The Regulation of Pollution and Contaminated Sites in Alberta

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ENVIRONMENTAL LAW CENTRE (ALBERTA) SOCIETY

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EXECUTIVE SUMMARY

Alberta has an estimated 8,000 contaminated sites throughout the province, not including oil and gas facilities.[1] Most of these sites lay vacant and idle – causing ongoing environmental harm and leaving a blight on the local landscape. Still others are being remediated and/or redeveloped, some with mixed results.

Identifying and managing these contaminated sites is a complex task with various technical, financial, legal and social challenges. Yet, there has never been a more important time to tackle them. Alberta continues to undergo robust population growth and urbanization.[2] These trends put increased pressure on urban lands (or lands that were previously characterized as rural but, due to sprawl, are now located within city borders) and in turn, provides strong incentives to remediate and redevelop Alberta's contaminated sites, such as increased tax revenue, increased productivity and market value for surrounding land, reduced urban sprawl and revitalized urban cores.

This report reviews the laws that currently govern pollution and contaminated sites in Alberta, identifies issues and challenges with these laws, and makes recommendations for reform. The legislation reviewed includes the *Environmental Protection and Enhancement Act (EPEA),* the *Public Health Act*, and the *Municipal Government Act*, along with various court and tribunal cases that have interpreted *EPEA*. This report also looks at legislation and approaches in other jurisdictions, in particular British Columbia and Ontario, in order to develop recommendations for law reform in Alberta.

The following issues and challenges for the regulation of contaminated sites are identified:

- A lack of proactive identification of contaminated sites;
- Uneven public access to environmental site information;
- Uncertainty with respect to who qualifies as a "person responsible" for a substance release under EPEA;

[1] Drew Anderson "Internal emails reveal Alberta government's unwillingness to talk about contaminated sites", *The Narwhal* (Feb 16, 2022) https://thenarwhal.ca/alberta-contaminated-sites-secrecy/. Numbers come from internal government emails (and originate from environmental site assessment repository) obtained by *The Narwhal* through a freedom of information request.
[2] Government of Alberta, "Population Projections: Alberta and Census Divisions, 2023-2051" (July 5, 2023), online(pdf): https://open.alberta.ca/dataset/90a09f08-c52c-43bd-b48a-fda5187273b9/resource/cb65532d-d722-4121-9120-2cf40503ce20/download/tbf-population-projections-2023-2051-alberta-census-divisions.pdf.

- Absence of guiding policy around the allocation of remediation costs with respect to an Environmental Protection Order;
- Lack of regulation for risk management through exposure control at contaminated sites; and
- A failure to capture the true costs of a substance release and its environmental harms over time.

Finally, the report also includes a broad range of recommendations aimed at the issues and challenges set out above. These recommendations are mainly derived from a review of the legislation, strategies and processes used in other jurisdictions. Key recommendations include amending *EPEA* to include the following:

- **Recommendation 1** - Implement reporting obligations prior to the change of use or ownership of a property so as to ensure that an environmental assessment and risk analysis takes place and encourages the proactive designation of contaminated sites;
- **Recommendation 2** - Improve public access to environmental site information through title registrations;
- **Recommendation 3** - Clarify the scope of "persons responsible" for a substance release by creating an exemption for innocent owners and purchasers of contaminated sites;
- **Recommendation 4** - Create a general assurance fund to address, among other things, underfunded or orphan sites where the person responsible no longer exists or is financially incapable of addressing remediation;
- **Recommendation 5** - Adopt allocation provisions to help apportion liability amongst those persons named in an Environmental Protection Order for a substance releases;
- **Recommendation 6** - Implement a comprehensive regulatory regime for risk management through exposure control at contaminated sites; and
- **Recommendation 7** - Create standards of remediation and require financial securities that help to fully account for the true costs of a substance release and its environmental harms over time.

This report concludes with the hope that the recommendations, taken together as a whole, will help facilitate the clean-up and revitalization of the contaminated sites that sit idle and unproductive in Alberta.

INTRODUCTION

Alberta's laws seek to set out the obligations of polluters and those who own contaminated sites. Yet, due to the nature of pollution, the abilities and motivation of the polluters, and the passage of time, the regulation and management of contaminated sites is a complicated area. The technical feasibility of clean-up, financial capacity of those responsible, and public interest in environmental protections may often be at odds.

Generally, the regulation of pollution and contaminated sites starts at the time of a release and ends with a final regulatory determination of a site being suitable for a specific use. The regulation of parties that pollute or otherwise end up in control of a polluted site typically cover a wide variety of matters, including:

a) The obligations of the polluter to remediate the polluted site;

b) The obligations of landowner(s) or occupier(s) of a polluted site (who did not pollute the site);

c) The standard of clean-up;

d) The timing of clean-up;

e) The closure of regulatory liability for a site;

f) The management of a site while polluted;

g) The future management and liability of contaminated site mitigation measures and monitoring; and

h) Administrative remedies available to government to order remediation or to recover costs of remediation.

This report aims to demystify Alberta's current contaminated sites regulatory regime, identify its challenges, and make recommendations for improvement. The report begins by setting out the current state of the law in Alberta for regulating contaminated sites. It is followed by an analysis of the central issues and challenges that plague the management of these sites and the regulation of pollution more generally, along with select decisions of courts and tribunals in Alberta with direct implications. Where applicable, approaches to contaminated sites management and regulation in other jurisdictions are also featured. Finally, law reform recommendations are provided in an effort to address some of the area's key challenges.

Background on Contaminated Sites

The objectives of pollution and contaminated sites regulation includes a) ensuring the clean-up of pollution that may cause harms to people, property and the environment, and b) ensuring land and water can be put to productive societal and economic uses. A primary motivating principle of the regulatory obligations is the "polluter pays" principle, which is focused on ensuring that polluters pay the costs associated with their pollution, either through abatement measures or through remedial actions. A second principle is that of pollution prevention.

Throughout various levels of legislation, the language around pollution and contaminated sites can vary. Alberta's *Environmental Protection and Enhancement Act (EPEA)* does not directly define a contaminated site, instead it is a "designation" for a site "[w]here the Director is of the opinion that a substance that may cause, is causing or has caused a significant adverse effect is present in an area of the environment".[3] The phrase "significant adverse effect" is not defined.

At the federal level, the Government of Canada defines a contaminated site as "one at which substances occur at concentrations that (1) are above background levels and pose, or are likely to pose, an immediate or long-term hazard to human health or the environment; or (2) exceed the levels specified in policies and regulations. A real property may have more than one contaminated site".[4] Although the types of contaminants can vary, most are petroleum hydrocarbons, metals and polycyclic aromatic hydrocarbons. Other contaminants include hydrocarbons, inorganics and polychlorinated biphenyls.[5]

A similar (but not identical) term is a "brownfield". Alberta's *Municipal Government Act* defines a "brownfield property" as a commercial or industrial property that (i) is, or possibly is contaminated; (ii) is vacant, derelict or under-utilized, and (iii) is suitable for development or redevelopment for the general benefit of the municipality.[6] Accordingly, "brownfield" is a more general term as it can refer to an actual or perceived contaminated site and it is usually located in an urban area.[7]

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[3] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s.125 [*EPEA*].
[4] Government of Canada, "A Federal Approach to Contaminated Sites: Contaminated Sites Management Working Group" (Nov 1999), at 5, online (pdf): https://www.canada.ca/content/dam/eccc/migration/fcs-scf/B15E990A-C0A8-4780-9124-07650F3A68EA/fa-af-eng.pdf.
[5] Government of Canada, "About federal contaminated sites" (June 21, 2023), online: https://www.canada.ca/en/environment-climate-change/services/federal-contaminated-sites.html.
[6] *Municipal Government Act*, RSA 2000, c M-26, s. 364.1(1) [*MGA*].
[7] *Supra note* 5.

In Alberta, the government's approach to contaminated sites is set out in the *Contaminated Sites Policy Framework*.[8] Naturally, the government prefers pollution prevention and has tried to enact policies that "emphasiz[e] the importance of proactive efforts that keep soil and groundwater clean and free of contaminants".[9] However, once a substance release has occurred, the government's stated preference is to "promote the return of contaminated sites to productive use and ensure that risks to human health and the environment are minimized".[10] The three key elements of Alberta's framework for management of these sites includes source control, contamination delineation, and contaminant management, including remediation.[11]

There is inherent in contaminated land management a tension between appropriate land uses, economic drivers and environmental objectives. In the United Kingdom, the contaminated land legislation has been characterized as being focused on a "development managerialist" approach as opposed to an environmental quality and public health approach that "may leave a toxic debt for future generations to address".[12] While the Alberta system can be differentiated from the UK system in a variety of ways, a similar characterization can be seen in the standards of remediation and risk management system in Alberta.

And yet, the economic calculus of development and clean-up is also part of the problem. Where development upside is significantly outweighed by the costs to remediate land there is unlikely to be active remediation and sterilization of land (at least temporarily). This cost benefit analysis encourages policy makers to largely ignore the principles of polluter pays or pollution prevention.

Clean-up can further be compromised through the use of specific corporate structures that enable avoidance of liabilities associated with contaminated land. For instance, in *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc*, 2022 ABCA 111, the respondent Perpetual Operating Trust (POT) transferred assets to Perpetual Operating Corp. (PEOC), which then declared bankruptcy 17 months later. The transferred assets were licenced petroleum assets and almost two thirds of them were shut-in or abandoned, meaning their end-of-life obligations were significant. The appellant PricewaterhouseCoopers Inc., in its capacity as Trustee in Bankruptcy, alleged that the asset transaction made by the respondents was undervalue by

[8] Government of Alberta, "Contaminated Sites Policy Framework" (Oct 31, 2014, updated Dec 1, 2023), online (pdf): https://open.alberta.ca/dataset/9cce09d7-0725-4870-9f8d-bfba4d77851e/resource/84f4880d-7524-49d0-b1b3-fe73df10e902/download/epa-contaminated-sites-policy-framework-2023-12.pdf [*Contaminated Sites Policy Framework*].
[9] *Ibid* at 4.
[10] *Ibid*.
[11] *Ibid*.
[12] See Philip Catney et al, "Dealing with Contaminated Land in the UK through 'Development Managerialism'" (2006) 8:4 Journal of Environmental Policy and Planning 331-356.

more than $217 million and void under s. 96 of the *Bankruptcy and Insolvency Act*. The Court of Appeal found that the chambers judge erred in law when he failed to consider the value of the end of life obligations associated with 74% of the wells and its impact on the respondents' assets. The appeal was allowed and the matter was directed to trial.

In order to achieve its environmental goals, Alberta has put in place various pieces of legislation, guidelines and procedures, many of which will refer back to these overarching themes. Read on to learn more about the legislation governing pollution and contaminated sites in Alberta.

Legislation Governing Contaminated Sites in Alberta

In Alberta, pollution and contaminated land is primarily regulated under the *Environmental Protection and Enhancement Act* (*EPEA*), which has been in effect since 1993.[13] Previously, the legislation governing pollution management was split into several different acts including the *Clean Air Act*, the *Clean Water Act*, and the *Hazardous Chemicals Act*. The *Hazardous Chemicals Act* enabled the issuance of chemical control orders to those who store or otherwise deal with substances that cause or were likely to cause "injury or damage to property or to plant or animal life", use of the natural environmental or human health and safety of people".[14] The orders could stop the release or deposit and/or direct the party responsible to undertake measures in relation to containment and management of the hazardous chemicals.[15] This evolved under *EPEA* to create an obligation to remediate to specific standards, a focus on release reporting, and the ability to designate contaminated sites.

Since *EPEA* came into force there has been little legislative change. However, the associated Remediation Regulation was amended significantly in 2018 and these changes came into force in 2019.

[13] *EPEA, supra* note 3.
[14] *Hazardous Chemicals Act*, RSA 1980, c. H-3, s. 6(1) [*HCA*].
[15] *Ibid*, s. 1(j). A person responsible was defined as: "person responsible", when used with reference to a hazardous chemical or a substance or thing containing a hazardous chemical, means (i) its owner, (ii) the person having the charge, management or control of it, and (iii) the person having the charge, management or control of the handling, storage, use, disposal, transportation, or display of it.

i. The *Environmental Protection and Enhancement Act*

There are two parts of *EPEA* that are primarily used to deal with contaminated land, including those properties that may be categorized as brownfields:

- Part 5, Division 1, dealing with substance releases, and
- Part 5, Division 2, dealing with the designation of contaminated sites.

Note the conservation and reclamation of "specified land" is dealt with under Part 6 of *EPEA*. In addition, the decommissioning and reclamation of certain industrial activities in the province are also guided by approvals issued under *EPEA*. This section reviews Divisions 1 and 2 of Part 5 of *EPEA* and the regulations that pertain to contaminated sites and reclamation.

The substance release provisions under Division 1 set out the process most commonly used by Alberta Environment and Protected Areas (AEPA) to deal with contaminated land. Since *EPEA*'s introduction in 1993, AEPA has used the Division 2 contaminated site designation provisions very sparingly. The authors are only aware of five sites having been designated as contaminated sites, with the most recent designation being in 1996.[16] This may be because although the designation provisions are much more detailed, they are also more cumbersome to administer because they involve a detailed and lengthy process for moving from the designation of a site to completion of remediation. AEPA's previously stated view is that the designation provisions are intended as a "last resort" to deal with extraordinary circumstances where contaminated land poses a significant adverse effect to human health or the environment, and where there are no other appropriate tools available.[17] In contrast, the substance release provisions are more streamlined, with less related processes and a narrower scope of liability and potentially responsible parties. The substance release provisions have proven simpler to administer.[18]

EPEA itself does not include clear criteria to guide the choice between the substance release and contaminated sites provisions, which creates uncertainty. As a result of this uncertainty, the matter of choice of process has been litigated in Alberta a number of times. Alberta courts have now held that the substance release provisions may be used to deal with contamination

[16] Alberta Environment, "Review of Regulatory Approaches to Contaminated Land Management" (March 2004), at 1, online (pdf): https://open.alberta.ca/publications/0778532100.
[17] Alberta Environment, Guideline for the Designation of Contaminated Sites Under the Environmental Protection and Enhancement Act (Edmonton: Alberta Environment, 2000) at 1-2 *[Designation Guideline]* online (pdf): https://open.alberta.ca/publications/0778511820.
[18] Review of Regulatory Approaches to Contaminated Land Management, *supra* note 16 at 1.

that pre-dates *EPEA*.[19] In fact, amendments to *EPEA* were introduced in 2003 and 2006 to clarify that Division 1 orders and the substance release provisions can apply retrospectively.[20]

Altogether, these factors have contributed to AEPA relying almost exclusively on the substance release provisions to regulate contaminated land. A review of both the Division 1 substance release provisions and Division 2 contaminated site designation provisions follows below.

Part 5, Division 1 – Substance releases

Division 1 contains provisions regulating the release of substances into the environment. It is triggered when "a substance that may cause, is causing or has caused an adverse effect is released into the environment".[21] *EPEA* imposes a statutory duty on the person who releases or causes or permits the release to report the release to the Director.[22] The Act also imposes a statutory duty on the person who becomes aware or ought to have become aware of the release to take remedial measures and restore the environment.[23] The terms "adverse effect", "substance" and "release" and are all defined quite broadly under *EPEA*:

- "adverse effect" is defined as "impairment of or damage to the environment, human health or safety or property";[24]
- "substance" is defined as any matter that is (i) capable of becoming dispersed in the environment or capable of being transformed in the environment into such matter; and/or (ii) any sound, vibration, heat, radiation or other form of energy as well as (iii) any combination of (i) and (ii);[25]
- "release" includes "to spill, discharge, dispose of, spray, inject, inoculate, abandon, deposit, leak, seep, pour, emit, empty, throw, dump, place and exhaust".[26]

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[19] See *Legal Oil and Gas Ltd. v. Alberta (Minister of Environment)*, 2000 ABQB 388; *McColl-Frontenac Inc. v. Alberta (Minister of Environment)*, 2003 ABQB 303; and *Imperial Oil Limited v. Alberta (Minister of Environment)*, 2003 ABQB 388.
[20] *Environmental Protection and Enhancement Amendment Act, 2003*, S.A. 2003, c. 37, s. 18(b) added subsection (4) to section 113 of *EPEA*, explicitly providing for retrospective application of substance release environmental protection orders. *Environmental Protection and Enhancement Amendment Act, 2006,* SA 2006, c 15, s. 13 added subsection (5) to section 113 of *EPEA* to clarify that environmental protection orders can be issued for historical releases committed prior to September 1, 1993 (when *EPEA* came into force) if an adverse effect has occurred or is occurring.
[21] *EPEA, supra* note 3, ss. 112-113.
[22] *Ibid*, s. 110(1).
[23] *Ibid*, s. 112.
[24] *Ibid*, s. 1(b).
[25] *Ibid*, s. 1(mmm).
[26] *Ibid*, s. 1(hhh).

Persons Responsible

Division 1 ties liability for a substance release to the "person responsible." Person responsible is defined in the Act as follows:

> (tt) "person responsible", when used with reference to a substance or a thing containing a substance, means
>
> (i) the owner and a previous owner of the substance or thing,
>
> (ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing.[27]

Accordingly, persons responsible can include the owner and previous owner of a substance, any person with charge, management or control of a substance, and any successor, representative, principal and agent of those persons.[28]

There are certain exemptions from the scope of person responsible for municipalities and investigators. Municipalities that take title to land under municipal tax recovery proceedings or acquire land by dedication or gift and persons who carry out investigations to determine the environmental condition of land are not considered persons responsible under *EPEA*.[29] Under the exemptions, these parties will only attract liability if they release a new or additional substance into the environment which causes an adverse effect or aggravates the initial release.

Municipalities also have some protection from civil liability under *EPEA* in relation to the condition of property listed on a municipal tax arrears list. This protection does not apply if a municipality either causes new or additional substance releases on the property or aggravates existing contamination on the property. The section also does not relieve a municipality of liability for land that was owned by a municipality before the parcel was placed on the tax arrears list.[30]

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[27] *Ibid,* s. 1(tt).
[28] *Ibid,* ss. 1(tt)(i) – (iv).
[29] *Ibid*, ss. 1(tt)(v) – (vi).
[30] *Ibid*, s. 221.

Environmental Protection Orders

The most significant and commonly used tool to deal with substance releases is an environmental protection order (EPO) issued under section 113 of *EPEA*. This order is issued if AEPA is of the opinion that a substance release into the environment may cause, is causing, or has caused an adverse effect.[31] The EPO can require the person responsible to take any measures necessary, including investigation, remediation and monitoring activities.[32] However, these orders cannot address substance releases that are otherwise authorized by an approval or under regulations, unless the adverse effect from the release was not reasonably foreseeable at the time the approval was issued or the regulation was made.[33]

Generally, liability imposed under EPOs is joint and several, which means all regulatory obligations can be enforced against one party.[34] Note, however, joint and several liability does not apply to an EPO issued under Division 2 if it provides for the apportionment of costs.[35]

EPEA also provides some protection from liability when an EPO is issued against fiduciary representatives, such as persons acting as an executor, administrator, receiver, receiver-manager or trustee of a property. Where such a person is issued an order, their liability is limited to the value of the assets they are administering, unless they have caused or aggravated the situation through gross negligence or wilful misconduct. [36]

Another available tool is an emergency EPO. This order may be issued where a substance release into the environment may cause, is causing, or has caused an *immediate and significant adverse effect*.[37] An emergency EPO can be issued regardless of whether a substance release is otherwise authorized by an approval or under regulations.[38]

[31] *Ibid*, s. 113(1).
[32] *Ibid*, s. 113(3).
[33] *Ibid*, s. 113(2).
[34] *Ibid*, s. 240(1).
[35] *Ibid*, s. 240(2).
[36] *Ibid*, s. 240(3).
[37] *Ibid*, s. 114.
[38] *Ibid*, s. 114.

Remediation

Following a release, *EPEA* provides a general statutory duty to take remedial measures. Section 112 of the Act requires the "person responsible for the substance, as soon as they became aware or ought to have become aware of the release" to do the following:[39]

a) take all reasonable measures to

i. repair, remedy and confine the effects of the substance, and

ii. remediate, manage, remove or otherwise dispose of the substance in such a manner as to prevent an adverse effect or further adverse effect,

and

b) restore the environment to a condition satisfactory to the Director.

Section 112(2) of the Act also clarifies that the remediation provisions are retrospective. Where a substance was released into the environment before September 1, 1993 (when *EPEA* came into effect) and the activity that resulted in the release was permanently discontinued before that date, the person responsible for that substance shall remediate as per s. 112 (1).[40]

Section 120 of *EPEA* permits the Lieutenant Governor in Council to make regulations "respecting the manner in which remediation is to be carried out" and "respecting the establishment of standards or criteria to be used to determine whether remediation has been completed in a satisfactory manner".[41] Up until 2019, *EPEA* itself did not provide much in the way of guidance on remediation requirements or the level of cleanliness required to be met.

On January 1, 2019 a new contaminated sites regulation came into effect, updating the existing *Remediation Certificate Legislation* and re-naming it the *Remediation Regulation*.[42] The changes introduced were the culmination of several years of stakeholder review and consultation led by AEPA. Among other things, the *Remediation Regulation* introduced reporting requirements for

[39] *Ibid,* s. 112.
[40] *Ibid*, s. 112 (2).
[41] *Ibid*, s. 120(b) & (c).
[42] *Remediation Certificate Amendment Regulation*, OC 187/2018, (*Environmental Protection and Enhancement Act*).

"new information", additional details on the remedial measures required by *EPEA,* and imported and codified additional guidelines for remediation.

The *Remediation Regulation* now requires that, where there is new information about the impact of a released substance to a person or land, there is a duty to report the information to an affected person and the Director at the time of discovery.[43] This obligation is in addition to the requirements of *EPEA* and the *Release Reporting Regulation* and appears to impose a duty to report an impact (as opposed to just a release) that arises in connection with a prior release. The duty to report new information falls to the "person who releases or causes or permits the release of a substance" as per s. 110(1) of *EPEA*. Previously, the reporting obligations in EPEA and the *Release Reporting Regulation* did not require a person reporting a release to also report on the impacts of the release.

The *Remediation Regulation* also now includes specific instructions and a timeline for the remedial measures imposed by s. 112(1) of *EPEA*. Going forward, when the person responsible becomes aware or ought to have become aware of the release of a substance, they must, as soon as possible: (a) submit a Phase 2 environmental site assessment to the Director; or (b) complete remediation and submit a report to the Director, along with any other requirements specified by the Director.[44] The regulation also imposes a two-year time limit to complete remediation, or else a remedial action plan is required.[45] Note this does not negate the requirement that remediation be completed "as soon as possible".[46] Still, if the site cannot be remediated to the satisfaction of the Director within a two-year period, then a remedial action plan, which specifies a period of time for completion that is acceptable to the Director, must be submitted immediately.

The regulation further states the person responsible must take remedial measures within the period of time specified in the remedial action plan.[47] The Director has the discretion to modify or waive these requirements. There is no suggestion that the two-year period discussed above precludes the Director from requiring remedial action sooner. Note that these provisions do not apply to releases that occurred prior to the coming into force of the *Remediation Regulation*, unless required by the Director.[48]

[43] *Remediation Regulation*, Alta Reg 154/2009, s. 2.1 [*Remediation Reg*].
[44] *Ibid,* s. 2.2(1).
[45] *Ibid*, s. 2.2(2).
[46] *Ibid*, s. 2.2(1).
[47] *Ibid*, s. 2.2(5).
[48] *Ibid,* s. 2.2(7).

AEPA also has a number of policies and guidelines in place to assist with the management of contaminated sites. Some of these policies and guidelines include:

a) *Contaminated Sites Policy Framework*;

b) *Alberta Tier 1 Soil and Groundwater Remediation Guidelines*;

c) *Alberta Tier 2 Soil and Groundwater Remediation Guidelines*;

d) *Environmental Site Assessment Standard*;

e) *Alberta Exposure Control Guide*; and

f) *Risk Management Plan Guide*.

Since 2018, the Remediation Regulation includes specific reference to the *Alberta Tier 1 Soil and Groundwater Remediation Guidelines* and *Alberta Tier 2 Soil and Groundwater Remediation Guidelines* and clarifies the circumstances in which they are applicable.[49] The *Environmental Site Assessment Standard*, *Alberta Exposure Control Guide*, and *Risk Management Plan Guide* were also imported and codified in the regulation.[50] Note this is one of the only (indirect) mentions in *EPEA* or the regulations of exposure control and risk management plans as forming part of what is meant by "remediation". A brief review of these policies and guidelines follows below.

a. Contaminated Sites Policy Framework

The *Contaminated Sites Policy Framework* provides an overview of the Government of Alberta's applicable legislation and policy framework for the management of contaminated sites. It applies when developing and assessing options for the management of contaminated lands in Alberta and includes information on stakeholder roles and responsibilities, principles of contaminant management, and Alberta's risk management framework.

The *Contaminated Sites Policy Framework* lists three risk management options for contaminated sites in Alberta:

- Remediation that meets Tier 1 Remediation Guidelines;

[49] *Ibid*, s. 2(1).
[50] *Ibid*.

- Remediation that meets Tier 2 Remediation Guidelines; and
- Exposure control (i.e. risk management through exposure barriers or administrative controls).[51]

The objective for all three is to deliver the same degree of human health and ecological protection through different means. However, while regulatory closure is available for sites that achieve Alberta Tier 1 & 2 remediation guidelines, sites that employ exposure closure are ineligible.[52]

b. Alberta Tier 1 Soil and Groundwater Remediation Guidelines

The *Alberta Tier 1 Soil and Groundwater Remediation Guidelines* contain general, numerical targets for remediating contamination on cultivated, residential, commercial, and industrial land. They are designed using relatively conservative assumptions (including that all exposure pathways and receptors relevant to a particular land use are present) and are meant to be applicable at most sites in Alberta.[53] Note that Tier 1 guidelines (as well as Tier 2) are not "pollute-up-to" levels and sources must not be left uncontrolled until cumulative releases result in exceedance of the guidelines.[54]

c. Alberta Tier 2 Soil and Groundwater Remediation Guidelines

The *Alberta Tier 2 Soil and Groundwater Remediation Guidelines* describe how to modify the Tier 1 guidelines using site-specific information. For example, when a site has characteristics that make it more sensitive than the Tier 1 assumptions, the resulting Tier 2 guidelines may be more restrictive, while sites that are less sensitive may have less restrictive guidelines (but deliver the same human and ecological health protection).[55] Tier 2 application requires

[51] *Contaminated Sites Policy Framework*, *supra* note 8 at 13.
[52] *Contaminated Sites Policy Framework*, *supra* note 8 at 13 & 15.
[53] Government of Alberta, *Alberta Tier 1 Soil and Groundwater Remediation Guidelines*, (Edmonton: AEP Land Policy 2023), at 6, online(pdf): https://open.alberta.ca/dataset/842becf6-dc0c-4cc7-8b29-e3f383133ddc/resource/018c0139-ae40-4537-af72-23458c8c58c7/download/aep-albertatier1guidelines-aug24-2022.pdf [*Tier 1 Guidelines*]; Tier 2 Government of Alberta, *Alberta Tier 2 Soil and Groundwater Remediation Guidelines*, (Edmonton: AEP Land Policy, 2023) at 7, online (pdf): https://open.alberta.ca/dataset/aa212afe-2916-4be9-8094-42708c950313/resource/cd270bae-923b-4d03-a5e6-c8cab54a8071/download/aep-albertatier2guidelines-aug24-2022.pdf [*Tier 2 Guidelines*].
[54] *Tier 2 Guidelines*, *ibid* at 9.
[55] *Tier 2 Guidelines, ibid* at 7.

additional information so that an assessor can develop guidelines tailored to the particular characteristics of the site.[56]

d. Environmental Site Assessment Standard

The *Environmental Site Assessment Standard* provides an outline of the minimum requirements for environmental site assessment (ESA) site characterization and reporting at contaminated or potentially contaminated sites in Alberta.[57] The Standard is meant to be used in conjunction with Alberta's regulatory framework and supports other documents such as the *Contaminated Sites Policy Framework* and Tier 1 & 2 Soil and Groundwater Remediation Guidelines.[58] It addresses site evaluation and reporting processes including Phase 1 & 2 ESAs, confirmatory investigation and reporting.[59]

e. Alberta Exposure Control Guide

The *Alberta Exposure Control Guide* presents AEPA's exposure control policy for contaminated sites and outlines the requirements for risk management using the exposure control option as outlined in the *Contaminated Sites Policy Framework*. Exposure control on contaminated lands requires "removing or mitigating an exposure pathway or receptor, or controlling a contaminant source".[60] It may be done as an interim step until remediation guidelines can be met or, where remediation is not possible, accomplished by physical or chemical barriers to prevent exposure to receptors and/or administrative controls. The former requires long-term monitoring by responsible *parties* and may result in limits on land uses.[61] Generally, AEPA prefers and promotes a full remediation of a contaminated site. However, exposure control is an option if remediation is severely restricted by constraints or cannot achieve acceptable environmental endpoints.[62]

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[56] *Tier 2 Guidelines*, *ibid* at 7.
[57] Government of Alberta, Environmental Site Assessment Standard (Edmonton: AEP Land Policy 2016), at 2, online(pdf): https://open.alberta.ca/dataset/3acc7cff-8c50-44e8-8a33-f4b710d9859a/resource/579321b7-5b66-4022-9796-31b1ad094635/download/environmentsiteassessstandard-mar01-2016.pdf [Standard].
[58] *Ibid* at 2.
[59] *Ibid* at 2.
[60] Government of Alberta, Alberta Exposure Control Guide, (Edmonton: Land Policy Branch, 2016) at 6, online(pdf): https://open.alberta.ca/dataset/6ce7e015-2cee-4bc4-b863-e84feddccfaa/resource/d9d6b320-3e26-46ff-8c13-fe86382e372e/download/exposurecontrolguide-may03-2016.pdf [*Alberta Exposure Control Guide*].
[61] *Ibid* at 6.
[62] *Ibid* at 7.

f. Alberta Risk Management Plan Guide

The *Alberta Risk Management Plan Guide* provides guidance and detailed information on the AEPA and Alberta Energy Regulator requirements for risk management plans. An risk management plan is required when assessing or choosing exposure control as an option for managing contaminated sites in Alberta. The *Alberta Risk Management Plan Guide* outlines the administrative, site investigation and implementation requirements for risk management plans.

Liability Closure for Remediation

Once remediation of a site is complete, s. 117 of *EPEA* provides for the issuance of remediation certificates. The Director (or an inspector) may issue a remediation certificate in respect of land where remediation has been carried out in accordance with the terms and conditions of any applicable approvals, EPOs, *EPEA*, or any other instructions provided by the Director (or inspector).[63] The effect of a remediation certificate is to provide that "no environmental protection order requiring further work, in respect of the same release of the same substance may be issued under [the] Act".[64] Remediation certificates are voluntary. The incentive to obtain one comes mainly from the fact that they provide closure for potential regulatory liability.

The *Remediation Regulation* provides additional information on the application, issuance and effect of remediation certificates. There are two types of remediation certificates:

- "limited remediation certificate" which shows that the "remediated area", defined as land that is the subject of an application, has been remediated in accordance with the Guidelines;[65] and

- "site-based remediation certificate" which shows that a "site", defined as land used in connection with an activity referred to in the Schedule of Activities to *EPEA* (e.g. manufacture or processing of petroleum products, natural gas, pulp and paper products, etc.) and on which a substance is stored, treated, sold or used as part of a commercial or industrial activity, has been remediated in accordance with the Guidelines.[66]

[63] *EPEA*, *supra* note 3, s. 117.
[64] *EPEA*, *supra* note 3, s. 118.
[65] *Remediation Reg*, *supra* note 43, ss. 1(g.2) & (j).
[66] *Ibid*, ss. 1(n) &(o).

The two differ in that a limited remediation certificate is only issued with respect to the portion of a site or property that is remediated, whereas a site-based certificate closes off regulatory liability for the whole site. The site-based remediation certificate was introduced as part of the 2019 revisions to the *Remediation Regulation* and appears to have been aimed at increasing certainty for the owners of brownfield-type sites, as it permits owners and developers to ascertain and quantify their liability with respect to an entire piece of property, which in turn, supports brownfield redevelopment.

An application for a site-based remediation certificate requires more supporting documentation than a limited remediation certificate, as one must show that the reported area has been remediated and that the area outside the remediated area does not require remediation. The documentation required includes a legal land description or survey, a current Phase 1 environmental assessment, a detailed Phase 2 environmental assessment and a detailed remediation report.

In terms of closing off regulatory liability, both the site-based and limited remediation certificate provide protection against an EPO with respect to the substance and remediated zone that is the subject of the certificate. There are, however, select exceptions. With respect to a limited remediation certificate, the *Remediation Regulation* still permits the issuance of an EPO at any time where one or more of the substances that are the subject of the limited remediation certificate are present in the remediated zone and exceed the remediation objectives that were applicable at the time the certificate was issued.

With respect to a site-based remediation certificate, the *Remediation Regulation* still permits the issuance of an EPO if one or more substances that are the subject of the site-based remediation certificate are present anywhere in or under the site, or any area off the site, or any area on or off the site that was not assessed in the original Phase 2 environmental site assessment and that exceed the remediation objectives that were applicable at the time the certificate was issued.

Another instrument which helps to provide project closure certainty is the Alberta Tier 2 compliance letter. Introduced by the *Remediation Regulation,* the Alberta Tier 2 compliance letter is issued by the Director and confirms that the area of land or the site meets the Alberta Tier 2 Soil and Groundwater Remediation Guidelines and does not need to be remediated. Its purpose seems to be to provide documentation with respect to areas of potential environmental concern, in circumstances where the site is not eligible for a remediation certificate. In essence it acts as notice that further remediation of a site is not required.

In order to obtain an Alberta Tier 2 compliance letter, the applicant must submit Phase 1 and 2 environmental site assessments, delineation of the area of land or the site and a risk

assessment in accordance with the Alberta Tier 2 Soil and Groundwater Remediation Guidelines. Note that the legal significance of an Alberta Tier 2 compliance letter is not clear. Unlike a remediation certificate, it is not a product of *EPEA* and there is no mention of its legal effect in the Act.

Correspondence with AEPA suggests that since 2009 they have issued 1 Tier 2 Compliance letter and 172 Remediation Certificates for 143 unique sites (as well as refused 32 Remediation Certificates).[67]

Finally, AEPA does not issue remediation certificates or letters of compliance for sites that are risk managed by alternative measures such as exposure barriers or administrative land use controls because these methods depend upon the future diligence of those responsible for managing the site.[68]

Timing of Regulatory Closure

a) Regulatory Liability

Unlike the limitations periods involved in civil suits, administrative actions are generally not curtailed by strict time limitations. *EPEA* does not put any time limitations on EPOs under the Act and an EPO related to remediating past contamination is not date constrained. That said, EPOs may be appealed, and the amount of time that has elapsed between the contamination and the issuance of the EPO may play a role in how the AEAB considers certain aspects of the EPO.

Note that the issuance of a remediation certificate generally closes regulatory liability for a site.[69] As set out above, the government retains discretion to issue an EPO where a remediation certificate exists in various instances for both "limited" remediation and "site-based" remediation. For "limited" remediation certificates an EPO may be issued for the limited remediation where substances are present in the area and exceed guideline levels. For site-based remediation an EPO may be issued where the Director or inspector "is of the opinion" that substances that exceeded guideline levels were present (either on the site or off site) when

[67] Email from Lisa Fairweather, Director of Land Conservation, Reclamation & Brownfield Redevelopment of Alberta Environment and Protected Areas, to Jason Unger, Executive Director of Environmental Law Centre (June 26, 2023).
[68] *Alberta Exposure Control Guide*, *supra* note 60 at 7.
[69] *Remediation Reg*, *supra* note 43, s. 8(1).

the certificate was issued, for areas not assessed under a phase 2 site assessment, or where a risk management plan was not fulfilled.[70]

An EPO may also be issued at "any time" to a person who causes or changes the condition of the remediated zone to result in causing (or has the potential of causing) an adverse effect.[71] In this regard, there is no definitive cap on liability if there are site conditions above guideline levels or if there are additional activities on a remediated site that may cause adverse effects. This can be contrasted with reclamation certificates which may be revisited by regulatory orders for 25 years, after which liability ends.[72]

With respect to a prosecution under the Act, the Director is time limited to two years from the date of the offence or from the date of the Director first becoming aware of the evidence of the offence.[73]

b) Civil Liability

In general, Alberta's *Limitations Act* provides that an action must be commenced either i) two years after the person making the claim knew or ought to have known of the claim, or (ii) ten years after the claim arose, whichever period expires first.[74] Nevertheless, section 218 of *EPEA* permits the court, upon application, to extend a limitation period for the commencement of a civil proceeding where the basis for the proceeding is an alleged adverse effect resulting from the alleged release of a substance into the environment. The application may be made before or after the expiry of the limitation period. The court shall look at when the alleged adverse effect occurred, whether they exercised due diligence or whether the adverse effect ought to have been discovered by the claimant had they exercised due diligence, whether extending the limitation period would prejudice the defendant's ability to maintain a defence on the merits, and any other criteria the court considers to be relevant.

Recently, in *Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited,* Alberta's Court of Appeal had occasion to consider s. 218 of *EPEA*.[75] At issue was whether the Court should extend the limitation period for Brookfield Residential (Alberta) LP ("Brookfield") to bring an action against Imperial Oil Limited ("Imperial") under s. 218 of *EPEA*.[76] Brookfield

[70] *Remediation Reg*, *supra* note 43, s. 8(2.1).
[71] *Remediation Reg*, *supra* note 43, s. 8(3).
[72] *Conservation and Reclamation Regulation*, Alta Reg, 115/93, as amended at s. 15.
[73] *EPEA, supra* note 3, s. 226.
[74] *Limitations Act*, RSA 2000, c L-12, s. 3(1).
[75] 2019 ABCA 35 [*Brookfield CA*] aff'g 2017 ABQB 218 [*Brookfield QB*]
[76] *Brookfield QB*, *ibid* at paras 1-2.

sued Imperial for contaminated soil on property it purchased, allegedly arising from an oil well drilled by Imperial in 1949. Imperial brought a summary dismissal application asserting a limitations defence.

At the Court of Queen's Bench, Justice Graesser reviewed the existing s. 218 caselaw and considered the enumerated factors. The court found that while it could not pinpoint a precise date, there was sufficient evidence to conclude that the alleged adverse effect occurred sometime between 1949 and 1961.[77] In addition, there was evidence that Brookfield exercised sufficient due diligence in assessing whether there had been adverse effects to the property.[78]

Nevertheless, Justice Graesser found that Imperial would suffer significant prejudice if they were to extend the limitation period. Imperial gave evidence that, more than 60 years later, they were unable to locate anyone who could speak to the drilling of the well in 1949, the operation of the well between 1950-1957, the use of the well for salt water disposal in 1958, or its decommissioning in 1961.[79] In the court's view, permitting an action to go ahead more than 60 years after the Defendant was last involved with the well would be an "abuse".[80] For instance, calling the expert evidence required to establish the standard of care would be "impossible".[81] There were also no additional factors like deceit, gross negligence or recklessness. In fact, the Alberta government of the day had issued a reclamation certificate for the well in 1968 – which suggested that the practices in reclaiming the lands involved were in accordance with standards prevailing at the time.[82] Overall, the case at hand did not meet the threshold for reaching back decades after the limitation period expired.[83]

On Appeal, the Court upheld the decision of the chambers judge. With respect to limitation periods, the Court noted that it was difficult to tell when the actual limitation period expired in this case. However, the breach of duty occurred whenever the land was contaminated, and the limitation period started to run as soon as that contamination was reasonably discoverable. The Court noted that even where damage to the land is continuous, that does not mean there is a continuous breach of duty that starts the limitation period running anew each day.[84]

The Court also noted that s. 218 applications should generally be decided pre-trial. For one, this was consistent with the wording of s. 218 which provides that the limitation period can be

[77] *Ibid* at para 101.
[78] *Ibid* at para 88.
[79] *Ibid* at para 99.
[80] *Ibid* at para 102.
[81] *Ibid* at para 103.
[82] *Ibid* at para 107.
[83] *Ibid* at para 109.
[84] *Brookfield CA*, *supra* note 75, at para 6.

extended "on application".[85] Two, sending a s. 218 application to trial defeats the whole purpose of the provision, which is designed to avoid the distractions, expense and risks of litigation after the limitations period has passed. Even if a defendant "wins" the limitations issue at trial it has "lost virtually all of the repose that the limitation statute was designed to bring".[86]

Finally, the court reviewed the chambers judge's consideration of the s. 218 factors. They noted that the judge's finding on issues like prejudice and due diligence are findings of fact that should not be disturbed unless there has been a palpable and overriding error.[87] The decision on whether or not to extend a limitation period includes an element of discretion, and the court found that the judge's decision not to do so was amply supported by the record. Furthermore, the Court of Appeal agreed that it was "not an error of principle…to infer prejudice based on the passage of time, and to infer greater prejudice the greater the passage of time".[88] Certainly, "[a] long passage of time makes it difficult to establish the proper standard of care".[89]

Accordingly, while the Court of Appeal in *Brookfield* acknowledged that "[i]t might not be impossible to demonstrate the standard of care, despite the passage of decades", it was[90] reasonable to find there would be prejudice based on the facts at hand. The was no reviewable error and the appeal was dismissed.

In short, the comments from the Court of Appeal in *Brookfield* include:

- The breach of duty (i.e. adverse effect) occurs when the land is contaminated and the limitation period starts to run as soon as that contamination was reasonably discoverable;[91]
- The breach of duty is not continuous (i.e. the limitation period does not renew every day);[92]
- Applications under s. 218 should be tried before trial; and[93]

[85] *Ibid* at para 9.
[86] *Ibid* at para 10.
[87] *Ibid* at para 18.
[88] *Ibid* at para 14.
[89] *Ibid* at para 15.
[90] *EPEA*, *supra* note 3, s. 107(1).
[91] *Brookfield CA*, *supra* note 75, at para 6.
[92] *Ibid*.
[93] *Ibid* at para 10.

- The ultimate decision on whether to extend the limitation period includes an element of discretion.[94]

Overall, the *Brookfield* decision(s) suggests that a s. 218 application for an extension of the limitation period is not likely to be successful when the time elapsed between the tortious conduct and claim is lengthy (i.e. 60 years) and there is a high likelihood of prejudice to the defendant as a result of lost documents, records, witnesses and evidence. At a minimum, for a claimant to be successful, there should be access to evidence that makes it possible (and perhaps even easy) to establish the proper standard of care.[95]

Part 5, Division 2 – Designation of contaminated sites

Part 5, Division 2 of *EPEA* may be used to deal with a contaminated property in limited circumstances. As previously discussed, very few sites have ever been designated as contaminated under Division 2 of *EPEA* as they involve a detailed and lengthy process for moving from the designation of a site to completion of remediation. Nevertheless, these provisions are still a useful tool in specific circumstances and/or that could be revised for greater application. We discuss this further below in the context of legal reforms.

Section 125 (1) of the Act provides that, where the Director is of the opinion that a substance that may cause, is causing or has caused a *significant* adverse effect is present in an area of the environment, the Director may designate this area as a contaminated site. Significant adverse effect is not defined in *EPEA*. Designation of a site may occur regardless of any previous authorizations or remedies applied to the site, or compliance with any legislation.[96] Division 2 also applies regardless of when a substance became present in, on or under the contaminated site.[97]

Formal designation is achieved by issuing a designation document and by providing notice to the owner of the site, all parties responsible for the contaminated site, municipal authorities, and the general public.[98] Members of the public who are directly affected by the designation

[94] *Ibid* at para 18.
[95] *Brookfield CA*, *supra* note 75, at para 15.
[96] *EPEA*, *supra* note 3, s. 125(2).
[97] *Ibid*, s. 123.
[98] *Ibid,* s. 126.

may provide a statement of concern to AEPA.[99] Directly affected parties have a right to appeal matters related to the designation to the Environmental Appeals Board (AEAB).[100]

With respect to liability, Division 2 ties liability to the "person responsible for the contaminated site," which is similar in nature to the definition of "person responsible" (found in Division 1) but with a significantly broader scope for liability. The term "person responsible for the contaminated site" can include persons responsible for a substance present on a contaminated site, persons considered to have caused or contributed to the presence of a substance on a site, current and previous owners of a site, and successors, representatives, principals and agents of those persons.[101] As compared with Division 1, Division 2 casts a broader net for liability, tying liability not only to the substance present on the site but also to current and past owners of the land where the contamination is situated.

Similar to Division 1, there are limited exemptions from the scope of "person responsible for the contaminated site" for municipalities and investigators.[102] There are also limits on the liability of fiduciary representatives, such as persons acting as an executor, administrator, receiver, receiver-manager or trustee of a property, who are subject to environmental protection orders issued under Division 2.[103]

Unlike Division 1, the designation provisions allow for voluntary agreements among parties and a means of allocating responsibility and apportioning costs. Division 2 allows for agreements to be made between persons responsible for a contaminated site and AEPA.[104] Where AEPA is not a party to this type of agreement, it must be approved by the department to be valid.[105] Compliance with an approved agreement shields the parties to the agreement from an environmental protection order dealing with any matter provided for in the agreement.[106]

The primary tool for dealing with a site once it is designated is an environmental protection order (EPO) under section 129 of *EPEA*. If an order under section 129 is issued, AEPA can require any measures necessary to restore the site and the environment, apportion costs among persons responsible, and regulate or prohibit the use of the site. A key feature of the

[99] *Ibid*, s. 127(1).
[100] *Ibid,* ss. 91(1)(g), 91(1)(m), & 127.
[101] *Ibid*, ss. 107(1)(c)(i) - (vi).
[102] *Ibid*, ss. 1(tt)(v) - (vi). Unlike Division 1, municipal exemptions from liability under Division 2 relate only to land acquired through tax recovery proceedings, not to land acquired by dedication or land gifts. The recent amendments to *EPEA* added the municipal exemption for dedications and land gifts under Division 1 only.
[103] *Ibid,* s. 240(3).
[104] *Ibid*, s. 128(1).
[105] *Ibid*, s. 128(2).
[106] *Ibid,* s. 128(3).

designation provisions is the ability of AEPA to allocate liability for remediation costs among persons responsible instead of defaulting to joint and several liability. There is an extensive list of criteria to be considered in deciding whether to issue an EPO to a particular person responsible; these criteria are generally directed at a person's role and relationship to the site, with a focus on the involvement and actions related to the contamination.[107]

Liability Closure

EPEA does not provide any specific statutory mechanisms for regulatory closure for designated contaminated sites. So long as the remediation of the land has been carried out in accordance with the Act, then the *Remediation Regulation* (discussed above) would also apply to contaminated sites. Section 125(3) of *EPEA* permits the Director to cancel a designation of a contaminated site. Section 132 of the Act also enables regulations to be made regulating or prohibiting the use of land with a substance release, but no regulations have been enacted in this regard.

Public Registrations of Contaminated Sites

EPEA includes a provision that allows the designation document, an enforcement order or an environmental protection order to be registered on the land title to which it relates, which can only be removed upon request by the Director. There are also provisions that allow the Minister of Environment to enter into an agreement with a landowner to restrict the land use for a parcel of land and for such an agreement to be registered on title.[108] In practice, it is not clear whether the registration of these types of documents on title has been done consistently or at all. There are also provisions under *EPEA* to make a wide range of information available to the public including approvals, environmental protection orders, and remediation and reclamation certificates.[109]

[107] *Ibid,* s. 129(2).
[108] *Ibid,* ss. ss. 21, 224.
[109] *Ibid*, s. 35(1); see also *Disclosure of Information Regulation*, Alta. Reg. 273/2004.

Policy Guidance for Contaminated Sites

Previously, the Government of Alberta provided policy guidance with respect to contaminated sites in *the Guideline for the Designation of Contaminated Sites under the Environmental Protection and Enhancement Act (Designation Guideline)*.[110] The *Designation Guideline* was "intended to aid in implementing the contaminated sites provisions and to assist parties involved with contaminated sites in becoming aware of the designation process".[111]

The *Designation Guideline* noted that "the designation of a contaminated site will only occur as a last resort when there are no other appropriate tools".[112] It also included guidance on what amounted to significant adverse effect ("adverse effect can become significant when there is an actual or high probability of impact which has or could have a severe consequence on human health, safety or the environment"), provided a list of supplemental criteria to assist the Director in determining whether a site should be designated, and additional guidance on situations in which the liability of parties associated with a contaminated site may be limited.[113] The Designation Guideline also noted that letters of compliance and remediation certificates could be issued when a contaminated site is properly remediated.[114]

The *Designation Guideline* is now listed as out of date on the Government of Alberta's website.[115]

Part 6 – Conservation and reclamation

EPEA differentiates between remediation (under Part 5) and reclamation (under Part 6), which is the focus of this section. Remediation is defined in the *Remediation Regulation* as "reducing, removing or destroying substances in soil, water or groundwater through the application of physical, chemical or biological processes".[116] Meanwhile, reclamation is defined in *EPEA* to

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[110] Alberta, Alberta Environment, *Guideline for the Designation of Contaminated* Sites *Under the Environmental Protection and Enhancement Act*, (Edmonton: Environmental Sciences Division, 2000) online(pdf): https://open.alberta.ca/publications/0778511820 [*Designation Guideline*].
[111] *Ibid* at 1.
[112] *Ibid*.
[113] *Ibid* at 1 & 5.
[114] *Ibid* at 22-23.
[115] *Ibid*.
[116] *Remediation Regulation*, *supra* note 43, s. 1(l).

include the removal of equipment or structures, decontamination of structures, land and water, and the reconstruction of the land surface.[117]

Another difference associated with Part 6 of *EPEA* is that it only deals with the reclamation of "specified land." Specified land has a defined meaning for *EPEA*'s purposes and is aimed at industrial uses of land concerning wells, pipelines and other oil and gas facilities, as well as transmission lines, roadways, railways, mines, quarries, certain plants, and coal and oil sands operations.[118] Liability for reclamation rests with "operators" who carry out activities on specified land.[119] In practice, the operator is most often the current holder of a license issued by the Alberta Energy and Utilities Board (AEUB) for specified land related to upstream oil and gas activities.

Section 137 of *EPEA* imposes a statutory duty on an operator to conserve and reclaim specified land and obtain a reclamation certificate. This duty does not have a time period or specific triggering event tied to it, although an inspector can direct an operator to undertake conservation and reclamation work. The objective of reclamation is to return the specified land to an "equivalent land capability," which means that the ability of the land to support various land uses after reclamation must be similar to the ability that existed prior to an activity being conducted on the land, but that individual land uses will not necessarily be identical.[120]

One of the most important aspects of Part 6 is the provision to terminate liability by issuing a reclamation certificate following the satisfactory completion of reclamation activities.[121] A reclamation certificate protects the operator from being issued an EPO to further reclaim the site after a specified period of time has passed.[122] For upstream oil and gas activities, an operator has a five year period after the certificate is issued where the operator remains responsible for reclamation activities for sites certified before October 1, 2003; operators have a 25 year period of ongoing responsibility for sites certified after October 1, 2003.[123] For certain activities with an *EPEA* approval, regulatory liability ceases from the date the reclamation certificate is issued.[124]

The Act provides that an EPO may be issued to an operator, directing a site to be reclaimed. The order can be issued prior to the issuance of a reclamation certificate or, in cases where a

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[117] *EPEA*, *supra* note 3, s. (1)(ddd).
[118] *Conservation and Reclamation Regulation*, Alta. Reg. 115/93, s. 1(t) [*Reclamation Regulation*].
[119] *EPEA*, *supra* note 3, s. 134(b).
[120] *Reclamation Regulation*, *supra* note 118, ss. 1(e), 2.
[121] *EPEA*, *supra* note 3, s. 138.
[122] *Ibid*, s. 142(2)(b); *Reclamation Regulation*, *supra* note 118, s. 15.
[123] *Reclamation Regulation*, *supra* note 118, s. 15(2).
[124] *Ibid,* s. 15(1)(b).

reclamation certificate has been issued, before the date prescribed in the regulations.[125] There is also a specific provision that permits an EPO to be issued for off-site damage that is not on specified land.[126]

EPEA approvals and security

Certain types of industrial facilities require operating approvals under *EPEA*.[127] When a facility reaches the end of its operating life, the operating approval can be amended to become a decommissioning and reclamation approval. Decommissioning is the permanent closure of all or part of an industrial facility, followed by the removal of process equipment, buildings, and other structures, and the remediation of the surface and subsurface.[128] As mentioned above, reclamation is the reconditioning of the land to a state fit for some future use, and includes the stabilization, contouring, maintenance, conditioning, reconstruction and re-vegetation of the surface of land.[129]

Reclamation approvals are required for coal mines, coal processing plants, oil sands mines, oil production sites where an environmental impact assessment was required, certain sand and gravel pits, larger pipelines, quarries where an environmental impact assessment was required, transmission lines over a certain voltage, and peat operations where an environmental impact assessment was required.[130] The approval specifies measures that must be taken to ensure that any potential impacts on the environment are resolved before the facility is deemed to be reclaimed. The approval is usually issued for a 10 year term.[131]

Security funds are collected from operators who hold approvals for reclamation.[132] Exemptions for posting security are provided for local authorities, and for approvals for pipelines, transmission lines, and oil production facilities.[133] The amount of security is determined by the Director, but must be sufficient to cover the estimated cost of reclamation submitted by the

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[125] *EPEA*, *supra* note 3, ss. 140, 142.
[126] *Ibid*, s. 141; *Reclamation Regulation*, *supra* note 118, s. 9.
[127] *EPEA*, *supra* note 3, ss. 60, 61. Activities requiring approvals are listed under the *Activities Designation Regulation,* Alta. Reg. 276/2003.
[128] Decommissioning is not defined in *EPEA* or in its regulations. It is defined online: Alberta Environment https://www.aer.ca/regulating-development/project-closure/reclamation/oil-and-gas-site-reclamation-requirements/reclamation-process-and-criteria-for-oil-and-gas-sites#decommsiioning.
[129] *EPEA*, *supra* note 3, s. 1(ddd).
[130] *Activities Designation Regulation*, Alta Reg. 276/2003, s. 5(1).
[131] *Environmental Protection and Enhancement Act (Miscellaneous) Regulation*, Alta. Reg. 118/93, s. 7.
[132] *Reclamation Regulation*, *supra* note 118, s. 16.
[133] *Ibid,* s. 17.1.

operator. This amount can be readjusted if circumstances change.[134] The security is held in the Environmental Protection Security Fund, and is returned to the operator when the site is reclaimed and a reclamation certificate is issued.[135] Security may be forfeited if an operator fails to meet its reclamation obligations by failing to comply with orders issued by Alberta Environment. If the funds are insufficient to cover the cost of reclamation, the government can complete the reclamation work and collect the additional money from the operator.[136]

As of March 31, 2021, the total amount of security held in the Environmental Protection Security Fund was $66,366,124.[137]

ii) The Public Health Act

Although the *Public Health Act* (*PHA*) is not environmental legislation, it has an important role to play with respect to "nuisances" or conditions that may be injurious or dangerous to public health.[138] Under the *PHA*, regional health authorities have the power to inspect any public place for the purpose of determining the presence of a nuisance or determining whether the Act and regulations are being complied with.[139] The regional health authorities also have broad powers to issue orders to require, among other things, a site to be vacated, that substances be removed or that work be done on the site.[140]

Regional health authorities are often involved in reviewing environmental assessment reports for sites that are managed by Alberta Environment or that are seeking municipal approvals for changes in land use, or other planning and development approvals.[141] The review process is undertaken to ensure any site remediation or risk management plan adequately protects human health and safety. This role is not explicitly set out in the legislative framework,

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[134] *Ibid,* ss. 18-20.
[135] *EPEA*, *supra* note 3, s. 32; *Reclamation Regulation*, *supra* note 118, ss. 22-24.
[136] *Reclamation Regulation*, *supra* note 118, ss. 22-24.
[137] Alberta Environment, *The Environmental Protection Security Fund Annual Report* (31 March 2021), online: Alberta Environment, Land Reclamation https://open.alberta.ca/dataset/ab50461e-98d2-4faa-9f94-e919bd685680/resource/5d126975-7f47-4821-aa57-31c5cabc4b51/download/aep-environmental-protection-security-fund-annual-report-2020-2021.pdf. This amount includes cash deposits plus interest and securities and does not include non-cash security deposits (guarantees) that have been accepted in lieu of cash.
[138] RSA 2000, c P-37, s. 1(ee) [*PHA*].
[139] *Ibid*, s. 59.
[140] *Ibid*, s. 62.
[141] Jodie Hierlmeier, "Brownfield Redevelopment in Alberta: Analysis and Recommended Reforms" (2006) Environmental Law Centre at 34.

although *EPEA* refers to the cooperative approach that must be taken between environment and health issues.[142]

iii) The Municipal Government Act

Municipalities in Alberta are created by, and derive their powers from, the *Municipal Government Act* (*MGA*).[143] While the regulation of contaminated land falls largely to the province under *EPEA*, municipalities are the level of government that faces the most direct challenges from these sites. Municipalities face concerns over liability issues that can arise in relation to brownfield sites they own or acquire through failed tax sales or dedication during the subdivision process. They may also face civil liability associated with off-site contamination and land use planning decisions related to lands that are contaminated, remediated or risk managed.

In addition to liability issues, municipalities have a significant role to play in brownfield redevelopment. Municipalities may offer financial incentives to spur redevelopment activity in the form of grants, loans, tax breaks or the waiver of fees associated with approvals or permits.[144] Municipalities also have some powers to regulate environmental matters within their borders. They have the power to pass statutory plans and land use bylaws as a means of regulating the use and development of parcels of land.[145] Although these powers are not expressly designed for the purpose of brownfield redevelopment, they are nonetheless important tools that municipalities can use to promote or restrict redevelopment.

[142] *EPEA*, *supra* note 3, s. 11.
[143] RSA 2000, c M-26 [*MGA*].
[144] *Ibid*, s. 364.1
[145] *Ibid*, ss. 632-634, 640.

Issues and Challenges for the Regulation of Contaminated Sites

As set out above, *EPEA* is the primary piece of legislation that governs contaminated sites in Alberta and in particular, the Divisions 1 substance release provisions and the Division 2 contaminated site provisions. The application of these provisions has also given rise to various challenges and some uncertainty with respect to the administration of the current regulatory regime. The ELC has identified the following six issues as being both challenges for the administration of Alberta's current regulatory regime and ripe for law reform:

i. **The Proactive Identification and Designation of Contaminated Sites** – Alberta is not proactive in terms of site identification and clean-up, instead, the regulation of a release is typically only triggered where the release is self-reported or the subject of a complaint;

ii. **Public Access to Comprehensive Environmental Site Information** - Alberta lacks a comprehensive system for registering and accessing environmental site information such as environmental remediation history and related land use restrictions, and information is spread across various sources depending on the type of record or source of information;

iii. **Responsibility for the Clean-Up of Contaminated Sites** - There is some uncertainty with respect to who qualifies as a "person responsible" for a substance release under *EPEA,* in particular with respect to whether a new landowner (who is not a polluter) is liable for the clean-up of pre-existing pollution;

iv. **Allocation of Liability** – There is an absence of guiding policy around the allocation of remediation costs with respect to those named in an Environmental Protection Order;

v. **Lack of Regulation for Risk Management through Exposure Control at Contaminated Sites** - the overall focus of *EPEA* and its regulations is on remediation and, as a result, there is a lack of regulatory guidance with respect to the use of exposure control and/or managing contaminated soil *in situ*;

vi. **Standards of Remediation and Related Compensation** – Alberta's current regulatory regime fails to capture the true costs of a substance release and its environmental harms over time.

This section of the report looks at the above-noted issues along with recent case law and tribunal decisions of the Alberta Environmental Appeals Board (AEAB). Where applicable, we have canvassed other jurisdictions' approaches to these challenges. Finally, recommendations are made to address these issues and improve upon Alberta's regulatory regime.

i. The Proactive Identification and Designation of Contaminated Sites

Substance Release vs Contaminated Sites Provisions

When *EPEA* was first enacted there was some confusion as to when it was appropriate for AEPA to enforce the substance release provisions in Division 1 versus the contaminated sites provisions in Division 2. Given that the contaminated sites provisions had more stringent requirements and were more cumbersome to apply, the Ministry seemed to prefer to rely upon the substance release provisions to address historical contamination. Meanwhile, industry took issue with these provisions having retrospective application.

Three early cases, *Legal Oil and Gas Ltd. v Director, Land Reclamation Division, Alberta Environmental Protection, McColl-Frontenac Inc. v. Alberta (Minister of the Environment) and Imperial Oil Limited v. Alberta (Minister of the Environment)* confronted this issue. Ultimately, the AEAB and the courts found that the language of the substance release provisions was neither retrospective nor prospective, but that the provisions could be used retroactively to address historical contamination. Since these three cases were decided, it is mostly settled that the Division 1 substance release provisions may be enforced against historical contamination. In part, this has led to AEPA preferring to use the Division 1 provisions to address historical contamination, even though the Division 2 contaminated sites provisions expressly apply "regardless of when a substance became present in, on or under the contaminated site."[146]

One consequence of AEPA relying on release related provisions rather than the contaminated site provisions of *EPEA* is that the Government of Alberta has not been proactive in terms of site clean-up and identification. Indeed, regulation of releases is typically only triggered where the release is self-reported or where complaints are made, i.e. reactive contamination regulation.

[146] *EPEA*, *supra* note 3, s. 123.

Conversely, the contaminated site designation provisions empower the Director to identify and designate contaminated sites on a proactive basis. Generally speaking, a proactive approach to contaminated site designation helps to promote greater clarity around liability for polluters and landowners; increased transparency for government, industry and the public due to land title registrations; and more timely remediation as a result of the earlier identification of sites and imposition of regulatory timelines and reporting obligations. Other jurisdictions have successfully pursued avenues of proactive contaminated site designation and liability allocation. These approaches include the statutory delegation of site evaluation and designation to local authorities, as well as the imposition of requirements such as site assessments and reporting prior to a change of use.

The following section looks at the three cases that helped pave the way for the substance release provisions to be used for historical contamination. There is a brief discussion of how these two provisions differ as well as the repercussions of preferring the substance release provisions. Finally, there is a review of different jurisdictional approaches to the proactive designation of contaminated sites.

Legal Oil and Gas Ltd. v Director, Land Reclamation Division, Alberta Environmental Protection, 1999 ABEAB 15

At issue in this appeal was whether an EPO applied retrospectively to substances released prior to Sept 1, 1993, the date *EPEA* was proclaimed. This appeal also considered the question of who are persons responsible, which is discussed in greater detail under s. iii "Responsibility for the Clean-Up of Contaminated Sites" below.

The facts of the case are that an EPO was issued in 1998 requiring Legal Oil and Gas Ltd. ("Legal Oil") and Mr. Charles Forster (Legal Oil's sole director and shareholder) to assess the extent of, and remediate salt water brine and hydrocarbon pollution on farm land currently owned by the Tieulies.[147] The salt water and hydrocarbon contamination arose from the operation of a well-site on the Tieulies' land that has been more or less continuously owned by Legal Oil since 1963.[148] Prior to that, it was owned by Sinclair Canada Oil Co. ("Sinclair").

The Tieulie family originally entered into a petroleum and natural gas lease with Sinclair in 1949 and the well was drilled in 1953. All parties were in agreement that Sinclair's operations were

[147] *Legal Oil and Gas Ltd. v Director, Land Reclamation Division, Alberta Environmental Protection,* 1999 ABEAB 15 at paras 1-2 [*Legal Oil*].
[148] *Ibid* at para 2.

likely the original cause of the salt water brine and hydrocarbon contamination.[149] Sinclair sold its interest in the well to Legal Oil's predecessor in 1961 and ceased to exist.[150] The contamination extended beyond the legal borders of the well-site but was within the Tieulies' overall quarter section of land in which the well was located.[151]

Legal Oil's primary objection was that it was not a person responsible for the salt water brine and hydrocarbons which exist outside of the well-site boundary.[152] For reasons discussed in greater detail below, the Board found that both Legal Oil and Mr. Forster himself were persons responsible and validly named in the Order.[153]

Legal Oil also argued that the Order was being applied "retrospectively", that is, imposing new legal consequences on conduct which occurred prior to the enactment of *EPEA*. In general, the Board noted that statutes are not meant to be applied retrospectively unless such a construction is expressly or by necessary implication required by the language of the Act.[154] However, the presumption against retrospective legislation is inapplicable when the legislation is intended to protect the public rather than to impose punishment for past conduct.[155]

The Board concluded that the Director's order was consistent with the Legislature's intent in enacting s. 113(1) (previously s. 102(1)) of the Act). Section 113 takes a broad temporal approach by referring expressly to "releases" and person responsible in the present, future and past tenses.[156] Furthermore, section 2 of the Act lists far-reaching environmental objectives, and given the prevalence of historic releases of substances which pose threats to Alberta's environments, the Board noted it was difficult to imagine how these objectives could be achieved without authorizing the Director to require that historic releases be assessed and remedied.[157]

While Legal Oil's post-hearing submissions referred to the unfairness of having to clean up a mess it did not make, the Board noted that Legal Oil agreed to inherit Sinclair's rights and responsibilities with respect to the Tieulies' entire quarter section (and not just the well site) and that Mr. Forster gave testimony that suggested he knew of Sinclair's disposal practices

[149] *Ibid* at para 6.
[150] *Ibid* at para 7.
[151] *Ibid* at para 3
[152] *Ibid* at para 13.
[153] *Ibid* at para 16.
[154] *Ibid* at para 32.
[155] *Ibid* at para 33.
[156] *Ibid* at para 34.
[157] *Ibid* at para 36.

prior to his purchase.[158] It would also be unfair to ask Alberta taxpayers or the Tieulies to bear the costs of remediation. The Board found that the Legislature intended s. 113 to have retrospective application.[159]

McColl-Frontenac Inc. v. Alberta (Minister of the Environment), 2003 ABQB 303

McColl-Frontenac Inc. ("McColl") sought judicial review of the Minister of the Environment's decision to confirm an EPO granted by the Director. Among other things, McColl sought to appeal the decision on the basis that the Minister erred in interpreting relevant sections of *EPEA*, namely by finding that Division 1 (as opposed to Division 2) was applicable and also "by finding that…the legislation was intended to have retrospective effect".[160]

By way of background, the EPO required McColl to assess pollution at a site in northwest Calgary and to design and implement a plan for remediation. McColl is the successor to several companies that owned the site and operated a gas station on it from approximately 1956 to 1979. The underground storage tanks and equipment were removed some time in 1981. Since 1982, the property had been used for the operation of an equipment rental company. Environmental site assessments in 1998 and 1999 revealed hydrocarbon contamination. AEPA was notified of the contamination in early 2000 and contacted McColl, who advised that the property had been sold "as is" to Al's Equipment Rentals (1978) Ltd. ("Al's Rentals"), an equipment rental company. AEPA issued the EPO and named McColl as a person responsible.

McColl argued that, among other things, the AEAB made a patently unreasonable error when it concluded that the Director could issue the EPO under the Division 1 substance release provisions rather than the Division 2 contaminated sites provisions.[161]

The Court upheld the Minister's decision to issue the EPO under the Division 1 provisions of *EPEA*. The Court made note of the following differences:

- There is a lower threshold under Division 1 than Division 2 – Division 1 applies where the Director is of the opinion that a substance may cause, is causing, or has caused an

[158] *Ibid* at para 39.
[159] *Ibid* at para 42.
[160] *McColl-Frontenac Inc. v. Alberta (Minister of the Environment),* 2003 ABQB 303 at para 1 [*McColl 2003*], aff'g *McColl-Frontenac Inc. v. Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (7 December 2001), Appeal No. 00-067-R (AEAB) [*McColl 2001*].
[161] *Ibid* at para 81.

adverse effect, whereas Division 2 applies to a site where the Director is of the opinion that a substance may cause, is causing, or has caused a *significant* adverse effect. There is no evidence the site posed a severe risk to humans or the environment;[162]

- The Director cannot issue an EPO under s. 114 until the site has been designated as a contaminated site. This designation requires a comprehensive public process that is considered "time-consuming and resource intensive" by the AEAB. As a result, it is the slowest tool for cleaning up a polluted site;[163]

- The two types of EPOs feature different kinds of directions. For instance, under s. 102 the Director can require the person to whom the order is directed to investigate the contamination, whereas under s. 114, they cannot.[164]

Altogether, the AEAB noted there were policy reasons for proceeding under either section, but due to timeliness issues and the higher "significant adverse effect" the Director favoured proceeding under s. 102 and the Court found that this decision was not patently unreasonable.

The Court also considered whether the AEAB erred in finding that s. 102 could be applied retrospectively. In its report, the AEAB reviewed the decision in *Legal Oil* and concluded the EPO rested on a spectrum with some aspects reflecting retrospective operation and others prospective. The Court found the Board has "developed and articulated its own jurisprudence and analytical approach to the interpretation of the Act" which was subject to deference.[165] While the Court may have found otherwise, its decision was not patently unreasonable.[166]

Finally, the court also considered whether the AEAB erred in finding that there was a public protection exception to the presumption against retrospectivity. This presumption holds that "statutes are not to be construed retrospectively unless such a construction is expressly or by necessary implication required by the language of the Act".[167] The presumption does not apply to statutes that impose a penalty related to a past event so long as the goal of the penalty is public protection.[168]

The Court found that the statute at issue fell within the public protection category. One of the objectives of the Act is to make the polluter pay – and consistent with this is imposing an

[162] *Ibid* at para 82.
[163] *Ibid* at paras 83, 86.
[164] *Ibid* at para 84.
[165] *Ibid* at para 99.
[166] *Ibid* at para 100.
[167] *Ibid* at para 102.
[168] *Ibid* at para 102.

obligation upon those who caused the pollution in the first place.[169] Accordingly, the application was dismissed.

Imperial Oil Limited v. Alberta (Minister of the Environment), 2003 ABQB 388

The *Imperial Oil Limited v. Alberta (Minister of the Environment)* decision was issued shortly after *McColl* and came to a similar conclusion. In this case, Imperial Oil Limited ("Imperial") sought judicial review for an EPO issued to Imperial and Devon Estates Limited ("Devon") with respect to hydrocarbon pollution on Lynnview Ridge, a residential subdivision.

Imperial owned and operated a petroleum refinery on lands immediately north of Lynnview Ridge from 1923-1975. The lands also contained soil storage tanks and a "land farm" where petroleum sludge was spread on open lands. The refinery, holding tanks, and land farm were decommissioned between 1975-1977.[170] The clean-up complied with what was necessary at the time, as there were no regulatory standards relating to hydrocarbon or lead contamination at that time. Lands used in conjunction with the hydrocarbon refinery were reclaimed and redeveloped into a residential community. The land was eventually developed by Imperial (or its subsidiary Devon) and then sold to Nu-West Developments.[171]

Later, monitoring and testing revealed the levels of hydrocarbon vapours and lead in the soil exceeded acceptable levels relative to today's standards. In 2001, Alberta Environment issued an order requiring Imperial and Devon (as "persons responsible") to remediate the site.[172] On July 3, 2001, Imperial and Devon appealed the EPO to the AEAB. A stay was never granted in relation to the EPO, although Imperial requested one. On September 11 & 12, 2001, the Director wrote two letters to Imperial directing it to do numerous things, and indicating that the Director was continuing the process established under the Act and ensuring that remedial action is taken. Imperial was unable to appeal the September Letters. In May 2002 the AEAB issued its report to the Minister and in July 2002 the Minister issued his decision and ordered the Director to require compliance with the EPO and if new evidence permits, to give due consideration to applying the procedures related to contaminated sites. In response, Imperial filed for judicial review.

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[169] *Ibid* at para 111.
[170] *Imperial Oil Limited v Alberta (Minister of the Environment)*, 2003 ABQB 388 at para 2 [*Imperial Oil*].
[171] *Ibid* at para 2.
[172] *Ibid* at para 2.

One of the issues under review was whether the Minister committed a reviewable error by allowing the use of s. 113 of *EPEA* (for release of a substance) rather than s. 129 (for contaminated sites). Imperial argued that only the contaminated sites provisions applied to sites that were contaminated before the introduction of the Act.[173] In upholding the EPO, the Minister applied the Act retrospectively to the substances at Lynnview Ridge.

Similar to the decision in McColl, the court found that the appropriate level of review was "patent unreasonableness".[174] The court acknowledged that the Division 2 provisions created a "comprehensive regime to deal with contaminated sites".[175] Nevertheless, s. 113 in Division 1 uses the past tense when it refers to a release of a substance that "has occurred" and "has caused" and it is a reasonable interpretation that s. 113 can deal with a present or ongoing effect of a past release.[176]

In this case, the AEAB had decided that the Director had the discretion to decide under which section to proceed and noted that the Director's main concern was the ongoing presence of the substances and their present adverse effects.[177] The Court found that the decision of the Minister to rely on s. 113 (and not s. 129) was not patently unreasonable, as the wording of the Act uses past tense in s. 113 as well as the broad legislative scheme.[178]

Discussion

The aforementioned trio of cases made it clear that the Division 1 substance release provisions could be used to address sites with historical contamination. Since then, because the substance release provisions are generally simpler to apply, AEPA tends to prefer them over the more onerous contaminated sites provisions. Nevertheless, there are substantive differences between the two sets of provisions, including:

- The substance release provisions can apply where a substance may cause, is causing or has caused an "adverse effect" while the contaminated sites provisions require a "significant adverse effect";

[173] *Ibid* at para 36.
[174] *Ibid* at para 39.
[175] *Ibid* at para 46.
[176] *Ibid* at para 47.
[177] *Ibid* at para 50.
[178] *Ibid* at para 51.

- The substance release provisions lay responsibility with the "person responsible for the substance" whereas the contaminated sites provisions apply to a "person responsible for the contaminated site";

- A contaminated site designation may be registered on land title whereas for releases only orders are registered on title;[179]

- The contaminated sites provisions permit the "person responsible for the contaminated site" to enter into voluntary agreements with AEPA while the substance release provisions do not; and

- Under the substance release provisions, once a remediation certificate has been issued there can be no EPO with respect to the same release, whereas under the contaminated sites provisions the Director may designate an area as contaminated and issue an EPO notwithstanding that a remediation certificate has already been issued;[180]

Depending on the circumstances, one set of provisions may be more appropriate than the other. Moreover, there can also be repercussions to proceeding under the substance release provisions versus the contaminated sites provisions.

For example, in *Sears Canada Inc. et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks*[181] (discussed in greater detail below under s. iii "Responsibility for the Clean-Up of Contaminated Sites" section), AEPA issued an EPO to Sears Canada Inc. ("Sears"), Suncor Energy Inc. ("Suncor") and Concord North Hill GP Ltd. ("Concord") under the substance release provisions with respect to a site with historical contamination. The AEAB considered whether the EPO should have been issued under the contaminated sites provisions, but the main issue on appeal was whether Sears, Concord, Suncor and the owners of the shopping mall next to the contaminated property were "persons responsible" as defined in *EPEA*.

The Board relied upon *Imperial* and *McColl* to find that the Director's decision to issue an EPO under section 113 of *EPEA* was reasonable.[182] In addition, the Board recommended that the EPO be confirmed with respect to Sears and Suncor as they were polluters and/or operated the service station on the site and were clearly persons responsible under *EPEA*. However, the

[179] *EPEA*, *supra* note 3, s. 224(1).
[180] *Ibid*, ss. 118 & 125 (2)(a).
[181] *Sears Canada Inc. et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (3 February 2020), Appeal Nos. 17-069- 070 and 18-013-R (AEAB), 2020 ABEAB 6 [*Sears*].
[182] *Ibid* at para 244.

Board declined to find that Concord and the owners of the shopping mall were proper parties to the EPO. The Board pointed to *Imperial* and *McColl* as cases where the Board declined to find that select owners of the subject property were a person responsible.[183] In the Board's view, the fact that the substance release provisions (as opposed to the contaminated sites provisions) did not include the owners of the property as a person responsible indicates that they were not intended, without more, to include the owner of the contaminated property.[184]

The *Sears* case illustrates how consequences can flow from the Director's decision to proceed under one set of provisions as opposed to the other. In choosing to issue the EPO under the substance release provisions, the Director was limited in the type of party that could be added to the order and therefore share in the labour and costs of remediation. This was especially relevant in the *Sears* case given that the titular party, Sears, was insolvent.

Another issue that arises with AEPA preferring the substance release provisions and which was briefly touched on above is that these provisions do not put any focus on the proactive identification and clean-up of contaminated sites. Indeed, regulation of releases is typically only triggered where the release is self-reported or where complaints are made, i.e. reactive contamination regulation. In contrast, the contaminated sites designation process relies on the Director's initiative to identify and designate contaminated sites.

Proactive designation and management of contaminated sites can be challenging both politically and practically. Polluters, landowners and municipalities may all have concerns with transparent and proactive identification of sites as they can be perceived as economically costly and counterproductive to market driven remediation efforts. Nevertheless, if one considers a stand-alone public duty to remediate land as a starting point then the delay and obfuscation of site conditions is antithetical to these stated statutory aims.

The following section looks at how select other jurisdictions have taken a more proactive approach to the designation of contaminated sites.

Jurisdictional Approaches to Proactive Identification and Designation of Contaminated Sites

Other jurisdictions have successfully pursued alternative avenues of proactive contaminated site designations and liability allocation. Approaches that have been used include the statutory

[183] *Ibid* at para 265.
[184] *Ibid* at para 269.

delegation to local authorities for site evaluation and designation, and requiring a site assessment and reporting prior to a change of use. Examples from British Columbia, Ontario and the United Kingdom are detailed below.

British Columbia

In British Columbia, the proactive identification of contaminated sites is promoted through the use of site disclosure statements. The *Environmental Management Act* (*EMA*) requires that site disclosure statements are provided in a variety of instances (and to various parties depending upon the situation).[185] Site disclosure statements are required where a person applies for or "otherwise seeks approval for subdivision", applications for zoning changes, development permits that involve soil disturbance, those decommissioning a site or ceasing operations on land and those filing for creditor protection or bankruptcy under relevant federal laws.[186] Further, a vendor must provide a site disclosure statement to a prospective purchaser where "the vendor knows or reasonably should know that the real property has been used for a specified industrial or commercial use."[187]

The *Contaminated Sites Regulation* requires that site disclosure statements are provided at least 30 days before the actual transfer of real property, or if the time is shorter, then before the written agreement is entered into.[188] The Director may also order a person to "prepare and provide to the director a site disclosure if that person …owns or occupies land that, in the opinion of the director, may be a contaminated site on account of any past or current use on that or other land".[189]

The Director may also order an owner or operator of a site, at their own expense, to undertake a preliminary site investigation or detailed site investigation and prepare a report if the Director reasonably suspects on the basis of a site disclosure statement that the site may be contaminated or contains substances that may cause or threaten to cause adverse effects on human health or the environment.[190] Upon receipt of the site investigation, the Director may require additional investigation or reporting.[191]

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[185] *Environmental Management Act*, SBC 2003, c 53, s. 40 [*EMA*].
[186] *Ibid*.
[187] *Ibid*, s. 40(6).
[188] *Contaminated Sites Regulation*, BC Reg 375/96, s. 3.3 [*Contaminated Sites Reg*].
[189] *EMA*, *supra* note 185, s. 40(8).
[190] *Ibid*, s. 41.
[191] *Ibid*, s. 41(3).

Certain aspects of the regulatory approach can be delegated to municipal officials, including that of site investigations and the issuance of remediation orders.[192] Nevertheless, unlike in other jurisdictions such as the United Kingdom (discussed below), BC law prohibits delegation of the determination of whether a site is contaminated and whether a person responsible is a "minor contributor".[193] The legislation also enables the recovery of fees related to the administration of this section.[194]

A failure to provide a site disclosure statement or knowingly provide false or misleading information is subject to prosecution and a fine not exceeding $200,000 or imprisonment not greater than 6 months (or both).[195]

Ontario

Proactive identification of contaminated sites in Ontario is promoted through a requirement that a record of site condition be provided to the government prior to any change in use of the property. The *Environmental Protection Act* (*EPA*) provides that a "person shall not…change the use of a property from industrial or commercial use to residential or parkland use", change the use as prescribed by the regulation, or construct a building if it is in connection with a change of use, except where a record of site condition is filed on the provincial registry set up for that purpose.[196]

A record of site condition is a document that summarizes the environmental condition of a property.[197] The *Records of Site Condition Regulation* sets out the requirements of the record of site condition and the changes in use which trigger the need to provide the record.[198] The record of site condition must be prepared by a qualified party and go through a phase 1 environmental site assessment and, if necessary, phase 2 environmental site assessment process, as well as confirmatory sampling in the case of a site cleanup. A phase 1 environmental site assessment requires a records review, interviews and a site visit but does not require an

[192] *Ibid*, s. 57.
[193] *Ibid*, s. 57(4).
[194] *Ibid*, s. 57(5).
[195] *Ibid*, s. 120(17).
[196] *Environmental Protection Act*, RSO 1990, c E.19 at s. 168.3.1 [*EPA*].
[197] Government of Ontario, *Guide: site assessment, cleanup of brownfields, filing of records of site condition* (October 2004), online: https://www.ontario.ca/page/guide-site-assessment-cleanup-brownfields-filing-records-site-condition#section-9.
[198] *Records of Site Condition - Part XV.1 of the Act*, O Reg 153/04 [*Record of Site Condition Reg*]. Additional requirements for soil removal and evaluation are set out in the *On-Site and Excess Soil Management*, O Reg 406/19 (not yet in force).

intensive site investigation.[199] A phase 2 environmental site assessment requires a site investigation, including a sampling and analysis plan. In addition, sites that require a phase 2 environmental site assessment must also submit a risk assessment that is satisfactory to the Director.[200] A record of site condition must be completed and filed in the Environmental Site Registry.[201]

In this way, Ontario ensures that land use changes are only allowed where some level of assessment and risk analysis has occurred.

United Kingdom and Scotland

The process of evaluating and designating contaminated sites in the UK and Scotland is managed under the *Environmental Protection Act* (*UK EPA*).[202] Section 78B of this Act states that "every local authority shall cause its area to be inspected from time to time for the purpose…of identifying contaminated land; and enabling the authority to decide whether any such land is land which is required to be designated as a special site".

The local authority is further able to determine "appropriate persons" to bear responsibility for clean-up and "shall…serve on each person who is an appropriate person a notice specifying what that person is to do by way of remediation and the periods within which he is required to do each of the things so specified."[203] A remediation notice will also include the proportion of costs to be covered by the appropriate parties (where there are two or more appropriate parties).[204] The remediation ordered must be "reasonable" with regard to cost and the seriousness of the harm or pollution of controlled waters.[205] Several exemptions apply to remediation notices and appeals are enabled by the legislation.[206]

In a review of the establishment of these laws, W. Walton observed that there was significant pushback from local authorities over the concern that identification and public registration of

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[199] Government of Ontario, *Guide for completing phase one environmental site assessments under Ontario Regulation 153/04,* s. 2.2 (Sept 2016 updated Sept 2023), online (pdf): https://www.ontario.ca/page/guide-completing-phase-one-environmental-site-assessments-under-ontario-regulation-15304#section-4.
[200] *EPA*, *supra* note 196, s. 168.4; Government of Alberta, *Guide for completing phase two environmental site assessments under Ontario Regulation 153/04,* online: https://www.ontario.ca/page/guide-completing-phase-two-environmental-site-assessments-under-ontario-regulation-15304.
[201] *EPA*, *supra* note 196, s. 168.3 & 168.3.1(2).
[202] *Environmental Protection Act* 1990 (UK), 1990, c 43 [*UK EPA*].
[203] *Ibid*, s. 78E.
[204] *Ibid*, s. 78E(3).
[205] *Ibid*, s. 78E(4).
[206] *Ibid*, ss. 78H & 78L.

these sites would discourage property development (i.e. stigmatize the property). He notes that the position of some of the local authorities illustrated "how important those [property development] fortunes are considered to be…compared with the environmental objectives which the registers were intended to address" with one local authority even indicating that it would not comply with the new laws.[207]

This type of proactive delegation would be prudent insofar as it emphasizes the relevant role of municipalities in Alberta in land use decision-making. Furthermore, legislative changes to enable such delegation could include an expansion of land use management powers in terms of administrative orders for remediation. A key consideration is that municipalities (and other local authorities) would need more resources to undertake the contaminated assessment, compliance and enforcement functions.

Conclusion on the Proactive Identification and Designation of Contaminated Sites

At first, following the enactment of *EPEA*, there was some confusion as to when and how AEPA should proceed under the substance release provisions versus the contaminated sites provisions. Three early cases, *Legal Oil and Gas Ltd. v Director, Land Reclamation Division, Alberta Environmental Protection, McColl-Frontenac Inc. v. Alberta (Minister of the Environment),* and *Imperial Oil Limited v. Alberta (Minister of the Environment)* considered this issue and ultimately worked out that the substance release provisions could be used to address historical contamination. Since then, and because the substance release provisions are generally simpler to apply, AEPA has tended to prefer them over the more onerous contaminated sites provisions.

However, due in part to this preference, AEPA has not put much focus on the proactive identification and clean-up of contaminated sites. Under the substance release provisions, the regulation of releases is typically only triggered where the release is self-reported or where complaints are made. In contrast, the contaminated sites designation process relies on the Director's initiative to identify and designate contaminated sites.

How can the law encourage the proactive designation and management of contaminated sites? A review of other jurisdictions suggests the following methods:

[207] Walton, W. "Bad land and bad law: the role of local authorities in the formulation of new legislation and guidance for contaminated land in the United Kingdom." *Environment and Planning C: Government and Policy* 15, no. 2 (1997): 229-243 at 241.

- In BC landowners must file a site disclosure statement before making certain changes to use or zoning, when selling the property or at the request of the Director;
- In Ontario a record of site condition (including a site assessment) must be provided to the government prior to any change in use of the property. If the property requires a phase 2 environmental site assessment, then the Director may issue a "certificate of property use" requiring specific actions to be taken (and which may limit the use). Financial assurance may also be required;
- In the United Kingdom local authorities are tasked with inspecting and identifying contaminated sites and may determine "appropriate persons" and issue remediation orders;

One or all of these approaches would assist Alberta in more proactively designating contaminated sites. A key consideration however is that the province and/or municipalities (and other local authorities) would need additional resources to undertake these functions.

Recommendation 1: Implement reporting obligations prior to change of use or ownership of property

Alberta should implement reporting obligations (similar to those in BC or Ontario) when a property changes hands or use. This would help to ensure that changes in use only occur where some level of assessment and risk analysis has taken place. Moreover, it would also help the government to proactively designate contaminated sites.

On a practical level, property owners should be required to submit a record of site condition to the government before changing the property from industrial or commercial use to residential or parkland use (or as otherwise prescribed by regulation), and before the sale of a property. The record of site condition should be prepared by a qualified party and go through an environmental site assessment process (also as prescribed). In select circumstances, where the environmental site assessment reveals contamination or potential contamination, then the Director may issue a certificate of property use and require any action that is necessary to prevent, eliminate or ameliorate any adverse effect that has been identified in the site assessment as well as put limits on use. The record of site condition (as well as any certificates of property use) should be recorded in the Environmental Site Assessment Repository and linked to the Land Titles registry.

ii. Public Access to Comprehensive Environmental Site Information

A related issue to the proactive designation of sites is that of public access to information about environmental site conditions. Currently, Alberta lacks a comprehensive system for registering and accessing environmental site information such as environmental remediation history and related land use restrictions. Furthermore, while *EPEA* does provide for the public disclosure of a wide range of information, in practise this is not done on a consistent basis and the information is not contained in one registry but rather spread across various sources depending on the type of record and information.

The Government of Alberta does maintain an online database with respect to assessed and reclaimed sites. The Environmental Site Assessment Repository (ESAR) is an online, searchable database of information about assessed and reclaimed sites in Alberta. ESAR provides access to the following information:

- Environmental site assessments (ESAs); and
- Reclamation certificates, applications and reports for upstream oil and gas well sites, gravel pits, and other specified lands on private land.[208]

However, ESAR does not contain information on reclamation certificates on public lands, oil and gas contaminated sites information, or incidents reported under the *Release Reporting Regulation*.[209] ESAR also does not include EPOs, risk management plans, voluntary remediation agreements, remediation certificates, or record of site conditions (as discussed above). As a result, ESAR is of limited utility when it comes to identifying and obtaining information on contaminated sites.

As previously discussed, there are legislative mechanisms in *EPEA* that permit select information to be registered on title. Section 224 of *EPEA* provides that the Director may submit a contaminated site designation, enforcement order or EPO to be registered on the land title to which it relates. The endorsement or record does not lapse and can only be removed upon request by the Director.[210] There are also provisions that allow the Minister to enter into an agreement with a landowner to restrict the land use for a parcel of land and for such an

[208] Government of Alberta, "Environmental site assessment repository", online: https://www.alberta.ca/environmental-site-assessment-repository.
[209] *Ibid*.
[210] *EPEA*, *supra* note 3, s. 224(4).

agreement to be registered on title.[211] However, in practice, it appears that the registration of these types of documents on title have not been done consistently or at all.

There are also provisions under *EPEA* to make a wide range of information available to the public.[212] Section 35(1)(b) of the Act provides that select documents such as remediation certificates, enforcement orders and EPOs "shall be disclosed to the public in the form and manner provided for in the regulations". Section 2(1) of the *Disclosure of Information Regulation* provides that the Director (or other person in charge of the information referred to in section 35(1) of *EPEA*) "may publish the document or information in any form and manner the Director or other person considers appropriate".[213] The regulations also provide instructions and timelines with respect to requests in writing for documents or information referred to in section 35 of the Act.[214] The Government of Alberta does maintain a *webpage* for disclosing environmental compliance enforcement Orders and reports. However, this webpage does not appear to be updated on a consistent basis.[215]

Discussion

Registries for environmental site information are important tools for both regulators and the public. They can alert purchasers to potential contamination and aid with due diligence.[216] They can also assist with identifying actual contamination as well as dispel the perception of contamination that can stigmatize certain sites.[217] Overall, something like a comprehensive registry of environmental site information that is registered or tied to title would help provide accurate information on site conditions, promote transparency to the public and ensure that land transfers do not undermine regulatory responses to contaminated sites.

[211] *Ibid*, ss. 21, 224.
[212] *Ibid,* s. 35(1).
[213] *Disclosure of Information Regulation*, Alta. Reg. 273/2004, s. 2(1).
[214] *Ibid*, s. 2.
[215] As of September 11, 2023, the webpage had not updated its "orders by year" section since 2021 and had not issued a "Summary of Enforcement Actions Quarterly Report" since January 2022.
[216] Robert K. Omura, "Strategies for Cleaning Up Contaminated Sites in Alberta" (2013) CIRL Occasional Paper #41 at 16, online: https://canlii.ca/t/t2q3.
[217] *Ibid* at 16.

Jurisdictional Review of Public Access to Comprehensive Environmental Site Information

British Columbia

As previously discussed, the *EMA* requires that site disclosure statements are provided in relation to real estate transactions. Specifically, the vendor of real property must provide a site disclosure statement to a prospective purchaser if "the vendor knows or reasonably should know that the real property has been used for a specified industrial or commercial use."[218] In addition, the Director may order a person to "prepare and provide to the director a site disclosure if that person …owns or occupies land that, in the opinion of the director, may be a contaminated site on account of any past or current use on that or other land."[219]

The *EMA* also requires the Minister to establish and maintain a site registry that is accessible to the public and contains records about the identification, investigation and remediation of contaminated sites.[220] In particular, the Director must provide information respecting:

- All site disclosure statements, preliminary site investigations and detailed site investigations;
- All orders, approvals, voluntary remediation agreements and decisions;
- Pollution abatement orders that impose a requirement for remediation;
- Notifications respecting independent remediation;
- Declarations and orders made by the minister re orphan sites; and
- Other information as required by the regulations.[221]

Note the Act exempts vendors of real property from the requirement to provide a site disclosure statement if the vendor does not have an ownership interest in the real property, the prospective purchaser waives their entitlement to the site disclosure statement or, if at the

[218] *EMA*, *supra* note 185, s. 40(6).
[219] *Ibid*, s. 40(8).
[220] *Ibid*, s. 43.
[221] *Ibid*, s. 43(2); *Record of Site Condition Reg*, *supra* note 198, s. 7.1-10.

time of the contract for purchase and sale, the real property is used primarily for a residential purpose or has never been zoned for any other use than residential purposes.[222]

Ontario

Similarly, in Ontario a record of site condition must be provided to the government prior to any change in use of the property. The *EPA* states that the Director shall establish, maintain and operate an environmental site registry to allow the filing of records of site condition and to facilitate public access to information contained in records of site condition.[223] The record of site condition contains, among other things, a description of any remediation done on site and information on known contaminants and their concentration on site.[224]

Conclusion on Public Access to Comprehensive Environmental Site Information

Legislation in both British Columbia and Ontario requires the government to maintain registries that facilitate public access to greater environmental site information. Similarly, *EPEA* should be amended to provide for the registration on title of remediation certificates, enforcement orders, EPOs, and site-specific risk management measures. Provisions should be included to ensure the notice on title constitutes an interest in land that "runs with the land" so as to bind not only the current landowner but also their successors in title. These recommendations are consistent with existing provisions under *EPEA* that allow for the registration on title of land use restriction agreements (s. 21) and conservation easements (s. 23-24) as well as provisions that require the public disclosure of remediation certificates, EPOs and enforcement orders (s. 35). Registration on title is the preferred approach because it can provide an accurate, accessible and inexpensive source of information on the state of title to any piece of privately owned property in the province.

In addition, this information should be linked to Alberta's current database, ESAR. Ideally, ESAR would be updated to include the following information for both public and private property in a searchable registry:

- Record of site conditions (see Recommendation 1, above);

[222] *Contaminated Sites Reg.*, *supra* note 188, s. 4.6.
[223] *EPA, supra* note 196, s. 168.3.
[224] *Ibid*, s. 168.4(2).

- Risk management plans;
- Voluntary remediation agreements;
- Reclamation certificates;
- Remediation certificates; and
- Enforcement related information.

Note that while ESAR currently includes reclamation certificates for private property it does not include those for public lands.

Recommendation 2: Improve public access to environmental site information through title registrations

Alberta should amend *EPEA* to provide for the registration of additional environmental site information such as remediation certificates, enforcement orders, EPOs and site-specific risk management plans/measures on title in a timely fashion. This information should also be linked and published in ESAR as part of its searchable registry.

iii. Responsibility for the Clean-Up of Contaminated Sites

Clarity around who is responsible for pollution and clean up should be a focus of environmental laws. While the "polluter pays" principle is mostly expressed in *EPEA* the issue becomes muddied where land is transferred from one party to another. That is, there is some uncertainty whether a new landowner (who is not a polluter) is liable for pollution clean-up.

EPEA, as has been described above, defines two types of "persons" who may be held responsible for pollution. Those that are responsible for the "substance" and those that are responsible for a "contaminated site" (once designated). These definitions, and the practical impact of AEPA not using the contaminated sites provisions, has limited the regulatory tools to ensure liability does not fall to the public or that sites do not languish in civil litigation and bankruptcy proceedings.

The heart of the matter can be distilled into a single question: should an "innocent" owner or occupier of land be responsible to clean up pollution on that land, even though they may have not been the one who polluted the land?

"Person Responsible"

Sections 113 and 114 of *EPEA* permit the Director to issue an EPO and Emergency EPO for a release of a substance to the "person responsible for the substance". The phrase "person responsible for the substance" is defined in the Act as:

> (tt) "person responsible", when used with reference to a substance or a thing containing a substance, means
>
> (i) the owner and a previous owner of the substance or thing,
>
> (ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,
>
> (iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and
>
> (iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii),[225]

Certain exemptions apply, including a municipality in respect of a) a parcel of land shown on its tax arrears list and/or b) a parcel of land acquired by dedication or gift of an environmental reserve, school reserve, road, utility lot or right of way, as well as a person who investigates or tests a parcel of land for the purpose of determining the environmental condition and the Minister responsible for the *Unclaimed Personal Property and Vested Property Act*.[226]

If one reads this definition in isolation, it can readily be interpreted to include the purchaser of a contaminated property. If you buy property, you own the property; you own the soil and you own the pollution in the soil. Similarly, as owner of the property you have charge, management and control of the "substance or thing" as you have control of your property and all that is on it. However, this interpretation has been observed to ignore the "person responsible for a contaminated site" provisions which casts a broader net of liability.

Section 129(1) of *EPEA* also permits the Director to issue an EPO for a designated contaminated site to a "person responsible for the contaminated site". The "person responsible for the

[225] *EPEA*, *supra* note 3, s. 1(tt).
[226] *Ibid*, s. 1(tt)(v)-(vii). Note the exemptions do not apply if any of the aforementioned parties release a new or additional substance into the environment that causes or aggravates the adverse effect.

contaminated site" is defined more broadly and includes the person responsible for the substance, any other person who caused or contributed to the release of the substance, and past and present owners of the contaminated site.[227] Again, there are exemptions for a municipality in respect of a parcel of land shown on its tax arrears list and any person who investigates or tests a parcel of land for the purpose of determining the environmental condition, unless any of the aforementioned parties release a new or additional substance into the environment that causes or aggravates the adverse effect.

Statutory interpretation tells us to look at the plain meeting but also the statutory context. Therefore, if the broader net cast by the definition of a person responsible for a contaminated site is to have its meaning, the meaning of a person responsible for a "substance or thing" must be cast more narrowly. This was noted in the *Sears* case and is discussed further below. It is also true that both interpretations may apply in situations where discerning the polluter and the owner is not readily evident. For instance, for oil and gas activities it is readily accepted that the environmental obligations of a lease site are transferred with the lease site upon sale to a new owner, regardless of whether the new owner polluted the land.

For the most part, *EPEA* and the persons responsible provisions are based on the polluter pays principle, which enables the government to target owners, occupiers and a wide range of third parties for cleanup costs in instances of environmental contamination. This principle helps to enforce the duties of parties at fault and acts as a general deterrent, but it can also create a disincentive for the clean-up of abandoned sites, as the system can extend responsibility for clean-up beyond the polluter to include those connected to the polluter, the polluting activity and the contaminated soil.[228] A deeper look at the polluter pays principle takes place in the ELC publication *The Polluter Pays Principle in Alberta Law*.

For example, *EPEA*'s designation provisions in Division 2 (contaminated sites) appear to let liability "run with the land", meaning that once a party became involved with the site, even just as a past or current owner, they could be held liable for any contamination discovered on the site.[229] While the Division 2 provisions are rarely used, the potential for liability can still have a chilling effect. In addition, there has been some confusion with respect to how the AEAB and the courts interpret the Division 1 substance release person responsible provisions along with the phrase "charge, management and control".

[227] *Ibid*, s. 107.
[228] Omura, *supra* note 216 at 82.
[229] Hierlmeier, *supra* note 141 at 54.

Extended polluter liability is justified on the basis that the public should not bear the costs of cleaning up historical contamination.[230] However, the lack of statutory clarity around when a landowner and occupier may be viewed as a person responsible for pollution may, in turn, deter the purchase and re-development of contaminated land. The cases below provide a window into some of the uncertainty that has developed in the cases with respect to persons responsible in the substance release provisions.

Legal Oil and Gas Ltd. v Director, Land Reclamation Division, Alberta Environmental Protection, 1999 ABEAB 15

As previously discussed, this appeal concerned an EPO issued to Legal Oil and Mr. Charles Forster, Legal Oil's director and sole shareholder, to assess and remediate salt water brine and hydrocarbon pollution from a well-site on farm land currently owned by the Tieulies.

Legal Oil's primary objection was that it was not a person responsible for the salt water brine and hydrocarbons which existed outside of the well-site's boundary.[231] Legal Oil argued that while it succeeded Sinclair with respect to Sinclair's interest in the well-site, the off-site pollution was caused solely by Sinclair's affirmative releases outside of the well-site and Legal Oil had no control or legal relation to the off-site pollution resulting from those releases.[232]

Nevertheless, the Board found that there was sufficient legal connection between Legal Oil and the off-site pollution. Most importantly, the 1961 agreement between Sinclair and Legal Oil's predecessor plainly transferred Sinclair's Lease interest in the Tieulies' entire quarter-section.[233] As a result, Legal Oil inherited both Sinclair's rights and its responsibilities of access to and use of the off-site portions, including the "overall mess which Sinclair allegedly created".[234] Legal Oil became the "owner" of released substances, had "management and control" over those substances and was a "successor" and "assignee" of Sinclair.[235] Therefore, Legal Oil was a "responsible" person under the Act and validly named in the Order.

In addition, Mr. Forster argued that he was neither a "principal" nor "agent" of Legal Oil because those concepts did not include corporate directors or primary shareholders, and that

[230] Omura, *supra* note 216 at 82.
[231] *Legal Oil*, *supra* note 147 at para 13.
[232] *Ibid* at para 13.
[233] *Ibid* at para 15.
[234] *Ibid* at para 16.
[235] *Ibid* at para 16.

principles of fairness warranted excluding him personally from the EPO.[236] Meanwhile, the Board found that Mr. Forster was ignoring his concurrent status as president, manager, and boss with exclusive control of the company's operation. Given this level of managerial control, Mr. Forster certainly qualified as either principal or agent and therefore qualified as a person responsible under the Act.[237] Moreover, the Director argued that it was fair to name Mr. Forster directly given Legal Oil's "history of contentious relations" with AEPA and the Board did not question their judgment on the issue.[238]

McColl-Frontenac Inc. v. Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment (7 December 2001), Appeal No. 00-067-R (A.E.A.B.)

As previously discussed, *McColl* was a case involving a former gas station and hydrocarbon contamination on a site in Calgary. The Director issued an EPO against McColl, the successor to several companies that owned the site and operated a gas station on it from approximately 1956 to 1979. McColl appealed the EPO to the AEAB.

Among other things, McColl argued that the Director had erred by failing to name Highway Realties Limited ("Highway Realties") and Al's Rentals as persons responsible in the Order. Highway Realties previously owned the site for approximately 24 years (until 1980) during which time it leased the site to McColl's predecessors for the operation of a gas station. Beginning in or around 1982, Al's Rentals had leased the property to operate an equipment rental company and then agreed to purchase the property "as it stands" from McColl's predecessors in 1986.

At the outset of its analysis, the Board noted that the Director has the authority to name more than one person in a s. 113 (previously s. 102) order but could exercise discretion and was not required to name every person that falls within the category of person responsible.[239] With respect to Highway Realties, the Board found that, regardless of whether they were a person responsible, there was no practical purpose in adding them because the company was no longer in existence and there was no clear evidence that there were related individuals or companies that should be held responsible.

[236] *Ibid* at para 18.
[237] *Ibid* at para 19.
[238] *Ibid* at para, 22.
[239] *McColl 2001*, *supra* note 160, at paras 94-95.

With respect to Al's Rentals, McColl argued that their purchase of the site "as it stands" absolved McColl of liability under the order and made them a person responsible under *EPEA*. The Board disagreed, finding that the liability pursuant to s. 113 (previously 102) was to the public and not influenced by private contractual terms.

The Board also disagreed that Al's Rental's purchase of the site rendered them a person responsible. The Board found that the language "person responsible for the substance" who had "charge, management or control of the substance" defined these categories in relation to the pollution and not the overall property where the pollution is located.[240] Furthermore, s. 107 (previously s. 96) defined "person responsible for the contaminated site" to include the contaminated site owner and any prior site owner who owned the site when the pollution occurred. The Board noted that if site owners were meant to be subsumed within the definition of "persons responsible" for the substance then it would not have been necessary for the Legislature to list owners as additional categories of "persons responsible for the contaminated site" under the contaminated site provisions.[241]

The Board noted that there was "potential unfairness" in construing the definition of person responsible to be inapplicable to current and past owners by virtue of their ownership alone, especially where the owner purchased the site knowing it was polluted or at risk of being polluted.[242] The Board suggested a "remedy" may be for the person named in the order to request that the Director consider designating the site as contaminated which would allow the Director to expand the ambit of liability to past and present owners.[243]

Imperial Oil Ltd. and Devon Estates Ltd. v. Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd. (21 May 2002), Appeal No. 01-062-R (A.E.A.B.)

As previously discussed, in this case Imperial Oil and its wholly owned subsidiary, Devon Estates, appealed an EPO to the AEAB with respect to lead and hydrocarbon pollution at the Lynnview Ridge residential subdivision in Calgary. One of the issues raised on appeal was

[240] *Ibid* at para 107.
[241] *Ibid* at para 107.
[242] *Ibid* at para 108.
[243] *Ibid* at para 108.

whether the Director should have named additional parties as a person responsible under the EPO.

The Board considered whether the City of Calgary and/or Calhome Properties Ltd. ("Calhome"), among others, were persons responsible. With respect to the City of Calgary, the appellants argued that because the City had knowledge of the contamination, encouraged the appellants to release their land for residential development, approved the re-zoning and placed conditions on the subdivision it went beyond regulatory approval and constituted "charge, management and control" over the substances.[244] The Board found that the City did not have the direct ability to control the hydrocarbons (or lead) and was not a person responsible.[245]

Meanwhile, Calhome was a wholly owned subsidiary of the City of Calgary and purchased some of the townhouses on the subdivision lands. The appellants argued that Calhome had knowledge of the contamination when it purchased the lands, paid a reduced price, and then went on to re-zone and develop the land.[246] However, the Board was satisfied that Calhome paid fair market value for the townhouses. Furthermore, Calhome did not manufacture the substances, manage or deposit the substance on the subdivision lands.[247] In short, it was not the polluter. The Board did acknowledge that "Calhome assumed the ability to exercise charge, management, or control over the substances in the land that it purchased", but considered it "unreasonable on these facts" for Calhome to be named in the EPO.[248]

Sears Canada Inc. et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks (3 February 2020), Appeal Nos. 17-069- 070 and 18-013-R (A.E.A.B.), 2020 ABEAB 6.

These appeals were concerned with historical contamination at a former service station. A predecessor company of Sears Canada Inc. ("Sears") originally owned and operated the service station from 1958-1984. Beginning in 1984, a predecessor company of Suncor Energy Inc. ("Suncor") operated the service station on behalf of Sears from 1984 until it was decommissioned in 1994. Concord North Hill GP Ltd. ("Concord") purchased the former service station site from Sears in 2015. In the Agreement of Purchase and Sale, Sears agreed to

[244] *Imperial Oil*, *supra* note 170 at para 210.
[245] *Ibid* at para 228.
[246] *Ibid* at para 241.
[247] *Ibid* at para 244.
[248] *Ibid* at para 245.

indemnify Concord from all costs resulting from a failure by Sears to perform any of its environmental remediation obligations for 50 years.[249]

In or around 1989, while Suncor was replacing three underground storage tanks, liquid petroleum hydrocarbons were discovered in the soils under the service station site. Suncor retained a company to remove 1,075 tonnes of contaminated soils from the site.[250] In 1995, Sears and Suncor agreed to decommission work on the service station and hired an environmental engineering company, SEACOR, to conduct the decommissioning.[251] Shortly afterwards, in 1997, SEACOR identified and provided a report detailing a serious leak from the underground storage tanks that likely occurred in the 1970s or early 1980s. The contamination had spread through the soil on site and migrated into a commercial property (shopping mall) and a residential neighbourhood (Hounsfield Heights) and concentrations exceeded the Alberta guidelines in place.[252]

Sears began remediation and risk management of the contamination until the end of 2017 when it advised AEPA that it was insolvent and would no longer be able to continue the remediation work.[253] In response, AEPA issued an EPO finding Sears, Concord and Suncor were persons responsible and named them as parties to the EPO. At issue on appeal was whether it was appropriate for AEPA to issue the EPO and whether Sears, Concord and Suncor were properly persons responsible as defined in *EPEA*, and whether the terms and conditions of the EPO were appropriate.

The Board found that it was appropriate for AEPA to issue the EPO on the basis that Sears was letting them know that it was going to stop remediation. However, Concord and the mall owners were not persons responsible and their names should be removed from the EPO.

With respect to Concord, the Board noted that the Director believed Concord was a person responsible because it was the current owner of the site and therefore owned and could take charge, management or control of the substances on the site.[254] However, the Board heard that, other than purchasing the site from Sears, Concord had taken "no active steps to assume charge, management or control of the [s]ubstances" and had only ever operated the buildings on the property as a landlord to commercial businesses. Concord did retain an environmental consultant to conduct a limited Phase 2 Environmental Assessment as due diligence prior to

[249] *Sears*, *supra* note 181 at para 16.
[250] *Ibid* at para 7.
[251] *Ibid* at para 9.
[252] *Ibid* at para 10.
[253] *Ibid* at para 22.
[254] *Ibid* at para 263.

purchasing the Site.[255] Nevertheless, the Board took the view that "something more" was required.[256]

In particular, the Board appeared to be swayed by the fact that, under the Director's interpretation, it believed the owners of individual properties in Hounsfield Heights affected by the plume could also be persons responsible. The Board pointed to *Imperial* and *McColl* as cases where the Board declined to find that select owners of the subject property were a person responsible.[257] In the Board's view, the fact that the contaminated sites provisions include the owner of the property while the substance release provisions do not indicate that s. 113 of *EPEA* is not intended, without more, to include the owner of the contaminated property.[258]

Similarly, the Board also found that the mall owners were not persons responsible for the release of substances under the EPO. The mall owners had never been in the business of operating a retail service station and had not taken charge management or control of the substances.[259] The Board did note, however, that in the future should Concord or the mall owners redevelop their land, they could take charge, management and control of the substances and become persons responsible.[260]

Discussion

The differing outcomes in the aforementioned cases help illustrate why there continues to be some confusion as to who is a person responsible with respect to a substance release.

For instance, is the determination of person responsible influenced by private contractual terms? In *Legal Oil*, the AEAB relied mainly on the agreement between Sinclair and Legal Oil's predecessor to find a legal connection between Legal Oil and the off-site pollution. The AEAB acknowledged that there was some uncertainty around whether Legal Oil (or its predecessor's) activities actually caused the contamination. Nevertheless, the AEAB found that it was not necessary to resolve these facts as the 1961 agreement had transferred Sinclair's lease interest in the Tieulies' entire quarter-section and, as a result, Legal Oil inherited Sinclair's rights and responsibilities of access to and use of the off-site portions.[261] Sinclair ceased to exist and Legal

[255] *Ibid* at para 263.
[256] *Ibid* at paras 264-265.
[257] *Ibid* at para 265.
[258] *Ibid* at para 269.
[259] *Ibid* at para 275.
[260] *Ibid* at para 276.
[261] *Legal Oil*, *supra* note 147 at para 16.

Oil became the "owner" of the released substances, had "management and control" over those substances, and was a "successor" and "assignee" of Sinclair and therefore a "person responsible" under the Act.[262] As noted by Robert K. Omura, from this it would appear that "a subsequent party who assumes a predecessor's obligations without reservation in the contract can be liable for the whole of its predecessor's share of the damages".[263]

Meanwhile in *McColl*, the Board declined to take private contractual terms into account. McColl argued that because Al's Rental's rentals had purchased the site "as it stands", McColl was absolved of its liabilities under the order and no longer a person responsible under *EPEA*. The Board disagreed, finding that the liability pursuant to s. 113 (previously 102) was to the public and not influenced by private contractual terms. Moreover, despite the contract, Al's Rentals was not a person responsible because the Legislature defined the term in relation to the pollution and not to the property where the pollution was located.[264]

Of course, there are other differences between the two cases that could also help to explain the different results. In *Legal Oil*, the Sinclair entity (the original polluter) was insolvent which likely influenced the Director and the AEAB to "justify an extension of liability".[265] As also noted by Robert K. Omura, it is not clear whether a specific reservation in the contract would have led to a different result or whether "the "identity" between the polluter and the successor or the "continuity" of the polluting enterprise remain[ed] so strong that liability would still follow to the successor".[266]

Furthermore, while it was likely that Sinclair was the only polluter, the Board could not entirely exclude that Legal Oil had some potential responsibility for the contamination. Conversely, in *McColl*, Al's Rentals likely played no role in the contamination on site. Still, the Board's reliance on the terms of the contract in *Legal Oil* (rather than just the facts about the contamination) to establish liability for the contamination set a confusing precedent regarding contracts and succession.

Another issue that has resulted in confusion is what is meant by the phrase "charge, control and management of the substances" and whether it requires something more than just ownership of the land on which the substances reside. For instance:

[262] *Ibid* at paras 7 & 16.
[263] Omura, *supra* note 216 at 86-87.
[264] *McColl 2001*, *supra* note 160 at para 107.
[265] Omura, *supra* note 216 at 86-87.
[266] *Ibid* at 86-87.

- In *Legal Oil*, the Board found that "even if the off-site pollution was caused entirely by Sinclair's affirmative disposals…Legal Oil inherited that "facility" and the overall mess which Sinclair allegedly created".[267] It was "through this inheritance" that Legal Oil became the "owner" of the released substances; had "management and control" over those substances and was a "successor" and "assignee" of Sinclair.[268]

- In *McColl*, the Board declined to find that Al's Rentals purchase of the contaminated site made them a person responsible, as *EPEA* defined the term "in relation to the pollution, not the overall property where the pollution is located".[269] The Board went on to state that they recognized "the potential unfairness of construing…"person responsible"…to be inapplicable to current and past owners, by virtue of their ownership alone" especially where the owner (such as Al's Rentals) may have purchased the site knowing of actual or potential pollution, but they did not reverse course.[270]

- Similarly, in *Imperial Oil* the Board noted that s. 113 (previously s. 102) "attached responsibility under an EPO to the polluter rather than the owner of the polluted land: section 102 focuses on the ownership or control of the substances rather than ownership or control of the land".[271] While the Board acknowledged that Calhome, who purchased townhomes on the subdivision lands and had knowledge of the pollution, "assumed the ability to exercise charge, management, or control over the substances in the land that it purchased" it would be unreasonable to name them as a person responsible because they were not the polluter.[272]

- Finally, in *Sears Canada Inc.* it was the Director that named Concord, the current site owner, and the mall owners as persons responsible in the EPO. The Director argued that by virtue of owning the site (and allegedly purchasing it for less than market value), Concord also owned the substances that were found in the soils and groundwater on and under the site, and therefore had the ability to take charge, management and control of these substances on site. The Board pointed to the *McColl* and *Imperial* cases to state that a party was not responsible for the substances simply because they owned the property. However, they did note that if some time in the future they decided to redevelop the site, such as by excavating the site and removing the substances, then

[267] *Legal Oil*, *supra* note 147 at para 16.
[268] *Legal Oil*, *supra* note 147 at para 16.
[269] *McColl 2001*, *supra* note 160 at para 107.
[270] *McColl 2001*, *supra* note 160 at para 108.
[271] *Imperial Oil*, *supra* note 170 at para 190.
[272] *Ibid* at para 245.

> they would be taking "charge, management or control" of the substances and become a person responsible.

In each of the aforementioned cases the Director and/or Board puts a different (and sometimes conflicting) spin on what it means to have "charge, management and control" of the substances. Put together, they raise the following questions: Must the person responsible always be a polluter? If not, when does the owner of the site become a person responsible? Does it depend on a) the terms of the purchasing contract? b) whether they knew about the pollution ahead of time? c) whether they paid a reduced rate? d) whether they tried to excavate, clean-up or redevelop the site?

Jurisdictional Approaches to Responsibility for the Clean-up of a Contaminated Site

When determining the person responsible for a contaminated site we see various approaches in different jurisdictions. There is a general consensus across jurisdictions that the polluter should pay for remediation of the pollution they release. However, jurisdictions depart once land is transferred away from the polluter. Even within Alberta the system is somewhat different depending on the sector involved. For instance, a licensee of an oil and gas well is liable for remediation, regardless of whether they were the ones who caused all or part of the pollution. Meanwhile, liability for those who purchase contaminated land is less clear (i.e. *Legal Oil, Sears*).

British Columbia

In BC, the system of liability for remediating contaminated lands may rest with a landowner where they knowingly purchase property that is contaminated. The starting point under BC's *EMA* is that a person responsible for a contaminated site may be an "owner or operator of the site":[273]

> "owner" means a person who
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> (a) is in possession,
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> (b) has the right of control, or

[273] *EMA, supra* note 185, s. 45.

> (c) 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 section 45 (3).

The owner of the site may not be responsible if they can establish that at the time they became the owner the site was already contaminated; that they had "no knowledge, or reason to know or suspect, the site was a contaminated site"; and that they "undertook all appropriate inquiries into the previous ownership and uses of the site...consistent with good commercial or customary practice at that time".[274] Past owners of the site may still be liable if they did not disclose known contamination of the site or where they contributed to the site's contamination.[275] Further, owners and occupiers of a site are not responsible where the site was not contaminated at acquisition and during ownership they did not "dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become" a contaminated site.[276] The Act also requires that "[a] vendor of real property must provide, in accordance with the regulations, a site disclosure statement to a prospective purchaser of the real property if the vendor knows or reasonably should know that the real property has been used for a specified industrial or commercial use."[277]

Ontario

Ontario's regulatory approach is focused on the polluter pays principle but also sufficiently broad to impose duties on those owning polluted properties. The *EPA* creates a duty to mitigate and restore the environment for the "owner of a pollutant and the person having control of a pollutant that is spilled" and that is causing or likely to cause an adverse effect."[278] The owner and the person having control of a pollutant are defined in the Act to be those who have direct control of a pollutant prior to its release, as well as their "successors, assignees, executor or administrator".[279]

In addition, the Minister under the Act has the discretion to make an order regarding a spill against "[t]he owner or the person having the charge, management or control of any real

[274] *Ibid*, s. 46(1)(d).
[275] *Ibid.*
[276] *Ibid,* s. 40(1)(e).
[277] *Ibid,* s. 40(6).
[278] *EPA*, *supra* note 196, s. 93.
[279] *Ibid*, s. 91(1) & (5).

property or personal property that is affected or that may reasonably be expected to be affected by the pollutant."[280] The order may "require the doing of everything practicable or the taking of such action as may be specified in the order in respect of the prevention, elimination and amelioration of the adverse effects and the restoration of the natural environment within such period or periods of time as may be specified in the order".[281]

Finally, s. 168.7 of *EPA* provides that liability risks related to the issuance of remediation focused orders may be minimized where a record of site condition is registered with government. This limitation of liability extends to future landowners of the registered property.

Saskatchewan

Saskatchewan, like BC, relies on a level of knowledge when determining regulatory liability of an owner or occupier of contaminated lands. The *Environmental Management and Protection Act*, *2010 (EMPA, 2010)*, defines person responsible to include the owner or occupant of land on which the discharge occurs (by their own acts or omissions) and every subsequent owner or occupant of the land.[282] However, an owner or occupant of land may avoid responsibility where the pollution occurred prior to owning the land and "who could not reasonably have been expected to know about or discover the existence of a substance at the time the person became the owner or occupant".[283]

The person who is deemed responsible may be required to conduct a site assessment if the Minister "reasonably believes that it may be an environmental impacted site".[284]

Of additional interest is Saskatchewan's provisions that are focused on directors of corporations. Specifically the Act states that " every director of a corporation: (i) who directed, authorized, assented to, acquiesced in or participated in an act or omission of the corporation that resulted in the discharge or the presence of a substance; or (ii) who, after the coming into force of this section, authorized a dividend or distribution at a time when the director knew or should have known the dividend or distribution impaired or could reasonably be expected to have impaired the ability of the corporation to prevent, mitigate, remedy or reclaim adverse

[280] *Ibid*, s. 97.
[281] *Ibid*, s. 97 (2).
[282] *The Environmental Management and Protection Act,* 2010, SS 2010, c E-10.22, s. 12(1)(c) and (e) [*EMPA, 2010*].
[283] *Ibid*, s. 12(3)(d).
[284] *Ibid,* s. 13.

effects on land owned or occupied by the corporation.[285] A corrective action plan is mandated where a site is impacted.[286]

This provision may cover instances where corporations are undermining the ability of a company to reclaim or remediate a site and elevates a director's obligation. Nevertheless, the provision is likely to come with enforcement challenges. These challenges include a determination by the court as to what constitutes "impairment" of the ability to "prevent, mitigate, remedy and reclaim adverse effects". As part of this determination the timing of any dividend or distribution and the timing of the remediation will be of central importance that will need to be determined by a court. The question of at what point is it reasonable to expect that remediation will be undermined must be contextualized around the likely cost of the remediation (another area of potential contention) and the ongoing ability to ensure sufficient capacity of the corporation to remediate the lands it owns. It appears that such a provision would be of potential value near the end of an activities' life cycle.

United Kingdom and Scotland

A more simplified system is implemented by local authorities in the United Kingdom and Scotland where the authorities identify polluters to remediate lands, and in the absence of polluters the landowner(s) become responsible. This hierarchy of liability has the benefit of avoiding the issue of "knowledge" of contamination, which can be an area of contention and dispute.

The *UK EPA* requires that local authorities inspect areas "from time to time for the purpose of identifying contaminated land".[287] Specifically, the Act states that if no person who caused or permitted the substance release can be found "after reasonable inquiry", then the "owner or occupier for the time being of the contaminated land in question is an appropriate person".[288] The owner and occupier of land is exempt from liability for pollution that migrates off one piece of land to another.[289]

[285] *Ibid*, s. 12 (1)(g).
[286] *Ibid*, s. 14.
[287] *UK EPA*, *supra* note 202, s. 78B.
[288] *Ibid*, s. 78F.
[289] *Ibid*, s. 78K.

A similar process to the contaminated sites provisions of *EPEA* are also set out to determine the allocation of liability of "appropriate persons". The issue of allocation is discussed in greater detail immediately below in s. iv "Allocation of Liability".

A variety of statutory exclusions apply, including in certain prescribed instances of the sale of land to others within their liability group. Binding statutory guidance for allocation of liability and exclusions has been published by the Department of Environment Food and Rural Affairs (UK).[290]

This reflects a significant divergence from most other jurisdictions reviewed as part of this report and was contentious when it was being developed. In a review of the inception of these laws W. Walton observed that there was significant pushback and concern around the identification and registration of contaminated sites and that the opposition of some local authorities illustrated how important economic imperative of land development was "compared with the environmental objectives which the registers were intended to address."[291]

Pennsylvania

While in a slightly different context the state of Pennsylvania's *Clean Stream Law* allocates regulatory liability to landowners where there is a risk of pollution "resulting from a condition which exists on land".[292] Specifically the government "may order the landowner or occupier to correct the condition in a manner satisfactory to the department or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action."[293] A "landowner" is defined as "any person holding title to or having a proprietary interest in either surface or subsurface rights."[294] Case law regarding this section confirmed that a lessee could be held liable for clean-up notwithstanding whether they caused the pollution.[295]

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[290] United Kingdom, Department for Environment Food & Rural Affairs, *Environmental Protection Act 1990: Part 2A Contaminated Land Statutory Guidance*, (April 2012) online (pdf): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/223705/pb13735cont-land-guidance.pdf [*Contaminated Land Statutory Guidance*].
[291] Walton, *supra* note 207 at 241.
[292] *The Clean Streams Law*, 35 PS §§ 691.1-691.1010 (Act of 1937, PL 1987, No. 394) s. 316.
[293] *Ibid*.
[294] *Ibid.*
[295] See *Adams Sanitation Co. v. Department of Envtl. Protection*, 715 A.2d 390 (Pa. 1998).

Conclusion regarding Responsibility for the Clean-up of a Contaminated Site

Based on all of the above, there does appear to be a regulatory gap (or at least significant confusion) with respect to landowners and occupiers and when they are persons responsible for pre-existing contamination on their lands. In recent cases the AEAB has found that the language "person responsible for the substance" who had "charge, management or control of the substance" means that responsibility runs with the pollution and not the overall property where the pollution is located. As a result, an EPO issued under the substance release provisions is "directed at the polluter or those who benefitted from the activity that caused the pollution" and "does not expressly extend to landowners and occupiers".[296]

There are downsides to this approach. For one, current landowners generally have control over the source of contamination and can often times be in the best position to respond in an emergency situation.[297] Another issue is that purchasers who knowingly benefit from a lower purchase price may avoid liability for costs of remediation whereas the previous owner/polluters may go on to wind up or become insolvent, leaving the question of clean up unaddressed or the costs borne by the public.

On the other hand, the AEAB has also sometimes found that "person responsible for the substance" can include a successor (i.e. *Legal Oil*) or a purchaser that redevelops the property (i.e. as per the AEAB's musing in *Sears)*, regardless of whether they were actually a polluter. This approach can also be problematic as it introduces a great deal of uncertainty for innocent purchasers of brownfield properties and can discourage redevelopment.

One option to provide further certainty for parties is to include additional exemptions or limits on liability in the Act itself, including clear exemptions from liability for parties such as municipalities, lenders and innocent purchasers who are associated with owning, financing or purchasing contaminated properties that could be redeveloped.[298] While the Act does include some exemptions for municipalities it could go further. For example, BC's *EMA* includes exemptions for innocent purchasers so long as they can establish that at the time they became owner the site was already contaminated, that they had no knowledge or reason to suspect the site was contaminated at the time, and that they took all appropriate inquiries according to good commercial practice at the time. This approach could be advantageous in that there is already Canadian precedent.

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[296] Omura, *supra* note 216 at 17.
[297] *Ibid.*
[298] Hierlmeier, *supra* note 141 at 54.

However, the downside is that there may be instances where there is no one to hold accountable for pollution, such as where the original polluter no longer exists or is insolvent. For this reason the ELC would only recommend this approach in conjunction with the establishment of a general assurance fund. A general assurance fund could be funded by fines, penalties and costs recovered from parties that are found to be responsible for substance releases, levies on wholesale hazardous chemicals and/or fees for remediation certificates and would ensure the public is not left on the hook for the costs of remediation.

Another approach would be to have strict liability for landowner remediation based on a system of regulatory requirements that clearly outline a string of liability from vendors to purchasers (either through the UK/Scotland approach or through an alternative approach to linking liability with land transfers). This approach promotes clarity and has the added benefit of dispensing with any obligations to prove whether there was knowledge or no knowledge of contamination. The public is also much less likely to be left with the costs of remediation. Nevertheless, this approach is more novel and potentially contentious and would require greater "buy-in" from the authorities and the general public.

Recommendation 3: Exempt innocent owners/purchasers from definition of person responsible in *EPEA*

Alberta should adopt additional exemptions in the definition of "person responsible" when used with "reference to a substance or a thing containing a substance". Currently, the definition exempts a municipality in select scenarios, mainly where the municipality becomes responsible for contaminated land but did not cause or aggravate the contamination. There should also be an exemption for innocent owners and/or purchasers who can establish the following:

a) At the time they took ownership of the property,

   - the site was contaminated;
   - the person had no knowledge or reason to know or suspect that the site was contaminated; and
   - the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at the time to minimize potential liability;

b) If the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee; and,

c) The owner did not, by any act or omission, cause or contribute to the contamination of the site.[299]

Similarly, the Act should also exempt an owner who owned or occupied a site that at the time of acquisition was not contaminated and, during their ownership, did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site.

Recommendation 4: Create a general assurance fund

Amend *EPEA* to create a general assurance fund to address, among other things, underfunded or orphan contaminated sites where the person responsible no longer exists or is financially incapable of addressing remediation. Revenue for the general assurance fund could come from a variety of sources, based on the polluter pays principle, including:

- A levy on wholesale hazardous substances including petroleum products, pesticides, dry cleaning related products and other chemicals;
- Fines, penalties and costs recovered from parties that are found to be financially responsible under EPEA for substance releases; and
- Fees for regulatory activities such as remediation certificates.

Note that the general assurance fund will need to be coordinated with existing programs such as the Orphan Well Association/Orphan Fund Levy and the Environmental Protection Security Fund.

iv. Allocation of Liability

A related issue to the question of responsibility for the clean-up of a contaminated site is that of allocating liability for this clean-up. The number of parties named in an EPO as responsible persons is also the number of parties who share in the costs of remediation. Section 240 of *EPEA* provides that, where an EPO is directed to more than one person, all persons named are jointly responsible for carrying out the terms of the order and are jointly and severally liable for payment of the costs.

299 Language borrowed from BC *EMA*, *supra* note 185, s. 46(1)(d).

While the use of joint and several liability can be efficient, it is not always fair. Therefore, in some other jurisdictions, allocation provisions that apportion liability (and costs) according to each parties' degree of responsibility are preferred. Currently, *EPEA* only addresses allocation in the contaminated sites provisions. The Act states that the Director may issue an EPO to "persons responsible for the contaminated site" and may provide for the "apportionment of the costs of doing any work or carrying out any…measures".[300] Where the information is available, the Director must consider certain matters including whether the substance was present when the site was transferred to the new owner and whether they knew or ought to have known of the contamination; whether the parties exercised due diligence before becoming owner; the cause of the contamination and the price paid. There are also considerations for how the owner of the site managed the contaminant while being in charge and control of the site.[301]

However, given that the contaminated sites provisions of *EPEA* are not typically used, there is an absence of guiding policy around the allocation of remediation costs. As a result of this uncertainty, the issue of how many parties should be named and how costs should be allocated between them has come up at the AEAB, including in the cases mentioned above:

- In *Legal Oil*, the Board noted that, "due to environmental concerns and budget constraints, the Director should not be required to...undertake the inquiries necessary to identify all responsible persons before issuing orders to current operators".[302]

- In *Imperial*, the Board noted that there was nothing in the substance release provisions that required the Director to name all potential persons responsible in an EPO.[303] In fact, "efficiency arguments might militate against" such an approach.[304] Yet, administrative fairness does oblige the Director to name other clearly responsible parties in an EPO so that the costs of clean-up may be shared. Accordingly, the Director must "balance efficiency and fairness in reaching [their] decision to issue an EPO".[305]

- In *McColl*, when comparing the contaminated sites and substance release provisions, the Board notes that the contaminated sites provisions offer the chance for allocation, which could allow for a current or more recent owner who has assumed some contractual responsibility for the contamination to share in the costs of remediation.

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[300] *EPEA*, *supra* note 3, s. 129(4).
[301] *Ibid*, s. 129(2).
[302] *Legal Oil*, *supra* note 147 at footnote 37 at para 39.
[303] *Imperial*, *supra* note 170 at para 193.
[304] *Ibid* at para 193.
[305] *Ibid* at para 197.

The Board posits that such allocation is "arguably more equitable" than joint and several liability for complying with an EPO under the substance release provisions.[306] The Board notes that while joint and several liability is "theoretically more efficient from the public's standpoint, an equitable allocation may better achieve environmental objectives by engendering a greater buy in to the remedial solution among the responsible parties."[307]

Discussion

Currently, the fact that Alberta's substance release provisions lack any process for allocating between responsible parties leads to "an unfair procedure".[308] As stated in *Imperial*, administrative fairness requires that clearly responsible parties be named in an EPO and, if two or more parties caused or contributed to a substance release, it would be unfair for only one party to bear the costs of remediation.

Moreover, some commentators argue that joint and several liability also creates unfairness because it can lead to the "free rider problem".[309] That is, a situation where some parties avoid their fair share of costs while others, generally those with deeper pockets, pay more. Not only can this discourage those who are less likely to face liability to exercise due diligence and care, but it can also arguably lead regulators to prefer to target parties that are more likely to pay and require less administrative costs to pursue.[310] Another issue is that, while joint and several liability may appear to promote expediency (i.e. fewer parties and less time spent assessing each party's respective liability), these issues often end up being litigated later on (see *Legal Oil*, *Imperial*, etc.).

Altogether, the use of allocation provisions is likely to lead to fairer outcomes and, if done correctly, to a more streamlined process for determining liability and associated costs.

[306] *McColl 2001*, *supra* note 160 at para 130.
[307] *Ibid* at para 130.
[308] Omura, *supra* note 216 at 24.
[309] *Ibid* at 25.
[310] *Ibid.*

Jurisdictional Approaches to Allocation of Liability

A review of other jurisdictions offers some slightly differing examples of how this may be resolved.

British Columbia

In BC the *EMA* sets up an "allocation panel" with up to 12 persons with "specialized knowledge in contamination, remediation or methods of dispute resolution to act as allocation advisors under the section".[311] Upon request, three such advisors may be appointed to provide an opinion on whether a party fits specific legislative definitions of "person responsible", a "minor contributor" and their contribution to the contamination and, if ascertainable, the share of the costs of remediation attributable to the contamination.[312]

Notable in BC is the legislative characterization of "minor contributors" which limits the liability exposure to a maximum amount allocated by the director.[313] A person may be considered a "minor contributor" if they establish that they were responsible for only a "minor portion" of the contamination, and either no remediation would be required as a result of that portion or the proportion of the cost of remediation attributable to the person would be minor and that "the application of joint and separate liability to the person would be unduly harsh".[314]

Manitoba

Manitoba's *Contaminated Sites Remediation Act* includes a section on the apportionment of responsibility for the costs of remediation.[315] Section 21 of the Act states that, when considering how to apportion the costs among the potentially responsible persons, the director (or other relevant authority) shall apply the principle that the primary responsibility lies with the polluter. The Act also lists a number of factors that they should take into account, including when the site became contaminated, whether the current or previous owner knew or ought to have known the site was contaminated at the time of purchase, the effect of remediation on the fair market value or permitted uses of the site, whether the person took reasonable steps

[311] *EMA*, *supra* note 185, s. 49(1).
[312] *Ibid*, s. 49(2).
[313] *Ibid*, ss. 50(2) & (3).
[314] *Ibid*, s. 50(1).
[315] *Contaminated Sites Remediation Act*, CCSM c C205, s. 21 [CSRA].

to prevent contamination, etc.[316] Section 9(3) of the Act also includes an exemption for a minor contributor.

United Kingdom and Scotland

The UK and Scotland's *UK EPA* also includes allocation provisions "where two or more persons would...be appropriate persons in relation to any particular thing which is to be done by way of remediation":

> 78F Determination of the appropriate person to bear responsibility for remediation.
>
> ...
>
> (6) Where two or more persons would, apart from this subsection, be appropriate persons in relation to any particular thing which is to be done by way of remediation, the enforcing authority shall determine in accordance with guidance issued for the purpose by the Secretary of State whether any, and if so which, of them is to be treated as not being an appropriate person in relation to that thing.
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> (7) Where two or more persons are appropriate persons in relation to any particular thing which is to be done by way of remediation, they shall be liable to bear the cost of doing that thing in proportions determined by the enforcing authority in accordance with guidance issued for the purpose by the Secretary of State.[317]

The Contaminated Land Statutory Guidance offers extensive additional guidance on how to apportion liability, including different approaches for persons who caused or knowingly permitted each "contaminant linkage" ("Class A" persons) and those who owned or occupied the land ("Class B" persons).[318] With respect to Class A persons, the general principle is that liability should be apportioned to reflect the relative responsibility of each member for creating or continuing the risk now being caused by the contaminant linkage.[319]

[316] *Ibid*, s. 21(b).
[317] *UK EPA*, *supra* note 202, s. 78F.
[318] *Contaminated Land Statutory Guidance*, *supra* note 290, at 41, 45-61.
[319] *Ibid* at 55.

Conclusion on Allocation of Liability

At present, Alberta's substance release provisions lack any processes for allocating costs and liability between persons responsible. As discussed, the current "joint and several liability" leads to an unfair procedure. There are allocation provisions in the contaminated sites provisions, but as these provisions are rarely used, they are effectively toothless. Alberta should amend *EPEA* to include allocation processes for the substance release provisions as well. Similar to BC and Manitoba, the Act should exempt minor contributors. This would help to reduce the number of parties and their associated transaction costs.[320]

Nevertheless, absent joint and several liability, and in the event the responsible parties no longer exist and/or are bankrupt, there is always the possibility that the government and taxpayers could be left responsible for the remediation costs. For this reason, we would only recommend adopting allocation provisions if the creation of a general assurance fund (pursuant to Recommendation No. 4) is also adopted.

Recommendation 5: Adopt allocation provisions for substance releases

Allocation provisions should be embedded in *EPEA* for both the contaminated sites and substance release provisions. Provisions should include an enumerated list of factors to take into account when apportioning liability and costs. Provisions should also include exemptions for minor contributors.

v. Lack of Regulation for Risk Management through Exposure Control at Contaminated Sites

Still another issue that arises out of the legislation and recent caselaw is whether *EPEA* is equipped to deal with the *in situ* management of contaminated soil and the use of exposure control as a risk management option.

The *Alberta Exposure Control Guide* states that "[e]xposure control on contaminated lands involves removing or mitigating an exposure pathway or receptor or controlling a contaminant source".[321] It "can be accomplished by physical or chemical barriers to prevent exposure to

[320] Omura, *supra* note 216 at 26.
[321] *Alberta Exposure Control Guide, supra* note 60 at 6.

receptors and/or by implementing administrative controls on a property".[322] Exposure control may be used as an interim step until remediation can be undertaken, or where remediation is not a viable option. Either way it requires continued care and control by responsible parties.[323] Exposure control is one type of risk management but the terms are often used interchangeably. For the sake of clarity, this section will mainly use the term "risk management" (unless more specificity is required).

As previously mentioned, both *EPEA* and the *Remediation Regulation* are mostly silent when it comes to employing risk management on contaminated sites. Efforts have been made in the past to address this issue, and changes have included the addition of the word "manage" (although it is not defined) into the Act's s. 112 duty to take remedial measures and the incorporation of policy documents such as the *Alberta Exposure Control Guide* and *Risk Management Plan Guide* into the *Remediation Regulation.*

Still, the overall focus of the legislation is generally on remediation and does not address or specifically regulate some of the issues that can arise with risk management, such as managing contamination on-site or in the long-term. Such details are only discussed in policy documents and guidelines or sometimes not at all. As a result, conflicts can arise when it comes to enforcing *EPEA*.

One such instance of conflict is the recent case of *Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* [*Cherokee*]. At issue in *Cherokee* was whether the construction of a berm using contaminated soil on-site was permitted and properly undertaken under the Act.

Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks (26 February 2019), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-R (A.E.A.B.)

This matter concerns enforcement orders issued to, and appealed by, Cherokee Canada Inc. ("Cherokee"), 1510837 Alberta Ltd., and Domtar Inc. ("Domtar"). The orders related to a property located in Edmonton that was previously used by Domtar to manufacture treated wood products from approximately 1924 to1987. The plant was closed in 1987 and cleaned up to the standards of the day. The property remained vacant but residential neighbourhoods

[322] *Ibid*.
[323] *Ibid*.

grew up around the property. In 2010 Domtar sold the property to Cherokee. In 2012, Cherokee, who is in the business of brownfield redevelopment, began cleaning up the site with the goal of selling it for residential development.

Cherokee obtained approval to develop "Parcel C" of the land into a residential neighbourhood now known as the Verte Homesteader Community, half of which is occupied by homes. Parcel C contained an engineered berm.[324] Shortly afterwards, Cherokee began working on Parcel Y, immediately to the east of Parcel C. The work on Parcel Y also included the construction of an engineered berm using contaminated material from the site.[325]

In 2015, an approval engineer from AEPA contacted the Director and advised that Cherokee could be in breach of its regulatory approval by constructing a berm on Parcel Y without the proper authorization.[326] The Director commenced an investigation (including an "unprecedented site sampling program")[327] and between December 2016 and July 2018 issued five enforcement orders plus two significant amendments directing Cherokee and Domtar to undertake certain actions. In particular, the orders required Cherokee and Domtar to develop and implement plans for the immediate removal of all contaminated material from the property, including the Parcel Y berm.

Cherokee and Domtar appealed the orders, with the main issue being that the actions ordered by the Director were inconsistent with Cherokee's brownfield redevelopment plan. As part of its site redevelopment, Cherokee had planned to construct an engineered berm using the contaminated material from the site.[328] According to the AEAB, managing and using contaminated material on-site (such as constructing a berm) is a recognized and economically advantageous way of redeveloping sites.[329] For example, in this instance, Cherokee estimated the cost of removing the material from the site to be approximately $52,000,000.[330]

However, in the Director's view, the Parcel Y berm was constructed without authorization. Additionally, both the Parcel Y and Parcel C berms were constructed with "hazardous waste", and therefore their construction constituted the unauthorized disposal of hazardous waste. More specifically, when Cherokee moved the contaminated soil from one place to another on

[324] *Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (February 26, 2019), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-R (AEAB) at para 9 [*Cherokee*].
[325] *Ibid* at para 10.
[326] *Ibid* at Executive Summary.
[327] *Ibid* at para 12.
[328] *Ibid* at para 10.
[329] *Ibid* at para 8.
[330] *Ibid* at para 13.

the site, and then used the contaminated soil to build a berm, the contaminated material became waste and the berm became an unauthorized landfill. Further, according to the Director, the contaminated material met certain requirements of the *Waste Control Regulation*, AR 192/1996 and therefore the berm was an unauthorized hazardous waste landfill.[331] The contaminants of concern included naphthalene, dioxins, and furans.

The *Waste Control Regulation* (at that point in time) defined waste as "any solid or liquid material or product or combination of them that is intended to be treated or disposed of or that is intended to be stored and then treated or disposed of…".[332] The term "dispose" meant, "when used with respect to waste at a landfill…the intentional placement of waste on or in land as its final resting place".[333] The Director took the view that, by placing the contaminated material within the berm, Cherokee was placing it in its final resting place and meant to dispose of it. Furthermore, the waste was also "hazardous waste", because it met the definition of "waste that has one or more of the properties described in Schedule 1" and was not listed in Schedule 2.[334] Schedule 1 lists a series of characteristics such as "ignites and propagates combustion in a test sample" and "contains polychlorinated biphenyls at a concentration equal to or greater than 50 mg/kg" to help identify hazardous waste.

The Board did not accept the Director's arguments. For one, the Board found that Cherokee held a reasonable belief that it was authorized to go ahead with building the berm. The poor wording of the Approval made it unclear that written authorization was required, Cherokee had met and communicated with AEPA officials regarding its plans to build the berm, and representatives from AEPA had even visited the site while the berm was being built and did not object to the construction.[335]

Moreover, the Board did not accept the Director's interpretations with respect to "waste". In its view, neither Cherokee nor Domtar intended to dispose of the contaminated material present in the berms. The berms form part of the reclamation and remediation design and at least one of the berms acted as a barrier to protect the proposed residential development from a nearby railway and highway. Cherokee intended to use the contaminated material, as opposed to dispose of it, and therefore it was not "waste" within the meaning of the regulation.[336]

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[331] *Ibid* at para 39.
[332] *Waste Control Regulation*, Alta Reg 192/1996, s. 1(ll) as it appeared in February 2019.
[333] *Ibid*, s. 1(p).
[334] *Ibid*, s. 1(v).
[335] *Cherokee*, *supra* note 324 at para 31.
[336] *Ibid* at para 41.

The Board noted that if the Director's interpretations of waste and hazardous waste were correct, then very large quantities of the contaminated material from the site would have to be taken to a hazardous waste landfill. If this same interpretation were applied to other former industrial sites in Alberta, there would be an "unprecedented" amount of material that would have to be transported and disposed of at hazardous waste landfills. Transportation of all this material would result in unnecessary risks and there was also not enough landfill space. The Board found that "[u]sing up this valuable landfill space to deal with contaminated materials that could be safely and responsibly managed on-site makes it clear the Director's interpretation…of waste and hazardous waste is both incorrect and unreasonable".[337]

The Board recommended reversing the enforcement orders and recommended the project be returned to an approval director with AEPA. The Board did, however, recommend two additional EPOs: one to Cherokee for further delineation for dioxins and furans in the Verte Homesteader Community, and one to Domtar for further delineation for naphthalene, dioxins and furans in the Overlander Community.

Ministerial Order 18/2019

Following the Board's decision in *Cherokee*, the Minister of Environment and Parks issued a Ministerial Order that mostly accepted the AEAB's recommendations and reversed the EPOs and the amendments to the EPOs.[338] The Order directed that the project be managed as a brownfield redevelopment and made the approvals "director" responsible for the *EPEA* regulatory approval process and the Assistant Deputy Minister of Environmental Monitoring and Science Division the "Chief Scientist" for the site.

The Order also set out a lengthy list of requirements (with timelines) for items such as dust control, site delineation and human health risk assessments along with those aimed at implementing exposure control on site including site specific risk assessments, site-specific remediation criteria, risk management plans, reclamation and remediation plans and monitoring plans for Cherokee and Domtar. Finally, the Order also includes EPOs issued to Cherokee and Domtar for additional work with respect to the dioxins and furans found in and around parcel C.

[337] *Ibid* at para 43.
[338] *Order Respecting Environmental Appeals Board Appeal Nos. 16-055-056, 17-073-084 and 18-005-010*, Ministerial Order 18/2019 (March 12, 2019) at 63-75 online (pdf): www.eab.gov.ab.ca/dec/16-055-etc.-Cherokee-R.pdf.

Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks (18 March 2020), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-CD (A.E.A.B.)

Following the hearing, Cherokee and Domtar filed costs applications seeking legal costs, expert witness costs, and corporate costs. The Board held that in order to award costs against the Director there needed to be special or exceptional circumstances. In this regard, the Board found that, while there was no bad faith on the part of the Director, the Director made "egregious" errors in decision-making and his conduct "was that of a pure and overly persistent litigant rather than that of a regulator".[339] In total, the Board directed the Director to pay costs to Cherokee and Domtar in the amounts of $831,625.43 and $718,546.67 respectively.[340]

Discussion

On its face, the dispute in *Cherokee* seems to be about whether Cherokee was authorized to move and bury the contaminated soil on the property. Yet, upon closer inspection it also reveals a tension between the approval and enforcement arms of AEPA, and grey areas within the regulatory regime itself when it comes to managing contamination on site. On the one hand, managing contamination *in situ* and more broadly, risk management through exposure control, has become an accepted and even pragmatic policy choice by AEPA for select contaminated sites. On the other hand, these policies exist in somewhat of a regulatory vacuum and do not necessarily align with the spirit of the legislation.

One of the main issues in *Cherokee* was whether it was permissible for Cherokee to bury contaminated soils in the Parcel Y berm. The Director reportedly took the view that the Parcel Y and C berms were a) not authorized and b) constructed with hazardous waste and therefore constituted the unauthorized disposal of (hazardous) waste.[341] Nevertheless, the Board found that Cherokee held a reasonable belief that they were authorized to build the berms, in part, based on the actions of AEPA.[342] Furthermore, based on the definition in the *Waste Control Regulation*, for contaminated material to be "waste" there must be an intention to dispose of

[339] *Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (18 March 2020), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-CD (AEAB) at paras 19-20.
[340] *Ibid* at paras 96-97.
[341] *Cherokee*, *supra* note 324 at para 27.
[342] *Ibid* at paras 31-38.

the material. Given that Cherokee intended to keep the material on site and use it to build the berms, the Board found that they did not actually intend to "dispose" of the contaminated material and therefore it was not actually "waste". In the same vein, if the contaminated material was not "waste" then it could not be "hazardous waste".

In our view, the question of whether the contaminated soil on site was "waste" or "hazardous" waste was a bit of a red herring – the real question at issue is whether the Director has the authority under *EPEA* to regulate when contaminated material is managed on-site or disposed of elsewhere. Nevertheless, the "waste" question had to be addressed and revealed gaps with respect to how contaminated soil is characterized in the legislation.

By way of background, waste in Alberta is defined in the *Waste Control Regulation* as any substance that is intended to be treated or disposed of, and does not include recyclables.[343] Accordingly, waste is not defined by its physical composition so much as whether it is intended to be treated or disposed of. At the time, the definition of "dispose" in the *Waste Control Regulation* was "when used with respect to waste at a landfill or by deepwell injection, the intentional placement of waste on or in land as its final resting place".[344] Therefore, the definition of "dispose" was only applicable with respect to waste at a landfill or deepwell injection. The *Waste Control Regulation* defines "hazardous waste" as "waste that has one or more of the properties described in Schedule 1, but does not include those wastes listed in Schedule 2".[345] Note the contaminated material in *Cherokee* reportedly met certain requirements of Schedule 1 of the Waste Control Regulation.[346]

However, the Act is clear that the Director can regulate "waste". Section 176 of *EPEA* provides that no person shall dispose of waste except at a waste management facility or in accordance with the written authorization of the Director. At their discretion, the Director can allow for alternative disposal or the use of specific wastes somewhere other than at a "waste management facility". Nevertheless, in exercising their discretion, the Director should consider "the protection of human health and the environment, nature and quantity of the waste, remoteness of the location, availability of facilities, and the liability associated with the

[343] *Waste Control Regulation*, Alta Reg 192/1996, s. 1 (ll) [*Waste Control Reg*].
[344] *Ibid*, s. 1(p).
[345] *Ibid*, s. 1(v).
[346] *Cherokee, supra* note 324 at paras 39 & 115.

proposed alternatives".[347] The *Waste Control Regulation* also identifies a few exemptions, including "inert waste used for reclamation".[348]

A related concept is the "beneficial use of waste". As part of the Director's discretionary decision-making, there is the option to permit the use of waste as a resource or product intended for specific beneficial uses.[349] Meaning, inert wastes or products derived from wastes such as contaminated soils, sands and gravels that would otherwise be handled as waste and disposed of as such, can be repurposed for another use. Products derived from waste must meet a specific use and have physical, chemical or biological characteristics that meet specific quality criteria.[350]

Meanwhile, as a matter of policy, AEPA considers excavated contaminated soils that are going for disposal as "waste".[351] This includes any contaminated soil that is excavated and disposed of in another location, including by allowable methods such as land treatment cells where soil is left in place after treatments, or materials used as soil amendments or in the construction or manufacture of other products.[352]

In short, *EPEA* gives the Director the authority to regulate "waste", including the discretion to both waive the requirement that waste be disposed of at a waste management facility and to permit the use of certain waste for reclamation and other specific beneficial uses. Yet, due to the language in the definition of "waste" and "dispose" in the Act, it is not clear that contaminated material that was set to be managed on-site would fall within the definition of "waste" and/or hazardous waste.

Notably, the definition of "dispose" in the *Waste Control Regulation* was recently revised. The *Waste Control Regulation* now defines "dispose" as "discharge, deposit, dump, throw, drop, discard, abandon, spill, leak, pump, pour, emit or empty".[353] There are no geographical limitations and the definition is considerably broader. If *Cherokee* were decided today, would the Board still find that the contaminated soil was not "waste" because there was no intent to

[347] Government of Alberta, *Beneficial Use of Waste* (May 2012) online (pdf): https://open.alberta.ca/dataset/7567b368-cc1b-4fd7-beee-ec441e192f7f/resource/0c371fe1-ac9e-4f31-a155-2dc8881dc51b/download/2012-beneficial-use-waste-acceptable-industry-practices-february-2012.pdf at 1.
[348] *Waste Control Reg, supra* note 340, s. 23.
[349] *Beneficial Use of Waste, supra* note 344 at 1.
[350] *Ibid* at 1-3.
[351] *Ibid* at 1.
[352] *Contaminated Sites Policy Framework*, supra note 8 at 18.
[353] *Waste Control Reg*, *supra* note 340 at s. 1(p) as it was December 6, 2022.

dispose? Or would Cherokee's use of the contaminated soil as part of the berm constitute a "deposit" (and therefore a disposal)?

Nevertheless, it is our view that the question of whether the contaminated material constitutes "waste" or "hazardous waste" is a bit of a distraction. Regardless of whether the contaminated material was found to be "waste" under the Act, the Director has the authority under *EPEA* to regulate when contaminated material is managed on-site or disposed of elsewhere. Section 112(1)(b) of *EPEA* requires the person responsible to "restore the environment to a condition satisfactory to the Director". Furthermore, the Director has the authority to issue EPOs where there has been a release of a substance into the environment and the release may cause an adverse effect.[354]

Aside from waste it appears that the real issue, and what likely animated the AEAB's decision, was the perceived or real unfairness that arose when the approvals arm and the compliance arm of AEPA fell out of lockstep. From the *Cherokee* decision, it appears that the approvals group of AEPA worked with Cherokee and gave actual or perceived authorisation for Cherokee's Decommissioning and Land Reclamation plans, which included the construction of the berms. Meanwhile, the compliance group took steps to investigate and later issue EPOs with respect to those same berms. It is also clear from the costs decision that the AEAB took issue with some of the Director's behaviour throughout.

Ultimately, the *Cherokee* case points out a gap in the legislation. The Act as currently written mostly assumes that contaminated material will be remediated, disposed of or removed from the site. *EPEA* imposes a duty to take remedial measures where a substance may cause, is causing or has caused an adverse effect. Section 112(1) of the Act requires the person responsible for the substance to "take all reasonable measures" to repair, remedy and confine the effects of the substance, and to remediate, manage, remove or otherwise dispose of the substance and "restore the environment". Entire sections of the Act and its regulations are devoted to the who, what, where and when of this remediation and restoration.

In practise, however, AEPA recognizes that not every site is eligible for remediation and permits some sites to be risk managed. The rules and guidelines that govern risk management are found mainly in policy documents such as the *Alberta Risk Management Plan Guide* and the *Alberta Exposure Control Guide*. While these documents have been adopted by the *Remediation Regulation*, the Act and regulations themselves are mostly silent with respect to how risk management must be carried out and how it fits into the regulatory framework.

[354] *EPEA*, *supra* note 3, s. 113(1).

Specifically, the Act does not touch on issues such as when risk management may be preferred to remediation; what factors must be considered when deciding to employ risk management (i.e. can they be purely economical?); what type of notice, signage, monitoring or safety precautions must be used to protect future generations and for how long; who pays for monitoring, etc. Given that these decisions will arguably impact humans and the environment on or around these sites in perpetuity it makes sense to plan and articulate these decisions in *EPEA* and its regulations, rather than rely on ad hoc policy determinations.

Moreover, when contaminated material remains on site, such as in the *Cherokee* case, it can cause confusion. Is contaminated soil still "waste" or "hazardous waste" if it is intended to be stored on-site rather than disposed? What rules and regulations apply to material that has the properties of "waste" or "hazardous waste" but is being used for something such as building a berm on private property? Again, *EPEA* as written does not appear to contemplate that contaminated material would stay on site and not be remediated.

Altogether, the *Cherokee* case highlights that there is a lack of regulation for risk management of contaminated sites in Alberta. Not only can this cause confusion for parties that are seeking clarity for current remediation and brownfield redevelopment projects, but it also acts as a strong deterrent for parties considering future brownfield redevelopment in the province.

Jurisdictional Review of Risk Management through Exposure Control at Contaminated Sites

The intention of Alberta's legislation, on its plain reading, is focused on active remediation in a timely fashion. However, as the decision in *Cherokee* illustrates, this is not always the case. Instead, at times it appears that the remediation of contaminated sites has been inhibited by an economic lens that is not found in either statutory or policy direction. This observation is not made to make light of the real and potentially problematic costs of remediation but rather to point out that the statutory intent is, in the authors' opinion, not being met. As such, there appears to be a significant gap between the stated statutory objectives and the practical application of a contaminated sites regulatory framework. Fundamental to this discussion is the notion of time and delay, and the augmentation of risks and regulatory compliance responses that occur as time passes without a remediation response.

Accordingly, it is helpful to review how other jurisdictions ensure that public and environmental risks are adequately managed in instances where timely remediation is not being undertaken.

British Columbia

In BC, the government permits the use of "risk-based remediation" where "complete physical removal of contaminants is not feasible or desirable".[355] Contamination may be evaluated using risk assessment to estimate the levels of risk and hazard to human and environmental health. Once assessed, they are compared with risk-based standards and, if needed, the site may be managed using risk management solutions.[356]

BC's *Contaminated Sites Regulation* directly addresses risk-based remediation. The Regulation defines the terms "risk assessment" and "risk management" and sets out remediation standards for risk-based remediation generally and risk-based remediation for environmental management areas specifically.[357] The Regulation also includes a section on contaminated soil relocation and when a contaminated soil relocation agreement is required.[358]

In addition, British Columbia legislation enables the Director to require the registration of covenants and/or financial security to secure contaminated sites and remediation. Section 48(1) of the Regulation permits the Director to require registration of a covenant at Land Titles that can set conditions for land use and soil disturbance.[359] Remediation orders under the Act may require that a person provide security and a remediation plan may include conditions related to security.[360] Further, the Director may require financial security in case of "significant risks" that the site will not be addressed, managed or monitored and where a covenant is insufficient to ensure remediation is carried out.[361]

Ontario

Ontario also permits the on-site treatment and/or containment of contaminated soil as part of its remedial action and mitigation regime. Part XV.1 of Ontario's *EPA* sets out the requirements for the assessment and cleanup of a property and the filing of a Record of Site Condition in the Environmental Site Registry. Ontario Reg 153/04 provides additional details on matters related to records of site condition, including risk assessment and risk management. For additional

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[355] Government of British Columbia, "Selection of remediation options", online: https://www2.gov.bc.ca/gov/content/environment/air-land-water/site-remediation/remediation-planning/selection-of-remediation-options.
[356] Government of British Columbia, "Risk assessment", online: https://www2.gov.bc.ca/gov/content/environment/air-land-water/site-remediation/remediation-planning/remediation-plan-aip/risk-assessment.
[357] *Contaminated Sites Reg*, *supra* note 188, s. 1, 18-18.1.
[358] *Ibid*, ss. 40-46.2.
[359] *Ibid*, s. 48.
[360] *EMA*, *supra* note 185, s. 48(2).
[361] *Ibid*, ss. 48(4)-(5).

details on the record of site condition please also see the "Proactive Designation of Contaminated Sites" section above.

A risk assessment is defined in the Act as "an assessment of risks prepared in accordance with the regulations by or under the supervision of a qualified person".[362] In cases where it may be difficult for a property to meet the site condition standards, the property owner may instead use a risk assessment to develop property specific standards. The risk assessment approach allows for the incorporation of site-specific conditions in the development of soil, ground water and sediment (if any) standards.[363] A risk assessment typically includes an assessment of potential risk, the setting of site-specific standards and the identification of any risk management measures that may be required.[364]

Risk management refers to the implementation of a strategy or measures to control or reduce the level of risk estimated by the risk assessment to prevent, eliminate or ameliorate any adverse effect on the property.[365] The regulatory requirements for a risk assessment as well as risk management and risk management plans are set out in Schedule C to O. Reg 153/04.

Once a risk assessment has been accepted, and if there are ongoing risks associated with a property, the Director may issue a "Certificate of Property Use".[366] The certificate of property use is issued to the owner of the property and can require them to do the following:[367]

> *1. Take any action that is specified in the certificate and that, in the Director's opinion, is necessary to prevent, eliminate or ameliorate any adverse effect that has been identified in the risk assessment, including installing any equipment, monitoring any contaminant or recording or reporting information for that purpose.*
>
> *2. Refrain from using the property for any use specified in the certificate or from constructing any building specified in the certificate on the property.*

[362] *EPA*, *supra* note 196, s. 168.1.
[363] Government of Ontario, "Guide: site assessment, cleanup of brownfields, filing of records of site condition", online: www.ontario.ca/page/guide-site-assessment-cleanup-brownfields-filing-records-site-condition#section-7. The site condition standards are set out in "Soil, ground water and sediment standards for use nnder Part XV.1 of the Environmental Protection Act", online: www.ontario.ca/page/soil-ground-water-and-sediment-standards-use-under-part-xv1-environmental-protection-act.
[364] Guide: site assessment, cleanup of brownfields, filing of records of site condition, *ibid*, s. 7.
[365] Government of Ontario, "Procedures for the Use of Risk Assessment under Part XV.1 of the Environmental Protection Act", s. 7.0, online: www.ontario.ca/page/procedures-use-risk-assessment-under-part-xv1-environmental-protection-act#section-2.
[366] *EPA*, *supra* note 196, s. 168.6.
[367] *Ibid*, s. 168.6(1).

Financial assurance may be required in a certificate of property use and orders may be made in relation to the terms and conditions of the certificate or in relation to risk management measures set out in the record of site condition.[368] Administrative penalties for violation of the Act or a condition of the certificate of property use are capped at $100,000.[369] Fines for offences related to a change in property use without a record of site condition have a maximum of $50,000 for individuals and $250,000 for corporations.[370] A fine for violating a certificate of property use ranges from $25,000 to $6 million for a first conviction of a corporation or $5000 to $4 million for an individual.[371]

Further, to avoid potentially conflicting authorizations the Act states that, "despite any other Act…no permit, licence, approval or other instrument shall be issued to any person…that would authorize the person" to use or build on the property in such a way that is contrary to the use in the certificate.[372]

Saskatchewan

Saskatchewan also permits risk management with respect to "environmentally impacted sites".[373] However, similar to Alberta, the legislation and regulations do not go into much detail on how or when risk management should be implemented.

Saskatchewan's *EMPA, 2010* requires the preparation of a "corrective action plan" with respect to environmentally impacted sites within six months of a site assessment.[374] The Saskatchewan Environmental Code, adopted in *EMPA, 2010*, provides that the corrective action plan may include "risk management with future reclamation".[375] Policy documents state that "long-term management of a site can arise where the proponent prefers to implement risk management measures with immediate active remediation", such as where natural attenuation is effective at removing contaminants and/or an operating facility has infrastructure on site that prohibits the implementation of corrective actions.[376]

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[368] *Ibid*, ss. 132(11) & 168.7 (5).
[369] *Ibid*, ss. 182.1(5) & 187.
[370] *Ibid*, s. 187.
[371] *Ibid*.
[372] *Ibid*, s. 168.6(6).
[373] Saskatchewan Ministry of Environment, *Guidance Document: Impacted Sites*, May 2015, at 64, online: Government of Saskatchewan https://publications.saskatchewan.ca/api/v1/products/77475/formats/110310/download.
[374] *EMPA, 2010*, *supra* note 282, s. 14.
[375] *The Environmental Management and Protection (Saskatchewan Environmental Code Adoption) Regulations*, RRS c E-10.22 Reg 2, Chapter B.1.3 Corrective Action Plan Chapter, s. 1-2(2).
[376] *Supra* note 373 at 64.

EMPA, 2010 requires mandatory financial assurance where "risk management with future reclamation" is involved.[377] Specifically, the Act states:

> 17(1) The minister shall not accept a corrective action plan that proposes risk management with future reclamation unless the responsible party provides a financial assurance that will ensure that the site is ultimately reclaimed. (2) For the purposes of this section, the financial assurance must be in the amount and in a form that is acceptable to the minister. (3) The minister may require a financial assurance in an amount and in a form that is acceptable to the minister for corrective action plans that propose actions different than those set out in subsection (1).

Accordingly, while Saskatchewan's legislation does not provide any additional clarity on how to legislate the in-situ management of contaminated soils, it does require financial assurance for any sites that delay or put off reclamation.

Conclusion on Lack of Regulation for Risk Management through Exposure Control at Contaminated Sites

Overall, there is a lack of regulation in Alberta for remediation that departs from the standard (i.e. immediate removal of contaminated soil). For one, there appears to be a gap in prescriptive regulations. The practical aspects of remediation have departed from remediating releases "as soon as" the persons responsible become aware to take all reasonable measures to remediate the site. Instead, owners of contaminated property often allow polluted sites to sit without conducting active remediation (i.e. remediation deferral). This gap around deferred remediation should attract statutory mechanisms to minimize risks and ensure that ongoing risk management and future monitoring and risk will be addressed. This should include requirements for security where remediation deferral is taking place.

Another evident gap in Alberta's regulatory approach revolves around longer term monitoring and maintenance of risk management systems (ex. exposure control). Under the current regulatory system long term reliance on mitigation and risk management mechanisms may be part of land use allowances. Yet, there are no regulatory rules or expectations for long term monitoring and maintenance of mitigation and risk management systems. Furthermore, there are no financial assurances required when going this route despite the risk that these systems may fail and/or those responsible may wind up or become insolvent, as well as the costs associated with monitoring these sites in perpetuity. Ongoing risk management should be

[377] *EMPA, 2010*, *supra* note 282, s. 17(1).

explicitly regulated in *EPEA* and its associated regulations, and include requirements that risk management plans must be registered on title and require financial security.

Recommendation 6: Implement regulatory regime for risk management through exposure control

Alberta should create a comprehensive regulatory framework for risk management through exposure control at contaminated sites that includes:

- Definitions for "remediation" and "manage" in s. 112 of *EPEA*;
- Guidelines for when and how remediation may be deferred and/or risk managed (i.e. what factors must be considered, the process for undergoing a risk assessment and completing a risk management plan, etc.)
- Guidelines for when a change of use (i.e. from industrial or commercial to residential use) may be permitted without full remediation;
- Registration on title of any approved risk management plans; and
- Ongoing monitoring and financial securities for sites that are not immediately remediated.

The risk management through exposure control regime should be integrated into EPEA and either the existing Remediation Regulation or as a standalone regulation. Either way efforts should be made to ensure that it dovetails with existing legislation.

vi. Standards of Remediation and Related Compensation

The basis of the polluter pays principle is that the polluter must pay for the harms of their pollution. This is reflected in the purpose of *EPEA* where it recognizes "the responsibility of polluters to pay for the costs of their actions".[378] It is further reflected in the Act through, among other things, the prohibition against releases and the duty to remediate.

Yet, also embedded in the Act is the ability to avoid the costs of pollution. Examples include release reporting exemptions (i.e. releases which need not be reported pursuant to the *Release*

[378] *EPEA*, *supra* note 3, s. 2(i).

Reporting Regulation) and the statutorily ambiguous remediation standard of being required to "restore the environment to a condition satisfactory to the Director".

Discussion

In practice, the standard of remediation is generally the *Alberta Tier 1 Soil and Groundwater Remediation Guidelines* and/or *Alberta Tier 2 Soil and Groundwater Remediation Guidelines* (as described above) for a specific concentration of pollutants. Meanwhile, pollution which falls below these guidelines can, in essence, be free.

Moreover, there are no timelines set on remediation, notwithstanding the duty to "take all reasonable measures...as soon as a "person becomes aware or ought to become aware" of a release.[379] In practice, remediation efforts can be delayed significantly, as exemplified by most brownfield sites in Alberta. While the duty to remediate is clear, there is no liability for harms that occur while remediation remains incomplete. That is to say, that during the time it takes to remediate the land, ongoing environmental, social and economic harms are being incurred without compensation.

In contrast, the starting premise at common law is that if one's land is polluted by another then the Plaintiff (the party harmed by the pollution) is entitled to be "made whole" and their land restored to its pre-pollution state. In this regard, the baseline condition of the land will be relevant (although the courts have overlayed an analysis of practicability and reasonableness overtop of the basic principle). There have also been instances where, rather than ordering remediation to a baseline condition, courts have ordered a "barrier system" to isolate properties from future impacts. In doing so, the courts have recognized that there are future costs of maintaining such barrier systems.[380] These costs are, however, still time-constrained – meaning that they are not awarded indefinitely into the future.[381] Accordingly, the common law approach is notable as the starting point is the "pre-pollution" condition of land, and courts have found that accounting for future costs of monitoring and risk management may be part of civil liability.

As will be seen other jurisdictions have attempted to address these issues and more fully account for a pollution release.

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[379] *EPEA*, *supra* note 3, s.112. Of course, if remediation does not occur within two years then other regulatory requirements (i.e. a remedial action plan) are triggered. Still, this does not constitute a statutory timeline for remediation.
[380] *Huang v. Fraser Hillary's Limited*, 2017 ONSC 1500 (CanLII) at paras 206-208.
[381] *Ibid*. In *Huang*, the Court ordered costs for the replacement of the barrier system in approximately 15 years.

Jurisdictional Approaches to Standards of Remediation and Related Compensation

European Union

A full cost accounting of the harms incurred by a release is reflected in the European Union's Environmental Liability Directive (ELD)**.** The ELD sets out a regulatory approach that seeks to adhere to the polluter pays system. In this regard, the expectation is to remedy environmental damage to the baseline condition. The baseline condition is defined as:[382]

> [T]he condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available;

Further, the requirement to take remedial measures is set out in the definition and Annex II to the directive:[383]

> '[R]emedial measures' means any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services as foreseen in Annex II;

Of specific interest is the regulatory approach that remedial measures are categorized into several areas:[384]

a. 'Primary' remediation is any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition;

b. 'Complementary' remediation is any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services;

[382] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, (OJ L 143, 30.42004, p 56) at Article 2, s. 14, online: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0035.
[383] *Ibid* at Annex II.
[384] *Ibid*.

c. 'Compensatory' remediation is any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect;

d. 'Interim losses' means losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the primary or complementary measures have taken effect. It does not consist of financial compensation to members of the public.

Where primary remediation does not result in the restoration of the environment to its baseline condition then complementary remediation will be undertaken. In addition, compensatory remediation will be undertaken to compensate for the interim losses. Remedying environmental damage, in terms of damage to water or protected species or natural habitats, also implies that any significant risk of human health being adversely affected be removed. As such, the directive casts a broad net in an effort to capture all types of harms above the baseline condition. Where the baseline condition is not met the directive requires restoration at alternate sites or improvements to protected habitat and liability also covers the duration of the remediation process (to cover interim losses).

This approach can be contrasted with the Alberta approach where there is no compensatory remediation for interim losses. In Alberta, if there is not an administrative order forcing remedial activities to align with regulatory obligations, the harms between the time of the release and the remediation are not accounted for.

Another distinguishing feature of the ELD is that it enables a "natural or legal person" to make submissions to the competent authority regarding environmental damage or the imminent threat of such damage.[385] This includes those affected or likely to be affected and specifically includes non-governmental organizations that promote environmental protection. The authority must then consider the taking of actions as a result and inform the party of that decision.[386]

EPEA does have a similar public engagement provision but it is notably different insofar it requires two persons to attest to a failure to remediate and the prescribed remediation

[385] *Ibid* at Article 12(1).
[386] *Ibid* at Articles 12(3) & (4).

requirements are not clearly applicable to issues regarding habitat and ecosystem focused harms.

Conclusion on Standards of Remediation and Related Compensation

It is notable that the ELD uses "baseline condition" as its reference point for defining compensable harms and includes interim harms. Mechanisms to fully account for harms of pollution should be integrated into *EPEA*. This means recognizing harms that occur during remediation delays and a failure to compensate for all of the pollution. More fully accounting for pollution harms will also incentivize higher levels of due diligence and motivate more prompt remedial action.

Recommendation 7: Amend *EPEA* to include a statutory remediation standard

EPEA should be amended to include a statutory remediation standard that ensures liability covers all pollution to a baseline condition, as set out in the EU directive on environmental liability. This means that a polluter must fully remediate, or remediate to a prescribed standard and offset the difference in cost to baseline and compensate for the duration of the impact of the pollution.

Section 196 of *EPEA* should be amended to enable the request for investigation to extend to registered non-profit societies and charities that have among their object the protection of the environment.

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Review of Recommendations

Recommendation 1: Implement reporting obligations prior to change of use or ownership of property

Alberta should implement reporting obligations (similar to those in BC or Ontario) when a property changes hands or use. This would help to ensure that changes in use only occur where some level of assessment and risk analysis has taken place. Moreover, it would also help the government to proactively designate contaminated sites.

On a practical level, property owners should be required to submit a record of site condition to the government before changing the property from industrial or commercial use to residential or parkland use (or as otherwise prescribed by regulation), and before the sale of a property. The record of site condition should be prepared by a qualified party and go through an environmental site assessment process (also as prescribed). In select circumstances, where the environmental site assessment reveals contamination or potential contamination, then the Director may issue a certificate of property use and require any action that is necessary to prevent, eliminate or ameliorate any adverse effect that has been identified in the site assessment as well as put limits on use. The record of site condition (as well as any certificates of property use) should be recorded in ESAR and linked to the Land Titles registry.

Recommendation 2: Improve public access to environmental site information through title registrations

Alberta should amend *EPEA* to provide for the registration of additional environmental site information such as remediation certificates, enforcement orders, EPOs and site-specific risk management plans/measures on title in a timely fashion. This information should also be linked and published in ESAR as part of its searchable registry.

Recommendation 3: Exempt innocent owners/purchasers from definition of person responsible in EPEA

Alberta should adopt additional exemptions in the definition of “person responsible” when used with “reference to a substance or a thing containing a substance”. Currently, the definition exempts a municipality in select scenarios, mainly where the municipality becomes responsible

for contaminated land but did not cause or aggravate the contamination. There should also be an exemption for innocent owners and/or purchasers who can establish the following:

a) At the time they took ownership of the property,

   i. the site was contaminated;

   ii. the person had no knowledge or reason to know or suspect that the site was contaminated; and

   iii. the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at the time to minimize potential liability;

b) If the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee; and,

c) The owner did not, by any act or omission, cause or contribute to the contamination of the site.

Similarly, the Act should also exempt an owner who owned or occupied a site that at the time of acquisition was not contaminated and, during their ownership, did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site.

Recommendation 4: Create a general assurance fund

Amend *EPEA* to create a general assurance fund to address, among other things, underfunded or orphan contaminated sites where the person responsible no longer exists or is financially incapable of addressing remediation. Revenue for the general assurance fund could come from a variety of sources, based on the polluter pays principle, including:

- A levy on wholesale hazardous substances including petroleum products, pesticides, dry cleaning related products and other chemicals;
- Fines, penalties and costs recovered from parties that are found to be financially responsible under *EPEA* for substance releases; and
- Fees for regulatory activities such as remediation certificates.

Note that the general assurance fund will need to be coordinated with existing programs such as the Orphan Well Association/Orphan Fund Levy and the Environmental Protection Security Fund.

Recommendation 5: Adopt allocation provisions for substance releases

Allocation provisions should be embedded in *EPEA* for both the contaminated sites and substance release provisions. Provisions should include an enumerated list of factors to take into account when apportioning liability and costs. Provisions should also include exemptions for minor contributors.

Recommendation 6: Implement a regulatory regime for risk management through exposure control

Alberta should create a comprehensive regulatory framework for risk management through exposure control at contaminated sites that includes:

- Definitions for "remediation" and "manage" in s. 112 of *EPEA*;
- Guidelines for when and how remediation may be deferred and/or risk managed (i.e. what factors must be considered, the process for undergoing a risk assessment and completing a risk management plan, etc.)
- Guidelines for when a change of use (i.e. from industrial or commercial to residential use) may be permitted without full remediation;
- Registration on title of any approved risk management plans; and
- Ongoing monitoring and financial securities for sites that are not immediately remediated.

The risk management through exposure control regime should be integrated into *EPEA* and either the existing *Remediation Regulation* or as a standalone regulation. Either way efforts should be made to ensure that it dovetails with existing legislation.

Recommendation 7: Amend EPEA to include a statutory remediation standard

EPEA should be amended to include a statutory remediation standard that ensures liability covers all pollution to a baseline condition, as set out in the EU directive on environmental liability. This means that a polluter must fully remediate, or remediate to a prescribed standard and offset the difference in cost to baseline and compensate for the duration of the impact of the pollution.

*S*ection 196 of *EPEA* should be amended to enable the request for investigation to extend to registered non-profit societies and charities that have among their object the protection of the environment.

CONCLUSION

Pollution and contaminated sites present complex technical, financial, legal and social challenges. As a result, these sites tend to sit idle and unproductive, or worse, causing ongoing harm to people and the environment. Moreover, these challenges will only be heightened so long as Alberta continues on its path of growth and urbanization.

Nevertheless, the solutions to some of Alberta's issues are already present in other jurisdictions across the country and beyond, and demonstrate legislative changes, strategies and programs that may be used or adapted to help with managing contaminated sites as well as supporting brownfield redevelopment in Alberta. Note, however, the issues, challenges and solutions identified in this report are often interrelated. Accordingly, the recommendations in this report are interdependent and should, as much as possible, be taken as a whole.

Managing pollution and contaminated sites needs to be seen as part of a larger vision for Alberta's communities. The larger vision includes limiting urban sprawl, preserving agricultural land and green spaces, and restoring lands contaminated with hazardous substances back to productive use. Provincial law reform has an important role to play in creating this vision by outlining the appropriate roles and responsibilities for provincial and municipal regulators, setting standards for remediation, and providing legal and financial incentives for landowners, developers and polluters to undertake initiatives that support sustainable communities.