investigation reports, negligent review of risk assessment reports, negligent application of MWLAP standards and negligent preparation of the recommendations to the manager.

In a letter responding to the concerns of Patricia Houlihan and Reidar Zapf-Gilje, two members of the Roster Steering Committee, Eric Partridge, Director of Waste Management, confirmed that approved professionals are only held to the same standards as MWLAP staff when they make their recommendations. That is, approved

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<sup>40</sup> *BG Checo International Ltd. v. British Columbia Hydro & Power Authority* (1993), 75 B.C.L.R. (2d) 145 (S.C.C.), 154-155.

<sup>41</sup> See *Queen v. Cognos Inc.* (1993) 14 C.C.L.T. (2d) 113 (S.C.C.).

professionals are not required to look behind the documents submitted in support of a particular application for an Approval. Mr. Partridge stated:

Reviewers, whether ministry staff or Professional Experts, are not required to carry out exhaustive investigations of work relating to the issuance an approval unless they have reasonable cause to believe errors or oversights exist in that body of work. Rather, members of the Roster are expected to apply their professional expertise in conducting a thorough review and assessment of both the work and conclusions upon which they ultimately make their recommendation related to issuance of a requested ministry document.<sup>42</sup>

It was the concern of the two members of the RSC that approved professionals feared liability for errors in cases where they fail to carry out an investigation into the background work upon which an application is based. This fear of liability, they say, has led many approved professionals to refuse to review the work of anyone who does not work for the same company, causing problems for firms without approved professionals working in their offices.<sup>43</sup>

While there is no direct connection between approved professionals and the issuance of Approvals and Certificates, because it is ultimately the Director who issues the approval, a court may reason that third parties rely on Approvals and Certificates and that member recommendations form the basis for the issuance of such Approvals and Certificates.<sup>44</sup> Such a finding of liability is possible, as the MWLAP states on its web-site:

Managers place a high degree of reliance on such recommendations and will normally issue a requested document (e.g. contaminated site determination, contaminated soil relocation agreement, approval in principle, or certificate of compliance) without further review by ministry staff.<sup>45</sup>

The fact that government employees are immune to any claims by virtue of the indemnification contained in section 61 of the EMA,<sup>46</sup> further increases the likelihood that

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<sup>42</sup> Eric Partridge, Director of Waste Management. Communication to Reider Zapf-Gilje dated May 23, 2003.

<sup>43</sup> Reider Zapf-Gilje and Patricia Houlihan, Communication to Eric Partridge dated February 28, 2003.

<sup>44</sup> BLG Report, 2002, *supra* note 3.

<sup>45</sup> MWLAP web-site, "Roster Audit Findings" October 10, 2002. Online at: [http://wlapwww.gov.bc.ca/epd/epdpa/contam\\_sites/roster/rosterauditfindings.html](http://wlapwww.gov.bc.ca/epd/epdpa/contam_sites/roster/rosterauditfindings.html)

<sup>46</sup> Immunity in relation to contaminated sites

61 (1) In this section, "protected person" means

- (a) the government,
- (b) the minister,
- (c) a municipality,
- (d) a current or former approving officer,
- (e) a current or former employee or agent of the government,
- (f) a current or former elected official of the government,
- (g) a current or former "municipal public officer" as defined in section 287 (1) of the *Local Government Act*, and
- (h) a current or former "civic public officer" as defined in section 294 (4) of the *Vancouver Charter*.

(2) Subject to subsection (3), no action lies and no proceedings may be brought against a protected person because of

- (a) any
  - (i) act, advice, including pre-application advice, or recommendation, or
  - (ii) failure to act, failure to provide advice, including pre-application advice, or failure to make recommendations

persons who have been harmed by the negligent issuance of an approval will come after an approved professional.

### ***Contractual Liability***

The BLG opinion outlines the possibility that approved professionals can be held liable under contract as well:

Under liability in contract, the environmental consultant is answerable for either a breach of the contract or for the failure to perform the services described in the contract with due care and diligence. Consultants are able to limit their contractual liability by developing a clear set of terms and conditions for engagement of services. Most insurance policies cover contractual liability that would otherwise have existed in the absence of a contract, such as where liability arises out of the negligence, error or omission of the environmental consultant. Some insurance policies cover liability assumed under a contract of indemnification except that arising out of the sole negligence of the indemnitee.

Insurance coverage against liability as it applies to approved professionals under the current regime, is discussed later in this section.

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in relation to this Part, regulations under this Part, section 85.1 of the *Land Title Act*, section 946.1 or 946.2 of the *Local Government Act*, section 571B of the *Vancouver Charter* or section 34.1 of the *Islands Trust Act*, or

(b) any

(i) purported exercise or performance of powers, duties or functions, or

(ii) failure to exercise or perform any powers, duties or functions

arising under this Part, regulations under this Part, section 85.1 of the *Land Title Act*, section 946.1 or 946.2 of the *Local Government Act*, section 571B of the *Vancouver Charter* or section 34.1 of the *Islands Trust Act*.

(3) Subsection (2) does not provide a defence if, in relation to the subject matter of the action or proceedings,

(a) the protected person is a responsible person, or

(b) the conduct of the protected person was dishonest, malicious or willful misconduct.

(4) Without limiting subsection (2), if a municipality, or its approving officer, employees, officers or elected officials, relies honestly and without malice or willful misconduct on the contents of

(a) a preliminary determination or final determination,

(b) a certificate of compliance, or

(c) an approval in principle,

those protected persons are not liable for damages arising from reliance on the determination, approval or certificate.

(5) Without limiting subsection (2), if a municipality enters into an agreement under section 57 [*delegation of responsibilities to municipalities or other ministries*] enabling the municipality to issue an approval in principle or a certificate of compliance, the municipality, its approving officer, employees, officers and elected officials are not liable for damages if they rely on an approval in principle or a certificate of compliance where the contents of the approval in principle or the certificate of compliance have been prepared honestly and without malice or will full misconduct.

## ***Liability As A Responsible Person***

### *Under a Director's order:*

Section 45 of the EMA defines who is responsible for the remediation of a contaminated site.<sup>47</sup> Responsible persons include the current and previous owners or operators of the site, a person who produced a substance and caused the substance to be disposed of, handled or treated in a manner that has caused the site to become contaminated (i.e. a generator) and a person who transported or arranged for the transport of a substance and caused the substance to be handled in a manner that has caused the site to become contaminated (i.e. a transporter).

As discussed in the Harper Grey Easton Opinion, once a consultant is negligent, he or she cannot avail themselves of the consultant exception under subsection 46 (1) of the EMA. This opens them up to liability as a responsible person. As such, the consultant may be named a "responsible person" by the Director in a remediation order requiring participation in the clean-up of a site. Such an order may be issued days, years, or decades after the consultant has completed work at a site.<sup>48</sup>

### *As an owner or operator:*

The definitions of "owner" and "operator" found in subsection 39 (1) of the *EMA* are very broad. An "operator" is defined as "a person who is or was in control of or responsible for any operation located at a contaminated site". An "owner" is defined as "a person

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<sup>47</sup>Section 45 (1) Subject to section 46 [*persons not responsible for remediation*], the following persons are responsible for remediation of a contaminated site:

- (a) a current owner or operator of the site;
- (b) a previous owner or operator of the site;
- (c) a person who
  - (i) produced a substance, and
  - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
- (d) a person who
  - (i) transported or arranged for transport of a substance, and
  - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
- (e) a person who is in a class designated in the regulations as responsible for remediation.

(2) In addition to the persons referred to in subsection (1), the following persons are responsible for remediation of a contaminated site that was contaminated by migration of a substance to the contaminated site:

- (a) a current owner or operator of the site from which the substance migrated;
- (b) a previous owner or operator of the site from which the substance migrated;
- (c) a person who
  - (i) produced the substance, and
  - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site;
- (d) a person who
  - (i) transported or arranged for transport of the substance, and
  - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site.

<sup>48</sup> Harper Grey Easton Opinion, *supra* note 26.

who is in possession of, has the right to control of, occupies or controls the use of real property, including without limitation a person who has any real estate or interest, legal or equitable, in the real property". Both the Harper Grey Easton Opinion and the BLG Opinion highlight the possibility of an approved professional being found to be an owner or operator. The Harper Grey Easton opinion points out that the negligent consultant may face joint, several, absolute, and retroactive liability for the whole of the site's contamination, regardless of his or her role on site, if found to be a responsible person in a cost recovery action under the EMA. The allegation would be that the consultant, as a result of his or her negligence, is an operator on the site and, therefore, a responsible person. What constitutes negligence in the context of this provision, such that the exemption is lost, will depend on the facts of the case.

However, at the point where remediation has been completed and a cost recovery action has made its way to trial, the EMA and the Contaminated Sites Regulation provide some added protection to the environmental consultant, even where that consultant was negligent and is therefore named as a responsible person. The protection applies to a cost recovery action under the EMA and is found in subsection 35(2) of the Regulations, which reads:

In an action between 2 or more responsible persons under section 47(5) of the Act, the following factors must be considered when determining the reasonably incurred costs of remediation:

- (a) the price paid for the property by the person seeking cost recovery;
  - (b) the relative due diligence of the responsible persons involved in the action;
  - (c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action;
  - (d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;
  - (e) any remediation measure implemented and paid for by each of the persons in the action;
  - (f) other factors relevant to a fair and just allocation.
- [emphasis added]

According to the Harper Grey Easton opinion, subsection 35(2) provides the court in a cost recovery action with leeway as to how it applies the language of the EMA in determining the payment of costs of remediation. Together, subsections (b) (due diligence), (d) (degree of involvement) and (f) (other factors relevant to a fair and just allocation of the costs of remediation) are of particular benefit to consultants. Joint and several liability is thereby tempered by the court's freedom to seek a fair and just result, which result may even include the virtual absolution of a relatively innocent, albeit technically negligent, environmental consultant. On the other hand, the consultant who significantly exacerbates the contamination on the site will likely shoulder greater liability.

### **Implications of liability protection**

It is the view of the authors of the Harper Grey Easton Opinion that the qualification contained in the consultant exemption which excludes negligent consultants from liability

protection, “when coupled with the decision of the Environmental Appeal Board in *Lawson v. Deputy Director of Waste Management*<sup>49</sup> (“Lawson”), places environmental consulting firms and their individual partners, directors, officers, and employees at risk of facing liability far in excess of that which a negligent professional might normally face.”

While the decision of the B.C. Environmental Appeal Board in *Lawson* does not speak to consultants being affected as a result of insufficient liability protection, the Harper Grey Easton Opinion argues that this decision could adversely affect environmental consultants and their firms.

The *Lawson* decision deals with contamination at 9250 Oak Street and held that where a company is found to be responsible for a contaminated site, its directors, officers, and employees can be found to be “responsible persons” and that these responsible persons can be found to be liable in their personal capacity. In this case, decommissioning activities directed by Mr. Lawson caused further contamination to the site and he was found to be responsible person.

At page 32 the Panel states:

“With respect to the question of causation, the Panel finds that there need not be a causal link between the contamination at a site and the directors or officers of that site’s owners and operators, in order for those directors and officers to be persons responsible for remediation. It is clear that section 26.5 of the *Act* holds both current and previous owners and operators of a site responsible for the site’s remediation, subject to the exemptions that are provided under section 26.6 of the *Act*, which do not apply in this case.”

The decision cited with approval, the Environmental Appeal Board’s earlier decision in *Beazer East, Inc. et. al. v. Assistant Regional Waste Manager* (Appeal No. 98-WAS01 (b) at page 46:

“The Panel finds that the requirement that the most substantial contributors “must” be named (and then only if feasible) does not mean these are the *only* persons who may be lawfully named to a remediation order. To the contrary, section 27.1(1) clearly states that a manager may issue a remediation order to any responsible person. The Panel, therefore, finds that sections 27.1(1) and 27.1(4), together, provide a manager with the discretion to name any responsible person to a remediation order while, in this process, directing him to ensure that, to the extent feasible based on the information before him, he names the persons who contributed most substantially to the contamination.”

The *Lawson* decision concludes:

The Panel agrees with the Deputy Director that the Board’s interpretation of section 27.1 of the *Act*, as previously stated in *Beazer*, applies in this case. The

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<sup>49</sup> *Lawson v. Deputy Director Waste Management*, (19 September 2001) , 98 WAS 14(c) (B.C. E.A.B.) (“*Lawson*”).

Panel also agrees that the Deputy Director is not limited by section 27.1(4) to naming only those persons who are “most substantial contributors” to the contamination at the Site. On this point, the Panel adopts the Board’s reasoning in *Beazer*, as referred to above.

The Harper Grey Easton Opinion states that:

The *Lawson* decision means that any director, officer, or employee of a consulting firm that has lost its exemption due to negligence can be named in a remediation order and sued in a cost recovery action, just as the firm they work for and any of the original polluters or owners of the contaminated site may be sued. ...The legislature has made no effort to contradict or modify this far-reaching interpretation of the *EMA* in recent amendments.

It is our view that the Harper Grey Easton Opinion may be giving too broad a reading to the *Lawson* decision. One of the facts stressed in this case was Mr. Lawson’s direct involvement in directing the site decommissioning. This factual nexus would be difficult to establish within an environmental consulting firm, where consultants often work quite independently. Thus, *Lawson* could be distinguished based on its facts.

### **Present Liability Insurance Requirements of Professional Associations in B.C.**

#### ***Association of Professional Engineers and Geoscientists (“APEGBC”):***

The majority of practicing environmental consultants are members of the APEGBC. Members of the APEGBC are currently required by their code of ethics and their by-law to disclose their liability insurance status to clients prior to entering into an agreement or commencing work. They must also obtain the client’s signed acknowledgement that this status has been communicated.

Subsection 10 (1) of the Engineers and Geoscientists Act [RSBS 1996] C. 116 provides that the engineering council may pass by-laws for the following purposes mandating the holding of professional liability insurance.

(e) the circumstances in which members, licensees or certificate holders, or a class of members, licensees or certificate holders, must hold professional liability insurance and the amount and category of professional liability insurance that must be held;

(e.1) the establishment and administration of a professional liability insurance program in any category including, without limitation, for providing the council with the power to establish terms, conditions, policies and procedures for categories of professional liability insurance;

(e.2) the circumstances and manner in which members, licensees or certificate holders, or a class of members, licensees or certificate holders, must disclose

(i) whether professional liability insurance is held, and

(ii) whether the insurance is applicable to the services in question.

Further subsection 10(1.1) provides:

The council, by bylaw, may

- (a) establish classes of members, licensees or certificate holders,
- (b) specify different categories of professional liability insurance, and
- (c) require that different classes of members, licensees or certificate holders hold different categories of professional liability insurance.

Pursuant to subsection 10(1.1), the APEGBC has specific requirements for Roster members. They must provide the APEGBC with a certificate of insurance issued to the MWLAP that:

- (i) confirms professional liability insurance coverage to a minimum of \$2,000,000 dollars;
- (ii) confirms that the coverage includes the individual applying for Roster appointment;
- (iii) confirms that such coverage has no pollution exclusion; and
- (iv) commits to confirm coverage annually for the period of the Roster appointment.

It is the responsibility of the Roster member to ensure there are no lapses in proof of insurance coverage. Failure to provide continuous proof of insurance can result in the removal of the expert from the Roster for a minimum period of three months.

APEGBC's bylaw 17 provides that before entering into an agreement to provide services, a member, licensee or certificate holder must notify the client in writing whether professional liability insurance is held. In September 2002, APEGBC amended by-law 17 to make Secondary Professional Liability Insurance coverage a mandatory requirement of registration with APEGBC. This program is intended to respond to claims by the general public against an engineer or geoscientist for professional services provided. Hartford Insurance provides the coverage at a cost of approximating \$10 premium per member. The policy provides all APEGBC members with \$100,000 in secondary liability coverage, including defence costs, to protect them against claims made while the policy is in force. The Secondary Liability coverage is required for members of APEGBC over and above the E & O and general liability insurance that they are also required to hold.

This program is the culmination of the efforts of APEGBC's Secondary Liability Insurance Task Force to develop an affordable, minimum level of liability coverage for all APEGBC members.<sup>50</sup>

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<sup>50</sup> APEGBC's web-site, online at: <http://www.apeg.bc.ca/members/sec-liability-ins.html>.

The Policy permits claims when the insured has had a suit filed against them or an arbitration proceeding naming them, for an alleged error, omission negligent act or personal injury arising out of the provision of professional services. The policy states:

3.1 We will pay those sums in excess of the Deductible, if any, that you become legally obligated to pay as damages because of CLAIMS to which this policy applies arising out of your PROFESSIONAL SERVICES. We have the right and the duty to defend such CLAIMS, subject to the following:

3.1.1 We may investigate any CLAIM and settle it in accordance with section 6.2 Settlement. We have the right to designate legal counsel to represent you.

3.1.2 The most we will pay is described in section 5.0. LIMITS OF INSURANCE AND DEDUCTIBLE.

3.1.3 Our right and duty to defend and pay on your behalf ceases when the applicable limit as described in section 5.0 LIMITS OF INSURANCE AND DEDUCTIBLE is exhausted by the payment of damages or CLAIM EXPENSES, separately or in combination for all CLAIMS.

The policy excludes claims for arising out of:

4.21.1 your activities as a manufacturer, generator, disposer, storer, transporter or treater of POLLUTANTS, or as a WASTE site owner or operator;

4.21.2 POLLUTION from or onto property or facilities which are or were at any time owned, rented, occupied or operated by you, or POLLUTION above or below ground at such property or facilities.

The policy defines the following terms:

2.8 POLLUTANTS means any solid, liquid, gaseous or thermal irritant or contaminant, including gas, smoke, vapour, soot, fumes, acids, alkalis, chemicals and WASTE.

2.9 POLLUTION means the actual, alleged or threatened discharge, dispersal, release or escape of POLLUTANTS. This definition does not include POLLUTION arising out of:

2.9.1 wastewater, STORM WATER and domestic sewage collection and treatment systems, including those receiving industrial WASTE, but only if such industrial WASTE is pre-treated in accordance with applicable governmental or regulatory standards; or

2.9.2 potable water systems; or

2.9.3 heating, ventilation, or air conditioning systems or electrical systems; but systems designed for the purpose of controlling POLLUTANTS remain within this definition. For the purpose of this definition STORM WATER means water from rain, hail, snow or sleet.

2.10 PROFESSIONAL SERVICES means the customary services performed in Canada, whether paid or unpaid of engineers and geoscientists provided in their capacity as a MEMBER of the PARTICIPATING ASSOCIATION.

2.11 WASTE means, including, but not limited to, materials to be recycled, reconditioned or reclaimed.

The exclusion provision does not appear to include environmental consultants who are engaged in Phase 1 or Phase 2 Environmental Site Investigations, or consultants who design a remediation plan. However, if an environmental consultant were to negligently carry out site remediation, which involved the “treatment” or “transport” of contaminated soil they might not be covered by this insurance policy. Such exposure would most likely extend to on-site chemical and biological treatment technologies and to excavating and removing polluted soil from the site. Further a consultant could be excluded if a Phase 2 testing program should cause pollution to escape from a property or facility. Therefore, environmental consultants should not assume that this policy affords complete protection against acts of negligence.

### ***Institute of Agrology***

Members are not currently required to carry any liability insurance under the *Agrologists Act* [RSBC] C. 12. Approximately only 30% of agrologists practicing in private practice currently carry insurance.<sup>51</sup>

### ***College of Applied Biology***

Members are not currently required to carry any liability insurance under the *College of Applied Biology Act* [SBC 2002] C. 68. The majority of professional biologists do not carry insurance.<sup>52</sup>

## **Insurance**

### **Current availability of insurance in B.C.**

There are three general categories of insurance available to environmental consultants. Errors and Omissions coverage (“E & O”), Commercial General Liability (“CGL”) and Pollution Insurance.<sup>53</sup> There are four major providers of these kinds of insurance in B.C.: ENCON, AIG, Elliot’s and South Western Group.<sup>54</sup> An Errors & Omissions Liability Insurance Policy for Environmental Consultants protects the consultant against liabilities arising out of acts, errors and omissions during the rendering of environmental professional services. Professional liability coverage is only available on a claims-made basis (i.e. claims must be made upon the insured and reported to the insurance company during the policy period). CGL coverage is only available when a professional also holds an E & O policy.<sup>55</sup> Contractors Pollution Liability coverage offers protection to environmental consultants against claims of third party bodily injury, property damage and on and off-site clean up costs arising from polluting conditions caused while working at third party sites. These policies are tailored very closely to an environmental

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<sup>51</sup> Telephone communication with representative of the B.C. Institute of Agrology (the “BCIA”).

<sup>52</sup> Telephone communication with representative of the College of Applied Biologists (the “CAB”).

<sup>53</sup> Telephone communication with representatives from the insurance industry.

<sup>54</sup> *Ibid.* This statement was confirmed in a telephone communication with a representative of the Insurance Bureau of Canada.

<sup>55</sup> *Ibid.*

consultant's specific practice and therefore involve direct negotiations between the insurance company and the consultant.<sup>56</sup>

The current MWLAP policy requires Roster members to have in place at least \$2 million in professional liability insurance. None of the approved professionals we spoke with had any problem getting this amount of insurance at a reasonable cost and most approved professionals obtained insurance coverage through their employers. However, almost everyone we spoke with mentioned that insurance was much more costly and difficult to obtain if one works alone or as part of a small firm.

### **Cost of insurance**

The cost of insurance in B.C. varied dramatically whether it was purchased as part of a program or individually. For E & O insurance outside of a program, consultants could pay between \$ 5,000 to \$8,000 for claim limits ranging from \$250,000 to \$2 million. This same level of coverage within a program would only cost between \$1,000 and \$3,000. As a rule, we were told that getting insurance coverage as part of a program would generally save the insured at least 30 % in premiums, and often more than this.<sup>57</sup>

The size of the firm the consultant works with also affects the cost of insurance. For example, the premium for a professional (within a program), for a \$2,000,000 limit and a \$2,000,000 annual aggregate is \$2,405 for a professional working in private practice as a one person entity. For the same coverage, a premium of \$1,795 would be required for a professional working in private practice where there is more than one in the firm and a \$630 premium when a professional is employed in industry or government.<sup>58</sup>

Further, if an environmental consultant is not a member of a professional association (such as the APEGBC, the BCIA or the CAB) his or her insurance premiums would be considerably higher than those mentioned immediately above.<sup>59</sup>

Once an insured has E & O coverage he or she can also buy CGL coverage. Once again the price is affected by whether or not a consultant is able to buy insurance as part of a program or not. Within a program, this additional insurance costs \$650 - \$2000 depending on the limit, with the higher cost for a limit of \$1 million/per claim and a \$5 million limit in the aggregate. Outside of a program, the premiums would be higher at between \$1 200 to \$3 500 for the same level of coverage.

Both E & O insurance and CGL coverage is dependant on a firm's gross earnings. For example, when a firm's gross fees are greater than \$ 1 million annually, premiums are the base amount plus the actual gross fee multiplied by 0.0005.

No insurance broker or agent we spoke to was able to give us a cost quote for pollution liability coverage because each policy is specifically tailored to the individual consultant. However, they did say that these policies are far more costly than their most expensive E & O policy. Further, once a consultant needs pollution liability coverage, he or she can

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<sup>56</sup> Telephone communication with representatives of the insurance industry.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

no longer apply as part of a program. This pushes their E & O and CGL fees up considerably, in addition to the high cost for the pollution liability coverage itself.<sup>60</sup>

### **Perceived costs**

All approved professionals we spoke with reported that they had no trouble finding insurance at a reasonable cost.<sup>61</sup> However, a number of approved professionals as well as the CAB and BCIA were concerned with the availability of insurance to all members of their respective professions. They all reported that insurance is perceived to be too costly for environmental consultants who work in small firms and who do not generate high yearly revenues.<sup>62</sup> As a result, these consultants are taking on a significant level of risk because some are working without insurance.

### **Exclusions**

All E & O policies contain exclusions for pollution, design/build and the liability of others.<sup>63</sup>

#### *Pollution Exemptions:*

For example, a typical pollution exemption excludes “claims arising out of or attributable to pollution”. Pollution has been defined as:

“Emission, release, discharge, dispersal, escape or disposal of smoke, gas, vapours, soot, fumes, acids, alkalis, toxic substances, waste materials, irritants, contaminants or pollutants into or upon land or any water of any description no matter where located or how contained, or into any drainage or sewage system, or into the atmosphere.”

Another insurance broker is in the process of rewriting their E & O policy to include a modified exclusion for pollution. Effective 1 March 2005, Pollution Liability is covered; however, a sub-limit of \$100,000 has been put in place. Prior to 1 March 2004 no sub-limit existed. The wording now states that Pollution is covered up to a limit of \$100,000 per occurrence.<sup>64</sup>

### **The design/build exclusion**

Some insurance policies contain an exclusion specifically aimed at environmental consultants who conduct a site investigation, design a remediation plan and then do the site remediation. The specific wording of such an exclusion is:

“Claims resulting from services rendered by the insured where:

b) decommissioning, remediation, clean-up, removal, containment, detoxification, or neutralization of any property, pollutants or contaminants:

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<sup>60</sup> Telephone communication with representatives of the insurance industry.

<sup>61</sup> Telephone communication with Roster members.

<sup>62</sup> Telephone communications with representatives of CAB, BCIA and Roster members.

<sup>63</sup> Telephone communication with representatives of the insurance industry.

<sup>64</sup> Telephone communication with representative of March Canada.

is also performed by or on behalf of the insured or by or on behalf of an associated business enterprise in which the insured either directly or indirectly an interest, or that directly or indirectly has an interest in the insured.”

If an environmental consultant were to do all the work at a contaminated site, he or she would likely void their insurance policy. This is a problematic exclusion as the norm in the environmental consulting business is for one environmental consultant to do all of this work, viz., investigation, remediation design and execution.<sup>65</sup> Environmental consultants have attempted to explain to insurance companies that including this exclusion in an E & O policy for environmental consultants shows a deep misunderstanding of the practice of environmental consulting.<sup>66</sup> However, insurance companies have refused to remove this exclusion. Only the largest environmental consulting firms which have a design arm that works with site remediators have been able to successfully avoid the “design/build” exclusion.<sup>67</sup>

### **Work of others exclusion**

This exclusion applies when an environmental consultant acts as a sub-contractor and hires other environmental consultants to work on a specific aspect of remediation and enters into a contract with this second environmental consultant. Any claim that results from the liability of the sub-contractor will be denied by the contractor’s insurance policy. This will not occur if an environmental consultant manages a team of environmental consultants that are working on a project and who have direct contractual relationships with the client.<sup>68</sup>

### **Canadian case law where environmental consultants have been sued**

Our review of the case law has revealed that there is not a lot of litigation against environmental consultants. The BLG opinion, written two years ago, concurs noting that “there have been relatively few successful negligence claims against environmental consultants”.<sup>69</sup> Below we have outlined the rules in the case law relating to environmental consultants.

### **General Principles**

The courts have upheld a series of limitations on the liability of environmental consultants. Environmental consultants can shield themselves against liability to third parties through the use of disclaimer clauses in environmental audit reports.<sup>70</sup> Although

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<sup>65</sup> Telephone communication with Roster members.

<sup>66</sup> *Ibid.*

<sup>67</sup> Telephone communication with Roster members.

<sup>68</sup> Telephone communication with insurance industry representatives.

<sup>69</sup> For example, Mario Faieta et al., *Environmental Harm: Civil Actions and Compensation* (Toronto: Butterworths, 1996) reports that only two reported Canadian decisions have considered whether a consultant maybe liable for losses arising from the purchase of contaminated land: *Goodwin v. McCully* (1989), 101 N.B.R. (2d) 289 (Q.B.), aff’d unreported, summarized in (1990), 22 A.C.W.S. (3d) 190 (N.B.C.A.); and *Wolverine Tube, infra* note 77. See also *Beers v. Jacques Whitford Environment Ltd.* [2001] N.B.J. No. 351 (Unreported, No. M/C/1164/96, N.B.Q.B., 27 September 2001).

<sup>70</sup> *Wolverine Tube (Canada) Inc. v. Noranda Metal Industries Limited et al.* (1995) 26 O.R. (3d) 577 (Ont. C.A.). This case involved a sale of land. The consultant had prepared environmental audit reports for the vendor prior to selling the land. The purchaser claimed that he relied on the reports for the state of the land. Those reports contained the following disclaimer:

a third party may rely on the consultant's report, the action may fail because the consultant is not aware the report would be used in the manner it was used.<sup>71</sup>

Our review of the case law revealed the following lawsuits where environmental consultants were successfully sued for negligence. In *Beers v. Jacques Whitford Environmental Ltd*<sup>72</sup>, an environmental consultant was found to be liable for remediation costs, the fees paid for their service, loss in property value and compensation for the delay in the plaintiff opening its business when the environmental consultant was found to have negligently performed an environmental site assessment. In this case, the consultant dug a series of boreholes testing the soil for the presence of hydrocarbons and concluded that the property was free of hydrocarbons, prior to the close of a real estate transaction. After the property was sold and construction began, extensive hydrocarbon contamination was found.

### British Columbian cases

The case of *Beazer East Inc. v. British Columbia (Environmental Appeal Board)* (the "Board")<sup>73</sup> dealt largely with the potential liability of a parent corporation for contamination on the site of its subsidiary. Beazer was the parent corporation. The Board held that Beazer was a responsible person by virtue of being a previous owner and operator under subsection 26.5(1)(b) of the WMA. Beazer attempted to use subsection 26.6(1)(h) as a defence. Beazer argued unsuccessfully before the Board that it was entitled to avail itself of the consultant exemption in the WMA because it had provided assistance or advice respecting remediation work. In considering Beazer's defence, the Board also considered the interpretation of the environmental consultant's exemption in subsection 26.6(1)(h) of the WMA (now section 46(1)(h) of the EMA). The exemption is available to "a person who provides assistance or advice respecting remediation work at a contaminated site in accordance with this Act, unless the assistance or advice was carried out in a negligent fashion".

The Board held that the public policy reason for the exemption under subsection 26.6(1)(h) is to ensure that arm's length third party consultants and others whose primary role is providing assistance and advice respecting remediation work, are not held to be responsible persons unless they are negligent. It found that *Beazer* was not solely or primarily involved providing assistance or advice respecting remediation work but that it was the owner and operator at the site that was engaged in such work.

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This report was prepared by Arthur D. Little of Canada Limited for the account of Noranda, Inc. The material in it reflects Arthur D. Little's best judgment in light of the information available to it at the time of preparation. Any use which a third party makes of this report, or any reliance on or decisions made based on it, are the responsibilities of such third parties. Arthur D. Little accepts no responsibility for damages, if any, suffered by any third party as a result of decisions made or actions based on this report.

The court held that while it was common practice to rely on the reports of consultants when purchasing property, this was not the case in the instant case. The wording of the disclaimer made it clear that Little did not assume a duty of care, and Wolverine was aware of the limitation before it agreed to buy the properties .... "[C]onsultants such as Little must be able, as a matter of policy, to limit the use to which those with whom they have no direct contact can put their reports".

<sup>71</sup> 327973 *British Columbia Ltd. v. HBT Agra Ltd.* (1994), 120 D.L.R. (4<sup>th</sup>) 726 (B.C.C.A.).

<sup>72</sup> [2001] N.B.J. No. 351.

<sup>73</sup> [2000] B.C.J. No. 2358.

The B.C. Supreme Court upheld the Board's interpretation and stated at paragraph 127:

"It is my view that the Legislature intended to exempt persons if the only activity which would make such persons an "owner" or an "operator" was their provision of assistance or advice respecting remediation of a contaminated site (as long as they were not negligent)."

The court also commented at paragraph 124:

"I think the Board is probably right that the Legislature had third party consultants primarily in mind when it enacted the exemption under s. 26.6(1)(h), but the Legislature chose to use broader language."

These comments by the Board and the B.C. Supreme Court set a useful precedent on the proper interpretation to be given to the meaning of the consultant's exemption in the EMA.

## APPENDIX 2

### Background Research:

Pursuant to the work plan, the following summarizes the purpose of the background reports as well as their findings and recommendations concerning the liability of approved professionals and related insurance issues.

### Advisory Panel on Contaminated Sites, "Final Report of the Minister's Advisory Panel on Contaminated Sites," January 2003 (the "Minister's Advisory Panel Report")

In May 2002, the Honourable Joyce Murray, Minister of Water, Land and Air Protection, appointed an Advisory Panel on Contaminated Sites to review Part 4 of the *Waste Management Act* ("Act") and the *Contaminated Sites Regulation* ("CSR" or "Regulation"). There were four members of the Panel: Ms. Margaret Eriksson, Mr. Dennis Konasewich, Mr. Peter Lloyd and John Sager (of the Ministry of Air, Water and Land Protection). The Panel was asked to review several key components of the contaminated sites system and to make "actionable" recommendations that would become the basis of a new policy framework for regulating contaminated sites in British Columbia. The Panel was also asked to consult with citizens and stakeholders to determine their needs and expectations.

Areas reviewed by the Panel included issues associated with liability principles, funding mechanisms, government administration, standards and best practices in other jurisdictions.

The Panel recommended that a self-regulating independent Licensed Environmental Professional ("LEP") system be implemented in British Columbia. This recommendation stemmed from the Panel's review of the model in place in the State of Massachusetts and the Panel's proposal that "British Columbian adopt a model in some ways similar to that used by the state of Massachusetts."<sup>1</sup>

Below, we have summarized the recommendations relating to liability and the proposed structure of the proposed LEP system.

### Recommendations regarding liability:

To encourage redevelopment of commercial and industrial properties in British Columbia, the Panel believed it is absolutely critical that liability associated with historical contamination be finite and certain. Several mechanisms for achieving this were proposed, including:

- (i) Records of Site Condition and No Further Action Letters;
- (ii) Prospective Purchaser Agreements;
- (iii) Private Agreements Allocating Liability; and
- (iv) Limitation Periods Terminating Liability.

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<sup>1</sup> Advisory Panel on Contaminated Sites, "Final Report of the Minister's Advisory Panel on Contaminated Sites," January 2003 at p. 56.

We have summarized the relevant mechanisms below:

**(i) Records of Site Condition and No Further Action Letters**

A Record of Site Condition, in the view of the Panel, would provide greater certainty by establishing a baseline against which the environmental conditions on the site could be assessed until the land use changes. The Record of Site Condition would work in conjunction with a No Further Action Letter, which is the mechanism that provides the party responsible for the site with a certain degree of closure. According to the Panel, the LEP would submit a completed Record of Site Condition to the Regulator and the Regulator would provide a No Further Action Letter.

*Record of Site Condition:*

Certainty would be enhanced by filing a Record of Site Condition because the numerical values at the time it is filed would continue to be applicable as long as the land use stays the same and any required risk management measures are maintained. These values would apply as remediation objectives in the future should an owner elect to remove all identified substances of concern from the site. And, if numerical values should change in the future (e.g., because new substances of concern are added as screening values or existing values are tightened) and an assessment is made that further risk management or remediation is required to protect human health or the environment from an unacceptable risk, the current and past owners of the site would not bear the increased costs of remediation. Instead — because the revised screening values reflect new knowledge and a change in social policy — the costs would be paid out of a new proposed BC Land Remediation Fund (see section 17 of the Report). In addition, as long as the land use remains the same, further investigations of the site would not be required. Should the current owner or a subsequent owner change the land use, however, the then existing numerical screening values for the new land use would apply.

*No Further Action Letters:*

The letter confirming that no further action is required for the stated land use is intended to provide comfort to third parties (such as bankers, municipalities and prospective purchasers) that the site is fit from an environmental perspective for its intended use, and to bring about closure of the liability that arises under the legislation. The Advisory Panel proposed that these letters be issued by the government. The form of “comfort letter” could continue to be called a Certificate of Compliance, or it could be called a No Further Action Letter. The Panel preferred the latter term, which is used in a number of American jurisdictions, as it is more descriptive for third parties.

These letters could contain conditions (as current Certificates of Compliance do), specifying risk management measures that need to be maintained at the site, or could impose land use restrictions that would be noted in the joint contaminated sites and land title registry.

These letters should exempt those who participate in, or contribute to, site investigation and remediation (together with future owners and occupants as long as the land use does not change) from liability under the Act associated with historical contamination, subject to limited exceptions.

In this regard, the Panel suggested that a No Further Action Letter could be “reopened” where:

- (i) the Letter was obtained through misrepresentation or deceit;
- (ii) a person responsible fails to maintain the required risk management systems; or
- (iii) an unrecognized imminent risk is discovered and there is an urgent need to intervene to protect human health and the environment.

The Panel also concluded that it would be important to achieve a balance between providing closure of liability and ensuring that issues related to off-site contamination would be addressed. For that reason they recommended that the LEP determine, as part of the investigation and risk classification phase, whether a site contains a source of contamination that poses an unacceptable human health or environmental risk to off-site receptors and thus requires remediation or risk management measures.

Such a determination by the LEP would have to be done before the Record of Site Condition is filed and the No Further Action Letter is issued.

It was the view of the Panel that it would be inappropriate for an environmental statute to provide a scheme for addressing off-site issues that failed to take account of an unacceptable risk to human health or the environment. The purpose of the statute should be to protect human health or the environment — not to protect private parties from economic loss.

### **(ii) Limitation Periods Terminating Liability**

To promote greater certainty in the marketplace while at the same time protecting innocent third parties, the Panel concluded that civil liability should be made subject to a clearly defined limitation period (e.g., 5 or 10 years) following the issuance of a No Further Action Letter.

The Panel also recommended that the government consider the recommendations of the National Brownfield Redevelopment Strategy Task Force for limiting civil and regulatory liability for historical contamination, to promote greater consistency in approach between British Columbia and other Canadian jurisdictions.

### **Recommendations for Licensed Environmental Professional System (LEP)**

- Establish a stand-alone and independent system of LEPs.
- Allow a broader range of professionals than is recognized in the current Roster system to be recognized as LEPs.
- Allow LEPs to oversee a wide range of activities on non-high-risk (Categories I - III) sites and work in conjunction with the MWLAP on Category IV sites.
- LEPs would be responsible for site assessment, risk evaluation, remedial plan design, remediation, and the preparation of documentation to enable “no further action” letters to be issued for all categories of sites.

### **Recommendation: Structure of the LEP**

The Panel determined that the Massachusetts system should be used as a precedent:

- The Panel proposes that British Columbia adopt a model in some ways similar to that used by the State of Massachusetts. This approach would ensure that professionals responsible for managing sites with substances of concern have sufficient experience to do so effectively, and it would give the public assurance that these sites are being managed in a responsible manner. The Massachusetts model has been in place since 1993 and has proven effective.

### **Recommendation: Function of the LEP**

The Panel recommended that the LEP perform the following functions:

- The LEP is the one entrusted under the auspices of the Act and CSR to provide and support an opinion in the Record of Site Condition that assessment and risk management options comply with the intent of the Act and CSR. The LEP must have the confidence of regulators and all stakeholders (including the public) that he or she is qualified to provide such an opinion.
  - For Category I - III sites: carry out the site investigation, verify the risk level and prepare the Record of Site Condition.
  - For Category III sites: in addition to the above, define site risk management conditions, if necessary.
  - For Category IV sites: investigate and assess the site, and develop a remedial action plan on behalf of the responsible party jointly with the regulatory agency
- Only a Record of Site Condition with an opinion provided by an LEP would be accepted by the MWLAP.
- In the Record of Site Condition the LEP must confirm that services requiring an understanding of applicable scientific and engineering principles were undertaken by individuals qualified to perform such services. For example, if the LEP is not a hydrogeologist and the expertise in hydrogeology was required, the LEP must confirm that a qualified hydrogeologist performed the appropriate work. Much of the work that leads to an LEP's opinion may be performed by other professionals who do not have an LEP certification, but the LEP will be responsible for the opinion rendered.
- Once the plan is approved and the remedial goals achieved, the LEP would also prepare the closure report and Record of Site Condition for review and approval by the regulatory agency. The objective of the proposed LEP system is to allow the government to focus its resources on high-risk sites where they are most needed and to minimize government involvement at sites designated as having risks within acceptable limits. The use of LEPs would address many of the inefficiencies in the current system.

The inefficiencies of the current system include:

- the lack of timely response by government officials at key stages of the process;
  - the fact that if a site is subject to a random audit there are no timelines imposed and the Certificate of Compliance can be issued many months after the start of the audit; and
  - the MWLAP spends too much time addressing low/moderate risk sites with the result that high risks sites do not get the attention they deserve.
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- Professionals in the field of site assessment and remediation may continue to serve their clients or employers without a LEP designation. The fact that individuals are not LEPs should not reflect upon their technical capabilities. However where a Ministry acknowledgement is desired, the MWLAP will require an opinion provided by an LEP.

## **Recommendations: Implementing the LEP System**

### **Eligibility and licensing procedures**

- Existing Roster members should be “grandfathered” into the existing system.
- Eligibility should be similar to the current roster requirements. Continuing education should be required in order for an LEP to maintain his or her designation.
- Government officials responsible for managing contaminated sites should be required to undergo the same LEP qualification process as those in the private sector.
- Individuals with training outside of the engineering or geoscientist professions should be eligible for an LEP designation, in order to respond to LEP demand.

### **Governing body**

- An independent, multi-stakeholder board (LEP Board) should be established to regulate the LEP system.
- The LEP Board would be responsible for licensing, auditing and disciplinary functions.
- The initial LEP Board could be established by the Province, and in the initial period when the LEP Board is establishing its licensing and disciplinary processes, the MWLAP could carry out the auditing function.
- There are at least three possible vehicles for establishing the ultimate LEP system:
  - (i) as an organization under the *Society Act*,

- (ii) as a self-governing body with its own statute; or
- (iii) as a body created by amending the Act and Contaminated Sites Regulation.

### **Site assessment and risk management procedures**

Guidelines or policies establishing site assessment and risk management procedures for LEPs should be developed or identified by the LEP Board in conjunction with the MWLAP. The guidelines would provide:

- consistency in the way sites in the Province are evaluated and managed;
- greater certainty for government as it undertakes its regulatory decision making process with respect to, for example, issuing Letters of No Further Action;
- greater certainty for LEPs as they perform their key site assessment, risk management and remediation functions; and
- reassurance to stakeholders about the contaminated sites process in the Province.

These guidelines should also allow for the exercise of professional judgment and for variations in approaches regarding how sites are assessed, and how risk management and remedial options are developed and implemented, without jeopardizing the goal of protecting human health and the environment.

Washington State's *Cleanup Regulation* should be used as a precedent in establishing guidelines<sup>2</sup>

### **Documentation requirements and procedures**

The Panel recommended that minimum requirements for all documentation prepared by an LEP for any site be established by the LEP Board (in consultation with the MWLAP).

Ultimately the requirements should seek to achieve a reasonable balance between relying on professional judgment and a more prescriptive approach.

Similar to the Ontario process, the LEP should swear in the Record of Site Condition, that he or she has the expertise required to undertake the work underlying the site condition report; the services of experienced and qualified professionals have been

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<sup>2</sup> Washington Guidelines:

- Emphasizes practicality with respect to remediation, e.g. "when selecting a cleanup action, preference shall be given to permanent solutions to the maximum extent practicable"
- Recognizes that natural attenuation of hazardous substances may be appropriate at certain sites.
- Recognizes that engineering controls such as containment may be needed at certain sites where treatment is impracticable.
- Requires treatment or removal of sources of a release for liquid wastes, highly mobile hazardous substances or hazardous substances that cannot be reliably contained. However, source containment may be appropriate when the free product consists of a dense non-aqueous phase liquid (DNAPL) that cannot be recovered after reasonable removal efforts have been attempted.

employed where required; the assessment and remediation activities have been performed in accordance with applicable regulatory guidelines and requirements; and generally accepted environmental, geoscience and/or engineering practices were followed.

### **Audits**

The Panel recommended that decisions of LEPs be audited by the LEP Board.

The Panel did not recommend the percentage of LEP decisions that should be subject to an audit, but suggested that this be determined.

The audit process should look into the substance of the work done, not the process.

The LEP Board should be given powers in its auditing capacity to accept the LEP decision, provide guidance to the LEP for future reports and where necessary, overturn the decision of the LEP. The Board should also have disciplinary powers similar to those of other professional licensing bodies.

### **Delegation of government functions**

Once the LEP system is established, the Government may decide to delegate more responsibility to LEPs, such as issuing “no further action” letters for Category I – III sites.

Such delegation will further decrease the need for regulatory involvement, allowing regulators to focus on high-risk sites (Category IV), increase the timelines of decision-making and decrease the overall costs associated with the process.

### **Liability**

The Panel recommended that LEPs be evaluated against the same standard they are required to meet in their consulting practice – the standard of professional negligence.

Where LEPs perform delegated functions such as issuing “no further action” letters on Category I - III sites or other approvals, they should be afforded the same protection against liability as their government counterparts would have received.

**Waldemar Braul, McDonald & Company, "Considerations for Establishment of a Licensed Environmental Professional System for Contaminated Sites in British Columbia: Final Report," October 28, 2003.**

The purpose of this report was to assist the Ministry of Water, Land and Air Protection ("WLAP") in its review of the exiting contaminated site process and its plans to significantly change the current system by creating a LEP system.

The author pointed out that WLAP is looking to: reduce the reliance on WLAP staff in reviewing contaminated site submissions, provide enhanced flexibility in the application of on-site risk assessment and enhance responsibilities for LEPs.

This summary will only deal with the comments and recommendations that the author made with respect to liability and insurance concerns as the subsequent December 2004 Report, authored by Waldemar Braul (and described below) lays out many of the points this report respect to the details of the LEP system.

This report contains a summary of the three options that Birchall Northey is being asked to consider in this report. They are:

- *Government regulated profession* - The LEP system would be established by government and regulated by government. The government would set standards of practice and competency, admission of professionals who can provide advice and enforcement standards through audit and disciplinary measures. Such an LEP system would be comparable to systems set up in California, Connecticut and Ontario. The difference from current system is that this type of system would involve less independence for approved professionals and a more hands on role for government.
- *Self-regulating profession* – This model is completely independent of government and involves and creates an independent legal body to govern the profession using legislation that would empower a supervisory board to set registration and professional standards and enforce these standards through a disciplinary process. The Massachusetts legislation generally applies this model. This model shares many similarities with self-regulating bodies such as APEGBC and the Law Society of British Columbia.
- *Hybrid model* - A supervisory board would have representatives from relevant professional bodies, WLAP and other stakeholders that would govern the persons providing LEP services. A new profession would not be created and no new statute would be enacted.

The Roster Steering Committee ("RSC") found that a hybrid model could realize the independence of the self-regulating profession without incurring the heavy administrative burden normally associated with self-regulating bodies.

As part of a hybrid model, the report considers using a society established under the British Columbia *Society Act* (the "*Society Act*") as a means of providing the necessary structure of an LEP system. The *Society Act* permits a group of at least 50 members to register as a provincial society to represent the interests of a profession (sections 86 and

88). The *Society Act* disclaims government endorsement of societies (subsection 89(2)). The British Columbia Society of Respiratory Therapists and the British Columbia Psychological Association have organized themselves using this Act.

The Report makes following recommendations:

- There must be a strong supervisory board to safeguard the broader public and private interest. This is because as private consultants are invested with greater responsibility for rendering advice, this sort of safeguard must exist to ensure public confidence in the system.
- The new B.C. model should follow the Massachusetts precedent in that false, inaccurate or misleading statements by an LEP during the reporting requirements (such as within a Record of Site Condition or Closure Report) may be enforced by prosecutions beyond the profession's disciplinary mechanism (an example of this is a prosecution enforced by criminal sanctions).
- The RSC has recognized that LEP interest in giving advice may depend on the nature of the legislative guidance and that LEPs may decline to offer their services if they would be exposed to a high level of risk. Therefore, while the RSC agrees that an unduly prescriptive system should be avoided, the RSC is concerned that expecting LEPs to apply "common sense" and "professional judgement" without the necessary legislative guidance may be counterproductive, as LEPs might not be willing to perform the work for fear of personal liability. The concern is that the aggressive model contemplated by the Advisory Panel may create unacceptable liability exposure and insurance availability issues for LEPs and a system in which LEPs are unwilling to fully participate. The Report notes that even the Massachusetts model, which arguably calls for the most independent LEP discretion amongst the jurisdictions surveyed, does not go so far as the Advisory Panel proposes.

This Report sets out a number of issues that should be addressed:

- Would liability protection (such as a provision of immunity to approved professionals) and insurance protection be available for LEPs should they form as a society?
- Whether LEPs should be able to exercise delegated regulator powers taking into account exposure to liability. Further, it must be considered whether insurance would be available for LEPs conducting this function and what the cost of that insurance would be. It is noted that the RSC has expressed concern as to whether it is in the public interest for private individuals to be authorized to assign liability.
- If LEPs were to take on regulatory functions what would be the finality or binding effect of LEP advice? What are the possibilities of WLAP revisiting an opinion? To what extent should the opinions apply in civil actions?

- Should the government (as the Advisory Panel suggests) give immunity to LEPs similar to that provided now to government regulators? Currently the EMA does not include LEPs as Protected Persons (under section 61 of the EMA).
- Should parties affected by a LEP's decision have a right to challenge it to WLAP or to the Environmental Appeal Board as is the case for decisions of a WLAP manager? Would the cost of a LEP challenge to WLAP or the Environmental Appeal Board have to be borne by the LEP or would WLAP cover the cost?
- Would the processes of the Environmental Appeal Board apply to an appeal of a LEP decision or would an alternative process be developed?

**Waldemar Braul, McDonald & Company, "British Columbia's New Licensed Environmental Professional Framework," September 1, 2004.**

This report was prepared for the LEP Development Subcommittee (the "Subcommittee"). This Subcommittee has 4 members and was struck to advance the development of the LEP system, by the Roster Steering Committee ("RSC") and to provide LEP-relevant scientific, regulatory and legal advice to the RSC, in late 2003.

This report proposes a Framework for a new Licensed Environmental Professional ("LEP") system for British Columbia's contaminated sites regulatory scheme, which is slated to replace the existing Roster of Professional Experts ("RPE") system on April 1, 2006. The Report makes some assumptions about the form the LEP system will take. These assumptions are that the Ministry of Water, Land and Air Protection (the "Ministry") will establish a "hybrid" system. This means that it will operate more independently from the Ministry than the current RPE system and coordinate its work with its three parent organizations, the Association of Professional Engineers and Geoscientists of British Columbia ("APEGBC"), the British Columbia Institute of Agrologists ("BCIA"), and the College of Applied Biology ("CAB"). However, the LEP system will not go as far as the Massachusetts Model (recommended by the Minister's Advisory Panel (see summary above) comprising an independent, self-regulating system with its own enabling legislation. While there are some very positive elements to the Massachusetts Model, particularly in light of liability protection, the LEP Subcommittee felt that establishing an LEP system by the target date of April 1, 2006 would not allow for the enacting of enabling legislation which would be required if an independent, self-regulating system were to be created.

**Overview of the LEP system:**

The Braul report provides an overview of the LEP system as follows. First, LEP reviews and recommendations will be essential and mandatory for Ministry regulatory approvals respecting low risk and moderate risk sites; owners of these sites will be required to retain LEPs to conduct the necessary reviews and recommendations to the Ministry. The membership admissions criteria to the LEP will mirror the existing RPE criteria, except the \$2 million insurance requirement will be waived in favour of an insurance disclosure requirement and qualified specialists who are not eligible for membership in APEGBC, BCIA, or CAB, but who satisfy the requirements established by the LEP Board will be eligible for admission.

The Ministry will no longer review or audit LEP reviews and recommendations as that job will be the responsibility of the LEP Board. The Ministry's regulatory focus will be on high-risk sites. These new audits will be called performance assessments and will review the member's practice methodology used to provide the review. Practice guidelines will be established addressing the coordination of LEP reviews, conflict of interest, LEP-client relations, and the extent to which LEPs may review their own work. Practice guidelines will fill a current gap as the current RPE system is often criticized for giving inadequate guidance on how reviews should be conducted. It is proposed that assessments will be triggered by a 1:10 selection ratio, which is the same ratio carried out currently under the RPE system. The Ministry will conduct audits of the LEP Board performance assessments. The frequency of those audits has yet to be determined.

The LEP system will likely recognize that an individual LEP might not have the full specialist background necessary to conduct a comprehensive review of a specific project by having expertise in both the numeric clean-up standards established by the industry and the risk assessment and management approach. Therefore, an approved professional can act as a lead LEP and “sub-contract” out the consideration of certain issues to another LEP with the necessary expertise. It should be noted that the LEP is proposing that two licensing exams be written, one on the numerical standards and another on the risk assessment process.

The LEP Subcommittee has recommended that a society under the *British Columbia Society Act*, R.S.B.C. 1996, c. 433 be established as the legal foundation for the hybrid LEP system, for at least the first two years of the LEP system. The LEP would organize themselves as a society with membership, performance assessment, discipline and other quality control and governance features typically found in professional organizations. The society will be more independent than the current relatively informal arrangement created by the Ministry to manage the RPE system through the RSC. The Braul report discusses certain draw-backs to a society model rather than an entirely independent body. For the purposes of our research, the key limitation identified in the Braul report to the society model is in terms of liability protection. The *Society Act* rules govern the extent to which a society may provide limited liability protection to its members and directors, whereas the legislative model provides a broader scope for liability protection.

The LEP Board should have the following composition:

- An APEGBC member who is also an LEP,
- A BCIA member who is also an LEP,
- A CAB member who is also an LEP,
- A LEP who is not a member of any of the three parent organizations,
- An industry member,
- A representative of local government,
- A member of an environmental group, and
- A representative from the Ministry.

#### **Responsibilities of involved parties:**

LEP Board Administrative Responsibility:

- Assess and appoint LEP members
- Conduct performance assessments of LEP submissions for quality assurance and appropriate disciplinary actions, including referral to the appropriate umbrella licensing organisation of the individual if necessary
- Investigate legitimate public complaints
- Establish membership, examination and other related fees

Shared Ministry/LEP Board Administrative Responsibility:

- Develop protocols, policies and guidelines for LEP operation
- Protect against undue liability
- Establish a new fee structure to support the LEP system
- Collection of fees and management of budgets

Ministry Administrative Responsibility:

- Issuance of regulatory instruments
- Site profile evaluation, and Site Registry operation and maintenance
- Review of “High-Risk” sites as defined by the Director
- “Oversight” audits of the new LEP system

**Summary of liability issues posed by LEP system:**

The Braul report notes:

“Exposure to liability may be the single most important factor in determining LEP willingness to meet the demand from property owners for pre-approval reviews. Liability exposure is also a potential concern for directors, officers and employees of a LEP Board.

In short, the LEP system could be fatally flawed if LEPs fear that their reviews or participation on a LEP Board will attract undue liability exposure. Accordingly, the Subcommittee paid particular attention to how liability issues might constrain the willingness and ability of LEPs to provide review services.”

The report concludes that with the proper measures a LEP system can be set up which controls the liability concerns associated with approved professionals in a superior way to the current Roster system. The Report also recognizes that liability exposure issues could arise for the directors and officers of the LEP Board.

**Liability exposure for approved professionals:**

The report relies on the Bull Houser and Tupper opinion (summarized later in this review) for an overview of the possible types of liability exposure possible for approved professionals.

That opinion concluded that private sector advisors to government could be exposed to a significant degree of liability if their negligent acts cause harm to other parties, such as site owners, neighbouring property owners, municipalities, regional districts, former and subsequent purchasers of the site and lenders. Although the opinion did not specifically address LEPs (as it was written prior to development of the LEP system), the Subcommittee expressed concern that the liability exposure problems identified in that legal opinion could apply to LEPs.

The Report goes on to discuss in greater detail the liability for approved professionals. We have summarized the relevant points as follows.

**Liability for LEP reviews respecting regulatory applications:**

The author considers: Who can rely on the LEP review? and Does the LEP have a duty of care to these other parties?

LEP reviews are prepared for the client for the limited purpose of seeking regulatory approval. Without suitably express language in the LEP review, it may be unclear

whether the review is intended for use by parties other than the Ministry and the LEP's client. This could create an inference that, although the decision-maker is the Ministry,<sup>3</sup> any actionable errors or omissions are those of the LEP. As a result of this, it is arguable that because the LEP review is a precondition for Ministry approval, third parties who rely on the regulatory instruments might be construed to have (indirectly) relied upon the LEP advice. This could give rise to a law suit in negligence because indirect reliance by third and/or subsequent parties is reasonably foreseeable.

The author notes that case law is unclear as to what constitutes foreseeability of *indirect* reliance by a third-party plaintiff in this context. While the LEP review may be focused – ostensibly written for the owner for the sole reason of Ministry approval – it is not difficult to imagine situations where transactions are premised on LEP advice, thus drawing in more actors than merely the LEP client and Ministry.

The author's concern is that without further clarification a court could decide both that third parties, adversely affected by advice given by a LEP, could reasonably rely on the LEP advice and further, that this ought to have been reasonably foreseeable to the LEP. As a result, the LEP owes the third party a duty of care and is liable to the third party for his or her negligent advice.

#### **Liability for LEP preparation of Summaries of Site Condition:**

Bill 13, the *Environmental Management Amendment Act* (EMAA), introduces the concept of the Summary of Site Condition ("SSC"). The subsections of the EMAA dealing with summaries of site condition have not yet been brought into force. Under subsections 39(1) and (3), a SSC will be defined as a document that must be prepared and signed by an approved professional, in the form established in a protocol, and in accordance with the minister's requirements. The Director will be able to rely on a SSC when making a determination of contaminated site under section 44 and when issuing Approvals in Principle and Certificates of Compliance. The preparation and entry of SSCs onto the Site Registry will likely be the subject of consultations between the Ministry and the new LEP Board.

When compared with LEP reviews respecting applications for approvals, LEP compilation of SSCs arguably creates more liability exposure, because the intention of the Ministry Site Registry is to allow the public to rely on this information. According to the author of this report, it is especially problematic if the Ministry does not vet, or 'adopt', the information. This is because plaintiffs may more readily argue that they are entitled to rely on this publicly available information especially as it has no stated limited focus.<sup>4</sup>

#### **Recommendations:**

Given these two prominent concerns – over foreseeability of indirect reliance and standard of care – this Report proposes that the following measures be considered as a means for reducing liability exposure:

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<sup>3</sup> It is assumed that the Ministry will continue to sign off on instruments, such as Certificates of Compliance, under a hybrid LEP system.

<sup>4</sup> See pages 67 to 68 of this Report.

- practice guidelines have the potential of providing considerably more guidance for practitioners than is now the case under the RPE system;
- the performance assessment process, the public complaints procedure and the professional conduct procedure will, over time, help reduce the overall liability exposure of members through education, mentoring and deterrence;
- insurance disclosure and acknowledgment will give clients a clear understanding that the LEP might not be insured, or, if insurance applies, the extent of that coverage.
- express statements or disclaimers in the LEP advice to Ministry could state that LEP advice is just that – advice – and it pertains only to the Ministry and the client. This disclaimer would assist the defendant LEP to argue that the advice was not intended to be used by another party who sought to rely on the advice;
- a reference or disclaimer in site registry legislation that any entry onto the registry by an LEP (eg., a summary of site condition) could expressly warn that reliance on the registry provides no basis for damages by a member of the public who reads and relies upon the LEP entry [Note: this position was taken by a number of lawyers and environmental consultants in Ontario during the debate surrounding Bill 56. The Ministry of the Environment ultimately rejected granting environmental consultants and site owners immunity for third party liability for fairness reasons].
- issuance of regulatory approvals such as Certificates of Compliance by the Ministry should not refer to any reliance by the Ministry on LEP advice. That is, Ministry should clearly state that it has reached its own independent view, although in practice the review of approved professionals has been a primary source of information.

Absent an appropriate combination of liability protections, the Subcommittee expressed concern that only two types of LEPs may come forward to provide services:

- those in large companies or firms that have adequate internal or other means of insurance; and
- parties who do not have insurance and, although they disclose this fact to clients, take the view that they will ‘roll the dice’. This latter mischief is difficult to overcome, but it certainly can be mitigated and largely prevented if the field is opened up to more types of LEPs, including those firms and companies whose LEPs might not have the full capacity that larger companies have for self-insurance or some other forms of financial guarantees in the event of errors.

### **Insurance Issues:**

The Braul report recommends doing away with the RPE requirement that an approved professional must carry professional liability insurance, naming the Ministry as beneficiary, in the amount of \$2 million, in order to be eligible for appointment to the roster.

The author is suggesting that this requirement be dropped because it is his view that “an omnibus insurance requirement on all LEPs may have the perverse effect of blocking entry by many types of professionals whose participation would be necessary in LEP reviews”.

In its place, the report suggests that insurance disclosure and acknowledgement requirements apply when an LEP is retained by a client. Further, the report suggests that this insurance requirement would not be used as a criterion for entry into the LEP membership. This option should be utilized for the short term, as the LEP Board works with the insurance industry to determine if an omnibus insurance requirement (similar to the one currently in place for RPEs) could be implemented.

The Subcommittee also found the insurance industry to be “in a state of flux making it difficult to predict which products will be available, especially for LEPs who are members of organizations which do not now require insurance”. The Insurance Bureau of Canada has indicated that insurance coverage may not be available for approved professionals at all or will be prohibitively expensive for some LEPs. Further, the Subcommittee stated that it might be more difficult for LEPs who are not members of the three parent organizations to obtain insurance. Currently the BCIA and CAB are not required to carry insurance today whereas the members of APEGBC must carry such insurance.

**Richard Bereti, Ken Serne and Jonathan Corbet, of the law firm Harper Grey Easton, "Consultant Liability: Are Environmental Consultants Really "Exempt" from Liability when Working on Contaminated Sites?" October 2004**

This paper examines the protections that the provincial government has extended to environmental consultants under the *Environmental Management Act* ("EMA") in order to reduce their potential liability for clean-up activities on contaminated sites.

Subsections 46(1)(h) and (i) of the EMA limits liability to a person who provides assistance or advice respecting remediation work at a contaminated site that is negligent:

The following persons are not responsible for remediation of a contaminated site:

(h) a person who provides assistance respecting remediation work at a contaminated site, unless the assistance is carried out in a negligent fashion

(i) a person who provides advice respecting remediation work at a contaminated site unless the advice is negligent

Subsection 46(3) states that "a person seeking to establish that he or she is not a responsible person under subsection (1) has the burden to prove all elements of the exemption on a balance of probabilities.

Approved professionals could fall within both of these exemptions as they both provide assistance respecting remediation work and provide advice respecting the remediation done at a site to the Director.

This paper takes the view that the consultant "exemption", contained in the *EMA* - is not an absolute exemption from liability. The exemption is qualified and, when coupled with a decision of the Environmental Appeal Board, places environmental consulting firms and their individual partners, directors, officers, and employees at risk of facing liability far in excess of that which a negligent professional might normally face.

In the authors' view, the problem with the exemption is that it does not apply if the consultant is negligent in carrying out a site investigation or a clean-up. Consultants could thus face liability as "operators" under the *EMA*, and find themselves exposed to the same potential liability as the actual polluter of the site.

In the event that a consultant is negligent while working on a contaminated site, the consultant faces three primary challenges. First, the consultant may be sued for damages in negligence. Second, the consultant may be named a "responsible person" by the Director in a remediation order requiring participation in the clean-up of the site. Such an order may be issued days, years, or decades after the consultant has completed work at a site. Third, the negligent consultant may face joint, several, absolute, and retroactive liability for the whole of the site's contamination, regardless of his or her role on site, if found to be a responsible person in a cost recovery action (a lawsuit under the *EMA*). The allegation would be that the consultant, as a result of his or her negligence, is an operator on the site and, therefore, a responsible person. Only

responsible persons can be successfully sued under the *EMA*, which makes the loss of the consultant exemption due to negligence so serious. Such lawsuits can be complex, lengthy and very costly to defend, so being named by the Director and/or sued in a cost recovery action can have a serious impact on consultants regardless of their ultimate portion of liability.

### **Conclusion of the Paper:**

In the context of contaminated sites, the application of the *EMA* means that a consultant, when negligent, faces more than simply a potential claim in negligence for damages directly attributable to the conduct of that consultant. Rather, negligent consultants lose their “immunity” under the *EMA*, and are exposed to the potential liability of the full cost of cleaning up a contaminated site. As a result, in addition to facing a claim for damages in negligence, the consultant faces all the potential liability of an “operator” and, therefore, a “responsible person.” under the *EMA*.

Negligent consultants who become responsible persons carry a far greater burden than they would if their liability was limited to that of a traditional negligent professional. As responsible persons, they may be ordered by the Director to clean up all or a portion of a contaminated site or contribute money toward the clean-up carried out by someone else. Consultants as responsible persons also face joint, several, absolute and retroactive liability, which is critical when all or some of the real polluters are without assets. At the very least, consultants could be swept along in complex and costly litigation.

In addition to consulting firms, individual directors, officers, employees and agents may also be named as responsible persons. Such individuals can then be ordered to clean up a contaminated site. This same broad group of individuals may also face cost recovery lawsuits. If the Plaintiff is successful, then joint, several, retroactive and absolute liability lurk in the background until a “just” allocation of the costs of remediation is arrived at by the courts. Such costs increase for each responsible person as other responsible persons either disappear or demonstrate they have no assets with which to pay for the remediation. In this way, remediation costs allocated to the negligent environmental consultant or consulting firm could exceed significantly the damages that would be sought against them solely under a claim of negligence.

**Craig Godsoe and Tracey Sandgathe, Borden Ladner Gervais LLP, "Contaminated Site Administration in British Columbia: Report to B.C. Ministry of Water, Land and Air Protection," May 16, 2002 (the "BLG Report").**

This Report contains an analysis of two policy options for the structure of a new contaminated site regime in British Columbia:

- *Option 1*, entailing the delegation of authority to issue Approvals in Principle ("Approvals") and Certificates of Compliance and Conditional Certificates of Compliance (collectively, "Certificates") for 'low' to 'medium' risk, and possibly 'high' risk, sites under Part 4 of the *Waste Management Act* (the "WMA") and the Contaminated Sites Regulation to 'non-government qualified professionals'; and
- *Option 2*, whereby Approvals and Certificates would not be available with respect to 'low to medium risk sites', and possibly 'high risk sites', and responsible persons and other interested parties would rely on the opinions of 'non-government qualified' professionals that provincial standards have been met.

**Conclusions with respect to Option 1:**

The authors note that there is no direct precedent for Option 1 in Canada as no provincial regime has implemented a system of government-issued certificates and subsequently delegated that responsibility to environmental consultants. There are four Canadian jurisdictions in which consultants issue Certificates of Compliance (Newfoundland & Labrador and Nova Scotia) or Records of Site Condition ("RSC") (New Brunswick and Ontario) pursuant to non-binding guidelines. In all four cases, persons remediating contaminated sites are not required to follow the approach or remediation standards set out in the guidelines. Often, however, purchasers, lenders and, in the case of Ontario, local governments require Certificates or RSCs.

The New Brunswick, Nova Scotia and Newfoundland contaminated site regimes are hybrids in the sense that while consultants provide Certificates or RSCs, the provincial regulator in each of those jurisdictions is directly involved in regulating clean-ups of contamination. The degree of involvement varies depending on the circumstances.

Ontario's regime most closely resembles Option 1. Under Ontario's guideline, the regulator no longer reviews and approves clean-up plans for most contaminated sites, nor does it issue any form of 'sign-off'. Instead, the regulator simply accepts and registers a RSC when signed by the owner of the subject land and the consultant that supervised the clean up.

**Consultant Liability Under Option 1**

It is the view of the authors that the liability of consultants would be significantly higher under Option 1 than under the current system in British Columbia. Consultants would be exposed to third party liability solely as a result of issuing Approvals and Certificates. There would be a broad range of parties who would rely on consultant-issued Approvals and Certificates, including local governments, lenders and purchasers. Currently, consultants may shield themselves against liability to third parties through the use of

disclaimer clauses in environmental reports. Under Option 1, it was thought that this would not be possible.

### **Insurance Issues Under Option 1**

The authors noted that there was a concern whether the conduct of consultants issuing Approvals and Certificates under Option 1 would fall within the language of some of the typical exclusion clauses found in professional liability policies. The particular types of exclusions which could be relied upon by an insurer to deny coverage are exclusions for claims arising out of express warranties and guarantees given for the benefit of others and claims arising out of the performance of services not usual or customary for environmental consultants. The result could be that no insurance coverage would be available. The author's pointed to some anecdotal evidence that premiums increased for Ontario consultants signing RSCs, to support their conclusion. They authors also noted that in Ontario, the wording of the RSC was controversial, and many consultants refused to sign it. The concern was that signing an Ontario RSC might void insurance policies because the RSC was worded as a warranty that no contamination on a site exceeded the standards contained in the guideline for the proposed use.

The authors of the BLG Report noted that when they were doing the research for their report, they were told by insurance companies that in the absence of specific regulatory language for review, insurance companies were not willing to comment on whether there would be difficulty in placing professional liability insurance for the new responsibilities to be assumed by consultants under Option 1.

### **Measures to Reduce or Eliminate Liability**

The authors found that there were a number of measures available for limiting the liability of environmental consultants:

1. Protection against liability associated with consultant issuance of Approvals and Certificates could be provided in the *WMA* (now *EMA*). The authors recommended that environmental consultants issuing Approvals or Certificates be listed as "protected persons" under section 28.6 of the *WMA* (now subsection 46(1)). Listing those consultants as protected persons under section 28.6 would protect them from any claim with respect to the signing and issuing of Approvals and Certificates except where the consultant is dishonest, malicious or guilty of wilful misconduct.
2. Government should reimburse a consultant for his or her time and costs associated with participation in any appeal of the consultant's Approval or Certificate even if statutory immunity is provided pursuant to section 28.6 of the *WMA* (now subsection 46(1)). It was the view of the authors that such statutory immunity would likely cut down significantly on the number of appeals. The authors also noted that the government should be responsible for conducting the defence of an appeal of a consultant's Approval or Certificate to keep a tighter rein on costs.
3. Amending the current forms of Approval and Certificate to expressly provide that nothing in either is to be construed as a guarantee or warranty (i.e. a Certificate is not a warranty of site condition). The authors note that case law has upheld such

wording. The authors go on to state that Ontario is planning to address insurer and consultant concerns regarding RSCs by inserting such a statement into the RSC. However, such wording may not address circumstances in which insurance coverage is denied due to the narrow definition of the term 'professional services' and the position of insurance companies that issuance of Approvals and Certificates is not 'usual or customary' in British Columbia

The authors examined alternative measures available for limiting the liability of consultants examined in the BHT Opinion (summarized below) but found the following recommendations to be problematic:

- Limiting consultant liability to the amount of the consultant's professional liability insurance, with immunity for claims in excess of such insurance. It is unclear whether all practising environmental consultants have professional liability insurance coverage. In Ontario limiting consultant liability for signing RSCs to the amount of each consultant's professional liability insurance was rejected.
- Restricting consultant liability to the situation where he or she negligently reviews or relies on reports filed in support of an application for an Approval or Certificate. However, under Option 1, it is not clear whether consultants would perform the remedial work, draft RAPs and issue Approvals and Certificates (along the lines of Ontario, New Brunswick, Nova Scotia and Newfoundland) or would review other consultants' RAPs and issue Approvals and Certificates based on reviews of other consultants' work. The former was preferred by the consultants interviewed. It was the authors' view that consultant reviews of other consultant work would likely increase the cost of assessments by necessitating more review time. The measure to limit liability to negligent reviews of reports makes little sense if one consultant is drafting the report and issuing the Approval or Certificate. An alternative is to provide immunity under section 28.6 of the *WMA* (now ss. 46(1)) to consultants except where their work is carried out negligently or where a consultant is 'grossly negligent' in issuing an Approval or Certificate.

## Implications

The authors noted that stakeholders could raise concerns centring on the fact that although consulting firms undertaking environmental assessments consist of professionals drawn from several disparate fields, there would be no professional organization of environmental assessors to regulate and set standards for its members. On the other hand, the consulting industry has matured over the last decade. Insurance coverage is now readily available, and British Columbia environmental consulting firms have gained financial depth and expertise during the last decade. Nevertheless, the authors believe that some form of Roster system should continue under Option 1 to protect the public's interest. The authors illustrated that there is ample precedent for this approach. Of the five Canadian jurisdictions in which consultants currently or are slated to issue certifications, four (New Brunswick, Nova Scotia, Newfoundland and Quebec) have or plan to have some means of regulating which consultants can certify clean-up results.

The final implication noted by the authors was that the consultants they interviewed were unanimous in their belief that the fees currently set out in Schedule 3 of the Regulation (charged by consultants) would rise under Option 1. (It is unclear if this would be the case if consultants were offered statutory immunity pursuant to section 28.6 of the WMA). The authors believed that this could be a problem for other contaminated site stakeholders.

## **Conclusions with respect to Option 2:**

### **Precedent**

The authors noted that there were no Canadian contaminated site regimes relying solely on environmental consultant reports for evidence that a site has been satisfactorily remediated. They noted that Prince Edward Island's contaminated site regime is the Canadian regime that bears the closest resemblance to MWLAP's proposed Option 2 because with the exception of petroleum contaminated sites, persons must rely on consultant reports. In British Columbia prior to the introduction of the contaminated sites legislation and the issuance of Certificates, MWLAP provided written confirmation of its acceptance of remediation plans and issued 'comfort letters' stating that the lands were environmentally safe and suitable for the contemplated purpose. In three of the four Canadian jurisdictions (Alberta, Saskatchewan, and the Northwest Territories) where consultant reports and opinions provide the primary evidence that a site has been satisfactorily remediated, regulatory agencies typically issue letters stating that in the view of the regulatory agency the subject site has been remediated in accordance with the applicable environmental legislation or guidelines.

### **Consultant Liability**

It was the opinion of the authors that environmental consultants' exposure to liability would be no greater under Option 2 than under the current system. A consultant retained to conduct an environmental assessment or cleanup of property could be held liable to his or her client for inadequate performance either for breach of contract or for negligence.

### **Insurance Issues**

The authors were of the belief that there would be no adverse impact on the availability of and rates for environmental consultant liability insurance under Option 2. This was because it was felt that environmental consultant liability policies would continue to be available in British Columbia (as they are in the four Canadian jurisdictions where consultant reports and opinions provide the primary evidence that a site has been satisfactorily remediated – P.E.I., Alberta, Saskatchewan, and the Northwest Territories) for both polluting conditions resulting from contracting operations and negligent acts, errors and omissions in the course of providing environmental professional services.

### **Implications**

The authors pointed out that Option 2 represents a wholesale revision of the contaminated site legislation. It was argued that amending or deleting those sections of the WMA and the Regulation which provide for Approvals and Certificates would have a significant impact on the identification of contaminated sites, information sources relating

to contaminated sites and the triggers for remediating contaminated sites. It was noted that there might also be stakeholder concerns centering on the loss of certainty and the possible re-introduction of local government measures aimed at the remediation of historic contaminated sites based on their ability to control development within their boundaries. Such local government measures could result in inconsistency and a “patchwork regulatory” effect for remediation of contaminated sites.

**Shelley O'Callaghan, Bull Houser & Tupper, Letter to Roster Steering Committee "BC Ministry of Water, Land and Air Protection - Experts Roster," November 16, 2001.**

This legal opinion examined the nature and scope of the liability of members under the current system, changes to liability under a system where approved professionals issue Approvals and Certificates and the limits on liability under the new system.

*Current liability:*

It was noted that any employee of Government is granted immunity under section 28.6 of the Waste Management Act (now section 61 of the EMA). Under the current system, roster members (now referred to as approved professionals) provide recommendations to managers who have the power to issue an Approval or a Certificate. It was noted that,

“There is not a direct connection between members and the issuance of those certifications. However, as the Government’s employees are immune to any claims, there is the possibility that the members might be exposed to claims by persons who may be reasonably foreseeable as being harmed by any negligence of the member.”

The authors also noted that there is nothing in the legislation that limits the liability of the member to \$2 million, and therefore, if claims have the potential to be greater than \$2 million, the assets of the engineering firms and the individual members would be at risk (in the absence of additional insurance).

*Changes to liability under a system where approved professionals issue approvals:*

Under the new system, the members would bear the sole responsibility for the review of investigations and certification that the remediation of the contaminated site had been completed in accordance with WLAP standards as well as the issuance of Approvals and Certificates for all but high risk sites.

The authors noted that a number of parties would be relying on the consultants. For example, municipalities and regional districts are prohibited by legislation from issuing certain development approvals unless an Approval or Certificate has been issued. They therefore would rely on the instrument provided before issuing their own approvals. Approvals and Certificates are often a condition precedent to providing financing, proceeding with purchase and sales transactions as well as proceeding with land development.

The authors noted that one of the key goals of the WLAP in proposing the new system is to ensure that the business community accepts the new system. Therefore, according to the authors, the business community must be convinced that once the site has been remediated and a Certificate issued, that third parties can rely on this Certificate as being a final determination that the site is acceptable for a particular use. The authors expressed concern that if there is a risk of the Certificate being open to challenge or the if the member has concerns about potential liability to third parties, the member issuing the Certificate would be overly cautious which would cause delay in the issuance of the

Certificate. The authors determined that without providing protection against liability, the Government's goals would not be achieved.

The authors also recommended that if WLAP "insist[s] that members' decisions to issue an Approval or Certificate be subject to an appeal" that the defence of the member's Approval or Certificate continue to be handled by the Attorney General's department. Further, it was noted that participating in an appeal would represent a significant cost to a member.

The authors stated that there is a serious concern whether issuing Approvals and Certificates would exempt approved professionals from insurance coverage by falling within some of the typical exclusion clauses in professional liability policies. The typical types of exclusions include:

1. claims arising out of express warranties, guarantees and penalty clauses given for the benefit of others; and
2. claims arising out of the performance of services not usual or customary for professional architects or engineers. (The argument here is that engineers do not typically issue regulatory approvals.)

*Limits on liability under the new system:*

The authors made the following recommendations in order of preference:

1. *Statutory immunity.* That "approved professionals" receive the same immunity protection as is currently available to "protected persons" under s. 28.6 of the WMA (now section 61 of the EMA). The authors commented that this would protect the members from any claim except where the member is a responsible person or has been dishonest, malicious or guilty of wilful misconduct. This would mean that "approved professionals" would have the same protection as the persons currently issuing Approvals and Certificates (i.e., WLAP staff who are granted immunity under the Act).
2. *Limitation of Liability.*
  - Limit member's liability to the amount of their professional liability insurance, with immunity for claims in excess of that amount,
  - A member should only be liable if the member negligently reviews or relies on the reports filed in support of the application for an Approval or Certificate,
  - Place limitations in the Act on the right to sue a member (i.e. define those persons who qualify as claimants; limit the amount that can be claimed; and/or set a limitation period).
3. *Reimbursements of Member's costs if they are named in a lawsuit.* reimburse a member for the time spent and costs incurred if he or she faces a lawsuit.
4. Finally, the authors noted that more research needs to be done on insurance.

As part of our background research you asked us to consult with the Insurance Bureau of Canada and the Ministry of Finance's Risk Management Branch. Pursuant to the

work plan, the views of these two organizations on the viability of different options for managing the short and long term liability of approved professional is summarized and discussed below.

## **Consultation with a Representative of the Ministry of Finance’s Risk Management Branch<sup>5</sup>:**

The representative we spoke to stressed that it was important for the Ministry of Water, Land and Air Protection (MWLAP) to ensure that any amendments it makes to the contaminated site remediation regime “puts a box around the exposure of approved professionals” in a manner that makes the insurance industry comfortable. He suggested that a two-pronged approach be applied in order to ensure that approved professionals would be able to obtain the insurance needed to work as approved professionals at a reasonable cost. The first prong is to have a proactive plan with respect to financing through the establishment of a risk pool. The second prong is to shape the approval in an appropriate manner. We will discuss each of these in turn.

### **The establishment of a Risk Pool:**

A Risk Pool could be established, as a last resort, only if:

- Adequate insurance is not available on a consistent and cost effective basis throughout the insurance industry;
- The government determines that establishing a risk pool would be the only way to move forward; and
- The pool would become completely funded by approved professionals in a relatively short period of time.<sup>6</sup>

“Adequate insurance” should be defined as insurance coverage that is readily available in the British Columbia market and does not contain exclusions for working on contaminated property, at a cost that is not prohibitive having regard to the average annual billings of the environmental consultant. It was noted that the cost part of the equation would vary from approved professional to approved professional.

It was noted that MWLAP could look to the government devolution of responsibility for the delivery of safety inspection services to the BC Safety Authority (“BCSA”), established under the *Safety Authority Act* (April 1, 2004) as a case-study for devolution with respect to approved professionals. This process involved similar issues to those we have been asked to examine by the MWLAP. Under the case study, the responsibility for inspection of boilers and boiler systems; electrical systems and equipment; elevating devices and passenger conveyors; gas systems and equipment; pressure vessels, pressure piping, refrigeration systems and equipment; amusement rides; railways and ski lifts as well as other safety services in the province were delegated from government to the BCSA under subsection 84(1) of the *Safety Standards Act* (“SSA”). During this process, safety officers, who would be appointed under section 11 of the SSA were very worried that they would not be able to get insurance that would cover these delegated duties, which were traditionally associated with government.

In order to establish a viable risk pool, it must be capitalized immediately so that it can respond to losses immediately. There are two ways to capitalize a risk pool. The first is to arrange a contingent loan that would respond in the event that losses are incurred by

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<sup>5</sup> Telephone Communication with representative of the Ministry of Finance, Risk Management Branch.

<sup>6</sup> *Ibid.*

the pool that exceed the individual contributions to the pool by approved professionals. The second is to request an indemnity from government to backstop the pool until such time as it is adequately capitalized. The actual capital requirements would require analysis of the loss history of the approved professionals. As a comparison, the BCSA required \$50 million in their risk pool in order to cover potential losses.<sup>7</sup> If a government indemnity were obtained, it would expire when the risk pool is fully capitalized.

### **The Wording of the Approval**

The representative we spoke to stated that if the MWLAP decides to move forward with an option that devolves the Director's regulatory authority to approved professionals and requires them to sign Approvals in Principle, Determinations, and Certificates of Compliance, the specific wording of what they are signing will be critical to determining both their liability and their ability to obtain insurance coverage. The closer the wording of these approvals gets to resembling a guarantee or a warranty, the higher the associated liability and the more difficult it will be to obtain insurance coverage. The representative we spoke to thinks that the wording of the approval is one of the most important issues to be addressed by the MWLAP before it permits approved professionals to sign-off on approvals. He seemed to agree with the authors' suggestion that the wording should resemble a check-list and should state that the approved professional has followed the required procedures with respect to the site. It should not warrant that the site is clean or even that the site has been remediated to meet the standards published in the Schedules under the Contaminated Sites Regulations. We note that the changes in the current and past wording of a Record of Site Condition (RSC) in Ontario are particularly instructive to help illuminate this point (please see body of report). In Ontario, the former RSC resembled a guarantee while the current wording does not and explicitly states that, "by signing this RSC, I make no express or implied warranties or guarantees".

### **The possibility of other Government action**

The authors' asked the ministry representative a series of questions relating to what steps the B.C. government might be willing to take to help alleviate some of the liability concerns that were shared with us by approved professionals. It was indicated that the government might be willing, as a last resort, to step in to provide insurance for approved professionals in the form of a risk pool, on an interim basis as the MWLAP searches for other insurance or until enough money builds up in the risk fund to make it viable. However, the representative indicated, that in his opinion, the B.C. government would not be prepared to cap insurance for approved professionals in the legislation and pay for claims in excess of that amount. Nor did he think that the government would be willing to underwrite approved professionals insurance. The authors inquired if the government would grant immunity to approved professionals. The response was a resounding "no". It was pointed out that the government was planning to remove immunity for government entities from many acts. The authors also asked about the possibility of providing liability protection to approved professionals under section 61 of the *Environmental Management Act*. It was felt that the government would be unwilling to do this as it could look like it was covering someone's error or omission and also removing a third party's right of action.

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<sup>7</sup> However, before this scheme was established for the BCSA, the safety officers were able to find appropriate insurance and the government abandoned its plans to assist with the formation of the pool.

## **Consultation with Representative of the Insurance Bureau of Canada (IBC)<sup>8</sup>:**

### **Insurance concerns:**

Our conversation with the representative of IBC started with her view that there would be insurance coverage available under each of the various options being considered by the MWLAP. Therefore, lack of insurance would not be an issue. However, obtaining insurance at the price that approved professionals want could prove to be more difficult. She did not think that pricing would be a problem for approved professionals who are members of professional bodies or working for large companies, but could be a very significant concern for self-employed environmental consultants without a membership in a regulated body (such as APEGBC, CAB, and BCIA). The concern is that some of the self-employed would not generate enough income to make the insurance premiums worthwhile. The IBC representative voiced a concern that the shift to greater reliance on approved professionals could have the result of driving the smaller players out of business.

Currently a number of environmental consultants do not carry insurance. The authors asked if making insurance compulsory would ameliorate the situation. The IBC representative pointed out that the implication of this could be that it would become more difficult to tell who is qualified to do the work. It was further stated that there is an expectation that the insurance industry will weed out the “bad apples”. It was noted that such a task could be better performed by a licensing board.

It was also the IBC representative’s view that transferring immunity from government to approved professionals would not make getting insurance any easier for approved professionals. However, it was stated that the more standards, regulations and by-laws that must be complied with by a professional, the more comfortable the insurance industry would feel providing insurance to such a person or company. The IBC representative’s comments showed a preference for a self-regulated model and she indicated that it was her view that in Massachusetts, there was no trouble getting insurance.

The IBC representative made a link between some of the current confusion about insurance with the 30-year history of government automobile insurance. It is her view that the automobile scheme has coloured professionals’ views of insurance and results in them not thinking of insurance as a commodity that differs from insurer to insurer.

### **Wording of approvals:**

The IBC representative also agreed with the statement that the closer the wording of an approval gets to that of a guarantee, the less likely an insurance company will want to insure the issuer of the approval.

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<sup>8</sup> Telephone communication, with representative of the Insurance Bureau of Canada.

## APPENDIX 3

### Other Jurisdictions

The following is a summary of contaminated site regimes in other jurisdictions. Each analysis contains the following elements:

1. Comparison to the B.C. Regime
2. Overview of the Regime
3. Wording of Instruments signed by Environmental Professionals (if applicable).

For ease of comparison, we have provided a brief summary of the B.C. regime at the start of our analysis. A more detailed description can be found in Appendix 1 of the report.

### CANADA

#### British Columbia

##### 1. Overview of the Contaminated Site Regime

Environmental consultants can be appointed to the Roster of Approved Professionals (the “Roster”) by the Director of Waste Management (the “Director”) who acts on the advice of the Roster Steering Committee (the “Committee”). MWLAP officials rely on the opinion of approved professionals when making decisions about the issuance of instruments under the Environmental Management Act (the “EMA”).

The current system is enabled by section 42 of the EMA and paragraph 49.1 of the *Contaminated Sites Regulations*, Reg. 375/96 (the “Regulations”).<sup>1</sup> The Director may appoint approved professionals to a roster established under subsection 42(2) of the EMA as follows: “the Director may develop a roster of persons described in subsection 42(1)”. Subsection 42(1) provides, “a director may designate classes of persons who are qualified to perform classes of activities, prepare classes of reports and other documents or make classes of recommendations that by or under this Act may be or are required to be performed, prepared or made by an approved professional”.

Approved professionals can be appointed as a Professional Expert: Risk Assessment Specialist and can then conduct risk assessments or they can be appointed as a Standards Assessment Specialist by the Director on the recommendation of the Roster Steering Committee. Approved professionals are appointed for a term of three years, with the option of a two year extension and must:

- be a registered member, in good standing, with the Association of Professional Engineers and Geoscientists of the Province of BC (the “APEGBC”), the British Columbian Institute of Agrologists (“BCIA”) or the College of Applied Biology of BC (CAB);

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<sup>1</sup> 49.1 For the purpose of determining the manner and extent of the review that must be undertaken of the work on which an application referred to in section 15 (6), 43 (3), 47 (1.41) or 49 (7), a director may consider whether the application includes the recommendation of an approved professional in respect of the decision requested in the application.

- possess a minimum of eight (8) years of documented experience relevant to the type of specialist they would like to be appointed as;
- have successfully written and passed, a licensing exam;
- have been recommended for inclusion on the Roster by the Roster Steering Committee, and
- have obtained the required professional liability insurance as specified by the Director. Currently, candidates must have submitted proof to the Director that they have at least two million dollars of professional liability insurance.<sup>2</sup>

All applications for low or moderate risk sites must be submitted as Roster submissions by an approved professional.<sup>3</sup> Protocol 6 for Contaminated Sites: Eligibility of Applications for Review by Approved Professionals, clarifies the types of sites and approvals that approved professionals can provide advice on. Approved professionals can make recommendations to the Director with respect to the issuance of a determination that a site is or is not contaminated, irrespective of the risk it poses after a preliminary and/or detailed site investigation has been reviewed. Approved professionals can also make recommendations regarding the granting of an approval in principle or a certificate of compliance, as well as contaminated soil relocation agreements for low or moderate risk sites, after a remediation plan or a confirmation of remediation report has been evaluated. The system currently permits self-review and review of others work done with respect to the site assessment and remediation work for the purposes of advising the Director.

The MWLAP conducts an administrative and not a substantive review of the submission of an approved professional before the Director issues the instrument.<sup>4</sup> Therefore, if the paper work is in order, the approved professional's submission is accepted.

*The Roster Steering Committee (the "Committee"):*

The Committee is responsible for the administration and management of the Roster.<sup>5</sup> The Committee makes recommendations regarding appointments to the Roster and has a role in audits and has the authority to conduct spot audit checks. The committee also has the authority to conduct investigations of approved professionals when necessary. The Committee works on audits and make recommendations to the Director with respect to the appropriate course of action to take. The Director generally accepts the recommendations of the Committee. One in every ten Roster Submissions is audited.<sup>6</sup> The purpose of conducting an audit is to ensure that professional experts maintain the high standards of work required. Our conversations with approved professionals revealed that the purpose of the audit has shifted in focus from being disciplinary to educational in nature.<sup>7</sup>

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<sup>2</sup> MWLAP, Procedures for the Roster of Professional Experts under the Contaminated Sites Regulation, February 11, 2005.

<sup>3</sup> *Ibid.*

<sup>4</sup> Telephone communication with MWLAP staff from the Legislative and Finance Unit. See also: [http://wlapwww.gov.bc.ca/epd/epdpa/contam\\_sites/roster/rosterauditfindings.html](http://wlapwww.gov.bc.ca/epd/epdpa/contam_sites/roster/rosterauditfindings.html).

<sup>5</sup> MWLAP, Procedures for the Roster of Professional Experts under the Contaminated Sites Regulation, 11 February, 2005.

<sup>6</sup> Waldemar Braul, McDonald & Company, "British Columbia's New Licensed Environmental Professional Framework," September 1, 2004, at p. 43.

<sup>7</sup> Telephone communication with Roster members.

### *Implications for Liability Protection*

The provincial government has extended liability protection to consultants in order to reduce their potential exposure for clean-up activities on contaminated sites. In this regard, subsections 46(1)(h) and (i) of the EMA state that an environmental consultant who provides advice respecting remediation work at a contaminated site will be exempt from being named a “responsible person” unless he or she has assisted or provided advice in a negligent fashion.

Subsections 46(1)(h) and (i) state:

The following persons are not responsible for remediation of a contaminated site:

(h) a person who provides assistance respecting remediation work at a contaminated site, unless the assistance is carried out in a negligent fashion

(i) a person who provides advice respecting remediation work at a contaminated site unless the advice is negligent

Currently there are 47 Standards Assessment Specialists and 4 Risk Assessment Specialists appointed to the Roster of Approved Professionals.

## **2. Wording Of Certificates**

Currently all regulatory instruments (Certificates of Compliance, Approvals in Principle, Determinations and Soil Relocations Agreements) are signed by MWLAP staff on the recommendation of an approved professional if the instrument relates to a low or moderate risk site.

Each certificate includes the name of the of the approved professional who made the recommendation for the site.

The following wording is found in a certificate of compliance:

### **CERTIFICATE OF COMPLIANCE (Pursuant to Section 53 of the *Environmental Management Act*)**

**THIS IS TO CERTIFY** that as of the date indicated below, the lands identified below have been satisfactorily remediated to meet prescribed standards for **<land use> soil** and **<water use> water, <sediment use> sediment** criteria **<and Hazardous Waste Regulation standards>**. The substances for which remediation has been satisfactorily completed are as follows:

#### **In soil:**

*<List substance by substance class as they appear in the regulations, and alphabetically as they appear within each substance classes, or indicate none required as appropriate. May have to differentiate as follows:>*

- To meet Contaminated Sites Regulation numerical standards < list Schedules 4, 5 and 10 standards and regional or site specific background substance concentrations as appropriate) –
- To meet Contaminated Sites Regulation risk-based standards –
- To meet Hazardous Waste Regulation standards –

**In water:**

*<List substance by substance class as they appear in the regulations, and alphabetically as they appear within each substance classes, or indicate none required as appropriate. Follow a similar format as above.>*

**In sediment:**

*<List substance by substance class as they appear in the regulations, and alphabetically as they appear within each substance classes, or indicate none required as appropriate. Follow a similar format as above.>*

The lands covered by this certificate are located at <civic address> which are more particularly known and described as: <legal description or portion of> as depicted in legal sketch plan <plan number> (if for a portion of the site) PID : <PID>.

I have issued this certificate based on the information summarized in:

<Provide *titles (italicized)*, authors, and dates of pertinent documents, listing the most recent documents first. ><sup>8</sup>

As recommended by an approved professional in the following letter:

<Provide *titles (italicized)*, authors, and dates of pertinent documents, listing the most recent documents first. >

This certificate is qualified by the conditions described in Schedule “B” which is attached to and is part of this certificate.

This certificate of compliance is based on the most recent information provided to the ministry regarding the specified lands. I, however, make no representation or warranty as to the accuracy or completeness of this information. I expressly reserve the right to change or substitute different requirements where circumstances warrant.

This certificate should not be construed as an assurance that there are no hazards present on the site described above.

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<sup>8</sup> If appropriate include the following: “Includes *Required Responsible Person’s Assertion* with respect to substances listed in Schedule 10 of the Contaminated Sites Regulation under the Ministry’s Technical Guidance document 18.

## New Brunswick

### 1. Comparison to B.C. Regime

- Voluntary regime laid out in Guidelines. The Minister has a statutory power to order remediation of contaminated sites in limited circumstances.
- The Department of Environment and Local Government (the “DELG”) has not created a licensing scheme for site professionals. They will only accept reports or documentation submitted in compliance with the Guideline and if they are signed by a member in good standing of the Association of Professional Engineers and Geoscientists of New Brunswick (APEGNB).
- No licensing system for environmental consultants. While Site Professionals submit Environmental Site Assessments, Remedial Action Plans (RAPs), Site Closure Reports and Records of Site Condition (RSC) to the DELG, all of these instruments must be Acknowledged by the DELG. In the case of the RSC, the DELG will process the Closure Report to ensure the Management Process has been followed in accordance with the Guideline. This process includes a substantive review
- Site Professionals sign site closure reports and RSCs.
- The Acknowledgement is not accompanied by a substantive review (unlike in Nova Scotia). The DELG simply reviews the document for completeness.
- The DELG is responsible for auditing certificates signed and submitted by site professionals. The audit is done, at random, for 10% of submissions. However, the audit process ensures that every site professional is audited once every 3 years. If a site professional fails an audit, their next submission will be audited.
- The DELG does not require the site professional to have insurance.

### 2. Overview of the Contaminated Site Regime

The Minister’s authority pertaining to the issuance of orders to address a contaminated site is outlined primarily in the *Clean Environment Act* (the “Act”)<sup>9</sup>. The DELG has the legislative authority to issue orders mandating clean-up, site rehabilitation or other remedial action “if a contaminant or waste has been released into or upon the environment or any part of the environment” (paragraph 5(1)(g) of the Act). There are two regulations established under the Act that also enable the Minister or his/her delegate to issue an order: the Petroleum Product Storage and Handling Regulation (“the Petroleum Products Regulation”<sup>10</sup> and the Water Quality Regulation<sup>11</sup>. The Petroleum Products Regulation requires that any person (including the person responsible for the system or any other person) who suspects or detects that a petroleum product is leaking or has leaked from a storage tank to notify the Minister (sections 43 and 44). The Water Quality Regulation requires immediate notification of the Minister where any contaminant is “emitted, discharged, deposited, left or thrown into or upon the environment in any location such that it may, directly or indirectly, cause water pollution to any waters” (section 3). Orders can be issued either under the Act or after notification has been received under these two regulations. The Minister has discretion to determine who is responsible for ensuring the remediation of the

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<sup>9</sup> R.S.N.B. 1973, c. C-6.

<sup>10</sup> N.B. Reg. 87-97.

<sup>11</sup> N.B. Reg. 82-126.

contaminated site. This may require investigation and assessment efforts on the part of the Minister.<sup>12</sup>

When such orders are issued, the practice of DELG<sup>13</sup> is to require the party to whom the order has been issued to adhere to the *Guideline for the Management of Contaminated Sites, Version 2* (the “NB Guideline”).<sup>14</sup> Voluntary compliance with the NB Guideline also occurs, in the absence of an Order from the Minister.<sup>15</sup> This NB Guideline describes the general management process to be used during the remediation of contaminated sites.

The Guideline is based upon the “Risk Based Corrective Action’ approach (“RBCA”) which is a tool used by the American Society for Testing and Materials. New Brunswick in collaboration with Nova Scotia, Newfoundland and Labrador and Prince Edward Island, have developed a modified version of the ASTM RBCA for the use in the Atlantic Provinces through participation in the Atlantic Partnership in the RBCE Implementation Committee (“PIRI”). The RBCA process initially started out as a tool for managing petroleum-impacted sites in New Brunswick, however, this management process is also used for managing sites impacted by other contaminants.<sup>16</sup>

The NB Guideline clarifies the responsibilities of the various parties involved in the remediation of contaminated sites. The process is largely government driven, however, there is a significant role for Environmental Site Professionals within the process. Site professionals sign-off on a closure report which they submit to the DELG along with a Record of Site Condition (“RSC”). The DELG then provides a written Acknowledgement of the RSC.

The New Brunswick form of RSC does not constitute a warranty or a guarantee as it contains no statement that specific remediation standards have been met.<sup>17</sup> Following the legislative changes that resulted in the enactment of the *Engineering and Geoscience Professions Act*, in June 1999, the DELG asked APEGNB to examine the activities generally required in the management of a contaminated site (as described in the first version of the NB Guideline which is very similar to the current version). APEGNB’s response was that the work required to manage a contaminated site as stated within the NB Guideline, constitutes the practice of engineering and geoscience as defined in the profession’s Act.<sup>18</sup>

### **Future Development of the System:**

In the 2004 Speech from the Throne, the government of New Brunswick made the following commitment with respect to contaminated site clean-up:

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<sup>12</sup> New Brunswick Department of the Environment and Local Government, *Guideline for the Management of Contaminated Sites, Version 2*, November 2003 (the NB Guideline), at page 3.

<sup>13</sup> Telephone communication with Director Remediation Branch, Department of the Environment and Local Government, 03 March 2005.

<sup>14</sup> The NB Guideline, *supra* note 4.

<sup>15</sup> *Supra*, note 2.

<sup>16</sup> The RBCA process is explained online at <http://www.atlanticrbca.com/eng/right.html>.

<sup>17</sup> Telephone Communication with Michael Sprague, *supra* note 5.

<sup>18</sup> *Ibid.*

“Your government will develop an initiative to encourage the clean up of a number of former industrial properties and other contaminated sites, commonly known as "brown fields," as a means of offering revitalized and environmentally managed properties for future development. This initiative will encourage the purchase and redevelopment of existing properties while minimizing expansion into undeveloped land.”

The government is planning to achieve this goal by legislating a number of aspects contained in the Guidelines.<sup>19</sup> The New Brunswick Liability Working Group has also been struck and is considering ways to limit liability with respect to contaminated sites in order to encourage site remediation. This working group is considering instituting a 10 year statute of limitations for civil liability with respect to contaminated land and stipulating that once a site has been remediated to meet the standards in the Guidelines, legislation and regulations, no orders can be issued with respect to the site.<sup>20</sup> There are no plans underway to create a licensing regime for Site Professionals.

### **3. Summary Statement of the Site Professional contained in the RSC:**

The RSC must be signed by the site professional and at a minimum provide that:

- The work upon which the RSC is based was prepared, overseen and/or reviewed by the site professional;
- The site was managed in accordance with the NB Guideline; and
- One of the following statements must be checked (statement provided on RSC):
  - Based on the ESA, environmental criteria were not exceeded (on the source property or 3<sup>rd</sup> party properties) and therefore remedial action and/or site-specific engineered or institutional controls are not required for the current or reasonably foreseeable future site activities,
  - The remedial criteria and objectives defined by the site professional have been achieved for the current or reasonably foreseeable future site activities and unconditional closure is recommended, or
  - The Property requires site-specific engineered or institutional controls to satisfy current or reasonably foreseeable future site activities and conditional closure is recommended.
  - This RSC is identical to the one approved by DELG and the content of the form has not been altered.

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

The RSC submitted to, and acknowledged by, the DELG becomes a public document and indicates to all interested parties that the Management Process outlined in the Guideline and related technical documents has been followed. As such, the RSC indicates that the site is acceptable, as of the date of the document, for the indicated current or reasonably foreseeable future site activities. DELG keeps data of remediated sites accessible to purchasers and other interested parties.

## Ontario

### 1. Comparison to B.C. Regime

- Term of art is “qualified professional”.
- While qualified professionals play a key role in the investigation and remediation of contaminated sites, there is no program in place to qualify environmental professionals and no specific list of “qualified professionals” like the Roster Steering Committee or the Roster of Approved Professionals.
- Insurance requirements for qualified professionals are included in the regulations.
- Qualified professionals are required to sign-off on a Record of Site Condition (“RSC”) (similar to a Certificate of Compliance) and post the RSC to the Brownfields Environmental Site Registry established by the Minister of Environment. The sign-off wording is very specific and does not equate to a guarantee or warranty of site condition. Qualified professionals are not required to sign-off on other regulatory approvals offered by the Ministry of Environment (“MOE”) (for example the Certificate of Property Use).
- There is no MOE oversight with respect to RSCs issued for sites which utilize the generic standards published for site remediation. However, there is extensive oversight when the site is addressed using the risk assessment method.
- Minister accepts the RSC after performing an administrative review of the RSC.
- The Ontario system can be classed as a “hybrid” system

### 2. Overview of Contaminated Site Regime

#### Statutory basis for Contaminated Site regime:

- Environmental Protection Act (the “EPA”)
- Regulation 153/04, under the EPA
- Former Guideline for Use at Contaminated Sites. Parts of this former guideline are still in force as the amendments necessitated by Bill 56 are coming into force through amendments to the EPA and Regulations enacted under the EPA.

#### Cleanup Process:

The Ontario regime first started as a voluntary process under the *Guideline for Use at Contaminated Sites* (the “Guideline”). The four levels of cleanup are: generic full-depth (cleaning all the soil and groundwater up to the published standard for 117 different hazardous chemicals to both potable and non-potable water standards), generic stratified (cleaning the top 1.5 meters of the soil to the published standard respecting potable and non-potable water standards), background or pristine (cleaning the soil and groundwater to their pre-contamination state) and site-specific-risk-assessment (“SSRA”), which enables site-specific clean-up standards to be generated using risk assessment. For each of the four approaches, site cleanups can be targeted in accordance with the future land use; with agricultural lands requiring the highest level of clean up, followed by residential/parkland with industrial/commercial land requiring the least of clean up.

SSRAs prepared in accordance with the Guideline underwent external peer review and were submitted to the MOE for review. SSRAs, which were determined to have been conducted in accordance with the *Guideline*, were considered complete by MOE and the owners received acknowledgement from MOE.

Under the former Guideline clean-up and the filing of a RSC was mandatory under a few scenarios: when owners or prospective purchasers wished to change the use of the land; it was general practice for Ontario municipalities to refuse to issue approvals for a zoning change if that site was contaminated, unless the owner first cleaned up the land;<sup>21</sup> and lenders would often insist on an RSC before providing financing or if a purchaser demanded one. Clean up was also mandatory when the contamination was so severe that it posed a risk to the environment and the community. If this was the case, the MOE could (and still can) issue the following orders: control order (section 7), stop order (section 8), remediation (section 17), prevention (section 18) and waste removal (section 43) under the EPA as well as an order relating to spills (section 97). The MOE has the authority to order the clean-up of contaminated property including soil and groundwater, under section 17 of the EPA, if a person “caused or permitted” a contaminant to be discharged into the natural environment that had, or is likely to, damage or endanger land, water, property, human health or safety or animal or plant life. If an order is not complied with, or likely to be complied with, the MOE can clean up the site and recover its costs for the remediation under section 150 of the EPA.

This Guideline is in the process of being replaced by a binding statute and regulations as a result of Bill 56, *The Brownfields Statute Amendment Act, 2001*. Amendments have been made to the EPA and the RSC Regulation (O. Reg 153/04) has come into force. However, the regime that was created by the Guideline still remains largely in place today. The key differences are:

- 1) If an owner files an RSC, following the requirements in the regulation, the MOE cannot issue the orders, discussed above, under the EPA.<sup>22</sup> It is this immunity from MOE orders that in large part drives the contaminated site process (in addition to the fact that RSCs are required by municipalities before they issue any sort of permit, by lenders before they lend and by purchasers before they will buy a property).
- 2) The following approaches to site clean-up are required under the Regulations and generic standards have been published in the form of tables:
  - Full depth background site condition standards (See Table 1 of the Soil, Ground Water and Sediment Standards)
  - Full depth generic site condition standards, potable ground water (See Table 2 of the Soil, Ground Water and Sediment Standards)
  - Full depth generic site condition standards, non-potable ground water (Table 3 of the Soil, Ground Water and Sediment Standards)

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<sup>21</sup> D. Saxe, *Ontario Environmental Protection Act –Annotated* (Aurora: Canada Law Book, 2002) at II-102-103.

<sup>22</sup> Telephone communication with a representative from the Legal Services Branch, Ontario Ministry of the Environment, 12 February 2005.

- Stratified site condition standards, potable ground water (Table 4 of the Soil, Ground Water and Sediment Standards)
- Stratified site condition standards, non-potable ground water (Table 5 of the Soil, Ground Water and Sediment Standards)

In most cases the generic standards are the same as they were under the Guideline with the exception of the adoption of the Canada Wide Standards for petroleum hydrocarbons in soil.

- 3) The SSRA process has been renamed the Risk Assessment process (“RA”) and RAs must be prepared and submitted in accordance with Schedule C of the RSC Regulation, if the owner wants to file an RSC for the property.

Under the current regime, qualified professionals sign RSCs. For sites remediated using the generic standards, the MOE has no role in this process, with the exception that the MOE Audit Team currently audits RSCs on a 1:10 basis. There is no specific provision in the regulation or in any guidelines that requires the MOE to conduct audits.

There is considerable Ministry oversight involved when RSCs are issued using the risk assessment method of site remediation.

### **3. Certifications that Qualified Professionals must provide in the RSC**

The RSC wording has changed significantly from the former wording that many people felt inappropriately forced the qualified professional to sign a guarantee that the site met the Guidelines.

#### **Current wording when generic site clean-up used:**

##### **Schedule A. O.Reg. 153/04**

Schedule A of the Record of Site Condition Regulation O. Reg 153/04 contains the wording that a qualified professional is required to use in a RSC. The current wording makes it clear that no guarantee is given by the qualified person. The wording for RSCs where a Phase I and a Phase II has been done is provided below:

With respect to a Phase I ESA:

10. The qualified person shall certify, in the language set out in this section, the following in the RSC:

1. A phase one environmental site assessment of the RSC property, which includes the evaluation of the information gathered from a records review, site visit and interviews, has been conducted in accordance with the regulation by or under the supervision of a qualified person as required by the regulation.
2. As of [*insert the certification date*], no phase two environmental site assessment is required by the regulation for any part of the RSC property and based on the phase one environmental site assessment for the RSC property, in my opinion, it is not necessary for any other

reason to conduct a phase two environmental site assessment for any part of the RSC property.

3. As of [*insert the certification date*], in my opinion, based on the phase one environmental site assessment, there is no evidence of any contaminants in the soil, ground water or sediment on, in or under the RSC property that, if the RSC property were put to any of the types of property uses listed in subsection 1 (2) of the regulation, are likely to interfere with any of those types of property uses

12. The qualified person shall, in the RSC, make, using the language set out in this section, the following statements in relation to the part of the RSC that includes the information, certifications and statements required by this Part:

1. I am a qualified person and have the qualifications required by section 5 of the regulation.
2. I have in place an insurance policy that satisfies the requirements of section 7 of the regulation.
3. I acknowledge that the RSC will be filed in the Environmental Site Registry, that records of site condition that are filed in the Registry are available for examination by the public and that the Registry contains a notice advising users of the Registry who have dealings with any property to consider conducting their own due diligence with respect to the environmental condition of the property, in addition to reviewing information in the Registry.
4. The opinions expressed in this RSC are engineering or scientific opinions made in accordance with generally accepted principles and practices as recognized by members of the environmental engineering or science profession or discipline practising at the same time and in the same or similar location.
5. To the best of my knowledge, the certifications and statements in this part of the RSC are true as of [*insert certification date*].
6. By signing this RSC, I make no express or implied warranties or guarantees.

With respect to a Phase II ESA:

17. The qualified person shall certify, in the language set out in this subsection, the following in the RSC:

1. I have conducted or supervised a phase two environmental site assessment, which includes the evaluation of information gathered through the sampling and analysis of soil and other site investigation or assessment activities, of all or part of the RSC property with respect to one or more contaminants, in accordance with the regulation.
2. The information represents the site conditions at the sampling points at the time of sampling only and the conditions between and beyond the sampling points may vary.

3. As of [*insert certification date*], in my opinion, based on the phase one environmental site assessment and the phase two environmental site assessment, and any confirmatory sampling, there is no evidence of any contaminants in the soil, ground water or sediment on, in or under the RSC property that would interfere with the type of property use to which the RSC property will be put, as specified in the RSC.

#### Covering Statements

35. The qualified person shall make the following statements in the RSC, using the language set out in this section, in relation to the part of the RSC that includes the information, certifications and statements required by this Part:

1. I am a qualified person, as defined in section 168.1 of the Act and have the qualifications required by section 5 of the regulation.
2. I have in place an insurance policy that satisfies the requirements of section 7 of the regulation
3. I acknowledge that the RSC will be filed in the Environmental Site Registry, that records of site condition that are filed in the Registry are available for examination by the public and that the Registry contains a notice advising users of the Registry who have dealings with any property to consider conducting their own due diligence with respect to the environmental condition of the property, in addition to reviewing information in the Registry.
4. The opinions expressed in this RSC are engineering or scientific opinions made in accordance with generally accepted principles and practices as recognized by members of the environmental engineering or science profession or discipline practising at the same time and in the same or similar location.
5. To the best of my knowledge, the certifications and statements in this part of the RSC are true as of [*insert certification date*].
6. By signing this RSC, I make no express or implied warranties or guarantees.

#### **RSC wording when Risk Assessment method used in Schedule C**

##### **Mandatory certifications**

5. (1) In an appendix to the risk assessment report, the qualified person shall certify the following, using the language set out in this section:
  1. I have conducted or supervised a risk assessment report in accordance with the regulation.
  2. I am a qualified person, as defined in section 168.1 of the Act, and have the qualifications required by section 6 of the regulation.
  3. I have in place an insurance policy that satisfies the requirements of section 7 of the regulation.

4. The risk assessment team included members with expertise in all of the disciplines required to complete the risk assessment in accordance with the regulation.
5. The opinions expressed in the risk assessment are engineering or scientific opinions made in accordance with generally accepted principles and practices as recognized by members of the environmental engineering or science profession or discipline practising at the same time and in the same or similar location.
6. To the best of my knowledge, the certifications and statements in this risk assessment are true as of [*insert date of completion of risk assessment report*].
7. By making these certifications in this risk assessment report, I make no express or implied warranties or guarantees.

### **In Appendix**

In an appendix to the risk assessment report, the qualified person shall certify, in the language set out in this section, the following in relation to the RA property:

1. As of [*insert date of completion of risk assessment report*], it is my opinion that based on the phase one environmental site assessment and the phase two environmental site assessment and other relevant property information, the approach taken in the conduct of the risk assessment,
  - i. is appropriate to evaluate human health and ecological risks from the contaminants of concern at the concentrations proposed as the standards specified in the risk assessment and assuming no measures have been taken at the RA property which have the effect of reducing the risk from the contaminants, and
  - ii. is consistent with the approach set out in the pre-submission form with the exception of those deviations listed in section 1 of the report under the heading "Deviations from Pre-Submission Form".
2. As of [*insert date of completion of risk assessment report*], it is my opinion that, taking into consideration the assumptions specified in the risk assessment report, including the use of the property specified in report section 3 of the risk assessment, and any risk management measures recommended in the report, as long as the RA property satisfies those assumptions and meets the standards specified in the risk assessment report, the contaminants of concern are unlikely to pose a human health or ecological risk greater than the level of risk that was intended in the development of the applicable full-depth site condition standards for those contaminants.

3. As of [*insert date of completion of risk assessment report*], it is my opinion that, (pick the applicable statement below),
  - i. no risk management plan is necessary for a contaminant of concern addressed in the risk assessment report to prevent, eliminate or ameliorate any adverse effect from that contaminant to the human or ecological receptors addressed in the report and located on the RA property, or
  - ii. the implementation of the risk management plan described in section 9 of the risk assessment report is necessary for a contaminant of concern addressed in the risk assessment report to prevent, eliminate or ameliorate any adverse effect from that contaminant to the human or ecological receptors addressed in the report and located on the RA property and is sufficient to address the current and potential future transport and exposure pathways.
4. As of [*insert date of completion of risk assessment report*], the risk assessment report completely and accurately reflects the risk assessment assumptions and conclusions and all pertinent information has been included in the report and the appendices to the report.

(3) If in report sections 4 and 5 of the risk assessment report under the heading “Risk Characterization”, the report concludes that the standards that are being proposed for the RA property are not likely to result in a concentration greater than the applicable full depth site condition standard for any of the human or ecological receptors that are addressed in the report and are located off the RA property, the qualified person shall certify, in the language set out in this subsection, the following in relation to the RA property and its impact on those receptors:

As of the submission date, it is my opinion that, taking into consideration the assumptions specified in the risk assessment report including any risk management measures recommended in the report, as long as the RA property satisfies those assumptions and meets the standards specified in the report, the applicable full depth site condition standards will likely be met at the nearest off-site ecological and human receptors identified in the report.

## **Newfoundland & Labrador**

### **1. Comparison to B.C. Regime**

- The Department of Environment and Conservation (the “Department”) plays a far more central role in the management of contaminated site clean-up than in B.C.
- The Department accepts Records of Site Condition (RSC) from Site Professionals, reviews all RSCs, formally acknowledges the RSC and then formally issues a Site Closure Letter.
- There is no licensing board for Site Professionals, however, there is a requirement that they be a Member in Good Standing of the Professional Engineers and Geoscientists of Newfoundland and Labrador (“PEGNL”)
- Site professionals must also hold professional errors and omissions liability insurance coverage for environmental work of at least \$1,000,000 individually or through a registered company employer

### **2. Overview of Contaminated Site Regime**

In 2002, Newfoundland and Labrador enacted the *Environmental Protection Act*<sup>23</sup> (the “Act”), the first piece of legislation to address contaminated sites in the province. The Act sets out two parallel paths; one for Department designated contaminated sites and one for non-designated sites, for identifying and cleaning up contamination. The Site Management Process for both paths is outlined in the *Guidance Document for the Management of Impacted Sites*<sup>24</sup> (the “Guidance Document”).

The Management Process is considered mandatory for designated sites. The person responsible is required to conduct an Environmental Site Assessment and to submit a Remedial Action Plan to the Department for review. Although the process is considered voluntary for non-designated sites, following the management process greatly facilitates closure of identified impacts.

The Department designates that area of the environment as a “contaminated site”; gives written notice to the Person Responsible after the designation of a contaminated site; establishes standards, criteria or guidelines before designating of an area as a contaminated site; and ensures that the Site Management Process is followed properly and in a timely manner.

The Site Professional is ultimately responsible for stating when a site has been sufficiently remediated or how it is to be managed to provide satisfactory protection to human health and the environment. The Site Professional submits a completed Record of Site Condition upon completion of the work specified in the Site Management Process to the Department, on behalf of their client. The Department then provides acknowledgement when satisfied that the Site Management Process is complete and Site Closure letter is provided to the Person Responsible. This documentation provides a high level of certainty to the province, owners, lenders, and buyers or sellers of real property that safety and environmental risks have been satisfactorily addressed.<sup>25</sup> The

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<sup>23</sup> SNL2002 C. E-14.2.

<sup>24</sup> Version 1.0, December 2004.

<sup>25</sup> Telephone communication with representative of the Department of Environment and Conservation, 07 March 2005.

Minister of the Environment and Conservation (the “Minister”) has a duty to ensure the process is followed and for technical verification of the work of the Site Professional. Currently the Department audits 100% of all submissions. The Minister does not determine or apportion liability.

When the Province determines that complexity and risks posed at a site are low, the “Limited Remedial Action” option can be followed and a Site Professional is not required.

When remediating a contaminated site, the person responsible, with the assistance of the Site Professional, is able to choose Tier I, II or III depending on the specifics of the site, the contamination, the affected parties and the intended property use after Closure. Tier I and II methods result in the selection of contaminant concentrations (clean-up criteria) that are protective of human health and the environment. Tier III may either result in the selection of clean-up criteria or in the implementation of risk management techniques to reduce or eliminate exposure to the identified contaminants. The three tiers were developed through the Risk Based Corrective Action (“RBCA”).<sup>26</sup>

### **3. Summary Statement of Site Professional in Record of Site Condition**

The Minister considers the pre-checked statements below to be mandatory for submission of the Record of Site Condition. The signature of the Site Professional on this form indicates the fulfillment of these mandatory requirements as well as the requirements of all other checked statements.

The following statements are pre-checked:

- This Record of Site Condition form is identical to the one provided in the Province of Newfoundland & Labrador Guidance Document for the Management of Impacted Sites and the content of the form has not been altered.
- All work on which this Record of Site Condition is based was prepared, overseen and/or reviewed by the Site Professional.
- The site was managed in accordance with the current version of the Province of Newfoundland & Labrador Guidance Document for the Management of Impacted Sites.
- The applicable quality criteria (Tier I, II or III) for the site as defined by the Site Professional and as cited in Part 3 have been achieved for the current or reasonably foreseeable future site activities as cited in Part 5.
- A site plan with scale indicated, identifying the referenced properties is attached to this Record of Site Condition.

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<sup>26</sup> The standards can be found on line as part of the “Tool Kit, Version 2” at <http://www.atlanticrbca.com/eng/right.html>.

The Site Professional must check all of the following that apply:

- All reports cited in Part 2 and other related documents that have been prepared by the Site Professional have been delivered to the Person Responsible.
- The Remedial Action Plan, Risk Assessment or Closure Report was peer reviewed by a qualified, independent Site Professional.
- If peer reviewed, the results of the Peer Review were appropriately incorporated into the final Remedial Action Plan and/or Closure Report.
- Based on the results of the site evaluation, the applicable quality criteria (Tier I, II or III) were not exceeded on the source property and therefore, remedial action and/or on-going site management is not required for the current or reasonably foreseeable future site activities.
- Based on results of the site evaluation, the applicable quality criteria (Tier I, II or III) were not exceeded on the third party properties and therefore, remedial action and/or on-going site management is not required for the current or reasonably foreseeable future site activities.
- The source property has been remediated to an acceptable level for the current or reasonably foreseeable future site activities as cited in Part 5.
- The source property requires on-going site management to satisfy the current or reasonably foreseeable future site activities as cited in Part 5.
- Third party properties affected by the contamination of the source property have been addressed and remediated to an acceptable level for the current or reasonably foreseeable future site activities as cited in Part 5.
- Third party properties affected by the contamination of the source property have been addressed and require on-going site management to satisfy the current or reasonably foreseeable future site activities as cited in Part 5.
- With respect to notification, the requirements of section 8(d) of the *Environmental Protection Act* have been fulfilled.
- The source property is recommended for **Conditional Closure** and is subject to monitoring requirements specified in documents listed in Part 2.
- The source property is recommended for **Final Closure**

Signature  
Name (Print) Date  
Professional Affiliation Membership No.  
Company  
Address Tel.

## Quebec

### 1. Comparison to B.C. Regime

- The contaminated sites regime creates a hybrid regime using legislation, regulations and guidelines.
- The Ministère de l'Environnement approves site characterization and rehabilitation plans and environmental consultants will certify implementation of those plans.
- In certifying a characterization study, the expert shall attest that the study was performed in accordance with the guide prepared by the Minister. The current applicable guide is the "*Guide de caractérisation des terrains*".
- In certifying a rehabilitation plan, an environmental expert shall submit to the Minister a certificate stating that the rehabilitation was carried out in accordance with the plan
- Neither of these certificates constitutes a guarantee or a warranty

### 2. Overview of Contaminated Site Regime

The Ministère de l'Environnement's ("ME") has recently replaced the voluntary policy: the "Soil Protection and Rehabilitation of Contaminated Sites Policy" (the "policy") with binding legislation and regulation. The process itself remains largely unchanged from the policy and provides a framework for identifying and managing contaminated sites. Bill 72, *An Act to amend the Environmental Quality Act and other legislative amendments with regard to land protection and rehabilitation*, was passed in May 2002, and entered into force on 1 March 2003. It replaces Division IV.2.1 of Chapter I of the *Environmental Quality Act*<sup>27</sup> (the "Act").

The legislation creates a hybrid system in which the ME will approve site characterization and rehabilitation plans and environmental consultants will certify implementation of those plans. Once the implementation of a rehabilitation plan approved by the ME has been completed, a 'Certificate of an Expert' stating that remediation has been carried out in accordance with the rehabilitation plan must be submitted to the ME.<sup>28</sup> The Act requires the ME to maintain a 'list of experts' authorized to furnish such certificates.<sup>29</sup> A guidance document has been created detailing the process for the appointment of a list of experts. The document is entitled, "Mécanisme de gestion de la list des expert". Experts must apply to be an expert. A candidate must fill out an application for registration on the list of experts and submit it to the *Centre d'expertise en analyse environnementale du Québec* (this center is an agency of the government). An evaluation committee evaluates the applicant's file. If the evaluation is successful, the candidate is permitted to write the qualification exam. To be listed on the List of Experts, a candidate must attain a mark of 70% on the exam.<sup>30</sup>

The ME can order a site characterization when:

- He or she believes that contaminants described in 31.43 are present on land;
- A person permanently ceases an industrial or commercial activity (section 31.51)

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<sup>27</sup> R.S.Q. chapter Q-2.

<sup>28</sup> *Ibid.* at section 31.48.

<sup>29</sup> *Ibid.* at section 31.65.

<sup>30</sup> Ministère de l'Environnement, Mécanisme de gestion de la list des expert (10 July 2004).

- Any person intending to change the use of land on the site of an industrial or commercial activity (31.53).

Environmental experts must certify site characterization studies.

The ME can order the preparation of a rehabilitation plan when:

- The ME believes that contaminants are present on land (section 31.43) that exceed regulatory values (determined by a characterization study); are likely to adversely affect the life, health, safety, welfare or comfort of human beings, other living species or the environment, or be detrimental to property value;
- A characterization study reveals the presence of contaminants in a concentration exceeding the regulatory values (on former industrial land section 31.51); and
- If a characterization study done for a change in land use under section 31.53 reveals contamination that exceeds the regulatory limits for the new use.

Environmental experts also certify whether completed rehabilitation meets the rehabilitation plan.

Where it appears to the ME that contaminants are present in land in a concentration exceeding the prescribed limits or that the contaminants are likely to adversely affect the environment or human safety, the ME may order that any person who permitted the contamination or has custody of the land that is contaminated to submit for the ME's approval a rehabilitation plan.<sup>31</sup> Rehabilitation plans must also be submitted to the ME for approval where designated industrial or commercial activities are terminated or the use of property is changed if contaminants are present in the land in a concentration exceeding the regulatory limit values.<sup>32</sup> Voluntary remediation is also permitted under the Act. Voluntary rehabilitation also requires an approved rehabilitation plan whenever contaminants are left on property in concentrations exceeding regulatory standards.<sup>33</sup>

The Land Protection and Rehabilitation Regulation fixes the value limits for a range of contaminants and defines the types of industrial activities contemplated by the Regulation. It also establishes the conditions under which groundwater quality must be monitored downstream of the lands on which some of those activities take place.

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<sup>31</sup> *Ibid.* at section 31.43.

<sup>32</sup> *Ibid.* at sections 31.51 and 31.54.

<sup>33</sup> *Ibid.* at section 31.57.

### 3. Wording of Environmental Expert Certification

#### **FORMULAIRE D'ATTESTATION**

##### **ÉTUDE DE CARACTÉRISATION**

J'atteste que l'étude de caractérisation de ce terrain a été réalisée conformément aux exigences du *Guide de caractérisation des terrains* du ministère de l'Environnement du Québec.

\_\_\_\_\_  
Nom de l'expert (en lettres moulées)

\_\_\_\_\_  
Numéro d'identification de l'expert

\_\_\_\_\_  
Signature de l'expert

\_\_\_\_\_  
Date

#### **FORMULAIRE D'ATTESTATION**

##### **RÉSUMÉ DE L'ÉTUDE DE CARACTÉRISATION**

Après vérification, j'atteste que le résumé est conforme aux exigences du *Guide de caractérisation des terrains* du ministère de l'Environnement du Québec.

\_\_\_\_\_  
Nom de l'expert (en lettres moulées)

\_\_\_\_\_  
Numéro d'identification de l'expert

\_\_\_\_\_  
Signature de l'expert

\_\_\_\_\_  
Date

#### **FORMULAIRE D'ATTESTATION**

##### **RÉALISATION DE TRAVAUX DE RÉHABILITATION**

Après vérification du rapport final des travaux de réhabilitation, j'atteste que les travaux ont été réalisés conformément aux exigences du plan de réhabilitation, préalablement autorisé par le ministère de l'Environnement du Québec.

\_\_\_\_\_  
Nom de l'expert (en lettres moulées)

\_\_\_\_\_  
Numéro d'identification de l'expert

\_\_\_\_\_  
Signature de l'expert

\_\_\_\_\_  
Date

## Nova Scotia

### 1. Comparison to B.C. Regime

- The contaminated site regime is currently voluntary. It is a hybrid model that involves both government and Environmental Site Professionals.
- There is no licensing body analogous to the Roster Steering Committee or the LEP Board for Environmental Site Professionals (“ESP”).
- ESPs are not required to hold insurance unless they are working under the Domestic Fuel Oil Spill Policy.
- Currently the Nova Scotia Department of Environment and Labour (“NSDEL”) Accepts and Acknowledges Certificates of Site Condition and Records of Site Condition Submitted by ESPs, on a form which is attached to the certificate. The NSDEL does not sign certificates, the ESP does.
- The NSDEL does a substantive review of all ESP submissions.
- The business community derives a great deal of comfort from the government Acceptance and Acknowledgment.
- ESPs are not asked to provide a guarantee or a warranty in the certificates they sign (see section 5 in this analysis for precise wording).

### 2. Overview of Contaminated Site Regime

The regime for contaminated sites in Nova Scotia is governed by the Guidelines for Management of Contaminated Sites in Nova Scotia (the “NS Guidelines”). The NS Guidelines were issued 27 March 1996 and were updated on 08 November 2004. Compliance with the NS Guidelines is voluntary although, pursuant to the *Environment Act*,<sup>34</sup> the NSDEL may order that a site be remediated and may direct how such remediation is to be undertaken (pursuant to section 125 of the Act). ESPs are retained to perform the cleanup.

There is a second guideline in place in Nova Scotia that applies to fuel oil contamination called the *Domestic Fuel Oil Spill Policy*, which came into effect on January 2004. The objective of this Policy is to provide clarification on the minimum requirements for the assessment, remediation and reporting of domestic fuel oil spills in Nova Scotia. This Policy also establishes minimum eligibility requirements for both Certified Cleanup Contractors and Site Professionals.

The standards to which sites should be remediated are those published under the “Risk Based Corrective Action” approach (“RBCA”) which is a tool used by the American Society for Testing and Materials. New Brunswick together with Nova Scotia, Newfoundland and Labrador and Prince Edward Island, have developed a modified version of the ASTM RBCA for the use in the Atlantic Provinces through participation in the Atlantic Partnership in the RBCE Implementation Committee (“PIR”).<sup>35</sup>

The NSDEL reviews notification reports to determine whether specific action is required and whether the NS Guidelines process is to be followed. If no specific action is required, a letter will be provided by NSDEL advising the owner of the same. Where

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<sup>34</sup> S.N.S. 1994-1995, c. 1.

<sup>35</sup> The standards can be found on line as part of the “Tool Kit, Version 2” at <http://www.atlanticrbca.com/eng/right.html>.

remediation is required, the owner and site professional must submit to NSDEL and implement a RAP, following which a 'Certificate of Compliance' ("COC"), signed by the site professional, must be filed with NSDEL. This COC is posted on the Environmental Site Registry.

The minimum requirement for an ESP is membership in either the Association of Professional Engineers of Nova Scotia ("APENS"); or the Association of Professional Geoscientists of Nova Scotia ("APGNS"). APGNS and APENS are both self-regulating professions pursuant to the Engineering Profession Act R.S.N.S. 1989, c. 148 and the Geoscience Profession Act, S.N.S. 2002, c. 7 that are able to create by-laws, Codes of Ethics and discipline their members. There is currently no requirement that these professionals hold insurance.<sup>36</sup>

The NSDEL considered creating a licensing body similar to the Roster Steering Committee but felt that layering a separate licensing body on top of the APGNS and APENS would be redundant and costly, in light of the fact that the professional associations already "license" these professionals and discipline their members, set, publish and enforce appropriate professional standards; and develop appropriate training and continuous education programs.<sup>37</sup>

The *Domestic Fuel Oil Policy* is triggered when there is a fuel oil spill. This Policy has different requirements for ESPs acting under it. First, Site Professionals must have Errors and Omissions Liability Insurance Coverage with a minimum of \$1,000,000 coverage for specific occurrences or in the aggregate, with no environmental exclusions. A person acting as a "Site Professional" under the NSDEL's "*Guidelines for the Management of Contaminated Sites in Nova Scotia*" may be eligible for registration as a Site Professional as defined in the *Domestic Fuel Oil Spill Policy* provided they:

- (i) make application with a department approved licensing body (to be established) to be registered as a Site Professional, (currently there is no licensing body and the Director approves Site Professionals directly);<sup>38</sup>
- (ii) attain education to a bachelor's degree level in an appropriate engineering, science or applied science discipline by 31 December 2006, and
- (iii) can successfully demonstrate a minimum of eight years of general professional practice of which a minimum of five years shall be specific practical experience in all phases of environmental site assessment, development and implementation of remediation plans, compliance monitoring, and contaminated site health and safety.

The Minister currently Accepts and Acknowledges all submissions under both policies.

#### **Future Trends:**

Nova Scotia is currently looking at devolving additional responsibility to ESPs in the future. Currently, a significant burden is placed on the NSDEL: they substantively review every COC or RSC they receive from ESPs.<sup>39</sup> They are looking to creating one

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<sup>36</sup> Telephone communication with representative of the NS Department of Environment and Labour, 05 March 2005.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

standardized approach to contaminated sites by combining the two current policies. They are also looking into creating an auditing program for auditing only a percentage of the submissions.<sup>40</sup>

### **3. Prescribed Wording of Certificates of Compliance (COCs)**

#### **a) COCs for Contaminated Sites**

A Certificate of Compliance shall be completed and signed by a Site Professional responsible for the management of the remediation project and shall include the following prescribed wording:

1. All work was overseen by competent persons;
2. All reports and other documents related to this site work have been delivered to the owner of the property identified in this certificate, who has been advised to retain these for permanent reference. These documents are deemed to be the property of the site owner who has been advised that they must be transferred to any new owner;
3. The site has been assessed, remediated and/or managed in accordance with the Guidelines for Management of Contaminated Sites in Nova Scotia and to the standards generally accepted within Nova Scotia at the time of completion;
4. Off-site impacts have been identified and the applicable site owner and applicable off-site owner(s) have been notified;
5. All treatment and disposal activities have been addressed;
6. Close-out and monitoring confirms that the remedial objectives have been met;
7. All remedial works have met the objectives defined in the Remedial Action Plan of (DATE) and the meeting of these objectives is clearly demonstrated in the close-out report of (DATE);
8. All agreements relating to work carried out have been finalized;
9. Disclosure of any and all limitations associated with the report and conclusions has been made.

The Certificate of Compliance shall identify all of the following:

- Site Owner company name, mailing address, name and telephone number of contact person who has direct access to all reports
- Site Operator name, address and telephone number
- Site Address civic address, municipality, county, property identification number, map location (Universal Transverse Mercator Grid method)

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<sup>40</sup> *Ibid.*

Records of Site condition are posted on the Environmental Registry.

**b) Record of Site Conditions (RSC) for Domestic Fuel Oil Spill (Site Professional)**

\*\*\*\*Note for the purpose of this document only, site is defined as the area of the domestic fuel oil spill. Site is not the full property.

**Site Information**

Property Civic Address:  
Property Identification number:  
Property Owner: (Name only)  
Source Property Owner: (Name only)

**Site Professional**

Company Name, Contact Name:

**Prescribed Wording**

1. The Department was notified of a domestic fuel oil spill on \_\_\_\_\_
2. Site assessment, remediation and management upon which this record relies has been overseen by the undersigned Site Professional.
3. All reports related to the domestic fuel oil spill have been provided to the person responsible and the owner of the property identified in this record. The property owner has been advised to retain these documents for permanent record and disclose such information in future property transactions.
4. The site assessment, remediation and management have been performed in accordance with the Domestic Fuel Oil Spill Policy, dated \_\_\_\_\_
5. Remediation of the domestic fuel oil spill has been performed and the following criteria have been met:

(check one of the following)

- Remedial criteria as defined in the Domestic Fuel Oil Spill Policy, dated \_\_\_\_\_, or
- In all areas accessible to remediation, the remedial criteria as defined in the Domestic Fuel Oil Spill Policy, dated \_\_\_\_\_ have been met, however, residual contamination in excess of the remedial criteria set out above, remain (specify physical location and levels) \_\_\_\_\_. Engineering controls have been installed to close the pathways of exposure.
- The following conditions must be maintained on the property:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, or
- G The Atlantic Risk Based Corrective Action (RBCA) Tier \_\_\_\_\_ approach was used to assess and manage the spill. An

environmental site assessment was completed. The following remedial objectives have been met:

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Signature of Site Professional: \_\_\_\_\_  
Date: \_\_\_\_\_

## AUSTRALIA

### Victoria

#### 1. Comparison to the B.C. Regime

- The Victoria regime involves the appointment of Environmental Auditors. The Role of Environmental Auditors is different than the role of approved professionals. Environmental Auditors take on a supervisory role to ensure that the site is investigated and remediated according to the Environmental Audit System, regulations and guidelines. An Environmental Auditor must “form an independent opinion with respect to the site.” There are strict conflict of interest guidelines in place and an Environmental Auditor cannot review the work of anyone who works at his or her firm, or a site that he or she has previously worked on.
- The Remediation Applicant (client) must hire environmental consultant(s) to carry out work relating to the investigation and remediation of a contaminated site as well as an Environmental Auditor to review the work.
- Environmental Auditors are appointed by an Environmental Protection Agency (“EPA”) appointed four-member panel, which is chaired by the Principal Environmental Auditor (of the EPA).
- Environmental Auditors conduct environmental audits; prepare environmental audit reports; and if requested, issue certificates of environmental audit or statements of environmental audit. These instruments are issued directly by the Environmental Auditor and are submitted to the EPA, the local planning authority and the client who hired the Environmental Auditor.
- An Environmental Auditor is required to hold liability insurance in the amount of at least \$5 million/occurrence, with no environmental exclusions as well as run-off insurance. Run-off insurance provides coverage to an Environmental Auditor for the full length of the limitations period in which the Environmental Auditor could be sued for his or her work on a site.
  - NOTE: This level of insurance is not commercially available in B.C.
- There are currently 36 Environmental Auditors for Contaminated Land.
- Environmental Auditors that are appointed and able to work in Victoria can also be cross appointed to the Auditor list in New South Wales (“NSW”) [Note the equivalent of an Environmental Auditor in NSW, is referred to as a Site Auditor], and able to work in both jurisdictions. Many site auditors are cross-appointed, making the pool of available Auditors quite small. An analysis of the NSW scheme follows.
- Quality assurance program: The EPA reviews all Environmental Audits and does a full review of 10% of all audits.

#### 2. Description of the Contaminated Site Regime

There are two distinct processes for identifying and cleaning up contaminated sites in Victoria. The first is the Priority Sites System and the second is the Environmental Auditing System.

##### **Priority Sites System:**

Priority Sites are sites for which the EPA has issued a Clean-up Notice pursuant to section 62A or a Pollution Abatement Notice pursuant to section 31A or 31B (relevant to

land and/or groundwater) of the *Environment Protection Act* 1970. Typically these are sites where pollution of land and/or groundwater presents an unacceptable risk to human health or to the environment. The condition of these sites is not compatible with the current or approved use of the site without active management to reduce the risk to human health and the environment. Such management can include clean-up, monitoring and/or institutional controls. The EPA maintains a Priority Sites Register as a listing of all priority sites, which is accessible by the public. A site is listed on the Priority Sites Register when the EPA issues a Clean-up Notice or a Pollution Abatement Notice (relevant to land and groundwater). A notice is a means by which the EPA formalizes requirements to manage pollution. Sites are removed from the Priority Sites Register once all conditions of a Notice have been complied with. This is formalized through a Notice of Revocation pursuant to section 60B of the Act. This Register does not provide a list of all contaminated sites in Victoria, nor sites managed by voluntary agreements.

### **The Environmental Audit System:**

The Environmental Audit System has also been established by the EPA as a means by which planning authorities, site owners, purchasers and others are provided assurance regarding the condition of a site and its suitability for use, frequently in the context of site redevelopment.

The Act allows for environmental audits of any segment of the environment and the issuing of a certificate or statement of environmental audit for that segment. The System is aimed at clearly identifying the environmental quality of a segment and any detriment to the beneficial uses of that segment.<sup>41</sup> Beneficial uses are linked to land uses protected for residential land and include the protection of human health, maintenance of ecosystems, aesthetics, buildings and structures and production of food, fiber and flora.

An environmental audit is required when a planning authority is issuing a planning permit that allows the use or development of potentially contaminated land, when a site is slated for redevelopment for a sensitive use (such as a school), to confirm if a site is suitable for its existing use or to ensure that a cleanup of a contaminated site was adequate.

### **Description of the Role of Environmental Auditors**

Environmental Auditors are appointed by the EPA and manage the environmental audit and remediation process with the help of environmental consultants. Environmental Auditors owe a primary duty of care to the environment and to the people of Victoria, which is paramount to any duty of care they owe to their client.<sup>42</sup> Environmental Auditors can be described as an extension of the Victoria EPA.<sup>43</sup>

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<sup>41</sup> EPA Victoria, "Environmental Auditing of Contaminated Land" Publication 860, July 2002.

<sup>42</sup> EPA Victoria, "Environmental Auditor Guidelines for Conducting Environmental Audits" Publication 953, June 2004.

<sup>43</sup> Telephone Communication with representative of Environmental Protection Agency, Victoria, 16 March 2005.

Their function is to conduct environmental audits; to prepare environmental audit reports; and if requested, to issue certificates of environmental audit or statements of environmental audit.<sup>44</sup>

The Environmental Auditor has the responsibility of ensuring that the site investigation meets the requirements in terms of quality, number and location of samples. The Environmental Auditor must be independent of the person or company conducting the investigation. The Environmental Auditor must ensure that the investigation complies with the *Environmental Auditor (Contaminated Land) Guidelines for the Issue of Certificates and Statements of Environmental Audit*, Publication 759b, June 2002. This usually includes reviewing site history information and the results of sampling and an analysis of soil, groundwater, surface water and possibly air. A copy of the audit must be provided to the EPA and the planning authority.

If the assessment indicates that the site is contaminated (that is above the published standards) a clean-up program must be implemented. Once again, the person conducting the cleanup should liaise with the Auditor to ensure that an acceptable standard of cleanup is achieved, however, the Environmental Auditor must not be directly involved in either the design or implementation of the cleanup. After the cleanup has been done the Environmental Auditor must undertake a site validation program to confirm that it has been effective. At the end of the assessment and cleanup, the Environmental Auditor will prepare an environmental audit report and decide if he or she will issue a certificate or a statement of environmental audit.

An environmental audit results in the preparation of an environmental audit report and the issuance of either a Certificate of Environmental Audit or a Statement of Environmental Audit.

### *Certificates*

A certificate indicates that the Environmental Auditor is of the opinion that the site is suitable for any beneficial use and that there is no restriction on the use of the site due to its environmental condition. Very few certificates are issued because Environmental Auditors feel very uncomfortable making this kind of guarantee.<sup>45</sup>

### *Statements:*

A statement indicates that the Auditor is of the opinion that there is, or may be, some restriction on the use of the site. A statement may indicate that the site is:

- Not suitable for any use;
- Suitable for specific uses (i.e. commercial use) without further conditions or limitations; or
- Suitable for specific uses subject to conditions and/or limitations related to its use and management.

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<sup>44</sup> EPA Victoria, "Environmental Auditor Guidelines for Conducting Environmental Audits" Publication 953, June 2004.

<sup>45</sup> Telephone communication, *supra* note 43.

## Appointment process:

Environmental Auditors are appointed under Section 53S of the Act. The *Environmental Auditor Guidelines for Appointment and Conduct* outlines the appointment process.<sup>46</sup> Auditors can apply to be appointed as Environmental Auditors in the categories of Contaminated Land and/or Industrial Facilities. They are appointed based on the recommendation of an expert panel. The panel assesses the applicant's knowledge and experience in assessing and managing contaminated land. Applicants must demonstrate expertise and extensive experience in a number of areas depending on the auditor category of appointment sought, plus an understanding of the Victorian *Environment Protection Act 1970* and associated statutory policies, regulations and guidelines. The Environmental Auditor must not have a financial interest in the site and must not have previously assessed the site and made a comment as to its suitability.

Auditors are initially appointed for 1 year. They then must reapply and submit the work they have done in their first year. If their appointment is renewed it will be for 1 year again. The reapplication process occurs again, and the appointments can be for up to 2 years. If an Auditor applies again, he or she can be appointed for up to 4 years.

## Insurance Requirements

An Environmental Auditor is required to hold liability insurance in the amount of at least \$5 million/occurrence. This insurance must:

- include run-off (or equivalent) insurance that provides professional indemnity coverage for work conducted during the period of appointment and for a minimum of seven years following revocation or cessation of appointment.
  - The run-off insurance must provide coverage for 7 years, the applicable limitation period
- specifically cover the Environmental Auditor for: activities undertaken pursuant to the *Environment Protection Act 1970*;

Applicants must satisfy themselves that any exclusions of their professional indemnity insurance policy do not limit coverage for work undertaken as an Environmental Auditor, and must provide a statement to this effect to the EPA for appointment purposes.

Environmental Auditors have reported a great deal of difficulty obtaining the requisite levels of insurance. Very few insurers offer this type of insurance.<sup>47</sup> Most Environmental Auditors are insured by large British Companies such as Lloyd's of London. The cost of insurance is approximately \$40, 000 - \$60,000 per person per year and these premiums are rising each year. The high cost of insurance means that only environmental professionals working for large to mid-size firms can become Environmental Auditors.<sup>48</sup>

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<sup>46</sup> EPA Victoria, *Environmental auditor Guidelines for Appointment and Conduct*, Publication 865.2, February 2005.

<sup>47</sup> Telephone communication, *supra* note 43.

<sup>48</sup> *Ibid.*

## Certificates and Statements of Site Audit:

The wording in each of these statements is viewed as a guarantee.<sup>49</sup> The result of this has been that Site Auditors are very conservative in determining what they will sign. It is not unusual for the Site Auditor to state that he or she will not sign a certificate or statement until the consultants working on the site do more testing. This has resulted in “over-testing” and an increase to the cost of investigation and remediation.<sup>50</sup> A certificate can only be issued for a site that is suitable for any beneficial use, whereas statements can be issued which specify the degree of contamination left on a site. If there is any doubt in a site assessor’s mind that a site might not be suitable for a certificate, they will issue a statement instead. The result has been that very few certificates are issued, even though clients want certificates, not statements.<sup>51</sup>

### 3. Prescribed Wording for Instruments that Environmental Auditors Sign

#### a) Certificate of Environmental Audit

The following pro forma must be used by auditors when notifying the EPA of the request to issue a Certificate of Environmental Audit.

I, \_\_\_\_\_ of \_\_\_\_\_,  
a person appointed by the Environment Protection Authority (‘the Authority’) under the Environment Protection Act 1970 (‘the Act’) as an environmental auditor for the purposes of the Act, having:

1. been requested by \_\_\_\_\_ to issue a certificate of environmental audit in relation to the site located at \_\_\_\_\_ (‘the site’) owned/occupied by \_\_\_\_\_.

2. I had regard to, among other things,

(i) guidelines issued by the Authority for the purposes of Part IXD of the Act,  
(ii) the beneficial uses that may be made of the site, and  
(iii) relevant State environment protection policies/industrial waste management policies, namely \_\_\_\_\_, in making a total assessment of the nature and extent of any harm or detriment caused to, or the risk of any possible harm or detriment which may be caused to, any beneficial use made of the site by any industrial processes or activity, waste or substance (including any chemical substance), and

3. completed an environmental audit report in accordance with section 53X of the Act, a copy of which has been sent to the Authority and the relevant planning and responsible authority.

I HEREBY CERTIFY that I am of the opinion that the condition of the site is neither detrimental nor potentially detrimental to any beneficial use of the site.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

Other related information

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This Certificate forms part of environmental audit report (Company, Site, Report Number, Date) Further details regarding the condition of the site may be found in the environmental audit report.

DATED \_\_\_\_\_

Signed \_\_\_\_\_

ENVIRONMENTAL AUDITOR

**b) Statement of Environmental Audit**

I, \_\_\_\_\_ of \_\_\_\_\_, a person appointed by the Environment Protection Authority ('the Authority') under the Environment Protection Act 1970 ('the Act') as an environmental auditor for the purposes of the Act, having

1. been requested by \_\_\_\_\_ to issue a certificate of environmental audit in relation to the site located at \_\_\_\_\_ ('the site') owned/occupied by \_\_\_\_\_

2. had regard to, among other things,

- (i) guidelines issued by the Authority for the purposes of Part IXD of the Act,
- (ii) the beneficial uses that may be made of the site, and
- (iii) relevant State environment protection policies/industrial waste management policies,

namely \_\_\_\_\_, in making a total assessment of the nature and extent of any harm or detriment caused to, or the risk of any possible harm or detriment which may be caused to, any beneficial use made of the site by any industrial processes or activity, waste or substance (including any chemical substance), and completed an environmental audit report in accordance with section 53X of the Act, a copy of which has been sent to the Authority and the relevant planning and responsible authority.

HEREBY STATE that I am of the opinion that the site is suitable for the beneficial uses associated with [auditor to insert land uses] subject to the following conditions attached thereto:

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The condition of the site is detrimental or potentially detrimental to any (one or more) beneficial uses of the site. Accordingly, I have not issued a Certificate of Environmental Audit for the site in its current condition, the reasons for which are presented in the

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**BIRCHALL NORTHEY**

environmental audit report. The terms and conditions that need to be complied with before a Certificate of Environmental Audit may be issued are set out as follows:

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Other related information

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This Statement forms part of environmental audit report (Company, Site, Report Number, Date).

Further details regarding the condition of the site may be found in the environmental audit report.

DATED \_\_\_\_\_

Signed: \_\_\_\_\_

ENVIRONMENTAL AUDITOR

Signed: \_\_\_\_\_

## AUSTRALIA

### New South Wales (“NSW”)

#### 1. Comparison to the B.C. Regime

- The regime in NSW is modeled after the regime in place in Victoria, Australia.
- Site Auditors are accredited by an EPA accreditation panel, many of the qualifications are similar to those required for appointment to the B.C. Roster
- Site Auditors sign off on Site Audit Statements which must be submitted to the, local planning authority, the client and the Environmental Protection Agency with a Site Audit Report.
- The role of Site Auditors is different than the role of approved professionals. Site Auditors take on a supervisory role to ensure that the site is investigated and remediated according to the Site Audit System, regulations and guidelines
- A Site Auditor must preserve his or her objectivity and is not permitted to review his or her own work or the work of an employee of their company
- There are currently 29 Accredited Site Auditors in NSW.
- There is an agreement with Victoria for cross-appointment of Site Auditors and Environmental Auditors. Many Auditors appear on both the Victoria and NSW lists and can work in both jurisdictions.
- Site Audit Statements and Reports are reviewed by the EPA.
- The EPA has the authority to discipline and remove a Site Auditor’s accreditation.
- Site Auditors must hold a minimum of \$5 million dollars (per occurrence) in professional liability insurance.

#### 2. Overview of the Contaminated Site Regime

In NSW, the management of contaminated land is shared by the Environmental Protection Agency (the “EPA”), the Department of Infrastructure, Planning and Natural Resources and planning consent authorities (usually local councils).

Under the *Contaminated Land Management Act 1997* (the “Act”) the EPA regulates contaminated sites that pose a significant risk of harm to human health or the environment.

The Act gives the EPA power to:

- declare an investigation site and order an investigation
- declare a remediation site and order remediation to take place and
- agree to a voluntary proposal to investigate or remediate a site.

#### Contaminated Land Management Regulation, 1998

The Regulation prescribes a number of matters for the purposes of the *Contaminated Land Management Act 1997*, including:

- the content of Site Auditors' annual returns;
- the fees payable in connection with accreditation as a Site Auditor;

- the time within which an application for renewal of accreditation must be made;
- the form to be used when reporting contamination; and
- the amount which the EPA may recover for its costs incurred in relation to investigation and remediation orders.

### **Accreditation of Site Auditors**

Under section 49 of the *Contaminated Land Management Act 1997*, the EPA may accredit only individuals as Site Auditors, not organizations or companies. In order to be accredited, they must demonstrate extensive knowledge and experience in relation to the investigation and remediation of contaminated sites. The EPA also conducts ongoing reviews of the work of Site Auditors.

### **Role of Site Auditors**

Accredited Site Auditors can be engaged to independently review reports on assessment, remediation and validation actions to ensure that the consultant's methodology and interpretation of data are consistent with current regulations and guidelines endorsed by the NSW EPA.

Under section 47 of the *Contaminated Land Management Act 1997*, a site audit is defined as an independent review:

- that relates to investigation, or remediation, carried out in respect of the actual or possible contamination of land; and
- that is conducted for the purpose of determining any one of the following matters:
  - the nature and extent of any contamination of the land;
  - the nature and extent of the investigation or remediation;
  - whether the land is suitable for any specified use or range of uses;
  - what investigation or remediation remains necessary before the land is suitable for any specified use or range of uses; or
  - the suitability and appropriateness of a plan of remediation, a long term management plan, a voluntary investigation proposal or a remediation proposal.

Although the site audit is a separate process from the investigation and remediation, it is recommended that the Site Auditor be engaged at the beginning of the investigation and/or remediation project. Communication between the consultant and the Site

Auditor from an early stage should ensure that the consultant does sufficient work to satisfy the Site Auditor and therefore minimize potential delays for the site owner or developer.

### **Preparing a site audit statement**

In preparing a site audit statement, the Site Auditor must:

- exercise independent professional judgment and be objective;
- have regard to legal requirements under:
  - *Protection of the Environment Operations Act 1997*

- other relevant Acts
- take into account directions issued by the EPA or planning authorities, or any other requirements imposed by or under an Act, in relation to the site;
- have regard to regulations and guidelines in relation to contaminated sites;
- make every reasonable effort to identify and obtain all relevant data, reports and other information that are held by the person commissioning the site audit or that are readily available, that provide evidence about the conditions at a site;
- identify and obtain any additional data or information that is needed to prepare a site audit statement; and
- assign each site audit statement a consecutive number.

### **Quality control of the Site Auditor Scheme**

The EPA will conduct checks on Site Auditors, site audit statements, summary site audit reports and/or sites to make sure standards of performance are acceptable and consistent. If a Site Auditor is chosen for a NSW Site Auditor Scheme audit, the EPA will notify the Site Auditor of the nature of the audit before it starts.

During an auditor scheme audit, the EPA may:

- examine documents within its own files;
- require the Site Auditor to provide a written explanation, or other supporting evidence, to justify his or her decisions;
- require the Site Auditor to meet with EPA officers to discuss the procedures used and the basis of their decisions;
- investigate, collect samples at a site and inspect records, conditions, and/or equipment in relation to a site or a site audit; and
- take any other actions it deems necessary to determine the standards of performance.

The EPA can also revoke or suspend a Site Auditor's accreditation (section 56 CLM Act) or prosecute a Site Auditor for making a false or misleading statement in a site audit or site audit statement (section 55 CLM Act)

### **Insurance:**

Applicants need to satisfy the EPA that they have insurance coverage in respect of any liability or claims for damages for professional negligence on their part arising out of the conduct by them of the activities of a site auditor as envisaged by the *Contaminated Land Management Act 1997*. This insurance must have no exclusions for pollution.

- As generally indicative of what would be acceptable to the EPA such insurance coverage will be for not less than \$5 million with provision for reinstatement.
- The insurance policy may be written on either an occurrence basis or on a claims made basis; however, for applicants whose insurance is written on a claims-made basis the EPA would expect:
  - claims-made policies to have unlimited retroactivity; and
  - the coverage to be maintained in respect of the Site Auditor for a minimum period of two (2) years after the Site Auditor ceases to be accredited; and the Site Auditor to give an undertaking to the EPA to this effect.

Site Auditors have had trouble getting this level and type of insurance. As a result, only professionals working for large, often multi-national firms, are able to be accredited as Site Auditors.<sup>52</sup> We were told of one individual, who was a sole practitioner, and who was unable to find insurance with all of the features that the NSW's EPA required. He finally found an insurer who was willing to insure him at a premium of \$250,000/year. This individual decided not to go through with his accreditation.<sup>53</sup>

### 3. Site Audit Statement

**A site audit statement summarises the findings of a site audit. For full details of the site auditor's findings, evaluations and conclusions, refer to the associated site audit report.**

**This form was approved under the Contaminated Land Management Act 1997 on 21 February 2005. for more information about completing this form, go to Part IV.**

PART I: Site audit identification

**Site audit statement no.** .....

This site audit is a **statutory audit/non-statutory audit\*** within the meaning of the Contaminated Land Management Act 1997.

**Site auditor details** (as accredited under the Contaminated Land Management Act 1997)

Name ..... Company .....  
Address .....  
..... Postcode .....  
Phone ..... Fax .....

#### Site details

Address .....  
..... Postcode .....

Property description (attach a list if several properties are included in the site audit)

.....  
.....  
.....

Local Government Area.....  
Area of site (e.g. hectares) ..... Current Zoning .....

To the best of my knowledge, the site **is/is not\*** the subject of a declaration, order, agreement or notice under the *Contaminated Land Management Act 1997* or the *Environmentally Hazardous Chemicals Act 1985*.

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<sup>52</sup> Telephone communication with representative of the New South Wales EPA, 16 March 2005.

<sup>53</sup> *Ibid.*

**Declaration/Order/Agreement/Notice\* no(s)** .....  
\* strike out as appropriate

**Site audit commissioned by:**

Name ..... Company .....  
Address ..... Postcode .....  
Phone ..... Fax .....  
Name and phone number of contact person (if different from above)  
.....

**Purpose of site audit**

A. To determine land use suitability (please specify intended use[s])  
.....

**OR**

B.

- (i) To determine the nature and extent of contamination, and/or
- (ii) To determine the appropriateness of an **investigation/remedial action/management plan\***, and/or
- (iii) To determine if the land can be made suitable for a particular use or uses by implementation of a specified remedial action **plan/management plan\*** (please specify intended use[s])  
.....

**Information sources for site audit**

Consultancy(ies) which conducted the site investigation(s) and/or remediation  
.....

Title(s) of report(s) reviewed  
.....  
.....  
.....

Other information reviewed (including previous site audit reports and statements relating to the site)  
.....  
.....  
.....

**Site audit report**

Title .....  
Report no. .... Date .....

**PART II: Auditor's findings**

Please complete either Section A or Section B, not both. (Strike out the irrelevant section.)

Use Section A where site investigation and/or remediation has been completed and a conclusion can be drawn on the suitability of land use(s).

Use Section B where the audit is to determine the nature and extent of contamination

and/or the appropriateness of an investigation or remedial action or management plan and/or whether the site can be made suitable for a specified land use or uses subject to the successful implementation of a remedial action or management plan.

**Section A**

I certify that, in my opinion, the site is **SUITABLE** for the following use(s) (tick all appropriate uses and strike out those not applicable):

- Residential, including substantial vegetable garden and poultry
- Residential, including substantial vegetable garden, excluding poultry
- Residential with accessible soil, including garden (minimal home-grown produce contributing less than 10% fruit and vegetable intake), excluding poultry
- Day care centre, preschool, primary school
- Residential with minimal opportunity for soil access, including units
- Secondary school
- Park, recreational open space, playing field
- Commercial/industrial
- Other (please specify) .....

**subject to compliance with the following environmental management plan** (insert title, date and author of plan) **in light of contamination remaining on the site:**

.....  
.....  
.....

**OR**

I certify that, in my opinion, the site is **NOT SUITABLE** for any use due to the risk of harm from contamination.

**Overall comments:**

.....  
.....  
.....  
.....

**Section B**

Purpose of the plan, which is the subject of the audit .....

**I certify that, in my opinion:**

the nature and extent of the contamination **HAS/HAS NOT\*** been appropriately determined

**AND/OR**

the investigation/remedial action plan/management plan\* **IS/IS NOT\*** appropriate for the purpose stated above

**AND/OR**

- the site CAN BE MADE SUITABLE for the following uses** (tick all appropriate uses and strike out those not applicable):
- Residential, including substantial vegetable garden and poultry
  - Residential, including substantial vegetable garden, excluding poultry
  - Residential with accessible soil, including garden (minimal homegrown produce contributing less than 10% fruit and vegetable intake), excluding poultry
  - Day care centre, preschool, primary school
  - Residential with minimal opportunity for soil access, including units
  - Secondary school
  - Park, recreational open space, playing field
  - Commercial/Industrial
  - Other (please specify) .....

**if the site is remediated/managed\* in accordance with the following remedial action plan/management plan\*** (insert title, date and author of plan)

**subject to compliance with the following condition(s):**  
 .....  
 .....

For simplicity, this statement uses the term 'plan' to refer to both plans and reports.

**Overall comments**  
 .....  
 .....  
 .....  
 .....  
 .....  
 .....  
 .....

**PART III: Auditor's declaration**

I am accredited as a site auditor by the NSW Environment Protection Authority under the *Contaminated Land Management Act 1997* (Accreditation No. ....).

I certify that:

- I have completed the site audit free of any conflicts of interest as defined in the *Contaminated Land Management Act 1997*, and with due regard to relevant laws and guidelines, I have examined and am familiar with the reports and information referred to in Part I of this site audit, and
- on the basis of inquiries I have made of those individuals immediately responsible for making those reports and obtaining the information referred to in this statement,
- those reports and that information are, to the best of my knowledge, true, accurate and complete, and
- this statement is, to the best of my knowledge, true, accurate and complete.

I am aware that there are penalties under the *Contaminated Land Management Act 1997* for wilfully making false or misleading statements.

Signed ..... Date .....

#### **PART IV: Explanatory notes**

To be complete, a site audit statement form must be issued with all four parts.

#### **How to complete this form**

**Part I** identifies the auditor, the site, the purpose of the audit and the information used by the auditor in making the site audit findings.

**Part II** contains the auditor's opinion of the suitability of the site for specified uses or of the appropriateness of an investigation, or remedial action or management plan which may enable a particular use. It sets out succinct and definitive information to assist decision-making about the use(s) of the site or a plan or proposal to manage or remediate the site.

The auditor is to complete either Section A or Section B of Part II, not both.

In **Section A** the auditor may conclude that the land is suitable for a specified use(s) OR *not suitable* for any beneficial use due to the risk of harm from contamination. By certifying that the site is suitable, an auditor declares that, at the time of completion of the site audit, no further remediation or investigation of the site was needed to render the site fit for the specified use(s).

Any **condition** imposed should be limited to implementation of an environmental management plan to help ensure the site remains safe for the specified use(s). The plan should be legally enforceable: for example a requirement of a notice under the Contaminated Land Management Act 1997 (CLM Act) or a development consent condition issued by a planning authority. There should also be appropriate public notification of the plan, e.g. on a certificate issued under s.149 of the *Environmental Planning and Assessment Act 1979*.

Auditors may also include **comments** which are key observations in light of the audit which are not directly related to the suitability of the site for the use(s). These observations may cover aspects relating to the broader environmental context to aid decision-making in relation to the site.

In **Section B** the auditor draws conclusions on the nature and extent of contamination, and/or suitability of plans relating to the investigation, remediation or management of the land, and/or whether land can be made suitable for a particular land use or uses upon implementation of a remedial action or management plan.

By certifying that a site can be made suitable for a use or uses if remediated or managed in accordance with a specified plan, the auditor declares that, at the time the audit was completed, there was sufficient information satisfying guidelines made or approved under the CLM Act to determine that implementation of the plan was feasible and would enable the specified use(s) of the site in the future.

For a site that can be made suitable, any conditions specified by the auditor in Section B should be limited to minor modifications or additions to the specified plan. However, if the auditor considers that further audits of the site (e.g. to validate remediation) are required, the auditor must note this as a condition in the site audit statement.

Auditors may also include **comments** which are observations in light of the audit which provide a more complete understanding of the environmental context to aid decision-making in relation to the site.

In **Part III** the auditor certifies his/her standing as an accredited auditor under the CLM Act and makes other relevant declarations.

### **Where to send completed forms**

In addition to furnishing a copy of the audit statement to the person(s) who commissioned the site audit, statutory site audit statements must be sent to:

Department of Environment and Conservation (NSW)  
Contaminated Sites Section  
PO Box A290, SYDNEY SOUTH NSW 1232  
Fax: (02) 9995 5930

**AND**

the **local council** for the land which is the subject of the audit  
DEC 2005107  
February 2005

## UNITED STATES OF AMERICA

### Massachusetts

#### 1. Comparison with B.C.

- This regime is a precedent for Option 3.
- The Licensed Site Professional Board is independent from government and administers an exam, qualifies and disciplines Licensed Site Professionals (“LSPs”). The Board is enabled by Chapter 21 A of the General Laws of Massachusetts and Regulation 309 CMR.
- LSPs sign instruments and submit them to government. There is broad industry reliance on the instruments signed by LSPs.
- The Department of Environmental Protection (the “DEP”) is responsible for creating standards and guidelines.
- The DEP focuses its attention on sites that pose a significant risk to human and environmental health.

#### Key Differences:

- LSPs are not required to hold liability insurance.
- There are currently 549 LSPs.
- The DEP retains a significant role in quality control of the program. DEP audits 20% of all submissions.

#### 2. General Overview of Program

Massachusetts established the Licensed Site Professional (“LSP”) Program to place greater responsibility for cleaning up sites on the private sector. LSPs sign and stamp a variety of instruments “certifying” that site investigations and remediation meet regulatory requirements (e.g. Response Action Outcome (“RAO”) Statements which include Waste Site Cleanup Opinions). Each instrument is accompanied by a transmittal form, which states that it is the opinion of the LSP that the requirements of the regulation and program have been met.<sup>54</sup> Chapter 21 E of the Massachusetts General Laws sets out the legal obligation of property owners and others responsible for contamination to report the contamination, investigate the contamination, take action to address hazards that pose a significant risk of harm and to cleanup the contamination. The regulations known as the Massachusetts Contingency Plan (the “MCP”) lay out the rules for conducting clean-ups for contaminated sites. The MCP requires people who are responsible for cleanups to hire a LSP to manage and/or oversee the required assessment and cleanup work.

LSPs are scientists or engineers experienced in the assessment and clean up of oil, gasoline and hazardous material contamination. They are licensed by an independent state board to manage cleanups and provide formal, written opinions that the cleanup work meets the requirements of the MCP. They are appointed and disciplined by an Independent 11 member Board of Registration of Hazardous Waste Site Cleanup Professionals (the “LSP Board”). A separate LSP Association promotes the sound

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<sup>54</sup> Telephone communication with Executive Director of the LSP Program, 05 March 2005.

business and technical practices of its member LSPs. Ten members of the LSP Board are appointed by the State Governor, while one member is appointed by the DEP. LSPs are not required to hold liability insurance, however, according to the Executive Director of the LSP Board, all of them do.<sup>55</sup>

LSPs must have: (1) a minimum of 8 years total professional experience, including at least 5 years of contaminated sites environmental experience, 3 years of which must have been within the last 5 years; and (2) hold a Bachelor's or higher degree in a related science or engineering field; OR (3) have a minimum of 14 years total professional experience, 3 years of which must have been within the last 5 years and hold at least a high school diploma. LSPs must also pass an exam written and administered by the LSP Board. Every 3 years, each LSP must demonstrate that he/she has obtained 48 Continuing Education Credits. The DEP audits 20% of all waste site clean-up submissions, including LSP opinions. 231 audits were conducted in 2000, of which 120 were adequate & 111 required further assessment/fieldwork. There are three tiers of review. All submissions undergo a Tier 1 review, which is a review for completeness. Tier II reviews include a review of the logic of the submissions and Tier III involves a complete review, which could involve sampling. These higher forms of review are completed at random, or if a deficiency is noted. If an audit finds significant non-compliance by an LSP, a complaint is filed with the LSP Board, which carries out an investigation. As of October 2004 a total of 31 complaints had been filed by the DEP. Currently, there are 549 LSPs.<sup>56</sup>

When a cleanup is complete, the LSP provides a final opinion (a "Response Action Outcome" or "RAO") stating that the response actions have achieved an outcome that complies with the MCP.<sup>57</sup> The Executive Director of the LSP Board was unaware of any case law where an LSP was sued as a result of his or her role in signing regulatory instruments.<sup>58</sup>

### **3. Sample wording of Opinions given by LSPs (Contained in all Transmittal Forms)**

#### **Massachusetts Department of Environmental Protection Bureau of Waste Site Cleanup RESPONSE ACTION OUTCOME (RAO) STATEMENT**

#### **F. LSP SIGNATURE AND STAMP:**

I attest under the pains and penalties of perjury that I have personally examined and am familiar with this transmittal form, including any and all documents accompanying this submittal. In my professional opinion and judgment based upon application of (i) the standard of care in 309 CMR 4.02(1), (ii) the applicable provisions of 309 CMR 4.02(2) and (3), and 309 CMR 4.03(2), and (iii) the provisions of 309 CMR 4.03(3), to the best of my knowledge, information and belief, that the response action(s) that is (are) the subject of this submittal:

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<sup>55</sup> *Ibid.*

<sup>56</sup> The complete list of LSPs can be found at <http://www.mass.gov/lsp>.

<sup>57</sup> Telephone communication with Executive Director of the LSP Program, *supra* note 54.

<sup>58</sup> *Ibid.*

- (i) has (have) been developed and implemented in accordance with the applicable provisions of the regulations,
- (ii) is (are) appropriate and reasonable to accomplish the purposes of such response action(s) as set forth in the applicable provisions of provisions of the regulations, and
- (iii) comply(ies) with the identified provisions of all orders, permits, and approvals identified in this submittal.”

Ext.:

LSP #:

Date:

Signature:

Telephone:

FAX:

First Name:

I am aware that significant penalties may result, including, but not limited to, possible fines and imprisonment, if I submit information which I know to be false, inaccurate or materially incomplete.

Last Name:

LSP Stamp:

**J. CERTIFICATION OF PERSON MAKING SUBMITTAL:**

1. I, , attest under the pains and penalties of perjury (i) that I have personally examined and am familiar with the information contained in this submittal, including any and all documents accompanying this transmittal form, (ii) that, based on my inquiry of those individuals immediately responsible for obtaining the information, the material information contained in this submittal is, to the best of my knowledge and belief, true, accurate and complete, and (iii) that I am fully authorized to make this attestation on behalf of the entity legally responsible for this submittal. I/the person or entity on whose behalf this submittal is made am/is aware that there are significant penalties, including, but not limited to, possible fines and imprisonment, for willfully submitting false, inaccurate, or incomplete information.

The regulations that are quoted in the wording above are:

309 CMR 4.02(1) states:

In providing Professional Services, a licensed site professional shall act with reasonable care and diligence, and apply the knowledge and skill ordinarily exercised by licensed site professionals in good standing practicing in the Commonwealth at the time the services are performed.

309 CMR 4.02(2)

An LSP shall not provide Professional Services outside his or her areas of professional competency, where this competency is based on his or her education, training, and/or experience, unless that LSP has relied upon the technical assistance of one or more professionals whom the LSP has reasonably determined are qualified in such area or areas by education, training and/or experience.

309 CMR 4.02(3)

In providing Professional Services, an LSP may rely in part upon the advice of one or more professionals whom the LSP reasonably determines are qualified by education, training and/or experience.

309 CMR4.03(2)

A licensed site professional shall render a waste site cleanup activity opinion only when he or she has either:

- (a) in the case of an opinion related to an assessment:
  - 1. managed, supervised or actually performed such assessment, or
  - 2. periodically reviewed and evaluated the performance by others of such assessment; or
- (b) in the case of an opinion related to a containment or removal action:
  - 1. managed, supervised, or actually performed such action, or
  - 2. periodically observed the performance by others of such action.

309 CMR4.03(3)

In providing professional services, a licensed site professional shall:

- (a) exercise independent professional judgment;
- (b) follow the requirements and procedures set forth in applicable provisions of M.G.L. c. 21E, and 310 CMR 40.0000;
- (c) make a good faith and reasonable effort to identify and obtain the relevant and material facts, data, reports and other information evidencing conditions at a site that his or her client possesses or that is otherwise readily available, and identify and obtain such additional data and other information as he or she deems necessary to discharge his or her professional obligations under M.G.L. c. 21A, §§ 19 through 19J, and 309 CMR; and

(d) with regard to the rendering of waste site cleanup activity opinions, disclose and explain in the waste site cleanup activity opinion the material facts, data, other information, and qualifications and limitations known by him or her which may tend to support or lead to a waste site cleanup activity opinion contrary to, or significantly different from, the one expressed.

## North Carolina

### 1. Comparison to B.C.

- The *Inactive Hazardous Response Act* established a mechanism for privatizing the oversight role of Inactive Hazardous Sites Branch (“IHSB”), a branch of the Division of Waste Management at lower priority voluntary remedial action sites. Lower priority sites are ones where there are no private or public wells or residential areas near by.
- The IHSB retains responsibility for higher priority sites, sites in or near residential areas, wells or sites where there is public concern.
- The IHSB appoints firms, not individual professionals, as Registered Environmental Consultants (“REC”). In order for a firm to be classified, it must put forward at least one person as a Registered Site Manager (“RSM”). Again, no RSM member of a REC firm can be referred to individually as a REC.
- RSMs perform a supervisory function and certify that all investigative & remedial works at Inactive Hazardous Wastes Sites (“IHS”) undergoing Voluntary Remediation meet the required standards, and at the end of remediation certify that clean-up levels have been met at the site and that no significant or unacceptable levels or risks to human health or the environment remain at the site. The site is then assigned “No Further Action” status by the State.<sup>59</sup> RECs carry out the work on the sites.
- Government audit function: IHSB will conduct random and targeted audits. Based on the findings of the audit, the IHSB may terminate a site’s eligibility for a voluntary remedial action program, disqualify a RSM or REC from working on the site or from the program, and take any other applicable enforcement action.
- RSMs do not provide guarantees in the instruments they sign under the program.
- Insurance: RECs and RSMs are not required by statute to hold insurance. However, most do.<sup>60</sup>
- Approximately 60 firms are certified as RECs and approximately 95 RSMs are employed by those firms.

### 2. Overview of Program

The Inactive Hazardous Sites Branch (“IHSB”), a branch of the Division of Waste Management<sup>61</sup>, has authority to remediate any site where hazardous substances and/or hazardous waste contamination exists, subject to a few exceptions<sup>62</sup>. *The North Carolina Inactive Hazardous Sites Response Act of 1987* as amended in 1994 and 1995 (the “Act”), establishes the Inactive Hazardous Sites Program. There are two types of remediation processes within the Inactive Hazard Sites Program depending on the risk

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<sup>59</sup> Most owners request a No Further Action Letter from the IHSB. Before issuing a No Further Action letter, the IHSB will review the work of the RSM. However, they will not carry out a full audit of the RSMs work. The fee for a No Further Action Letter is \$500: Telephone communication with Ms. Charlotte Jesneck, Branch Head, Inactive Hazardous Sites Branch, 17 March 2005.

<sup>60</sup> Telephone communication with Branch Head, Inactive Hazardous Sites Branch, 17 March 2005.

<sup>61</sup> The Division of Waste Management is forms part of North Carolina’s Department of Environment and Natural Resources.

<sup>62</sup> IHSB obtains its legislative authority from *The North Carolina Inactive Hazardous Sites Response Act of 1987* (N.C.G.S. 130A-310 et seq) which was enacted to establish a program to protect the public and the environment from uncontrolled & unregulated hazardous wastes sites that are not addressed by other environmental programs.

to public health and the environment. For sites having a low risk to public health and/or the environment, the voluntary remedial action (“VRA”) may be assigned to the Registered Environmental Consultant (“REC”) Program versus the State-Lead Cleanup Program for higher risk sites.

The establishment of the REC Program provides a mechanism to increase the private sector’s involvement in site remediation. Rules governing the administration of the program are provided for in North Carolina’s Administrative Code<sup>63</sup>. Under the REC Program the VRA is conducted by a REC under the supervision of a RSM. In turn, the RSM will certify<sup>64</sup> whether the site meets the required standards and clean-up levels. If the site meets the standards, then the site is assigned a “No Further Action” status by the State, provided the site owner asks for such a letter. In practice, most site owners request such a letter. The IHSA provides such a letter after a review of the work submitted by the RSM.

IHSB has authority to conduct routine audits of REC site projects. If the results of an audit reveal any breach in the required standard, the IHSB may issue a notice of violation to the REC and give the REC an opportunity to correct the deficiency; disqualify the REC and/or RSM from participation in the REC Program; or the IHSB may assess civil and/or criminal penalties.

### **Standards of Conduct for RECs and RSMs<sup>65</sup>**

#### *(a) Standards of Professional Competence*

All documents and completion statements must be certified by the RSM. The RSM shall certify documents only when he/she has directly reviewed the work in question. The RSM’s certification indicates that the document meets the requirements of the statute, the REC program rules, and accepted standards of practice for hazardous substance site investigation and remediation. The REC program rules do not authorize an RSM to practice outside his/her area of professional expertise. If a document contains work outside the RSM’s area of expertise, he/she must rely on the advice of other professionals with relevant expertise. Before certifying any document, the RSM must ensure that the document has been certified by a representative of the remediating party and has been signed and sealed by the appropriate professionals (e.g., licensed geologist, registered professional engineer, etc.). A single document may require the signature and seal of more than one professional. Violation of these provisions will result in the RSM and/or the REC being temporarily or permanently disqualified from the REC program. The RSM and the REC may also be subject to penalties and other applicable sanctions.

#### *(b) Standards of Professional Responsibility*

Section .0305(b) states that RECs and RSMs are subject to the following standards of professional responsibility. Violations of the provisions will result in the RSM and/or the

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<sup>63</sup> See REC Program Rules, 15A NCAC 13C .0300.

<sup>64</sup> Although Rule .0306 outlines what a REC may certify, all “certifications” must be signed and notarized by a RSM.

<sup>65</sup> North Carolina Department of Environment and Natural Resources, Division of Waste Management Registered Environmental Consultant Program: Implementation Guidance, August 2004.

REC being temporarily or permanently disqualified from the REC program. The RSM and the REC may also be subject to penalties and other applicable sanctions.

- (1) RECs shall at all times recognize that their primary obligation in the performance of professional services is to protect public health, safety, welfare and the environment.
- (2) RECs must report the existence of imminent hazards to the IHSB in writing within 24 hours of discovery, unless the remediating party has already provided such notice in writing.
- (3) RECs must report the presence of sensitive environments, mixed chemical and radioactive wastes, or off-site migration of hazardous substances to the IHSB in writing within 24 hours of discovery, unless the remediating party has already provided such notice in writing. As provided by .0302(g), the IHSB may elect to supervise and/or direct the cleanup of sites with these site conditions. RSMs must follow the requirements and procedures set forth in the rules, must act with reasonable care and diligence, and must exercise independent professional judgment. "Independent professional judgment" refers to the RSM's judgment with respect to interpretation of the REC program rules and accepted standards of practice for hazardous substance site investigation and remediation.
- (5) If a REC becomes aware of new information that would modify its previous opinion on a site cleanup, the REC must promptly notify the remediating party and the IHSB in writing.
- (6) If a REC becomes aware of relevant information that was not disclosed by a previous REC on the project, the REC must promptly notify the remediating party and the branch in writing.
- (7) RECs shall not allow the use of their names or the names of their RSMs by any firm engaging in fraudulent or dishonest business practices. They are also not allowed to associate in a business venture with such firms.
- (8) RECs must ensure that their professional reports, public statements and testimony are objective and truthful. They must include all relevant and pertinent information when the results of an omission could lead to an incorrect conclusion.
- (9) RECs shall not misrepresent an RSM's academic or professional qualifications or degree of responsibility for prior site cleanups.
- (10) RECs must comply with all provisions of the REC program regulations, all applicable federal and state laws, and local ordinances.
- (11) RECs and RSMs are required to read and understand the REC program rules, this implementation guidance and the site-specific administrative agreement.

Liability exposure for RSMs does not seem to be a problem in North Carolina. This is thought to be related to the fact that the required certification of documents and certification of work phase completion statements do not contain a guarantee that the site is "clean". We were told that there have been no lawsuits where an RSM has been sued for negligently certifying documents on the sites permitted to work on.<sup>66</sup> Further, the liability exposure is understood as being solely limited to an RSM or REC's work being negligent or falling below the standard of care of an environmental professional (discussed above).<sup>67</sup> This would be covered by a professional's errors and omissions

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<sup>66</sup> Telephone communication with Ms. Charlotte Jesneck, Branch Head, Inactive Hazardous Sites Branch, 17 March 2005.

<sup>67</sup> *Ibid.*

insurance. There is no requirement in the legislation for RECs or RSMs to hold insurance, however, almost all do.<sup>68</sup>

### **3. Wording of REC Certification**

#### **Certification of Documents**

##### **REC Certification of Documents and Completion of Work Phases**

Section .0306(b) requires two separate certifications: certification of documents and certification of work phase completion. Both certifications are notarized, sworn statements subject to penalty of law.

##### Certification of documents:

All work plans, reports and project schedules submitted to the branch must first be certified by a representative of the remediating party and then by the RSM. The “certification of documents” statements are shown below. The language in the certification statements is specified in the rules and may not be modified under any circumstances.

##### Certification of work phase completion:

The RSM must also certify the completion of the work phases shown in section .0306(b)(5). The “certification of work phase completion” language is shown below and involves:

##### (1) REC Certification of Documents

In this statement, the REC is certifying that the content of the submitted document complies with both REC program rules and the Inactive Hazardous Sites Response Act.

It is the responsibility of the REC and its RSMs to read, understand and comply with the REC program rules, the site-specific administrative agreement and this implementation guidance. The certification statement is a notarized sworn statement subject to penalty of law. The RSM may sign this certification statement only *after* completion of the certification statement required by .0306(b)(2) and, if applicable, the professional signatures required by .0306 (b)(3).

##### (2) Remediating Party Certification of Documents

All work plans, reports and project schedules must also be certified by a representative of the remediating party. The remediating party is certifying that the information is true, accurate and complete. This certification is required to ensure that the REC has been supplied with all the site data it needs to make a competent professional decision. This certification statement is a notarized sworn statement subject to penalty of law.

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<sup>68</sup> *Ibid.*

### (3) Other Professional Certification

The RSM may approve work products by relying, in part, on the advice of one or more professionals having relevant expertise (see section .0305(a)). It is the RSM's responsibility to determine when documents must be sealed by a licensed professional (i.e., a professional licensed by the state professional board such as the Association of Professional Engineers or the Association of Professional Geoscientists). If a portion of the site investigation or site cleanup requires the seal of a licensed professional, that portion must be sealed before the document is certified by the remediating party and the RSM. Work that is not properly prepared under the supervision of, and sealed by, a licensed professional will be reported to the appropriate professional licensing board.

### (4) Documents to be Certified Prior to Implementation

The following documents must be certified first by the remediating party, second by the RSM and received by the IHSB before implementation:

- (A) remedial investigation work plans,
- (B) remedial action plans,
- (C) remedial action pre-construction reports, and
- (D) any major modifications of project schedules.

## **Certification Statements**

### **Certification of Documents**

All work plans, reports and project schedules submitted to the branch must first be certified by a representative of the remediating party and then by the RSM. The "certification of documents" statements are shown below. The language in the certification statements is specified in the rules and may not be modified under any circumstances. The Remediating Party Certification Statement (.0306(b)(2)) is as follows:

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"I certify under penalty of law that I have personally examined and am familiar with the information contained in this submittal, including any and all documents accompanying this certification, and that, based on my inquiry of those individuals immediately responsible for obtaining the information, the material and information contained herein is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for willfully submitting false, inaccurate or incomplete information."

The Registered Site Manager Certification Statement (.0306(b)(1)) is as follows:

"I certify under penalty of law that I am personally familiar with the information contained in this submittal, including any and all supporting documents accompanying this certification, and that the material and information contained herein is, to the best of my knowledge and belief, true, accurate and complete and complies with the Inactive Hazardous Sites Response Act G.S. 130A-310, et seq, and the voluntary remedial action program Rules 15A NCAC 13C .0300. I

am aware that there are significant penalties for willfully submitting false, inaccurate or incomplete information.”

RSMs can certify the following forms:

- PHASE I REMEDIAL INVESTIGATION COMPLETION CERTIFICATION  
(under 15A NCAC 13C.0306(b)(5)(A))
- REMEDIAL INVESTIGATION COMPLETION CERTIFICATION  
(under 15A NCAC 13C.0306(b)(5)(B))
- PROPOSED REMEDIAL ACTION PLAN COMPLETION CERTIFICATION  
(under 15A NCAC 13C.0306(b)(5)(C))
- REMEDIAL DESIGN COMPLETION CERTIFICATION  
(under 15A NCAC 13C.0306(b)(5)(D))
- CONSTRUCTION COMPLETION CERTIFICATION  
(under 15A NCAC 13C.0306(b)(5)(D))
- REMEDIAL ACTION COMPLETION CERTIFICATION  
(under 15A NCAC 13C.0306(b)(5)(E))

In each form they must sign the following statement:

“The (insert name of form), which is the subject of this certification has, to the best of my knowledge, been completed in compliance with the Inactive Hazardous Sites Response Act G.S. 130A-310, et seq. and the voluntary remedial action program Rules 15A NCAC 13C .0300, and [insert REC Name] is in compliance with Rules .0305(b)(2) and .0305(b)(3), of this section. I am aware that there are significant penalties for willfully submitting false, inaccurate or incomplete information.”

## West Virginia

### 1. Comparison to B.C.

- The government has a greater degree of involvement in this regime than any of the three options considered in this report.
- Site assessment preparation and work done under voluntary remediation agreements (“VRA”) must be supervised by a Licensed Remediation Specialist (“LRS”).
- The Director of the West Virginia Department of Environmental Protection (“WVDEP”) certifies LRSs as qualified to perform professional remediation services and to supervise the remediation of contaminated sites. All candidates for licensing must have minimum education requirements. Exams are administered and the Director can revoke a license.
- The LRS issues a final report to the person undertaking the remediation when all work has been completed as contemplated in the voluntary remediation agreement or site assessment.
- After receiving the report, the party undertaking the voluntary remediation may seek a Certificate of Completion from the Director.
- LRSs receive immunity from lawsuits. Once a Certificate of Completion is issued, the LRS, is
  - relieved from liability to the state for the release that caused the contamination, and the state shall not bring civil, criminal or administrative action as long as the site meets the standards in effect at the time the certificate was issued, and
  - shall not be subject to citizen suits with regard to the contamination that was the subject of the Voluntary Remediation Agreement.
- There are 134 LRSs.

### 2. Overview of Program

West Virginia's Voluntary Remediation and Redevelopment Act (“VRRRA”) became effective on July 1, 1996 for the purpose of encouraging the voluntary cleanup of contaminated sites and redevelopment of abandoned and under- utilized properties. The VRRRA encourages voluntary remediation and redevelopment through an administrative program set out in the WV Code of State Regulations, Title 60, Series 3 entitled the Voluntary Remediation and Redevelopment Rule (the “Rule”), which became effective on July 1, 1997. The VRRRA limits enforcement actions by the West Virginia Division of Environmental Protection (“WVDEP”), by providing financial incentives to entice investment in brownfield sites, and limits liability under environmental laws and rules for those who remediate sites to the standards provided in the Rule. Site assessment preparation and work done under voluntary remediation agreements must be supervised by a LRS.

#### Licensed Remediation Specialist

Within the Voluntary Remediation Program (“VRP”), all activities must be supervised by a LRS. A LRS is a person certified by the Director of the WVDEP as qualified to perform professional remediation services and to supervise the remediation of contaminated

sites. Applicants must write an exam unless they have successfully waived this requirement.

The overriding duty of the LRS is to protect the safety, health and welfare of the public in the performance of his/her professional duties. It is expected that a single LRS will supervise all site remediation activities. The LRS must be highly qualified, but it is unlikely that a single individual will have all of the skills and knowledge to perform all activities associated with the remediation. The LRS must only perform assignments for which he or she is qualified by training and/or experience in those specific technical fields. He/she should seek assistance from other qualified professionals as needed in performing work at the site. The LRS is employed by the owner or developer of the contaminated site. However, the LRS must be completely objective in developing and reviewing work plans, reports, and opinions. The LRS represents the interests of the public as well as providing technical supervision of all remediation activities. The LRS must only perform assignments for which he or she is qualified by training and/or experience in those specific technical fields. He/she should seek assistance from other qualified professionals as needed in performing work at the site.

The LRS is responsible for any release of contaminants from the site that occur during approved remediation activities. If a release not contemplated by the Voluntary Remediation Agreement (“VRA”) occurs during remediation activities, the LRS must immediately notify the WVDEP. The LRS issues a Final Report to the person undertaking the voluntary remediation when the property meets the applicable standards and all work has been completed as contemplated in the VRA or site assessment.

#### **Certification of final report:**

The completeness and accuracy of the Final Report must be certified by an authorized agent of the applicant and by the LRS. The LRS and the applicant’s agent may be the same person. The certified Final Report may be submitted to the Director for approval with a request for a Certificate of Completion. Upon review of the final report, the Director determines whether it was properly issued.

#### **Certificate of Completion:**

A Certificate of Completion will incorporate the following information:

- Description of the site;
- Description of contaminants for which the standards have been met;
- The Voluntary Remediation Agreement;
- The Final Report prepared by the LRS; and
- Any land use covenant or deed restriction including, where applicable, a description of any institutional or engineering controls required for the site.

The Certificate of Completion will certify that:

- the site meets the applicable standards; and
- the applicant, current and future owners and occupiers and their successors, public utilities, remediation contractors, the LRS, and lenders:
  1. are relieved from liability to the state for the release that caused the contamination, and the state shall not bring civil, criminal or administrative

- action as long as the site meets the standards in effect at the time the certificate was issued, and
2. shall not be subject to citizen suits with regard to the contamination that was the subject of the VRA.<sup>69</sup>

The Certificate of Completion becomes effective upon signature by the Director or, if applicable, when any land use covenant is filed, whichever occurs last.

The Director may delegate responsibility for issuance of the Certificate of Completion to the LRS in limited circumstances. The LRS, after assuring the site is eligible for the VRP, must issue a Final Report to notify the Director of his or her intent to issue a Certificate of Completion when the remediation is complete. When the LRS is sure that the site meets the De Minimis Risk Based standards for Human Health and passes the De Minimis Ecological Screening Evaluation, he or she may issue the Certificate to the owner of the site.

The Certificate of Completion also may be revoked or further remediation required if the Director determines that a re-opener has been triggered. Re-openers include: fraud, new information, increased level of risk or if the remediation methods failed to meet remediation standards in the Voluntary Remediation Agreement.

### **3. Wording of Certification of the LRS in the Final Report**

The completeness and accuracy of the Final Report will be certified, in writing, by an authorized agent of the applicant and by the Licensed Remediation Specialist. The form of the certification shall be as follows:

“I hereby certify that the information presented in this report is, to the best of my knowledge and belief, true, accurate, and complete, having been prepared under a system and organization designed to produce true, accurate, and complete information.”

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<sup>69</sup> §22-22-13 West Virginia Code, Chapter 22, Article 22, Voluntary Remediation Act. The entire provision reads as follows:

**§22-22-13. Certificate of completion.**

(a) The licensed remediation specialist shall issue a final report to the person undertaking the voluntary remediation when the property meets the applicable standards and all work has been completed as contemplated in the voluntary remediation agreement or the site assessment shows that all applicable standards are being met. Upon receipt of the final report, the person may seek a certificate of completion from the director.

(b) The director may delegate the responsibility for issuance of a certificate of completion to a licensed remediation specialist in limited circumstances, as specified by rule pursuant to this article.

(c) The certificate of completion shall contain a provision relieving a person who undertook the remediation and subsequent successors and assigns from all liability to the state as provided under this article which shall remain effective as long as the property complies with the applicable standards in effect at the time the certificate of completion was issued. This certificate is subject to reopener provisions of section fifteen of this article and may, if applicable, result in a land-use covenant as provided in section fourteen of this article.

## California

### 1. Comparison to B.C.

- The Registered Environmental Assessor Program is government regulated. The Program is administered by the California EPA Office of Environmental Health Hazard Assessment & the Department of Toxic Substances Control. Registered Environmental Assessors (“REAs”) are registered by the State under the REA Program.
- Audits of REA work are conducted by the California EPA for the purpose of ensuring that the work meets the specified standard of performance.
- There are two classes of REAs:
  - REA I: Conduct the fundamental site inspections of residential and commercial properties (Phase I environmental site assessments), prepare waste reduction plans and opinions on contamination of site
  - REA II: Most stringent level of environmental registration provided by the State. REA II is a project manager who can conduct all assessment & investigations performed by the REA I, plus issue cleanup opinions, evaluate risk from contamination & manage cleanup of contaminated sites and can provide opinions on the successful remediation of a site
- Currently, the REA program has more than 3,200 registrants.
- REAs are not required to hold liability insurance in order to be registered by the State.

### 2. Overview of Program

The California Environmental Protection Office of Environmental Health Hazard Assessment & Department of Toxic Substances Control administer two voluntary registration programs for environmental professionals desiring to display their expertise<sup>70</sup>. The Registered Environmental Assessor Program registers REAs on a voluntary basis. The registration of a REA means that the State has evaluated the experience and credentials of each Registered Environmental Assessor applicant and verified that he or she is qualified to conduct environmental assessments. Each application for REA registration is individually evaluated to ensure that the applicant possesses the required education and appropriate experience.

The REA program is fully funded by application and registration fees paid by the registrants. Information regarding each registrant is maintained in a database. The purpose of the program is to connect small-and medium-sized businesses with assessors who have the particular kinds of expertise to assist them with complying or maintaining compliance with environmental regulations. The annual Registration Fee is \$100.00.

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<sup>70</sup> REA stands for a “registered environmental assessor”: There are two classes of REAS: REA I (basic level of registration) and REA II (most stringent level of environmental registration provided by the State). An REA I may conduct the initial site inspection of residential and commercial properties (i.e. Phase I environmental site assessment) and may prepare waste reduction plans and opinions on contamination of sites. REA IIs are project managers who can conduct all assessment & investigations performed by the REA I. In addition, REA IIs can issue cleanup opinions, evaluate the risk associated with a contamination, manage the cleanup of a contaminated site and can provide opinions on the successfulness of a remediation of a site.

The legislative authority for these programs is found in sections 25570-25570.4 of the California Health and Safety Code (“HSC”). These sections form a chapter known as the *Environmental Quality Assessment Act of 1986* (see section 25570.1)<sup>71</sup>. The key section is 25570.3. This section outlines the Director’s authority to pass regulations, outlines the application process for REA I and REA IIs, sets fees and defines certain enforceable actions. The specific details and implementation of the REA I and REA II programs are found in Chapter 3 (Voluntary Registration of Environmental Assessors) sections 19030 through to 19043 of the California Code of Regulations. Amongst other things, the regulations outline the specific educational and professional experience requirements to qualify for either the REA I or the REA II program, the application review processes, appeals, audits, performance standards, etc.

### Scope and purpose of the REA II designation<sup>72</sup>

A REA II has significant authority under existing statutes<sup>73</sup> and regulations to engage in various environmental programs and site mitigation activities. The REA II is a qualified environmental professional who may manage and conduct site investigations; assessments and remediation work at school-sites, brownfields, or other potentially contaminated properties. The REA II acts as a project manager and is authorized to supervise, manage and direct activities relating to the development of hazardous substance or hazardous waste site cleanup opinions using preliminary endangerment assessment procedures. These opinions include determining whether a significant release has occurred, and whether a response action is needed.

Regulations (Title 14, California Code of Regulations, Section 19030 et seq.) describe the activities and evaluations that a REA II may perform as a project manager. A REA II:

- Determines the activities needed to adequately characterize hazardous waste or hazardous substance release sites;
- Conducts environmental assessments and investigations;
- Directs and performs site investigation and remediation activities;
- Evaluates site information and data and render opinions derived from that data;
- Defines the work required to reduce risk from contamination; and,
- Determines and certifies that all work necessary to reduce risk from contamination has been properly conducted and that all work has been completed.

Further, the regulations specify that a REA II must meet certain performance standards when conducting, developing, performing or directing the following activities: preliminary endangerment assessments; remedial investigations/feasibility studies; remedial design; remedial action; remedial action plans; corrective action plans; removal action work plans; and, remedial work.

A REA II may obtain the assistance of registered subcontractors for the performance of any work requiring professional registration while performing environmental assessment and restoration activities, as long as the work is incidental to the business of the REA II.

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<sup>71</sup> In addition to setting applicants qualification standards other requirements, the statute specifies the minimum standards for registration, sets fees, and defines certain enforceable actions.

<sup>72</sup> The information in this section was taken from a document title *The REA II – Site Mitigation Authority and Expertise*, published by the Department of Toxic Substances Control. The document can be assessed at the following site: [http://www.dtsc.ca.gov/rea/publications/REA\\_FLY\\_Letter\\_SiteMitAuthority.pdf](http://www.dtsc.ca.gov/rea/publications/REA_FLY_Letter_SiteMitAuthority.pdf)

<sup>73</sup> See Part 4 (Additional Information) for a list of statutes and regulations that authorize a REA II to complete a number of various tasks.

Any subcontractor's work, or the work performed by others, must be properly cited in any report prepared by the REA II. The REA program can assist registrants or interested parties in evaluating whether the activities of a REA II may be in an area reserved for other licensed professionals. The REA program will also disseminate useful information pertaining to the practice of other registered professionals to all REA II's.

In performing work activities, the REA II is charged to hold paramount public health, safety and welfare, and to follow all applicable performance standards while conducting work activities. Regulations specify the performance standards for the work activities of a REA II. The REA program may randomly audit the work products of its registrants to ensure that all applicable performance standards are met.

#### Scope and Purpose of the REA I designation<sup>74</sup>

Like the REA II program, the REA I program is voluntary. Registration as a REA I is limited to the individual's relative expertise in one or more environmental assessment areas. The California EPA provides businesses with lists of REA I registrants who have the specific expertise to help them achieve and maintain compliance with environmental regulations. When using the designation, a REA I is not permitted to: perform environmental services outside the scope of his or her expertise; or claim the privileges of being a registered geologist, professional engineer or the privileges of any other registration, certification or license unless the REA I holds the relevant credentials. REA I registrants, acting outside of their area of expertise, risk losing their REA I designation.

California strives to maintain the standard of work quality and professional conduct of the REAs by monitoring and evaluating an REA's work products. Complaints against a REA can be lodged with the Department of Toxic Substances Control, a Department of the California EPA, that administrators of the REA Program. REA Program staff will investigate any complaint to determine whether the REA has failed to comply with the State regulations or standard industry practices. The director may perform periodic audits of work performed and certified by a REA 1, as necessary, to ensure the desired standard of performance.

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<sup>74</sup> <http://www.dtsc.ca.gov/rea/publications/rea1scope.pdf>

## Connecticut

### 1. Comparison to B.C.

- The process in Connecticut shares a number of similarities with the process in B.C.
- Government plays a larger role under this program than in Massachusetts.
- Licensed Environmental Professional (“LEP”) review is only permitted for low to moderate risk sites. The Connecticut Department of Environmental Protection (“DEP”) retains the responsibility for high-risk sites as well as sites that may impact on public or private wells.<sup>75</sup>
- A LEP license is required only if a professional wants to verify clean-ups and/or conduct & certify clean-ups.
- There are approximately 330 licensed LEPs in Connecticut.
- The Program is administered by an 11 member board called the State Board of Examiners of Environmental Professionals, which is chaired by the Commissioner of Environmental Protection (the “Commissioner”) or his/her designee and supported by the DEP. The DEP is responsible for all of the administrative work of the Board. The Board creates the licensing standards, accepts licensing applications and fees and issues licenses for LEPs.<sup>76</sup> This Board is similar to the Roster Steering Committee, with its close connection to government.
- LEPs must have a minimum number of years of experience, and pass a written or combined written and oral exam.
- The Board has the authority to conduct investigations of LEPs and the DEP conducts audits of 20% the LEP’s work.
- Insurance is not required by statute, however, site owners who hire LEPs usually insist that LEPs and/or environmental consultants hold insurance. Therefore, the DEP and the Board do see any need to formally require insurance coverage of LEPs.<sup>77</sup>

### 2. Overview of Program

There are two formal voluntary programs in the State in which LEPs are involved. The first, the Voluntary Remediation Program - Connecticut General Statutes (the “CGS”) 22a-133x - is an elective process by which an Environmental Condition Assessment Form is filed with the DEP (together with a fee) so that certain owners of contaminated properties can expedite the voluntary remediation of their sites. Environmental Condition Assessment Forms must be prepared under the supervision of a LEP.

This program can be utilized by owners of sites which are (1) owned by a municipality, or (2) defined as establishments pursuant to section 22a-134 of the CGS or (3) on the inventory of hazardous waste disposal sites maintained pursuant to section 22a-133c of the CGS, or (4) located in a GA or GAA groundwater area. GA and GAA are groundwater quality classifications and signify “existing private and potential public water supply”. Within 30 days of receiving an Environmental Condition Assessment Form, the Commissioner will notify the owner regarding the decision whether the owner may use a

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<sup>75</sup> Telephone communication with an Environmental Analyst from the Remediation Section, Waste Management Bureau, CT DEP, 17 March 2005.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

LEP to verify that a parcel has been investigated in accordance with prevailing standards and guidelines and remediated in accordance with the Remediation Standard Regulations, or if the Commissioner needs to maintain oversight of the investigation and remediation of the parcel. If DEP oversight is not required and a LEP is used, the process is complete when the DEP receives a written verification by an LEP that the parcel has been investigated in accordance with prevailing standards and guidelines, and the remediation of the parcel has been performed in accordance with the Remediation Standard Regulations. The owner must submit a copy of the verification letter to the DEP.

The second, Voluntary Remediation Program - CGS 22a-133y – is an elective process for which environmental assessments and remediation of properties located in areas which have a GB or GC ground water classification are performed by a LEP. GB and GC are groundwater classifications where it is presumed that the water needs treatment before human consumption. This program requires the submission of a remedial action plan and remedial action report to the DEP.

Any LEP may conduct a Phase II Environmental Site Assessment or a Phase III investigation, prepare a Phase III remedial action plan, supervise remediation or submit a final remedial action report to the DEP for any real property subject to a spill which meets the criteria for voluntary remediation. The LEP must render an opinion that the action taken to contain, remove, or mitigate the spill is in accordance with the remediation standards for the property adopted by the DEP under CGS 22a-133k

A LEP license is required only if a professional wants to verify clean-ups (section 22a-134a), and/or conduct & certify clean-ups (sections 22a-133x and 22a-133y). CGS Section 22a-134a gives the DEP discretion to allow LEP to verify that the remediation of a contaminated site (defined as an "establishment" by CGS Section 22a-134) has been accomplished in accordance with the remediation standard regulations. LEPs may verify that the site has been investigated and remediated according to standards as an alternative to obtaining DEP's approval.

The Program is administered by an 11 member State Board of Examiners of Environmental Professionals, chaired by the Commissioner of Environmental Protection or his/her designee and supported by the DEP. The Board is appointed by the State Governor, and the DEP acts as the administrator for the Board. This system is less independent from government than the system in place in Massachusetts. LEPs must have a minimum of 8 years experience with environmental investigation and remediation, including a minimum of 4 years in responsible charge, and hold a Bachelor's or higher degree in a related science or engineering field or is a licensed professional engineer; OR they must have a minimum 14 years experience with environmental investigation and remediation, including a minimum of 7 years in responsible charge. LEPs are required to pass a written exam or a written and oral examination testing technical and regulatory knowledge.

The Board may conduct investigations of LEPs and the DEP conduct audits of 20% of the Verifications submitted by LEPs.

**3. Copy of the Voluntary Remediation Verification Form Signed by LEPs**

(Licensed Environmental Professional Verification of Remediation at Property or Establishment)

"I verify in accordance with Section 22a-133x(b) of the Connecticut General Statutes, that an investigation has been performed at the parcel in accordance with prevailing standards and guidelines and **that the parcel has been remediated in accordance with the remediation standards**, Sections 22a-133k-1 through 22a-133k-3 of the Regulations of Connecticut State Agencies."

\_\_\_\_\_  
Signature of Environmental Professional

Date

\_\_\_\_\_  
Name of Environmental Professional (type/print) / License #

Phone No.: \_\_\_\_\_

**PARCEL**

affix seal

Establishment now or formerly known as:

\_\_\_\_\_

located at

\_\_\_\_\_  
State                      Zip                      Address                      City/Town

More fully described as:

Map \_\_\_\_\_ Block \_\_\_\_\_ Lot \_\_\_\_\_ in a deed recorded at

\_\_\_\_\_  
(City/Town)

in Volume \_\_\_\_\_ Page \_\_\_\_\_ .

ECAF was filed on \_\_\_\_\_  
(Date)

Verification of remediation was delegated by the Commissioner to an LEP on

\_\_\_\_\_  
(Date)

Bureau of Waste Management  
§22a-133x (property) Verification Form  
Rev. 4/03, DEP-Remediation Section

Environmental Condition Assessment Forms must be prepared under the supervision of a LEP. LEPs must sign below the following statement:

"I have personally examined and am familiar with the information submitted in this document and all attachments, and certify that based on reasonable investigation the submitted information is true and accurate to the best of my knowledge and belief. I certify that this form is complete and accurate as prescribed by the Commissioner without alteration of the text."

This certification must be notarized.

## Illinois

### 1. Comparison to B.C.

- The system in Illinois is quite different from any of the options B.C. is considering.
- The system is highly regulated and controlled by government.
- There are two classes of “approved professional”: Licensed Professional Engineers or Geologists ("LPEG") and Review and Evaluation Licensed Professional Engineers ("RELPE")
  - LPEGs conduct the site assessment work and write and submit plans and reports to the Illinois EPA. A Remediation Applicant (“RA”) must hire a LPEG to do the site work
  - The RELPE performs a supervisory function and ensures that the work done by the LPEG meets the program requirements. The RELPE is accountable to the Illinois EPA, not the RA who hires them. A RA is not required to hire a RELPE, however, RA’s tend to hire RELPEs to expedite the process.<sup>78</sup>
- There is no government run or external licensing scheme for LPEGs or RELPEs. They are required to be licensed engineers or geologists, licensed to practice by their profession.
- The Illinois EPA conducts a review of all reports submitted to it and makes a determination to approve or disapprove the plan or report.
- The Illinois EPA is authorized to issue No Further Remediation ("NFR") letters after they have reviewed the reports issued by the LPEG
- Liability is not a concern for LPEGs or RELPEs as both classes of environmental professionals work under the direct supervision of the EPA and because they are not required to sign guarantees.<sup>79</sup>
- RELPEs must provide the RA’s who hire them the following information about insurance:
  - Names of insurance carriers and amount of coverage: Worker's Compensation, General Liability, and Professional Liability.
  - If the stated professional liability policy includes coverage for "environmental" claims relative to release of pollutants, or if there is a pollution exclusion.

### 2. Overview of Program

The Bureau of Land (“BOL”) is responsible for the protection and restoration of land and groundwater resources in the State of Illinois. The BOL administers a broad variety of solid and hazardous waste management and cleanup programs.

The BOL is comprised of the Division of Land Pollution Control, the Division of Remediation Management, and Planning and Reporting. The primary focus of the Division of Land Pollution Control is on development and implementation issues concerning the solid and hazardous waste programs while the Division of Remediation Management primarily focuses on clean-up programs. The Planning and Reporting portion of the BOL supports all aspects of financial management, computer support, records management and training.

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<sup>78</sup> Telephone communication with the LPG Unit Manager, Voluntary Site Remediation Program, 18 March 2005.

<sup>79</sup> *Ibid.*

The purpose of the **Division of Remediation Management** ("DRM") is to provide remedial responses and oversight to uncontrolled releases of hazardous and petroleum substances into the environment. The DRM is primarily responsible for implementing the Federal and State funded cleanup program (i.e., CERCLA, Department of Defense, LUST, and State Response Action) and the privately funded Pre-Notice Program.

The **Remedial Project Management Section** ("RPMS") oversees clean up of sites containing hazardous substances to mitigate, reduce or eliminate existing or potential threats to human health or the environment. Response actions are accomplished with either State or private party resources. The RPMS is made up of three units (Voluntary Site Remediation Program Units A & B, and the State Response Action Program).

### **Voluntary Site Remediation Program (the "Program")**

The Program provides RAs (i.e., any persons seeking to perform investigative or remedial activities) the opportunity to receive Illinois EPA review, technical assistance and no further remediation determinations from the Illinois EPA. This program is designed to be flexible and responsive to the needs of the RAs. The goals and scope of actions at these sites are normally defined by the RAs.

The Illinois EPA is authorized to issue No Further Remediation ("NFR") letters to the RAs who have successfully demonstrated, through proper investigation and, when warranted, remedial action, that environmental conditions at their remediation site do not present a significant risk to human health or the environment. The NFR letter signifies a release from further responsibilities under the Illinois Environmental Protection Act. The Program's activities are paid for by the parties requesting the Illinois EPA's oversight.

The Illinois EPA is very involved in the Program and is authorized and may agree to provide the following services under the Program:

1. Review and evaluation of site investigation reports, remediation objectives reports, remedial action plans and remedial action completion reports;
2. Sample collection and analyses;
3. Assistance with community relations;
4. Coordination and communication between the RA and other governmental entities; and
5. Other activities as requested.

Illinois EPA Program project managers will provide all reasonable assistance to RAs towards identifying regulatory requirements and obtaining Illinois EPA permits for the conduct of corrective action.

### **Licensed Professional Engineer or Geologist ("LPEG") and Review and Evaluation Licensed Professional Engineer ("RELPE")**

All site activities must be conducted by or under the supervision of a LPEG. These professionals are not licensed by the Illinois EPA or an independent licensing body. The LPEG is someone who is licensed in Illinois to practice as a professional engineer or professional geologist.

The other class of licensed environmental professionals in Illinois is the RELPE. The RELPE performs a supervisory function and ensures that the work done by the LPEG meets the program requirements. A RA hires a RELPE to expedite the remediation process by ensuring work is done correctly the first time

### **Review and Evaluation Licensed Professional Engineer ("RELPE")**

A RA may elect to contract with a RELPE who will perform review and evaluation services on behalf of and under the supervision of the Illinois EPA relative to remediation site activities. Once again the government does not license RELPEs. Prior to entering into a contract with a RA, the regulations require the RELPE to provide the RA with the following information:

- Firm Name
- Address
- Telephone/fax
- Principal officials and titles
- Number of full-time employees
- Business structure (corporation, partnership, limited liability partnership, limited liability company, professional services corporation)
- License Number issued by Secretary of State, if any
- License Number issued by Dept. of Professional Regulation, if any
- Name of Illinois Registered Managing Agent
- Names of insurance carriers and amount of coverage: Worker's Compensation, General Liability, and Professional Liability. [Note insurance is mandatory to act as a RELPE, however, LPEGs are only required to disclose their insurance statuts]
- If the stated professional liability policy includes coverage for "environmental" claims relative to release of pollutants. If not covered, or covered by a different carrier or in a different amount, the information must so state.
- If the firm or owner has ever filed for bankruptcy. If "yes," the information must state when and explain the circumstances.
- If the firm is an outgrowth, result, continuation or organization of a former business. If "yes," the information must explain the background.
- A list of the RELPE's (and other) key full-time employees who will participate on the project with the RELPE. The information must provide resumes for each, including Illinois P.E. License #, certifications, project role, years of experience in related work and education.
- A list of at least five projects similar in nature for which the RELPE has performed environmental preventive or corrective action, and identifying the role of the RELPE.
- If employees are to be assigned to the project in compliance with 29 CFR 1910.120 (HAZWOPER training and medical surveillance) as applicable to their role on the project.

Prior to entering into the contract with the RELPE, the RA must identify to the Illinois EPA the potential terms of the contract. At a minimum the contract must provide that the RELPE will submit any plans or reports directly to the Illinois EPA, will take his or her directions for work assignments from the Illinois EPA, and will perform assigned work on behalf of the Illinois EPA. In addition, the contract must set forth the scope of work for

which the RA has engaged the RELPE, the effective date of the contract, and that costs incurred by the RELPE shall be paid directly to the RELPE by the RA.

### **Role of the Licensed Professional Engineer or Geologist ("LPEG").**

All remediation site activities must be conducted by, or under the supervision of, an Illinois LPEG. A Licensed Professional Engineer (LPE) / Geologist (LPG) means a person, corporation, or partnership licensed under the laws of this State to practice professional engineering/geology.

Remediation site investigations must be performed to identify any recognized environmental conditions existing at the remediation site, the related contaminants of concern, and associated factors that will aid in the identification of risks to human health, safety and the environment, the determination of remediation objectives, and the remedial design. Site investigations must satisfy data quality objectives for field and laboratory operations to ensure that all data are scientifically valid and of known precision.

All plans and reports submitted for review and evaluation must be prepared by, or under the supervision of, an Illinois LPEG. The four reports that must be submitted are:

1. Site Investigation Report
2. Remediation Objectives Report
3. Remedial Action Plan
4. Remedial Action Completion Report

Any plan or report submitted to the Illinois EPA for review and evaluation must be accompanied by a Site Remediation Program Form (FORM DRM-2). The EPA conducts a review and makes a determination to approve or disapprove the plan or report, or approve the plan or report with conditions.

Project documents submitted for review on behalf of the RA may be submitted concurrently to both the Illinois EPA and the RELPE, but all subsequent communications, telephone calls, meetings, etc. should be coordinated with the assigned Illinois EPA project manager. The RELPE's review/evaluation notes, comments etc. must be addressed to the Illinois EPA for final approval, prior to communication back to the RA. The RELPE will be given appropriate procedural guidance and checklists to use in review/evaluation activities in order to minimize Illinois EPA administration.

In no event shall the RELPE acting on behalf of the Illinois EPA be an employee of the RA or the owner or operator of the remediation site or be an employee of any other person the RA has contracted to provide services relative to the remediation site.

### **Review of LPEG work:**

There are two alternatives for review and evaluation of site activities. The Illinois EPA will act as the sole reviewer, or participants may contract with a reviewing licensed professional engineer (who must be different from the site licensed professional engineer) to provide review of site activities as assigned by the EPA. The Illinois EPA

will then have ultimate approval authority based on the recommendations of the reviewing licensed professional engineer.

**3. Documentation**

Site Remediation Program Form (DRM-2)  
(To Be Submitted with all Plans and Reports)

I. Site Identification:

Site Name:

\_\_\_\_\_

Street Address :

\_\_\_\_\_

City: \_\_\_\_\_ Illinois Inventory I. D. Number:

\_\_\_\_\_

IEMA Incident Number:

\_\_\_\_\_

\_\_\_\_\_

II. Remediation Applicant:

Applicant's Name: \_\_\_\_\_

Company: \_\_\_\_\_

Street Address:

\_\_\_\_\_

\_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ ZIP Code: \_\_\_\_\_

Phone: \_\_\_\_\_

I hereby request that the Illinois EPA review and evaluate the attached project documents in

accordance with the terms and conditions of the Environmental Protection Act (415 ILCS 5),

implementing regulations, and the review and evaluation services agreement.

Remediation Applicant's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

III. Contact Person:

Contact's Name: \_\_\_\_\_ Company:

\_\_\_\_\_

Street Address:

\_\_\_\_\_

\_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ ZIP Code:

\_\_\_\_\_ Phone: \_\_\_\_\_

IV. Review & Evaluation Licensed Professional Engineer or Geologist (“RELPEG”), if applicable:

RELPEG’s Name: \_\_\_\_\_ Company: \_\_\_\_\_

Street Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ ZIP Code: \_\_\_\_\_

Phone: \_\_\_\_\_

Registration Number: \_\_\_\_\_ License

Expiration Date: \_\_\_\_\_

All information submitted is available to the public except when specifically designated by the RA to be treated confidentially as a trade secret or secret process in accordance with the Illinois Compiled Statutes, Section 7(a) of the Environmental Protection Act, applicable Rules and Regulations of the Illinois Pollution Control Board and applicable Illinois EPA rules and guidelines. The Illinois EPA is authorized to require this information under Sections 415 ILCS 5/58 - 58.12 of the Environmental Protection Act and regulations promulgated thereunder. Disclosure of this information is required as a condition of participation in the Site Remediation Program. Failure to do so may prevent this form from being processed and could result in your plan(s) or report(s) being rejected. This form has been approved by the Forms Management Center.

V. Project Documents Being Submitted:

Document Title: \_\_\_\_\_ Date of

Preparation of Plan or Report: \_\_\_\_\_

Prepared by: \_\_\_\_\_ Prepared for:

Type of Document Submitted:

Site Investigation Report - Comprehensive	Sampling Plan
Site Investigation Report - Focused	Health and Safety Plan
Remediation Objectives Report-Tier 1or 2	Community Relations Plan
Remediation Objectives Report-Tier 3	Risk Assessment
Remedial Action Plan	Contaminant Fate & Transport Modeling
Remedial Action Completion Report	Environmental Remediation Tax Credit - Budget Plan Review
	Other: _____

Document Title: \_\_\_\_\_ Date of

Preparation of Plan or Report: \_\_\_\_\_

Prepared by: \_\_\_\_\_ Prepared for:

Type of Document Submitted:

Site Investigation Report - Comprehensive	Sampling Plan
Site Investigation Report - Focused	Health and Safety Plan
Remediation Objectives Report-Tier 1or 2	Community Relations Plan
Remediation Objectives Report-Tier 3	Risk Assessment
Remedial Action Plan	Contaminant Fate & Transport Modeling
Remedial Action Completion Report	Environmental Remediation Tax Credit - Budget Plan Review
	Other: _____

VI. Professional Engineer's or Geologist's Seal or Stamp:

I attest that all site investigations or remedial activities that are the subject of this plan(s) or report(s) were performed under my direction, and this document and all attachments were prepared under my direction or reviewed by me, and to the best of my knowledge and belief, the work described in the plan and report has been designed or completed in accordance with the Illinois Environmental Protection Act (415 ILCS 5), 35 Ill. Adm. Code 740, and generally accepted engineering practices or principles of professional geology, and the information presented is accurate and complete.

Engineer or Geologist Name:

\_\_\_\_\_ Professional Engineer's or

Geologist's Seal or Stamp:

Company: \_\_\_\_\_ Phone: \_\_\_\_\_

Registration Number: \_\_\_\_\_

Signature: \_\_\_\_\_ License Expiration Date:

\_\_\_\_\_

Note: The authority of a Licensed Professional Geologist to certify documents submitted to the Illinois Environmental Protection Agency for review and evaluation pursuant to Title XVII of the Environmental Protection Act is limited to Site Investigation Reports (415 ILCS 58.7(f), as amended by P.A. 92-0735, effective July 25, 2002). A Licensed Professional Geologist cannot certify Remediation Objectives Reports, Remedial Action Plans or Remedial Action Completion Reports.

## Ohio

### 1. Comparison to B.C.

#### Similarities:

- Certified professionals (“CP”) are responsible for verifying that properties are cleaned up to the levels required by the program rules. The detailed program rules allow CPs and the site owner, which he or she represents, to do the remedial work without the ongoing involvement of the Division of Emergency and Remedial Response (“DERR”), the responsible division of the EPA.
- A CP may undertake, review or provide opinions on Phase I and Phase II environmental site assessments, risk assessments, and/or remediation activities.

#### Differences:

- Once the review is completed and based on the best available knowledge, information and belief, the CP provides either a no further action letter (“NAFL”) stating that the voluntary remediation project complies with applicable regulations or a written notice that the property does not comply with applicable standards.
- If requested by the volunteer (site owner), DERR will issue a legal release after it has reviewed the NFAL.
- Unlike in B.C., Ohio does not require applicant’s for CP status to take and pass an examination.
- The audit program is administered by the DERR, which ensures that at least 25% of the submissions are audited.
- Ohio certifies both professionals and laboratories.
- Liability is not a significant concern under this regime because the CP is not required to make any guarantees in the No Further Action Letter, and because the site owner can request DERR to issue a legal release.
- Insurance is not required by statute, however, most professionals carry errors and omissions insurance.

### 2. Overview of Program

One of the Divisions of the Ohio Environmental Protection Agency is the DERR. The DERR focuses on the prevention, identification, investigation, regulation, and remediation of chemical and petroleum hazards in Ohio. To this end, the DERR supports a variety of preparedness, prevention and cleanup activities. They include: radiation safety; spill prevention, control and countermeasures; special investigations; site investigation and assessment; brownfield revitalization; orphan drum removals; emergency response; remedial response; and the Voluntary Action Program (“VAP”).

The VAP allows companies to investigate possible environmental contamination, clean it up if necessary and receive a promise from the State of Ohio that no more clean-up is needed. The VAP reduces governmental involvement and maximizes resources and expertise in the private sector. The VAP Rules (Ohio Revised Code Chapter 3746) were developed by the Ohio EPA with considerable input from a steering committee and technical subcommittees representing diverse interests, such as environmental advocacy groups, manufacturers, environmental consultants, cities and counties, bankers, and medical professionals. Anyone can undertake a cleanup project, following

the VAP Rules, in order to meet environmental standards without direct oversight from Ohio EPA.

The VAP maximizes resources and expertise in the private sector by certifying qualified and experienced professionals such as engineers and scientists. These certified professionals (“CPs”) are responsible for verifying that properties are cleaned up to the levels required by the program rules. The detailed program rules allow CPs and the site owner, which he or she represents, to do the remedial work without ongoing Agency involvement.

The governing legislation provides minimum qualifications for individuals seeking to become a CP. Unlike other programs, Ohio does not require applicants to take and pass an examination. Recertification is required every year providing applicants demonstrate a minimum of twenty-four hours professional development training in the previous year.

Once certified, a CP may undertake, review or provide opinions on Phase I and Phase II environmental site assessments, risk assessments, and/or remediation activities, as necessary, on a property undergoing voluntary remediation. Once the review is completed and based on the best available knowledge, information and belief, the CP provides either a NFA letter stating that the voluntary remediation project complies with applicable regulations or a written notice that the property does not comply with applicable standards.

If the volunteer wants the legal release from Ohio, the CP must submit the NFA to the Ohio EPA for review. When a NFA is received by the Ohio EPA, technical staff reviews the document to determine if all of the standards (i.e. investigation and cleanup rules contained in OAC Chapter 3745-300) have been met and accordingly issues or denies the covenant not to sue. Many volunteers may reach this point and decide not to pursue a legal release. That choice is largely driven by business decisions concerning financing and ability to sell the property.

Once the DERR receives a NFA letter or opinion, the letter is placed into one of three audit pools: (1) a mandatory audit pool (if it is believed to be fraudulent or inaccurate, or submitted by a CP whose certification was subsequently revoked); (2) a priority pool (when site remediation involves risk assessment or engineering controls) and (3) a random pool. Each year the Ohio EPA will audit 100% of the mandatory pool, 25% of the priority pool and sufficient numbers from the random pool such that at least 25% of the submissions involving remediation and 25% of the submissions not involving remediation are audited.

### **3. No Further Action Letter (NFA)**

The NFA is a very large document. It can be accessed at:  
<http://www.epa.state.oh.us/derr/vap/noaction/noaction.html>

Below, we have outlined the contents of the NFA and included the affidavits that must be signed by CPs.

## Contents of the NFA Form Sections

**Section A General Information.** The CP must provide basic information concerning the NFA Letter, including property name and address, acreage, volunteer's name, NFA Letter review period (30 or 90 days), etc.

**Section B Executive Summary.** The CP must provide an executive summary of the NFA Letter. An outline of what should be included in the executive summary is included in Section B of the NFA Form.

**Section C Eligibility.** The CP must respond to VAP eligibility issues and reference the location of more detailed eligibility findings within the NFA Letter.

**Section D Property Maps and Table Requirements.** The CP must affirm that maps required by the rules are included in the NFA Documentation. References for the location of all maps within the NFA Documentation are also required. This section also includes sample formats of tables that must be included in the NFA Documentation. The table formats are optional, but the tables provided must include all the elements identified in the sample formats.

**Section E Phase I Property Assessment.** The CP must indicate that the activities required under the Phase I rule have been performed. References are required to assist in the NFA Letter review.

**Section F Phase II Property Assessment.** The CP must indicate that certain activities required under the Phase II rule, based upon the outcome of the Phase I, have been performed, and provide the location (within the NFA Letter) of the specific Phase II findings.

**Section G Phase II Property Assessment -Ground Water.** The CP must indicate that several activities, which may be required based upon the existence and type of ground water underlying the property, have been performed. In some instances, the CP is asked to provide the result of a particular evaluation in a "Yes or No" format. References are required in some instances to assist the NFA Letter review.

**Section H Generic Numerical Standards and Property Specific Risk Assessment Procedures.** The CP is asked to provide information regarding the applicable standards chosen and how they are consistent with the exposure assumptions found at the property.

**Section I Demonstration of Compliance with Applicable Standards.** The CP is asked to provide summary information (in the form of a table) regarding the applicable standards, and references concerning the remedies employed at the property.

**Section J All Affidavits.** Locations, within the NFA Documentation, of all affidavits required to be prepared in connection with the voluntary action are to be provided in this Section. Template affidavits are provided as an attachment for use by the CP .

**Section J of NFA – Attachments**

**Affidavit by Certified Professional Pursuant to OAC 3745-300-13(N)**

[for submissions under OAC 3745-300-13(N): Certified Professional providing information for conducting or completing a voluntary action, not for the submittal of an NFA letter or an addendum to an NFA letter]

I, \_\_\_\_\_ ***[insert name of Certified Professional affiant]***, being first duly sworn according to law, state that, to the best of my knowledge, information and belief:

1. I am an adult over the age of eighteen (18) years old and competent to testify herein.
2. I am a Certified Professional, CP No.\_\_\_\_\_, in good standing under Ohio Revised Code (ORC) Chapter 3746 and Ohio Administrative Code (OAC) Chapter 3745-300.
3. I have conducted work or prepared or reviewed documents in connection with a voluntary action at property known as \_\_\_\_\_, located at \_\_\_\_\_ ***[insert name and address of the Property]*** (the "Property").
4. The purpose of this submission is to \_\_\_\_\_ ***[insert description of purpose; e.g., "request an urban setting designation" or "provide a description of the scope of services for which I have been retained as a certified professional"]*** for conducting or completing the voluntary action identified in paragraph 3 of this affidavit. ***[Please note, if there is more than one purpose, list each purpose.]***
5. I provided the following information, data, documents, or reports with this submission: ***[List the documents, dates and persons, below..]***
6. The information, data, documents, and reports identified in this affidavit are true, accurate and complete.

\_\_\_\_\_  
Signature of Affiant  
Sworn to before me this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

**Certified Professional Affidavit Pursuant to OAC 3745-300-13(P) and 3745-300-05(F)(4)**

[for submittals under OAC 3745-300-13(P): Certified Professional NFA letter submissions to the Director of Ohio EPA]

**Volunteer: Owner(s) of Property:**  
***[insert name and address of Volunteer]***

***[insert name and address of owner(s)]***

**Certified Professional who issued the NFA Letter: Property subject to NFA Letter:**  
***[insert CP's name, address and phone number] [insert property name and***

**address]**

I, \_\_\_\_\_ **[insert name of Certified Professional affiant]**, being first duly sworn according to law, state that, to the best of my knowledge, information and belief:

1. I am an adult over the age of eighteen (18) years old and competent to testify herein.
2. I am a Certified Professional, No. \_\_\_\_\_ **[insert CP number]**, in good standing under Ohio Revised Code (ORC) Chapter 3746 and Ohio Administrative Code (OAC) Chapter 3745-300.
3. I have prepared a No Further Action (NFA) Letter for \_\_\_\_\_ **[insert name of Volunteer]**, issued on \_\_\_\_\_ **[insert NFA Letter issuance date]** for property located at \_\_\_\_\_ **[insert address of the Property]** (the "Property").
4. I have read the standards of conduct contained in OAC 3745-300-05(F), and maintained full compliance with these standards regarding the NFA Letter and while rendering professional services to the Volunteer regarding the Property.
5. The Property is eligible for the Voluntary Action Program pursuant to ORC 3746.02 and OAC 3745-300-02.
6. The voluntary action has been conducted and the NFA Letter has been issued in accordance with the ORC Chapter 3746 and OAC Chapter 3745-300.
7. The Property meets the applicable standards contained in ORC Chapter 3746 and OAC Chapter 3745-300.
8. The voluntary action at the Property was conducted in compliance with all applicable federal, state and local laws and regulations.
9. The NFA Letter, the completed NFA Form for the Property and any other information, data, documents and reports submitted with the NFA Letter and the NFA Form are true, accurate and complete.
10. The NFA Letter, the completed NFA Form and all supporting information, data, documents and reports, are a true, accurate and complete characterization of conditions at the Property, including the presence or absence of hazardous substances and petroleum.

Signature of Affiant \_\_\_\_\_  
Sworn to before me this day of \_\_\_\_\_  
Notary Public

## APPENDIX 4

### People Interviewed for Final Report

Mr. Don Rugg  
Registrar BC Institute of Agrology  
21 February, 2005

Mr. Graham Knox,  
B.C. Ministry of Water, Land and Air Protection, Legislative and Finance Unit  
21 February, 2005

Mr. Glyn Fox  
MWLAP Member of the Roster Steering Committee  
B.C. Ministry of Water, Land and Air Protection, Science and Standards Unit.  
22 February 2005

Mr. Kenneth Kehler  
VP Morris Mackenzie  
22 February 2005

Ms. Kimberley Fairbairn  
Insurance Brokerage Services  
Morris Mackenzie  
22 February 2005

Mr. Glen Frederick  
BC Ministry of Finance, Risk Management Branch  
23 February, 2005

Ms. Lindsay Olson  
VP Pacific Region  
Insurance Bureau of Canada  
22 February 2005

Ms. Linda Michaluk  
Executive Director, College of Applied Biologists  
23 February 2005

Ms. Joy Scharf  
Marsh Canada (Insurer for B.C. Institute of Agrologists)  
24 February 2005

Mr. Guy Patrick, P.Eng.  
Roster Member  
Principal with Golder and Associates  
01 March 2005

Mr. Steven Panciuk  
Architects & Engineers Division, ENCON  
02 March 2005

Dr. John Wiens, P. Ag.  
Roster member  
Environmental Consultant with Seacor  
03 March 2005

Mr. Will Gaherty, P.Eng.  
Roster Member  
Principal with Pottinger Gaherty  
Member – Scientific Advisory Panel  
03 March 2005

Mr. Tony Linardi  
Legal Council, Golder and Associates  
04 March 2005

Mr. Wally Brual  
Brual Environmental  
09 March 2005

## APPENDIX 5

### Terms of Reference:<sup>1</sup>

#### Liability Protection for Approved Professionals

Ministry of Water, Land and Air Protection  
Request for Proposal (RFP) Number EMB 05-121

#### 1. Summary of the Requirements

The Ministry of Water, Land and Air Protection is considering options for devolving to approved professionals greater responsibility for the review and approval of contaminated sites reports, plans and legal instruments such as approvals in principle and certificates of compliance.

The purpose of this RFP is to obtain an independent, unbiased review of the liabilities and liability protections environmental professionals providing similar services have in British Columbia and in other jurisdictions, of associated issues and recommendations of key stakeholders who have considered this subject, and to obtain recommendations for liability protection of these professionals for different devolution options.

#### 2. Additional Definitions

In addition to the RFP Definitions set out in paragraph 1 of Section A, throughout this Request for Proposal, the definitions in Parts 4 and 5 of the *Environmental Management Act* and Contaminated Sites Regulation apply. They may be reviewed at the following Internet addresses:

[http://www.qp.gov.bc.ca/statreg/stat/E/03053\\_00.htm](http://www.qp.gov.bc.ca/statreg/stat/E/03053_00.htm)

[http://www.qp.gov.bc.ca/statreg/reg/E/EnvMgmt/EnvMgmt375\\_96/375\\_96.htm](http://www.qp.gov.bc.ca/statreg/reg/E/EnvMgmt/EnvMgmt375_96/375_96.htm)

#### 3. Ministry Situation/Overview

The Province implemented comprehensive legislation and regulations for contaminated sites in 1997. In 1999, the Contaminated Sites Regulation was amended to create a roster of professional experts whose recommendations could be relied upon by ministry officials in deciding whether or not to issue legal instruments such as approvals in principle and certificates of compliance. In July this year, the terminology for one these professionals was changed to “approved professional” under the new *Environmental Management Act*.

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<sup>1</sup> The following Terms of Reference have been taken from the Request for Proposal (RFP) Number EMB 05-121.

During the last few years, these professionals have indicated concerns about their liability associated with their activities as approved professionals, and several reports have been written which deal with this subject.

The ministry is considering options for devolution of responsibility for the signoff of contaminated sites legal instruments. Before making a decision, it wishes to review the liabilities and liability protections such approved professionals currently have in BC and in other jurisdictions, to review associated issues and recommendations of key stakeholders who have considered this subject, and to obtain recommendations for liability protection of these professionals for different devolution options.

## **Ministry Responsibility**

The Ministry of Water, Land and Air Protection administers the *Environmental Management Act* and Contaminated Sites Regulation which contain the key legal provisions for the management of contaminated sites in BC.

## **4.2 Report**

The Contractor will submit a report that contains the following:

### **4.2.1 Summary of current practice**

#### British Columbia

- Summarize, review and discuss the current liability protections required and afforded approved professionals in their capacity as appointees to the roster of approved professionals under the *Environmental Management Act*.
- Summarize, review and discuss the current availability, types and general costs of insurance coverage for approved professionals in BC. The costs should be reported based on information received both from insurance carriers and approved professionals. The discussion should address areas of practice, and specific activities and exemptions which require additional coverage and costs.
- Summarize, review and discuss the types of liability protection provided approved professionals under their existing affiliations with the Association of Professional Engineers and Geoscientists of BC, the Institute of Agrology and the College of Applied Biology.
- Summarize, review and discuss the undated article by Richard Bereti, Ken Serne and Jonathan Corbet, of the law firm Harper Grey Easton, "Consultant Liability: Are Environmental Consultants Really "Exempt" from Liability when Working on Contaminated Sites?" A copy of this report will be provided by the Ministry.
- Summarize, review and discuss cases where environmental consultants in Canada have been impacted as a result of insufficient liability protection, for example, through lawsuits over the quality of their environmental consulting work.

## Other Jurisdictions

- Summarize, review and discuss the duties of contaminated sites environmental professionals and the current liability protections required and provided them in other jurisdictions (contacts to be provided by the Ministry), including:
  - Ontario
  - Quebec
  - New Brunswick
  - Nova Scotia
  - Newfoundland
  - Australia – New South Wales
  - Australia – Victoria
  - Massachusetts
  - California
  - Illinois
  - North Carolina
  - Ohio
  - Connecticut
  - West Virginia

### **4.2.2 Background Research**

- Summarize, review and discuss findings and recommendations in the following documents (to be provided by the Ministry) which address, in part, the management of liability for approved professionals in British Columbia.
  - ⇒ Advisory Panel on Contaminated Sites, “Final Report of the Minister’s Advisory Panel on Contaminated Sites,” January 2003.
  - ⇒ Shelley O’Callaghan, Bull Houser & Tupper, Letter to Roster Steering Committee “BC Ministry of Water, Land and Air Protection – Experts Roster,” November 16, 2001.
  - ⇒ Craig Godsoe and Tracey Sandgathe, Borden Ladner Gervais LLP, “Contaminated Site Administration in British Columbia: Report to B.C. Ministry of Water, Land and Air Protection,” May 16, 2002.
  - ⇒ Waldemar Brault, McDonald & Company, “Considerations for Establishment of a Licensed Environmental Professional System for Contaminated Sites in British Columbia: Final Report,” October 28, 2003.
  - ⇒ Waldemar Brault, McDonald & Company, “British Columbia’s New Licensed Environmental Professional Framework (draft),” September 1, 2004.
- Consult the Insurance Bureau of Canada and the Ministry of Finance’s Risk Management Branch (contacts to be provided) to determine their views on the viability of different options for managing the short and long term liability of approved professionals, and summarize, review and discuss the findings.

### **4.2.3 Deliverables**

- Provide an overview and analysis of methods used to manage the liability of environmental professionals working on contaminated sites in their capacities of advising regulatory agencies and making statutory decisions.
- Based on the research conducted, submit a report which includes a detailed analysis of a range of options for managing the liability of approved professionals in BC under three scenarios:

- ⇒ **Option 1. Current roster of approved professional system:** The current system involves the appointment of approved professionals by the director of waste management, assisted by the advice of a roster steering committee. Legal instruments are signed by a ministry official based on the advice of an approved professional, and one in ten submissions is audited. The system is enabled under section 42 (1) of the *Environmental Management Act* and section 49.1 of the Contaminated Sites Regulation.
  - ⇒ **Option 2. Hybrid system:** Under this option, a supervisory board would have representatives from relevant professional bodies, the Ministry of Water, Land and Air Protection and other stakeholders. Legislation for a new type of professional would not be required, and the supervisory board would govern persons providing the services. Under this option, the ministry would retain the function of final signoff of legal instruments such as approvals in principle and certificates of compliance.
  - ⇒ **Option 3: Self-regulating profession:** A hallmark of this option is legislation which creates an independent legal body to govern the profession. It is not part of government or a delegated part of government. The legislation would empower a supervisory board to set registration and professional standards and enforce such standards through a disciplinary process, and would create a new profession — a “licensed environmental professional”. Under this option, licensed environmental professionals would be given legal authority to sign legal contaminated sites instruments under the *Environmental Management Act* such as approvals in principle and certificates of compliance.
- The options and implications for the Ministry, the remainder of the Provincial Government, approved professionals, and third parties for each scenario must include, but are not limited to:
    - ⇒ No additional liability protection provided;
    - ⇒ Protection provided for liability above a variety of fixed insurance caps suggested by discussions with the Insurance Bureau of Canada;
    - ⇒ Liability protection provided as a “protected person” under the *Environmental Management Act*; and
    - ⇒ Full indemnification.
  - Include in the analysis a discussion of the implications, advantages and disadvantages of each option as well as recommendations.
  - The analysis will describe and discuss the following issues for each scenario and option:
    - ⇒ The liability protection vehicles used
    - ⇒ Type, scope and amount of liability protection provided
    - ⇒ Costs to parties
    - ⇒ Availability of protection now and in the future
    - ⇒ Liability protections that would not be provided
    - ⇒ Consistency with practice with other professionals in BC
    - ⇒ Requirements for statutory and regulatory amendments

- ⇒ Differences between the recommended and existing liability protection schemes for contaminated sites professionals in BC today
- ⇒ Whether significant changes to insurance policies and premiums would be anticipated or needed
- ⇒ Whether government may need to underwrite some of the approved professionals' insurance, and if so, the legal and administrative processes needed to provide such underwriting