

Remediation Liability and Insurers, Lenders, Receivers, Sureties, and Trustees

The Contaminated Sites Regulation, under the *Environmental Management Act*, specifies that not everyone connected with a contaminated site is responsible for its cleanup or remediation. In general, those who are involved in purely financial matters concerning the site escape liability. Reviewed here are situations where such protection from liability arises, and where a financial professional is responsible for remediation.

The affected professionals include:

- insurers and insurance brokers;
- secured creditors, who hold an interest in and a right to sell, property in case of default on a loan;
- receivers, including current or previous receivers, receiver managers, and bankruptcy trustees who are owners or operators;
- sureties, who take formal responsibility for an undertaking at someone else's request; and
- trustees, who hold legal title to a property for the benefit of another person.

The Regulation sets out similar rules for all of these professionals. Some differences do apply, however, and these are discussed below.

Burden of proof

A person seeking to establish that he or she is not responsible for remediation must prove all elements of the exemption.

General circumstances conferring immunity

For the most part, a professional associated with a contaminated site is not responsible for its cleanup, unless that person exercised any control or imposed requirements regarding the treatment, disposal, or handling of a substance that caused contamination.

A person is not considered to exercise control over a site if he or she acts under his or her professional rights or obligations, such as by:

- participating in purely financial matters relating to activities at the site;
- having capacity to influence operations at the site in a way that could increase contamination, but choosing not to exercise the capacity in this way;
- imposing requirements on other people, as long as doing so does not have a reasonable probability of causing or increasing contamination of the site;
- appointing a person to inspect or investigate a contaminated site to determine future steps or actions that the professional may take; and
- imposing requirements on any person to comply with environmental laws, standards, policies, or codes of practice of government or industry.

Insurance professionals

If an insurer is responsible for remediation, the liability is limited to the cost of remediation. This holds true unless such liability exceeds the sum of any proceeds of insurance coverage on the site for such environmental risks. However,

as with sureties, this cap does not apply to an insurance professional who intentionally or negligently caused damage.

Secured creditors

In addition to having the protection described above, a secured creditor may be free of responsibility for remediation if that creditor:

- participates in restructuring or refinancing of a loan;
- takes steps to protect or enhance the value of the secured assets;
- takes steps to reduce or prevent future contamination or the migration of existing contaminants;
- otherwise conducts any independent remediation; or
- undertakes to sell secured property – *unless* the secured creditor:
 - exercised control over, or imposed requirements on, anyone regarding the treatment, disposal, or handling of a substance and doing that led to some amount of contamination; or
 - becomes and remains a registered owner of the site.

Receivers

A receiver is not personally liable for remediation at a contaminated site unless it is established that:

- the receiver exercised control over, or imposed requirements on, any person regarding the manner of treatment, disposal, or handling of a substance; or
- the receiver was grossly negligent or guilty of wilful misconduct and caused the site to become in some way contaminated.

Despite having protection from personal liability under the Act, a receiver is obliged to comply with applicable cleanup requirements. This obligation may be limited to the available funds to satisfy the obligation, as defined in the

Regulation, and lasts only during the period of the receiver's appointment.

A receiver not having sufficient funds available to comply with remediation obligations must notify a Director of Waste Management of this fact as soon as it becomes known.

A receiver who has a site that shows up on the Site Registry as being partly or wholly contaminated must notify a Director in writing of any proposed distribution of available funds (at least 15 days before the date of the proposed distribution) or of any proposed abandonment of the receivership appointment.

Upon receiving a remediation or pollution abatement order, a receiver may, within 30 days, give written notice to a Director that he or she is reviewing the options regarding the contaminated site, such as whether to terminate the appointment or abandon the site.

During the 30-day period, the receiver is not required to comply with the remediation or the pollution abatement order. After giving the Director further written notice, the receiver may apply to the court for an extension of the 30-day period.

Sureties

A surety is someone who agrees to take responsibility for another person's obligations. If that other person's site is contaminated, then the surety may be liable for the cost of cleaning it up. This liability is limited, however, to the value of the bond for that site posted by the other person – though the limitation does not apply to a surety who intentionally or negligently caused damage.

Trustees

A trustee is not personally liable for remediation at a contaminated site unless there is evidence that the trustee:

- exercised control over, or imposed requirements on, any person regarding the manner of treatment, disposal, or handling of a substance; and
- was grossly negligent or guilty of wilful misconduct and caused the site to become in some way contaminated by that substance.

Nevertheless, a trustee is obliged to comply with applicable remediation requirements for the contaminated site, but this is limited to the available funds, as defined in the regulation, and ends after a trustee's obligations end. If a trustee is unable to meet these requirements out of the available funds, he or she must immediately notify a Director.

A trustee may apply to the court to obtain an order stating that the trustee's remediation obligation is terminated. If this happens, the trustee must notify the Director so the latter can make representations to the court.

The trustee has 30 days after receiving a remediation, pollution abatement, or pollution prevention order to give the Director written notice that the trustee is reviewing:

- his or her ability to comply with the order;
- the responsibilities that he or she would incur by administering the trust property; and
- whether he or she should seek to terminate the appointment.

During this 30-day period, the trustee is not required to comply with the particular order given, and may apply to the court for an extension of this 30-day period

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