

Submission on MELP's Comparative Review of the Liability Regimes under the *Mines Act* and the *Waste Management Act*

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In order to assist the consultants undertaking the above review, West Coast Environmental Law (WCEL) has prepared the following submission regarding the liability provisions for mine reclamation and environmental protection as they relate to mining under both the *Waste Management Act* (WMA) and the *Mines Act* (MA). We understand that the need for this project has arisen out of the Ministry of Energy and Mines (MEM) proposal to exempt mine sites from the requirements of Part 4 of the WMA and its associated Contaminated Sites Regulation.

Our comments are divided into four main areas: general concerns about this proposal; the relative strengths of the WMA over the MA regarding liability; remarks on the adequacy of the bonding provisions under both Acts; and finally, recommendations as to how any problems could be addressed within the current framework.

PART 1:

GENERAL CONCERNS

Based upon our participation in the Mining Subcommittee of the Contaminated Sites Implementation Committee (CSIC), WCEL understands that the mining industry has a number of concerns about the unfairness of applying blanket joint/several and retroactive liability provisions of the WMA to mine sites in BC. While we understand the basis for these concerns, we believe that the blanket exemption, as generally proposed, is taking a "sledgehammer" approach, and would unnecessarily diminish environmental protection in order to remedy some narrow issues of concern to the mining industry.

The original proposed exemption would have broad implications beyond environmental liability. In our view, the rationale for a liability exemption cannot be considered independent from some of these other consequences.

COMPROMISED ENVIRONMENTAL PROTECTION

- The MA does not contain the necessary safeguards to guarantee environmental quality as does the WMA. The intent of the Act is to regulate mining activity, not environmental quality. Under the MA, activity in and around a mine is dictated almost exclusively through the permitting provision in s. 10. Further, virtually all the requirements for mine permits under the Act are discretionary; the chief inspector may even waive the requirement to obtain a permit (s. 10(2)).
- MELP's role in responding to environmental protection issues arising from mine sites would be unduly limited. There are a number of valuable mechanisms for addressing contamination that would be lost if Part 4 of the WMA no longer applied to mine sites. Some of these mechanisms include the right to request site investigations; issue remediation orders; make orphan site determinations; require remediation or make orders; exercise cost recovery powers; and the crown's right to take future action.
- The MA does not contain standards for site remediation. In contrast, Part 6 of the Contaminated Sites Regulation stipulates that a site may be remediated to either numerical standards or risk based standards. Unless these requirements are incorporated into the MA in some way, there will be no clearly established standard for mine site remediation. Instead, determinations would be made on a case by case basis, a process that would likely not be nearly as transparent or accountable as the Part 6 mechanism. In our view, it would be a redundant policy exercise to recreate these standards in another Act.

LACK OF PUBLIC ACCOUNTABILITY

- WCEL is concerned about the incompatibility of the dual role that MEM would have to play as the primary regulator responsible for addressing the on-site generation of contaminants, and the primary ministry responsible for promoting economic development of mining in BC. Public accountability for both roles would be undermined.
- The MA permitting process is not subject to the same (or even similar) public consultation requirements as permits and approvals under the WMA (s. 27.5 – which is not even consistently applied; and the Public Notification Regulation). There is no requirement to consult with the public prior to issuing a permit for activity in and around a mine. The proposed exemption would effectively mean that no public consultation would occur for activity at mines.
- The MA process does not contain any guaranteed right of appeal. A person aggrieved by a permitting decision under the MA can appeal to the non-arms-length Chief Inspector of Mines, and if necessary, can then take their grievance by way of judicial review to the Supreme Court. This avenue of recourse may be initially more biased, and is significantly more costly and cumbersome than the WMA procedure, which establishes a right of appeal to the Environmental Appeal Board.

OPENING THE FLOODGATES

- The recent Environmental Appeal Board decision in the *Beazer East and Atlantic Industries v. Assistant Regional Waste Manager and CNR* (Appeal No. 98-WAS-01(b)) has already triggered a request by a responsible party for an exemption to the Contaminated Sites Regulation. The granting of an exemption for a dissatisfied party from the requirements of this regime may well result in a wholesale run on Part 4 of the Act. This "slippery slope" concern is all the more reason why a blanket exemption for one industry from the liability regime is inadvisable.

PART 2: STRENGTH OF WMA OVER MINES ACT WITH REGARD TO LIABILITY

POLICY CONTEXT

The contaminated sites regime (which for our purposes includes Part 4 of the WMA and the Contaminated Sites Regulation) evolved through a lengthy process, that, in part, grew out of the CCME's Core Group on Contaminated Site Liability. There are a number of principles underlying this regime, which ensure that it is both effective and fair, to industry and the public. The key principles of the regime are as follows:

Polluter Pays. This reflects the government's commitment to fairness. Those who reap the benefit from industrial activity are expected to pay the costs, which they can then internalize.

Remediate then Allocate. The regime places a first priority on clean up of a contaminated site. Allocation issues are addressed through allocation panels and cost recovery actions. This principle was recently affirmed by the Environmental Appeal Board (*Beazer*, 98-WAS-01(b), p. 45).

Absolute, Retroactive and Joint/Several Liability. The imposition of this set of liability principles is a key component of the regime. These principles establish clear parameters of potentially responsible parties and create incentives for these parties to allocate responsibility amongst themselves. The inclusion of personal liability for directors and officers in this framework further encourages appropriate accountability for site clean up.

LIABILITY PROVISIONS IN THE MINES ACT

The MA does not contain any remediation liability provisions whatsoever. Thus, any liability for contamination emanating from a mine must be resolved through civil actions for damages in the courts. The government has no clear authority to intervene to ensure that parties responsible for contamination are held accountable and are required to pay for remediation at a mine site.

The only way a party responsible for contamination can be held accountable would be for it to be successfully sued by a plaintiff for damages. However, if there was no

identifiable plaintiff, or if there was no plaintiff willing to undertake a court action (and expose itself to the possibility of an adverse cost award), there would be no means of holding a party responsible and therefore liable for the costs of clean-up.

The MA does not embody any of the key principles underlying the WMA. For example, s. 17 of the MA permits an inspector to require work to be done to remove or alleviate danger or remedy pollution emanating from a mine in certain circumstances. In such cases, the Act states that the costs incurred for work done under section 17 must be paid from the consolidated revenue fund. This is clearly not an expression of the polluter pays principle. There is no absolute, retroactive, joint or several liability, nor is there any provision for director and officer liability for remediation.

The only other reference to liability is found in the offence and penalty provisions in s. 37, which hold that persons, including directors and officers who interfere with inspectors or contravene provisions of the MA, commit an offence and are liable to a penalty if convicted. This section is not directed at remediation, and provides only for the fines or penalties that would flow from violation of the Act; it does not address clean up costs.

Simply put, the MA does not contain any mechanism to compel a party responsible for contamination to pay for clean up of a site. The burden for paying for clean up lies with government. If the government wanted to recover clean up costs, as with any other litigant, it would have to pursue an action in the courts.

Recourse to the courts is costly, time consuming, uncertain, and would likely not be commenced until substantial environmental harm had occurred. Because of these drawbacks with the common law system, governments in Canada have been moving toward more sophisticated liability regimes such as those found in the WMA.

LIABILITY PROVISIONS IN THE WASTE MANAGEMENT ACT

In contrast to the MA, the WMA contains a sophisticated and relatively comprehensive regime for ascertaining and allocating liability for contaminated sites, and for ensuring their clean up.

In our view, the key principles identified above are essential for the regime to be interpreted fairly and effectively. Any loss of application of these features to mine sites would seriously undermine environmental protection in BC. The contaminated sites regime allows for effective identification and clean up of contaminated sites through the preparation of site profiles, site investigations and a site registry. These elements, while not directly addressing liability, are a key part of the accountability regime established in the WMA. Further, the WMA has a number of mechanisms for ensuring CERTAINTY and CLARITY, as well as FAIR and TIMELY clean up of

contaminated sites. In particular:

The WMA defines who is and isn't responsible. **Section 26.5 of the WMA clearly defines who is responsible for remediation at a contaminated site. Similarly, section 26.6 clearly states who is not responsible for remediation at a contaminated site.**

In addition, ss. 19 through 33 of the Contaminated Sites Regulation list 15 different categories of exemption for "persons not responsible". The mere existence of this list indicates that a significant amount of effort was expended at the time the Regulation was passed in defining specific exemptions to the regime. These exemptions outline the clearly prescribed circumstances whereby a party can be considered a "person not responsible" – a blanket exemption for an entire industry is clearly far more broad than the limited exemptions currently contemplated by the regime.

The WMA clearly states the applicable principles of liability. Section 27(1) of the WMA is the clearest statement regarding liability under the Act. It states that:

A person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

This section is extremely important for a number of reasons. First, it clarifies that liability is absolute, retroactive, joint and several. By holding parties responsible absolutely and retroactively, it ensures that responsible parties will be accountable for the consequences of their actions, and further, that the costs of clean up will be internalized by those responsible for the contamination. It is also consistent with notions of economic benefit, as those who profit from the contaminating activity will be accountable.

By holding parties responsible jointly and severally, the regime ensures that parties have an incentive to encourage settlement – given that a responsible party knows that it may be responsible for the full costs of clean up it will be more inclined to bargain with others to work out a fair allocation. In addition, joint and several liability is consistent with common law tort doctrines applicable in civil actions. If there were no liability regime for situations where more than one party is potentially responsible, and such issues had to be resolved in the courts (as is currently the case for liability under the MA), the courts would apply a similar set of common law principles as those outlined in the WMA. In our view, the mere existence of joint and several liability is a deterrent for potentially liable parties to undertake any activity at a site that may result in contamination.

Finally, the wording of this section is important as it includes remediation of contamination that has extended off site. The MA does not address any off-site

contamination issues.

Section 27(2) provides even further clarity by defining what the costs of remediation are.

The WMA contains specific mechanisms to encourage responsible parties to allocate liability for clean up fairly. The allocation panel and minor contributor provisions (ss. 27.2 and 27.3 respectively) both provide means by which fairness factors can be considered in the allocation of liability. Allocation panels provide an informal non-binding mechanism whereby potentially responsible parties can seek an opinion on their relative responsibility. Similarly, a party may demonstrate that he or she is a minor contributor where no remediation would be required solely as a result of that person's contribution; where the remediation costs attributable to that person would be minor; or where the application of joint and several liability would be unduly harsh.

Section 35 of the Contaminated Sites Regulation contains a list of factors which must be considered in determining the reasonably incurred costs of remediation between the parties. These factors incorporate elements of fairness in a cost recovery action between the parties, as they address such issues as relative due diligence; relative contributions of parties; relative degrees of involvement; any remediation measures paid for by each of the parties; and any other factors relevant to a fair and just allocation. Similarly, s. 38 of the Regulation provides additional criteria for the application of the minor contributor provisions.

All of these mechanisms were built into the Act to ensure that its application would not be unduly harsh or unfair. These fairness mechanisms also provide ample opportunity for "polluters" or responsible parties, to find a way out of the liability box. If the application of these liability principles to a minesite was unduly harsh, then a responsible party is free to utilize the mechanisms in the Act to avoid liability. In our view, the application of these principles is narrowly enough proscribed so as not to be arbitrary.

PART 3: BONDING ISSUES

The bonding regimes under both the MA and the WMA are not adequate. Simply put, the regime in place under the MA is arbitrary, and that in place under the WMA is virtually non-existent.

Mines Act. Section 10(5) of the MA states that security must be posted if required by

the chief inspector to perform and carry out permit conditions, mine reclamation, and protection of and/or mitigation of damage to watercourses affected by the mine. While bonding is a regularized part of the reclamation process, the applicable criteria are unclear and inconsistent.

We are also concerned by the fact that the environmental provisions of these bonding requirements are limited to damage to watercourses, and do not include damage to land or property, harm to human health, or the environment and species generally.

We have reviewed the 1991 Bonding Agreement Regarding the Joint Administration and Regulation of the Mining Industry between MEM and MELP. We have two concerns about this agreement; first, we have little or no information about the extent of its application in practice; and second, it is merely a policy document, it does not have the same force as legislation. In our view, the entirely discretionary bonding provisions in the MA alone are inadequate to ensure the range of environmental protection issues that may arise from a mine site.

Waste Management Act. As with the MA, the bonding provisions in the WMA are entirely discretionary. According to s. 48(1)(d), a manager will only require financial security where a significant risk could arise from the site, and only then where a covenant under the *Land Titles Act* is unlikely to be an effective means to ensure that the necessary remediation is carried out. Further, there are only four occasions where security can be required under the WMA -- remediation orders under s. 27.1(2); voluntary remediation agreements under s. 27.4(1); certificates of compliance under s. 27.6(2); and contaminated soil relocation agreements under s. 28.1(4).

Given that the use and application of these options is extremely limited to date (see footnote 3), we have little comment on this issue other than to note that they appear to be relatively unused tools to address liability concerns.

PART 4: POSSIBLE SOLUTIONS WITHIN EXISTING FRAMEWORK

In our view, there are a number of ways to deal with industry's concerns that would not entail a full exemption from the province's liability regime for contaminated sites.

Better use of existing allocation and apportionment mechanisms in the WMA.

The contaminated sites regime currently contains a number of mechanisms for allocating liability under the WMA. These tools ensure that liability issues can be resolved fairly and effectively between responsible parties. These mechanisms appear to have been underutilized to date; more experience with them should be gathered before exemptions from the contaminated sites regime are considered.

- **Allocation panels (s. 27.2 of the WMA).**

CSIC has discussed the function of allocation panels. While it has recognized that they are not as effective as originally intended, our sense of the Committee's view is that the premise remains a good one. Allocation panels can be used to encourage positive resolution of liability issues. Clarifying and refining their role with respect to the allocation of liability, by making their recommendations binding, is one option available to address the perceived problems within the existing framework. In our view, it would be far preferable for the government to amend the WMA to improve the functioning of allocation panels than exempt mines from the contaminated sites regime.

- **Minor contributor provision (s. 27.3 of the WMA).**

The minor contributor provision sets out three clear circumstances that can cap the extent to which a person can be held responsible for clean up at a site. In our view, the circumstances identified can be interpreted broadly enough to ensure that the application of the liability provisions would be fair.

- **Compensation/allocation factors (s. 35(2) of the Contaminated Sites Regulation).**

The regulation contains a list of factors to be considered where there are two or more responsible persons who may be liable for remediation at a contaminated site. These factors provide sufficient scope to ensure that liability is allocated fairly amongst the parties. The fact that these factors have been clarified in legislation, and are listed in addition to common law remedies, is evidence of the government's commitment to ensure a fair application of the liability regime.

Better use of existing financial mechanisms. Existing financial mechanisms can be used to address liability concerns before they result in conflict. In our view, these mechanisms should be strengthened, and experience should be gained, before liability exemptions are contemplated.

- **WMA and MA Bonding.**

As noted above, consideration should be given to more extensive, consistent, and transparent application of the bonding provisions in both Acts as a means of avoiding liability concerns altogether. More effective application of bonding requirements earlier in the mine permitting process would obviate the need for

liability exemptions at a future point in time, because clean up costs would be assured. The principle of "remediate then allocate" could be applied by ensuring that sufficient funds are made available early in the mine permit process to enhance environmental protection.

Similarly, a strong financial security policy should be developed for contaminated sites under the WMA. This policy should be consistent with that which applies to mine sites. Where the MA process will not adequately address environmental remediation goals, there should be sufficient flexibility for the WMA process to be used for mine site remediation. We are not certain of the extent to which this is occurring under the 1991 joint arrangement.

- **Protocol Agreement for Indemnification Under the MA and WMA.**

The government has already developed a mechanism to indemnify a party wishing to transfer remediation liability to a new owner upon the sale of a mine (*Financial Administration Act* or FAA indemnification). In our view, this mechanism has the potential to deal with liability concerns while at the same time limiting the extent to which taxpayers may be forced to fund clean up at a mine site, as it requires the new owner to assume responsibility for the site. However, we are aware that there are concerns about transparency and accountability in the existing FAA process. We recommend that a strengthened FAA model be considered as a means to deal with industry concerns.

Consideration of narrowly defined, issue specific exemptions. Where the regular application of WMA liability principles may be unfair in certain circumstances, and existing mechanisms are unsuitable to resolve the problem, consideration should be given to carving out limited exemptions to the WMA regime. Such exemptions should be modeled on the "persons not responsible" approach outlined in Part 7 of the Contaminated Sites Regulation.

CONCLUSION

Government made a commitment to the principles of absolute, retroactive, and joint and several liability when it passed Part 4 of the WMA. Mines were specifically included in the development of this new liability regime. Exempting mine sites from the environmental liability requirements of the WMA, without an equivalent liability regime under the mining legislation would signal a dramatic shift in the province's commitment to environmental protection, particularly considering that mines account for a significant portion of environmental contamination in BC. Holding private actors responsible and accountable for the results of their profit making activities will result in more responsible corporate behaviour; ensure that the threat

of environmental harm is minimized; and where it does occur, that it can and will be cleaned up.

Government today does not have sufficient resources to fulfil its basic mandate, much less go cleaning up after industry. The chances of publicly funded clean up actually taking place are minimal. Litigation through the common law system is more costly and time consuming than the sophisticated regime developed under the WMA. It would be neither a justifiable use of diminishing public resources, nor an effective use of private resources. Further, should a dispute about liability for mine site clean up ever end up in court in the absence of the WMA regime, a court would likely apply a modified version of the principles already listed in the WMA. The requisite factors have already been hammered out in the WMA, and should be used proactively before alternatives are contemplated.