Responses to Comments on Establishing the Boundaries of a Site Procedure (Draft 12)

Original Document Section(s)	Issue	Stakeholder Comments	Stakeholder Recommendation(s)	Ministry Response(s)
	General	We own large parcels of land within B.C. Some of these properties may have multiple operations on a single site, legal parcels licensed to more than one operator, or parcels partially encumbered by ongoing operations. In the past, the ministry has granted exemptions to investigate portions of large legal lots when the other portion has ongoing operations.	We would like to see an allowance for this provision in the new procedures as eliminating the exemptions would unnecessarily restrict land that could otherwise be redeveloped.	Revised. See new sections 7.3.1 and 9.0.
	General	It is our opinion that implementing rigid requirements to investigate and/or obtain instruments for entire legal parcels would lead to more brownfield properties, particularly in areas of the province with low property values.		This has been noted for any future review of the contaminated sites legal provisions as part of a provincial brownfields program.
	General	Finally, while we appreciate your effort to provide some certainty to the process of determining site boundaries, we are very concerned that the issues related to the permission of multiple land uses for a single legal parcel will create considerable uncertainty both for those currently undertaking remediation and for those dealing with those properties in the future.		This has been noted for possible future amendments to the legislation and regulations.
	General	Rather than use of words like “could” and “should” we recommend putting the ideas in context of what is required under the CSR process. e.g. Does Section 6.5 mean that the ministry will not approve any instrument for a site or portion of a site unless instruments are concurrently sought for remaining portions of the site and any offsite areas?	Rather than use of words like “could” and “should” we recommend putting the ideas in context of what is required under the CSR process.	The procedure needs to maintain the discretion of the Director to vary his or her decisions on a case by case basis. The use of “could” and “should” enable that flexibility.
	Offsite migration	I was interested to know who would get the instrument for the offsite migration component? Section 7.3.2 - if its a migration issue onto 3rd party land which is linked to another site - different owners then usually the original polluter would get the instrument - but do they even have to tell Owner B that they are doing that? They would have notified owner B of offsite contamination but they can get AIP without consent from owner B. I know the courts have said the affected party does not have to agree/consent. This is a huge issue for all the gas stations as the contaminants cross onto private lands.		This has been noted for review as part of the current review of offsite contaminant migration provisions.

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	Offsite migration	As previously discussed, I am concerned with AIPs on road allowances and the local government being informed as the property owner. Often the City is not party to all the details being discussed between the ministry or professional and consultant - agreements and work plans may not coincide with needs of the local government especially if road widening or new infrastructure is proposed in a roadway. Risk managed AIPs are of particular concern as MOE is allowing a 3rd party to risk manage on land that is not theirs without fully informing the land owner perhaps. I know some remediation may require this and there are lots of examples where we have worked this out - lately we are not getting copies of the AIPs only notification that they were granted for our land and then we have to try to get details afterwards. I think the ministry in their process needs to make sure the property owner is informed of the agreement - even at draft stage so they can comment and then also be provided with a copy of the full agreement showing details when completed so they know what is to happen on their land. The ministry could require this of the proponent applying for the instrument - could just have a copy of the report made for the 3rd party.		This has been noted for review as part of the ministry's response to offsite migration report. Note that local governments whose land is impacted by offsite contamination in the context of an application for a contaminated sites legal instrument should already have been notified about the actual or likely contamination via notification of offsite migration.
	Timing	Will there be a warning of the effective date (or grandfather period) to allow for applications to be made for ministry instruments where investigation/reporting time-frames will not otherwise be able to accommodate implementation of the new documents?		Yes.
	Training	I was talking to some MOE staff at the seminar and they had different interpretations on how this would be used. Some felt it was still one site, etc. I think you need to make sure at the ministry that staff understand the way the rules are to be applied as it's not business as previously conducted - the boundary definition is quite different than before as are the instrument rules for the two property owners.		Staff and Approved Professionals will be trained on this procedure when it is finalized.
1.0	Definitions	It is unclear as to how a "parcel" is defined.		Definition of "parcel" created.

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1.0	Definitions	Is ownership of legal parcel equivalent to legal lease when determining the legal boundaries of a site?		Definition of “parcel” created and addresses this question.
1.0	Definitions	The procedure allows the site to be defined by the source site and the offsite contaminant limits if the property is owned by the same party. Clarification is required on whether this applies to leased Crown lands where the surrounding land is also Crown.		Definition of “parcel” created which provides the requested clarification. Also see new text in section 2.1.
1.0	Definitions	“potential contaminant of concern”	We suggest that the word “site” be replaced with “legal parcel”;	Change made except "parcel” instead of “legal parcel” was used.
1.0	Definitions		We also suggest that the term “legal parcel” be used throughout the document (sometimes there is just a reference to “parcel”).	Change made except "parcel” instead of “legal parcel” was used.
1.0	Definitions	The references to “owner” should be references to “legal owner” since the EMA contains a very broad definition of “owner”. For example, there may be two separate legal owners, both of whom lease to the same tenant.		The term “owner” is used and has been added to the definitions to maintain consistency with the definition in the *Environmental Management Act.* Unusual circumstances such as that described will be dealt with using the discretion of the Director.
1.0	Definitions	“wide area site”	We suggest that the references to “individual properties” be replaced with “legal parcels”.	This is a legal definition in the Regulation so should not be amended.
2.0	General	In section 2, the general section, it is stated that a “site” can have only one land use, but a legal parcel of land can have more than one “site”. The result is that a legal parcel can have more than one land use. This basic premise is then included in section 8 of the draft document. Section 12(5) of the Contaminated Sites Regulation states that the Director must take into account current and reasonable potential future land, water and sediment uses in determining the primary land, water or sediment use and in doing so is to consider a number of factors. The first two factors on the list are:	In view of the foregoing, we submit that the procedure should specify that: (a) current and proposed zoning and land use and planning policies of the government or municipality should be added to the list of factors to be considered on page 3; and (b) land use will be determined for an	a) Change made b) The court decision is binding on the ministry. This will be added to the list of possible amendments to the contaminated sites legal regime.

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		• current and proposed zoning; and • land use and planning policies of the government or the municipality. The draft procedure contains a list of factors to be considered in determining the boundaries of a site (bulleted points on page 3) but there is no mention of the zoning or land use and planning policies. If these factors are to be considered in relation to determining the primary land use it is difficult to see how they would not be considered in relation to the determination of boundaries of a site since one is dependant upon the other. While it may be that these factors are included by implication since the primary land use is included in the first point in the list, it is by no means clear. The reality is that in determining land use most people look to zoning and municipal land use and planning policies. Zoning is readily ascertainable and the uses permitted within a zoning classification are clear. Furthermore zoning is enforced by the municipalities for both current and future land use. Changes to the zoning and therefore permitted uses must follow an extensive procedure. The zoning is based upon legal parcels; you cannot have part of a legal parcel zoned for one use and part for another. There is mixed use zoning, but it also has very specific guidelines. The use of zoning as a guideline for the determination of land use provides a measure of certainty. We recognize that there may be some very unusual situations where having more than one land use on a legal parcel or looking to something other than zoning or municipal policies to determine land use may be warranted, however, as a general rule, it is submitted that the certainty associated with determining land use based on the legal parcel as a whole and with particular reference to zoning is preferable. In addition to the foregoing, if multiple land uses are permitted on a legal parcel there must be a mechanism to ensure that the designated land use (for contaminated sites purposes) is maintained on the part of the legal parcel so designated.	entire legal parcel except in very exceptional circumstances. In the event that the ministry is of the opinion that this is not possible, because of the Court decision referred to the in the draft procedure, then it is submitted that consideration should be given to a legislative amendment to clarify this issue.	

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		Presumably the legal title to the property would have to be encumbered with restrictive covenants to ensure that the use continues on the basis that the Director has determined. However, once in place there is a question as to who will monitor compliance with the restrictive covenants and who will enforce any breach thereof. It is submitted that the potential for risk to human health and the environment is much greater if land use is not determined based on a legal parcel, simply because of the problems associated with the ongoing monitoring and enforcement of the land use designation.		
3.0	General	Section 3.0, states that…"Ministry staff shall use the procedures in this document to establish the boundaries of a site and to establish the associated service fees". What is the role of the consultant in determining site boundaries? What process is available for the consultant for establishing site boundaries?		Explained in section 2.4.
3.0	General	For ministry staff only?		This will also guide environmental consultants in preparing draft legal instruments for eventual signature by the Director. Clarified in section 2.4.
3.0	General	A question arises as to how an Approved Professional would use this Procedure when recommending instruments. Must a decision of the Director regarding boundaries of a site be obtained?		Clarified in section 2.4. This will also guide environmental consultants in preparing draft legal instruments for eventual signature by the Director. We would expect Approved Professionals to be aware of this procedure and draft legal instruments accordingly.
3.0	General	Could Protocol 6 be linked to this Procedure to ensure that Approved Professionals also follow this Procedure? Does it need to be a Protocol if it is to be used by Approved Professionals? What authority to make decisions regarding site boundaries is afforded Approved Professionals under EMA? Will challenges to such decisions made by Approved Professionals (e.g. for sites not captured in quality reviews) be borne by the Director?		There is legal authority to include provisions such as these in a protocol but there needs to be discretion for a Director in making site boundary decisions. For the present these provisions should be part of a ministry procedure document where there is more flexibility for a Director. Approved Professionals are not making legal decisions on site boundaries – they are making recommendations to the Director so challenges will be borne by the Director.

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6.1	Full areal extent of contamin-ants	"Depending on the [specific] circumstances", the Director may require delineation within entire parcel even if an instrument for a portion of the parcel is sought, or that the entire extent be delineated if similar contamination is present on bordering parcels. The phrase "depending on the…circumstances" is used in both paragraphs, with no explanation of what the circumstances might be. Phrase is therefore ambiguous, redundant and should be clarified or removed. "Circumstances" should be clarified, such as if delineation is not achieved for the portion or recontamination may occur. Should also specify responsibility for source parcels. Retain "the Director *may* require*"* to allow MOE discretion.	Suggest re-wording as: The ministry may receive an application for a contaminated sites legal instrument for part of a legal parcel. If delineation is not achieved for the part or there is a potential for contamination of the part by remaining areas of the parcel, the Director may require that the entire extent of potential contaminants of concern and of contaminants be addressed within the single legal parcel. If an application for a contaminated sites legal instrument is received for an entire legal parcel where the ministry knows or suspects that the subject parcel is the source of contamination of a similar nature at bordering parcels or there is a potential for subsequent contamination of a source parcel by bordering parcels, the Director may require that the entire extent of potential contaminants of concern and of contaminants at all the parcels be addressed.	This change has been accepted with a few edits.
6.1	Full areal extent of contam-inants	Para 2 typo: "the a Director" should be "the Director		Correct. Change made.
6.3.1	Part sites	Does this mean that the responsible party have to obtain a Determination for the other part of the legal parcel, or otherwise fully investigate the entire legal property? We think this policy would be problematic in the case of someone who	MOE should clarify comments provided in the workshop that seem contradictory to past policy. Specifically, MOE suggested that it is	Comments addressed in new section 10.0.

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		is leasing a portion of a legal parcel, and is vacating their lease (e.g., is the operator of a gas station at the corner of a mall required to investigate the dry cleaners on the mall also?) In the past, the policy has been to consider the activities on the rest of the property as potential "offsite" APECs to the property under investigation, and assessed accordingly.	possible to get a contaminant specific instrument if the contaminants of concern were distinctly different (the example given was migration of hydrocarbons onto a neighbouring site that has metals-contaminated fill).	
6.3.2	Part sites	Section 6.3.2 is unclear. The last sentence seems to contradict the earlier text in the section.		Corrected contradiction.
6.3.2	Part sites	Lease agreements often involve portions of legal properties. As leases have become more sophisticated leaseholders are required to obtain (or see a benefit from obtaining) an instrument on the lease lands upon termination of the lease. Under this procedure the leaseholder would be required to obtain an instrument for the remainder of the property. Consistent with the Ministry Advisory Panel Report we believe that the joint several and absolute liability for the entire legal property is unduly harsh in this circumstance.		This has been noted for any future review of liability provisions for remediation of contamination.
6.3.2	Part sites	Why would an instrument be required for the remaining part of the site? There may be scenarios where the site owner does not want an instrument for the remaining portion. This would provide some assurance that a contaminated site owner is not going to diminish assets. In the event that the remaining portion is determined to be “high risk”, BC MOE would be involved until the remaining portion was no longer considered high risk.	We do believe, however, that in certain circumstances, some form of legal agreement from a site owner to investigate and delineate contamination (and submit reports for MOE/Approved professional review) on the remaining portion may be warranted prior to issuance of an instrument.	The ministry might be able to enter into an agreement to investigate and delineate contamination but it would not be legally enforceable. Thus the ministry favours more enforceable provisions such as that described in section 7.3.2 of the current draft of the procedure.
6.3.3	Part sites	Does "site" in the last line refer to the clean or the dirty? Is this any different than saying an instrument can be issued for a part of a site as per 53(6) EMA?		It refers to the contaminated part of the parcel and is the same as saying an instrument can be issued for a part site.
6.4.1		First sentence redundant; no need to refer to 6.2, as 6.2 is a general umbrella statement.	Only need: If an application for a contaminated sites legal instrument has been received for a parcel that is evidently	We prefer to maintain the current wording since it serves as a reminder to staff.

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			the source of contaminant migration to a bordering parcel, the boundaries of the site should be established based on the procedures in sections 7.2 or 7.3, depending on the ownership of the bordering parcels.	
6.5	Bordering parcels	"associated sites" too vague, and may refer also to source and/or receiving sites named in a Contaminated Soil Relocation Agreement. I think the intent was to refer to associated parcels, but if the definition of a site can include a portion or all of a bordering parcel, then this statement should be simplified and thus clarified. Also, there is no reference to ownership, which can complicate obtaining instruments for multiple parcels.	Suggest rewording to: All contaminated sites legal instruments for a site having a single owner should be issued concurrently.	The term "associated" was clarified to mean they have common sources.
6.5	Bordering parcels	Section 6.5 states that…"All contaminated sites legal instruments for a site and associated sites should be issued concurrently." As a consultant, we are concerned with the level of effort to obtain instruments "concurrently" as delineation would be required for obtaining any instrument (AIP or CoC) for a portion of a legal property. We believe that this could limit brownfield development in the province. Our comments above apply to this section as well.		This has been noted for any future review of the contaminated sites legal provisions as part of a provincial brownfields program.
6.5	Bordering sites	Section 6.5 contains a reference to "associated sites". It is not clear what is intended. Is it legal parcels that are all contaminated from the same source? Also, the legal parcels may be cleaned up at differing rates or some owners may not want or be able to clean up their legal parcels. Waiting to issue all instruments concurrently may result in unnecessary delays in dealing with legal parcels (sale, development, etc.) that have been remediated.		The term "associated" was clarified to mean they have common sources.
7.1	Site boundaries		Grey areas should be described as "delineated areas of environmental concern (AECs)".	Done.

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7.2.1	Site boundaries		Grey area should be described as “delineated area of environmental concern (AEC)”.	Done.
7.2.2	Site boundaries		Grey area should be described as “Site 1”; white area, “Site 2”.	No change made because the combined area is one site.
7.3.1	Site boundaries		Should indicate that Parcel A = Site 1; Parcel B = Site 2	The description already is provided in the text, not in labels.
7.3.2	Offsite migration	There is an on-going concern as to the lack of consultation between the proponent, local government and the City with respect to offsite contamination and sharing of draft offsite instrument for review and comment prior to issuance by the ministry.		This has been noted for review as part of the ministry’s response to offsite migration report. Note that local governments whose land is impacted by offsite contamination in the context of an application for a contaminated sites legal instrument should already have been notified about the actual or likely contamination via notification of offsite migration.
7.3.2	Site boundaries		Grey area within Parcel A should be described as “Site 1”; grey area within Parcel B, “Site 2”.	Done but not labelled.
7.3.3 7.3.4	Bordering parcels	We are concerned with the liability statement as discussed in Section 7.3.3 and 7.3.4. The nature of the liability outlined in Appendix 2 gives the impression that risk based standards would not be as acceptable as numerical standards. It is our understanding that risk based standards are equivalent to numerical standards with respect to acceptability to the ministry.		Sentence reworded. Both types of cleanups are acceptable to the ministry. The liability under each differs since under the risk-based approach the site remains contaminated.
7.3.3	Site boundaries		Grey area should be described as “delineated area of environmental concern (AEC)”.	Done.
7.4	Site boundaries		Site should encompass all nearby contaminated areas. Grey areas should be described as “delineated areas of environmental	Done.

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			concern (AECs)".	
8.0	Multiple land uses	Based on case law, suggests that sites with multiple land uses require multiple instruments (i.e. separate instrument for each area of separate primary land use). Could significantly complicate (and increase costs for) large developments (i.e. Union Bay) if separate instruments are required for roads, commercial areas, residential zones, parks, etc. Also complicated by potential for having separate water and sediment uses defined as separate sites. Alternative is to use most conservative applicable standards, which will lead to more risk-based CoCs. (maybe a good thing?)		Multiple water and sediment uses are allowed. Clarified that the most stringent soil numerical standards could be used if a client wishes the administrative process to be simplified.
9.3	Fees	Does not include sites that are separated by roads, owned by the same owner. If not reworded as shown, you may have an owner trying to obtain instruments for separate, nearby parcels that were all investigated together for the same reason, having to pay separate fees for each report review only because of typically sluggish municipal or Crown owners of adjacent or intervening roads.	Should be reworded as: Fees for reviews of single site investigation reports, single remediation plans, single confirmation of remediation reports and single risk assessment reports may cover review services for multiple sites if the sites are bordering, are separated only by roads or right-of-ways, and are owned by the same owner or cooperating owners.	Recommendation accepted.
Appendix 2		A bit wordy, but generally understandable after reading a few times… Further clarification in language may be appropriate.		Revised and clarified.
Appendix 2	Liability	Clarification is required in Appendix 2 on the following statement: "In a situation where a Certificate of Compliance is issued for a site composed of parcels held by different owners, additional remediation liability for each owner may result". How would this relate to scenario in 7.3.2? Why would the owner of Parcel B hold additional remediation liability particularly when the owner of Parcel A does not even consult with owner of Parcel B on whether a numerical, risk based or a hybrid remediation strategy is undertaken for offsite		Reworded Appendix 2 for clarification.

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		contamination?		
Appendix 2	Liability	Furthermore, there is an additional statement in Appendix 2 which requires clarification: "This is particularly important for a site remediated using the risk based approach, where the site would continue to be considered contaminated after remediation, even though it met the risk based standards of the Contaminated Sites Regulation and had been issued a risk-based Certificate of Compliance".		Added explanation to Appendix 2 for clarification.