

ENVIRONMENTAL LAW CONFERENCE—2007

PAPER 1.1

How the New Environmental Management Act (“EMA”) Works

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I. Overview

The purpose of this paper is to offer a synopsis of the “new” *Environmental Management Act*, 2003¹ (“*EMA*”) and its fresh approach to environmental management. This paper provides a general overview of the *EMA*, which is now not so new having been in force for about three years. What follows is a brief outline of BC’s innovative environmental legislation and its machinery along with basic descriptions of the various players, all of whom enable the *EMA* to serve as the legal centre-piece of the Province’s environmental policy.

A. Legislative Background

In May 2002, the then Ministry of Water, Land and Air Protection, embarked upon a comprehensive review of the provincial government’s approach to environmental management, and particularly contaminated sites. Ostensibly, the Province intended to modernize BC’s environmental legislation and formulate an entirely restructured approach by incorporating contemporary public policy concepts. Considerable efforts went into consultation between the government and various stakeholder groups, including its executive, industry and, of course, numerous public interest groups.

Under the auspices of the since re-named Ministry of Environment (the “Ministry”), this considerable work culminated in the “new” *Environmental Management Act*, along with a series of fundamental amendments and additions to the Contaminated Sites Regulation (“*CSR*”), Hazardous Waste Regulation (“*HWR*”), and Waste Discharge Regulation (“*WDR*”) to name the major legislative changes. In addition, several provisions, including many that addressed “special waste,” were repealed or subsumed into the newly amended regulations under the *EMA*.

These fundamental changes were implemented with the object of creating a more dynamic and flexible legal framework to better address pressing environmental issues, although many of the same statutory and regulatory tools continue in use under the “new” *EMA* regime.² The resulting *EMA* is a single piece of legislation that repealed and replaced both its 1996 predecessor act of the same name and the *Waste Management Act*.³ Altogether, the new regime took effect July 8, 2004 with several amendments since then.

B. Core Objectives of the Province’s Fresh Approach under the *EMA*

I. Pre-*EMA* Legislative and Regulatory Background

In 2002, legislative reformers decided BC’s former environmental statutes and their associated regulations did not adequately tailor responses to the gravity of any given environmental threat. Legislation and regulations in force at that time mandated a standardized, default response in every situation without taking into account the true risk posed in any particular set of circumstances. In essence, the previous environmental regulatory system forced a so-called “one size fits all” approach on those assigned to implement the *EMA*’s predecessor legislation and those who worked under it. In other words, the former system often invoked inflexible responses without regard to the actual risk posed in each instance. For example, regulations geared to pulp mills could also catch run-off from car washes. Previously, any discharge of waste required some form of Ministry authorization whether it was a Minister’s or Director’s permit, regulatory approval, or other administrative approval.

1 S.B.C. 2003, c. 53.

2 Schedule “A” appended to this paper lists the 36 separate heads of regulations under the *EMA*.

3 BC Reg. 317/2004 repealed the *Environmental Management Act*, R.S.B.C. 1996, c. 118 and *Waste Management Act*, R.S.B.C. 1996, c. 482 effective July 8, 2004.

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In summary, owing to its prescriptive nature, the Province's former environmental legal regime frequently could not adequately take into account the actual environmental threats posed on a specific basis. As a result, often unjustified demands were brought upon both regulators and industry with the further consequences that the Ministry's limited precious resources, namely time, money, and people, were often needlessly diverted under the previous legislation and an onerous regulatory system.

In theory, it appears that the legislative reformers' prime goal was to replace the existing inflexible regime with a flexible system that would be capable of providing tailored and appropriate responses in any given environmental context. The Province and Ministry coined this new approach as a "risk-based" or "results-based" legislative system not dissimilar to the approach taken by the US EPA through its innovative initiatives proven effective years earlier.⁴

The modernization of BC's environmental legislation had several imperatives. No doubt, the shift that occurred in 2002 in the Province's strategy to achieve the very same goals set out in the original 1993 legislation was partially driven by budgetary necessity but also reflected the provincial government's free-market philosophical view.

Under the Ministry's new risk-based approach, a far larger role is now played by private environmental consultants, at least where hazardous waste and contaminated sites are deemed to be "low" to "moderate" risk, according to the relevant regulations. Under the new regime, the old "roster" of professionals is replaced by Ministry approved and authorized private environmental consultants who are now known as "Contaminated Sites Approved Professionals" ("CSAPs").⁵ Under the *EMA*, the Minister has far wider power than in past to establish regulations along with industry codes of practice or protocols pursuant to the Act.⁶ The Minister has statutory authority to delegate power to the CSAPs to identify contaminated sites and determine the extent of a site's contamination. Further, if the degree of total risk posed in all the circumstances by a particular site is assessed by CSAPs to be "low" to "moderate" under the new risk-based guidelines,⁷ save for highly contaminated sites, CSAPs are authorized to approve and supervise a remediation plan. The Ministry may rely on CSAP advice pursuant to *EMA*, s. 42. In the prior regime contaminated sites were assessed by simple reference to one factor, namely degree of contamination with reference to numerical standards, and only the minister could oversee this assessment.

To further assist the Province's move toward greater regulatory flexibility, under the *EMA* the Minister has power to make regulations directly, such as industry codes of practice, as opposed to previously regulation to the prior *EMA* and *WMA* were by Orders-in-Council though Cabinet.

4 For example, see the US EPA news release of October 1999, regarding the Agency's new "risk-based approach." Hypertext link: <http://yosemite.epa.gov/opa/admpress.nsf/89745a330d4ef8b9852572a000651fe1/604638f6fa69b9928525680300690391!OpenDocument>.

5 The CSAPs have already established a registered BC Society and have a home-page at www.csapsociety.ca for their members.

6 Broad, discretionary authority is granted to the Minister, including his or her delegates under *EMA*, ss. 5; *EMA* s. 22 provides the Minister with authority to make binding and enforceable codes of practice, which are industry-wide protocols; further broad discretionary powers are granted to the Minister and delegates to address contaminated site regulations under *EMA*, ss. 39, 43, 49, 53-59, 63; and the *EMA* even provides the Minister with the power to enter private land under authority of s. 110; lastly, although the Minister can launch cost recovery actions, levy fees, and charge persons with administrative penalties where reasonably warranted, the Minister enjoys immunity as a "protected person" under *EMA*, s. 61.

7 *CSR*, s. 18, Schedule risk-based standards that supersede the previous numerical 4-category approach.

2. Risk-Based (Principled) Approach

The risk-based approach under the *EMA* could be described as epitomizing a shift from a narrowly defined, strict or prescriptive approach to environmental management to one where there is reference to a broad set of principles in order to achieve the very same environment management goals. Under the Province's risk-based approach, comparatively inflexible prescriptive or standardized default responses have been replaced by risk-based remediation standards, Codes of Practice (also known as protocols) implemented largely by CSAPs with the Ministry's direct involvement limited to mainly high-priority, highly-risk contaminated sites.

The amended Contamination Site Regulation at its heart embodies the government's modern risk-based approach to remediation of contaminated sites.⁸ The objectives of the *EMA* and CSR are paramount as opposed to previous system where, all too often, the process itself became the focus of efforts. In theory, the new legal regime involves a move toward greater use of regulations, administrative orders and industry Codes of Practice⁹ as the Provinces' prime environmental management tools. This change in tactic should provide a more timely and flexible system that is less labour intensive to improve regulatory responses to contemporary environmental issues.

Under the former *Waste Management Act*, all authorizations to discharge waste were handled through granting individual permits which had to be continually monitored. With a view to focusing and stream-lining regulatory processes under the new *EMA* and WDR/HDR, permits are now necessary only for moderate to high-risk activities similar to the prior prescriptive solutions imposed the former "permit-based" regime. However, with respect to comparatively low risk activities, codes of practice now govern and encompass industry sectors.¹⁰ An important purpose behind industry codes is to shift away from a single, rigid, mandatory permit system to industry-wide solutions informed by experts from industry and CSAPs and far less day-to-day government involvement in monitoring and implementing prescriptive remedies.

To recap, a risk-based approach entails taking an objective view of the specific environmental threat relative to other risks in light of all relevant factors, such as cost to prevent or mitigate the threat, and then responding accordingly. To that end, the CSR is geared to adjust responses in proportion to the problem as measured by a priority-based model which is set out in the CSR, s. 18 and its Schedule 1. The CSR and its Schedules contain details of the "risk-based standards" that form an integral part of the contaminated site definition. This approach aims to allow limited Ministry resources to focus on high-risk threats. Consequently, the new *EMA* tends to be characterized not only as risk-based approach but also as market-based approach, because of its reliance on self-reporting and industry expertise to monitor and enforce the *EMA*'s objects, at least for low to moderate risk sites and operations. Commensurate with the greater role of the market under the new *EMA* is increased used of fees (purported "cost recovery"). Finally, it remains to be seen whether the numerous fees under auspices of the *EMA* will not rise above their source in some instances as temptation gives way to revenue generation.

In brief, some of the key changes in the *EMA* are highlighted below.

Notable changes in the *EMA* include:

- Responsibilities that were formally divided between "directors," "managers," and "officers" all belong to "directors" and the position of "manager" has been eliminated.

8 Section 18, CSR.

9 Section 22 *EMA*.

10 Subsections 6(2)-6(5) of the *EMA* in conjunction with the new Waste Discharge Regulation sets out permit based activities requiring permits and provides exceptions for compliance with applicable Practice Codes.

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- As is the practice in most other Canadian jurisdictions, “special waste” is now referred to as “hazardous waste” and no longer stored under individual permits but “in accordance with regulations.” Special waste is treated like any other contaminant now and rated on a gradient under the single head of HWR.
- “Conditional Certificates” of compliance are eliminated.
- Greater certainty is added for holders Certificates of Compliances (“COCs”) with the elimination of provisions that allowed ministry to revisit COCs and require further treatment of sites under different standards *post hoc*, though possession of a COC is not a complete answer to an allegation of non-compliance.¹¹
- There is a nod toward greater cohesion and uniformity in regulatory responses through “area-based management plans” but there appears to be dearth of such plans fully implemented.
- The former “Roster of Approved Professional Experts” in the CSR has been incorporated into the *EMA* as “Contaminated Site Approved Professionals” (“CSAPs”) with government-approved licensing in process.

Some Proposed changes:

- Some retention of numerical-based criteria to categorize sites (in order of progressive threat I, II, III, IV) but primarily a shift to “risk-based criteria”; however, CSAPs rather than the ministry will assess, investigate, verify actual risk levels and prepare recommendations for all categories but VI, which will also be handled by the Ministry.
- Section 64 *EMA*, in conjunction with CSAPs, directors authorized to establish mandatory protocols in relation to technical matters and Codes of Practice.
- There are nascent discussions of trading “pollution credits” so those operations most able and most economically motivated to reduce their emissions below beyond minimum levels. In theory, such a system would entice those actors who can further modify their activities to abate their pollution emissions beyond mandated minimums.

Purpose of the *EMA*, CSR, WDR

In the main, the purpose of the *EMA* is to provide a modern legislative vehicle for environmental management with the goals of protection of human health, the quality of water, land and air in BC.

With these purposes in mind, the *EMA* in conjunction with its regulations, specifically the CSR, casts a wide net of liability over persons responsible for pollution of BC’s environment. This is to ensure sites determined to be contaminated are properly and promptly remediated at the expense of those who were responsible for the pollution and not left orphaned for tax payers to cover remediation costs. Essentially, the *EMA* and CSR are a codification of the well-known “polluter pay” principle.

3. Authorizations under *EMA*

Under the *EMA* and Waste Discharge Regulations (“WDR”), Ministry authorizations are required only by prescribed entities that introduce waste into the environment. Previously, any discharge, no matter how slight the risk posed, required various forms of authorization from the Ministry. However, the risk-based approach of the *EMA* now allows for a site specific context in assessing threats. Under *EMA*, s. 6(2) and s. 6(3), only introductions of waste from “prescribed” industries, trades, businesses,

11 With a view to greater certainty, a change of standards no longer activates an automatic review of past COCs but the directors has an option to “re-open” a COC for reasons related to other areas of concern such as contaminants not addressed on the original clean-up order.

operations and activities are delineated in the WDR and require Ministry authorization in order to discharge substances into the environment. If an industry, trade, business, activity or operation is not “prescribed” by the regulation, it does not require an authorization to introduce waste into the environment.

In general, prescribed operations are those the Ministry considers pose a moderate to high risk to the environment, including people and wildlife. While low risk operations that are not prescribed do not require Ministry authorization to introduce waste into the environment, low-risk operators cannot cause pollution in any event (*EMA*, s. 6(4)).

High-risk operations still require permits or are governed by codes of practice and industry protocols which are basically sets of regulations that apply industry-wide. In general, operations which pose a moderate environmental risk will be addressed through a Code of Practice, and effectively make certain industries self-regulating.

4. Waste Discharge Regulation (“WDR”)

For the purposes of *EMA* ss. 6(2) and 6(3), the Waste Discharge Regulation (“WDR”), provides that only certain or “prescribed” industries, trades, businesses, activities and operations as listed in WDR, s. 2 and Schedule 1 and 2 require an authorization to introduce waste into the environment. The types of persons or operations listed as “prescribed” in the Schedules invariably are those that pose a moderate to high risk to the environment.

Generally, only the persons or operations listed in Schedule 1 require an authorization, which could be in the form of a site specific permit, an approval, a regulation, an operational certificate, an order or a waste management plan, to introduce waste into the environment.

Parties listed in Schedule 2 are eligible to be authorized by a Minister’s Code of Practice to introduce waste into the environment on an industry-wide basis as opposed to a site specific permit. However, where appropriate, site specific responses are available to the Ministry under the WDR, but this is not the default state.

In addition, the WDR contemplates aspects of the government’s philosophical thrust for “cost-recovery” of services, meaning more user-fees or simply fees in general. The WDR provides for registration and a fee payment process for operations that are eligible to seek a waste discharge authorization through a code of practice. There are positive incentives for good environmental behaviour as *EMA* gives the Ministry authority to pro rate fees according to historical behaviour.¹²

5. Code of Practice

Under s. 22 of the *EMA*, the Minister has the power to establish legally binding and enforceable sets of rules that must be followed by the specified industry and are collectively known as a “code of practice” (“Code”). Each Code directs a particular industry as what is expected of it in terms of environmental protection. Violation of a Code can lead to an enforcement action by the Director and Ministry against the offender, including monetary and administrative penalties. The first Code addressed was “Coalbed Gas Operations Discharging Produced Water.” Several more Codes are now in force including Slaughter and Poultry Processing Industries, and Soil Amendment with others winding their way through the Ministry’s consultative process, including Concrete and Concrete Products Industry Code for example. (The Ministry’s flow chart industry consultation for Codes is attached to this paper as Schedule “B.”)

¹² In addition to the Minister’s general powers, see WDR, ss. 9, 10.

6. Administrative and Monetary Penalties

The new *EMA* through ss. 115-129, provides statutory authority for both negative incentives, including monetary and administrative penalties, and positive economic incentives in the form of permitting the Ministry to charge certain persons preferred and individualized levels of fees contingent on a party's proven historical records of conforming to good environmental practices. In addition, those parties who prove themselves to be environmentally responsible will have less onerous reporting demands placed upon their operations. In other words, those parties who maintain good track records will pay less in terms of fees and charges and administrative burden under the *EMA*.

7. Hazardous Waste Regulation (“HWR”)

In order to harmonize with predominant legislation in other environmental jurisdictions, all previous regulations and references to “special waste” are gone and are simply now “hazardous waste.” Part 2 of the *EMA* gives the Director regulation-making power allowing the program director to require financial security for hazardous waste storage facilities. The Hazardous Waste Regulation (“HWR”) contains enhanced provisions for registering hazardous waste management activities (generation, storage, treatment, recycling and disposal) and for monitoring, reporting and auditing associated with these activities. Some important changes introduced by the HWR include mandatory use of a manifest purchased from the BC government for shipments of hazardous waste, biomedical waste is now defined, and the temporary storage exemption has been narrowed from previous provisions.

8. Site Registry

The Ministry's Site Registry is a public registry, established and available online since 1997, which lists sites investigated and cleaned-up. The Site Registry is not a contaminated sites registry, although some sites in the registry may be contaminated under current standards. In other words, the Site Registry is a guide but is not comprehensive or conclusive of any given site's environmental status.

9. Contaminated Sites

The fundamental policy imperative of “polluter pay” still underlies the *EMA* and its regulations and, in particular, the CSR, WDR, and HWR which flow directly from *EMA*, s. 6. The CSR sets out details of the contaminated site process including who may determine a site to be a “contaminated site” and consequences that flow from that determination and for which parties. The CSR sets out applicable standards, which vary by land and water use, for contaminated sites in its Schedules. In addition, although not as obvious as with post-pollution infractions, the concept of polluter pay also manifests in a pre-emptive sense through increased fees for non-conforming parties to help cover the overhead of the new regime. To a limited extent, the Ministry's “cost-recovery” fees may be justified using the polluter pays concept.

10. Liability for Contamination—*EMA*, Division 3, ss. 45-50

In respect to contaminated sites, s. 47(1) of the *EMA* prescribes liability of parties determined to be “responsible persons” under the Act in a broad and far-reaching manner.

The *EMA* states that persons responsible for remediation of a site determined to be contaminated under the Act's provisions are “absolutely, retroactively, and jointly and separately liable” to any person or government body for reasonably incurred remediation costs, whether incurred on or off a contaminated site.

Not only does the *EMA* work retroactively to assign liability for contamination, but that liability is absolute so no due diligence defence is available. Further, this provision provides for joint and

separate (several) liability¹³ so degree of involvement may not necessarily limit a party's exposure to liability and potential remediation costs. The former *Waste Management Act* (“*WMA*”) provisions provided that liability may be found even if the substance introduced to the environment is not prohibited by legislation at the time of introduction or was authorized by a former or existing permit. The new *EMA* is similar in that potential liability for activities of current and future land owners that were at one time but are no longer compliant appears to have carried over from the *WMA*. In contrast, the ability of the government to take regulatory action where a COC has been granted under the *EMA*, that is “re-open” an investigation, is now more constrained than in past.¹⁴

II. Cost Recovery Action

A. What is a “Cost Recovery Action”?

Also known as a “allocation action,” a cost recovery action is a statutorily created, private cause of civil legal action by which parties may recover reasonable costs incurred to remediate, or clean-up, land that the Director or a court has determined to be contaminated according to the provisions of the *EMA* (primarily s. 47) and its related regulations.

B. Who Can Start a Cost-Recovery Action?

Although it is usually the current owner, site operator or other responsible persons, or the Ministry, any party who has incurred reasonable remediation costs to clean-up a site determined by the Ministry to be “contaminated,” according to the *EMA* and CSR, may seek recovery of those expenses.

C. Certificate of Compliance

Once the Director is satisfied through reports by CSAPs that a contaminated site has been duly remediated, pursuant to *EMA*, s. 53, the Director will generally issue a Certificate of Compliance (“COC”) to the parties that undertook the site remediation or clean-up.

No doubt that improved predictably and certainty assists the contaminated site remediation process. Under the new *EMA*, the Ministry has less latitude to “re-open” contaminated site investigations or otherwise rescind its determination in granting a Certificate of Completion (“COC”) once a site has satisfied all necessary criteria for remediation and is therefore no longer contaminated. Currently, a mere change in Ministry standards alone is insufficient grounds to “re-open” a site investigation which was possible under the *WMA*. In addition, COCs no longer require indemnities to the Crown.¹⁵ While Conditional COCs no longer exist, an Approval-in-Principle (“AIP”) still exists. However, it ought to be noted that the Ministry's AIP is no guarantee. An AIP only suggests that the Ministry has approved the suggested remediation plan and confirms the plan should, but not necessarily will, result in a proper remediation.

13 The *EMA* drafters apparently view “joint and separate” as clearer in meaning in their desire to use plain language as opposed to the more familiar phrase, “joint and several” liability. However, consensus among commentators is that this change in language carries no substantive meaning.

14 *Supra*, n. 11.

15 *Petro-Canada vs. Assistant Regional Waste Manager Deputy Director of Waste Management*, Appeal Nos. 2004-WAS-001(a) & 2004-WAS-002(a) Jan./06 decisions (B.C.E.A.B). The EAB panel found that jurisdiction to include the indemnity clauses in the Certificate and the Conditional Certificate cannot be implied from the jurisdiction to require a person to register a covenant under s. 219 of the *Land Title Act* (“*LTA*”). The Act and regulations did not provide any source of express or implied authority for an indemnity clause or its registration pursuant to s. 219 *LTA*.

III. Who is the “Director”?

A. What is the Director’s Role?

Director is defined in *EMA*, s. 1 as:

“director” means a person employed by the government and designated in writing by the minister as a director of waste management or as an acting, deputy or assistant director of waste management.

Essentially, the Director is a Ministry employee who has delegated authority to implement the *EMA*, its various regulations, and related policies. The term Director in the legislation and regulation includes “delegates,” who are usually senior employees in the Ministry who have been expressly delegated in written form limited powers, pursuant to *EMA*, ss. 3, 57.

I. Conservation Officers

Under the Director’s oversight, Conservation Officers carry out compliance and enforcement duties. Conservation Officers derive their authority pursuant to s. 106 of the *EMA* and the Conservation Officer Authority Regulation (BC Reg. 318/2004), which provides conservation officers with their necessary powers and duties under various enactments.

Officer is defined in *EMA*, s. 1 as:

“officer” means a person or class of persons employed by the government or a municipality and designated in writing by a director as an officer, or a conservation officer.

B. What is the Extent of the Director’s Powers?

The Director has extensive power under the *EMA*. For example, under *EMA*, s. 64, the Director can set enforceable rules and protocols touching extensive areas of practice which the Director can then enforce through penalties. The Director can set standards and suspend CSAPs where warranted for failing to meet those standards. The Director can determine which sites are to be investigated or approve or deny remediation plans. Under *EMA*, s. 81, the Director can issue a Pollution Prevention Order, or a Pollution Abatement Order under *EMA*, s. 83 to force an activity to cease. If the Director requires further information, where warranted the Director may issue a Requirement to Provide Information Order under *EMA*, s. 77. These are only the Director’s main powers.

C. What May the Director Consider in Making Decisions?

The Director is subject to the usual constraints imposed by administrative law on the government’s executive. For example, the director, or delegatee, must find authority for his or her decision in the *EMA*, its regulations or otherwise from his delegated power. The Director cannot be arbitrary or consider irrelevant factors in his or her decisions. In other words, a Director’s decision cannot be patently unreasonable if the issue pertains to a question of fact. This means that, objectively viewed, no reasonable person in the very position and circumstances would have made the same decision. Director’s decisions involving a question of law are more open to EAB or court to review and, if appropriate, revise accordingly. Decisions on legal questions, like whether a particular regulation may apply to a given situation, are judged on the basis of whether the decision was objectively reasonable in all the circumstances.

IV. The Environmental Appeal Board (“EAB”)

A. What is the EAB’s Role, Mandate, and Authority?

The Environmental Appeal Board (“EAB”) is a statutorily created, quasi-judicial body or independent agency, which is the first level of appeal by the public or industry for the Ministry’s administrative decisions related to environmental issues. The role of the EAB is to ensure that administrative decisions made by the Ministry to protect the environment are fair and objective and conform to the relevant environmental statutes or regulations. The EAB derives its authority from Part 8 of the *EMA* and it is mandated to hear appeals of executive decisions under the *EMA* as well as the *Integrated Pest Management Act*, the *Water Act*, and the *Wildlife Act*. Members of the EAB are appointed by provincial Cabinet for a term of two years. The EAB is the final level of non-judicial appeal. Appeals from EAB decisions are discretionary and to the BC Supreme Court subject to the *Judicial Review Procedure Act*.¹⁶

B. The EAB’s Authority

The powers of the EAB are much the same as any quasi-judicial body. For instance, the EAB has the power to summon witnesses, documentary evidence and contempt powers. Recently, the source of the EAB’s powers were changed although, in practice, no effective change in power occurred. Effective June 21, 2007, the *Inquiry Act*¹⁷ was repealed. Concurrently, a new enactment, the *Public Inquiry Act*,¹⁸ came into force. The *Public Inquiry Act* amended s. 93(11) of the *EMA*, giving the EAB powers under ss. 34(3) and (4), 48, 49 and 56 of the *Administrative Tribunals Act*. These sections give the Board the power to compel witnesses and order document disclosure, to maintain order at hearings, to apply to the court for contempt proceedings and to provide immunity for the tribunal and its members.

V. Responsible Person Status

A. General Principles of Liability for Remediation

The *EMA*, s. 47(1), which sets out the general principles of liability for remediation, casts a relatively wide net as to which parties may be determined to be a “responsible person” (“RP”) under the Act and therefore liable for clean-up costs. 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. This means that any party that is found to be a RP may be held liable to pay in full the total remediation costs deemed to be reasonable in the circumstances and then look to the other RPs, if any, for contribution under a cost recovery action. Not surprisingly, the retroactive liability of the *EMA* can be harsh in some cases. The two main factors that a court will use in determination of a party’s liability are that party’s degree of involvement in the activities which led to the contamination and that party’s positive steps to conduct due diligence in the circumstances, given the information publicly and privately available at the material time.

¹⁶ R.S.B.C. 1996, c. 241.

¹⁷ R.S.B.C. 1996, c. 224.

¹⁸ S.B.C. 2007, c. 9.

I. Private Agreements

RPs, and others, are free to make arrangements among themselves to apportion liabilities but such agreements will always be subject to the court's final approval and override although the court may take into account the parties' intentions. In no event would the court or the Ministry allow a contaminated site to be "orphaned" meaning left without a party to fund its clean-up. Of course, the agreements must be enforceable to have any relevance.

2. Voluntary and Independent Remediation

Both voluntary and independent remediation involves clean-up of contaminated sites by RPs or, in some cases such as where contaminant has migrated, innocent parties. In all cases, remediation must be carried out in accordance with the CSR. However, no official determination by the Ministry or a court that a site is contaminated is required and to proceed with independent remediation. Voluntary remediation involves the RP and Director entering into an agreement which details how and when the contaminated site remediation will be done. This agreement, if duly executed by the RP serves to discharge that party's liability under the *EMA*.

Independent remediation largely does not involve government participation beyond the RP's obligation to give notice that it intends to remediate a property to the Ministry, which may inspect the site. Parties often begin with remediation and seek a determination that a site is contaminated later though this invites the risk that a cost recovery action may be more difficult to prove establish against other parties once the remediation of the site is underway.

On their own accord, RPs who undertake independent remediation may submit a remediation plan to the Ministry. If approved and carried out accordingly, following the successful issuance of a Certificate of Completion by the Ministry, RPs who successfully complete remediation of the contaminated site are no longer liable.

B. Who's a Responsible Person ("RP")?

First, it is important to note the distinction between being declared a "responsible" party for a contaminated site's clean-up as in a "responsible person" under the *EMA* and being "liable" for a site's clean-up. In choosing the label "responsible," the drafters of the *EMA* provided the Minister, and specifically the Director, with discretionary authority to compel parties to pay to clean-up sites before dealing with issues liability. However, having responsibility for a contaminated site assigned by the Director or Minister can, of course, ultimately lead to liability.

A party may have "responsible person" status imposed upon it by the Director issuing it with a remediation order pursuant to *EMA*, s. 48 in conjunction with the CSR. Alternatively, a party may be found to be a "responsible person" by the Director or a Court pursuant to the definition in the *EMA*, s. 47(5).

The terms "person" and "owner" and "operator" are cast in relatively wide definitions under the *EMA*, s. 39(1) and, because of the *EMA* retroactive liability aspects, also encompasses past directors, officers, employees, or agents past owners or operators of the site. However, there is a limitation in the CSR that stipulates that directors, officers, employees or agents must have authorized or permitted or acquiesced to the active that gave rise to the activities that gave rise to the costs of remediation. Similarly, CSR, s. 19 limits the liability of Producers to only those which had control over the handling and treatment of the contaminating substance at issue.¹⁹ Thus, acquiescing to activities that

19 For example, Chevron in *Gebbring et al. v. Chevron Canada Limited et al.*, 2006 BCSC 1639 [*Gebbring*], only delivered gasoline to the impugned filling station and did not exert meaningful control over its negligent storage and handling on site.

did not directly lead to site contamination would not fall within the definition of “operator.”²⁰ In addition, the definition of “owner” is far wider in meaning under the *EMA* than under the *Land Title Act* and would, for instance, include commercial tenants with lease hold interests who were not otherwise caught by the *EMA* as operators. Essentially, all parties with a prior and or continuing legal interest in the contaminated real property are caught by the definition as “responsible persons.”

“**person**” includes a government body and any director, officer, employee or agent of a person or government body

“**owner**” means a person who is in possession, has the right of control, or occupies or controls the use of real property, and includes, without limitation, a person who has an estate or interest, legal or equitable, in the real property, but does not include a secured creditor unless the secured creditor is described in s. 45(3) [*persons responsible for remediation of contaminated sites*]

“**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, but does not include a secured creditor unless the secured creditor is described in s. 45(3) [*persons responsible for remediation of contaminated sites*]

Subject to s. 46, *persons not responsible for remediation*, the *EMA*, s. 45 states which 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 produced a substance, and then 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 (“Producers”);
- (d) a person who transported or arranged for transport of a substance and then 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 (“Transporters”);
- (e) a person who is in a class designated in the regulations as responsible for remediation.

Where a contaminating substance has migrated from another real property, then the *EMA* deems the following persons to also be “responsible persons”:

- (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 Producer or Transporter who 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;

In addition, there are certain circumstances in which a secured creditor may be found to be a RP. It seems to be an open question still as to how site contamination caused by a chattel might be handled by the Act as the *EMA* addresses real property.

20 In *Gebring*, Directors of a copy which leased a contaminated property after the contaminated ceased spreading were not found not “operators” and therefore not liable.

I. EMA, s. 50, Minor Contributor

Once a party is found to be a responsible person under the act, that party is jointly and separately (severally) liable for all the contaminated site's remediation costs. However, that party may apply to the Ministry for "minor contributor status." If such status is granted at the sole discretion of the Ministry, then that party is only liable for its allocated share of the remediation costs and its liability is severed and limited.

Where the cost recovery action draws the party into court and no application has otherwise been made for minor contributor status under *EMA* s. 50(1), the court will address this secondary issue in assessing respective liability of the parties. Typical factors the court will take in to account in determine whether a RP is suitable for minor contributor status would weigh the party's degree of connection to the site over time.²¹

C. Who is Not a Responsible Person under the EMA? (Exceptions)

I. Who is Not a Responsible Person? EMA, s. 46, CSR, s. 19

Fortunately, the *EMA* contains provisions to protect innocent parties. Section 46 of the *EMA* lists several classes of persons who are "persons not responsible for remediation" in order to prevent them from being swept in by the Act's broad liability provision contained in s.47. For example, in s. 46(1)(a) there is an "act of God" exemption that provides an exemption for unforeseen, natural catastrophes. A further example can be found in *EMA*, s. 46(1)(j) where site owners or operators are not responsible for contamination that migrated onto their property from a property which they do not own and they are otherwise innocent as to the cause of the contaminant's migration.

The CSR, s. 19 stipulates that for owners and operators and their respective directors, officers, employees and agents to be liable they must have control of the substance which leads to the site's contamination.

2. EMA, s.61 Immunity from Contaminated Site Liability

Section 61(1) of the *EMA* defines who is a "protected person" and therefore immune from contaminated site liability. Essentially, this provision gives statutory immunity to members of the government and civil servants, though probably not their contractors or private sector consultants. Presumably, CSAPs are expected to carry insurance and this exposure provides a strong incentive to properly perform their professional responsibilities. However, this issue is very much unsettled as the potential for liability and cost of premiums could stifle the process or be prohibitive.

VI. Conclusion

Unquestionably, with its introduction of the *EMA* and its new "risk-based" approach, the Province intended to improve BC's environmental legislative regime and thereby improve management of BC's environment. In theory, a tiered or prioritized approach to managing environmental matters through the *EMA* and its related regulations should free resources to allow their reallocation to tackle higher-priority, meaning higher-risk, environmental matters. Given a central aim of the legislative reform begun in 2002 was to better focus and optimally allocate the efforts of government, environmental

21 For example, in *Gehring, supra*, n. 19, at para. 110 the Court accorded Ms. Filiatrault, who was a director of the company found to be a RP only for one of the 38 years the company owned the site and the contamination hydro carbon spread. Consequently, Ms. Filiatrault minor contributor status limited her personal liability.

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professionals, and industry to improve management of BC's environmental issues, it would be interesting to see objective empirical evidence to support these noble claims for "new" *EMA*, in time. Until then, few would dispute that the previous regulatory and legal framework had grown unwieldy and seriously needed to be revamped. A fresh approach was called for and that is precisely what we got with the *EMA*, starting in 2004.

VII. Schedule “A”—Environmental Management Act’s Various Regulations*

1. Agricultural Waste Control Regulation (BC Reg. 131/92)
2. Antisapstain Chemical Waste Control Regulation (BC Reg. 300/90)
3. Asphalt Plant Regulation (BC Reg. 217/97)
4. Cleaner Gasoline Regulation (BC Reg. 498/95)
5. Code of Practice for the Discharge of Produced Water from Coalbed Gas Operations (BC Reg. 156/2005)
6. Conservation Officer Service Authority Regulation (BC Reg. 318/2004)
7. Contaminated Sites Regulation (BC Reg. 375/96) [amendments up to BC Reg.239/2007, July 1, 2007]
8. Environmental Appeal Board Procedure Regulation (BC Reg. 1/82)
9. Environmental Data Quality Assurance Regulation (BC Reg. 301/90)
10. Environmental Impact Assessment Regulation (BC Reg. 330/81)
11. Finfish Aquaculture Waste Control Regulation (BC Reg. 256/2002)
12. Gasoline Vapour Control Regulation (BC Reg. 226/95)
13. Hazardous Waste Regulation (BC Reg. 63/88) [amendments up to BC Reg. 261/2006, September 21, 2006]
14. Land-based Finfish Waste Control Regulation (BC Reg. 68/94)
15. Motor Vehicle Emissions Control Warranty Regulation (BC Reg. 116/96)
16. Municipal Sewage Regulation (BC Reg. 129/99)
17. Mushroom Composting Pollution Prevention Regulation (BC Reg. 413/98)
18. Oil and Gas Waste Regulation (BC Reg. 254/2005)
19. Ootsa Lake Beehive Burner Regulation (BC Reg. 142/2001)
20. Open Burning Smoke Control Regulation (BC Reg. 145/93)
21. Organic Matter Recycling Regulation (BC Reg. 18/2002)
22. Ozone Depleting Substances and Other Halocarbons Regulation (BC Reg. 387/99)
23. Permit Fees Regulation (BC Reg. 299/92)
24. Petroleum Storage and Distribution Facilities Storm Water Regulation (BC Reg. 168/94)
25. Placer Mining Waste Control Regulation (BC Reg. 107/89)
26. Public Notification Regulation (BC Reg. 202/94)
27. Pulp Mill and Pulp and Paper Mill Liquid Effluent Control Regulation (BC Reg. 470/90)
28. Rebate of Waste Management Fees Regulation (BC Reg. 267/2000)
29. Recycling Regulation (BC Reg. 449/2004) [amendments up to BC Reg. 297/2006, August 7, 2007]
30. Solid Fuel Burning Domestic Appliance Regulation (BC Reg. 302/94)
31. Spill Cost Recovery Regulation (BC Reg. 250/98)
32. Spill Reporting Regulation (BC Reg. 263/90)

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33. Storage of Recyclable Material Regulation (BC Reg. 133/92)
34. Sulphur Content of Fuel Regulation (BC Reg. 67/89)
35. Waste Discharge Regulation (BC Reg. 320/2004)
36. Wood Residue Burner and Incinerator Regulation (BC Reg. 519/95)

* Unofficial listing from QPLegaleze.

VIII. Schedule “B”—EMA Code of Practice Regulatory Review Process



