

Remediation Liability Overview

The *Environmental Management Act* and *Contaminated Sites Regulation* lay out various principles of liability, or responsibility, for the cost of cleaning up contaminated sites in BC. Those who are in some way responsible for causing contamination are classified as “responsible persons.”

The Act and Regulation first cast a relatively broad net of liability by describing who are considered responsible persons such as current or former owners of a contaminated site or a site from which contamination migrated; and producers or transporters of substances. The provisions then identify a variety of circumstances under which those individuals are excluded from liability.

Polluter-pays principle

The remediation liability provisions are based on the “polluter-pays principle.” It holds that those who cause contamination should be responsible for paying the cleanup costs.

If a responsible person cannot be found or is unable to pay, then the Act relies on government to clean up the highest risk orphan sites and thereby protect human health and the environment.

Who is responsible for cleanup?

The Act lists the people who may be considered responsible for cleaning up contaminated sites. These include:

- a current owner or operator of a site;
- a previous owner or operator of a site;
- a producer or transporter of a substance that caused contamination; and

- any of the above if a site was contaminated by a substance migrating from an adjacent site.

Who is not responsible for cleanup?

Under the Act, a person may be exempted from responsibility for the remediation of a site that became contaminated by:

- an act of God or war;
- a third party unconnected with the owner;
- migration of a substance from another owner’s site;
- natural occurrences not assisted by human activity;
- an owner, if the owner “innocently acquired” the site.

What is meant by innocent acquisition?

To show that a contaminated site was innocently acquired, a person has to demonstrate that at the time he or she became an owner or operator of the site:

- the site was already contaminated;
- he or she had no way of knowing or suspecting that the site was contaminated; and
- he or she made all appropriate inquiries of previous ownership and uses of the site.

Furthermore, after becoming the owner of the site, the person must not transfer any interest in the site without first telling the transferee about the known contamination. And, the person must not have caused or contributed to the contamination at the site.

What is meant by “all appropriate inquiries”?

To establish that an owner or operator acquired a site without knowing that it was

contaminated, a person's investigations into the site must have been consistent with good commercial or customary practice at the time of acquisition of the property.

All of the following must be considered:

- personal knowledge of the previous owner or operator at the time of acquisition;
- the relationship of the price to the value of the property if it were uncontaminated;
- commonly known or ascertainable information about the property at the time of acquisition; and
- any obvious presence of contamination, and the feasibility of detecting such contamination by appropriate inspection.

Are there certain properties for which the owners are exempt from cleanup responsibility?

A person is also not responsible for remediation of a contaminated site if that person is a current or previous owner of:

- an easement,
- a right-of-way,
- a covenant under section 219 of the *Land Title Act*,
- a lien,
- a judgement,
- a reservation in a Crown grant, or
- an interest in real property that deals exclusively with subsurface rights.

However, this exemption from liability for remediation applies only if the person can establish that any use of the site did not result in contamination in whole or in part.

General remediation liability principles

According to the Act, a responsible person 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 site."

- Absolute liability – in which there is no defence of due diligence (a measure of judgement and perseverance expected of a reasonable person under a particular circumstance).
- Retroactive liability – in which a responsible person is liable for cleanup of contamination which occurred in the past.
- Joint and separate liability – in which one or more responsible persons are liable to pay the entire cleanup cost, if other responsible persons cannot or will not pay their share.

In short, these three general remediation liability principles mean that if you contributed to contamination of a site, you may have to pay all the cleanup costs. Reasons or excuses for causing the contamination are irrelevant. Even if you were legally permitted to discharge the contaminating substances, or if the contamination occurred before the relevant sections of the Act were passed, you may still be responsible.

Minor contributors

Under the Act, a responsible person may apply to a Director of Waste Management to be classified as a "minor contributor."

If the Director grants this status, he or she must then determine what portion, if any, of the remediation cost is attributable to the applicant.

Both statutory and civil liability are capped at this amount. This means that if a court action for costs is brought forward by the Crown or another person, the minor contributor is only liable for up to the amount specified by the Director.

The applicant must demonstrate to the Director that all of the following apply:

- only a minor portion of the contamination can be attributed to the applicant’s activities at the site,
- either no remediation is required as a result of the applicant’s activities, or the cost attributable to the applicant is a minor portion of the total cost; and
- it would be extremely harsh to name the applicant as being “jointly and separately liable” along with the other responsible persons.

The applicant must provide a range of information to assist the Director in determining the validity of the claim.

Allocating cleanup costs

The Act says that whoever incurred a cost in cleaning up a site (including a responsible person) may seek compensation from one or more other responsible persons in court. Under the Regulation, the responsible person (or persons) named as defendant in the previous court action may also seek compensation from other responsible persons.

In a legal action between two or more responsible persons, the following are some factors that must be considered by the courts in determining the costs of remediation:

- the price paid for the property by the person seeking cost recovery;
- due diligence of the responsible persons involved in the action;
- the amount of substances and toxicity attributable to the persons in the action;
- any cleanup done and paid for by each person in the action; and
- each responsible person’s contribution to the generation, transportation, treatment, storage, or disposal of the substances that caused the contamination.

Note: This summary is solely for the convenience of the reader. The current legislation and regulations should be consulted for complete information.

For more information, contact the Environmental Management Branch at site@gov.bc.ca