

Protocol 6 - Eligibility of Applications for Review by Approved Professionals

Document Section(s)	Issue	Stakeholder Comments/Recommendations	Ministry Response
3.2/5.2	CSAP Society comments from standards perspective	<p>Whereas Section 3.2 lists and addresses qualifications of persons preparing and submitting recommendations for legal instruments and documents (or endorsements for documents) that are conditions of legal instruments (Section 5.1) it does not list and address qualifications of persons making additional recommendations, reports and opinions (Section 5.2). Questions arise such as:</p> <ul style="list-style-type: none"> • Is there any reason the activities / responsibilities listed in Section 5.2 should not also be addressed in Section 3.2? • Section 5.2 states "...Approved Professionals may provide recommendations, reports and opinions to a Director in relation to the following:", so is it to be inferred that no qualification statements are needed or appropriate in regard to the submissions listed in section 5.2? 	Points noted and s. 5.2 has been amended to clarify that the same professional experience and qualifications required for AP activities identified in s. 3.2 apply to s. 5.2.
4.3(b)		<p>Section 4.3(b) indicates that a Director may require that an application for a high risk site must be accompanied by a recommendation of an Approved Professional. The following questions arise:</p> <ul style="list-style-type: none"> • Despite the definition for "high risk site" and "non-high risk site" indicated in Section 2, paragraph 2 of this Protocol (but not in Procedure 8 in terms of "low or moderate risk") has MOE determined that this is consistent with authority provided in CSR Sections 43, 47 and 49? 	Comment addressed in changes to sections 4.3 and 4.4
4.4 and Table 1		<p>Has MOE determined that even though Sections 43, 47 and 49 of the CSR give authority to the Director (i.e., "the Director may require"; and, "Classified under a Director's Protocol") only for:</p> <ul style="list-style-type: none"> • Contaminated Soil Relocation Agreements • Approvals in Principle, and • Certificates of Compliance <p>(and Section 15(6) &(7) Determination of Contaminated Site) and only for:</p> <ul style="list-style-type: none"> • "a low or moderate risk site" that in section 2, paragraph 2 of this Protocol is defined as a "non-high risk site" <p>that Section 4.4 and Table 1 can require that:</p> <ul style="list-style-type: none"> • applications for high risk sites be accompanied by the recommendation of an 	Comment addressed in changes to sections 4.3 and 4.4

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		Approved Professional?	
4.4 and Table 1		<p>Regarding the requirement in Section 4.4 and Table 1 for applications for Determinations and CSRAs to be accompanied by a recommendation of an Approved Professional:</p> <ul style="list-style-type: none"> • Is the definition in Section 2, paragraph 2 and the provision in Section 4.3(b) of this Protocol considered to provide the authority required authority despite CSR Sections 43, 47 and 49? • Does MOE consider that Approved Professionals are not in conflict with the CSR and that the Indemnity Agreement is still valid due to provisions and requirements of Protocol 6 if recommendations are made for high risk sites? • Does MOE consider EMA Section 64 (e.g. 64(2)(i)?) to provide the authority for Section 4.3 as well as 4.4 and Table 1 provisions despite CSR Sections 43, 47 and 49? (Note: CSR Section 15 appears silent on risk levels in regard to recommendations for Determinations) 	Comment addressed in changes to sections 4.3 and 4.4
4.6		<p>It is recommended that the 1st bullet of Section 4.6 be reviewed for consistency. We understand that a Determination can only be applied for if no contamination is present (unless it is for an application for Determination that a site is contaminated); therefore, to refer to requirements for delineating contamination at a site for which a Determination is applied for seem inconsistent. Perhaps alternate wording might be considered, for example as below:</p> <p>4.6 Subject to section 4.7,</p> <p>(a) with respect to an application for a Determination of Contaminated Site¹, any applicant who is not a responsible person for <u>any contamination that may be present</u> at the site need only have <u>satisfactorily investigated delineated</u> the entire area of <u>potential</u> contamination at the site which is the subject of the application for the Determination, and</p>	Point noted and simplification of former s. 4.6 made.
4.6		The footnote reference (#1) that refers to the EMA Section 53(6) provision allowing for an AIP or COC for part of a site is attached in both part (a) (i.e., Determination) and part (b) (i.e., AIP and COC). Unless it is intended to emphasize that the	Footnote 1 moved to Table 2.

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		provision does not apply to applications for a Determination, the footnote reference in part (a) could be deleted.	
4.7 / 4.8		Section 4.7 indicates two options if approval is not given for applications with any of the approaches in Table 2, Section 4.9. (i.e., seek approval again; or, amend the application for a legal instrument so the approval is not required). Section 4.7 does not make reference to Section 4.4 and Table 1. If approval for an approach in Table 2 is not granted is another option applicable (i.e., submission directly to the ministry for review, as per current Section 4.9)?	There would not generally be a third option; the point is noted and will be considered further as part of future updates to improve overall clarity of the Protocol.
4.9		Section 4.9 - relocation to immediately following Table 1 and Section 4.4 might be considered. Section 4.3 and 4.4 deal with mandatory submissions by Approved Professionals. Since 4.9 addresses the alternate, mandatory submissions to the ministry, relocating it would seem to ‘close off’ that issue before addressing the issues of investigation of part of a site (Sections 4.5 and 4.6) and (pre)approvals (Sections 4.7 and 4.8). The current location of Section 4.9 seems to be a temporary diversion into another topic the text of Section 4.8 and Table 2.	Agree; section 4.9 moved.
Table 2		<p>Several questions arise that would benefit from clarification in regard to approach 1 and particularly the sequence of approvals for situations addressed by AG#15 (referenced in a note to) Table 2, Site Profile release applications by Approved Professionals, and the relation to Protocol 6. Administrative Guidance #5 (p. 2 under states the following: “As with Protocol 6 approvals, site profile release notice approvals must be obtained in advance of making a request for a release notice. The release notice approval must be included with the release notice request package.”</p> <ul style="list-style-type: none"> • Does one reference to “release notice approval” refer to approval per Protocol 6 and one “release notice approval” refer approval per AG#6? • Is it correct (as would seem logical) that an approval per Protocol 6 would be a prerequisite to a request for a Site Profile release notice? (The AG#15 statement does not seem clear in this regard.) • For each of Situation 1 to 7 in Appendix 1 of AG#15, under the subheading “For a site profile notice approval” it is stated that a “A site profile release notice is 	Some amendments to the “Intended Approach” language and footnotes have been made. Other points will be considered as part of future updates.

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		required” which is expected (if a site profile release is intended). Can a statement be made regarding prior approval under Protocol 6 (either in AG#15 of Protocol 6)	
Table 2	Additional Amendment recommended by MOE: Retention of approval requirement for ordered sites.		The Ministry recommends retention of item No. 3 in Table 2 version 8 of Protocol 6 <i>Involving Orders</i> . This provision was initially removed as it was thought to be redundant and had never been used. However, recent experience has shown that the provision holds value particularly for sites under order from other Branches within the Ministry of Environment.
Appx 1 – Approval Applic Form		The instruction sentence at the top of the form refers to Table 2, section 4.7, whereas in the text of Protocol 6, Version 9, Draft 7, Table 2 is within section 4.9. The section reference should be corrected. The lead sentence refers to Table 2, section 4.7, whereas in the text of Protocol 6, Version 9, Draft 7, Table 2 is within section 4.9	Table 2 is repositioned as part of new s. 4.9. This addresses the second part of the comment too.
Applic Form		The items listed and to be checked in this part of the Approval Application Form do not appear to have been updated and so do not match Table 2. Item 2 has been removed in Version 9, Draft 7	Updated.
	CSAP Society comments from risk perspective	(no requested or suggested changes to draft Protocol)	Acknowledged.
3.1	Additional		In addition to the

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	<p>amendment recommended by MOE: Risk-based CSRA applications must be submitted for Ministry review</p>		<p>amendments proposed in v 9.0 draft 7 of Protocol 6, MOE is additionally recommending amendment of section 3.1 to remove risk-based CSRA applications from the list of application types that AP's are both qualified, and required, to make direct recommendations to the Director. In other words, all risk-based CSRA applications must be submitted for Ministry review.</p> <p>Very few risk-based CSRA applications have been sought and issued since 1997 and it has been recently determined that insufficient administrative and technical guidance exists to adequately guide AP's in preparing and recommending Director approval of these kinds of applications. For example, the Director has a number</p>

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			<p>of important considerations that must be made – and the ability to impose specific terms and conditions in any issued CSRA – pursuant to EMA s. 55; these considerations and authorities are not presently well documented meaning that APs and any applicable CSAP Performance Assessment Panel would likely find it difficult to be able to review a risk-based CSRA application.</p>
4.6 (b)	<p>Additional amendment recommended by MOE: Clarify limitations of non-responsible persons for delineation of contamination in the context of <u>both</u> Approvals in Principle and</p>		<p>Amendment of s. 4.6 (b) of Protocol 6 is recommended to clarify that persons not responsible for contamination at a site need only delineate contamination at the site for which an Approval in Principle or Certificate of Compliance is being sought. This recommendation operates to reinforce the</p>

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	Certificates of Compliance applications.		<p>remediation liability provisions of s. 46 of EMA (Persons not responsible for remediation).</p> <p>Footnote 1 is moved to Table 2 to similarly increase clarity of the document.</p>
Table 2 and footnotes	Additional amendments recommended by MOE to increase clarity for responsible persons regarding degree of delineation and scope of legal instrument(s), as well as adding footnote references to other key regulations, protocols and guidance.		<p>Item No. 1 of Table 2 is amended to further clarify that non-delineated and non-remediated parts of sites seeking legal instruments should not be included in instrument applications.</p> <p>Footnotes are added to explicitly reference the applicable protocol for determination of local background substance concentrations in soil and groundwater (i.e., Protocols 4 and 9), and to advise that management of hazardous waste is subject to the requirements of the Hazardous Waste</p>

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			Regulation including requirements for Director's approval of an in-situ management facility in the case of applications involving risk assessments.