SHORTCOMINGS
OF THE
CURRENT LEGISLATIVE REGIME
OF CONTAMINATED SITE
LIABILITY IN SASKATCHEWAN
AND A PRINCIPLED APPROACH
TO AN ALTERNATIVE MODEL

SUSAN ELIZABETH ROSS
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SHORTCOMINGS OF THE CURRENT LEGISLATIVE REGIME OF CONTAMINATED SITE LIABILITY IN SASKATCHEWAN AND A PRINCIPLED APPROACH TO AN ALTERNATIVE MODEL

A Thesis submitted to the College of Graduate Studies and Research in Partial Fulfilment of the Requirements for the Degree of Master of Law in the College of Law University of Saskatchewan Saskatoon

By
Susan Elizabeth Ross
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ABSTRACT

The purpose of this study was to examine the effectiveness of the current legislative scheme provided in *The Environmental Management and Protection Act* (the EMPA) and the current strategy established by Saskatchewan Environment and Resource Management (SERM) in ensuring the cleanup of contaminated land where voluntary cleanup is not forthcoming.

Both the EMPA and the strategy, based on the EMPA, are found inadequate for a number of inter-related reasons.

The study is comprised of three parts. First, the EMPA itself is examined and in particular its potential for unfair and arbitrary outcomes. The fact or perception of such outcomes, it is argued, serve to undermine the accomplishment of the purposes the EMPA is intended to effect by affecting the decisions of both SERM and parties potentially subject to the regime.

The impact of the Saskatchewan Court of Appeal's 1998 decision in *Busse Farms Ltd. v. F.B.D.B.* is examined and found to both severely undermine powers provided to the Minister under the EMPA and consequently the SERM strategy, and to reflect a confusion between issues of fairness as between private parties and a broader concept of fairness in the context of effecting public purposes.

Finally principles upon which to base an alternative model are proposed. These principles are developed based on liability which may rationally and fairly be connected to the purposes of preventing contamination and funding remediation.
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Eli Max Ross
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LIST OF ABBREVIATIONS AND ACRONYMS

CCME  Canadian Council of Ministers of the Environment

CERCLA  *Comprehensive Environmental Response, Compensation, and Liability Act*

CSLAG  Contaminated Site Liability Advisory Committee

E.A.B.  Environmental Appeal Board (Ontario)

EMPA  *The Environmental Protection Act*, S.S. 1983-1984, c. E-10.2

SERM  Saskatchewan Environment and Resource Management
INTRODUCTION

Chapter 1 - Introduction

The ultimate concern addressed in this thesis is straightforward. The legislative regime of liability established by The Environmental Management and Protection Act (hereinafter "the EMPA") has not been able to realize the successful remediation of contaminated sites in this province. From the time of its enactment, and as will be argued, continuing to the present, there has been considerable uncertainty as to the scope of those potentially responsible under the EMPA for the clean up costs and other damages arising as a result of environmental contamination to land. However, the failure to solve the problem of contaminated sites is not only the inability to identify with clarity those potentially responsible for remediation. The problem is multifaceted rather than unitary. The EMPA is capable of producing outcomes widely perceived as arbitrary and unfair. It has been severely undermined by a recent decision of the Court of Appeal. It is a conclusion of this thesis that the nature of the regime itself works against the goals which underlie the EMPA. This thesis will explore the EMPA, the justifiable underpinnings of


2 Although the EMPA is concerned with discharges of pollutants into all aspects of the environment, the focus of concern and the focus of this paper are the issues related to contaminated site liability.

liability thereunder, and the problems under the current regime, as a basis upon which to
develop a solution to the current impasse.

In Chapter 2, the history of the EMPA and the nature of Section 4 and Section 13 are
explored. The rational bases of responsibility for clean up of contaminated sites are
examined and the manner in which liability under Section 4 may depart from those rational
bases. The general level of uncertainty and the claim to unfairness in relation to the reach
of the provision are examined.

Two specific areas of potential liability result from the provisions of the EMPA: (1)
the “remediation” provisions in Section 4, and (2) the “compensation” provisions in Section
13. Section 4 empowers the minister to make sweeping orders requiring the “owner of the
pollutant”, the “person in control of the pollutant” and a “person responsible for the
presence of the pollutant” to, inter alia, investigate, contain or remove the pollutant and to
minimize or remedy the effect of the pollutant or restore the contaminated site (hereinafter
“remediation orders”). Section 13 of the EMPA is a strict liability provision entitling any
person to compensation from an owner or person having control of the pollutant for loss
or damage as a result of the discharge of the pollutant without proof of fault, negligence or
intent.

The central focus of concern in this thesis is the public interest provision in Section
4. As will be seen, however, Section 13 is inextricably connected to issues arising under
the public policy provision both in itself and through recent consideration in the Court of
Appeal’s decision in Busse. Accordingly, Section 13 will be given due consideration.

The regime created in Section 4 of the Act that allocates responsibility for
remediation is directed not only at those who have a causal connection to the event of
contamination but also to those who own or control the pollutant or contaminated land, whether or not they are causally responsible for a discharge. In either case there is a “no-fault” basis of liability. Responsibility is absolute. Further, Section 4 applies retroactively. Responsibility to remediate, or bear the cost of remediation, thus rests on owners and controllers of the pollutant at the time of the discharge and current owners of the land even in the event that the discharge was not a wrongful act at the time that it occurred. The absolute nature of the liability, particularly in view of its retroactive application, is widely perceived to be per se unfair.

The perception, and arguably the fact, of unfairness is exacerbated because the liability under Section 4 is joint and several. Combined with the absolute nature of the liability, there is potential that a party very remote from the act of contamination and without fault will bear the full burden even when at fault parties exist.

Compounding the general level of uncertainty with respect to this legislation, until 1996 there was no judicial consideration whatsoever in Saskatchewan of the meaning of the phrases “owner of the pollutant”, “person in control and management of the pollutant” or “person responsible for the presence of the pollutant” and therefore no clear delineation of...

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4 The term “absolute liability” is used in this thesis to indicate liability for which there is no defence. The term is defined in *The Dictionary of Canadian Law, 2nd ed.* (Scarborough: Carswell Thomson Professional Publishing, 1995) as “Liability regardless of intention or negligence”. The same concept is referred to in American usage as “strict liability”. *Black's Law Dictionary* Sixth Edition, defines “strict liability” as “Liability without fault.

5 The issue of fairness arises in two contexts in this thesis. In the context of the public interest provisions of Section 4 of the EMPA “fairness” denotes an absence of arbitrariness or a rational connection to public purposes in the obligations imposed. In the context of relations between private parties, the issue of fairness is related to who, as among two or more parties subject to liability under Section 4, the burden should fall.
who is caught by the Section 4 “net”. At its broadest, Section 4 could conceivably apply to transporters and manufacturers of pollutants who have no connection whatsoever to the discharge or the site, shareholders and general beneficiaries under a will. Of particular concern was, and remains, the concept of control.

As at the time of the enactment, there remains public interest justification for the imposition of absolute responsibility to remediate on parties who own and control pollutants and activities that have the potential to pollute, as well as on owners and successors in title to contaminated land who are unconnected to the discharge. However, when examining the valid public purposes and goals, even under a net narrowed to exclude such remote parties as transporter and beneficiary, at some point the outcomes are very remote from responsibility in any fault sense. While liability can be and is justified on the alternative bases of benefit, the creation of a self-policing mechanism and a new positive duty, potential liability exists under the current regime that has no rational connection to these bases at its possible limits. The breadth of possible liability in such circumstances is perceived to be, and to a certain extent can only be directed only to solving a funding problem. While this purpose itself may be valid, the consequences cause considerable discomfort and cynicism in those who may be subject to the reach of the liability.

The validity of a claim to unfairness has a stronger basis in the manner responsibility is resolved as between multiple parties implicated under Section 4. As between two or more parties obligated to remediate, the burden should fall principally to that party at fault. The combined effect of absolute and joint and several liability results in intuitively unfair outcomes as between private parties.

Chapter 3 is an analysis of the majority and minority decisions in Busse. The failure
of the Court to direct its attention to the public interest aspect of the legislation, and the resulting effect of the decision on the public interest provisions of the Act, is discussed.

Unfairness occasioned between private parties does not detract from the validity of the public purposes intended to be served by the EMPA and any resolution directed to eliminating unfairness should be developed by reference to those purposes. In assessing the fairness or justness of responsibility for remediation, there is a confusion and a failure to separate public and private purposes in the legislation. In the context of the public purpose, fairness may be viewed as a concept broader than fault. The failure to recognize this distinction is starkly revealed in the Court of Appeal’s treatment of the definition section of the legislation in its decision in Busse, with significant consequences.

The uncertainty and potential breadth of liability under the EMPA and similar legislation has been widely acknowledged in the 1990s. In 1993 the Canadian Council of Ministers of the Environment (CCME) published a set of principles intended to be applied in drafting legislation relating to contaminated sites which would result in predictable, fair and uniform liability.⁶ In 1994, Saskatchewan Environment and Resource Management (SERM), the body charged with the administration and enforcement of the EMPA, published a document entitled A Discussion Paper on Contaminated Site Liability (the 1994 discussion paper) for the consideration of stakeholders, in which it proposed a series

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of amendments to the Act directed to structuring a fair, certain and effective method of allocating responsibility. SERM indicated in the 1994 discussion paper that it hoped that legislation developed as a result would be forthcoming in early 1995. In 1996 the Minister of Environment and Resource Management struck a task force, the Contaminated Site Liability Advisory Committee (CSLAG), to develop recommendations based on the CCME principles for policies and legislation dealing with contaminated site liability in Saskatchewan. Concurrently, SERM has made concessions narrowing the potential breadth of liability. For example, as a result of the lobbying efforts of the Canadian Bankers’ Association, SERM has adopted a policy of non-enforcement against secured creditors that have become owners as a result of enforcement of the security if, following possession, the lender did not further the contamination. CSLAG published its recommendations to the Minister in May 1997. In 1998, SERM published its response to the CSLAG recommendations and the current strategy for liability and contaminated site management. Each of the CCME principles, the CSLAG recommendations and the SERM strategy purport to be the basis of a fair and effective model of contaminated site liability. However, only CSLAG’s recommendation departs in any significant way from the current regime of absolute and joint and several liability.

Chapter 4 is an examination of the model recommended by CSLAG to the Minister of the Environment and Resource Management with respect to contaminated site liability,

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8 Report of the Minister’s Advisory Group on Contaminated Site Liability in Saskatchewan (Regina, May 1997) Attached as Appendix “A”.


6
a model rejected almost without exception in the SERM strategy.

CSLAG recommended the rejection of both absolute and joint and several liability. It developed a liability model contemplating three streams of responsibility whereby those at fault in relation to the discharge, and to a lesser extent, those who in some manner had contributed to the discharge without fault, and those who would be unjustly enriched by the remediation, would have a responsibility to contribute to clean up. Liability would be allocated proportionately to reflect the degree of fault. Essential to the CSLAG model was the development of broader-based mechanisms for funding remediation of "orphan" sites or shares in situations where elimination of absolute and joint and several liability would result in a funding gap. CSLAG conceived orphan sites or shares occurring both where no one was at fault in causing the contamination and where a responsible party could not be located or was without resources.

Chapter 5 is a review and critique of the SERM strategy for contaminated site liability.\(^1\) The process is to be effected as SERM policy without legislative amendment, at least for the time being. SERM acknowledges the continuing uncertainty under the current joint and several absolute liability provisions of Section 4 of the EMPA and proposes to clarify it through the application of policy at the minister’s order stage. Effectively, the definition of parties responsible for clean up and subject to a minister’s order will be narrowed through the application of the policy in the decision as to against whom a minister’s order will be made. The SERM strategy results in continued absolute and joint and several liability of those who own or actively control or manage contaminants

\(^1\) \textit{Ibid.}
and contaminating activities and parties who take transfer of contaminated land without due diligence in investigation. SERM proposes a process whereby once all potentially responsible parties are identified, they be given the opportunity to voluntarily propose a plan for remediation and for allocating the costs among themselves. Failing an agreement, a mediation process would be available. Failing a mediated agreement, SERM will allocate responsibility through a minister’s order, its “final tool”.

The SERM strategy does not address the unfairness among multiple parties occasioned by joint and several liability. Once caught in the net, any responsible party will be principally liable for the whole of the remediation. It is unlikely that a system of voluntary compliance can work under these circumstances.

Concurrently the strategy results in the release of a number of parties which might logically be expected to contribute to clean-up. It does not however deal with the funding gap created by the elimination of absolute liability in these parties, which has the effect of further exacerbating the potential for unfairness arising from joint and several liability. Of significant concern, SERM’s release of these parties indicates a loss of focus on the purposes of the legislation.

The current regime of absolute and joint and several liability under the EMPA has not been an effective tool in resolving contaminated sites. Absolute and joint and several liability does not solve the funding problem. In the approximately twenty years since its commencement, there have only been perhaps ten to twenty remediation orders made under Section 4.\(^\text{11}\) At the same time there have been many active and abandoned contaminated

\(^{11}\) There is no central record of Section 4 orders. This rough estimate was obtained from (continued...)
sites identified. The vast majority of these sites have not been remedied. If absolute and joint and several liability solved the funding problem this would not be the case. SERM's strategy does not change the regime in any significant way except to weaken it to a certain extent.

SERM's strategy was published one month before the Court of Appeal's decision in Busse. Although Busse involved a civil liability action brought under Section 13 for consequential loss occasioned by the sale of contaminated property, the Court of Appeal's decision has had a dramatic impact on the minister's power to make an order under Section 4 and consequently SERM's ability to effect its current strategy in any event. On the basis of the Busse decision, parties who take over the conduct of an activity causing a discharge are excluded under Section 4 responsibility unless they had actual knowledge of the discharge and an ability to stop or prevent it. Absolute liability of those parties is eliminated, as is the liability of transferees of contaminated land. The Court's decision entirely disregards the public interest aims of the legislation and in doing so undermines not only these aims but also SERM's ability to enforce its strategy.

The state of the law in Saskatchewan with respect to contaminated site liability is at this time more uncertain than it has ever been since the introduction of the EMPA. Further there is a withdrawal from the purposes that underlie the legislation. There is every reason to expect that unless a clear, principled and pragmatic model is developed to address responsibility for the remediation of contaminated sites, the history of inactivity will be the

(...continued)
SERM March 20, 2000. No distinction could be obtained between orders requiring a cessation of activity or remediation of contamination.
best predictor of the future.

In the concluding Chapter 6, an alternative model is developed on the rational bases of contribution or responsibility identified in Chapter 2, applied in a pragmatic way with a view to breaking the impasse.
Chapter 2 - The Environmental Management and Protection Act

2.1 General Purpose and History

The general purpose of the EMPA is to protect and to restore the quality of the environment. To that end it creates duties and liabilities not existing prior to 1980. Those duties and liabilities are found largely in Section 4 relating to ministerial orders and Section 13 relating to civil liability. These sections represent much of the substance of the legislation in relation to unauthorized discharges.

There is no general common law duty compelling owners of contaminated property or persons who contaminate their own property to remediate. Prior to 1980 actions arising as a result of what the EMPA now defines as a discharge would occur generally only, (a) in the event the contamination in some manner affected the interests of parties or the public off the contaminated land, or (b) in limited and specific circumstances, on the sale of the land.

Private interest causes of action based on the tort of nuisance, the principle in Rylands v. Fletcher\(^\text{12}\), or the tort of negligence have a limited capacity to effect the public purpose of preventing contamination and/or restoring the quality of the environment. Any impact these actions have, is in any event, indirect: an off-shoot of immediate private interests. Where the discharge is contained on the owner's land, and does not create a nuisance to others, there is no basis for an action. As a result, there can be a significant

\(^{12}\text{Rylands v. Fletcher (1986) L.R. 1 Ex. 265, aff'd (1868) L.R. 3 H.L. 330.}\)
delay in any activity to remedy, which may exacerbate the consequences of a discharge and cause irrevocable damage to the environment. A successful action for damages where the tort is established does not necessarily result in remediation because the use of the damages depends on the discretion of the successful plaintiff.¹³

Section 13 retains the common law actions and remedies in existence prior to the EMPA. It also creates a new strict liability¹⁴ cause of action which, in some respects relative to the common law actions, eases the burden on the party suffering damage as a result of the discharge. So, the generally applicable strict liability cause of action created by Section 13 does enhance the possibility that would-be polluters will be deterred. For one thing, they can be pursued with greater ease. Further, Section 13 creates a cause of action where in many instances there would not be one. There is no requirement in Section 13 to establish a duty of care or physical proximity between the parties. However Section 13, like the common law, is largely reactive and initiated only at the instance of damaged parties. The enactment of what is now Section 4 created a regime of responsibility separate from private

¹³ Alastair R. Lucas comments in “The New Environmental Law” in E.L. Hughes, A.R. Lucas and W.A. Tilleman, eds., Environmental Law and Policy, 2d ed. (Toronto: Emond Montgomery Publications Limited, 1998) [hereinafter Environmental Law and Policy] 141 at 142 that it was recognized in the 1970’s “that civil law actions, designed to resolve disputes between private parties and compensate persons damaged, were an ineffective legal tool for general systematic control of environmentally harmful waste discharge.”

See also in the same text at p. 79 William Charles, David Vander Zwaag, “Common Law and Environmental Protection: Legal Realities and Judicial Challenges”.

¹⁴ Note that the term “strict liability” is used in this thesis to indicate the shift of onus to the defendant to establish reasonable care in order to avoid liability once the plaintiff has established that the act causing the harm was occasioned by the defendant and his damages.
interests and over riding them for the purposes of effecting the public interest of prevention and remediation through the imposition of immediate administrative orders.

The EMPA was enacted and came into effect on June 1, 1984. It replaced earlier legislation, The Department of the Environment Act, 1972, as amended (the Preceding Act). The Preceding Act did not, at the time of enactment, include provisions similar to those found in Sections 4 and 13. Section 12 made provision for a stop order where a person was contravening a regulation thereunder or contravening any other regulation or act and causing damage or pollution to a natural resource. The first predecessors of the current provisions were enacted as amendments to the Preceding Act effective June 3, 1980. The enactment of The Department of the Environment Amendment Act, 1980, (the 1980 Amending Act),

16 effective June 3, 1980, amended The Department of the Environment Act, 1972, by adding, inter alia, the provisions set out in Appendix “C” hereto.

The provisions were again amended by The Department of the Environment Act, 1981 effective May 19,1981 (the 1981 Amending Act). The changes were significant. Firstly, the amendments resulting from the 1981 Amending Act resulted in the replacement of the provision that a minister’s order could be made notwithstanding any other Act, regulation, permit or license with the provision that orders were made subject to existing


16 S.S. 1979-80, c. 58.

17 The Department of the Environment Amendment Act, 1981, 1980 - 81, c.50.
licenses, permits or privileges.  

Secondly, the amendments added a party against whom a minister’s order could be made. In addition to the owner and the person in control, a minister’s order could be made against “the person responsible for the presence of the pollutant.” Finally and most importantly, the amendments resulted in the retroactive application of the provision. The legislature expressly declared its that the minister may make administrative orders against owners and persons having control of a pollutant where the discharge occurred prior to the enactment.

The current provisions in Section 4 and 13 of the EMPA remain in substantially the form enacted by the 1981 Amending Act.

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Section 12.21 enacted by the 1980 Amending Act had provided that the minister’s order could be made notwithstanding “any other act, regulation, bylaw, order, permit, approval or license.” Subsequent to the 1981 Amending Act, Section 12.21 provided that minister’s orders were made “subject to the terms of any license, permit or other privilege granted pursuant to this Act, any regulations made under this Act or any other Act or regulation administered by the Department.”

The persons subject to a minister’s order under Section 12.21 as enacted by the 1980 Amending Act were the owner or person in control of the pollutant. Subsequent to the 1981 Amending Act Section 12.21 provided for minister’s orders against an additional party; “where . . . a pollutant . . . is present anywhere in circumstances that are harmful or potentially harmful to the environment . . . against ‘the person responsible for the presence of the pollutant’.”

Section 12.21 as enacted by the 1981 Amending Act expressly provides that the minister’s order may be made against the owner or person in control of the pollutant where a pollutant has been discharged before the section came into force.

Throughout this thesis reference is made to “historical” and “modern” contaminated sites. The term “historical” is intended to refer to sites which were contaminated prior to the later of (i) June 3, 1980 when the first version of the provisions provided in the EMPA came into effect, or (ii) the date the activity giving rise to the contamination was specifically regulated. The term “modern” is intended to apply to discharges occurring subsequent to June 3, 1980. This manner of distinction is not perfect however, as in some cases modern sites will give rise to similar issues as arise in historical sites.
The relevant portions of the EMPA for the purposes of this thesis are the following:

2. **Interpretation** - In this Act:

   (r) "**owner of a pollutant**" means the owner of a pollutant immediately before the first discharge of the pollutant and includes a successor, assignee, executor or administrator of the owner;

   (t) "**person having control of a pollutant**" means the person having the charge, management or control of the pollutant immediately before the first discharge of the pollutant and includes a successor, assignee, executor or administrator of that person;

3. **Investigation into discharge** - The minister may make or cause to be made any investigation that he considers necessary with respect to the discharge of any pollutant including:
   (a) its source and extent;
   (b) its effect on the environment; and
   (c) any advisable remedial action.

4. **Order to Restore or Protect Environment** - (1) Subject to the terms of any licence, permit or other privilege granted pursuant to this Act, any regulations made pursuant to this Act or any other Act or regulation administered by the minister, where, in the opinion of the minister, a pollutant:
   (a) is being or was, before or after the coming into force of this Act, discharged, accidentally or otherwise; or
   (b) is present anywhere in circumstances that are harmful or potentially harmful to the environment;
   
   he may, by order, direct:

   (c) in the circumstances described in clause (a), the owner of the pollutant or the person having control of the pollutant;

   (d) in the circumstances described in clause (b), the person responsible for the presence of the pollutant;

   to take any measure that the minister considers necessary to protect or restore the environment.

(2) For the purposes of subsection (1), the minister may order a person described in clause (1)(c) or (d) to:

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(a) investigate the situation;
(b) monitor the pollutant;
(c) lessen or prevent further discharge of the pollutant;
(d) contain the pollutant;
(e) remove the pollutant;
(f) store the pollutant and monitor its storage;
(g) destroy or otherwise dispose of the pollutant;
(h) minimize the effects of the pollutant on the environment;
(i) remedy any adverse effect of the pollutant on the environment;
(j) restore the area affected by the discharge or presence of the pollutant
and the environment to a condition satisfactory to the minister;
(k) maintain records on any matter relevant to:
   (i) the discharge or presence of the pollutant; or
   (ii) the measures specified in any order made pursuant to this section;
(l) report periodically to the minister, a project manager appointed
pursuant to section 6 or a person designated by the minister with respect
   to:
      i) any matter related to the discharge or presence of the pollutant; or
      
   (ii) the measures specified in any order made pursuant to this section;
(m) take any measure, other than one described in clauses (a) to (l), that
the minister considers necessary to:
   (i) facilitate compliance with any order made pursuant to this section; or
   
   (ii) protect or restore the environment.

(3) Where the minister issues an order pursuant to this Act or any other
Act requiring that a pollutant be contained or stored, he may issue a subsequent order to a person described in clause (1)(c) or (d) to take, with respect to the pollutant, any of the measures described in subsection (2).

(4) The minister may rescind, revoke, suspend, amend, vary or supplement any order made pursuant to this section.

(5) An order made pursuant to this section may specify:
(a) the manner, method or procedures to be used in carrying out the measures required by the order; and
(b) the time within which any measure required by the order is to be commenced and the time within which the order or any portion of the order is to be complied with.

(6) The minister is not required to give a hearing to any person before making an order pursuant to this section.

9. **Reporting of discharge** - The owner of a pollutant, the person having control of a pollutant, any person on whose property a pollutant is located or any other person who has knowledge relating to the pollutant or its discharge, shall furnish and maintain any information that the minister, an environment officer or any other person designated by the minister may request for the purposes of enforcing the Act, the regulations or any order made pursuant to this Act or the regulations.

13. **Civil Liability** - (1) In this section, "loss or damage" includes:

(a) personal injury;

(b) loss of life;

(c) loss of use or enjoyment of property; and

(d) pecuniary loss, including loss of income.

(2) The amount of any costs and expenses incurred with respect to an investigation taken pursuant to section 3 is a debt due to and recoverable by Her Majesty in right of Saskatchewan from the owner of the pollutant and the person having control of the pollutant.

(3) Subject to subsections (4) and (5), any person, including Her Majesty in right of Saskatchewan or in right of Canada, has a right to compensation from:

(a) the owner of the pollutant and the person having control of the
pollutant for loss or damage incurred as a result of:

(i) the discharge of a pollutant;

(ii) neglect or default in the execution of a duty imposed pursuant to section 9; or

(iii) an investigation or action taken pursuant to section 3 or 8; and

(b) any person to whom an order has been made pursuant to section 4 for loss or damage incurred as a result of the execution or intended execution, or neglect or default in the execution, of the order;

without proof of fault, negligence or wilful intent.

(4) No owner of a pollutant or person having control of a pollutant is liable pursuant to subsection (3) if he establishes that:

(a) he took all reasonable steps to prevent the discharge of the pollutant; or

(b) the discharge of the pollutant was wholly caused by:

(i) an act of war, civil war, insurrection or an act of hostility by the government of a foreign country;

(ii) a natural phenomenon of an exceptional inevitable and irresistible character not reasonably foreseeable; or

(iii) any combination of the events described in subclauses (i) and (ii).

(5) Notwithstanding subsection (4), the owner of a pollutant or the person having control of a pollutant is liable for:

(a) loss or damage that is a direct result of his own neglect or default in carrying out a duty imposed or an order made pursuant to section 4 or 9; and

(b) any costs and expenses described in subsection (2) of this section or in section 7 or 8.

(6) No person is liable for any action pursuant to this section or section 7 or 8 unless the action is commenced without six years from:
(a) where the claim arises pursuant to subsection (2) or section 7 or 8, the day when the last of the costs and expenses were incurred;

(b) where the person commencing the action incurred loss or damage as a result of the discharge of a pollutant, the day when the person knew or ought to have known of the loss or damage; or

(c) where the person commencing the action incurred loss or damage as a result of the execution or intended execution, or neglect or default in the execution of, an order made pursuant to section 4, the day when the person knew or ought to have known of the loss or damage.

(7) The right of action granted pursuant to this section is in addition to, and not in derogation of, any other right of action or any other remedy available otherwise than pursuant to this section.

(8) For the purposes of apportioning liability on a just basis, and recognizing that liability pursuant to section 8 or this section is not based on fault or negligence, the provisions of *The Contributory Negligence Act* apply *mutatis mutandis* to an action commenced pursuant to section 8 or this section."

**2.2 The Nature of Liability under Section 4 and its Reach**

That the liability under Section 4 is absolute is clear. There is no-fault requirement and no defence. If you are an owner or person in control or a person responsible you are subject to an order. Equally clear is the retroactive application of the provision against owners and persons in control. Section 4 expressly applies whether a discharge occurred before or after the coming into force of the section. Liability is joint and several. Nothing in the *EMP*A prevents the minister from making an order against more than one party nor dictates that the minister must make an order against all potentially responsible parties. The circumstances in S.4(1)(a) and (b) may arise concurrently and there can at one and the same time be: (i) an owner of the pollutant immediately before the first discharge, (ii) one who controls the pollutant immediately before the first discharge, and (iii) a person responsible
for its presence. Joint and several liability is provided for by Section 13 (8) which expressly refers to the apportionment of liability pursuant to the provisions of The Contributory Negligence Act.\textsuperscript{22}

While the elements of (a) absolute, (b) joint and several and (c) retroactive liability appear to be supported by the legislative drafting, the identity of the parties against whom an order may be made is less clear. The intent to hold responsible those who directly engage in contaminating activities and those who own pollutants is clear. As indicated above, there has been, and to some extent there remains, a concern that the reference in the definition sections to successors, assigns, executors and administrators also attaches absolute personal liability to fund remediation to executors, administrators and beneficiaries of an estate and the trustee in bankruptcy. Shareholders, officers and directors of a corporation fear liability on the basis of the reference in section 2(t) to "charge, management and control" as do secured parties not in possession, landlords and in some cases, suppliers. It has been perceived that instrument and court appointed receivers and secured parties in possession assume liability as a result of the successor and assign provision. The concern of transporters, manufacturers and suppliers unconnected with the act of discharge is that they will be caught within the meaning of the "person responsible for the presence of the pollutant" in section 4(d).

The concern arising with respect to beneficiaries under an estate is that they will fall within the category of "successor" of the owner or person in control. This concern is probably overstated if it refers to personal liability for the obligation of the deceased once

\textsuperscript{22} R.S.S. 1978, c. C-31.
the assets of the estate have been exhausted. If the Crown were to be permitted to pursue the beneficiaries outside of the estate assets for an obligation of the deceased, or the legislature intended to create a new obligation of beneficiaries simply as a result of their relationship to the deceased, the legislation would have to be explicit.

The concern of executors and administrators of the estate is considerably more valid. They are expressly named as parties against whom an order may be made. The order is an order to remedy the contamination. The concern in regard to these parties is not that they are subject to liability to the extent of the assets of the estate. That level of liability is consistent with the law of estate administration generally. The concern is that the executor or administrator will be personally liable for the costs of remediation in excess of the assets of the estate. This extent of liability is plausible on the plain wording of the provision.

Prior to 1992 trustees in bankruptcy had a similarly valid concern that they may be personally liable, as “assignee” of the bankrupt, to comply with an order to remediate beyond the value of the bankrupt’s estate. Amendments to the Bankruptcy and Insolvency Act\(^2\) effective 1992 have resolved this issue for trustees in bankruptcy. Further amendments in 1997 resolved the same issue as it relates to instrument and court appointed receivers.\(^3\)


\(^3\)Amendments to the Bankruptcy and Insolvency Act, ibid. in 1997 extended the protection previously afforded to trustees in bankruptcy in 1992, to instrument and court appointed receivers. As of 1997 concerns of trustees in bankruptcy, trustees under a proposal and instrument and court appointed receivers and receiver-managers (“trustees”), with respect to potential personal liability over and above the value of the estate being administered, are addressed by Section 14.06(2). Section 14.06(2) provides that the trustee is not liable for environmental contamination that occurred prior to the trustee’s appointment or subsequent to the appointment unless the contamination
The concern of secured creditors not in possession, landlords and directors, officers and shareholders arises because of the reference to "charge, management and control" of the pollutant in section 2(t). Case law under environmental legislation and the common law in other jurisdictions offers some guidance with respect to the limits of liability arising out of consideration of the level of control necessary to attract liability. With respect to mortgagees not in possession and landlords, the mere ability to obtain possession under the agreement constituting the relationship has been found not to be sufficient control.\[25\]

occurred as a result of the trustee's gross negligence or willful misconduct. Section 14.06(7) provides that federal or provincial government claims for the cost of remediation of real property form a secured interest on the contaminated land and any contiguous land related to the activity that caused the contamination and rank in priority to all other claims including those of secured creditors against the subject property and municipal liens. Section 14.06(6) provides that costs in excess of the value of the property rank as unsecured claims. It is noteworthy that the 1992 provisions would have resulted in the trustee's liability for contamination occurring after the appointment, if the trustee was not duly diligent as opposed to grossly negligent.

\[25\] Canadian National Railway Co. v. Ontario (Director, Environmental Protection Act) (1981) 80 D.L.R. (4th) 269 affirmed (1992) 87 D.L.R. (4th) 603, involved the appeal of a decision of the Environmental Appeal Board (the E.A.B.) which had upheld, in part, a control order of the Director directed to CNR as owner and lessor of the land, Abitibi as a lessee/sublessor and mortgagee and Northern Wood Producers as current operator. The E.A.B. had upheld the order of the Director as against CNR and Northern Wood Producers and removed Abitibi. CNR and Northern Wood Producers appealed their continued inclusion in the order and the Director appealed the removal of Abitibi.

The Ontario Divisional Court considered the phrase "charge, management and control of the source of a contaminate" in the Ontario Environmental Protection Act, R.S.O. 1980, c. 141 and concluded that CNR as lessor had no direct charge, management or control over the undertaking which was the source of the contaminate and was therefore not a person responsible. Whether or not there was a breach of the covenant in the lease to maintain the premises the Court found that there was no obligation on CNR to terminate and that the future possibility of obtaining occupation or control could not be said to be sufficient to bring it within the meaning of person responsible.

Similarly, the Court concluded that Abitibi as mortgagee had only a right to
However, there remains uncertainty with respect to the degree in which a mortgagee or landlord or even a supplier may be involved in business or financial affairs of the mortgagor, lessee or operator and escape liability as a person in management and control.  

Again, the concern of manufacturers, transporters and suppliers who are not exercising control is probably overstated. These parties are not likely within the definition obtain control of the source of the pollutant in the future through its remedies under the mortgage and could therefore not be said to have charge, management or control. See also Ontario (Attorney General) v. Tyre King Tyre Recycling Ltd. (1992) 9 O.R. (3d) 318, where the mortgagee, SunLife Trustco, successfully argued that as mortgagee not in possession, it did not have the requisite element of control and obtained summary judgment dismissing the Province’s action for negligence, nuisance, unjust enrichment and compensation under Section 87(2) of the Environmental Protection Act, R.S.O. 1980, c.141.

See for example 724597 Ontario Inc. (c.o.b.Appletex) v. Ontario (Minister of Environment and Energy), (1994), 13 C.E.L.R. (N.S.) 257 (Ont. Environmental Appeal Bd.). Although it was considering the liability of investors, directors and officers rather than lenders, the E.A.B. states at p. 279, “‘Control’ does not only encompass the formal legal control available to officers and directors, but also defacto control by others in a position to significantly influence the management of the undertaking. It can incorporate control of the pursestrings through means other than direct or daily participation in the corporation or its business. Similarly, ‘management’ of the undertaking is not restricted to management of the operations creating a risk of pollution.” In 1996 in Karge v. Ontario (Ministry of Environment and Energy) [1996] O.E.A.B. No. 51, File No. 00507.A1, the Ontario Appeal Board commented on the continuing uncertainty for lenders in particular under both the Ontario legislation with respect to liability as one in charge, management and control and the American Comprehensive Environmental Response, Compensation and Liability Act, 1980, (“CERCLA”). CERCLA provides an exemption for a party “who without participating in the management of a . . . facility, holds indica of ownership primarily to protect his security interest in the . . . facility”. The EBA notes in particular the decision in United States v. Fleet Factors Corp. 901 F. 2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991) in which the court held that a lender would lose the exemption “by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation’s treatment of hazardous wastes.” On the issue of the uncertainty faced under the issue of charge, management and control see also Jimmy Y. Levy, “Landlord and Lender Liability for Hazardous Waste Clean-Up: A review of the Evolving Canadian and American Case Law”, (1992) 20 C.B.L.J. 269.
of the "person responsible for the presence of the pollutant". An examination of the phrase in the context of the whole of the legislation 27 indicates that it is unlikely that parties who supply or manufacture contaminants but who do not own or control them in relation to the discharge are intended to be held responsible for remediation. As argued below, if these parties were intended to be caught in the net there is no reason, relative to others caught in the net, that the provision should not apply retroactively to them. The liability of the "person responsible" is prospective only.

Section 4 of the EMPA has, since its enactment, been broadly perceived to allow the minister to direct remediation orders to successors in title to previously contaminated land and current owners of contaminated land. Certainly there is indication that SERM, the body charged with the administration and enforcement of the EMPA, understands that to be the case. 28 It must nevertheless be acknowledged that the current drafting of the legislation may not sustain that reach, particularly after the decision of the Saskatchewan Court of Appeal in Busse.

With respect to successors in title to contaminated land, the majority decision of the Court of Appeal has identified a lack of precision in the drafting of S. 2(r) and (t) which may preclude liability attaching to successors in title to contaminated land as "assignees" or "successors". 29 The Court’s comments with respect to the meaning of "assignee" were, however, obiter. There remains an arguable basis for the position that, even under the

27 See pages 25-28 below.
28 See 5.2 below.
29 See 3.4.2 below.
current drafting, liability follows to the first transferee of contaminated land whether or not that transferee is current owner. Under Section 4 an order may be directed to the owner of the pollutant immediately before the first discharge of the pollutant, and a successor, assignee, executor or administrator of the owner. If the owner of the pollutant is also the owner of the land, and a discharge into the land occurs, and the owner then sells the contaminated land, the assignee has effectively taken transfer of the pollutant. Under the law of vendor and purchaser in the context of real property the purchaser takes the land with patent defects and with latent defects of which the vendor was not aware. The purchaser may be able to force a rescission on the basis of fraudulent misrepresentation if the vendor was aware of the defect, or may recover damages for negligent misrepresentation. But otherwise the purchaser is the transferee of the defect, in this context, the transferee or assignee of the pollutant. 30

There is a stronger basis for arguing that the current landowner at any particular time is subject to an order under Section 4. The “person responsible” arguably refers to the land owner at the time the order is made. The concept of “the person responsible for the presence of the pollutant” is found in both Section 4 and indirectly in Section 13. It is not defined in the Act and has not been considered by the courts. To determine who it is that is intended to fall within the meaning of the “person responsible” it is necessary to examine the provisions relating to that party.

30 As identified by Chief Justice Bayda in Busse the fact that the first transferee from the owner immediately before the first spill may qualify as an assignee does not address the basis on which subsequent transferees may be liable. It would be a tortured interpretation to suggest that the assignee is an assignee of someone other than the owner of the pollutant immediately before the first discharge, for example the assign of the first assignee.
If someone is found to be “a person responsible for the presence of a pollutant” there are two distinct consequences. Firstly, such a person is subject to a minister’s order under Section 4(1):

4(1) Subject to the terms of any license, permit or any other privilege .

where, . . . a pollutant:
(b) is present, anywhere in circumstances that are harmful or potentially harmful to the environment;
he may, by order, direct:
(d) in the circumstances described in clause (b), a person responsible for the presence of a pollutant;
to take any measure that the minister considers necessary to protect or restore the environment.

Section 4(2) then applies. Section 4(2)(j) specifically refers to an order restoring the area “affected by the . . . presence of the pollutant . . .”. Secondly, once an order under Section 4 is made, a person responsible is caught by the civil liability provisions of Section 13(3):

13(3) Subject to subsections (4) and (5), any person . . . has a right to compensation from:
(b) any person to whom an order has been made pursuant to Section 4 for loss or damage incurred as a result of the execution or intended execution, or neglect or default in the execution, of the order;
without proof of fault, negligence or wilful intent.

Section 13(3) applies to any person to whom an order has been made. Orders are only made against owners of the pollutant, persons in control of the pollutant and persons responsible for the presence of the pollutant.

There is no difference in the consequence of being an owner or person in control as distinct from being a person responsible as a result of being subject to a minister’s order. Both groups are subject to a remediation order. Where either fails to comply, the minister may carry out the order and recover the costs from the person who failed to comply. Where
immediate action is necessary or the minister cannot identify or locate the person to whom the order should be directed he may take the required measures and recover the costs from the owner, person in control or person responsible as the case may be.

Some indication of who it is that is "the person responsible" may be ascertained from the present tense of the Section 4 provision relating to persons responsible. No discharge is required, merely the presence of the pollutant in circumstances that are harmful or potentially harmful.

A further indication arises from the distinction in the civil liability consequences in Section 13. Damages against the person responsible are limited to those incurred as a result of the execution or intended execution, or neglect or default in the execution, of a minister’s order. Damages therefore are not connected to the discharge of the pollutant but rather to the failure in some manner to comply with the minister’s order. The defence provided in Section 13(4) to the owner or person in control, of having taken reasonable steps to prevent the discharge, is not available to the person responsible.

The contemporaneity of Section 4(1)(b), its disconnection with anything related to the actual discharge, the limited civil liability damages in Section 13 available against persons responsible, and the absence of a defence of having taken all reasonable steps are all consistent with the person responsible having no causal connection to the act of contamination or ownership or control of the pollutant. Although the legislature could have expressed it more clearly, it appears that the person responsible is intended to be the person who owns or controls the contaminated property at any given time.

From a broader perspective, if in enacting the EMPA the legislature was stating and effecting a public policy that condemned the abuse of, and ensured the reclamation of
privately owned land, otherwise sacrosanct, it can be assumed that the force of Section 4 is intended to reach the owner. Otherwise that owner is able to leave the land in its contaminated state.\footnote{It is noteworthy that environmental legislation providing for minister’s control or remediation orders in each of British Columbia, Alberta, Manitoba and Nova Scotia and Ontario specifically provide for orders against the current owners of contaminated property. \textit{Waste Management Amendment Act,} 1990, S.B.C. 1990, c.74 effective August 31, 1990; \textit{Environmental Protection and Enhancement Act,} S.A. 1992, c.E-13.3 proclaimed in force September 1, 1993; \textit{The Contaminated Sites Remediation Act,} S.M. 1996, c.40, C.C.S.M. c.C205 which came into force May 15, 1997; \textit{Environment Act,} S.N.S. 1994-95, c.1 taking effect January 1, 1995; \textit{Environmental Protection Act,} R.S.O. 1990, c. E 19.}

It appears that the intent in enacting Section 4 was to cast a broad net which would impose absolute responsibility at the least (a) on any party which owned or controlled the contaminant at the time of the discharge, (b) on those who take transfer of contaminated land, and (c) on those who own contaminated land at any particular time. Part of the problem giving rise to the impasse in the resolution of contaminated sites is the significant question as to whether the drafting can sustain such an interpretation of the provision.

### 2.3 Justification for the Absolute Liability

#### 2.3.1 Reasonable Public Purposes

If one accepts the value that the need to prevent and remediate environmental contamination is crucial, one can also recognize the merit of absolute liability in achieving that end. On the other hand, for the most part our society, and accordingly our legal system, is one overwhelmingly committed to liability as a consequence of acts or omissions within our control. It is a fairness issue, and has profound repercussions in that we generally
obey our laws because we perceive them to be fair and rational. In the context of serving a legitimate public purpose, however, the concept of fairness may be considered broader than fault or wrongdoing. Nevertheless, in this context any finding of liability must have a rational basis to have legitimacy.

Section 4 may be said to be directed to deterrence. The absolute liability provided therein deters contamination by demanding good stewardship. Failure by the owner or person in control to do all things necessary to prevent contamination will be met with certain liability. There is no hearing. The order is triggered by the minister’s opinion. There is no defence. Reasonable care is insufficient. Heightened liability is justifiable because the stakes for the environment can be extreme.

32 M.A.H. Franson, R.T. Franson, and A.R. Lucas in “Environmental Standards”, in Environmental Law and Policy, supra note 13 at 161 include equity as a nontechnical consideration in the context of a discussion of setting standards for pollution control. At p. 169 they state, “The fundamental fairness of pollution control regulation is an important issue at this stage of the standards-setting process. As Lyon stated in 1965, ‘In any democratic country regulatory activity is attuned to the concept of equity. This concept is found in many other regulatory endeavors and is one that is always the approach most likely to gain general public acceptance. It is also a concept which very often is difficult to explain or justify in scientific terms’”.

33 Jack D. Coop in his article, “Beyond Appletex: The Status of Fairness Litigation and the Challenges Posed by the Doctrine of ‘Fairness’”, 7 J.E.L.P. 113 at 128 comments that the similar minister’s order provision in Section 43 of the Environmental Protection Act, R.S.O. 1990, c. E-19 is not designed to deter future behavior but is purely remedial, hence the absence of a defence. Regardless of such absence of a defence due diligence it is quite apparent that the swift and certain liability will encourage anyone who may be subject to its reach to conduct themselves so as to minimize the chances of that eventuality, whether it be directly, or indirectly. In Appletex, supra note 26 at 286, the E.A.B. commented on the deterrent effect of the potential liability on others than the polluter itself as follows, “An approach which gives Directors unlimited discretion to impose liability on a broad range of actors has the benefit of promoting a higher standard of care among that entire range of actors. To reduce the possibility that they will be caught within the net, these actors may take greater steps than they would otherwise to ensure that those with whom they have business dealings do not pollute”.

29
Quite apart from deterrence, Section 4 can also be said also to be remedial. Through retrospective and absolute application it creates a source of funding for remediation of contamination that has occurred prior to or subsequent to its enactment. Liability may be unconnected to "moral" fault in the sense that the liable party may have been conducting the activity in accordance with the law or the accepted standards of the day. Liability on this basis is justifiable where a party who has benefitted from a contaminating activity is made responsible for associated environmental contamination, the underpinning being unjust enrichment.

There is another possible basis on which to justify the imposition of an absolute obligation to remediate on both those who cause contamination without fault and those who own land contaminated without fault. If one shifts the focus from a concept of liability for damage to a concept of obligation to the public good, the idea is easier to envision. As indicated above, the EMPA made a profound change to the right of landowners to handle their property as they saw fit subject only to a duty not to harm others. That change may be said to represent a societal statement that there is a duty owed to the environment itself, that the harm addressed is the existing harm to the environment. As between the

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14 In United States v. Northeastern Pharmaceutical 810 F. 2d. 726 (8th Cir. 1986), McMillian, Circuit Judge commented on the similar retroactive and absolute nature of site clean-up liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that "the statutory scheme itself is overwhelmingly remedial . . ." cited in Frona M. Powell, Law and the Environment, (Indiana: West Educational Publishing Company, 1998) at 351.

15 The concept is not as ethereal as it might seem given the significant general threat posed by environmental degradation. The development of a recognition of a duty to the environment is recognized with frequency in both international and domestic treaties relating to the environment particularly after the 1970's. For a review of the statements of international bodies, see Alexander Gillespie, International Environmental Law.
landowner and the environment, what difference to the obligation is there that the discharge was pure accident or otherwise faultless?

This obligation may be viewed from a more mainstream perspective as society having simply recognized a new positive duty. If one accepts the premise of an obligation to the environment itself or a newly recognized positive obligation, the absence of an available defence to the responsible party makes sense. The obligation need not be directed to deterrence or otherwise. It is a positive responsibility to the general good, unconnected to fault. Harm to the environment simply must be rectified. The absolute liability of current owners of contaminated land, regardless whether they took ownership prior to due diligence requirements or whether their land has been contaminated by an act of God or an act of third party is not difficult to justify based on such a duty.36

There is a rational basis for the imposition under Section 4 of absolute liability on

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*Policy and Ethics*, (Oxford: Clarendon Press, 1997) at 107. It is noted by Karin Mickelson and William Rees in their essay “The Environment: Ecological and Ethical Dimensions” in *Environmental Law and Policy*, Supra note 13 at 25 that such statements represent an anthropocentric perspective whereby the purpose in protecting the environment is to protect human interests. It is from that limited perspective that the concept of a duty to the environment is used in this thesis.

36 Reference to the law of real property may assist further, but is not necessary. The law as it relates to real property places the burden of a latent defect on the purchaser of land, absent fraud. Ownership and occupancy of land carries with it other obligations to remediate. For example, if an owner acquires land on which a previous owner has set a trap for trespassers, the new owner has an obligation to remove the trap. It is not enough for him to say he is without fault or he was unaware of the presence of the trap when he acquired the property. None of this prior law creates an imperative obligation however. In neither case does the landowner have a positive obligation to change his property by repairing the defect or trap although he may risk liability for failure to do so. Further, the landowner can divest himself of risk of liability by divesting himself of the property. The positive obligation to remediate is, in this respect, a new duty arising as an aspect of land ownership based on a duty to the environment.
transferees of contaminated land. The potential liability of successors in title and current owners of contaminated property has a positive effect of indirectly promoting remediation of already contaminated sites. The reach of the current provision to subsequent landowners unconnected to the act of discharge should, and in fact generally does, ensure that purchasers of land and others taking an interest in land will conduct some level of environmental audit where there is any possibility of contamination. The existence of the legislation itself, with its potential for liability for clean-up, devalues contaminated property whether or not the purchaser sees it as devalued for his purposes. No one taking an interest in land can fail to consider their potential liability for the cost of clean-up which may easily be in excess of the value of the land uncontaminated. The carrying over of liability to subsequent land owners, either by way of the successor and assign provisions, or by way of the potential for orders against potentially responsible persons, creates a mechanism to trigger identification and resolution of site contamination. In theory, given enough time, all potentially contaminated land in the province will be audited and, if necessary, remedied at the cost of bargaining parties. Otherwise the land is virtually unmarketable. There is an obvious public benefit in having the marketplace promote remediation.

2.3.2 Where Section 4 Departs From a Rational Connection to Purposes

Even accepting the merits of absolute liability provided in Section 4, one expects, in each case, ends to be rationally and fairly connected to purposes.\(^{37}\) If the purpose is to

\(^{37}\) Fairness here is used in the first sense described supra note 5 to denote an absence of arbitrariness or a rational connection to valid purposes in the relationship between the regulator and regulatee. Such a concept of fairness may be described as an expectation that our obligations are purposeful. While the writer suggests that this is an intuitive and
ensure good stewardship one can justify more than the requirement of reasonable care. If the stakes are high enough one can justifiably demand that all possible care be taken. An extremely high standard of care is still within the potentially liable party’s control. Further, if a valid purpose is to have those who have benefitted from the contamination pay for its remediation then one can justify retroactive application even when the party responsible was without “fault” according to the law and standards in effect at the time of the discharge.

However, Section 4 may be seen to disconnect liability from any rational connection to the purposes so far identified in any number of circumstances. If, for example, the owner or person in control of the pollutant has done all things possible to prevent a discharge, which arguably would entail anticipating even remotely foreseeable natural disasters and the negligence or intentional acts of others, and then, as a result of an act of war or an unforeseeable event of nature a discharge occurs, how does liability act as a deterrent to irresponsible behavior or stated conversely, encourage good stewardship? To be deterred, a person must be able to exercise some measure of control over the actions that give rise to the consequences. While the obligation to remediate the contamination as a consequence of behavior is an important element of deterrence, so is the existence of a recognizable standard which must be met in the effort to avoid incurring that consequence.

There is therefore an issue to as to why the burden of funding remediation should

ded to our legal system. For example, the consequential analysis or absurdity rule of statutory interpretation require courts to reject as absurd interpretations that lead to irrational, unjust or unacceptable consequences. Ruth Sullivan Statutory Interpretation (Concord: Irwin Law, 1997) at 29. At page 149 the author states: “In testing whether the consequences of an interpretation are acceptable, the courts work with norms of reasonableness, fairness, and plausibility derived from the culture to which they belong.”
fall to parties who own or control pollutants and who are entirely without fault in a discharge. One can draw on the common law principles in *Rylands v. Fletcher* and negligence in the context of highly dangerous things, for an analogous level of near absolute liability between private parties whereby those who engage in highly dangerous activities or deal with highly dangerous substances bear the risk of disaster where another party's interests are damaged. The analogy extends to the inability of the owner of the damaging substance to avoid liability by turning control over to an independent contractor. Thus, in Section 4, both the owner and the person in control bear responsibility. However, the analogy falls short in two aspects. Firstly, even under the heightened level of liability in negligence, where the defendant has done all things possible, has anticipated the intervention of third parties, acts of war or acts of God, there remains the possibility of a defence that the occurrence was *entirely* outside of the control of the defendant. Secondly, the analogy to the principle in *Rylands v. Fletcher* must assume that either all pollutants are highly dangerous, which they are not, or that pollution in itself is highly dangerous.

In the case of owners or controllers of contaminants who are without fault in the discharge, the rational connection to liability can be to benefit. If that party can be recognized as the only party who has benefitted from the activity giving rise to the contamination, or if it has overwhelmingly benefitted, the burden is justified. However, nothing in the Act ensures that the liable party has benefitted.

Similarly when one looks to the retrospective application of absolute liability to historical parties, deterrence is obviously not the rationale. Instead, the connection to liability for the cost of remediation is again the benefit derived from the contamination. Again, the rational justification on this basis is dependent on the benefit having accrued to
the liable party. One would also expect the extent of liability to be balanced to the benefit. However nothing in the Act provides any kind of mechanism to ensure that those potentially caught by the net have in fact benefitted or the degree to which they have benefitted.

The disconnection of liability from purpose may fail completely in parties who took transfer of contaminated land prior to 1981 but do not remain current owners. Unlike transferees who took transfer subsequent to the legislation, they have no control over the event giving rise to liability, the due diligence the Act requires prior to taking transfer. So it is conceivable that a transferee took title to contaminated property in which the contamination constituted a latent defect, sold the property prior to 1981 and is liable for the remediation. That party’s liability cannot be connected to deterrence, benefit or a duty to the environment.

Viewed from the perspectives of an obligation to the environment and of each responsible party in isolation, there are many instances in which the absolute nature of the obligation can be rationally and fairly justified. However, both deterrence and benefit recognition as justifications for absolute liability fail in many fact situations covered by the legislation. The policy choice of an obligation to the environment is of some value, however, in many situations the only obvious purpose of such liability is simply the creation of a source of funding for remediation. A choice to impose a potentially overwhelming obligation on such parties gives rise to the appearance of an obligation that is unacceptably arbitrary.

Part of determining whether imposing liability upon a party is fair depends upon the purpose for which the obligation is to be imposed. Absolute liability as part of a fault finding process will often offend the principle of fairness. On the other hand, a problem
solving obligation to fund remediation, justified by a policy-based duty, a causal connection to the contamination or a benefit received from the contaminating activity, would not necessarily be arbitrary or unfair.

2.4 The Unfairness - Joint and Several Liability

Even accepting, in many instances, the absolute obligation of each party in isolation, the sense of unfairness is heightened with the application of joint and several liability. As between two or more parties bearing the obligation under Section 4, the obligation should rest on that party at fault. It is the nature of the outcomes resulting from the combination of absolute and joint and several liability as between several "responsible" parties that speaks most strongly of unfairness.

In either of historical or contemporary discharges there may be more than one contributing party. There may concurrently be a party who owns the pollutant immediately before the first spill, one who controls it and one who is at any particular time responsible for it. Further, there may be a successor or assign to the owner or person in control. There is nothing in the Act prescribing proportionate liability under a minister’s order against more than one of these parties or prescribing a pro rated responsibility among such parties.

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38 *Supra* note 5. “Fairness” is used here in the second sense relating to fairness and evenhandedness between parties. The expectation of evenhandedness in the law between parties permeates the common law in the concept of equity which has been described as “the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men”. Black’s Law Dictionary 6th ed., (St. Paul: West Publishing Co. 1993) at 540. The application of equitable considerations is central to the decision of the Ontario Environmental Appeal Board in *Appletex*. The E.A.B. found that it had the discretion to and did apply equitable considerations in releasing from liability two investors who had stepped into management to attempt to save the floundering company after the contamination had occurred.
where the minister enforces an order on the failure of a party to comply. Conceivably under the circumstances a party contributing in only a minor way to the contamination or one who has received little or no benefit will be burdened with the full cost of remediation.

The combined effect of absolute and joint and several liability result in the most extreme departures from fair results as between parties. Any number of scenarios can be imagined to demonstrate the effect. The owner of the pollutant may be taking delivery from one who manages and controls the pollutant immediately prior to the spill. Perhaps through no fault of the owner whatsoever, the transporter delivery person’s negligence causes a discharge onto a neighbor’s land. All will be subject to an order to remediate. If the transporter is impecunious, the full liability will fall on one or both of the landowners neither of whom have been able to make a decision based on deterrence and have not benefitted whatsoever from the activity giving rise to the contamination. Similarly, where two contractors are engaged in an undertaking during which a discharge occurs and one is grossly negligent and the other uses reasonable care, both may be in management and control immediately before the first spill and both liable. If the careful party is the party with resources, it may be that party who bears the cost of clean up.

2.5 Does Section 13 solve the problem?

Section 13 effectively follows immediately on the heels of Section 4. Accordingly, one might expect that Section 13 is an attempt to deal with the fallout of the absolute liability provisions in Section 4 by tying liability to fault through inter-party compensation or indemnity, while concurrently retaining public access to absolute responsibility. Section 13 does appear to be directed to that type of balancing, among other things. It falls short
however, from redressing the type of unfair outcomes that may be occasioned by Section 4, again because of joint and several liability.

Section 13(3)(a) provides a basis of liability against an owner or person in control where a party has suffered damages consequent to the discharge either not related to the cost of site remediation or conceivably resulting from the cost of remediation having fallen on the plaintiff outside a Section 4 order. Here liability is fault-related and strict. The plaintiff needs only to prove that the defendant is an owner or person in control, the fact of the discharge of a pollutant and his damages. The defendant may raise the defence of having taken all reasonable steps to prevent the discharge or that the discharge was caused wholly by an act of war or an inevitable and unforeseeable phenomenon of nature.

Section 13(3)(b) provides a right to compensation from a person against whom an order has been made where there is a loss experienced as a result of the execution of an order under Section 4 or the failure to properly execute the order. Defenses of reasonable steps to prevent and force majeure are not available here, and need not be, given that liability does not arise from the discharge but from the failure to perform the order. It is Section 13(b) that appears to contemplate a balancing between parties. If two parties are subject to a remediation order and one complies, the subsection may contemplate an action based on the complying party’s damage sustained in executing the order or in the failure of the other party to execute the order. Section 13(8) provides that the provisions of The Contributory Negligence Act apply to an action commenced under Section 13. It may be that proportionate responsibility is to be determined on the basis of fault pursuant to The Contributory Negligence Act thereby providing a right to indemnity to the plaintiff based on relative fault.
Section 13(8) also applies where the minister has taken action under Section 8. Section 8 provides that where the minister determines that it is in the public interest to take immediate action or cannot readily determine against whom a Section 4 order should be made, he may take any action contemplated by Section 4(2) and the costs and expenses are a debt due from the owner, person in control or person responsible as the case may be. Presumably, given that 13(8) refers to an action commenced pursuant to Section 8, which is in fact only the filing of the minister’s certificate as to costs, the minister or the court on appeal can determine relative responsibility based on fault.

In either case because Section 4 liability is not fault-based, one of two liable parties may be one hundred percent at fault and the other have no-fault-based responsibility. While the party without fault can seek complete indemnity from the other he will remain principally liable. Where the party solely at fault is impecunious or has ceased to exist there will be no balancing inter parties.

2.6 Conclusion

Viewed from a public policy perspective, where there is a simple contaminated site in the sense that there is one responsible party - the owner and controller of the pollutant is also the owner of the land - the fact of absolute liability to remediate may not be inherently unfair. Even in a complex site, where there are multiple responsible parties who are at fault, joint and several liability does not seem particularly oppressive. However, where there is a complex site with both fault and faultless parties implicated in liability to remediate, the combined effect of absolute and joint and several liability results in outcomes which challenge the identified justifications for liability under the EMPA. A narrow approach to
resolving issues of fairness among private parties under the EMPA, based on fault, without reference to its broader public policy justifications, underlies the decision of the majority of the Court of Appeal in Busse.
Chapter 3 - *Busse Farms Ltd. v. Federal Business Development Bank*

3.1 Introduction

Difficulties with the interpretation of the *EMPA* and the blurring of public and private interests have been highlighted in the Court of Appeal’s decision in *Busse Farms Ltd. v. F.B.D.B.*[^39] The action arose out of a sale of contaminated property by Federal Business Development Bank to Busse Farms Ltd. The contamination had been caused by a leak in the underground fuel storage system at a gas bar and had occurred over a period of years during which there were several owners and operators and during which F.B.D.B. had placed the premises and business into receivership. Busse Farms Ltd. (hereinafter “Busse”) brought an action claiming rescission of the contract under the common law and an action for damages under Section 13 of the *EMPA*.

The Court of Appeal ruled only on the issues under Section 13. The whole analysis in the majority decision in *Busse* centered on the meaning of the phrases “owner of the pollutant” and “person in control for the pollutant” as they are defined in Section 2. Those definitions apply to both Section 4 and Section 13. Section 4 is a public interest absolute liability provision. Section 13 is a civil liability, private interest section with a secondary public interest aspect under which liability is fault-based. To properly analyze the definition sections, one must take the whole of the Act into account. In analyzing the definitions, the Court of Appeal fails to take into consideration the nature of Section 4 and the justifiable

[^39]: *Supra* note 3.
purposes of absolute liability intended to be served, and instead analyzes Section 2 on the basis of the presumption of fairness or fault-based liability as among private parties. Unfortunately, the Court misses the capacity of Section 13 itself to accommodate fairness considerations.

As will be seen, the Court has drawn stark attention to weakness in the drafting of the EMPA in this decision. The weaknesses, however, are not as pronounced as the Court suggests if one looks to the whole of the statute.

In a negative sense, the judgement draws attention to the merits of absolute and broad liability in serving the public purposes described in Chapter 2 above. The Court was rejecting absolute liability as between private parties, but its judgement has a profound impact on the minister's ability to make public interest orders under Section 4. Consequently the decision has undermined the public interest purposes of the Act.

3.2 Facts

In 1979, Big 3 Truck & Trailer Centre Ltd. (Big 3) purchased 80 acres of farmland located approximately 6 miles from Paynton, Saskatchewan and in 1980 built a motel, restaurant and gas bar on it. It is reasonable to assume that in 1979, the raw farmland was not contaminated. The development was financed by F.B.D.B. which loaned $400,000.00 to Big 3 and took security in the land and equipment related to the business.

Construction was completed and operations began on a date unknown in 1980. On September 9, 1985 the loan was in arrears and F.B.D.B. began foreclosure proceedings and appointed a receiver-manager. The receiver-manager took possession of the land, the three businesses and the related personal property on September 12, 1985. At that time Federated
Co-operative Ltd. had a security interest for unpaid gas bills.

During the period between 1980 and September 12, 1985, Big 3 appears to have operated the complex for an uncertain period purchasing fuel supplies from North Battleford Co-operative Association Limited. During this period as well, Ross Wolf operated the gas bar as manager. Between September 12, 1985 and April 1, 1989 the gas bar was operated by three parties. Wolf operated on a commission basis for a period of 11 days between September 12 and September 23, 1985. During this period no fuel was purchased. Between September 23, 1985 and March 21, 1987, Keith Kwan leased and operated the gas bar and motel. Kwan's lease was terminated by the receiver-manager on March 21, 1987 for mismanagement. For approximately six months between March 21, 1987 and September 1, 1987, the businesses were closed. On September 1, 1987, Lynette Cook leased all three businesses and operated them until March 31, 1989. Both Kwan and Cook purchased gasoline for resale during their terms of occupancy.

F.B.D.B. became registered owner of the lands on January 24, 1989 pursuant to a final order for foreclosure issued December 15, 1988. Busse purchased the land from F.B.D.B. for $110,000 on February 10, 1989 and took possession April 1, 1989. The purchase price was $40,000 less than the asking price. It was the intention of Busse to develop the property, run it for a few years and sell the established business at a profit.

The agreement between F.B.D.B. and Busse contained the following clause: “Realty and equipment is sold as is, where is, with no guarantee, express or implied as to its fitness or use.”

In late February or early March 1989 Busse and Shell Canada agreed to a lease for the supply and delivery of gasoline and the construction of an expanded building to house
the gas bar. The agreement was conditional on the conduct of an environmental audit approved by Shell’s head office. According to evidence given by a Shell representative at the trial, this was the first time that Shell had required an environmental audit before entering into a lease with a gas retailer. The audit and investigation was conducted in July, 1989, and the result was the discovery of soil contaminated with gasoline. Shell agreed to go ahead with the lease if the property was cleaned up and subject to head office approval.

Busse contacted Saskatchewan Environment and Resource Management (SERM) officials with respect to clean up methods and then excavated the area of contamination exposing the underground pipes. In the course of the investigation, it was determined that the contamination resulted from the failure to properly tighten a coupler in the gas delivery line to the pumps at the time of installation. An area approximately 50 - 60 feet by 100 - 120 feet and 22 feet deep was excavated revealing free floating gasoline on the water table. Busse “torched” the gas, which burned for at least three days, and the area was then refilled with contaminated and uncontaminated fill.

Under these circumstances neither Shell nor any other fuel company contacted by Busse would agree to a lease arrangement and Busse requested F.B.D.B. to rescind the contract for sale or pay damages. F.B.D.B. agreed to conduct a clean-up of the site to a level satisfactory to SERM. The clean-up was completed in May, 1990, at a cost of $65,000. In spite of the successful clean up, Busse was unable to convince a fuel supplier to enter into an agreement to supply fuel to the previously contaminated site.

Busse sold the business realizing no profit and brought the action against F.B.D.B. in 1992. Busse claimed recission of the contract or, relying on s. 13(3), damages in excess of $200,000.00.
3.3 Queen’s Bench Decision

Busse’s claim was dismissed by the Court of Queen’s Bench on November 28, 1996.\footnote{Busse Farms Ltd. v. Federal Business Development Bank, (1996) 150 Sask. R. 305, [1997] 5 W.W.R. 34}

The claim for recission was denied on the basis that the contamination was a latent defect of which F.B.D.B. has no knowledge.

Madam Justice Wedge posed the issues under Section 13 of the EMPA as follows:

1. What is the effect of the ‘as is, where is’ clause in the sales agreement?

2. Was the Bank the ‘owner’ or person having control of the gasoline, within the meaning of The Environmental Management and Protection Act, S.S. 1983-84, c.E-10.2 (the EMPA)?\footnote{Ibid. at 308.}

On the first issue it appears from the judgment that Madam Justice Wedge agreed with the position of Busse that, because the EMPA is a public interest statute, F.B.D.B. could not contract out of it with the “as is, where is” clause. She states:

Other than s.13, our legislation is concerned with “clean up” orders issued by the Environmental Protection Authority .... while s.13 gave recourse to third parties injured by contamination without proof of negligence, the policy of the EMPA is not to regulate commercial transactions between private individuals, but to ensure that pollution will be prevented or rectified.\footnote{Ibid. at 310.}

Although Justice Wedge does not specifically say so, it appears that she concluded that the effect of s.13 could not be waived by the agreement of the parties.

On the second issue, Madam Justice Wedge held that there was no evidence as to
when the first discharge occurred. Therefore, the question who was the owner or controller "immediately before the first discharge" could not be answered. She determined that the first discharge could have taken place at any time between 1980 and 1989. The Court rejected the argument on behalf of Busse that a new discharge commences each day a leakage is allowed to continue unabated. The ruling distinguished the Ontario Court of Justice decision to that effect in *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corporation* on the basis that, in that case, the receiver of a landfill knew of the continuing discharge, whereas F.B.D.B. did not.

In view of Madam Justice Wedge’s finding of no evidence as to when the first discharge occurred, and her rejection of the *Innisfil* ruling, the answer to the claim was simply that the plaintiff had not proven its case. It had not shown that F.B.D.B. was an owner or person in control immediately before the first discharge. The Court, however, seems finally to make its decision instead on the public policy basis that where F.B.D.B. voluntarily cleaned up the contaminated site, the purpose and the policy of the Act have been met. Wedge J. states:

> It is clear from an examination of the whole Act that a party cannot contract out of the Act vis-a-vis clean-up orders or responsibility for payment of clean-up. Parties with the ability to pay, will pay. When the Bank voluntarily took the initiative to clean up the contaminated site at its own expense...it met the purpose and

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43 (1996), 3 O.T.C. 40; 20 C.E.L.R. (N.S.) 37 (Gen. Div.) This decision involved a motion for leave to commence an action against the receiver manager of a landfill site, under, *inter alia*, Section 99(2) of the *Ontario Environmental Protection Act*, R.S.O., c. E.19. It cannot, therefore, be considered definitive authority in any sense. However, in the context of considering the phrases "owner of the source of the pollutant immediately before the first discharge" and "person in management and control the source of the pollutant immediately before the first discharge", Justice Farley indicates at paragraph 19 that each day that leachate is allowed to escape the garbage dump there is a "fresh" spill.
requirement of the Act. There was no need for Saskatchewan Environment to issue a protection order. Any public concern was remedied and the public interest satisfied.

In my view, the policy of the EMPA is not to regulate commercial transactions between private individuals but to ensure pollution will be prevented or cleaned up at the expense of an owner or person having control of a pollutant - or his successor, assignee, executor or administrator - not at the expense of the government. 44

As is the case in the majority decision of the Court of Appeal discussed below, there appears, from the final comments of the Court quoted above, to be a confusion or blurring between the roles and structures of the public interest and private interest provisions of the EMPA.

3.4 The Court of Appeal

The result of the lower court decision was affirmed at the Court of Appeal in two separate judgments. The appeal related only to that portion of the lower court decision regarding Section 13 of the EMPA.

3.4.1 Minority Decision

In the minority decision, Wakeling J. identifies the central issue in the case as that of the effect of the “as is” clause in the sale agreement and finds, therefore, the interpretation of subsections ss. 2(r) and 2(t) embarked on by the majority to be unnecessary.

Busse’s claim was that the property purchased was unfit due to contamination by

44 Supra note 26 at 312.
gasoline. As noted, the contract provided “Realty and equipment is sold as is, where is, with no guarantee expressed or implied as to its fitness or use.” Busse argued that the cause of action created by s. 13(3) overrode the contractual waiver because the provisions of the EMPA, as a public policy statute, could not be waived.

The issue for Mr. Justice Wakeling then, was whether the right contained in s.13(3) is a statutory right of a private nature and therefore capable of waiver, or one representative of public policy and therefore not capable of waiver.

Wakeling J. analyzed s.13 as having an element of public policy in that it creates a cause of action against a polluter more easily established than would otherwise be the case, and therefore acts as a general deterrent to would-be polluters. However, he found that the decision of whether or not to make a claim is of a private nature, and that the public has no interest in that decision. There is no public interest in the decision between the private parties as to risk allocation and cost, which is essentially what the waiver represents. The public interest element of the statute is served as long as one of the bargaining parties effects the clean up, regardless of where the cost falls.

Justice Wakeling refers as well to the principles of paramountcy of contract over tort law and the general acceptance of a right to rely on a contractual waiver or limitation as a defence to a claim in tort. Accordingly, he finds that Busse has contracted out of the right of action provided in Section 13.

It is arguable that the public interest element in Section 13 goes well beyond the

45 Supra note 3 at 150.
46 Ibid. at 151.
indirect deterrence aspect identified by Justice Wakeling. The Act is intended to accomplish deterrence and promote remediation in part through a self-policing system triggered by the effective or practical requirement in the transferee of an environmental audit prior to the transfer of property. While that system may simply stop the transfer because the property cannot be marketed, stopping the transfer is a first step in effecting the public purpose of remediation. The consequences of pollution may take many years to materialize and migration may substantially increase the difficulty and eventual cost of remediation. Further, an unrecoverable loss to the environment and health may result. While parties clearly cannot contract out of Section 4 liability, allowing the vendor to contract out of Section 13 liability with a reduction in the purchase price has the effect of delaying and undermining the self-policing system.

Timely remediation is an aim of the EMPA.\(^\text{47}\) Allowing private parties buying and selling land to allocate a risk in advance of identifying whether the risk is actually present, offends this purpose. Arguably, the public purpose is served by requiring the discovery of the associated risks prior to transfer. Further, the inability of private parties to contract out of damages provides a significant deterrent. The threat of consequential damages puts an onus on the vendor to take positive steps to discover a defect.\(^\text{48}\) Recognizing that Section 47 See Coop, "Beyond Appletex" \textit{supra} note 33 generally with respect to the "quick and specialized" process established by the creation of the Ontario Environment Appeal Board.

48 Effectively, it reverses the onus of discovery occasioned by the exception to the common law rule of \textit{caveat emptor} in respect to the sale of real property. That exception, the duty to disclose latent defects of which the vendor is aware, is narrow. Having its basis in fraud, an action based on breach of the duty to disclose requires actual knowledge of the latent defect by the vendor. Although reckless disregard will suffice, negligence in not knowing the facts of the latent defect will not. Where the
13 liability is strict, in *Busse* the last transfer occurred at a time when one would have reasonably expected the vendor to have acquainted itself with the condition of the property. Subsequent to the transfer, F.B.D.B. chose to clean up Busse’s property regardless of the “as is” clause. The damages aspect of Section 13 should always be available to deter the assumption that lack of knowledge of contamination is an effective tool of avoidance or delay.

In itself, Justice Wakeling’s decision is a clear statement that would allow private parties to assess and allocate risk as part of a bargaining process and reduce uncertainty. However, the majority and minority decisions in this case are not complementary and should not be interpreted as being read together. As Wakeling, J. suggests, in the event that the “as is” clause eliminates the application of s.13, embarking on an interpretation of s.13 and the definition section to determine whether the defendant is an owner or person in control, was not necessary. The majority’s choice to interpret the statute would have been unnecessary if it had accepted that the contractual waiver prevailed. In view of the contradictory nature of the majority and minority analysis, Justice Wakeling’s decision does

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defect presents a significant potential health risk or renders a residential property uninhabitable the vendor with knowledge of such a latent defect has a duty to disclose. See for example *Sevidal et al v. Chopra et al* (1987) 2 CELR (NS) 174 (Ont.H.C.J.) In the context of industrial property, the exception may be said to be narrower yet, on the basis that the contamination is not a defect if the contaminated property can be used for industrial purposes lawfully and without posing a danger. Further, for the purchaser to establish breach of the duty to disclose a latent defect it may be necessary that the purchaser has made the vendor aware of the intended use of the property. See *Tony’s Broadloom and Floor Covering Ltd. et al v. NMC Canada Inc. et al* (1996) 31 O.R. (3d) 481. The inability of the vendor to contract out of Section 13 liability would require the owner to use reasonable care in the discovery of contamination. It would further alter the common law in this context to the extent that pollution would always constitute a defect.
not provide parties with any certainty in their ability to limit liability contractually.

3.4.2 Majority Decision

Bayda, C.J.S., speaking for the majority, identifies the four elements determinative of a claimant’s right to compensation under s.13(3) of the EMPA as follows:

(i) the existence of a specific pollutant as defined by s.2(u) and (v) of the Act;

(ii) the discharge (as defined by s.2(d) of the Act) of the pollutant;

(iii) the defendant is ‘the owner of the pollutant’ as that phrase is defined in s.2(r) of the Act, or alternatively is ‘the person having control of the pollutant’ as that phrase is defined in s.2(t) of the Act;

(iv) the damages alleged by the claimant were incurred as a result of the discharge.\(^{49}\)

Element (iii) and in particular the meaning of the phrase “immediately before the first discharge” is the first issue in the appeal. Chief Justice Bayda identifies the time at which the gasoline first started to leak into the ground as a necessary and preliminary matter. He finds, on the basis of inference, that the discharge of gasoline from the faulty connection commenced on the date that gasoline first started to flow from the storage tanks to the gasoline pumps in 1980, and that it continually leaked until April 1, 1989, when Busse took possession of the property. As a result, Bayda, C.J.S. determines that there were three conventional (as opposed to statutory) owners of the pollutant during the period of discharge. These were Big 3, Keith Kwan and Lynette Cook, the parties that purchased

\(^{49}\) Supra note 3 at 138, 139.
gasoline.\textsuperscript{50}

The central issue is the treatment of the word “first”. The analysis in this regard is complex and convoluted and finally inconclusive in a general sense. While at the same time stipulating a kind of code for determining liability. As an aside, the grammatical analysis is difficult to follow. It would be considerably less awkward if rather than focusing on the word “first” as an adjective or adverb, the Court had simply identified the issue as being whether the word “discharge” is intended as a noun or a verb.

At page 141, Chief Justice Bayda states:

Use of ‘first’ in the context of modifying the term ‘discharge’ is troublesome because it produces an ambiguity. A discharge may take any one of a number of forms. It could be long and continuous, in the sense of being one uninterrupted lasting occurrence with no intermissions. Or it could be long and continual, in the sense of being one lasting occurrence punctuated by brief intermissions. Or it could be one short occurrence. Or it could be a series of separate and distinct discharges. Or it could take some form other than one of these four. Or it could be a combination of one or more of these forms. Where there is only one discharge - whether continuous, continual, long or short is of no moment - ‘first’ describes that point in time when the discharge began. In that context it is used as an adverb. Where the discharge consists of a series of countable discharges - whether continuous, continual, short or long is irrelevant - then ‘first’ describes that discharge that started the series and excludes the discharges following. In that context ‘first’ is used as an adjective.

This question arises: Did the legislators intend to use ‘first’ as an adverb only, or did they intend to use the word as an adverb and as an adjective as the occasion may require?

The Court does not answer the question it poses but rather sets out steps to be

\textsuperscript{50} Although the only parties in this action were Busse Farms Ltd and F.B.D.B., the Court commented extensively on the positions of Big 3, Kwan and Cook within the provisions of the legislation.
considered in either event, \(^{51}\) which may be stated as follows:

Step (i) - Determine whether the pollution was caused by one discharge or a series of separate and distinct discharges.

Step (ii) - Determine the conventional as opposed to statutory owner or owners during the discharge.

Step (iii) - If it is determined that there is only one discharge as opposed to a series of separate and distinct discharges, determine who was the owner of the pollutant at the time the discharge began.

Step (iv) - If there was only one discharge there will be only one statutory owner, that identified under step (iii).

There are two alternative Steps (v) depending on whether the intention of the legislature was to use "first" as an adverb or "as an adjective as the occasion requires". In the event that the intent was to use it as an adverb, Step (v) is as follows:

Step (v) - If there is a series of separate and distinct discharges, determine who was the conventional owner of the pollutant at the time each of the discharges began.

Step (vi) - Each of these persons is a statutory owner.

However, if the intent of the legislature was to use "first" as an adverb and as an adjective, Step (v) is as follows:

Step (v) - If there is a series of separate and distinct discharges, determine which discharge started the series and identify the conventional owner of the pollutant immediately before that discharge.

\(^{51}\) *Supra* note 3 at 141-143.
Step (vi) - Only that conventional owner will be the statutory owner of the pollutant.

Conventional owners of the pollutant immediately before the other discharges in the series following the first discharge are not considered to be statutory owners unless so found as successors, assignees, executors or administrators under Step (vii).

In either event, step (vii) is to determine if there are any successors, assigns, executors or administrators of the statutory owners identified under steps (iii) or (v).

Compounding the difficulty of the analysis, the Court factors knowledge and due diligence of the conventional owner into the definition of statutory owner at Steps (i) and (ii). Specifically, Bayda C.J. states as page 142:

(ii) In making the determination under (i) it must be remembered that one continual or continuous occurrence lasting a period of time can include or sustain more than one owner in the conventional, ordinary sense. A change of ownership (of a pollutant) by itself does not bring a continuous or continual occurrence to an end and does not automatically start a fresh occurrence. Where the change in ownership of the discharging pollutant is accompanied or followed by the new owner's knowledge of the discharge and a reasonable ability to stop or prevent the discharge, the combined effect of these factors will bring a continuous or continual occurrence to an end and will start a fresh occurrence if the new owner does not take all reasonable steps to prevent the continuing discharge of the pollutant.

It is noted that Bayda C.J. gives no reason for tying the element of knowledge and due diligence into the equation at the point of determining who is a statutory owner under the definitions. There is no apparent reason in the wording of the statute that he should do so. To the contrary, as will be set out at greater length below, the opposite would appear to be the case. Neither knowledge nor due diligence is a factor in determining whether the conventional owner at the onset of the discharge is a statutory owner. In this case, Big 3
was equally unaware of the discharge. Further and more importantly, knowledge is implicitly made a factor in the defence of due diligence to civil liability of the statutory owner provided in s. 13(4)(a) of the Act which states:

13(4) No owner of a pollutant or person having control of a pollutant is liable pursuant to subsection (3) if he establishes that: (a) he took all reasonable steps to prevent the discharge of the pollutant;

The Court applies Steps (i) through (v) to the finding that the leak was one continual discharge and that it commenced in 1980 and finds there was only one statutory owner: Big 3. It determines that the other conventional owners of the pollutant during the period of the leak, Kwan and Cook, are not statutory owners because there has not been a series of separate and distinct discharges and neither Kwan nor Cook knew about the discharge. Had they known, Bayda C.J. says, the effect would have been to bring the continual discharge to a "legal end" and to commence a new one.

Because this was a continual discharge, Bayda C.J.S. did not need to determine whether the intent of the legislature was to use "first" as an adjective as well as an adverb. Accordingly, having raised the question, the Court does not answer it. Nor does it comment on the absurd results of such an interpretation from either of a public or private interest perspective. There is no conceivable basis from either perspective for liability to attach to the person causing the first of several separate and distinct discharges.

The Court then proceeds to examine the second issue, that is, whether F.B.D.B. is a successor, assignee, executor or administrator of the owner, Big 3, within the meaning of s. 2(r). If so, it is also a statutory owner and subject to the strict liability provisions of s. 13.

Because F.B.D.B. is a body corporate, the Court did not need to consider the terms "executor" or "administrator".
The Court states that there was no assignment by Big 3 to F.B.D.B. because F.B.D.B. became owner of the land by operation of law through the foreclosure proceedings. However, prior to drawing this conclusion, and unnecessary to it, the Court comments on the difficulties presented by the phrase “assignee... of the owner”. Chief Justice Bayda states:

For there to be an assignment “of the owner” there first needs to be an assignment made by the owner. For there to be an assignment the owner needs to assign his or her interest in something. What is that “something” that an adjudicator needs to look for in the assignment where the defendant is said to be “the assignee of the owner” in a pollution case? Is it the statutory owner’s interest in the pollutant? This does not make much sense. If the assignment is made before the pollutant is discharged, then the assignee becomes - by virtue of the first part of the definition - the statutory owner upon the discharge of the pollutant and the assignor ceases to have the quality of an owner “immediately before the first discharge of the pollutant” who could produce an “assignee” within the meaning of the second part of the definition. If the assignment is made after the pollutant is discharged a serious question arises whether the assignor could have any interest to assign in a pollutant that has been discharged. More to the point, why would anyone bother assigning an interest in a pollutant that has been discharged?

Is the “something” then the owner’s interest in the land on which the pollutant was situated before it was discharged? Is it his or her interest in the machinery or equipment that was used to produce the pollutant or effect the discharge?

To use an assignment of title to land, or title to equipment and machinery, as the sole base or determinative criterian for the purpose of determining who is an assignee of “the owner of the pollutant” could lead not only to unfairness, but to results bordering on the absurd. For example, in the present case had Big 3 after operating the gas bar assigned its interest to the motel, restaurant and gas bar to F.B.D.B., who in turn assigned to A, who assigned to B, and B to C, who then assigned to Busse Farms, in circumstances where none knew about the pollution and none operated the gas bar - and therefore none added one iota to the pollution - would it be fair for Busse Farms to be entitled to compensation for the pollution

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52 Ibid. at 144.
from F.B.D.B. on the ground that it was the assignee and the only assignee of Big 3 in the chain of four title holders following Big 3? There is no reason in fairness or the logic of the law for Busse Farms to be entitled to collect from F.B.D.B. and not A, B or C. Indeed, there is no reason in fairness or the logic of the law to collect from any of them given their lack of knowledge of the pollution and the total absence of any contribution by them to the pollution. Take another example. Suppose A owns an airplane that he uses for spraying crops. On one occasion he uses a noxious substance that pollutes a particular parcel of land. Sometime later he sells - assigns his interest in - the airplane to B who has no knowledge what the plane was used for and particularly no knowledge of the one occasion it was used to pollute some land. The result that B, an assignee of A and the new owner of the equipment that was used to effect the discharge of the pollutant should be responsible for the damages incurred by the pollution is absurd. If by using the term “assignee” in the definition of “owner of the pollutant” the legislators intended results such as these, they would need to use language that was much more clear and unambiguous than that used in the definition.53

The legislature must have meant something by the use of the phrase “assignee... of the owner” and Chief Justice Bayda’s analysis has eliminated any possibility that there will ever be such an assignee.

The Court then considers whether F.B.D.B. is a “successor... of the owner”.54 It makes extensive comment with respect to each of four possible dictionary meanings of the word successor these being:

(i) A person who acquires ownership of something by or through inheritance;
(ii) A corporation which acquires rights and obligations through amalgamation, merger or consolidation with another corporation;
(iii) A person who succeeds to office, title or position vacated by another;
(iv) A person who follows or takes the place of another who has left.

Chief Justice Bayda discards the successor as inheritor possibility because of the

53 Ibid. at 143.
54 Ibid. at 144.
reference to executor and administrator in the definition and because the legislature would have to be more precise if it intended the liability to continue in beneficiaries once a distribution of the estate was made. F.B.D.B. is, of course, a corporation and this issue did not have to be resolved in this case.

The Court says that it does not consider the possibility of succession to title as set out in (iii) as it is not necessary to the case to do so. However, it does seem to deal with that very issue in the first part of its discussion of (iv). Briefly, if “owner of a pollutant” is treated as a title it must be vacated in order for someone to succeed to it. The legislature did not intend liability of the original owner to end, thereby vacating the title.

Chief Justice Bayda eliminates possibility (iv), a person who follows or takes the place of another who has left, on the same basis as he eliminated any meaning for the word “assignee”. What is the successor succeeding to, what is being passed on by the first owner? The options again are the first owner’s interest in the pollutant, the land, or the equipment. Bayda says each possibility creates the same morass of ambiguity as did the application of the word assign, and the same possible unfair and absurd results. The legislature would have had to have been more precise if it intended to effect such results.

Accordingly, the only acceptable meaning of the word successor is (ii), the succession by one corporation to the rights and obligations of another through amalgamation, merger or consolidation.

Effectively, the Court has limited the application of the word “successor” to corporate amalgamations, eliminated entirely the application of the word “assignee” and restricted the impact on individuals to claims against the estate in the event of death. Arguably, if this was the full intent of the meaning of the words contained in the phrase
“successor, assignees, executors or administrators” the phrase would not have been necessary at all. The executor or administrator of a deceased individual is bound by operation of law to the deceased’s obligations, as is a corporation formed out of an amalgamation or merger bound to the obligations of its predecessor.

3.5 Critique of the Busse Decision

Chief Justice Bayda is quite clearly concerned with the element of fairness in outcomes occasioned by the application of Section 13 between private parties. Hence, the requirement of knowledge and a reasonable ability to prevent the discharge is brought into the definitions of owner and person in control. With respect, using the definition section to connect liability between private parties to fault as a basis of fairness was not only unnecessary and but also inappropriate in that it has significantly undermined the public interest elements of the legislation. The Court did not need to use Section 2 to tie liability to fault. The Section 13(4) defence is there for that purpose. This in itself is a relatively simple error. The more significant error is the disregard in the decision of the broader public interest purposes of the Act.

3.5.1 Treatment of “the first discharge”

Nothing in the express wording of Section 2(r) compels the conclusion that in a continuous or continual spill during which there are successive owners, “the owner of the pollutant immediately before the first discharge” is only the first of the succession. The opposite appears to be the case. The owner is the owner of the pollutant. The discharge is of the pollutant owned by that owner. Each of Kwan and Cook, for example, owned
different gasoline than Big 3. Once Big 3's gasoline was out of the underground tanks, the discharge of the pollutant owned by Big 3 arguably ended. Kwan was then the owner of the pollutant immediately before the first discharge of his gasoline. Likewise with Cook. This analysis focuses on the meaning of "the pollutant" rather the meaning of the word "discharge".

The argument can be clarified further by altering the facts slightly. If, for example, unknown to any of several successive users of a system of storage of chemicals, the system is leaking. The operators each use the system for a different chemical. Would the Court's conclusion be that there was one, not several spills, and that there was only one owner immediately before the first discharge. It is submitted that there is nothing in Section 2 to indicate that it is the method of the discharge, or the manner in which it occurs, that dictates whether there has been one or more discharge. Rather the section directs the reader to look to who is the owner immediately before that owner's pollutant is discharged into the environment.

3.5.2 The Requirement of Knowledge in the Definition of "owner" - The Simple Error on the Face of the Statute

It is clear that the Court could not countenance the "unfair" and "absurd" results whereby Kwan or Cook could be liable to compensate Busse without knowledge of the discharge. The simple error in the Court's use of the definition section to tie liability to fault is that it didn't need to.

As a preliminary matter, it is difficult to reconcile the Court's finding that liability of Kwan or Cook is unfair because they did not have knowledge with the Court's
acceptance that Big 3 is a statutory owner where it was equally unaware of the discharge. By Bayda C.J.'s own conclusion, knowledge is not a factor in determining whether the conventional owner at the onset of the discharge is a statutory owner. There is no logical basis for saying that civil liability without knowledge is unfair as against a subsequent owner during the period of the continuation of the discharge but not unfair as against the owner at the onset where neither is at "fault". Logically, by importing concepts of knowledge into the definitions, none of the parties, including Big 3, should be considered a statutory owner as none had actual knowledge of the leak. Obviously Big 3 is intended to be a statutory owner and, *prima facie*, liable to Busse Farms.

There is a strange amalgam of common law principles in the manner in which the Court has approached the liability of Big 3, Cook and Kwan. In some respects it resembles the bases of liability of the creator of a nuisance and one who continues or adopts a nuisance. By analogy, Big 3 is a the creator and its liability results merely on the occurrence. Its knowledge is irrelevant. Cook or Kwan are "continuers". Their liability rests on their failure to prevent, once they have knowledge of the nuisance. The analogy ends there however. The tort of nuisance imposes a responsibility on the defendant "continuer" to use reasonable vigilance in discovery of the facts giving rise to the nuisance. In this latter respect, the Court seems to require the element of actual knowledge of the discharge in a manner similar to that arising under the law of vendor and purchaser. There is no element of "ought to have known" factored into the requirement of knowledge. In any event, the Court did not have to look beyond the statute to determine liability of any of Big 3, Kwan or Cook to Busse Farms. The Act itself provides a clear mechanism to do so in accordance with negligence principles. In the case of each of Big 3, Kwan and Cook the
connection to fault is to be determined under Section 13(4).

Section 13 provides a right to compensation from the owner or person in control immediately before the first discharge to anyone suffering loss or damage as a result of the discharge without proof of fault, negligence or intent. The owner or person in control immediately before the first discharge is not liable if he can establish that he took all reasonable steps to prevent the discharge of the pollutant, or that the discharge was a result of war or an unforeseeable natural phenomenon.

Liability under Section 13 may be said to be based on the principles of negligence with a reverse onus. The defence to civil liability under s. 13(4), of having taken reasonable steps to prevent the discharge, may easily be conceived to incorporate a defence of no knowledge in a manner consistent with the principles of negligence. The law of negligence imposes a responsibility to use reasonable vigilance in discovering the facts: did the defendant know or ought he to have known of the leak?

Whether or not Big 3, Kwan, Cook or F.B.D.B. ought to have known that the tanks were leaking is unknown. On the facts as stated in the decisions there is no clear indication. In the Queen's Bench decision Madam Justice Wedge states:

There is no evidence that the original developer of the site, the 'Big Three,' nor its lessees knew of the seepage, nor took any steps to determine that all gas supplied was going into the tanks (which were new in 1980). [italics added] 55

In the Court of Appeal decision Chief Justice Bayda notes:

That the leak was a slow small leak is confirmed somewhat by the failure of any one of the operators of the gas bar to notice any discrepancy in the amount of gasoline put into the storage tanks and the amount sold through

55 Supra note 26 at 310.
the gasoline pumps despite the fact that records were kept. [italics added]56

Gasoline was considered a highly dangerous substance long before the enactment of the EMPA.57 Arguably, it would have been entirely reasonable for each owner, at the very least, to have turned their minds to the possibility that the underground tanks should be carefully monitored.58 The concept of “reasonable steps” might take into account the nature of the person on whom the duty rests. Kwan and Cook were lessors of a gas bar already in receivership and possibly small operators. On the other hand, the standard of care imposed may be what is reasonable in the context of inherently dangerous things or operations. If so, it may be that only those with sufficient resources to ensure the safety of the environment may take on such operations.

Analyzed as above, and depending on whether or not there was a reasonable basis for any of the conventional owners to inform themselves further as a reasonable step in preventing the discharge, the facts in Busse may or may not have given rise to a finding

56 Supra note 3 at 140.

57 See for example the level of care imposed in relation to gasoline in Ayoub v. Beaupre [1964] S.C.R. 448 wherein the Supreme Court quoted the statement of Middleton J.A. in Hudson et al v. United Motor Service Ltd. [1936], O.R. 225, [aff’d [1937] S.C.R. 294] at 230, “Gasoline is a dangerous substance. Gasoline vapor is far more dangerous, and when it is exposed to contact with a flame or spark an explosion in inevitable. The care necessary in such cases is ‘consummate care’ and as Pollock on Tort 13th Ed., p. 518 says: ‘It is doubtful whether even this be strong enough. At least, we do not know any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant’s part was held to exonerate him’.”

58 Note however that detailed regulation and monitoring requirements relating to underground storage of hazardous substances did not come into effect until April 1, 1989. “The Hazardous Substances and Waste Dangerous Goods Regulations, c. E-10.2 Reg. 3.
of liability as against each of Big 3, Kwan and Cook. The determination would be fault-based. For example, if Cook could not reasonably be expected to have knowledge, there would be no liability under Section 13. However, if she ought, under the circumstances to have had knowledge, liability between these private parties may follow without concern for an unfair or arbitrary outcome. F.B.D.B. may arguably have said never to have owned the pollutant, and never to have had sufficient control to be considered a person in management and control. However, under this analysis, F.B.D.B.'s measure of control would have been assessed both as a secured creditor of Busse and a secured creditor in possession through the receiver. Busse may have been contributorily negligent for failing, like the others before him, to inform himself.

Such an analysis would have accommodated the Court's concern that liability be connected to fault and left the definition section undamaged.

3.5.3 The Requirement of Knowledge in the Definition of Owner – the Troublesome Result

The outcome of the Court's approach is more troublesome from a public policy perspective. If the focus is shifted to the public interest purposes of the Act, interpreting the "owner of the pollutant immediately before the first discharge" in this latter manner, rather than in the manner of the Court, is compelling. If each owner or person in control is liable for the discharge of his pollutant, each will take positive steps to prevent that discharge. The effect of the majority decision from a public policy perspective is the opposite. If actual knowledge in Kwan or Cook is necessary to bring them within the definition, it is in their best interests not to turn their minds to the issue at all. Further, each of Kwan and
Cook have benefitted from the activity giving rise to the contamination but are relieved from any responsibility for remediation. The Court of Appeal’s analysis of “first discharge” effectively defeats the public purposes of both prevention and cost internalization by those benefitting.

As a matter of technical evidence, it should have been possible to estimate with some accuracy the amount of fuel discharged during the tenure of each party. In addition to reinforcing that each party should be responsible for his pollutant, this information would have had implications for allocating responsibility for remediation. Further, subject to a particular party establishing a defence, this information would also have implications in allocating the liability for consequential damage claims.

3.5.4 The Failure of the Court to Consider the Phrase “charge, management and control”

There is yet another disturbing aspect in the manner in which the Court of Appeal deals with this case. The majority never consider whether F.B.D.B. was a “person having the charge, management or control of the pollutant”. It decides that the determination is not necessary given its conclusions with respect to the use of the word “first” in the definitions.

With respect, the Court did not only err in this aspect of its decision, it missed an opportunity to interpret an important element of the legislation that has caused much concern and uncertainty since the enactment. The degree of “charge, management and

59 Supra note 1, Section 2(t).
control of the pollutant” necessary to attract liability under both Section 4 and Section 13 is, and remains, unconsidered in Saskatchewan. Even on the finding that the “first discharge” occurred during the ownership of Big 3 and prior to the receivership, the question of whether F.B.D.B., as secured creditor at the relevant time, had exercised “charge, management and control”, should have been addressed.

Interestingly, any attempt to work through an analysis of whether F.B.D.B. was a person in management and control after the Busse decision, gives rise to the immediate question of whether under Section 4 liability that person too must have knowledge of the discharge and a reasonable ability to stop or prevent it. Although such behavior would be unlikely in a mainstream lender, it is conceivable that a private lender may resist expenditures for preventative measures on a cost-benefit decision that the risk of contamination does not outweigh the cost of extensive safety measures and lends only on the basis. The lender has arguably played a management role with respect to the pollutant. If the deficient system fails, is it necessary that the lender have knowledge of the discharge?

3.5.5 The Treatment of “successor, assignee, executor or administrator”

The Court’s analysis of the meaning of the words “successor, assignee, executor or administrator” also does considerable damage to the public interest goals of the legislation. However in this case the Court’s conclusions are in likelihood, justified. Chief Justice Bayda has raised an important concern with the precision of the drafting if the statute is intended to serve the public purposes identified in Chapter 2. Again, the result of the majority decision is to limit those caught within the definitions to corporate successors of a corporate owner or person in control, and to the executors and administrators of the estate
of a deceased owner or person in control. Any meaning for the word “assignee” is eliminated.

Although it has been argued above 60 that the word “assignee” may conceivably mean the assignee of land contaminated by the pollutant, viewed in the context of the remainder of the phrase, the most likely assignment contemplated is an assignment of all the rights and liabilities of the owner or person in control to a trustee in bankruptcy. A successor, used in the context of a corporation, and an executor or administrator, each in law take on the rights and liabilities of the owner. 61

Admittedly there is a lack of precision in the drafting which may not sustain more than the Court has allowed.

However, from the perspective of public purposes, are the consequences occasioned by a broader interpretation of successor to and assignee of contaminated land, as unfair and absurd as the Court suggests? Chief Justice Bayda says that to use an assignment of land as the determinative criterion for the purpose of determining who is an assignee leads to unfairness. However, the party taking transfer has the ability to, and is forced to, avoid liability through investigation creating the system of a self-policing market place which results in remediation. He goes on to say that the results of such a criterion would be absurd. He gives the example of Big 3 assigning to F.B.D.B., who then assigns to A, who

60 See 2.2 above.

61 The Court’s conclusion that a secured creditor that has foreclosed is not an assignee will have an impact on the decision of a secured creditor as to whether to place an undertaking into receivership or simply to foreclose. Under the Bankruptcy and Insolvency Act, supra note 24, a receiver is subject to an order to the extent of the value of the contaminated land. After Busse, a secured creditor who has foreclosed is not subject to an order at all.
assigns to B, and B to C, who assigns to Busse. In that scenario, only F.B.D.B. is the assignee of the owner. Why then, he asks, should Busse be entitled to compensation from F.B.D.B. on the ground that it was the assignee and not entitled to compensation from A, B or C? From a public purposes perspective the answer is apparent. Liability in the first assignee has the effect of ensuring the clean up of the contamination, again through the self-policing market system. If the system is working, and it does, there should be no A, B, or C taking transfer of contaminated land. The first transforee or its lenders would have triggered the remediation or not bought.

While there may be a rational basis connected to justifiable purposes for “assignee” to bear liability for contaminated land, the legislation does not tell us what assignment from the owner is necessary. For the same reason it cannot support the interpretation that successors to contaminated land are caught in the definition.

3.5.6 The Consequences for the Public Policy Aspect of Section 13

The approach of the Court is generally inconsistent with the apparent intent of Section 13 to make a civil action for damages more readily available to a party who has suffered damages as a result of a discharge. Apart from an innovative application of the torts of nuisance or negligence, Busse had no cause of action. He could not establish knowledge in F.B.D.B. as vendor required to give rise to a duty to disclose latent defect. While the common law may have provided him a remedy under nuisance or the principle

62 Banks and Credit Unions now nationally require environmental audits as a condition precedent to commercial lending as a matter of policy. As a result a new industry of consultants specializing in conducting such audits has developed.

68
in *Rylands v. Fletcher* had the discharge occurred off his land, it would require a significant extension in the common law to extend liability thereunder to a predecessor owner or occupier of the contaminated property. To establish his case in negligence, Busse would have to establish that the predecessor owner or occupier owed him a duty of care. Section 13 eliminated the need to establish that duty of care and gave rise to a cause of action against those implicated in a discharge. Regardless of whether on the facts of this case, any of Big 3, Cook, Kwan or F.B.D.B. could be found to be an owner or person in control, the decision as a whole narrows the cause of action available and sends the person damaged by the contamination back to the common law remedies.

### 3.5.7 The Consequences for Section 4

The *Busse* decision, concerned only with civil liability for non-remediation damages under Section 13, has remarkable consequences for Section 4. The consequence of Chief Justice Bayda’s analysis of the owner in Section 2(r) and person in control in Section 2(t) in the context of a continuous spill, and the treatment of successor and assignee, dramatically limit who may be subject to a minister’s order under Section 4. Following *Busse*, parties who assume the ownership or management of a contaminating activity during the course of a discharge will not be subject to a remediation order unless they have actual

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63 In *Heightington v. Ontario*, (1987), 2 C.E.L.R.(N.S.) 93, 60 O.R. (2d) 641, additional reasons at (1987), 2 C.E.L.R. (N.S.) 93 at 111, 60 O.R. 641 at 655, aff’d (1989), 4 C.E.L.R. (N.S.) 65, 69 O.R. (2d) 484 (Ont.C.A.) residential land owners were successful in an action in negligence against a remote vendor of contaminated property where the vendor, the province of Ontario, was aware that certain property it had expropriated contained radioactive material, failed to use reasonable care in ensuring the material was removed, and transferred the land to Ontario Housing Corporation for development of residential low income housing.
knowledge of the discharge. Nor will successors in title to or assignees of contaminated land. The decision consequently undermines the public policy purposes served by that section.
4.1 Introduction

In May of 1997, at the request of the Environment Minister, the Contaminated Site Liability Advisory Committee (CSLAG) produced a comprehensive report focused primarily on matters surrounding the remediation of contaminated sites (hereinafter the "CSLAG report").

The objective of the group, as set out in the terms of reference provided to it, was as follows:

Provide a forum for ongoing consultation and consensus building with stakeholders through which to provide recommendations to the Minister of the Environment and Resource Management that will assist in the development and implementation of legislation and policy tools necessary

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64 The group was comprised of a broad cross-section of government and industry. Representatives were present from the Saskatchewan Urban Municipalities Association, Saskatchewan Association of Rural Municipalities, Saskatchewan Municipal Government, Saskatchewan Chamber of Commerce, the Environmental Fairness Association, Crown Investments Corporation, Economic Development, Saskatchewan Association of Rehabilitation Councils, Saskatchewan Mining Association, Canadian Chemical Producers Association, Credit Union Central, Canadian Petroleum Products Institute, Canadian Association of Petroleum Producers, Surface Rights Association and the Canadian Bar Association, as well as the representatives from SERM. Additional stakeholders were invited but declined active participation, these being Saskatchewan Eco-Network, Canadian Banking Association, Saskatchewan Justice, Saskatchewan Finance, Saskatchewan Taxpayers Association, Marie-Ann Bowden, Saskatchewan Insolvency Practitioners Association, Metis Nation of Saskatchewan, Federation of Saskatchewan Indian Nations and Saskatchewan Municipal Government.

65 Supra note 9.
for implementation of a Saskatchewan approach to contaminated site liability.\textsuperscript{66}

The essential elements of the model recommended by CSLAG in its report to the Minister are the elimination, for the most part, of absolute liability, and the complete elimination of joint and several liability. Under the proposed model, parties share the cost of remediation who: (a) have caused contamination by a wrongful act of omission, and to a lesser extent, (b) have contributed to the contamination without fault or, will benefit from remediation. Fault is the primary basis of liability. "No-fault" responsibility is secondary and limited. Liability is apportioned first among existing "at-fault" parties. Absent the existence of at-fault parties, liability is apportioned among no-fault parties. The elimination of absolute and joint and several liability results in a funding gap where there is no at-fault party, where a responsible party is without resources, or cannot be located. External funding of these "orphan" sites and shares is therefore essential to the model.

In accordance with its mandate, CSLAG reviewed and made recommendations on the application of the CCME recommended principles on contaminated site liability published in 1993.\textsuperscript{67} Much of the framework established early in the discussions followed from SERM's mid-1994 discussion paper on contaminated site liability.\textsuperscript{68} CSLAG was therefore cognizant of the issues surrounding the potential or perceived breadth of liability in the regime represented by the current provisions and its deliberations were focused, at least in part, on resolving those issues.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{66} Ibid. at 52.
\item \textsuperscript{67} Supra note 7.
\item \textsuperscript{68} Supra note 8.
\end{itemize}
\end{footnotesize}
Two lawyers formed part of CSLAG but they were not there in the capacity of legal advisors and the concepts and principles discussed are not intended as draft legislation. Rather, the recommendations are conceptual in nature. CSLAG specifically states for example, that the term “fault” is not a legal definition. The report was a stakeholders’ consensus document. No specific consideration of either the EMPA or common law jurisprudence was undertaken.

4.2 The CSLAG Model

Central to the issues the group were requested to review and make recommendations on were:

- the “application of the... CCME Recommended Principles on Contaminated Site Liability” and,

- “what parties should bear the costs of clean-up and how should those costs be apportioned (including orphan sites)”.

As set out in the CSLAG report, the CCME principles are a set of principles developed to be a focal point for the creation of provincial models and legislation in the 1990s. Five of these are identified by the CCME as core principles:

#1. The principle of “polluter pays” should be paramount in framing contaminated site remediation policy and legislation.

#2. In framing contaminated site remediation policy and legislation, member governments should strive to satisfy the principle of “fairness”.

#3. The contaminated site remediation process should enshrine the three

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69 Supra note 9 at 14.

70 Ibid. at 52.
concepts of “openness, accessibility, and participation”.

#4. The principle of “beneficiary pays” should be supported in contaminated site remediation policy and legislation, based on the view that there should be no “unfair enrichment”.

#5. Government action in establishing contaminated site remediation policy and legislation should be based on the principles of “sustainable development”, integrating environmental, human health and economic concerns.\(^1\)

With a single qualification with respect to the meaning of “beneficiary”, CSLAG accepted and applied the core principles. Not referenced in the report and to a considerable extent not endorsed by CSLAG were eight additional principles that the CCME understood to be consistent with the core principles.\(^2\) CSLAG drew from the specific principles in that

\(^1\) Supra note 7.

\(^2\) Ibid. at 4 - 10. The eight additional principles recommended by the CCME were the following:

#6 There should be a broad net cast for the determination of potential responsible persons. However prior to entering the actual liability-allocation stages of the process, the following persons should have a conditional “exemption” based upon clearly defined statutory exemptions: (a) Lenders; lenders who hold a security interest in the property of a borrower should be granted a pre-foreclosure exemption from personal liability, beyond the outstanding balance of the debt, unless the lender had actual involvement in the control or management of the business of the borrower. (b) Receivers, Receiver-Managers, Trustees (including trustees acting in a fiduciary capacity); these persons should be exempt from personal liability for pre-existing contamination, and only be liable if they fail to take reasonable steps to prevent further contamination, or otherwise fail to satisfactorily address ongoing environmental concerns at the site.

#7 Remediation legislation should provide the necessary authority and means to enable the recovery of public funds expended on the remediation of contaminated sites from those persons deemed to be responsible for such sites. Furthermore, member governments should strive to achieve environmental priority over all other claims or charges on an estate that has entered receivership or bankruptcy.

#8 Member governments should pay particular attention to the design of a process which will facilitate the efficient clean-up of sites and the fair allocation of liability. Further, this process should discourage excessive litigation to the maximum extent possible by promoting the use of alternative dispute resolution procedures.

#9 A list of factors should be established for use in the liability-allocation process to allocate the liability of responsible persons depending upon the specific circumstances of their involvement, and in relation to the involvement of other
responsible persons. The following list of "liability allocation factors" is suggested for use in cases where there is more than one responsible person to be considered in the allocation process. The list may not be exhaustive. Liability allocation factors:

(a) when the substance became present at the site;
(b) with respect to owners* or previous owners, including, but not limited to:
   -(i) whether the substance was present at the site when he took ownership;
   -(ii) whether the owner ought to have reasonably known of the presence of the substance when he took ownership;
   -(iii) whether the presence of the substance ought to have been discovered by the owner when he took ownership, had he taken reasonable steps to determine the existence of contaminants at the site;
   -(iv) whether the presence of the substance was caused solely by the act or omission of an independent third person;
   -(v) the price the owner paid for the site and the relationship between that price and fair market value of the property had the substance not been present at the site at the time of purchase;
(c) with respect to a previous owner, whether that owner sold the property without disclosing the presence of the substance at the site;
(d) whether the person took reasonable steps to prevent the presence of the substance at the site;
(e) whether the person dealing with the substance followed the accepted industry standards and practices of the day;
(f) whether the person dealing with the substance followed the laws of the day;
(g) once the person became aware of the presence of the substance, did he contribute to further accumulation or the continued release of the substance;
(h) what steps did the person take on becoming aware of the presence of the substance, including immediate reporting to and cooperation with regulatory authorities;
(i) whether the person benefitted from the activity resulting in the contamination, and what was the monetary value of their benefit;
(j) the degree of a person's contribution to the contamination, in relation to the contribution of other responsible persons; and
(k) the quantity and toxicity/degree of hazard of the substance that was discharged or otherwise released into the environment.

* includes lessees and other occupiers.

#10 Alternative Dispute Resolution (ADR) procedures should be made available by member governments as a means to resolve issues of liability for contaminated sites. For example, a four step allocation process could be implemented as follows:

Step 1 - Voluntary allocation - Upon designation of a contaminated site, and designation of responsible persons the affected persons should be given a reasonable time-bound opportunity to allocate the cost of clean-up among themselves.

Step 2 - Mediated Allocation - Failing Step 1, the persons will be required to enter into an allocation process whereby an independent person or body will mediate a settlement.
the factors to be applied in determining responsibility and apportionment between responsible parties, are substantially the same and all address fault, benefit or unjust enrichment. Thereafter CSLAG's model departs substantially.

To apply the specific CCME principles would result in an initial "net" that would encompass not only at-fault parties or causation parties, but all parties connected to the site regardless of the nature or measure of their involvement. Two narrow and specific statutory exemptions for personal liability for clean-up costs would be available to lenders and receivers/receiver-managers for pre-existing contamination. Allocation of liability would then be made between all responsible persons caught in the net on the basis of the allocation factors. Although liability would be allocated based on relative contribution, failure in the remediation on the basis of the allocation would result in default to joint and several liability of all responsible parties.

It is apparent from the report that CSLAG did not see the specific principles as consistent with the core principles. While the CCME allocation factors are directed to connecting liability for remediation to one of several reasonable and fair bases of responsibility, the broad net encompassing all contributors and the default to joint and several liability were seen to render final fairness illusory. CSLAG unequivocally rejects joint and several liability as inconsistent with the principle of fairness in Recommendation #18:

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**Step 3 - Directed Allocation -** Failing Step 2, the persons will be required to enter into an allocation process whereby an independent person or body will make an arbitrated apportionment of liability based upon its findings.

**Step 4 - Failing Steps 1, 2, and 3** liability will default to joint and several liability among all responsible persons.
The use of joint and several liability is not compatible with the principle of fairness and should not be used in the model. 73

CSLAG’s recommendation to the Minister was the implementation of a three stream model of responsibility introduced in Recommendation #15. Recommendation #15 and its explanatory text states:

The responsibility framework must be used as the first step in determining potentially responsible parties. The model designated by the group has three streams: a “fault stream”, a “no-fault stream”, and an orphan funding stream. The primary emphasis is on fault and allocated liability. Absolute liability, and joint and several liability, are not used. The no-fault stream of the model has two branches: a capped no-fault contributor branch and a beneficiary of remediation branch. The orphan funding section of the model could accommodate a variety of funding mechanisms. 74

The model is depicted in the flow chart attached as Figure 2 to the report, attached as Appendix A hereto.

The “fault stream” of the model begins by identifying potentially responsible parties. This is the process of “casting the net”.

Recommendation #19: That the Minister adopt the following framework for assigning responsibility: Parties potentially responsible for causing contamination are those who have or have had direct management1 and/or control over the activities which gave rise to the contamination; 1 direct management is defined as participation in the day to day activities and being in the position to control or direct or manage the activities that caused or contributed to the contamination of the site. 75

For clarity CSLAG specifically listed the following groups to be included as responsible at-fault parties:

73 Supra note 9 at 17.

74 Ibid. at 15, 16.

75 Ibid. at 18.
- Owners who had knowledge of a problem and did not act in an appropriate manner;
- Corporate Directors, who failed to discharge their duties as Directors;
- Companies established and used solely for the purpose of insulating another party from environmental responsibility; and
- Parties intending to become unjustly enriched from site clean up.\(^7^6\)

Although recommendation #19 appears to limit those intended to be caught to those who have actively participated in the activity giving rise to the contamination, the apportionment factors indicate that there are others intended to be included in the fault net. In particular, present and previous owners or occupants, who were not duly diligent in acquiring the property are included as those among whom liability will be apportioned on a fault basis. CSLAG’S concept of “fault” is broad enough to include “societal” fault where a party may be acting in accordance with the law but breach a societal value, such as the duty not to harm others.

At the onset therefore, the “net” cast is broad, encompassing all those who have carried on activities connected to the contamination and owners of contaminated land. However, the group used the concept of exemptions as a second step to limit the net cast in Recommendation #19 to those parties whose wrongful acts or omissions have given rise to the contamination. The exemptions indicate that absent an identifiable “wrong” a potentially responsible party will be exempted from the fault stream. The exemptions are contained in the second part of Recommendation #19 which states:

Those parties responsible for causing contamination would be exempt as fault parties upon showing that:
(a) the party did not cause or permit any of the contamination; or
(b) the activity was in compliance with the laws and standards of the day and the party took all reasonable steps to avoid the contamination; or

\(^7^6\) *Ibid.*

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(c) the activity was authorized or approved by government authority and the party took all reasonable steps to avoid the contamination."

The exemptions are amplified in the report's interpretive guidelines which provide an extensive list of parties intended to be exempted. Secured creditors, not implicated in management, are to be excluded. As well, manufacturers, suppliers and transporters of substances that became contaminates, owners of property subject to an agreed or imposed lease under the Surface Rights Acquisition and Compensation Act, and owners of property that has been contaminated by an Act of God are exempt from the fault stream. Others who inherit contamination: successors, assigns, executors, administrators, municipalities that become registered owners and owners of property contaminated by migration, as well as receivers and trustees in bankruptcy are all to be exempted from the fault stream.

While it is clear that liability under the fault stream envisioned by CSLAG results only in the event of a wrongful act or omission by the liable party in relation to the discharge, the group does not tackle what reasonable steps in preventing a discharge might be. The recommendation contemplates that a person would not be found at-fault for an event such as would qualify as an Act of God or unforeseeable event of nature. Absolute liability is expressly rejected in Recommendation #16 which states, "That absolute liability not be part of the Saskatchewan contaminated site liability model."78

Finally, in the third step on the fault side of the model, liability is to be apportioned among the remaining at-fault parties (those not exempted) in proportion to their contribution to the contamination.

77 Ibid. at 19.

78 Ibid. at 15.
Recommendation # 20: Apportionment, within the fault stream, should reflect degree of fault.\textsuperscript{79}

The apportionment factors among responsible parties set out under Recommendation #20 were developed from the original CCME document.\textsuperscript{80} As CSLAG suggests, all connect liability to either what CSLAG refers to as “statutory legal fault”

\textsuperscript{79} Ibid. at 21.

\textsuperscript{80} CSLAG listed the following apportionment factors not in order of priority:

1) when the contaminant became present at the site;

2) with respect to present or previous owners, lessees or occupants, including but not limited to:

a) whether the contaminant was present at the site when ownership was taken;

b) when the owner/operator knew or should have taken reasonable steps to discover the presence of the contaminant;

c) whether the presence of the contaminant ought to have been discovered by the owner/operator when ownership/control was assumed, had reasonable steps been taken to determine the existence of contamination at the site;

3) with respect to a previous owner, whether the owner, with knowledge, or should have had knowledge, sold the property without disclosing the presence of the contaminant at the site to the purchaser;

4) the extent to which the party took reasonable steps to prevent the presence of the contamination at the site;

5) the extent to which the party dealing with the contamination followed the accepted industry standards and practices of the day;

6) the extent to which the party dealing with the contamination followed the laws of the day;

7) on becoming aware of the presence of the contaminant, did the party contribute to further accumulation or the continued release of the contaminant;

8) what steps did the party take on becoming aware of the presence of the contaminant;

9) the degree of a party’s contribution to the contamination, in relation to the contribution of other responsible parties:

10) the quantity, nature and toxicity/degree of hazard, damage and risk of the contaminant (amongst a group of contaminants) that was discharged or otherwise released into the environment: and

11) whether the party understood, or should have understood, the consequences of the activity that caused the contamination and of the contamination.
meaning failure to follow the laws and standards of the day or "societal fault" meaning failure to undertake due diligence or reasonable care even when acting in accordance with the laws of the day.

The no-fault stream contemplates two distinct branches. No-fault "contributors" have a factual contribution to the contamination but were duly diligent and acting in accordance with the laws of the day. The group proposed a cap to the liability of the no-fault contributors in the range of between 5% to 15% but no consensus on this figure was reached. Although CSLAG does not describe it in this manner, the no-fault contributor stream appears to contemplate responsibility to fund, based on the principle of internalization of costs or benefit, despite the absence of a wrongful act.

The second branch, no-fault "beneficiaries", is narrowly defined as those who benefit from the remediation, for example, through corporate facades, or those who benefit by the use of public or outside funds for clean-up as opposed to the broader beneficiary, who benefits from the activities that gave rise to the contamination. The group indicated in excluding the latter group, that attaching liability to those with no knowledge or ability to influence the activity giving rise to the contamination, was unfair and arbitrary. The no-fault beneficiary stream appears to contemplate contribution of owners and lenders who have taken title, are not implicated in the fault stream, but who will benefit from the use of outside funds for remediation.

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81 Supra note 9 at 23.
82 Ibid. at 24.
83 Ibid.
The fault and no-fault streams accommodate many of the considerations of the broad current regime of liability identified in Chapter 2. The deterrence factor may be contemplated in the level of “reasonable care” necessary of those who own and control pollutants in order to avoid fault based liability.\textsuperscript{84} The positive duty of transferees to investigate that gives rise to the self policing mechanism is retained as well by the fault based stream. To a certain extent, although CSLAG did not see it in these terms, absolute liability is retained in the no-fault stream. In the case of each of the no-fault contributor and beneficiary of contamination, contribution will be required on the basis of benefit.

The elimination of broader absolute liability and joint and several liability eliminates the funding of sites where there is no-fault or benefit in any sense, where there is no identifiable at-fault party or where a responsible party is without funds.

Accordingly, essential to the efficacy of the system proposed by CSLAG is the third stream, the orphan funding stream. Orphan “shares” or sites are defined in the Report as follows:

An orphan share may arise in any of the following three circumstances:

(1) Where shares of liability are to be allocated and there is not an identifiable responsible party to whom a share can be allocated;
(2) Where a party at fault can only pay a portion of the total extent of their allocated liability and has no further assets available to which the remaining liability can be applied; or
(3) Where a potentially responsible party that caused or contributed towards the pollution of the site is exempted because of lack of fault.

When all of the shares of liability for site clean-up are orphaned, the site

\textsuperscript{84} CSLAG was of the view that advancing modern industrial practices, increasing regulation and licensing requirements, and the requirement of audits prior to property transfer were the keys to ensuring good stewardship. The group also considered that a finding of no-fault where a party was involved in a contaminated site would be rare in future given these elements.
is referred to as an orphan site.\textsuperscript{85}

CSLAG considered the development of funding mechanisms for clean-up of orphan shares critical to the model. The group expressly acknowledged that the current economic climate would make a general program of government funding unlikely. It recommended sectoral funding mechanisms and incentive programs. CSLAG did not resolve the specific issues relating to funding mechanisms. Rather, it canvassed a number of possibilities for further consideration.

CSLAG recognized that any broad based fund applicable to the remediation of all sectors would be administratively complex and recommended instead that industry based sectoral funding be used. The report notes that sectoral funding mechanisms have the advantage of allowing each industry to bear the burden of its own orphan site problems without concern for the circumstances of another industry. Among the difficulties of sectoral funding identified by CSLAG is the fact that not every industry is readily identifiable as a “sector”. Further, certain sectors may not be sufficiently viable to support a fund. Not mentioned in the Report is that regardless of the implication in the term “sectoral funding” of the cost of the program falling on industry, it is likely that the cost will be public, either directly or indirectly. The mechanisms referred to in the report under the headings \textit{U.S. Petroleum Storage Tank Site Remediation Funds} \textsuperscript{86} and \textit{Canadian Petroleum

\textsuperscript{85} \textit{Supra} note 9 at 26.

\textsuperscript{86} It appears from the report that state run remediation funds arose as a result of the imposition in 1988 of federal regulations issued by the Environmental Protection Agency which required, \textit{inter alia}, that every underground storage tank site carry one million dollars liability insurance. Insurance could not be obtained at affordable rates given the risk of unknown past liability, and the regulations threatened the existence of the fuel distribution network. As a result, state governments established insurance funds
Storage Tank Site Remediation Funds \(^{87}\) both rely heavily on levies of various sorts. The minutes indicate however that sector funding was contemplated to include mandatory or voluntary contribution of funds by members of the sector.\(^{88}\) Such contribution may be presumed to be indirectly passed on to the users of that sector’s products or services.

In addition to sectoral funding CSLAG placed some emphasis on the use of incentives to promote remediation. A site assessment fund was discussed whereby funds would be available to assist in determining the status of contamination of a site which would assist potential developers in understanding the extent of clean-up required. Further incentive could be given to those prepared to undertake remediation in the form of business tax write offs, grants, deferred property taxes or exemptions.\(^{89}\) Reference was also made to the use of tax incentives as a system of reward for the implementation of increased preventative measures.

More extensive use of performance bonds such as are currently used in the mining

\[\text{to enable retailers to acquire insurance. The revenue sources included annual tank fees, truck delivery levies, and taxes imposed at the wholesale and retail levels of sale.}\]

\(^{87}\) The program referred to by CSLAG under this heading was one that was discussed by the Canadian Petroleum Products Institute and the Alberta government but not implemented. The revenue source was to be a levy on taxable fuel at the wholesale level. Funds would be made available to remediate retail, commercial, industrial and government sites used for storage of refined petroleum products. The fund was to cover the complete cost of remediation of orphan sites and 90% of non orphan sites.

\(^{88}\) See CSLAG minutes September 18 and 19, 1996; CSLAG minutes October 4, 1996 and CSLAG minutes October 24 and 29, 1996.

\(^{89}\) The group made reference to the tax incentive based “brownfields” development of abandoned contaminated sites used in several American jurisdictions.
industry was considered.\textsuperscript{90} However it was acknowledged that the cost of acquiring bonds, as in the case of insurance, may be prohibitive to the small operator.

The group also considered as possibilities environmental lotteries, the use of orphan sites as research projects, and voluntary adoption by specific agencies and interest groups of specific sites.

The CSLAG recommendations with respect to the rejection of absolute liability in the party causing the contamination, represent an attempt to strike a balance between the at times conflicting CCME principles of “fairness” and “polluter pays”. The group rejected attributing fault in circumstances where the conduct giving rise to contamination did not show wrongdoing. This may be seen as a concession to industry particularly with respect to historical sites. However, it is clear in the minutes of the group’s discussion, that CSLAG believed that with respect to most future contaminated sites the fault side of the model would dominate. The group presumed that the combination of advancing industrial standards, increasingly rigorous regulation and licencing would make it unlikely that a party causing contamination in future could avoid a finding of fault.

CSLAG concurrently recognized that the fault side of the model would not likely result in finding at-fault parties for many historical contaminated sites. The distinction drawn by CSLAG between historical and modern contaminated sites is important. One of the useful contributions from CSLAG is this recognition that the issues posed by older

\textsuperscript{90} The view of the representative of the Saskatchewan Mining Association was that orphan shares do not exist in that industry. This industry has been carefully regulated for many years and site decommissioning plans and funding need to be in place prior to the commencement of the project under the current regulations.
contaminated sites will often be different than those arising in modern contaminated sites. In the modern context, contamination where there is no at-fault party will be rare. In contrast, longstanding sites may exist without there having been any wrongdoing. While in both situations the remediation of a contaminated site may be necessary, the problem posed by each is essentially quite different. In modern sites, assuming advanced technological knowledge and regulation, there will rarely be any tension between the principles of fairness and polluter pays. However with historical sites fairness and polluter pays may often be a direct contradiction.

To an extent the no-fault stream in the model, which imposes a limited liability on no-fault contributors as beneficiaries, represents an attempt at solving the problem of funding remediation created by a system of fault-based liability. Nevertheless, the minutes indicate that CSLAG accepted that a connection to a contamination could justify an obligation to contribute to the clean-up without the need to attribute fault. To an extent this is absolute liability with tempered consequences resulting from capping the extent of potential contribution. Imposing this obligation to contribute on a no-fault basis is consistent with accepting that a party engaging in activity resulting in contamination, regardless of fault, does have a duty to contribute to the solution.

As stated above the concept of responsibility of those who have benefitted from the contaminating act is limited to the no-fault contributor and is capped at a minimal level. The CSLAG minutes record that when discussing the concept of beneficiary generally, the group generated a wide ranging and often only remotely connected assortment of parties as those potentially benefitting from activity resulting in contamination. Those identified included various levels of government receiving tax and licencing revenues, professionals
and tradespeople providing advice and or service as well as lenders, manufacturers and transporters. It was observed that society generally has received significant economic benefits from industrial activities and, particularly when the problem posed is a historical contaminated site, there is no compelling reason why society at large should not bear a portion of the clean-up cost.\textsuperscript{91}

The very limited capping of no-fault contributor shares discloses a concession to industry particularly in respect to historical sites. One might question whether the cap is too limited and whether a greater contribution might be expected from beneficiaries of the contaminating act. In particular, if it can be shown that a party has received an inordinate or specific benefit from a contaminating activity it is arguable that fairness from both a regulatory and inter parties perspective would require a commensurate contribution.

CSLAG’s approach to the orphan share or site issue is an important contribution to the contaminated site discussion. CSLAG’s position that liability of parties who control contaminating activities should be fault based and that no-fault sites or shares should be externally funded may or may not be considered valid from a public purpose perspective. There is no doubt, however, that CSLAG’s recognition of the need for the funding of orphan sites generally, will be an essential component of any effective policy directed to effecting remediation. A pragmatic approach will admit that in both historic and modern

\begin{footnotesize}\begin{itemize}
\item \textsuperscript{91} See CSLAG minutes August 22 and 23, 1996 and CSLAG minutes September 18 and 19, 1996. A similar view if reflected in Diane Saxe’s comments in “Retrospective Liability for Environmental Contamination” (1992) 7 C.B.R. 492 at 506. “There is an obvious alternative to retrospective liability: payment of the cleanup costs by society as a whole. This would recognize that society as a whole benefitted from the past economic activity which led to the pollution, through, for example, provision of jobs, payment of taxes, creation of foreign exchange. It would also give weight to the responsibility of society as a whole for its laws which allowed the pollution to occur.”
\end{itemize}\end{footnotesize}
sites, there will always be orphan sites and shares resulting from a responsible party without resources. The current level of absolute and joint and several liability has not solved that problem. If ensuring remediation was as simple as joint and several liability there would be no unresolved orphan sites. In this respect, the CSLAG recommendations for external funding cannot be disregarded as merely an attempt by industry to transfer expense to the public purse. It is a possible solution to the funding problem that remains unresolved by absolute and joint and several liability. The CSLAG discussions add the dimension of practical reality to the assessment of liability for site remediation. The fact of orphan shares, whether defined on a no-fault basis or simply on a no fund basis, illustrates the reality that a central part of any contaminated site remediation policy needs to address funding the remediation work in a meaningful way.

4.3 Critique of CSLAG Report

Given the nature of the process certain weakness in the CSLAG model, such as inconsistencies between the definition and allocation factors, can be forgiven. Further, the model does not purport to be a complete model and does deal with a myriad of factors such as enforcement procedures.

The model does however have three substantive weaknesses. The first is the very limited contribution required from parties who have caused contamination without fault. As indicated above, this cap, of which figures between 5 to 15% were discussed, reveals a concession to industry particularly in the context of historical sites where contamination has been caused by parties acting in accordance with the law and acceptable standards of the day. Such a contribution cannot reasonably reflect the benefit occasioned to industry from
the activities giving rise to the contamination. In this context, benefit may be a reflection of profit but it may also be reasonably seen to be the benefit which exists in the chance to make profit. It would appear that industry would prefer to assume the burden in the more controlled and predictable context as contribution to sector funds.

The second weakness in the model is the failure to acknowledge that sector funding will inevitably fall on the consumers of the sector products or services in particular and ultimately on society in general through the eventual widespread absorption of these costs. This fact itself is not a weakness but rather the weakness lies in the failure to clearly acknowledge the fact.

Finally, CSLAG does not expressly deal with the issue of lender/landlord responsibility based on benefit. As indicated above, it is assumed that lenders and landlords will fall within the category of beneficiary in CSLAG’s narrower sense as among those who will benefit from remediation. However, given the extremely controversial nature of this particular issue a more direct comment would have been appropriate.
Chapter 5 - SERM's Strategic Approach

In October, 1998, Saskatchewan Environment and Resource Management (SERM) set out its current policy in *Environmental Liability and Contaminated Site Management - a Strategic Approach.* The strategy is stated to be a response, in part, to the CSLAG Report. The focus of SERM's strategic approach is the remediation of contaminated sites as contemplated through the minister's orders provisions of the EMPA. The strategy is the current approach to resolution of contaminated site liability and remediation in Saskatchewan. As previously noted, the discussion paper was published just prior to the Court of Appeal's ruling in *Busse v. F.B.D.B.*

The SERM approach is a process of encouraging voluntary allocation by responsible parties in the remediation process, backed by the authority to order remediation provided to the minister in the Act. The authority for the strategy is referenced to Sections 3, 4 and 7 of the EMPA although SERM acknowledges legislative amendment may be necessary to authorize certain aspects of the strategy.

The strategy, on its face, adopts the dual principles of "polluter pays" and "fairness" outlined by both the CCME and CSLAG. It suggests that the process for the management of contaminated site liability presented is consistent with the recommendations of CSLAG. Ultimately, however the strategy retains both absolute and joint and several liability. The

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92 Supra note 10.

93 Supra note 3.
policy results in two significant consequences for the current regime. Firstly, it clarifies to a certain extent, the parties against whom a Section 4 order will issue, thus reducing some of the current uncertainty over the breadth of the net. Secondly, in doing so it releases several parties from liability who might reasonably be expected to contribute to the cost of clean up, specifically no-fault owners of contaminated property. At the same time, SERM does not concede that there will ever be an orphan site or share resulting from an absence of fault, and no provision is made for funding the remediation of such sites. SERM does acknowledge that orphan sites or shares may result in the case of an impecunious responsible party. It fails, however, to deal with the funding of those sites in any substantive manner within the strategy, noting only that SERM will assess the applicability of sector funding or other alternatives for addressing this issue during the evaluation process. The SERM strategy not only fails to address the issues of regulatory unfairness and unfairness between private parties raised by the regime of joint and several liability, but also represents a step back from the societal goal of remediation underlying the EMPA.

5.1 The Process

The process outlined in the strategy involves the following steps:

Step 1: Site Identification...

This process step encompasses both a triggering event, in which a site is "discovered"; and a site assessment component, in which the extent of the problem is determined.\footnote{Ibid. at 14.}

\footnote{\textit{Ibid}. at 5.}
Step 2: Identification and Notification of Potentially Responsible Parties

After taking into account all the relevant factors and information available on the site and the owners of the pollutant or persons responsible for the presence of the pollutant the minister may designate those persons as being potentially responsible for the remediation of the site.96

Step 3: Allocation (of Responsibility) and Apportionment of (Financial) Liability

Once potentially responsible parties have been designated and notified, the next step is allocating who will pay for clean up and apportioning those costs among the parties. Potentially responsible parties will be invited to voluntarily propose a plan for remediation and given the opportunity to negotiate an agreement to determine how they will divide the costs between them . . . If the potentially responsible parties are unable to reach agreement voluntarily, SERM would help design a mediated process to resolve the allocation and apportionment of costs . . . 

Where both these voluntary options fail to resolve the concerns of potentially responsible parties, SERM will evaluate the parties to determine fault and degree of financial responsibility using the . . . “polluter pays” principle . . . Decisions from this allocation and apportionment process must be manifested as a Minister’s order which would remain as the final tool which may be employed to resolve liability.97

Step 4: Remediation Planning

Once a contaminated site has been identified, assessed and the responsible parties have been engaged or determined, tools such as numerical guidelines and risk assessments coupled with the principles and processes for making risk management decisions are used to evaluate what specific action will be necessary to manage contamination at a site.98

96 Ibid. at 7.
97 Ibid. at 9.
98 Ibid. at 10.
Step 5: Site clean up and sign off

Steps 2 and 3 in particular relating to identification of potentially responsible parties and allocation of liability are relevant to this discussion. No consideration is given in the strategy to the issue relating to civil liability under Section 13 or the common law.

5.2 Identification of Potentially Responsible Parties and Allocation of Liability

Although the SERM document acknowledges the uncertainty and potential requirement of legislative amendment, it is clear that SERM’s position is premised on the current existence of a broad net:

Within the existing legislative framework, the clean up order potentially may include past and present owners of the property; either as the owner of the pollutant, the person having control of the pollutant, or the person responsible for the presence of the pollutant, as determined by the Minister. Although the EMPA deals with most issues around contaminated site management, there are still aspects that have not been clarified:

- the extent and identification of those “who may be caught” is not certain because there has been limited jurisprudence considering that part of the Act; and

- the phrase “person responsible for the presence of the pollutant” is not defined. There is no jurisprudence which has tested the extent of this phrase. ⁹⁹

The general approach taken by SERM is one of limiting the size of the existing net through the application of a policy that would direct liability toward those who were involved in the act of contamination or ownership or control of contaminating substances and exclude others. In describing who, in this process, will be designated by the minister as being

⁹⁹ Ibid. at 3.
responsible for site remediation, SERM states:

In general terms ... liability can be said to follow the "act of contamination" or "ownership or control of substances" at the time when these substances became contaminants and not necessarily ownership of property, although in many cases, these may be the same parties. [This approach is consistent with the definitions of owner of a pollutant and the person having control of a pollutant and defined in the EMPA (s. 1) and the scope of application found under s. 4 of the Act]. More specifically, in expanding and clarifying the concepts of "act of contamination" and "ownership or control of a substance" and thereby applying the principle of polluter pays, SERM deems that the following parties to be potentially responsible parties:

1. Any party or parties which owned, controlled, or directly managed the substances and/or the day to day activities which gave rise to the contamination of a site immediately before or during their release; or

2. Any party or parties which caused, directed, authorized, assented, or acquiesced to acts which gave rise to the contamination immediately before or during the contamination of a site.

Application of this principle to the terms owner of a pollutant, person having control of a pollutant and person responsible for the presence of a pollutant within the EMPA is key in focusing the intent to apply the force of the Act to the actual polluter or owner of the pollutant. References to "successors and assignees" within the definitions of these terms within the Act are meant to apply to the successor of a corporate entity as opposed to the successor in title to contaminated land. As regards parties in their individual capacities, it is not the beneficiary of an estate that could face liability, rather it is simply intended to be the deceased's lawful estate.\(^\text{100}\)

Rather than using formal exemptions to the net, SERM suggests that the definitions of owner, person in control and person responsible, expanded and clarified by SERM policy, will exclude certain parties. SERM specifically notes that the policy definitions would automatically exclude:

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\(^{100}\) Ibid. at 8.
1. Innocent Purchasers and Municipalities: simply being the registered owner of a contaminated site does not, in the absence of being the actual polluter (or legal successor of the polluter) invoke liability;

2. Manufacturers, Suppliers, Transporters: being a manufacturer, supplier, or transporter of substances does not invoke liability unless their actions through the process of delivery of that substance lead to the contamination of a site;

3. Victims of Contamination: being a neighbor to a contaminated site and affected by the migration of contaminants does not invoke liability, nor does an act of God, war or insurrection;

4. Shareholders: no provisions exist within EMPA which enable the Minister to impose environmental liability on shareholders of a corporate entity. However, officers, directors and agents of a corporation may be subject to liability where they directed, authorized, assented to or acquiesced in the contamination of a site through their very controlled and directed management role; or

5. Lessors: specifically, owners of a property which is subject to an agreed or imposed lease under the Surface Rights Acquisition and Compensation Act. 101

The position of the trustee in bankruptcy and receivers is acknowledged to be governed by the 1992 and 1997 amendments to the Bankruptcy and Insolvency Act whereby the Crown is given a super priority to contaminated property to fund the cost of remediation of the contamination. 102 The effect of these provisions in a receivership context is that secured creditors will contribute to remediation to the extent of the outstanding loan but no further. The strategy does not address the question of whether, if a secured creditor has simply foreclosed on the property, it will be subject to an order. However, given the previous concessions made by SERM to secured creditors who foreclose, the status of a

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101 Ibid. at 9.

102 See text accompanying note 16.
secured creditor in that situation can be expected to be similar to that of a municipality that has enforced a tax lien.\textsuperscript{103}

Regardless of having expressly limited the responsible parties to those who own or control the pollutant or the activity, the list of factors to be applied in apportioning liability clearly contemplates a much broader net of responsible parties. By implication, current and previous owners, lessees and occupants of a contaminated site are caught by the net. Included in the factors relating to present and previous owners, lessees or occupants are the following:

- whether the contaminant was present at the site when ownership was taken;

- when the owner/operator knew or should have taken reasonable steps to discover the presence of the contaminant;

- whether the presence of the contaminant ought to have been discovered by the owner/operator when ownership/control was assumed, had reasonable steps been taken to determine the existence of contamination at the site;

- whether the presence of the contaminant was caused solely by the act or omission of an independent third party;

- the price the owner paid for the site and the relationship between that price and fair market value of the property had the contaminant not been present at the time of purchase;

- with respect to a previous owner, whether the owner, with knowledge, sold the property without disclosing the presence of the contaminant at

\textsuperscript{103} It is noteworthy that the proposed amendments to the EMPA outlined in 1994 in \textit{A Discussion Paper on Contaminated Site Liability}, supra note 8 would have required contribution from secured parties who could be established to have received a benefit from the undertaking giving rise to the contamination. Such contribution is not part of the current SERM strategy.
the site to the purchaser; \(^{104}\)

Additional allocation factors include:

- the extent to which the party took reasonable steps to prevent the presence of the contaminant at the site;

- the extent to which the party dealing with the contaminant followed the accepted industry standards and practices of the day;

- the extent to which the party dealing with the contamination followed the laws of the day;

- on becoming aware of the presence of the contaminant, did the party contribute to further accumulation or the continued release of the contaminant;

- what steps did the party take on becoming aware of the presence of the contaminant;

- whether the party benefitted from the activity resulting in the contamination, and what was the monetary value of that benefit;

- the degree of a party’s contribution to the contamination, in relation to the contribution of other responsible parties;

- the quantity, nature and toxicity/degree of hazard, damage and risk of the contaminant (amongst a group of contaminants) that was discharged or otherwise released into the environment: and

- understanding the consequences of the activity that caused the contamination and of the contamination. \(^{105}\)

The inconsistency in the strategy between the policy definitions and the apportionment factors mirrors the inconsistency in the CSLAG report. \(^{106}\) The initial policy

\(^{104}\) Supra note 10 at 10.

\(^{105}\) Ibid. at 11.

\(^{106}\) See Chapter 4 at page 78, 79 above.
definitions of potentially responsible persons do not result in a net that could encompass transferees of land. The factors to be applied in apportioning liability say otherwise. Although a transferee of contaminated land, whether or not that transferee has exercised due diligence prior to purchase, will not fall within the policy definitions, the allocation factors indicate that SERM assumes it is among the potentially responsible parties. Further, not only the current owner is contemplated within the allocation factors. The implied reach extends to previous owners, lessees and occupants. Regardless of the inconsistency and inapplicability of the policy definition to transferees, it appears that SERM intends to retain the self-policing duties imposed on transferees under the current regime through the system of potential liability.

In any event, the combined effect of the policy definitions and apportionment factors results in a net that includes parties who own or control pollutants and polluting activities and transferees of contaminated property who have not exercised due diligence. Excluded from the net of parties responsible for clean up and subject to a minister's order are owners of property whose land is contaminated by Act of God or migration or the act of a third party or lessee and those who acquire property as a result of enforcement of security or tax enforcement proceedings.

In spite of the apportionment factors to be applied among responsible parties, liability under the SERM strategy is, at the onset and ultimately, absolute. If a party owned and controlled a pollutant prior to or during the discharge, that party is liable to remediate. No consideration is made of the sufficiency of the care taken by the owner or person in control in the definitions resulting in the initial net. Liability will attach to those persons regardless of fault. While the apportionment factors contemplate considerations such as
"the extent to which the party dealing with the contaminant followed the accepted industry standards and practices of the day," that consideration will only come into effect if relative liability must be apportioned between two or more parties.

Accordingly, SERM’s strategy does not contemplate a no-fault orphan site or share in the sense that the party who has caused the spill is not at fault. The strategy assumes there will always be a responsible party. The SERM strategy contemplates only an orphan share or site resulting from the default by a responsible party. As set out in the discussion paper,

Under the approach advocated here, an orphan share may arise when a responsible party can only pay a portion of the total extent of their allocated liability and has no further assets available to which the remaining liability can be applied. When all the shares of liability for site clean-up cannot be allocated, the site is referred to as an orphan site.\(^{107}\)

The strategy does not make provision for how these orphan shares (as defined by SERM as responsible impecunious parties’ shares) will be funded. The discussion paper indicates only that, “Prior to or during SERM’s evaluation of this process [the strategy], the department proposes to assess the applicability of sector funds or other alternatives for addressing orphan shares/site, for example, in the downstream petroleum sector.”\(^{108}\)

\[^{107}\textit{Supra} \text{ note 10 at 14.}\]

\[^{108}\textit{Ibid.} \text{ As of March 9, 2000 in an e-mailed response to a query as to what activity is occurring with respect to development of such mechanisms SERM reports only “with respect to abandoned or orphan sites, the department is in the initial stages of looking at a mechanism for the downstream petroleum sector. Our minister (Hon. Buckley Belanger) has met recently with Canadian Petroleum Producers Institute (CPPI) and indicated to them that SERM will be pursing the development of a suitable funding mechanism for the remediation of orphan contaminated sites by working with CPPI and other key stakeholder groups...”}\]

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5.3 Critique of the SERM Strategy

Whether viewed from the perspective of public policy goals or fairness, the SERM strategy has a number of significant weaknesses:

1. It lacks clarity. While the inconsistency between the defined responsible parties and those among whom liability will be apportioned in the CSLAG report may be forgiven as being the product of stakeholder discussions, the SERM strategy purports to be the current policy regime under which liability for remediation of contaminated sites will be determined. Further, its stated purpose is to provide clarity and certainty in the context of longstanding uncertainty. The lack of clarity is also present in the failure of the document, at any time, to indicate expressly whether or not joint and several liability continues to be a part of the “final tool”. The absence, however, of any indication that joint and several liability is no longer a part of the enforcement process, and the default to the minister’s order provision of the EMPA, is a strong indicator that joint and several liability remains a part of the solution for funding remediation.

2. The continued application of joint and several liability undermines the process of voluntary allocation and assumption of responsibility the strategy purports to encourage. The process of allocating responsibility contemplates an “invitation” to responsible parties (including the impecunious party) to propose allocation among themselves. Where there is an impecunious responsible party this in itself does not seem likely. Nor does the second step, a mediated allocation, seem likely to succeed in such circumstances. Failure of responsible parties to determine allocation will result in SERM’S application of the allocation factors. SERM’S decision will result in a minister’s order under Section 4 or alternatively, Section 7 for cost recovery in the event that SERM carries out remediation.
Given the failure to address the funding issue when there is an impecunious party in any substantive way, it seems highly likely that a Section 4 or 7 order will result in the joint and several liability of all responsible parties.

When allocated liability defaults to joint and several liability, why would parties in controversial or complex sites agree to voluntary allocation and assumption of responsibility, especially where one responsible party is without resources? The initial reaction of a commercial interest will be to attempt to avoid or minimize the cost. If voluntary compliance results in the possibility of joint and several liability it may be more commercially reasonable to resist responsibility from the onset if there is nothing to be gained from participating.

If however, voluntary compliance and assumption of responsibility were to protect that party from joint and several liability, voluntary compliance would make commercial sense. A strategy to maximize compliance and minimize resource draining litigation must offer a reward for compliance, something SERM’s proposal does not contemplate. A solution, contemplated though not applied by the CCME principles, is to relieve one or more of two parties who voluntarily complies and performs, from the default to joint and several liability. So, where there are three responsible parties, one of which pays or performs its allocation, joint and several liability for the outstanding, or even the whole obligation, defaults only to the two non-performing parties. Each of the three parties is encouraged in the process, the first with a carrot and the second two with a stick. Similarly, where there are two responsible parties and one performs, joint and several liability defaults to the non-performer. Under the SERM strategy, when there are two responsible parties and one performs, the one performing is saddled with the full liability. The problem for SERM
is that unless it is prepared to deal with the funding of orphan shares where there is an 
impecunious responsible party, it cannot offer that protection and thereby encourage 
voluntary assumption of responsibility. Until such funding is a reality, SERM must default 
to the deep pockets basis of funding inherent in the joint and several provisions, central to 
the very unfairness the strategy purports to avoid.109

3. The SERM strategy releases completely a number of parties who would be 
responsible to contribute to clean-up under the CSLAG no-fault beneficiary stream. The 
no-fault current owner which appears to include the landlord, the secured creditor who has 
taken title and a municipality that has taken title to the land do not fall within the net created 
by the definitions or the allocation factors. Because CSLAG contemplated outside funding 
for remediation, these parties would be no-fault beneficiaries of the clean-up and therefore 
would have some responsibility for the cost. The SERM model does not contemplate the 
existence of a no-fault orphan site or share. Logically, it need not and does not contemplate 
funding of that site or share. There is therefore no basis of contribution from these parties.

The release of these parties from being made subject to a minister’s remediation 
order has serious consequences and is telling of a loss of focus on public purposes. Where 
an owner’s land has been contaminated as a result of an Act of God, no one will be subject 
to a remediation order. While the current owner might not be easily able to sell his land, 
neither is there a positive obligation on him to remediate. Where an owner’s land has been 
contaminated by a discharge or migration for which someone else is responsible, or where

109 This limited form of joint and several liability is contemplated in the Amendments to 
the EMPA proposed in SERM’s 1994 Discussion Paper, supra note 7 at 29. It does not 
appear however in the current SERM strategy.
a municipality or secured creditor takes title to contaminated land for which someone else is responsible, that owner has no responsibility to remediate. As long as the contamination is contained, the land can sit in its contaminated state indefinitely. If the EMPA represented a recognition of a general duty to the environment or a new positive responsibility to ensure the integrity of the land, that duty or responsibility is not retained in the SERM strategy. In this respect the SERM strategy represents a step back from the public interest underpinning the EMPA.

It is acknowledged that the SERM document is not legislation. However its stated purpose is to provide clarity, certainty, fairness and a resolution to contaminated site remediation. There is a real concern given, for example, the inconsistency between the policy definitions and the allocation factors, the failure to address the problems associated with joint and several liability and the failure to contemplate authority to cause remediation of a no-fault site or an orphan site, that the strategy has not been carefully thought through. There is a more ominous concern if it has. There is an obvious and simplistic "fairness" appeal to the concept of "polluter pays". Not only is the government going to be fair, its going to be tough. SERM has chosen to present what on a cursory glance might be a fair and tough regime. On closer examination there is little new offered by the strategy that would indicate a possibility of movement out of the current inactivity in relation to site remediation. Part of the reason for the failure to deal with this issue head on may have been the refusal of the Canadian Bankers Association to participate in any substantive way in these discussions.110

110 In 1990 Elizabeth J. Swanson and Elaine L. Hughes in The Price of Pollution: Environmental Litigation in Canada (Edmonton: Environmental Law Centre (Alberta)
5.4 The Impact of Busse v. F.B.D.B. on the SERM Strategy

SERM’s strategy contemplates a broad net of potentially responsible parties who will be solely liable for remediation or among whom liability will be apportioned. The strategy contemplates the absolute liability of parties such as Kwan and Cook. "...parties which owned, controlled, or directly managed the substances and/or the day to day activities which gave rise to the contamination of a site immediately before or during their release". ¹¹¹ Further, the strategy contemplates the liability of transferees of contaminated property in, among others, the following factors: “whether the presence of the contaminate ought to have been discovered by the owner/operator when ownership/control was assumed, had reasonable steps been taken to determine the existence of contamination at the site:” ¹¹² and “the price the owner paid for the site and the relationship between that price and fair

Society, 1990) quoted Andrew R. Thompson’s, summary of the findings of a study into the economic effects of environmental regulation in Environmental Regulation in Canada (Vancouver: West Water Research Centre, 1980) as follows:

The main finding... is that environmental regulation in Canada can be made far more effective... There is clear evidence of failure to achieve stated goals and public expectations.

... These weaknesses of the present system persistently surface in the case studies. They include lack of clearly stated goals and objectives and of the will to attain those that are stated, insufficient effort to provide regulations with the kind of practical information they require, inadequate funding and staffing, inconsistent enforcement policies and failure to inform and involve the public. Together they add up to an inadequate and ill-informed regulatory effort.

Ms. Swanson and Hughes comment of Thompson’s conclusions at 202, “Written more than a decade ago, these comments are, in general terms, an accurate reflection of the current state of affairs.” It would appear that these comments remain applicable in Saskatchewan to date.

¹¹¹ Ibid. at 8.

¹¹² Ibid at 10.
market value of the property had the contaminant not been present at the time of purchase:"

Through its analysis of the phrase “the first discharge” and the word “assignee”, the Court of Appeal has effectively eliminated the application of Section 4 to such parties.

The retention of joint and several liability in the SERM strategy makes voluntary assumption and allocation of liability unlikely to begin with. Following the Busse decision, parties to whom the SERM strategy would look to participate in such a process have every reason to resist such participation.

113 Ibid.
Chapter 6 - Conclusions

6.1 The Problem

The current regime under the EMPA has not been an effective tool in ensuring the remediation of contaminated sites. The history of activity under the EMPA in relation to remediation of problem contaminated sites is one of marked inactivity. In March 1993, the province established the Contaminated Site Program and published a document entitled Action on Contaminated Sites\(^{114}\) listing active and abandoned contaminated sites in Saskatchewan. The event leading up to the development of that program and the listing was the establishment of the CCME’s National Contaminated Sites Remediation Program (the NCSRP) in 1989.\(^{115}\) The list had originally been prepared in 1990. It was revisited in 1992 following the development of the CCME National Classification System for Contaminated Sites. The list identifies twelve sites requiring immediate action, seventeen requiring future action and an additional fifteen requiring further study.

In August 1993, Saskatchewan signed an agreement to participate in the NCSRP.\(^{116}\) Under the NCSRP, $250 million had been allocated for clean up of high risk contaminated sites. Of these funds $3.8 million was allocated to Saskatchewan for remediation of high

\(^{114}\) Saskatchewan, Action on Contaminated Sites: Background Information – The New Contaminated Sites Team – A List of Contaminated Sites (Regina: Saskatchewan Environment and Public Safety, 4 March 1993) Attached as Appendix “D”.

\(^{115}\) Ibid. at 1.

\(^{116}\) Infra note 118.
risk contaminated sites and an additional $950,000 for technical development and demonstration programs.\textsuperscript{117}

In March 1994 the *Action on Contaminated Sites* listing was updated.\textsuperscript{118} Of the twelve sites requiring immediate action none were resolved. During the course of the NCSRP, two sites from the listing of the twelve sites requiring immediate action, were approved for remediation in Saskatchewan. These were the Kamsack Northern Petroleum Refinery and the Baildon refinery disposal site. The NCSRP ended in 1995 before the monies that had been approved were released, and as a result these sites were not remedied under that program.\textsuperscript{119}

In 1995 the provincial Contaminated Site Program was abandoned. In March 2000, in response to an inquiry as to whether any activity has been undertaken with respect to the sites identified in *Action on Contaminated Sites*. SERM reports that only one of the twelve sites listed has been remedied. The Baildon site was remedied by Gulf Canada Resources.

\textsuperscript{117} _Infra_ note 118.

\textsuperscript{118} Saskatchewan, *Action on Contaminated Sites: Background Information – The New Contaminated Sites Team – A List of Contaminated Sites* (Regina: Saskatchewan Environment and Public Safety, 8 March 1994). Attached as Appendix “E”. Of the seventeen requiring further study only one is deleted. The Town of Davidson appears to have remediated an abandoned gasoline service station from which extensive leaking and migration had occurred. Of the 15 requiring further study, eleven remain listed. Those removed from the list are the Lloydminster sewage lagoon, chemical contamination from optical fibre cable production which appears to be operated by Northern Telecom and two sites in the R.M. of Maple Creek.

\textsuperscript{119} As reported by Ed Fee of SERM in e-mail correspondence dated March 9, 2000. Note that $750,000.00 in NCSRP funding was applied to the Prince Albert Industrial Site Development and Demonstration of Site Remediation Technology Project to demonstrate a biotechnology to destroy cresote and pentachlorophenyl soil contaminants.
Limited. There are continuing efforts to address a couple of the other higher priority sites.\textsuperscript{120}

The sites listed in \textit{Action on Contaminated Sites} are only the significant active or orphan sites. Even in 1994 it can be presumed that the listing did not address an unknown number of abandoned or simply unremediated contaminated sites in the province. With the abandonment of the provincial program there is not a current listing. However, when discussing the magnitude of the problem, SERM representatives on CSLAG estimated that there were about one thousand contaminated sites in the province, ranging from leaking underground storage tanks to abandoned mine sites.\textsuperscript{121}

The lack of movement toward resolution of contaminated sites, even where they have been acknowledged to require immediate action, demonstrates the ineffectiveness of the system of joint and several liability to serve the public purpose of remediation. In spite of the existence of contaminated sites, orders made under Section 4 of the \textit{EMPA} have been infrequent. One would expect that, given the purpose of the legislation and the available authority, under even the narrowest interpretation of the provision, orders would have been made.\textsuperscript{122}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{120} \textit{Ibid}.
\item \textsuperscript{121} CSLAG Minutes, May 16 and 17, 1996, Page 4.
\item \textsuperscript{122} For a discussion of the importance of enforcement to ensure compliance with a regulatory scheme see generally \textit{Environmental Law and Policy, supra} note 13 at 321 - 335. At p. 329 the authors state "There is a growing consensus that efforts to achieve compliance will fail, unless the basic components of an effective enforcement and compliance regime are recognized and implemented within a carefully developed strategy and framework." And at p. 329 "There is a broad consensus ... that any framework for effective enforcement and compliance should address the following minimum components:
\begin{enumerate}
\item political and institutional commitment to enforcement;
\end{enumerate}
\end{itemize}
\end{footnotesize}
Where the situation is straightforward and the polluter can be found and has the resources to fund the clean-up, whether voluntarily or otherwise, the EMPA and the SERM strategy will work. However the concern is not simple sites where responsible parties have resources, and never has been. The impasse arises due to complex sites where responsible parties have ceased to exist, are impecunious or are without fault. Where those types of situations occur there is little movement toward resolution. The fact is that there are, and will be, orphan sites and shares for which absolute and joint and several liability does not provide a solution. It can be speculated that even with the expenditure of $725,000 in NCSRP funding at the Prince Albert Industrial Park Site, funding for the remainder of the total project cost of $1.62 million could not be located.\textsuperscript{123}

Even in a simple site where the owner of the pollutant is also the owner of the land, cost recovery may be difficult. If the party does not have the resources or simply defaults on performance, the land itself may be available to cover the costs or part of them. However, if the land is encumbered even the land is not available. There is no Crown priority in the current regime to the assets of the responsible party to cover the cost of remediation. Absolute liability of the owner does not solve the problem. In a complex site, the imposition of joint and several liability is a theoretical solution to a funding problem. It is a "deep pockets" solution. Where there is more than one party to which liability might attach, the odds of finding a responsible party able to pay are increased. However, the

\begin{itemize}
\item[2.] a compliance strategy;
\item[3.] imposition of legally binding standards to provide a clear, consistent definition of compliance; \ldots .
\end{itemize}

\textsuperscript{123} Supra note 89 at 10.
continued lack of movement in resolving problem contaminated sites demonstrates that this will not necessarily be the case. The absence of orders under Section 4, and the inactivity in relation to remediation of known contaminated sites, demonstrates the fallacy in the assumption that a regime of absolute and joint and several liability is a sufficient or effective way to serve the public purpose of remediation.

At the same time, the combination of absolute and joint and several liability creates a disabling level of risk for those who may be subject to it. Absolute and joint and several liability result in an avoidance of any connection to any undertaking that may give rise to potential liability. The effect may be to prevent funding of development that would have the incidental result of remediation. As well, joint and several liability will cause any party who finds themselves connected to such a site to take steps to avoid any assumption or imposition of responsibility. The current regime appears to have created a stalemate.

SERM has chosen to retain the current regime. The strategy offers nothing that would indicate that the regime will operate any more effectively than it has in the past. Essentially, it retains the current system of joint and several and absolute liability with two exceptions. It has clarified the parties who, from a policy perspective, Section 4 will be applied against. It has eliminated from the discussion potential liability of shareholders, beneficiaries under a will, suppliers and transporters not implicated in the act of contamination. That increased clarity is a positive step. It has expressly or by implication indicated that the parties who will be pursued are those who engaged in or acquiesced to the activity giving rise to the act of contamination regardless of fault, persons who own pollutants regardless of fault, and persons who take transfer without performing due diligence. As between these parties it has done nothing to address the issue of regulatory
or inter-party fairness. Ultimately, liability remains joint and several.

What is remarkable about the SERM strategy is that it has addressed the concerns with respect to fairness to no-fault parties by backing away from the public purpose of remediation of contaminated land. Landowners whose land is contaminated by act of God or migration, secured parties and municipalities that take possession, and, presumably, beneficiaries who receive a specific bequest of contaminated property and landlords will have no positive obligation to remediate or to contribute to remediation. Where there is no responsible party, the strategy indicates that there will be no enforcement at all.

As ineffective as the current regime was prior to the Court of Appeal’s decision in *Busse Farms v. F.B.D.B.*, it is less effective since. SERM has never seen fit to have the reach of Section 4 tested before the courts. The only judicial interpretation of the legislation has been brought at the instance of a private party seeking damages resulting from the purchase of contaminated party. The Court of Appeal in *Busse* made an error. In concerning itself with fairness between private parties and fault, and in complete disregard for the public purposes of the Act, it imposed a fault requirement in the context of the definition section relating to owners and persons in control. The error, relatively simple on its face, shows a confusion or failure to address the distinction between valid public purposes and bases of responsibility and inter-party fairness based on fault. The effect from a public purpose prospective is perhaps worse in theory than in fact. On the basis of the *Busse* decision, parties taking an interest in property or taking over a potentially contaminating activity are better off not performing due diligence investigations. Knowledge gives rise to liability. The implication for the enforcement provisions in Section 4 is more immediate. Even prior to the *Busse* decision, any rational party would have a
difficult decision in whether to participate in voluntary assumption of responsibility for remediation under the SERM strategy, or resist liability given the default to joint and several liability. Subsequent to Busse any party who, without knowledge, has taken over a contaminating activity during the course of a discharge, and any transferee of contaminated property, has the basis of a defence. After the Busse decision the prospect of voluntary acceptance of responsibility is even less likely. The Busse decision has made imperative from any perspective, the amendment to or replacement of the EMPA.

6.2 A Possible Basis for an Alternate Model\textsuperscript{124}

Progress toward developing a model able to obtain movement toward remediation of contaminated sites first requires clarity and open discussion of the principles used to justify the model. Although the Act does not expressly state its purpose, based on the

\textsuperscript{124}The recommendation which follows is necessarily only a recommendation of the principles upon which to construct a model. Further, the recommendations are limited to those relating to who should bear the cost of remediation and on what basis. Among the complexities inherent in developing a comprehensive proposal, and out of the scope of this thesis, are:

- methods to ensure minimal increase of administration cost and delay arising from the determination of liability based on fault which implies the increased requirement of fact finding and the potential for litigation arising out of fault based liability;

- the development of appropriate enforcement mechanisms to ensure ease of access by the enforcing agency to title to property on default such as expropriation of and super priority against contaminated land;

- use of registry systems such as Land Titles to give public notice of the status of property;

- development of risk assessment criteria for the purpose of determining when contamination requires remediation and to what degree.
powers afforded the minister it may be stated that the purpose of the EMPA is to enhance and protect the quality of the environment.\textsuperscript{125} In furtherance of those purposes, it seems a small step consistent with that aim, to openly adopt a public policy duty to the environment. As well, there needs to be clear acknowledgment that the policy is well aimed at deterrence and remedial funding and the timely discovery of contamination.

There is a requirement to accept that at times the principles of "polluter pay" and "fairness" will be contradictory. Where contamination is the result of actual misconduct on the part of the owner or controller of the contaminant or the contaminating activity, there is no inconsistency in expecting the polluter to fund the clean up as a consequence of their behavior.\textsuperscript{126} However, where "fault" is arbitrarily attributed in circumstances where no assessment of fault can sustain a finding of wrongdoing, and the fault finding exercise is in actuality an effort to locate a funding source, then the principles of polluter pay and fairness do not coincide. A distinction needs to be drawn between the almost trite recognition that SERM is entitled to look to a wrongdoer causing contamination to entirely fund a clean up, and situations where contamination has been caused without wrongdoing. In the latter case the basis upon which the polluter pays should be distinguished as benefit based.

There should be a clearly recognized responsibility in those who own land and those who purchase it to discover the existence of contamination. Such a requirement serves the

\textsuperscript{125} Supra note 1, Section 2.1.

\textsuperscript{126} Indeed, the standard of care required of these parties should be high recognizing the hazardous nature, not just of the substance with which they are dealing, but the hazardous nature generally of the threat posed to the environment by pollution and the need for deterrence.
purpose of the timely identification of problems and should work to mitigate the extent of damage. Failure to use due diligence in such discovery may reasonably give rise to "fault based" liability.

There should be clear recognition that the public purpose sought to be achieved justifies a broader basis of responsibility than wrongdoing or causation. At times it will be "fair" that parties other than the polluter contribute to the cost of remediation. The responsibility of beneficiaries of the contaminating activity should be established and limited.

This distinction between various bases of responsibility is one of the principal contributions from the CSLAG recommendations. Its proposal to clearly separate at-fault parties from those required to contribute to the funding of a clean-up, is an important step in building a workable model. The model should recognize the complexities of the relationship of various parties to the discharge. The shortcoming of the CSLAG recommendations is the insufficient contribution from parties expected to contribute on the no-fault contributor stream, namely those that have benefitted from the activity but are without fault. The biggest single reason for inaction on remediation of contaminated sites is that a party with resources to fund sites cannot be identified. The inability to fund remediation is a significant barrier to effecting the purpose.

The CSLAG position that commercial industrial activity has created many widely distributed economic benefits to government and the population at large, thus justifying the expectation that the public purse can be called upon to contribute to funding remediation, has validity. However, CSLAG’s recommendations minimize the reality that several identifiable groups benefit disproportionately. Most obviously, the party responsible for
carrying on the activity giving rise to the contamination, even when carrying on the activity in a reasonable and acceptable fashion given the standards of the day and otherwise without fault, may have received diverse benefits, including but not limited to, profits.127 Less directly, a number of parties such as landlords, lenders, manufacturers and suppliers may be said to benefit from the activity.128 While the benefits received from tradespeople, professional advisors and transporters are probably too remote, and typically too limited to justify an expectation of contribution, those other beneficiaries listed above could be expected to contribute in a proportionate or controlled manner to the remediation of any particular site. Similarly, past land owners in some circumstances may benefit from the inflationary pressure industrial use of land creates, thus giving rise to an identifiable benefit accruing from the transfer of contaminated industrial property. Although not a beneficiary of the contaminating activity, unless a landlord or a secured party who has foreclosed, the current landowner will benefit from remediation of its land and thus could be expected to contribute to the problem solving.129 The contribution of the landowner who is without fault is consistent with the recognition of a duty to the environment.

Contribution from any of these beneficiaries to remediation costs of any specific site

127 The absence of realization of profit should not be definitive. As pointed out by Coop in Beyond Appletex, supra note 33 at 127, the calculated risk which businesspeople take in pursuit of profit is benefit in itself, whether or not the venture is a success.

128 In Appletex, after noting that the two investors subject to the directors order had lost their entire investments, the E.A.B. commented that F.B.D.B. had benefitted to the extent of $600,000.00 in interest on its loan to Appletex. Supra note 26 at 293.

129 Where an owner is contributing as a "no-fault" beneficiary only, the extent of its contribution should be limited to the difference between the value of the land contaminated and uncontaminated.
can be justified through resort to a duty to the environment, reinforcing deterrence, and as a logical basis for a remedial funding source. However, site specific contribution, proportional to the benefit received, is essential to meeting the principle of fairness. At the same time the requirement of contribution by beneficiaries, lenders and landlords in particular, has the important preventative benefit occasioned by the role these parties will play in minimizing their risk by monitoring the good stewardship of borrowers and tenants.

Contribution by beneficiaries needs only come into play where there is no at fault party, the at fault party is impecunious, or the at fault party is not responsible for the whole of the contribution. It is acknowledged that it is unlikely that sufficient benefit will be identified to fairly expect that the full cost of remediation will be fairly borne by these parties. Contribution on this rational basis will, however, assist in solving the funding problem.

Joint and several liability has no apparent role to play in a problem solving model. Whether multiple parties are required to contribute on a fault or beneficiary basis, joint and several liability will offend the fair treatment of the contributing parties. Further, joint and several liability ignores the distinction between fault and no-fault obligations to contribute.

It is problematic to categorize as "responsible" parties exhibiting substantially different levels of conduct. Inevitable in such a categorization is an aspect of attributing wrongdoing to all responsible parties. Further, even if joint and several liability is intended

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130 While joint and several liability between at-fault parties in the limited sense described in 5.3 at page 97 might be a useful inducement to compliance, given the very high standard of care suggested by this model it is concluded that joint and several liability not be used in that context. Under the heightened duty or standard of care there may be a considerable distinction between the nature of wrongdoing of two at-fault parties with one only slightly negligent and the other grossly negligent.
to ensure funding, this element of "fault finding" creates an intuitive pressure to narrow the net in "fairness" to remote parties who might otherwise be rationally expected to contribute to funding remediation.

In any complex site, where at-fault and no-fault beneficiary contributors may coexist, the specter of joint and several liability will, in likelihood, terminate cooperation. With a few possible exceptions, SERM has no history of issuing Section 4 orders despite the existence of contaminated sites with multiple potentially responsible parties so the actual effect is unknown. However it can be presumed that making a Section 4 order will compel a response from the affected parties. The threat of imposing joint and several liability against those parties required to contribute to a portion of the remediation effectively forces such potential contributors into litigation in the effort to avoid any responsibility.

There will be instances where, regardless of the expectation of contribution from at-fault parties or beneficiaries, orphan sites or shares will remain. To solve the problem of orphan sites or shares some funding mechanism or mechanisms must be identified. Whether or not such funding mechanisms are feasible in the current economic climate in Saskatchewan is not known. CSLAG acknowledged that funding from the general coffers would be unlikely. Tax incentive type programs seem more promising. Further, although not reflected in the final CSLAG report, the minutes of the meetings indicate a willingness expressed by industry representatives of specific sectors to contribute to funding mechanisms in exchange for certainty.

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131 Joint and several liability is considered to be in large part responsible for the extensive litigation experienced in the United States under CERCLA. See Frona M. Powell, Law and the Environment, supra note 34 at 360.
The issue of whether funding is available has another dimension that parallels the lack of clarity permeating the EMPA regime and SERM policy. If the high level of priority to be given the issue of prevention and remediation of contaminated land is as we would be given to believe from the legislation and SERM, funding mechanisms or at least a concerted effort to explore them, will be forthcoming. However, if the issue does not compel that priority, continued claim that it does can only result in cynicism.

Drawing a distinction between funding mechanisms for historical and modern sites may serve to relieve some of the difficulty in creating such mechanisms. When assessing the need for funding of orphan share clean-up it becomes apparent that the problem is not unitary. Orphan shares arising from historical sites are quite likely to occur because there is no at-fault party responsible for clean-up. As well, complex sites with a variety of contaminants associated with different activities should only occur in historical sites. Further, it will often be more difficult in a historical site to locate both at-fault parties and beneficiaries of the contamination, simply because of the passage of time. Resort to an orphan share fund with respect to historical sites might therefore be expected to be frequent.

By contrast, modern sites, generally, may be expected to be less complex in terms of multiple at-fault and no-fault contributors. The audit requirement prior to the transfer of property should eliminate several generational sites, whether these be sites with multiple contaminants or multiple parties carrying on the same contaminating activity. Increased regulation and licensing should result in more at-fault parties where a discharge has

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132 For example, of the twelve sites listed in Action on Contaminated Sites as requiring immediate action, perhaps six may be said to have arisen out of practices that were in accordance with the law and accepted industrial practices of the day.
occurred. With current or future contaminated sites, the need to access a generalized fund should only occur when the at-fault party in a simple contaminated site is impecunious. Further, in a modern site, the beneficiaries are more likely to be readily identifiable and possibly available to contribute. These elements should reduce the burden on funding modern sites.

As has been seen, the funding problem gives rise to an action problem. One of the benefits of distinguishing between the problem posed by historical sites from the problem posed by modern sites, is that if it is necessary to allow the historical sites to remain unremediated due to funding deficiencies, action can still be taken in a timely manner on current sites distinguishing the circumstances of inaction on historical sites. While delaying action on historical sites is not an optimal solution, at the least the timeliness problem isn’t exacerbated in the context of modern sites. The funding problem does not necessarily have to translate to an action problem throughout.

The EMPA does not enjoy a history of effectively meeting the aims identified in the Act. There is little record of aggressively enforcing remediation of contaminated sites in this province or of remediation. The main protection to the environment is the fact in Saskatchewan of relatively sparse industrial activity. That is precious little protection. The SERM strategy is nothing more than a restatement of the longstanding Ministry of the Environment approach. As stated, this non approach has been largely ineffective in resolving any difficult contaminated site problems. The Busse decision has exacerbated the shortcomings of the SERM strategy to the extent that it undermines and to a certain extent

It is an important element of this model that activities that have the potential of contaminating be highly regulated and that those regulations be vigorously enforced.
exposes the emptiness of the threat of widespread absolute and joint and several liability resulting from a minister's order. What is required to end the stalemate of inactivity is the development of a principled, transparent and pragmatic model for funding the clean-up of contaminated sites.
LIST OF REFERENCES

Texts/Articles/Reports

Dictionary of Canadian Law, 2nd ed.


Environmental Liability and Contaminated Site Management – A Strategic Approach for Saskatchewan (Regina: Queen’s Printer, 19 October 1998).


Andrew R. Thompson, in Environmental Regulation in Canada (Vancouver: West Water Research Centre, 1980).


Cases


United States v. Northeastern Pharmaceutical 810 F. 2d. 726 (8th Cir. 1986).


Legislation


Environmental Protection Act, R.S.O. 1980, c.141.


Environment Act, S.N.S. 1994-95, c.1.
Environmental Protection Act, R.S.O. 1990, c. E 19.

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Hazardous Substances and Waste Dangerous Goods Regulations. c. E-10.2 Reg. 3.
Report of the
Minister's Advisory Group

on

Contaminated Site Liability

in

Saskatchewan

May 1997
INTRODUCTION

The Process
In early 1996, the Minister of Environment and Resource Management appointed representatives of stakeholder groups to form the Contaminated Sites Liability Advisory Group (CSLAG), to develop recommendations on a broad range of issues (Appendix A lists CSLAG's membership). Specifically, the group was asked to make recommendations on: the application of the CCME principles; the identification of contaminated sites; clean-up requirements; responsibility and liability relating to clean-up; and, a timetable for action (Appendix B lists the Terms of Reference for CSLAG). We see these specifics in the broader concept of designing a contaminated site liability (CSL) model.

Background
The existence of contaminated sites, and the specifics of any model designed to facilitate clean-up, can impact on many aspects of society, and can result in a range of issues and concerns in addition to those around human and environmental health.

In some cases, there may be financial concerns - relating to loss of equity in the property, the cost of remediation, or the inability of property owners to qualify for loan capital due to potential liability.

A general lack of certainty regarding liability for contaminated sites is a barrier to economic development. This applies in large measure to the financial implications discussed in the previous paragraph.

Impacts on consumers include the potential for both direct and indirect costs associated with the liability for contaminated sites. This is the result of any business or government with some degree of liability, recovering its costs through revenues, either by pricing goods and services or through the levying of taxes. In addition, consumer impact can include loss of choice, opportunity and convenience.

In Saskatchewan, uncertainty surrounding liability for contaminated sites can have a range of negative impacts in both rural and urban areas.
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While lack of certainty can have a negative impact on economic development, a fair and clear contaminated site liability model can have a positive impact on human and environmental health, while stimulating economic development and creating jobs. A well defined, fault based model can attract new business investment to the province and provide an incentive for expansion of existing businesses.

These issues, and others, have been the focus of considerable attention over the last few years, both nationally and provincially. At the national level, the Canadian Council of Ministers of the Environment (CCME) endorsed a set of "principles on contaminated site liability" in 1993. In mid-1994, Saskatchewan Environment and Resource Management prepared and distributed, for stakeholder discussion, A Discussion Paper on Contaminated Site Liability. Discussion with stakeholders during late 1994 and 1995 confirmed the need for further review of this matter and underscored the complexity of the issues.

Since that time, the group has identified the issues which need to be resolved with respect to contaminated sites management and has prepared a number of recommendations. This paper outlines the recommendations of the Advisory Group. Consensus decision making was used and such items are in bold; where consensus was not achieved, the items are written to reflect the range of viewpoints presented. In working toward consensus recommendations, we developed a set of ground rules which guided our discussions (Appendix C).

The recommendations in this paper combine to provide a conceptual model for contaminated site liability in Saskatchewan. More work will be required in areas such as dispute resolution and the specific details of how the process will work.

Wording in the report is general and conceptual, and is not intended to be legally or technically precise.
The recommendations outlined in this paper are meant to apply to all provincial industry sectors, government departments/agencies, lending institutions and businesses. They are not intended to focus in on one particular sector/industry/group or exclude another.

**REFERENCE FRAMEWORK**

The Group recognized that it would be difficult to deal with the issues on a one-by-one basis, without the benefit of a framework that made clear the links between the various issues. Therefore, the first task of the Group was to develop such a framework (Figure 1). The framework serves as a map, providing a shared, big picture view and establishing common reference points to anchor our discussions. It breaks down the issues into the general categories of: voluntary compliance; site identification; allocating responsibility; funding clean-up; clean-up and signing off.

- **Voluntary compliance** recognizes that prevention of contamination is better than cure, and that voluntary action is preferable to mandatory.

- **Site identification** involves a number of sub-issues including: triggering the contaminated site identification process; development of appropriate standards for designating a site as contaminated; and, site tracking through site assessments and other mechanisms.

- **Allocating responsibility** determines who should be responsible for the clean-up of contaminated sites. Addressing this issue involves: determination of potentially responsible parties; exemptions (who’s in and who’s out) and limitations of liability; and, the establishment of liability allocation factors and process.

- **Funding mechanisms** ensure the remediation of sites in which no responsible parties can be identified (orphan sites); and, sites where there are multiple parties but one or more of the parties is no longer viable (orphan shares). This is a major issue in the management of contaminated sites.
Voluntary Compliance

Site Identification

Allocating Responsibility

Funding Cleanup

Cleanup

Signing Off

Triggering the Process

Appropriate Standards & Site Assessments

Site Tracking Mechanisms

Assigning Responsibility

Degree of Liability

Limitations on Liability

Who's in

Who's out

Dispute Resolution Mechanisms

Orphan Sites

Funding Mechanisms

Cost Recovery

Determining Cleanup Level

Compliance Certificates

Site De-Listing

Allocation Criteria
Once a site has been designated as contaminated, we need to know what standard of remediation is to be applied - how much clean-up is needed? This relates directly to the site assessment process in site identification.

Signing off is of concern after a site is cleaned-up to acceptable standards, and involves determining how long and under what circumstances will the responsible party be liable for the site after it is remediated.

CCME PRINCIPLES

CCME developed a set of five core principles which have become the focal point for discussion in the development of provincial models and legislation. The terms of reference specifically asked us to consider these principles in the Saskatchewan context. Although reflected in the recommendations and text, we will provide a brief overview here.

(The CCME principle statement is in italics.)

- **The principle of “polluter pays” should be paramount in framing contaminated site remediation policy and legislation.**

The "polluter pays" principle requires that the person(s) responsible for polluting or contaminating the environment becomes responsible for correcting the damage and paying any associated costs.

This is a cornerstone of our proposed model. We believe that the party or parties at fault, i.e. the polluter(s), should be held accountable, and made to pay for their actions. This is fundamental to our system of justice, and should apply to our handling of contaminated site liability.

- **In framing contaminated site remediation policy and legislation, member governments should strive to satisfy the principle of "fairness."**

In general, fairness is achieved when, in similar circumstances, parties are treated consistently and equitably. Timeliness can be seen as an aspect of fairness.
Openness, Accessibility, Participation

- The contaminated site remediation process should enshrine the three concepts of "openness, accessibility, and participation."

Parties who would benefit from information regarding contaminated sites, or involvement in an aspect of a contaminated site liability process, should have access to the information, or participation in the process.

Beneficiary Pay

- The principle of "beneficiary pays" should be supported in contaminated site remediation policy and legislation, based on the view that there should be no "unfair enrichment."

This is a most contentious element to consider. Who is a beneficiary? What amount or type of benefit should be sufficient to require that a party or parties pay for the clean-up of a mess they did not create? If "unfair enrichment" is the basis for this, we may agree. However, when beneficiary is defined as any party having any business relationship with the polluter, we believe it to be unfair.

Beneficiary pays is on the "no-fault" side of the model.

Sustainable Development

- Government action in establishing contaminated site remediation policy and legislation should be based on the principles of "sustainable development", integrating environmental, human health and economic concerns.

Remedial activity must be consistent with this principle to ensure that further damage is not done in an effort to correct other damage. A balance of environmental, human health, and economic interests must be achieved.
I. VOLUNTARY COMPLIANCE

This section discusses two distinct aspects of voluntary compliance: one which recognizes the value of preventing the contamination of a site; and, one which is relevant when contamination is present at a site.

A. Pollution Prevention

Recommendation #1: The Contaminated Site Liability Model should be designed to minimize the creation of future contaminated sites and within that context, designed to minimize the potential for future orphan sites through sectoral/stakeholder discussions and planning.

We firmly endorse the concept of pollution prevention. Pollution prevention is a shift away from the management of wastes through "end-of-pipe" technologies, instead placing emphasis on reduction at the source. It is an integral design element and practice today in many industries and businesses.

We feel that fewer resources will be required for site remediation if cases of contamination are prevented in the first place. Preventing contamination will also mean fewer risks to public and environmental health.

This type of initiative will be most efficiently and effectively developed through individual discussions on a sectoral basis.

B. Voluntary Clean-up

Recommendation #2: That the Contaminated Site Liability model promote voluntary compliance and avoid the creation of barriers or disincentives to voluntary compliance.

We recognize that in many cases, upon realizing that contamination has occurred, a party will take immediate action to clean up a site. This reflects a sense of stewardship and responsibility.

It is important that the Contaminated Site Liability system promote voluntary stewardship, and action wherever possible.
II. SITE IDENTIFICATION

This section includes discussion of how the process is initiated (triggered), when and how a site assessment is carried out, the need for appropriate standards, and the tracking of contaminated sites.

A. Triggering the Process

Recommendation #3: Conceptually, triggering the contaminated site identification process should be as follows:

Trigger (e.g. spill)

▼

Guidelines
(Tied to potential human or environmental risk)

▼

Variable Site Assessment

▼

Evaluation Against Appropriate Standards

The contaminated site identification process may be triggered by a variety of activities and events, including the reporting of spills, decommissioning activities, environmental site assessments, land development plans, and others. All events that trigger the process do not present the same risk, and therefore should not require the same assessment. As an example, a spill of a hazardous material over a permeable aquifer in a densely populated area presents a different risk than the same spill in a clay-based soil in a less populated area.
Guidelines

Recommendation #4: That guidelines be developed which tie the site assessment to the potential risk.

These guidelines, which will help determine the level/degree of site assessment, should be based on potential risk to human health and the environment, land use and physical characteristics of the site.

As mentioned, the level and degree of site assessment should be tied in to the evaluation performed under the directional guidelines. This is to ensure that there is a balance between the expense of gathering information for risk assessment and the return on this investment.

When completed, the site assessment will be compared to the appropriate standards.

Information for the Public

Recommendation #5: That information about potential triggers for site assessment be developed and distributed through a wide-range of methods and locations.

We believe that the rules need to be explicitly stated with respect to the triggering process. Furthermore, this information needs to be distributed in ways that target the greatest number of impacted stakeholders, such as through provincial and municipal government offices, real estate and law offices, and other sources.

Ministerial Responsibility for Emergencies

Recommendation #6: That the Minister must retain clear responsibility for emergency issues that significantly threaten public health and/or safety.

In emergency situations the Minister of Environment and Resource Management retains powers to require an immediate site assessment, and subsequent action, without going through the full triggering process. Guidelines should be developed, to assist the Minister and Saskatchewan Environment and Resource Management (SERM) for these types of situations.
Voluntary Site Assessment Encouraged

Recommendation #7: The Minister or designate should encourage voluntary site assessment prior to the use of an Order. If the voluntary agreement can't be reached, or fails, the Minister or designate may after taking into account the Guidelines, require an appropriate (i.e. variable) site assessment.

Voluntary site assessment is becoming commonplace in most jurisdictions as it allows responsible parties to assess their own contamination without involving bureaucracy or litigation. We recognize that many sites within Saskatchewan are cleaned-up without government intervention. This should continue to be encouraged and supported in the future; government intervention should be kept to a minimum.

B. Appropriate Standards and Site Assessments

Optional Approaches to Site Assessment

Recommendation #8: That for greater flexibility the criteria for site assessment include generic numerical standards, site specific numerical standards and risk-based standards.

Contaminated site assessments identify whether contaminants, by their nature and extent, are causing, or have the potential to cause, adverse effects on human health and the environment. Once determined, these characteristics could be compared to criteria, in the form of standards, to outline any necessary actions (e.g. no actions required, further evaluation, remediation).

Generic Numerical Standards

Three broad approaches for site assessment criteria have been proposed. The first is to establish generic numerical standards which are intended to protect human health and the environment at any site without consideration of site-specific factors other than land use. This approach has the advantage of setting out the rules of the game in a simple, easy to follow manner without having to undertake a potentially detailed risk assessment.

Site Specific Numeric Standards

Site specific numerical standards build upon the generic numerical standards, but use specific site features. These are the most flexible numerical standards and are specific to an individual site.
The third approach, sometimes referred to as a "risk-based" or "risk assessment" model, is to set standards on a case-by-case basis related to protection of human and ecosystem health. As an example, this approach may, depending upon the risks identified, permit less rigorous standards to be applied to an industrial site if it continued in an industrial use than would be the case if the site were to be converted to residential use.

Recommendation #9: That standards be determined by good science and consultation with appropriate stakeholders.

Considering the importance we place on having standards, we want to highlight the two key factors that are required for their development: good science and stakeholder consultations.

Recommendation #10: There should be guidelines for site assessment.

The guidelines should explain the characteristics, benefits and limitations of the three approaches, and discuss the rationale for choosing the right method to fit a specific situation.

Recommendation #11: Parties who need to have a site assessment carried out should be able to identify qualified professionals.

This does not mean that there should be a new process for certifying qualified persons. Rather, we encourage government to work with professional groups and associations to determine the skills, training and experience necessary to do site assessment. The specific professional credentials which would indicate capabilities in this area would be made available to the public.
Recommendation #12: There is a need for clarity, definition, and guidelines related to approaches to risk assessment.

Risk assessment is a procedure designed to determine the qualitative and quantitative aspects of a threat or hazard to human health or the environment. Risk assessment can range from a simple qualitative analysis to a full-blown quantitative evaluation.

Technical aspects of risk assessment challenge the understanding of all but a small number of professionals. This is an area where public reaction is intuitive, and often emotional. While "experts" quote figures, public discomfort increases. This is a critical area for consideration by government and others who have an ongoing need to discuss risk with a broad range of citizens and stakeholders.

The successful management of a contaminated site is a function of obtaining sufficient information to evaluate the risk posed by a site. The difficulty is that risk assessment, as an environmental management tool used in Canada, is in its infancy. As such, there needs to be a lot more work on defining "guidelines" for using risk assessment as a decision-making tool.

These risk assessment guidelines would define acceptable methods for determining risk, under specific exposure scenarios, that will generally be protective of defined ecological and human receptors for specified land use categories.

C. Site Tracking

Recommendation #13: Information on government held documents on the management of contaminated sites and file material related to specific sites should be available to the public in accordance with the Freedom of Information Act.

Access to information about contaminated sites will enable parties involved in land transactions to investigate potential site contamination and take some steps to minimize their potential liability. This is especially important given the current emphasis on knowledge and due diligence in informed decision-making.
We discussed various options for tracking the management of contaminated sites. We feel that information on the extent of contamination, land use restrictions associated with the site, and relevant approval conditions could be provided through options such as guidelines for disclosure, informal department file searches, zoning records and reclamation certificate tracking.

Recommendation #14: There may be some role for the use of land titles in tracking the management of contaminated sites, such as registration and de-registration of sites.

Land Titles was discussed as a possible mechanism for tracking the management of contaminated sites, as well as for listing and de-listing. By its very nature, land titles conveys a sense of legitimacy and provides the level of assurance necessary for the process of managing, tracking, listing and de-listing of contaminated sites.

However, we want to identify two concerns raised in our discussions. First, there is the potential for a land title reference, even one showing full remediation, to place a stigma on a site which may have ongoing negative impacts on the owner. Second, for landowners holding forced leases, provision should be made for the lessee to pay any legal fees required for removal of encumbrances from a land title.

We feel that while there may be a role for land titles, other mechanisms should be investigated for tracking, managing and listing/de-listing of contaminated sites.
III. ALLOCATING RESPONSIBILITY

A. General Discussion

"Net" Metaphor

Discussion of responsibility often uses a "net" metaphor. When we speak of casting a broad or narrow net, we are referring to the initial size of the group of potentially responsible parties. A narrow net is cast if the criteria for inclusion are so tight and restrictive that we can anticipate that very few parties will be identified as potentially responsible and screened against the exclusion criteria. A broad net is cast if the criteria will result in a large number of potentially responsible parties.

The type of net used, broad or narrow, has a direct relationship to the principle of fairness. It also has a direct relationship to the ability of a site liability model to show that it can indeed bring the right parties together to develop, fund and implement an appropriate site remediation plan.

Our model proposes a net, where a potentially responsible party is permitted an exemption based on lack of fault. We also propose no fault contributor and beneficiary of contamination streams which are limited: the former by a cap, and the latter by definition. As a result, the ability of our model to be successful depends heavily on the inclusion of funding mechanisms for orphan shares.

However, it should be noted that throughout this paper we recommend development of clear, scientifically based standards and guidelines. This will result in future exemptions being much more difficult to achieve, and as a further consequence, a significant reduction in the potential for orphan sites.

The following sections will provide more detail on all aspects of the model. We will start by setting out a conceptual framework for responsibility which has both fault and no fault aspects. The term "fault" is used with a general, not legal, definition.
Responsibility Framework - A Three-Part Model

Recommendation #15: The Responsibility Framework must be used as the first step in determining potentially responsible parties. The model designed by the group has three streams: a "fault stream", a "no-fault stream", and an orphan funding stream. The primary emphasis is on fault and allocated liability. Absolute liability, joint and several liability, are not used. The no fault stream of the model has two branches: a capped no fault contributor branch and a beneficiary of contamination branch. The orphan funding section of the model could accommodate a variety of funding mechanisms. Conceptually, the framework is shown in Figure 2.

B. Fault Stream

Recommendation #16: That absolute liability not be part of the Saskatchewan contaminated site liability model.

We believe that absolute liability is not consistent with the fault-based model we recommend for Saskatchewan. The distinction between the concepts of absolute and strict liability can be described as follows: absolute liability does not require the existence of fault or negligence and the mere factual existence of the damage confers liability; whereas strict liability allows a party to use a defence, such as "due diligence" or "reasonable care", to minimize liability.

Recommendation #17: Fault considerations should come into play first, at the stage of determining who is a responsible party and second, when allocating liability (apportionment).

Fault, in the context of contaminated site management, can be defined in a number of ways, including: statutory legal fault, professional fault and societal fault. Statutory legal fault results from failing to follow laws, regulations, legal guidelines or policies. Professional fault is failing to abide by professional codes or practices. Societal fault can be characterized as being contrary to societal values.
and includes moral fault and negligence. (As an example, a society value might be "to prevent harm to others from the release of anything dangerous within your control". This value might be violated if an industry released a substance to the environment which they knew might endanger others but could get away with at the time.) All forms of fault are intended to reflect the values of the day.

This is the central issue in framing the model, since the designation of a "party at fault" triggers liability for the clean-up of a contaminated site. In expanding the definition of fault to cover professional and societal fault, we suggest that a "broad net" of liability be cast for parties at fault. It should be noted, that unlike other jurisdictions, CSLAG's model recognizes different degrees of responsibility (based on fault) amongst polluters. It differentiates between those who actually caused the contamination but were following the laws of the day, and those in control who failed to prevent the contamination. The most significant result of this is the availability to potentially responsible parties of a due diligence exemption.

Recommendation #18: The use of joint and several liability is not compatible with the principle of fairness and should not be used in the model.

In cases where there is found to be more than one party at fault there are essentially two ways in which liability to pay clean-up costs can be distributed: (a) allocated liability; and (b) joint and several liability. Allocated liability, the method recommended by the Group, involves the determination of respective degrees of responsibility among the parties at fault, and then a fixing (as a percentage) of the amount of clean-up costs each party must pay.

Joint and several liability however does not result in such individual determinations of the degree of responsibility and corresponding liability. Instead, if a party at fault is found to have any degree of responsibility, even if very small, it is then potentially liable for the entire amount of clean-up cost. An individual party at fault who is ordered to pay clean-up costs in a system of joint and several liability can then initiate legal proceedings against any other parties at fault to obtain reimbursement.
Figure 2
CONTAMINATED SITE LIABILITY MODEL
FLOW CHART

FAULT
Potential Fault Group

No-fault
Contributor

Beneficiary of Contamination

Exclusions

Capping

Apportionment

Fault Share/Funding

Remediation Table

Clean-up

Clean-up Complete

Sign-off

143
Assigning Responsibility Based on Fault

On the fault side of the model, there are three major steps which determine who will be deemed to be responsible parties, and what share of the liability they shall have. Those steps are: 1) determining potentially responsible parties; 2) specifying criteria for exemption; and, 3) using specific factors to apportion liability among those remaining.

Recommendation #19: That the Minister adopt the following framework for assigning responsibility:

Parties potentially responsible for causing contamination are those who have or have had direct management\(^1\) and/or control over the activities which gave rise to the contamination;

\(^1\) Direct management is defined as participation in the day to day activities and being in the position to control or direct or manage the activities that caused or contributed to the contamination of the site.

Those parties responsible for causing contamination would be exempt as fault parties upon showing that:

a) the party did not cause or permit any of the contamination; or
b) the activity was in compliance with the laws and standards of the day and the party took all reasonable steps to avoid the contamination; or

c) the activity was authorized or approved by government authority and the party took all reasonable steps to avoid the contamination.

In addition to those above, we want to ensure that others in four categories are included as responsible parties from a fault perspective:

- Owners who had knowledge of a problem and did not act in an appropriate manner;
- Corporate Directors, who failed to discharge their duties as Directors;
- Companies established and used solely for the purpose of insulating another party from environmental responsibility; and,
- Parties intending to become unjustly enriched from site clean-up.
A potentially responsible party who is not exempt becomes a responsible party.

We agreed that fault considerations need to come into play in relation to parties responsible for causing the contamination. Specifically, there needs to be exemptions based on compliance with the laws and standards of the day and due diligence (i.e. taking all reasonable steps to avoid contamination or its spread).

The first criteria for determining who's in the net are those parties "who have or have had direct management and/or control over the activities which gave rise to the contamination". The key word is activities. What this suggests is that liability is tied to a specific event in time. In doing so, liability becomes retrospective.

Retrospective

The Saskatchewan model would exempt from the fault stream a party that followed the laws and standards of the day, did due diligence, and did not violate the professional or societal values of the day.

Exemptions: Who's Out

We had substantive discussion about exemptions on the fault side, and developed the following set of Interpretative Guidelines. It must be emphasized that these exemptions are only meant to provide clarity, in the simplest terms, to the Responsibility Framework. The "rules" are outlined in the framework; these interpretative guidelines profile what might be expected when applying the rules.

INTERPRETIVE GUIDELINES:

Clarification of Exemptions

The intent of the Responsibility Framework is to provide, SUBJECT TO THE FOREGOING CONDITIONS AND AS EXPLAINED BELOW, the following general exemptions:

- secured creditors who hold a security interest in a contaminated site;
- a manufacturer or supplier of a substance where that substance may have contributed to the contamination of the site;
- a successor, assignee, executor, administrator, receiver, receiver manager or trustee;*
- municipalities who become registered owners of a contaminated property;
- a person who transported a contaminant to a site;
a person who owns or occupies a contaminated site that was contaminated only by the migration of a substance from another property;
- owners of a property which is subject to an agreed or imposed lease under the Surface Rights Acquisition and Compensation Act;
- owners of a property that have been contaminated through an Act of God;

The following text reflects the rationale behind the exemptions listed in the interpretive guidelines. The exemption provided for creditors will ensure that they are not unduly penalized for actions beyond their control, and instead that they will be in a position to continue to support local industry, commerce and the economy. Notwithstanding, when lenders or other creditors take actions which represent direct management they should bear some potential responsibility for site remediation.

*Note: Changes proposed to the Federal Bankruptcy and Insolvency Act may have an effect on the personal liability of trustees and receivers, and introduce a new priority related to contaminated sites.

Similar to the general exemption for transporters which follows, manufacturers are not held responsible for the actions of others over which they have no control.

The next exemption, (successor, assignee, etc.), protects individuals who are willing to manage a contaminated site after the responsible party has become insolvent, died or otherwise given up control of the site. Regardless, there is a responsibility on the exempted party to not contribute further to the contamination (i.e. to undertake reasonable care in the management of the site).

The exemption related to municipalities provides protection to villages, towns, cities and local government districts involving transfers of title of contaminated land. As with the successor/assignee clause, there is a responsibility on the exempted party to not contribute further to the contamination (i.e. to undertake reasonable care in the management of the site and prevent further contamination).

The fifth general exemption covers people who are legally
transporting goods which have the potential to cause contamination. The intent of this clause is to encourage transporters to continue their service, by exempting them from responsibility for the action of others over whom they have no direct control. There is, however, a responsibility on the transporter to practice due diligence in its activities.

The sixth exemption ensures that neighbours who are victims of the contamination should not be further victimized by being held responsible for the remediation.

**Apportionment**

**Recommendation #20:** Apportionment, within the fault stream, should reflect degree of fault.

Liability should be apportioned amongst parties at fault in proportion to their contribution to the contamination and in accordance with clear factors.

**Apportionment Factors**

Following are examples of fault stream apportionment factors, not in order of priority.

1) when the contaminant became present at the site;

2) with respect to present or previous owners, lessees or occupants, including but not limited to:

   a) whether the contaminant was present at the site when ownership was taken;

   b) when the owner/operator knew or should have taken reasonable steps to discover the presence of the contaminant;

   c) whether the presence of the contaminant ought to have been discovered by the owner/operator when ownership/control was assumed, had reasonable steps been taken to determine the existence of contamination at the site;

3) with respect to a previous owner, whether the owner, with knowledge, or should have had knowledge, sold the property without disclosing the presence of the contaminant at the site to the purchaser;
4) the extent to which the party took reasonable steps to prevent the presence of the contaminant at the site;

5) the extent to which the party dealing with the contaminant followed the accepted industry standards and practices of the day;

6) the extent to which the party dealing with the contaminant followed the laws of the day;

7) on becoming aware of the presence of the contaminant, did the party contribute to further accumulation or the continued release of the contaminant;

8) what steps did the party take on becoming aware of the presence of the contaminant;

9) the degree of a party's contribution to the contamination, in relation to the contribution of other responsible parties;

10) the quantity, nature and toxicity/degree of hazard, damage and risk of the contaminant (amongst a group of contaminants) that was discharged or otherwise released into the environment; and

11) whether the party understood, or should have understood, the consequences of the activity that caused the contamination and of the contamination.

The apportionment factors all rely on the party being at "fault" in some sense or another. Either the party failed to follow the laws and standards of the day (statutory legal fault or professional fault) or the party failed to undertake due diligence/reasonable care (societal fault). We developed these factors from the original Canadian Council of Ministers of the Environment list.

When an allocation process is triggered, the civil burden of proof should be upon the proponent, with an evidentiary burden upon the responsible party to receive a claim to an exemption or a claim to due diligence.
C. No-Fault Stream

Although we recognized that fault considerations are important, there are other factors that could be used in assigning responsibility and allocating liability. We believe that "no-fault" considerations should be separate and distinct from the fault-side of the model.

Our model proposes two distinct branches within the no-fault stream: no-fault contributors and beneficiaries of contamination.

This branch is intended to include parties which have some responsibility for the contamination, but were not at fault. This acknowledges that while parties doing due diligence and in compliance with the laws of the day are not considered to be at fault, they still may bear some responsibility for assisting in funding the clean-up.

The overall potential liability exposure in this track should be capped to provide certainty. A cap in the range of 5-15% of the overall cost of the clean-up has been discussed, but without consensus.

If more than one party is considered to be a no-fault contributor, apportionment will need to be undertaken.

The following paragraph reflects the views, and has been included at the request of, the Environmental Fairness Association (EFA):

"Small business in Saskatchewan is being impacted negatively by a number of factors, including, but not limited to: gradual depopulation, business closures, aging population, tax burden, migration of young, skilled workers, and particularly environmental regulations. Since small business isn’t a major economic player, it is generally affected by the aforementioned concerns. The EFA feels that when apportionment factors are considered for the no-fault stream, they must reflect the special difficulties faced by small players, and, hence should be capped at a reasonable and manageable level."

Capping is a critical aspect of the ‘no-fault contributor’ stream, however, we must identify a potential problem with its use.
Several members expressed concern that the availability of a capped no fault contributor stream may, for some parties, act as a disincentive to voluntary clean-up. In some situations, parties having some responsibility for the pollution, but not at fault, might decide not to do a voluntary clean-up, if they knew that their share of the remediation costs as a no-fault contributor would be less than the cost of a voluntary clean-up. Notwithstanding the differing perspectives, we still affirm the need for a no-fault contributor category.

Another view held by some members is that where industry standards and codes of practice are in place, most parties would do the voluntary clean-up regardless of the difference in cost.

**Beneficiary of Contamination**

The second branch of the no-fault stream is beneficiary of contamination.

Perhaps the single most difficult issue which the CSLAG tackled was the no-fault stream, and specifically the principle of beneficiary pays. We applied the term quite narrowly, to those that benefited not from the activities that gave rise to the contamination, but rather those who benefitted from the contamination itself, or from the clean-up.

Beneficiary of contamination is intended to cover those who created corporate facades to obscure responsibility for polluting activities, and the use of public or outside funds for clean-up of a site, the sale of which will result in unjust enrichment for the owner.

While the intent is to ensure that no party is unjustly enriched, we do not want to see a system created which discourages people from cleaning up sites.

We feel that the broader definition of beneficiary often used in contaminated site liability models is simply too broad to be fair to those who had no knowledge of or ability to influence the polluting activity.
Following are examples of apportionment factors, not in order of priority, that can be used within the beneficiary of contamination branch:

1) when the contaminant became present at the site;

2) with respect to present or previous owners, lessees or occupants, including but not limited to:
   a) whether the contaminant was present at the site when ownership was taken;
   b) when the owner/operator knew or should have taken reasonable steps to discover the presence of the contaminant;
   c) whether the presence of the contaminant ought to have been discovered by the owner/operator when ownership/control was assumed, had reasonable steps been taken to determine the existence of contamination at the site;
   d) whether the presence of the contaminant was caused solely by the act or omission of an independent third party;
   e) the price the owner paid for the site and the relationship between that price and fair market value of the property had the contaminant not been present at the site at the time of purchase;

3) the extent to which the party took reasonable steps to prevent the presence of the contaminant at the site;

4) the extent to which the party dealing with the contaminant followed the accepted industry standards and practices of the day;

5) the extent to which the party dealing with the contaminant followed the laws of the day;

6) what steps the party took on becoming aware of the presence of the contaminant;

7) whether the party benefited from the activity resulting in the contamination, and what was the
monetary value of the benefit;

8) the degree of a party’s contribution to the contamination, in relation to the contribution of other responsible parties;

9) the quantity, nature and toxicity/degree of hazard, damage and risk of the contaminant (amongst a group of contaminants) that was discharged or otherwise released into the environment; and

10) understanding the consequences of the activity that caused the contamination and of the contamination.

D. Orphan Funding Stream

Where parties at fault can be identified and have the ability to pay, the funding of clean-up is fairly straightforward. However, where such parties are not identified, the situation can become complicated and contentious.

In January 1993, the CCME sponsored a workshop to discuss the issue of funding of orphan shares and sites. The final report was titled "Sharing the Unfairness", which speaks to the strong feelings which surround the notion that a party not at fault should not be asked to pay for the clean-up of another’s mess.

Orphan Shares

An orphan share may arise in any of the following three circumstances:

1) where shares of liability are to be allocated and there is not an identifiable responsible party to whom a share can be allocated;

2) where a party at fault can only pay a portion of the total extent of their allocated liability and has no further assets available to which the remaining liability can be applied; or

3) where a potentially responsible party that caused or contributed towards the pollution of the site is exempted because of lack of fault.

Orphan Sites

When all of the shares of liability for site clean-up are orphan, the site is referred to as an orphan site.

The Group agreed that there must be some type of mechanism to ensure that orphan shares are paid.
Although government may have a role in funding the clean-up of orphan sites, it is considered unlikely that government funds will be available to pick up all orphan shares.

E. Process Model

Recommendation #21: That a process model needs to be developed that translates the principles set forth in this document into a process.

The principles and concepts recommended in this paper will need to be placed within a process model in order to be implemented. This task remains to be done. An important part of the process model will be inclusion of dispute resolution mechanisms.
IV. MECHANISMS FOR FUNDING CLEAN-UP

Where parties at fault can be identified and have the ability to pay, the funding of clean-up is fairly straightforward. However, in the case of orphan shares, the situation can become complicated and contentious.

A. Introduction

The term "mechanism for funding clean-up" refers to funding approaches which do not target specific parties. Rather, they derive their funding capacity from other sources. Funding mechanisms are a critical component of the CSLAG recommended model.

In 1994, CCME held a workshop and did a report on funding for orphan sites. While it was helpful for us to read the report, we chose to do our own thinking in this area. The group decided to "brainstorm" for options that could potentially be used or further researched for application within the province.

B. Principles/Characteristics

We believe that there are a number of overarching principles, characteristics and factors which will inform any discussion of funding mechanisms. Although some may have more relevance to specific options, we will discuss them here in general terms.

• Spreading the Load - a primary benefit of funding mechanisms is that they can draw on a wide revenue base. They "spread the load" over a wide area. This has the dual benefit of having less impact on individual parties, while creating the broadest potential reservoir of revenue. It is directly related to the overall principle of fairness, in that sharing perceived unfairness can be considered more fair than placing a larger load on fewer sources. This principle affirms the need for all parties to participate in some way to facilitate orphan share funding.
• Voluntary vs. Mandatory

Funding mechanisms may be established so that participation is either voluntary or mandatory. Voluntary mechanisms may be developed by or with associations and form a code of practice or stewardship agreement.

One strength of a voluntary approach is that it is non-coercive and places emphasis on stewardship. A challenge for any voluntary approach will be to discourage "free riders" and achieve full participation among potentially involved parties.

Mandatory participation would likely be the result of government regulation. It would enhance fairness, and probably ensure that the mechanism had no effect on the relative competitive positions of the parties.

• Efficient and Effective Use of Funds

Funding mechanisms should be designed to ensure that resources are used for the primary objective, i.e., cleanup of contaminated sites. Expenditures for administration, research, reporting and other supporting activities should be minimized. End results must be clearly defined and progress tracked. Clear criteria, which are linked to risk, standards and accountability, will maximize efficiency and effectiveness.

• Minimize Impact on Economic Competitiveness

Access to a funding mechanism should not provide inequitable benefit amounts to similar operations. This could be the case in situations where one business has sufficient resources to pay its share of a clean-up, and does so, while a less successful business without sufficient resources receives assistance from a fund. The result is one of giving the less successful business an unfair advantage. One way to avoid this may be to set up the fund with a revolving loan component which becomes self-sustaining.
• **Timeliness**

Any program must be able to function in a responsive manner, without excessive delay or red tape. Timeliness must take into consideration the concept of risk.

• **Accountability**

The public and those parties involved expect a transparent process. The demonstration of fairness, effectiveness and efficiency are paramount to the acceptance of a fund or mechanism. Reporting will demonstrate adherence to the principles.

• **Fairness**

Guidelines should be in place to ensure that a funding mechanism is used in a fair manner. This is especially important for management and administration. Guidelines will assist to ensure that there is consistency and equity in fund administration and allocation decisions. Parties participating in resourcing funding mechanisms must be able to take part in fund management.

• **Flexibility**

A mechanism should have sufficient flexibility to address specific circumstances and situations. A balance will be required between flexibility and the need for consistency as an element of fairness.

• **Promote Economic Development and Technological Development**

In addition to meeting environmental quality objectives, well designed mechanisms can promote economic development and the development of new technologies for contaminated site remediation.
• Maintain Mechanism/Fund Size in Relation to Problem

The mechanism/fund must not exceed the scope of the problem. The ability to increase, decrease, cap or sunset a mechanism or fund will provide the adaptability required to proportionately address program needs.

C. Specific Funding Mechanisms

Types of funding mechanisms are hard to view as being totally separate. There is some sharing of basic characteristics. As mentioned, the group developed a series of mechanisms based on principles set out in Section B. They appear in no special order of priority or potential. Sections 2, 4, 6, 7, 8 and 9 were developed with research and analysis provided by individual group members.

1. Broad-based Fund

This option considers the use of a single, broadly applied fund which covers all sectors. Dollar input to such a fund could come from a variety of sources.

Concern was expressed regarding the need to avoid several potential pitfalls, including administrative complexity and extent to which the fund management ends up in litigation. In addition to process ineffectiveness and inordinate time delays, administrative and legal complexity could result in a large proportion of fund resources being spent on process and not on the actual remediation of contaminated sites.

2. Sectoral Fund

Recommendation #22: That sector funds should be used in Saskatchewan; be sector driven; have a high degree of definition; although recommended, may not be applicable in all situations; should be based on sector agreement.

The use of industry sectoral funds is being explored in other jurisdictions. With this funding option, each industry could deal with its own problems without being unfairly required to bear the costs of another industry’s
problems. One disadvantage of this approach is that not all industry sectors may be sufficiently viable to support a fund.

Recommendation #23: That a key role for government with sectoral funds is to ensure fairness and consistency.

A major difficulty expressed by the group was defining what a sector may be or how broad its representation. There was a suggestion that sectors would "self-select" and current associations would form the core of most sectors. Smaller sectors or loosely associated businesses would have more difficulty in forming a cohesive group for funding. It was thought that the government may want to see a number of larger sectors established rather than many smaller ones. Administratively larger sectors would prove more easily managed and reduce collection complications.

There are several advantages to the use of Sectoral Funds including:

- "spreading the load"
- potential to address many problem contaminated sites
- mechanisms may be national or regional as well as provincial
- national system has the potential benefit of consistency, which would minimize any impact on competitiveness
- government run programs may cost more
- voluntary funds will require incentives (such as participation in fund management decisions); those that participate should help determine how the fund is used, i.e., associations should be involved in setting priorities for clean-up

Some guiding principles that could be associated with Sectoral Funds were pointed out by the group.

- funds must direct dollars to achieving clean-up objectives (efficiency)
- minimize expenditures for administration, legal actions, etc.
The following examples outline existing or proposed sectoral funds for other jurisdictions.

**U.S. Petroleum Storage Tank Site Remediation Funds**

In 1988 the U.S. Environmental Protection Agency (USEPA) issued regulations concerning the management and upgrading of underground storage tank systems. The regulations mandated that by year end 1993 all underground storage tank sites must have leak detection installed, and that by year end 1998 all tank systems must be upgraded. Additionally the regulations required that every underground storage tank site prove financial responsibility by having a minimum $1 million liability insurance. Without proof of financial responsibility, a tank system may not be used.

Insurance companies at the time were not prepared to provide insurance at affordable premiums because of the risk from unknown, past liability. By not having insurance many retailers were going to be forced out of business. To ensure a viable fuel distribution network many States began establishing insurance funds so that retailers could acquire insurance at some reasonable premium. To provide the funds necessary to cover claims on the funds, States introduced various forms of revenue generation. These included annual tank fees, fees based on the size of tank truck deliveries, crude oil import fees, cents per gallon (cpg) fees imposed at the wholesale level, and cpg fees levied at the pump. By far the most common revenue source is a legislated cpg fee on gasoline.

Although most State funds began as a way to allow tank owners to meet the financial responsibility aspect of the USEPA regulations many have expanded to assist with site remediation costs. Each fund has specific rules regarding applicant eligibility, cost eligibility, limits of coverage and deductibles, etc.

As of June 1996 there were 46 U.S. States that provide some form of financial assistance to owners of refined petroleum contaminated sites.
Canadian Petroleum Storage Tank Site Remediation Funds

The Canadian Petroleum Products Institute (CPPI) discussed with the Alberta Government an approach to develop an industry managed pilot program to remediate contaminated underground petroleum product storage sites. Funding of the program would be derived through a levy on taxable fuel collected at the wholesale level. Eligible sites include orphans, retail, commercial, industrial and government sites which store refined petroleum products. Sites not eligible include exploration and production facilities, refineries, distribution terminals, large bulk storage plants and sites owned by users of non-taxable fuels, e.g. farming community. The fund would reimburse up to 90% of eligible remediation costs (orphans would be reimbursed at 100% of eligible costs). The fund would not pay for storage system replacement or upgrades. The program would deal with past contamination (to encourage good future operating practices) and applications for funds would sunset five years after the program commences. Ontario and Quebec have expressed interest in determining whether concepts in the proposed Alberta pilot would have application in their jurisdictions.

Alberta eventually chose a different approach, putting up $100 million to establish its own funding capacity. CSLAG still believes that the proposed CPPI approach is worthy of consideration.

3. Dedicated Taxes and Reserves

Taxes are generally thought to create a strongly negative reaction by both public and commercial sectors. However, the group felt there was potential for acceptance by the public and industry if a tax were dedicated to orphan site clean-up, and not handled as part of general revenues. We believe that the public would be agreeable to a dedicated tax or reserve if it could be tied to an "outcome" of clean-up.
Jurisdictional issues and competitiveness were also thought to be of concern should this type of mechanism be used. If new funds are to be generated, it must be made perfectly clear to the public what it is used for and packaged in a manner where there is no question as to benefit (i.e. orphan clean-up). A "sunset" provision of such a tax would increase acceptance by the public. We recognize that the current fiscal climate may make it difficult for government to pursue this option.

4. Incentives

Recommendation #24: In a general sense, incentives can play a role in funding the clean-up of contaminated sites.

Essentially, we believe that "carrot-type" policy instruments are more effective than "stick-type" instruments in encouraging the clean-up of contaminated sites.

Some benefits of using incentives could be: better use of existing infrastructure; local employment opportunities; increased revenue from taxes; increased property values; and, an overall sense of community pride.

A member of the group researched this topic and focused in on four specific types of incentives: site assessment fund; tax benefit; reduced liability; and, public recognition.

A site assessment fund could be set up to assist municipalities in understanding the details of a specific site, so that extent of required clean-up would be known by potential developers. This could be a preliminary step to the use of other types of incentives.

Tax type incentives would work on the basis of governments, at all levels, encouraging clean-up by rewarding those undertaking it with a "tax break" or relief. Mechanisms to provide relief are business tax write offs, grants, deferred property taxes or exemptions.
Several jurisdictions in the U.S. have been successful in using tax type incentives which focus on re-development of old or abandoned industrial sites (brownfields). The group also felt companies using pollution prevention programs which would reduce the incidence of future contaminated sites could also potentially qualify for some form of tax relief. A caution was noted that those receiving the tax relief must not be those who created the problem.

Liability protection to those undertaking clean-ups would provide a sense of surety to the investor, that should the clean-up process fail, further contamination is discovered or standards change, they will not be held responsible.

Public recognition was not seen as a strong enough incentive by itself to induce clean-up in most cases, however when used in combination with other incentives, participation in clean-ups may increase.

5. Performance Bonds/Sureties

Performance bonds or sureties are now being used in the mining industry within Saskatchewan to ensure future orphan sites will not be created. The bond or surety is based on a mutually developed (government/company) reclamation plan for a specific site. The form can be in a letter of credit and is essentially a form of self-insurance. This option is seen as having only limited potential as small business may be in the same position as applying for insurance. As with Item #10 insurance, this mechanism is preventative, and aimed at minimizing orphan shares in the future.

6. Contaminated Site Holding Company

A separate entity could be formed to assume ownership/control of orphan contaminated sites and/or shares. Similar companies now exist in the United States as re-development authorities with State/Federal co-funding. Revenues are generated through the eventual sale of re-developed or "clean" sites.
The use of a holding company could avoid excessive legal wrangling, expedite clean-ups, avoid excessive site evaluation, facilitate the connection of financing and appropriate technologies, maximize the recovery and reuse of sites and encourage development of economic development opportunities through the use of new or appropriate technologies.

Some concerns expressed over the potential use of such a company included the prospect that liabilities assumed may exceed assets. Obtaining ownership of properties may also present a problem where claims still exist. It was also pointed out that it may not be unusual for the cost of clean-up to exceed the value of the property placing the company in a money losing position.

7. Environmental Lottery

A working lottery based clean-up program currently exists in New Brunswick. A portion ($10 million) of the gaming revenues from video lottery terminals combined with other sources such as the beverage recycling program flow to an environmental trust fund of approximately $14 million annually. Of that total roughly $1 million is used to clean up orphan sites. Up until the demise of a federal contaminated site matched funding program, the $1 million was matched federally.

Approximately 30 orphan sites in New Brunswick have been funded for all or partial clean-up using this funding source. The group, in general, after the presentation by the CCPA felt there may be potential for use in Saskatchewan. Lottery revenues dedicated, or directed to environmental clean-up, were thought to be seen by the group as acceptable to the "public" in general terms. The group recognizing that there is already considerable competition for lottery revenues, felt further research into this option should be pursued.

8. Research Projects

Although using an orphan site as a research project would not provide "direct funding" for orphan shares or sites, it was felt that it could potentially reduce costs and address social or economic issues associated with the site.
Using an orphan site for research would benefit a company developing new technology and potentially provide reduced costs for the over-all clean-up and/or economic "spin offs" such as local employment opportunities or purchase benefits. Research was seen as having a strong tie to economic development opportunities and the incentives discussed above.

The group identified the problem of "experimenting" or making an existing problem worse. Surety for companies doing research not to face additional costs should the technology or approach fail was also seen as a requirement of such a program.

9. Adopt a Site Program

There are examples of the mining industry "adopting" sites and reclaiming them on a volunteer basis. Hudson Bay Mining and Smelting (HBM&S) provided the following rationale for undertaking such projects.

Public Perception: Since HBM&S is the largest mining company in the Flin Flon area, the company felt any unsightly mine site, whether owned by the company or not, would reflect directly on the company.

Public Opinion: The company became aware of and reacted to increasing interest by the public in seeing old mine sites cleaned up whether contamination was present or not.

Expediency: HBM&S found in some cases there was an advantage (amalgamation of substances, reduced hauling distances etc.) or no significant cost difference to the company in cleaning up a property in close proximity to one they were currently cleaning up.

Ownership: In cases of no increased costs and potential historical ownership links, HBM&S considered public perception and provided clean-up.

Corporate Benefits: When considering the "pros and cons" of cost versus benefit, HBM&S felt public perception, good will, future approvals and potential liability all weighed in favour of cleaning up orphan sites.
Although the possibility for cleaning up a contaminated site by an NGO or non-profit organization was discussed, it was pointed out that the site would need certain characteristics very specific to the needs of the proponent. For example, a site located near an existing nature refuge or natural area may produce interest from the owner of the adjoining nature refuge or area. Orphans located in less "desirable" areas will have little to no interest.

In very limited cases this may prove a viable option and should still be considered as a potential clean-up mechanism. Policy provisions within government should encourage this mechanism.

10. Insurance

The group felt that insurance was not a potentially strong option since several members, through experience, have found premiums and conditions prohibitive for companies with significant environmental risk. Larger industry prefers to "self-insure", however this is not a feasible possibility for small operators. It was also pointed out by the group that fears from insurers were often not based on science. Further education by industry/government of insurance professionals may improve this as a forward looking option.
V. CLEAN-UP

A. Establishing Priorities

Recommendation #25: SERM should develop guidelines to assist in prioritization for site remediation and/or site management after designation as being contaminated.

These guidelines could be used by both government and business/industry in prioritization of site remediation. This recommendation acknowledges that not all designated contaminated sites present the same order of risk and, in these times of fiscal restraint, money has to be spent wisely on the management of these sites. It also recognizes that all designated contaminated sites should eventually be remediated but that these clean-ups can occur over an appropriate period of time, tied to the risk presented by individual sites and changing concerns/issues.

B. Developing Management Plans

Recommendation #26: SERM should maintain an overall provincial strategic management plan for contaminated sites.

SERM, as the government agency with the mandate for protecting the environment, has an interest in ensuring that remediation programs are carried out effectively and in accordance with applicable guidelines and regulations. One of the ways to accomplish this is through the development of a provincial strategic management plan which will outline the government’s remediation “agenda”. It was noted that this strategic management plan should be tied in with the previous recommendation on site prioritization.

C. Determining Clean-up Level

Recommendation #27: Site remediation planning should be done on a performance-based approach.

The group noted that government should not dictate the clean-up methods or remediation technology but should be focused on end results - the remediation of sites to acceptable risk levels. All technologies will be subject to...
appropriate environmental controls and approvals.

**Option Guidelines**

**Recommendation #28:** SERM should have guidelines to assist clients in selecting appropriate remediation options/methods.

Government has a continuing role in licensing/permitting certain types of technology and, where requested, should provide guidance for clients.

**Education Regarding Handling of Contaminated Soils**

**Recommendation #29:** A dialogue process aimed at educating stakeholders (i.e. municipalities, government agencies etc.) on how to manage (i.e. reasonable handling) contaminated soils is needed.

Perceptual problems and the need to educate both the public, municipalities, and in some cases, provincial government departments on risks associated with contaminated sites/materials was expressed. Examples of contaminated material with very low risk being unnecessarily transported over long distances for treatment or disposal were cited as clean-up barriers. An effective infrastructure within municipalities is needed to treat or dispose of contaminated materials. The cost benefits to both those seeking treatment or disposal services and those providing them would make clean-up or remediation a more attractive option. Economic development opportunities for communities involved in treatment or disposal of contaminated materials locally was also pointed out by the group.
VI. SIGNING OFF

A. General Discussion

Sign-off of the successful remediation of contaminated sites is primarily necessary to provide a level of confidence for the remediating party(ies), others with some connection to the site, or potential new owners/operators. The group felt assurance given through a sign-off process was required and in some cases demanded. Although not an exhaustive listing, those requiring some form of assurance include:

- Government, to protect public interest.
- Parties which have effected the clean-up to avoid ongoing liability.
- Purchasers of property.
- Investors, lenders, lessees, and claim holders (i.e. mining).
- Contributors to the clean-up.

To ensure credibility and reliability, the group felt the provincial government would ultimately need to be the source of sign-off.

Sign-off will take place in two ways: with a firm discharge; or, with a discharge that could be subject to re-evaluation.

B. Sign-Off and Firm Discharge

There are two common situations in which sign-off should be upheld and not re-evaluated: when new standards are established after sign-off; and, when land use change is proposed.

1. New Standards

Recommendation #30: That clean-up to a higher level not be required as a result of changed standards or new technology.

Recommendation #31: That new technology or new standards should not affect a previous sign-off.
Standards should not be arbitrarily determined, and should be set only after extensive consultation. The group expressed concern over standards that come into force without sound rationale and consultation with affected parties. When a new standard is developed that reduces a risk to the public or environment, the need for clean-up to that level will be necessary. The question as to who pays for that higher standard needs to be addressed. It was felt that those who followed the standard of the day would only be liable to the old standard and that a "funding mechanism" would be required to clean the site to the higher level.

Emerging technologies tend to allow for higher levels of clean-up. This may also place an unfair burden on those required to do clean-up should a standard change to a higher level simply because the technology has been developed to achieve it. Good science and consultation with appropriate stakeholders, and not the availability of new technology, should determine whether a new standard is needed. One group member pointed out that using the "good science" approach, standards may, in some cases based on risk, go down. Examples of contaminants that were previously thought to be hazardous and subsequently found to present little risk were mentioned. Because standards are, in the end, set and enforced by government, a process must be in place that assures the public and industry of the standards' legitimacy. "Moving goal posts" when it comes to decommissioning and clean-up standards are a major source of uncertainty.

2. Land Use Change

Recommendation #32: That contaminated sites should be cleaned up to the standards for the existing land use designations; and that where land use requires further clean-up, the proponent(s) of the change be responsible for achieving the new standards.

Zoning by-laws and the required standards for clean-up are not always straightforward. Differences between rural and urban regulation also exist and further complicate the sign-off of a contaminated site after clean-up.
There was a suggestion by several group members that those planning to decommission a site should be required to consult with the local planning commission to discuss potential uses for the land involved.

The group felt that owners of contaminated sites should not be required to clean-up beyond the current land use designation. If land use were to change and required a higher standard of clean-up where no designation previously existed on use, it was felt the municipality or developer would be responsible to bear any incremental cost. If a municipality were to force a land use change requiring a higher standard, the municipality should be responsible for increased clean-up costs.

### C. Sign-off and Re-evaluate Discharge

Two situations should result in a sign-off being re-evaluated: failure of the remediating party(ies) to carry out work as agreed upon in a remediation plan; and, determination of new risk as agreed upon in a remediation plan.

#### 1. Failure To Carry Out Work as Agreed

**Work Not Completed**

Recommendation #33: Liability remains if work is not completed, improperly completed or improperly documented.

The group felt liability must remain where work is not completed, improperly completed or not properly documented on a contaminated site. Consequently, if sign-off had been granted, and the above conditions were encountered, the sign-off could be rescinded. The group suggested proper planning, combined with appropriate guidelines and legitimate monitoring would greatly improve the likelihood of a lasting sign-off.

#### 2. Determination of New Risk

**New Contamination**

Recommendation #34: That if new contamination is found that represents a significant risk tied to the activity, liability remains.
Based on the assumption that new contamination is found and not a change in criteria standards etc., the group felt liability should remain with the activity associated with the contaminant. One member of the group expressed concern that the risk must be significant and based on good science.

D. Listing/De-listing

1. Certification of Compliance

The current system of certification of compliance involves the issuing of a letter by SERM which addresses only the areas and parameters of the contamination investigated and based on clean-up information supplied by the owner or consultant. It was thought improbable that SERM or a consultant would/could sign-off on all liabilities after clean-up as there would always be unknown elements (contaminants, changing standards etc.) that could potentially appear in the future.

The group generally felt the letter supplied by SERM was adequate given the constraints of not, in practical terms, being able to provide an unconditional sign-off on liability. A means of connecting the Certificate of Compliance with removal of a site from the contaminated sites list is required and would constitute "de-listing".

2. De-listing

The means by which a site becomes "listed" as contaminated is not always clear. Several different levels of government and various departments within the provincial government are all thought to maintain lists of sites which if intended, could be considered a starting point for a contaminated site listing. The lists maintained by SERM and presumably others, are accessed by various people or agencies (lawyers, lenders, municipalities, etc.) requiring some form of evidence on the presence of contamination or assurance of its clean-up. We need a system that facilitates consistency and continuity of information and standards between levels of government and between provincial government departments.
A practical and workable means of listing contaminated sites and de-listing when appropriate is necessary. Several circumstances of when a site should be excluded from sign-off or conditions necessary to achieve it were discussed.

VII. CONCLUSION

We cannot overemphasize the importance of certainty and an approach based on fault and fairness.

The potential impact on average citizens, small and large businesses and the economy in general makes this a significant issue for governments throughout North America.

Government needs to see the model as a whole. A model based on fault, fairness and effectiveness will be difficult to operate without the creation and use of appropriate funding mechanisms.

Recommendation #35: That the Contaminated Site Liability Advisory Group be continued in an advisory capacity during public consultations and, following public consultations, continue to assist the Minister in finalizing and implementing a Contaminated Site Liability model.

We hope that the recommendations contained in this report will form the foundation for an innovative and effective contaminated site liability model for Saskatchewan. We recognize that some recommendations are broad, and that more work will be required to provide additional detail, and to develop an appropriate legislative and regulatory base.

We want to extend an offer to continue to assist you in whatever way we can.
### MINISTER’S ADVISORY GROUP ON CONTAMINATED SITE LIABILITY MEMBERSHIP LIST

<table>
<thead>
<tr>
<th>MEMBER</th>
<th>ALTERNATE</th>
</tr>
</thead>
</table>
| Bill Albert  
Environmental Fairness Association  
Box 394  
STOCKHOLM SK S0A 3Y0  
Phone: (306) 793-2010  
Fax: (306) 793-2010 | Greg & Marg Ruska  
Environmental Fairness Association  
Box 509  
SALTOATS, SK S0A 3R0  
Phone: (306) 744-2325  
Fax: (306) 744-8182 |
| Mayor Sharon Armstrong  
Saskatchewan Urban Municipalities Association  
Box 963  
WYNYARD SK S0A 4T0  
Phone: (306) 554-3391  
Fax: (306) 554-3224 | Murray Swanson  
Crown Investments Corporation  
2400 College Avenue  
REGINA SK S4P 1C8  
Phone: (306) 787-5841  
Fax: (306) 787-8030 |
| Don Axtell  
Crown Investments Corporation  
2400 College Avenue  
REGINA SK S4P 1C9  
Phone: (306) 787-5841  
Fax: (306) 787-8030 | Dale Botting, Executive Director  
Saskatchewan Association of Rehabilitation Councils (SARC)  
111 Cardinal Crescent  
SASKATOON SK S7L 6H5  
Phone: (306) 933-0616  
Fax: (306) 653-3932 |
| Dale Botting, Executive Director  
Saskatchewan Association of Rehabilitation Councils (SARC)  
111 Cardinal Crescent  
SASKATOON SK S7L 6H5  
Phone: (306) 933-0616  
Fax: (306) 653-3932 | Murray Swanson  
Crown Investments Corporation  
2400 College Avenue  
REGINA SK S4P 1C8  
Phone: (306) 787-6246  
Fax: (306) 787-8030 |
| Bob Cunningham  
Saskatchewan Mining Association  
1740 - 2002 Victoria Avenue  
REGINA SK S4P 0R7  
Phone: (306) 757-9505  
Fax: (306) 569-1085 | Bob Phillips  
Saskatchewan Mining Association  
c/o Cameco Corporation  
SASKATOON SK S7M 1J3  
(306) 956-6200  
(306) 956-6201 |
| David Goffin  
Canadian Chemical Producers Association  
350 Sparks Street  
OTTAWA ON K1R 7S8  
Phone: (613) 237-6215  
Fax: (613) 237-4061 |
MEMBER

Scott Hopley
Canadian Bar Association
Hnatyshyn - Singer
601 Investor Building
402 - 21st Street East
SASKATOON SK S7K 0C3
Phone: (306) 653-5150
Fax: (306) 652-5859

Brenda Machin
Credit Union Central
3rd Floor
2055 Albert Street
REGINA SK S4P 3G8
Phone: (306) 566-1664
Fax: (306) 566-1372

Laverne Moskal
Economic Development
1919 Saskatchewan Drive
REGINA SK S4P 3V7
Phone: (306) 787-9553
Fax: (306) 787-2198

Glen Myers/Bill Levy
Canadian Petroleum Products Institute
202 - 6th Avenue Southwest
CALGARY AB T2P 2R9
Phone: (403) 266-7565
Fax: (403) 269-9367

Bob Schutzman
Saskatchewan Chamber of Commerce
c/o IPSCO
P.O. Box 1670
REGINA SK S4P 3C7
Phone: (306) 924-7483
Fax: (306) 924-7670

Ron Styles
Saskatchewan Municipal Government
1510 - 1855 Victoria Avenue
REGINA SK S4P 3V7
Phone: (306) 787-4200
Fax: (306) 787-1530

ALTERNATE

Lorelei Johns
Economic Development
1919 Saskatchewan Drive
REGINA SK S4P 3V7
Phone: (306) 787-0912
Fax: (306) 787-3872

Tom Eason
Canadian Petroleum Products Institute
c/o Petro Canada Products
150 - 6th Avenue Southwest
CALGARY AB T2P 3Y7
Phone: (403) 296-6005
Fax: (403) 296-4114

Ray Sieber
Saskatchewan Municipal Government
1510 - 1855 Victoria Avenue
REGINA SK S4P 3V7
Phone: (306) 787-0032
Fax: (306) 787-5166
MEMBER

Donald Taylor
Saskatchewan Association of Rural Municipalities
Box 248
SREDENBURY SK S0A 0H0
Phone: (306) 898-2065
Fax: (306) 898-2337

Gary Webster
Canadian Association of Petroleum Producers
2100 - 350 7th Avenue Southwest
CALGARY AB T2P 3N9
Phone: (403) 267-1146
Fax: (403) 266-3214

Miles Vass
Surface Rights Association
Box 446
CARNDUFF SK S0C 0S0
Phone: (306) 482-3747
Fax: (306) 482-3747

ALTERNATE

Jim Ireland
Canadian Association of Petroleum Producers
11377 Wascana Meadows
REGINA, SK S4V 2V5
Phone: (306) 789-9799
Fax: (306) 789-9490
Those not attending, buy may submit comments and/or wish to be kept informed:

- Lloyd Saul
  Saskatchewan Eco Network
  Box 154
  SEMANS SK S0S 3S0
  Phone: (306) 524-4426
  Fax: (306) 524-4636

- Mr. G. Tallman/Ray Russell
  Chair, Environmental Sub-Committee
  Canadian Banking Association
  910 Scotia Centre, 1783 Hamilton Street
  REGINA SK S4P 2B6
  Phone: (306) 525-6410
  Fax: (306) 781-7919

- Gerry Tegart/Lian Schwann
  Saskatchewan Justice
  1874 Scarth Street
  REGINA SK S4P 3V7
  Phone: (306) 787-5495
  Fax: (306) 787-0581

- Marlene Tuck
  Saskatchewan Finance
  2350 Albert Street
  REGINA SK S4P 4A6
  Phone: (306) 787-6730
  Fax: (306) 787-7003

- Moira Wright
  Saskatchewan Taxpayers Association
  105 - 438 Victoria Avenue
  REGINA SK S4N 0N7
  Phone: (306) 352-1044
  Fax: (306) 352-7203

- Marie-Ann Bowden
  University of Saskatchewan
  College of Law
  15 Campus Drive
  SASKATOON SK S7N 5A6
  Phone: (306) 966-5869
  Fax: (306) 966-5900

- Mr. Schofield
  Saskatchewan Insolvency Practitioners Association
  c/o Peat Marwick Thorne Inc.
  1000 - 1801 Hamilton Street
  REGINA SK S4P 4B4
  Phone: (306) 791-1201
  Fax: (306) 797-4703
Mr. Jim Durocher  
Métis Nation of Saskatchewan  
219 Robin Crescent  
SASKATOON SK S7L 6M8  
Phone: (306) 343-8285  
Fax: (306) 343-0171  

Chief Blaine Favel  
Federation of Saskatchewan Indian Nations  
Suite 200 - 103 Packham Avenue  
SASKATOON SK S7N 4K4  
Phone: (306) 665-1215  
Fax: (306) 244-4413  

Ralph Leibel/Paul Raths  
Saskatchewan Municipal Government  
2nd Floor, 1855 Victoria Avenue  
REGINA SK S4P 3V7  
Phone: (306) 787-2893  
Fax: (306) 787-8748  

Attendees:  
Robert Blackwell  
Phone: (306) 787-2380  
Fax: (306) 787-2947  

Victor Chang  
Phone: (306) 787-6185  
Fax: (306) 787-0197  

Bob Ruggles  
Phone: (306) 787-6178  
Fax: (306) 787-0197  

Sam Ferris  
Phone: (306) 787-6193  
Fax: (306) 787-0197  

Terry Hanley  
Phone: (306) 787-6078  
Fax: (306) 787-0024  

Sponsors:  
Bruce Smith  
Phone: (306) 787-5760  
Fax: (306) 787-0024  

Bob Baird  
Phone: (306) 787-5897  
Fax: (306) 787-0024  

Joe Muldoon  
Phone: (306) 787-7803  
Fax: (306) 787-0024  

Ash Olesen
Contaminated Site Liability Advisory Group
Terms of Reference

GOAL

Define, in a consensus-based manner, the framework, policies, practices and legislation necessary for dealing with contaminated site liability within the Province of Saskatchewan.

OBJECTIVES

Provide a forum for ongoing consultation and consensus building with stakeholders through which to provide recommendations to the Minister of Environment and Resource Management that will assist in the development and implementation of legislation and policy tools necessary for implementation of a Saskatchewan approach to contaminated site liability.

The Advisory Group will be tasked to review and make recommendations on, but not limited to:

1. application of the Canadian Council of Ministers of the Environment (CCME) Recommended Principles on Contaminated Site Liability;
2. how contaminated sites should be identified and designated;
3. what procedures and actions must be taken to un-designate a contaminated site;
4. what parties should bear the costs of cleanup and how should those costs be apportioned (including orphan sites);
5. whether there should be any time restrictions governing liability (any time beyond which there would be no liability);
6. whether there should be transitional provisions in applying any new proposed model to sites which were contaminated at a time when the polluting activity was in compliance with then current laws (or where no laws existed);
7. implementation roles and responsibilities, including those of stakeholders;
8. a consultation mechanism for other stakeholders;
9. timetables for actions; and,
10. what actions must be taken to develop policies, practices and legislation that are harmonized to a reasonable degree with other jurisdictions, and whose impacts on existing provincial and municipal laws is taken into consideration.

Approved April 11, 1996
1.0 Background

The topic of environmental liability has received widespread attention during the 1990’s. Much of this discussion has focused on questions about potentially responsible parties and the amount of liability which can be imposed on each party for remediating contaminated sites.

In 1993, the Canadian Council of Ministers of the Environment (CCME) endorsed a set of principles that were meant to facilitate a consistent approach in the development of provincial models and legislation related to contaminated site liability. Many jurisdictions have either passed legislation or implemented policies on environmental liability consistent with the framework outlined by the CCME.

In May, 1997, the Minister of Saskatchewan Environment and Resource Management (SERM) received a report from the Minister’s Contaminated Site Liability Advisory Group (CSLAG). The report, Contaminated Site Liability in Saskatchewan, made a series of recommendations on: the application of the CCME principles in a Saskatchewan context; the identification of contaminated sites; clean-up requirements; and responsibility and liability relating to site clean-up.

This document sets out Saskatchewan Environment & Resource Management’s approach to the management of contaminated sites both within and beyond the existing legislative basis of The Environmental Management and Protection Act (EMPA). The 1997 CSLAG report and the ground-breaking principles described in the 1993 CCME work were catalysts for this document.

1.1 Purpose

This strategic document will provide a measure of clarity and certainty on SERM’s approach to the management of contaminated sites in Saskatchewan. The document proposes a process model, in accordance with the principles outlined by CCME and CSLAG, that SERM believes will provide:

- a workable system for determining appropriate remedial measures, if any, to be undertaken in relation to specific contaminated sites;

- an efficient process for identifying persons responsible for implementing or contributing to the implementation of remedial measures; and

- a fair process for apportioning responsibility for the remediation of contaminated sites that encourages the responsible parties to negotiate the apportionment among themselves.
The process which follows is how SERM envisions the future strategy and process of managing contaminated sites and environmental liability in Saskatchewan. Already, progress in this direction is positive since precedents exist which indicate that the strategy and process advocated here can and has worked. Past successful examples include the remediation of the former wood preservation site in Prince Albert and other sites around the province. Following future evaluation of functionality and practicality of this process, particularly the voluntary steps associated with the allocation of liability and factors for apportionment of costs, SERM will consider what legislative amendments may be necessary.

The proposed process for the management of contaminated site liability presented here is consistent with the recommendations of the Contaminated Site Liability Advisory Group. The primary difference is the degree to which SERM's process focuses on voluntary allocation of liability/responsibility in comparison to the generalized manner in which it was recommended by the advisory group. SERM’s direction and process outlined later in this document takes a cautious approach rather than pursuing immediate legislative amendments to the current joint and several model. In the short-term, it is SERM’s intent to fine tune this model based on feedback from interested stakeholders, and to bring into operation the portions of the model that can be performed as soon as practically possible. Comments on any aspects of the model are appreciated.

1.2 Introduction

SERM believes it is in the public interest to manage contaminated sites in Saskatchewan and for appropriate remediation to be undertaken where it is required, if it is required, in order to prevent, minimize or mitigate damage to human or ecosystem health. Management of contaminated sites covers the spectrum from site identification, identification of responsible parties, allocating responsibility, to clean-up and sign-off. SERM has built its strategic approach to the management of contaminated sites around the following CCME and CSLAG principles:

- **Polluter Pays** - the parties responsible for polluting or contaminating the environment become responsible for correcting the damage and paying any associated costs;

- **Fairness** - parties responsible for contamination should be treated consistently and equitably;

- **Risk-Based** - contaminated sites are those sites that may present a significant risk to human or ecosystem health and safety. Sites which present a significant risk will be given a higher priority for clean-up than those sites that present lesser risk.

Although in some respects the principles of polluter pay, fairness and risk-based priorities are vested components of the existing process, the recommendations of the CSLAG report, evolving public expectation and technical capability in environmental science have underscored the need for more concise clarification of the intent and application of these principles.

Although a number of Acts in Saskatchewan create indirect environmental liabilities of one form or another, this document focuses on the provisions of The Environmental Management and Protection Act (EMPA). EMPA is the most often encountered environmental law in Saskatchewan and addresses contaminated site management directly.
Specifically, Section 4 (s.4) of EMPA provides the Minister of Environment and Resource Management with the ability to issue clean-up orders in a variety of circumstances where environmental concerns are an issue.

Within the existing legislative framework, the clean-up order potentially may include past and present owners of the property; either as the owner of the pollutant, the person having control of the pollutant, or the person responsible for the presence of the pollutant, as determined by the Minister. Although EMPA deals with most issues around contaminated site management, there are still aspects that have not been clarified:

- the extent and identification of those "who may be caught" is not certain because there has been limited jurisprudence considering that part of the Act; and
- the phrase "person responsible for the presence of a pollutant" is not defined. There is no jurisprudence which has tested the extent of this phrase.

SERM, in this document, will minimize these uncertainties (to the greatest extent possible) by clarifying these definitions from a policy perspective. These terms will be clarified in a process context as outlined in the Contaminated Site Management Process diagram, Figure 1.

2.0 The Contaminated Site Management Process

Figure 1 outlines in conceptual terms, a five step process employed by SERM to manage contaminated sites.

The primary steps in the process include:

- Site Identification
- Identification and Notification of Potentially Responsible Parties
- Allocation of Liability (Voluntary or Directed)
- Remediation Planning
- Site Clean-up and Sign-off

A more detailed discussion of the legal intent and the strategic intent of each step in the site management process follows. While the layout of the process appears simple and linear, the successful management of contaminated sites often involves iterations and cross-links of all five steps.
CONTAMINATED SITE MANAGEMENT PROCESS

Site Identified

- Trigger: result of land change, spill, etc.
- Site Assessment: information assessment of risk which now presents or may in the future present

SERM Identifies & Notifies Potentially Responsible Parties

- SERM uses principles and factors outlined in guidance document

Voluntary Allocation of Liability

- voluntary or voluntary-mediated

Yes

Development of Remediation Plan

- guidelines for remediation

Site Clean-Up and Sign-Off

Minister's Order for Directed Allocation

No
2.1 The Legislative Basis

The following sections of The Environmental Management and Protection Act impart the authority for the approach and actions described in some of the sections which follow. Section 3 of EMPA provides the ability to cause site investigations or assessments to be performed.

S.3 The Minister may make or cause to be made any investigation that he considers necessary with respect to the discharge of any pollutant including:
(a) its source and extent;
(b) its effect on the environment; and
(c) any advisable remedial action.

Comments: If SERM believes on reasonable and probable grounds that a site is contaminated, the Minister may require the owner(s) of the pollutant or the persons responsible for the presence of the pollutant to conduct an investigation to determine the existence, nature and extent of the contamination and provide a report on the results of the investigation.

Likewise, section 4 confers the ability to direct clean-up orders to certain defined types of responsible parties, a step which parallels the identification and notification of responsible parties and directed allocation in the contaminated site management process being advocated in this document. Further refinement of these powers after further evaluation may be required to provide for full implementation of the proposed process model.

S.4(1) ... where in the opinion of the minister, a pollutant:
(a) is being or was, before or after the coming into force of this Act, discharged, accidentally or otherwise; or
(b) is present anywhere in circumstances that are harmful or potentially harmful to the environment;
he may, by order, direct:
(c) in the circumstances described in clause (a), the owner or the pollutant or person having control of the pollutant;
(d) in the circumstances described in clause (b), the person responsible for the presence of the pollutant;
to take any measure that the minister considers necessary to protect the environment.

Comments: Measures contemplated by S.4(1) are described in S.4(2) and include site investigations and a number of actions related to environmental protection from the effects of pollutants such as monitoring, containment, removal, storage, disposal, destruction, record keeping, reporting and others.

Finally, subsection 7(1) provides the ability to cause remediation to occur, in a manner that is discussed in this document.

S.7(1) Where a person to whom an order is made pursuant to section 4 is directed fails to comply with the order within the specified time, the minister may:
(a) carry out the order or enter into agreements to cause the order to be carried out; and
(b) recover the costs and expenses incurred pursuant to clause (a) on behalf of Her Majesty in the right of Saskatchewan, as a debt due and recoverable by Her Majesty, from the person who failed to comply with the order.

Comments: If the aforementioned parties do not carry out the investigation, the minister may carry it out at the expense of the owners of the pollutant or persons responsible for the presence of the pollutant.
2.2 The Process Steps

**Step 1: Site Identification**

In general terms, the contaminated site management process is initiated when environmental contamination is discovered or learned of by the site owner, SERM, or other parties which are involved with the site. This process step encompasses both a triggering event, in which a site is "discovered"; and a site assessment component, in which the extent of the problem is determined.

**Triggering the Process**

Over the last decade, identification and management of contaminated sites has often been initiated by voluntary due diligence actions in relation to property transactions or through internal corporate environmental programs. In other instances the site identification and contaminated site management process is triggered by legal requirements under *The Environmental Spill Control Regulations* (S. 4-8), *The Hazardous Substances and Waste Dangerous Goods Regulations* (S. 17), *The Mineral Industry Environmental Protection Regulations* (S. 12, 14, 22), *The Environmental Management and Protection Act* (S. 2.1(d), 2.3, 3, 4, 7, 9, 14, 35.1) and other regulations pursuant to that act.

Within the existing legislative framework entry into the contaminated site management process generally occurs as a result of any one of a number of potential triggering events, including:

- spills of pollutants including hazardous materials, waste dangerous goods or other substances which present a risk to human or ecosystem health;
- decommissioning activities;
- regulatory inspections;
- monitoring; or
- complaint investigations.

Three other types of events listed below often trigger entry into the contaminated site management process. There is no intent however to add these to any future legislative requirements.

- Sale of property, including but not limited to a site where hazardous materials were stored, manufactured or processed;
- identification of contamination through internal corporate environmental programs; or
- land development plans.

**Site Assessment**

The type and potential severity of contamination stemming from the triggering event may be helpful in initially determining the extent of an assessment. For example a spill of asphalt emulsion to a dry area not subject to ponding or run-off would not normally be subjected to the same level of assessment, if any, as would a spill of hazardous material over a permeable aquifer with nearby municipal wells.
Determining under what circumstances sites are contaminated to such a degree that some form of management or remediation action is warranted is the key to successful management. The purpose of a site assessment therefore is to identify contaminated sites and the source, nature and extent of contaminants that may be or have the potential to adversely affect human health and/or the environment.

Assessment of property on a voluntary basis is encouraged by SERM whenever possible. When requested by an involved party any guidance regarding site assessment provided by the department is descriptive in nature rather than prescriptive in approach. It must be noted that performance of a site assessment is not a legal requirement at the time of sale of real property within Saskatchewan. Rather, these are measures taken by purchasers and lending institutions to protect their investments.

The "Three Phase" approach to site assessments, previously outlined by SERM in Risk Based Corrective Actions for Petroleum Contaminated Sites, November 1995, is adaptable to a range of trigger events and contamination scenarios. This "phased approach" is commonly employed in most jurisdictions across Canada and is presently flexible enough to identify and evaluate most contamination related situations likely to be encountered within Saskatchewan now and in the future.

At present a number of guidelines for site assessment exist which are of use in assisting potentially responsible parties in identifying sites. "Appendix A" of the aforementioned Risk Based Corrective Actions for Petroleum Contaminated Sites, November 1995 gives generalized guidance on the types of information which is useful in conducting and considering the outcome of site assessments. In terms of more comprehensive documents, the Canadian Standards Association's Phase I Environmental Site Assessment, April 1994 and CCME's Guidance Document of the Management of Contaminated Sites, January 1997 and Subsurface Assessment Handbook for Contaminated Sites, March 1994 give progressively more detailed information regarding assessment options and methodologies. These documents and a number of others are available to provide assistance to parties involved in site identification and assessment activities.

SERM does not generally employ "assessment criteria" as tools to determine when assessment or further assessment may be necessary. Background concentration for inorganic constituents or detection level for organic constituents have been employed by other jurisdictions as "assessment criteria". This approach is viewed by the department as redundant in the context of remediation guidelines described later and somewhat conservative since in many cases some elevation in constituent levels may not necessarily impact on receptors. Rather, Saskatchewan Environment and Resource Management has chosen to use the "Tier 1" future use based criteria within existing guidelines as a good initial indication if further investigation to more clearly define if some form of management of the site will be necessary. However, some value remains in the use of assessment criteria in the absence of remediation guidelines for specific parameters and the department may be specifically consulted on these occasions.
Step 2: Identification and Notification of Potentially Responsible Parties

After taking into account all the relevant factors and information available on the site and the owners of the pollutant or persons responsible for the presence of the pollutant the Minister may designate those persons as being potentially responsible for the remediation of the site.

Resolving which party or parties carry the potential responsibility for a contaminated site is dependant on the application of principles governing liability (which were outlined earlier in this document). The foremost principle which guides selection of potentially responsible parties for contaminated sites is the polluter pays principle.

In the broadest of conceptual terms, the principle of polluter pays is used as a tool to aid in "casting the net" of liability towards those that were involved in the "act of contamination" and those who "owned, controlled or managed the substances" which gave rise to contamination. In general terms therefore liability can be said to follow the "act of contamination" or "ownership or control of substances" at the time when these substances became contaminants and not necessarily ownership of property, although in many cases these may be the same parties. [This approach is consistent with the definitions of owner of a pollutant and the person having control of a pollutant and defined in EMPA (s. 1) and the scope of application found under s.4 of the Act.]

More specifically, in expanding and clarifying the concepts of "act of contamination" and "ownership or control of a substance" and thereby applying the principle of polluter pays, SERM deems that the following parties to be potentially responsible parties:

1. Any party or parties which owned, controlled, or directly managed the substances and/or the day to day activities which gave rise to the contamination of a site immediately before or during their release; or

2. Any party or parties which caused, directed, authorized, assented, or acquiesced to acts which gave rise to the contamination immediately before or during the contamination of a site.

Application of this principle to the terms owner of a pollutant, person having control of a pollutant and person responsible for the presence of a pollutant within EMPA is key in focussing the intent to apply the force of the Act to the actual polluter or owner of the pollutant. References to "successors and assignees" within the definitions of these terms within the Act are meant to apply to the successor of a corporate entity as opposed to the successor in title to contaminated land. As regards parties in their individual capacities, it is not the beneficiary of an estate that could face liability, rather it is simply intended to be the deceased's lawful estate.
Additionally, applying the principle of *polluter pays* means that certain parties will generally be excluded as potentially responsible parties, including:

1. **Innocent Purchasers and Municipalities**: simply being the registered owner of a contaminated site does not, in the absence of being the actual polluter (or legal successor of the polluter) invoke liability;

2. **Manufacturers, Suppliers, Transporters**: being a manufacturer, supplier, or transporter of substances does not invoke liability unless their actions through the process of delivery of that substance lead to the contamination of a site;

3. **Victims of Contamination**: being a neighbour to a contaminated site and affected by the migration of contaminants does not invoke liability, nor does an act of God, war or insurrection;

4. **Shareholders**: no provisions exist within EMPA which enable the Minister to impose environmental liability on shareholders of a corporate entity. However, officers, directors and agents of a corporation may be subject to liability where they directed, authorized, assented to or acquiesced in the contamination of a site through their very controlled and directed management role; or

5. **Lessors**: specifically, owners of a property which is subject to an agreed or imposed lease under the *Surface Rights Acquisition and Compensation Act*.

With respect to lenders, recent changes (1997) to the *Bankruptcy and Insolvency Act* establish priorities and provide protection from environmental liability for secured creditors to a large degree. Key changes are:

- personal protection given to trustees in 1992 has now been extended to receivers and interim receivers;
- the standard for personal liability of trustees has been raised from mere negligence (failure to exercise due diligence) to gross negligence or wilful misconduct;
- the estate can abandon contaminated sites; if so the trustee is not personally liable to comply with orders relating to that site, and clean-up costs for that site do not rank as costs of administration;
- when an administrative order is issued, the trustee has 10 days grace during which he/she can abandon the property, appeal the order or seek a stay of order while considering its options;
- clean-up costs are provable claims, no matter where they arise; and
- the Crown has a superlien against the contaminated property, but not other assets of the estate.
Step 3: Allocation (of Responsibility) and Apportionment of (Financial) Liability

Once potentially responsible parties have been designated and notified, the next step is allocating who will pay for clean-up and apportioning those costs among the parties. Potentially responsible parties will be invited to voluntarily propose a plan for remediation and given the opportunity to negotiate an agreement to determine how they will divide the costs between them. During this voluntary phase SERM would provide potentially responsible parties with a reasonable time period (for example sixty days) to reach agreement on the remediation plan and the apportionment of costs.Potentially responsible parties will be advised of the allocation and apportionment factors described below to assist them in resolving the situation if they so desire. If the potentially responsible parties are unable to reach agreement voluntarily, SERM would help design a mediated process to resolve the allocation and apportionment of costs. SERM's participation in voluntary mediated discussions would be subject to the decision of the potentially responsible parties. Any remediation plan which is forthcoming from these voluntary processes would be subject to the agreement or approval of the department in terms of timing and technical acceptability.

Where both these voluntary options fail to resolve the concerns of potentially responsible parties, SERM will evaluate the parties to determine fault and degree of financial responsibility using the previously noted "polluter pays" principle with attention to opportunities for openness, accessibility and participation for involved parties and the apportionment factors described below. Decisions from this allocation and apportionment process must be manifested as a Minister's order which would remain as the final tool which may be employed to resolve liability. Should designated responsible parties fail to act on the order, SERM may undertake or enter into agreements to carry out remediation (EMPA s.7) and recoup cost from any or all responsible parties by filing a claim with the Court of Queen's Bench. [Responsible parties aggrieved by an order may appeal to the Court of Queen's Bench within 30 days of the date of the order. Similarly, provisions exist within EMPA for appeals to the Court of Appeal for parties aggrieved by a decision of the Judge of Her Majesty's Court of Queen's Bench.]

The following non-inclusive summary lists examples of factors, not in order of priority which the Minister may use to apportion the cost of remediation amongst responsible parties:

- when the contaminant became present at the site;
- with respect to present or previous owners, lessees or occupants, including but not limited to:
  - whether the contaminant was present at the site when ownership was taken;
  - when the owner/operator knew or should have taken reasonable steps to discover the presence of the contaminant;
  - whether the presence of the contaminant ought to have been discovered by the owner/operator when ownership/control was assumed, had reasonable steps been taken to determine the existence of contamination at the site;
  - whether the presence of the contaminant was caused solely by the act or omission of an independent third party;
  - the price the owner paid for the site and the relationship between that price and fair market value of the property had the contaminant not been present at the time of purchase:
• with respect to a previous owner, whether the owner, with knowledge, sold the property without disclosing the presence of the contaminant at the site to the purchaser;
• the extent to which the party took reasonable steps to prevent the presence of the contaminant at the site;
• the extent to which the party dealing with the contaminant followed the accepted industry standards and practices of the day;
• the extent to which the party dealing with the contaminant followed the laws of the day;
• on becoming aware of the presence of the contaminant, did the party contribute to further accumulation or the continued release of the contaminant;
• what steps did the party take on becoming aware of the presence of the contaminant;
• whether the party benefited from the activity resulting in the contamination, and what was the monetary value of that benefit;
• the degree of a party’s contribution to the contamination, in relation to the contribution of other responsible parties;
• the quantity, nature and toxicity/degree of hazard, damage and risk of the contaminant (amongst a group of contaminants) that was discharged or otherwise released into the environment; and
• understanding the consequences of the activity that caused the contamination and of the contamination.

Step 4: Remediation Planning

Once a contaminated site has been identified, assessed and the responsible parties have been engaged or determined, tools such as numerical guidelines and risk assessments coupled with the principles and processes for making risk management decisions are used to evaluate what specific action will be necessary to manage contamination at a site. While this discussion appears as Step 4 in the contaminated site management process, it is a normal extension of the site identification and assessment process (Step 1 - Site Identification) and is often necessary in order for responsible parties to settle on cost apportionment, particularly if the voluntary route is chosen (Step 3 - Allocation and Apportionment of Liability).

In resolving or finalizing management plans for contaminated sites and within the existing legislative framework SERM considers the risk that a site presents to human and environmental health as the most important factor in establishing the need and priority for management action (See Principle 3 in Section 1 of this document). Management of contaminated sites may include one of a spectrum of corrective or monitoring actions over a range of potential time frames. In some cases if significant risks are not apparent and if there is little likelihood of contaminant migration, it may be considered satisfactory to simply monitor the contamination. In other cases management of contamination may include use of options which limit exposure, prevent the migration of contaminants (containment or encapsulation), in-situ treatment, removal and treatment/disposal of contaminants or through the use of a combination of these and other methods. Submission of decommissioning and remediation plans is a regulatory requirement in some instances, particularly as pertinent under s.17 of The Hazardous Substances and Waste Dangerous Goods Regulations and s.6 of The Environmental Spill Control Regulations.
Priorities for actions to manage contamination may range from immediate, in the case of extreme risk emergency situations, to low priority in situations where impacts may only occur over the longer term if corrective actions are not taken. Wherever possible, site management plans must be undertaken before impacts occur or as soon as practical to limit the extent of impacts. It must be noted however that other factors may also influence when site management plans are undertaken, examples being specific existing permits, approvals or regulatory requirements, redevelopment schedules associated with property transactions or other factors. Throughout this process SERM will consider the risks to environmental and human health, financial and social circumstances to achieve a balance between environmental protection and social-economic concerns and thereby resolve which remedial actions are needed and when they must be scheduled.

When it is found that contaminated site management is necessary, the department remains flexible as to the approach selected by the responsible parties and focuses on end results rather than specifying methodologies or actions. The department provides assistance or guidelines with the goal of aiding responsible parties in the planning and selection of appropriate remediation options. Furthermore, where SERM's involvement with contaminated site management projects stems from permits, approvals or other regulatory requirements, a review of management plans, resolution of details during contaminant management projects and review of completed work are generally involved and are all aimed at selecting, undertaking and completing risk management projects in an efficient manner. If unexpected circumstances are encountered during remediation, there may be a need to revisit a remediation plan or directly consult with the department to deal with problems should they arise. This occurrence should be foreseen and included as a component of remediation plans.

In the simplest of cases where a risk management decision must be taken to apply environmental criteria to a specific site, such as the application of an established future land use based guideline, it may be adequate to simply compare conditions encountered at the site with guideline values to determine the physical extent of the desirable management activities. In more complex situations where risk assessment based guidelines are to be employed, several factors are considered in reaching risk management decisions, including:

- identification of contaminants present;
- risk characterization - an estimation of risk and the uncertainty in that risk;
- toxicity assessment - an evaluation of the types of toxicity that the contaminant(s) can produce and an evaluation of the conditions of exposure - dose and duration - under which the contaminants' toxicity can be produced;
- exposure assessment - an identification of the conditions - dose, timing, duration - under which the populations whose risk is being evaluated is or could be exposed to the contaminant;
- risk acceptability;
- public perception of risk;
- socio-economic impacts; and
- technical feasibility.
Risk communication is considered to be a key component of the risk management decision making process. Although the extent of risk communication varies between small and larger projects, it is recognized as a key element in maintaining transparency, openness and stakeholder involvement.

The "Risk Assessment Based" approach is generally employed when there are significant ecological concerns (e.g., critical or sensitive habitats for wildlife; rare, threatened or endangered species; etc); large or complex sites requiring management action; or other special site characteristics. When risk assessment based guidelines are to be developed and employed, both human health and ecological risk assessments are performed, unless specifically absent from the concerns at the site. A number of science and consultation-based documents developed by CCME and Environment Canada are available and describe the application of risk assessment in working towards guideline development protocols for protection of human and environmental health. These documents are available to guide in the development of risk assessment based remediation guidelines. Examples include:

A Framework for Ecological Risk Assessment: General Guidance, (CCME, 1996c);

A Framework for Ecological Risk Assessments; Technical Appendices, (CCME, March 1997); and


Readers are referred to SERM's "Risk Based Corrective Actions for Petroleum Contaminated Sites" (November 1995) to gain further insight and explanation surrounding existing planning and management options. These guidelines exemplify a "tiered" and "risk-based" approach to contamination management. The intent of a "tiered" approach is to provide flexible options for responsible parties while remaining adaptive to a number of situations where site specific factors warrant further consideration.

**Step 5: Site Clean-up and Sign-off**

In order to ensure remediation or management plans for contaminated sites fulfil their objectives, SERM monitors the progress of remediation projects. This may take the form of an on-site presence by department personnel, ensuring that qualified individuals perform or supervise remediation, through reporting and review of remediation activities or a combination of any or all of these methods. In some cases monitoring or management activities associated with contaminated sites are actually regulatory requirements as described in s.17 of The Hazardous Substances and Waste Dangerous Goods Regulations and s.7 of The Environmental Spill Control Regulations.

In terms of formal sign-off or release, only The Mineral Industry Environmental Protection Regulations, 1996 make provisions for release of governed operations from decommissioning and reclamation requirements or obligations. Specific provisions for release for operations or facilities governed under The Environmental Management and Protection Act and other pursuant regulations do not exist, however SERM has in the past provided informal comment to responsible parties following completion of remediation activities pursuant to the Act or any
associated regulations. These informal comments focus on the adequacy of remediation activities and/or attainment of remediation criteria, where the department has guidelines applicable to the project being considered. Generally, since remediation plans are directed in terms of risks to environmental and human health at a site, comments regarding adequacy of clean-up efforts will be framed in the context of the risks that were intended to be addressed and the status of any that remain or were not addressed. Formal releases provided under The Mineral Industry Environmental Protection Regulations or informal comments will be of assistance in providing greater certainty for responsible or other involved parties within the limitations of the governing legislation. However, SERM is not authorized or obliged to provide sign-off on other projects or activities unless regulatory approval for remediation or decommissioning activities is required and sought by responsible parties.

Policy Evaluation

After a suitable time period, SERM will evaluate the effectiveness of this model in addressing contaminated site remediation/liability. The department will determine if revisions to the model are necessary, or if changes to the legislation or regulations are required.

A Short Note on the Issue of Orphan Shares/Sites

While contaminated sites without responsible parties presently exist, SERM has taken actions to prevent the creation of additional sites in the future through existing licencing processes, environmental assessment processes, and legislative instruments such as the Mineral Industry Environmental Protection regulations which include financial assurances for decommissioning. In fact many of SERM’s guidelines and regulations have a pollution prevention focus.

Under the approach advocated here, an orphan share may arise when a responsible party can only pay a portion of the total extent of their allocated liability and has no further assets available to which the remaining liability can be applied. When all the shares of liability for site clean-up cannot be allocated, the site is referred to as an orphan site.

SERM recognizes that orphan shares and sites will continue to be identified in the province. Prior to or during SERM’s evaluation of this process, the department proposes to assess the applicability of sector funds or other alternatives for addressing orphan shares/sites, for example, in the downstream petroleum sector.
October 23, 1998

Dear Sir/Madam:

The resolution of contaminated site liability is an important issue for Saskatchewan Environment and Resource Management (SERM). In early 1996, I appointed the Contaminated Site Liability Advisory Group (CSLAG) to address the questions of how to better manage contaminated sites in Saskatchewan. The Group was composed of representatives from industry, municipalities, small business, financial institutions and other interest groups. In the summer of 1997, CSLAG tabled their report entitled “Report of the Minister’s Advisory Group on Contaminated Site Liability in Saskatchewan” and made recommendations on: the application of the Canadian Council of Ministers of the Environment (CCME) principles in a Saskatchewan context; the identification of contaminated sites; clean-up requirements; and allocating responsibility and liability related to site remediation.

Over the past year, SERM has been reviewing its approach for the management of contaminated sites. The attached discussion paper, Environmental Liability and Contaminated Site Management - A Strategic Approach, is in part, a response to the CSLAG report and outlines SERM’s proposed model to deal with these issues.

The proposed process model describes the approach SERM plans to follow for the management of contaminated sites in the province. You will notice many of the approaches adopted by the department are consistent with the principles and recommendations outlined by CCME and CSLAG. Although a large portion of the contaminated site management approaches outlined in this discussion paper are within the scope of the existing legislation, SERM recognizes that certain aspects of the strategy may need to be formally adopted through legislation. If necessary, SERM will recommend appropriate legislative change in the future.

Your ideas, comments and suggestions are important to us and they will be carefully considered in our future work to manage contaminated sites in Saskatchewan. Please forward your comments to:

Director
Environmental Protection Branch
Saskatchewan Environment and Resource Management
3211 Albert Street
REGINA SK S4S 5W6
Or FAX 306-787-0197

Your inputs and continued support are much appreciated.

Yours sincerely,

Lorne Scott

Enclosure
APPENDIX “C”

The enactment of the Department of the Environment Amendment Act, 1980, 1979-80, c.58 (the 1980 Amending Act), effective June 3, 1980, amended the Department of the Environment Act, 1972, S.S. 1972, D-14 by adding, inter alia, the following provisions:

2(c.2) "discharge" includes drain, deposit, release or emission.

2(h.1) "owner of a pollutant" means the owner of a pollutant immediately before the first discharge of the pollutant, and includes a successor, assignee, executor or administrator of the owner;

2(h.2) "person having control of a pollutant" means the person having the charge, management or control of the pollutant immediately before the first discharge of the pollutant, and includes a successor, assignee, executor or administrator of the person;

2(h.3) "pollutant" means a substance which results, or may result, in pollution of the environment.

12.21 -- (1) Notwithstanding any other Act, regulation, bylaw, order, permit, approval or licence, where, in the opinion of the minister, a pollutant has been discharged, accidentally or otherwise, he may by order direct the owner of the pollutant or the person having control of the pollutant, or both, to take any measures that the minister considers advisable to:

(a) investigate the situation;

(b) prevent further discharge of the pollutant;

(c) contain the pollutant;

(d) minimize the effects of the pollutant on the environment;

(e) remedy any adverse effect of the pollutant on the environment;

(f) restore the area affected by the discharge of the pollutant and the environment to a condition satisfactory to the minister.

(2) The minister may amend, vary, supplement or revoke any order made under this section.

(3) All orders made under this section must:

(a) set out the measures which the minister requires to be taken; and

(b) specify the time within which the order is to be complied with.
(4) The minister is under no duty to give a hearing to any person before making an order under this section.

The first occurrence of the predecessor civil liability provision contained in the current Section 13 of the EMPA took place with the enactment of the 1980 Amending Act effective June 3, 1980 which amended the proceeding legislation by adding the following Section 12.9:

12.9 -- (1) In this section, "loss or damage" includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income.

(2) The amount of any costs and expenses incurred in respect of investigations or actions taken pursuant to section 12.2, 12.3 or 12.4 are a debt due to and recoverable by Her Majesty in right of Saskatchewan from the owner of the pollutant and the person having control of the pollutant.

(3) Subject to subsection (4), any person, including Her Majesty in right of Saskatchewan or in right of Canada, has a right to compensation from the owner of the pollutant and the person having control of the pollutant for loss or damage incurred as a result of:

(a) the discharge of a pollutant;

(b) the execution or intended execution of an order made under section 12.21;

(c) neglect or default in the execution of a duty imposed or an order made under section 12.21 or 12.5; or

(d) any investigations or actions taken pursuant to section 12.2 or 12.4;

without proof of fault, negligence or wilful intent.

(4) No owner of a pollutant or person having control of a pollutant is liable under subsection (3) if he establishes that the discharge of the pollutant was wholly caused by:

(a) an act of war, civil war, insurrection or an act of hostility by the government of a foreign country;

(b) a natural phenomenon of an exceptional, inevitable and irresistible character not reasonably foreseeable; or

(c) any combination of the events described in clause (a) or (b).

(5) Notwithstanding subsection (4), the owner of a pollutant or the person having control of a pollutant is liable for:

(a) loss or damage that is a direct result of his own neglect or default in carrying out a duty
imposed or an order made under section 12.21 or 12.5; and

(b) any costs and expenses described in subsection (2) of this section.

(6) No person is liable to any action under this section unless the action is commenced within six years from:

(a) the day when the last of the costs and expenses were incurred, where the claim arises under subsection (2);

(b) the day when the person knew or ought to have known of the loss or damage, where the person commencing the action incurred loss or damage as a result of the discharge of a pollutant; or

(c) the day when the person knew or ought to have known of the loss or damage, where the person commencing the action incurred loss or damage as a result of the execution or intended execution or neglect or default in the execution of an order made under section 12.21.

(7) The right of action granted under this section is in addition to, and not in derogation of, any other right of action or any other remedy available otherwise than under this section.

(8) Notwithstanding the absence of fault or negligence, the provisions of The Contributory Negligence Act apply, mutatis mutandis, to an action under this section.
Action On
Contaminated Sites

Background information

The new Contaminated Sites Team

A list of contaminated sites

**Note** All site names used in this list are working titles only and are used by the department to identify the location of the site. These names are not necessarily meant to imply ownership, responsibility or liability.

March 4, 1993

For More Information Contact:

Randy Sentis, Assistant Deputy Minister and acting Team Leader at 787-6167 (Regina)
Collect calls accepted.
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Action on Contaminated Sites

Contaminated sites are often the result of many years of poor operational practices. These past practices and the resulting levels of pollution at these sites are unacceptable by today's environmental standards.

Modern environmental laws provide for immediate cleanup of spills and other pollution as soon as it occurs. However, dealing with the leftover contaminated sites from the past is a challenge.

Often the original polluters of the site are no longer in operation or no longer own the site. Every site is different in terms of its technical questions, health concerns, costs, liability issues and community needs. Determining the real risks, the priorities and the means of sharing responsibility have to be done on a case-by-case basis. And the process should involve all the people involved at that site both in the past and today. The high cost of cleanup, and question of who should and can bear the cost, are always of major interest to companies, financial institutions, landholders, municipalities, governments and taxpayers.

Determining a List of Contaminated Sites

A series of key events have lead up to the current list:

1. The Canadian Council of Ministers of the Environment initiated the National Contaminated Sites Remediation Program in 1989. To receive funding under the program, sites had to qualify as "orphan sites" or demonstrate a new cleanup technology.

2. Environment and Public Safety hired a consultant in 1990 to prepare a list of "active and orphaned, potentially contaminated sites". The consultant prepared a report of sites from information supplied by a survey sent to all municipalities, industries and institutions in the province. The report ranked sites, but this ranking was based upon his own classification system because national guidelines were not available at that time.

3. The following year, national guidelines did become available. The National Classification System for Contaminated Sites was released by the Canadian Council of Ministers of the Environment in 1991. In 1992, the environment department used these guidelines to re-examine the list of sites which the consultant had considered of most concern, and to develop a course of action.
As a result, the department has:
- created a Contaminated Sites Team to centralize and coordinate action; and
- has grouped the contaminated sites into three categories according to action required: current action, future action or further study.

(Additional sites have been added based upon investigations by the department since the 1991 report. Some sites have been removed in that period of time because they have been cleaned up.)

1. **Sites under Current Action**

   This list includes:
   - sites which have remediation plans and public involvement underway;
   - sites to be immediately investigated further;
   - sites for which stakeholder commitment to cleanup has been confirmed and which now requires the development of a cleanup plan; and
   - any new sites which may be identified in the future as posing an immediate hazard to the public or environment.

2. **Sites Requiring Future Action**

   A site where there is minimal impact on the public and the environment.

   Generally, pollution at these sites is low level, contained in a stable situation, and will be cleaned up as the property is developed in the future. Environment and Public Safety will continue to monitor the safety of these sites.

3. **Sites Requiring Further Study**

   These are sites where the risk from pollution is considered to be low but where further study is required to verify the extent. Ongoing monitoring of the sites to ensure safety standards, will be conducted by Environment and Public Safety. The Contaminated Sites Team will coordinate these monitoring programs.
How Joint Cleanup Actions are Developed

In recent years, while the inventory of sites was being drawn up, the government proceeded with cleanup activity at a number of sites of known concern. The approach to these cleanups has been based on a public process involving the participation of all parties involved at each site. This is the process the Contaminated Sites Team will employ.

The process involves four steps:

1. Environment and Public Safety invites all stakeholders at a site to a meeting to initiate the planning process for cleanup. Stakeholders include landowners, business operators, lease holders, financial institutions, local citizen groups and occasionally private interest groups.

   This meeting puts issues and conflicts on the table and initiates the development of the partnership approach to resolving the contamination problem.

   This process and its resulting actions are made widely known to the public and to the news media.

2. The stakeholder group or subcommittees of the group continue to meet and develop a plan to inventory and detail the extent of the contamination.

3. Once the scope of the problem is known, the stakeholder group work out a remediation plan for the site. Experience has shown that working together reduces duplication of effort and can save time and money. Cooperation at the planning stage also reduces the level of conflict during site cleanup.

4. The final step in the process is the actual clean-up work which may be shared by several stakeholders. Cleanup is monitored by the stakeholder group and by Environment and Public Safety.
1. Sites under Current Action

This list includes:
- sites which have remediation plans and public involvement underway;
- sites to be immediately investigated further;
- sites for which stakeholder commitment to cleanup has been confirmed and which now require the development of a cleanup plan; and
- any new sites which may be identified in the future as posing an immediate hazard to the public or environment.

1. Baildon; B.A. Oil Refinery Dump Site

Nature of the Problem: B.A. Oil refinery dump site is located approximately 6 Kilometres south east of the City of Moose Jaw. The site covers an area of approximately 442 feet by 473 feet and has been abandoned since 1970. In the past, it was used as a waste caustic and waste oil disposal dump by the refinery. The waste materials were deposited into unlined pits, which was acceptable practise at the time. Due to the lack of subsurface protective liners in the disposal pits, the contaminants have contaminated the groundwater.

Scope of the Problem: Contaminants are suspected to be Sulphur, Hydrogen Sulphide, Oil, and other toxic impurities.

Results from sampling verified that the ground water was highly contaminated with unacceptable levels of Arsenic, Cadmium, Chromium, Nickel, Phenol, Sulphide and Vanadium. And due to the caustic nature of the contaminant the ground water pH has dramatically increased. The combination of high pH and unacceptable levels of toxic impurities has made the ground water unfit for domestic consumption. The leachate effluent in the ground water may eventually reach the Moose Jaw River and Baildon Coulee, thus, degrading the quality of these valuable water resources.

The volume of contaminant is presently unknown.

Action: Preliminary site evaluation has been performed. Department is currently investigating current ownership of site.
2. City of Regina Landfill, Regina

Nature of the Problem: The City of Regina Existing Landfill is situated above the Regina Aquifer system, which provides approximately 20% of the city’s water supply. No contamination has been detected in the deep Regina aquifer which is used for the city water supply. The Regina Aquifers Sensitivity Mapping and Land Use report prepared by Environment and Public Safety identified that the landfill is located in an area of high groundwater sensitivity. Groundwater monitoring has been in place at the landfill for the past several years to monitor the water qualities of the two aquifer zones.

Scope of the Problem: Some contaminants have reached the shallower Condie aquifer due to the combination of an insufficient protective subsurface liner and high groundwater table. The contaminants are suspected of originating from household and industrial waste disposed at the landfill. The latest tests conducted on the groundwater samples revealed unacceptable levels of Chloride, Nitrate and Sulphate.

Action: The City is presently developing proposals for a new site. The development of remediation plans on the old site would be dependant on a decision on future site location.

3. Consumers’ Cooperative Refineries Limited, Regina

Nature of the Problem: The refinery is situated above the Regina Aquifer system, which provides approximately 20% of the city’s water supply. No contamination has been detected in the deep Regina aquifer which is used for the city water supply. A petroleum refinery has been operated at this site since the early 1900’s. A major expansion took place in the late 1980’s which allowed the facility to process heavy oil. When first sited the facility was quite removed from the city of Regina, however growth of the city has almost engulfed the refinery complex.

Scope of the Problem: The refinery complex processes light and heavy crude oil into retail fuel products. The refining process results in the production of several waste streams such as coke, oil sludges, tank bottoms, oily waste water and oil contaminated soils. Due to operational practises through the years there have been accidental spills at the site which have resulted in contaminated soil and groundwater areas. These operational practises were acceptable at that time.
Certain areas are contaminated to such an extent that there is free product floating on the water table. Inappropriate landfiling of sludges, catalysts, caustics and petroleum/hydrocarbon contaminated soils also present environmental concerns. The site requires remediation due to the high levels of hydrocarbons in the soil and water, the heavy metals in the soils, elevated pH (caustic) levels in the soil and the inappropriate storage of waste materials.

**Action:** The department is involved in ongoing discussions with the company. A waste management plan for the site is currently under review by the department. Remediation involving product recovery has been initiated at some sites and an intensive groundwater quality monitoring program is in place. A new wastewater treatment facility was recently completed which has eliminated an important source of groundwater contamination.

### 4. Federal Pioneer Ltd. (F.P.L.), Regina

**Nature of the Problem:** F.P.L. is located in an commercial part of the city less than 100 metres from a residential area. The company was involved in manufacturing electrical transformers containing PCBs used as a coolant.

A spill of up to 21,000 litres of pure PCB liquid occurred in 1976 at the F.P.L. plant as a result of an underground line break. Due to the absence of a disposal facility for large volume of PCB contaminated soil and a cost-effective technology to destroy PCBs in soil at the time of the spill, FPL was allowed to isolate the PCB contamination by constructing underground bentonite walls and paving the entire surface of the site. These steps were taken to prevent groundwater and surface water infiltration into the contaminated zone. Also, highly contaminated surface soil was excavated and placed into a storage cell on the site. Presently, the site is owned by SaskPower. The site is used for storage by SaskPower.

**Scope of the Problem:** The site is located nearby a residential area and situated above the Regina Aquifer. As stated above, the bentonite walls seems to be providing an effective protection against the infiltration of groundwater into the site. Concerns exist about whether complete containment of the PCB contaminant has been achieved.

**Action:** SaskPower is currently maintaining the site and supplying monitoring data to the department. Investigation of remedial technologies will be performed by Sask Power.
5. Interprovincial Co-operatives Ltd. (IPCO), Saskatoon

Nature of the Problem: The IPCO property is located near Warman Road and is approximately 0.5 Kilometres from the South Saskatchewan River. Herbicides including 2,4-5 T and 2,4-D were first produced by IPCO in 1961. From 1963 to 1970 IPCO injected waste herbicides into a deep disposal well. In addition to the disposal well, large amounts of wastes were discharged into a pit on the property. Waste by-products discharged into the pits consisted of spoiled batches of products and solid wastes such as steel barrels, concrete rubble and wood. The pit and disposal well were remediated and decommissioned during the 1980’s.

Scope of the Problem: Some residual contamination remains on the property. Surface water may infiltrate the contaminated soil which may allow contamination to pass thorough and reach the groundwater. This groundwater may discharge directly into the South Saskatchewan River. Such migration can persist for many years. Currently, the site is inactive and owned by a private company.

Action: Study of the site is ongoing. Department will be meeting with stakeholders again in the immediate future.

6. Magnum Oil Company Ltd., Saskatoon

Nature of the Problem: Magnum Oil is located approximately 8 Kilometres north of Saskatoon on Highway #12. They operate a small re-refinery on a seasonal basis which recycles used motor oil obtained from the local farmers and the citizens of Saskatoon. The recycled oil is sold from a small depot in Saskatoon. The recycled product includes various grades of motor oil. Spent acid clay (an oily sludge containing hydrocarbons, acids and heavy metals) is a waste dangerous good in the process which is being disposed of in unlined disposal pits on the property.

Scope of the Problem: Sampling and testing conducted on the spent acid clay by SEPS (1989) revealed that it contained high concentrations of Lead, Zinc and Hydrocarbons. The pH of the acid clay sludge is extremely low, thus, making it highly corrosive. The lack of proper waste dangerous good storage may potentially lead to contamination of a nearby well, the groundwater and/or the surrounding soils.

Action: Department presently reviewing remediation proposals for the site.
7. Northern Petroleum Refinery, Kamsack

Nature of the Problem: The Northern Petroleum site is located less than 1 kilometre east of Kamsack. The Assiniboine River is located approximately 300 metres east of the site. A petroleum refinery was in operation at this site for approximately 30 years until a fire shut down operations. The operation ceased and most of the equipment was dismantled. However, the site was never properly decommissioned and oil pits and petroleum-contaminated soil still exist at the site.

Scope of the Problem: The refining process requires the use of several products such as catalysts, acids, bases, which then results in the production of several waste streams such as coke, waste caustics, oil sludge, tank bottoms and oil contaminated soils. The local soil is sandy which allows precipitation to percolate contamination to the underlying aquifer. If a severe contamination at the site exists, the contamination could eventually find its way into the Assiniboine River.

In 1990, preliminary soil analysis was carried out on the site. The soil was contaminated with Benzene, Lead, Phenol and Toluene but the contaminant concentrations did not exceed the levels outlined in the CCME Environmental Quality criteria for Contaminated Sites for Industrial and Commercial sites. The 1991 soil analysis results were similar. The soil testing carried out on the site is considered to be inadequate to accurately judge the site contamination status. The site requires intensive and comprehensive soil sampling to verify the 1990/91 soil analysis results. Presently, the contaminants are not known to have reached the aquifer or the river.

Action: The department has done preliminary test drilling at the site and confirmed that there is a contamination problem. The site may qualify as an orphan site under the Federal/Provincial Contaminated Sites Program.

8. NWR Salvage Operations, Saskatoon

Nature of the Problem: NWR Salvage operated a battery salvage and scrap iron yard 8 Kilometres west of Saskatoon since 1987. Activities included open burning of tires, battery casing and scrap material and the dumping and spreading of sulphuric acid (extremely corrosive acid) obtained from the battery salvage operations.

Scope of the Problem: Soil testing conducted in September 13, 1991 by SEPS revealed that the site was highly contaminated with lead and sulphuric acid, posing a serious threat to local groundwater supplies and active wells in the area.
Action: Environment and Public Safety staff attempted to assist NWR with their waste management, but NWR did not clean up the site. On June 4, 1992, the owner of NWR was found guilty of violating the Environmental Spill Control Regulation of Saskatchewan by the provincial court. A jail term and fine were levied.

Further pollution at the site has ceased; an investigation into the appropriate actions to ensure site clean up has begun.

9. Prince Albert Industrial Park Site

Nature of the Problem: Located within the City of Prince Albert, this site is heavily contaminated with creosote and other wood preservative chemicals including pentachlorophenol. This pollution is the result of wood treatment operations in the area dating back to the 1930s and terminating in 1976. A storm sewer installed in 1979 compounded the problem by speeding up the contamination escape into the North Saskatchewan River.

Scope of the Problem: Immediate danger exists 100 metres downstream from the sewer outfall on the river bank. Contamination levels outside this area are no immediate threat. Long term effects of the pollution are of concern.

Action: In 1991 the department initiated a stakeholder clean-up process for this site. Landowners are currently examining test-drilling data and will soon develop a remediation plan for the site. Ongoing meetings with stakeholders are continuing.

10. SaskPower Estevan Generating Station

Nature of the Problem: Located 10 kilometres south of Estevan the old power station, which is now shut down, has a large storage lagoon of coal ash slurry, a by-product of burning coal. The ash lagoon is approximately 400 metres north of the Souris River. Ground water in this area is used for domestic purposes.

The ash lagoon covers an area of 8 hectares and has no liner to prevent seepage into the soil beneath it. Contaminants include barium, boron and sulphate in a highly corrosive mixture which would be very destructive to local water supplies.
Scope of the Problem: The lagoon itself is dry ash which is stable and doesn't pose any immediate health hazards. The chief concern is potential contamination of local ground water supplies from leachate seeping down from the lagoon.

Action: Sask Power has indicated they are committed to undertake remedial activities at the site. The department has been involved in ongoing discussions with the company to develop a clean-up plan. Surface waters and plant discharges have been monitored over the past several years, this information will form the basis for a remedial plan.

11. Shragge Steel, Regina

Nature of the Problem: Shragge Steel is located in the older part of Regina's downtown area. The site was used for metal smelting, car battery storage and hardware/steel sales. Past activities have lead to a high level heavy metal contamination of the soil. The contaminated soil is currently contained within the building structure. The building provides an adequate containment and prevents the contaminant from spreading. The City of Regina is concerned about the structural integrity of the building. The building poses a potential danger to the public due to its dilapidated condition.

Scope of the Problem: On March 8, 1991 a soil testing program was conducted by the City of Regina on the Shragge Steel property. The analysis on the soil samples revealed that it was contaminated with cadmium, chromium, copper, lead, mercury, PCB and various hydrocarbons. The greatest concern for this site is the high concentrations of lead and the close proximity to the downtown core population. The contaminants will be adequately isolated from the people and the environment, as long as the building remains over the contaminated area.

Action: The site is presently secure. Further investigation is required to determine extent of contamination and the required cleanup.
12. Weyerhaeuser Canada Pulp Mill, Prince Albert

Nature of the Problem: Weyerhauser Canada's pulp mill, approximately 20 kilometres east of Prince Albert has been in operation since 1968. Over the years, solid wastes were landfilled on the site or sent into the river. Weyerhauser's landfill site is approximately 62 hectares in size. Within the landfill is an industrial sludge disposal area of about 9 hectares.

For about 15 years three environmentally dangerous wastes were dumped into this unlined and unprotected industrial sludge disposal site. They were disposed along with various other potentially less dangerous wastes. The three potentially dangerous wastes disposed in the sludge disposal site makes up a small fraction of the total volume but they have tainted a large portion of the total waste volume.

The total waste volume at the sludge disposal site is estimated at one million cubic metres.

Scope of the Problem: The contaminants in the active industrial sludge disposal site are known to have reached the local groundwater. An analysis on the groundwater has revealed that it is contaminated with unacceptable levels of Arsenic, Chromium, Iron, Lead and Sodium. Due to the geology of the Weyerhauser location, the contaminated groundwater can flow through an upper sand layer and discharge directly into the North Saskatchewan River.

Action: The company has cleaned up several of its contaminated areas on its property. The department is engaged in an ongoing discussion with the company to develop a clean-up plan for the remaining sites.
2. **Sites Requiring Future Action**

A site where there is minimal impact on the public and the environment.

Generally, pollution at these sites is low level, contained in a stable situation, and will be cleaned up as the property is developed in the future. Environment and Public Safety will continue to monitor the safety of these sites.

**Location**

**Description**

Agriculture Canada:
Indian Head

Agriculture Canada experimental farm, the site was used as an open pit for agricultural waste disposal (dead animals and pesticide waste). The site has been converted to a landfill and allowed to revegetate.

Amoco:
Gull Lake

Tank bottoms, weathered oil and spill debris disposed of in pits. Oily materials are beginning to resurface.

*Note* Ownership of this site is currently under review.

Chemtec:
Regina

Chemical manufacturing company with past chemical spills and inadequate storage and disposal.

Davidson Hotel Square:

The hotel's parking lot is beside an abandoned gasoline service station. Extensive leaking of the gasoline from the abandoned service station's underground tank has contaminated most of the parking lot.

*Note* The Town of Davidson recently announced that cleanup of the site will begin soon.

Dept. of National Defense Dana:

Former Canadian Forces Base. Lime pits and unknown pits - possibly domestic waste, chemical solvents and cleaners, herbicides, pesticides, PCB and waste oil.
Future Action Sites contd...

<table>
<thead>
<tr>
<th>Location</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dominion Bridge: Regina</td>
<td>Potential minor PCB and solvent contamination.</td>
</tr>
<tr>
<td>Gunnar/Lorado</td>
<td>Tailings left from uranium mines that were not effectively decommissioned in the 1960’s.</td>
</tr>
<tr>
<td>Kindersley Landfill:</td>
<td>A municipal sanitary landfill with known past contamination of asbestos, paints, solvents, septic effluent and waste oil. Large quantities of waste oil from oil patches and other waste dangerous goods buried in the landfill.</td>
</tr>
<tr>
<td>Kleyson:</td>
<td>Salt contamination at a potash-related trucking facility.</td>
</tr>
<tr>
<td>Lehner Wood Products: Prince Albert</td>
<td>Pentachlorophenol, other wood treating chemicals and waste water. Contamination at the site as a result of wood preservation processes.</td>
</tr>
<tr>
<td>Lloydminster Abandoned: Landfill</td>
<td>Municipal landfill suspected of being contaminated with waste oil.</td>
</tr>
<tr>
<td>Lloydminster Active Landfill:</td>
<td>Municipal landfill suspected of being contaminated with waste oil.</td>
</tr>
<tr>
<td>Moose Jaw Asphalt:</td>
<td>An industrial site having soil and water contaminated by hydrocarbons and asphalt. Current owners have initiated remediation.</td>
</tr>
<tr>
<td>Prince Albert Current Landfill:</td>
<td>Municipal landfill. The hydrogeology of the site is characterized by high groundwater table and leachate movement towards the N. Sask. River.</td>
</tr>
</tbody>
</table>
Future Action Sites contd...

<table>
<thead>
<tr>
<th>Location</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prince Albert</td>
<td></td>
</tr>
<tr>
<td>Simpson Timber Company:</td>
<td>A timber processing sawmill. The Gas/Diesel contaminated soil is being treated on site.</td>
</tr>
<tr>
<td>Hudson Bay</td>
<td></td>
</tr>
<tr>
<td>Watkins Farm near Moose Jaw:</td>
<td>Gravel and rock quarry located on a farm near Moose Jaw. Diesel fuel was released into a coarse gravel area.</td>
</tr>
</tbody>
</table>

3. Sites Requiring Further Study

These are sites where the risk from pollution is considered to be low but where further study is required to verify the extent. Ongoing monitoring of the sites to ensure safety standards, will be conducted by Environment and Public Safety. The Contaminated Sites Team will coordinate these monitoring programs.

<table>
<thead>
<tr>
<th>Location</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alsask Dept. of National Defense (DND):</td>
<td>Used oil and antifreeze were dyked and burned in the disposal pits.</td>
</tr>
<tr>
<td>Lloydminster Present Sewage Lagoon:</td>
<td>Disposal method by irrigation or draining into N. Sask. River.</td>
</tr>
<tr>
<td>Mobile Oil: R.M. of Storthoaks #31</td>
<td>Brine contamination as a result of oil and gas extraction.</td>
</tr>
<tr>
<td>Northern Telecom Saskatoon:</td>
<td>Chemicals from optical fibre cable production.</td>
</tr>
<tr>
<td>R.M. of Bengough #40 Pit:</td>
<td>Pit filled with dead cattle result of Anthrax outbreak.</td>
</tr>
</tbody>
</table>
Study Sites contd...

<table>
<thead>
<tr>
<th>Location</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sask Power Site</td>
<td>Under ground electrical cable with PCB insulation.</td>
</tr>
<tr>
<td>R.M. of Emerald #277:</td>
<td></td>
</tr>
<tr>
<td>Prince Albert Former Landfill:</td>
<td>Municipal landfill with no documented decommissioning and potential for industrial wastes.</td>
</tr>
<tr>
<td>Prince Albert Former Snow Dump:</td>
<td>Unsecured dump site for snow, asphalt, concrete and construction materials near the North Sask. River.</td>
</tr>
<tr>
<td>R.M. of Maple Creek #111:</td>
<td>Unauthorized dumping of pesticide containers.</td>
</tr>
<tr>
<td>R.M. of Maple Creek #111:</td>
<td>Well drilling product disposal site in an alkaline slough.</td>
</tr>
<tr>
<td>R.M. of Corman Park #344:</td>
<td>Unknown waste material present at a dump site. Large impact on the native flora.</td>
</tr>
<tr>
<td>SPMC</td>
<td>General refuse disposed on-site.</td>
</tr>
<tr>
<td>Sask. Hospital North Battleford:</td>
<td></td>
</tr>
<tr>
<td>Star Valley Reclaimer:</td>
<td>Waste motor oil, crude oil and petroleum products dumped and spread on site in heavy concentrations.</td>
</tr>
<tr>
<td>Kisby</td>
<td></td>
</tr>
<tr>
<td>Swift Current Light &amp; Power:</td>
<td>PCB contamination remediated by PPM Canada. Final audit of the site is required.</td>
</tr>
<tr>
<td>Yorkton Dept. of National Defense:</td>
<td>Former Canadian Armed Forces base suspected to be contaminated with radioactive materials, PCB's and asbestos.</td>
</tr>
</tbody>
</table>
Study Sites contd...

**Generic Sites:**

The 1991 consultant’s report listed a number of sites which the department feels warrant investigation, however, relative to the named sites, they are low priority at this time.

These sites fall into five categories. All of these groups warrant further study.

**Landfills:** Possible industrial waste contaminations (waste oil, solvents, paints, freon, asbestos, etc...) and possible groundwater concerns at industrial and municipal sites in the province.

**Mines:** Active and inactive mine sites typically store large quantities of mine tailings. Inactive mine sites include: Rottenstone, Western Nuclear, Box Mine, Anglo-Rouyn and Prince Albert.

**Sewage Lagoons:** Potential leakage.

**Abandoned & Operational Underground Storage Tanks:** Potential soil and groundwater contamination from petroleum products.

**Industrial Sites** Locations where a contamination problem exists as a result of current or former industrial activity. Fire, spills and other accidents may have lead to the release of the chemicals.
Contaminated Sites Team Announced

Environment and Public Safety Minister Berny Wiens today announced the creation of a contaminated sites team in his department to co-ordinate the clean-up of polluted sites in the province.

"There is certainly no crisis in Saskatchewan but there is an urgent need to start the long-term process of cleaning up and getting to work to protect our future environmental health," Wiens said.

The contaminated sites team will co-ordinate the assessment and clean-up of contaminated sites. It will bring together everyone involved to determine how to get the job done and will ensure that clean-up standards are met at each site. The team will also solicit public information on contaminated sites.

The term "contaminated site" refers to pollution in soil or water, usually left over from a long-past enterprise or activity and created at a time when pollution standards were non-existent or weaker than they are today. In many cases, the original creators of the pollution are no longer in operation or no longer own the site.

"Many of these sites are the result of pollution accumulated over a number of years," Wiens said. "Cleaning up these sites will take a number of years to complete.

"I want to stress that, with the exception of the Prince Albert Wood Treatment Site, these sites do not pose any immediate hazard to the people of the surrounding communities. In the case of the Prince Albert Wood Treatment Site, the polluted area on the North Saskatchewan River shoreline has been fenced off to protect the public and clean-up plans are under way."
Wiens released a list of contaminated sites which have been identified:

- Twelve are high priority sites where cleanup investigations or plans are already under way. Most of these sites are well known publicly and include: a wood treatment site in Prince Albert, the Consumers' Co-operative Refineries Limited petroleum refinery in Regina, the former Interprovincial Co-operatives Limited herbicide plant near Saskatoon, the former Baildon industrial dump site southeast of Moose Jaw, the city of Regina landfill, the Federal Pioneer Ltd. PCB spill site in Regina, Magnum Oil Company Ltd. near Saskatoon, Northern Petroleum Refinery near Kamsack, NWR Salvage Operations near Prince Albert.

- A second set of low priority sites with minimal impact on the public and the environment has been identified as eventually requiring future action. In the meantime, ongoing monitoring will be conducted by the team.

- A third group of suspected low priority sites reported to the department requires further study to determine the extent of contamination. Ongoing study and monitoring will be conducted by the team.

People wanting more information about sites in their area can call Randy Sentis, assistant deputy minister and acting team leader, at 787-6167 in Regina. Collect calls will be accepted.

"We’re fortunate in Saskatchewan that our environment has not been exposed to the high level of industrial pollution that other parts of the world experienced in the years before environmental controls were created," Wiens said. "We are confident that, by taking action now to co-ordinate the clean-up of contaminated sites, we can protect our environment for the future."

-30-

For further information, contact:

Randy Sentis
Environment and Public Safety
Regina
Phone: 787-6167

Carol Bentley
Cabinet Press Office
Regina
Phone: 787-0888
NATIONAL CONTAMINATED SITES REMEDIATION PROGRAM

In October 1989, the five-year $250 million National Contaminated Sites Remediation Program (NCSRP) was initiated by the Canadian Council of Ministers of the Environment (CCME) to deal with properties across the country that have been polluted with hazardous materials. Such contamination may originate from abandoned landfills, byproducts of industrial activity, leaks from underground storage tanks, transportation spills and remnants of industrial plants improperly shut down. Whatever the pollution source, the NCSRP's focus is to ensure the appropriate cleanup of sites where contamination is a serious threat to human health or environmental quality.

The "Polluter Pays" Principle

The Canadian Council of Ministers of the Environment (CCME) has affirmed that the "polluter pays" is the program's guiding principle. Accordingly, the federal, provincial and territorial governments have begun to put in place the legal tools for applying this principle. In November 1991, the CCME Task Group on Contaminated Sites participated in a workshop focusing on effective legislation. Convened by the Canadian Institute for Environmental Law and Policy, it was an important step in resolving key legal issues as governments develop remediation laws and regulations.

Orphan Sites

When a polluter cannot be charged with the task of remediation, the program's orphan sites component comes into play. The National Contaminated Sites Remediation Program is prepared to assist in cleaning up high-risk properties for which a responsible party cannot be found, or where the owner is unable or unwilling to finance a remediation project. The costs are divided equally between Environment Canada and the respective provincial and territorial environment department. Collectively, the governments have agreed to commit a total of $200 million to orphan sites over the program's five-year life.

Technology Development

The primary goal of the program's Development and Demonstration of Site Remediation Technology (DESRT) component is to work with industry to develop and test new methods for assessing and cleaning up contaminated sites, and to bring them to commercial viability. This is a relatively new field in which Canadian industry has the opportunity to develop and market its expertise both domestically and internationally. The federal government and participating provinces and territories will each fund half the cost of demonstration project from a total commitment not to exceed $50 million for the DESRT portion of the program. Under DESRT, the financial participation of proponents is encouraged to the maximum extent possible.
Action On Contaminated Sites

Background information

The Contaminated Sites Program

A list of contaminated sites

**Note** All site names used in this list are working titles only and are used by the department to identify the location of the site. These names are not necessarily meant to imply ownership, responsibility or liability.

March 8, 1994

For More Information Contact:

Scott Robinson, Coordinator
Contaminated Sites Program
(306) 787-6138 (Regina) Collect calls accepted.
Fax: (306) 787-0197
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Action on Contaminated Sites

Contaminated sites are often the result of many years of poor operational practices. These past practices and the resulting levels of pollution at these sites are unacceptable by today's environmental standards.

Modern environmental laws provide for immediate cleanup of spills and other pollution as soon as it occurs. However, dealing with the leftover contaminated sites from the past is a challenge.

Often the original polluters of the site are no longer in operation or no longer own the site. Every site is different in terms of its technical questions, health concerns, costs, liability issues and community needs. Determining the real risks, the priorities and the means of sharing responsibility have to be done on a case-by-case basis. And the process should involve all the people involved at that site both in the past and today. The high cost of cleanup, and question of who should and can bear the cost, are always of major interest to companies, financial institutions, landholders, municipalities, governments and taxpayers.

Through Canadian Council of Ministers of the Environment's National Contaminated Sites Remediation Program the federal government allocated $3.8 million to Saskatchewan for the clean-up of high risk contaminated sites and an additional $950,000 for technology development and demonstration projects. An agreement for Saskatchewan to participate in the program was signed in August of 1993.

The department developed an inventory identifying potential active and "orphaned" contaminated sites in Saskatchewan. An "orphan" site is any high risk contaminated site where neither the party responsible for the contamination nor the property owner can be found or are willing to pay for the clean-up. It also is a site which the province or a municipality has acquired because the former owner failed to clean it up. The Contaminated Sites Program was established in March 1993 to co-ordinate the assessment and clean-up of these sites.
Determining a List of Contaminated Sites

1. The Canadian Council of Ministers of the Environment initiated the *National Contaminated Sites Remediation Program* in 1989. To receive funding under the program, sites had to qualify as “orphan sites” or demonstrate a new cleanup technology.

2. Environment and Public Safety hired a consultant in 1990 to prepare a list of “active and orphaned, potentially contaminated sites”. The consultant prepared a report of sites from information supplied by a survey sent to all municipalities, industries and institutions in the province. The report ranked sites, but this ranking was based upon the consultants’ own classification system because national guidelines were not available at that time.

3. The following year, national guidelines become available. The *National Classification System for Contaminated Sites* was released by the Canadian Council of Ministers of the Environment in 1991. In 1992, the environment department used these guidelines to re-examine the list of sites which the consultant had considered of most concern, and to develop a course of action.

As a result, the department has:

- created a Contaminated Sites Program to centralize and coordinate action; and
- has grouped the contaminated sites into three categories according to action required: current action, future action or further study.

(Additional sites have been added based upon investigations by the department since the 1991 report. Some sites have also been removed.)
LIST 1 - Sites under Current Action

This list includes:
- sites which have remediation plans and public involvement underway;
- sites to be immediately investigated further;
- sites for which stakeholder commitment to cleanup has been confirmed and which now requires the development of a cleanup plan; and
- any new sites which may be identified in the future as posing an immediate hazard to the public or environment.

LIST 2 - Sites Requiring Future Action

These sites have minimal impact on the public and the environment. Generally, pollution at these sites is low level, contained in a stable situation, and will be cleaned up as the property is developed in the future. Environment and Resource Management will continue to monitor the safety of these sites.

LIST 3 - Sites Requiring Further Study

These are sites where the risk from pollution is considered to be low but where further study is required to verify the extent of the contamination. Ongoing monitoring of the sites to ensure safety standards are met, will be conducted by Environment and Resource Management. The Contaminated Sites Program will coordinate these monitoring programs.
How Joint Cleanup Actions are Developed

In recent years, while the inventory of sites was being drawn up, the government proceeded with cleanup activity at a number of sites of known concern. The approach to these cleanups has been based on a public process involving the participation of all parties involved at each site. The Contaminated Sites Program will continue to employ this approach.

The process involves four steps:

1. Environment and Resource Management invites all stakeholders at a site to a meeting to initiate the planning process for cleanup. Stakeholders may include landowners, business operators, lease holders, financial institutions, local citizen groups and occasionally private interest groups.

   This meeting puts issues and conflicts on the table and initiates the development of the partnership approach to resolving the contamination problem. This process and its resulting actions are made widely known to the public and to the news media.

2. The stakeholder group or subcommittees of the group continue to meet and develop a plan to inventory and detail the extent of the contamination and to assess the risks presented.

3. Once the scope of the problem is known, the stakeholder group will develop a remediation plan for the site. Experience has shown that working together reduces duplication of effort and can save time and money. Co-operation at the planning stage also reduces the level of conflict during site cleanup.

4. The final step in the process is the actual clean-up work which may be shared by several stakeholders. Cleanup is monitored by the stakeholder group and by Environment and Resource Management.

In August 1993, the Province of Saskatchewan and the Federal Government formally signed the bilateral agreement that forms the framework under which the cleanup of contaminated sites will be completed in accordance with the National Contaminated Sites Remediation Program.
List 1 - Sites under Current Action

This list includes:
- sites which have remediation plans and public involvement processes underway;
- sites to be immediately investigated further;
- sites for which stakeholder commitment to cleanup has been confirmed and which now requires the development of a cleanup plan; and
- any sites which may be identified in the future as posing an immediate hazard to the public or environment.

1. Baildon; B.A. Oil Refinery Dump Site

Nature of the Problem: B.A. Oil refinery dump site is located approximately 6 kilometres south east of the City of Moose Jaw. The site covers an area of approximately 442 feet by 473 feet and has been abandoned since the early 1970's. In the past, it was used as a waste caustic and waste oil disposal dump by the refinery. The waste materials were deposited into unlined pits, which was acceptable practice at the time. Due to the lack of subsurface protective liners in the disposal pits, the contaminants have contaminated the groundwater.

Scope of the Problem: Contaminants are suspected to be Sulphur, Hydrogen Sulphide, Oil, and other toxic impurities. Results from sampling verified that the ground water was highly contaminated with unacceptable levels of Arsenic, Cadmium, Chromium, Nickel, Phenol, Sulphide and Vanadium, and due to the caustic nature of the contaminant the ground water pH has dramatically increased.

The combination of high pH and unacceptable levels of toxic impurities has made the ground water unfit for domestic consumption. The leachate effluent in the ground water may eventually reach the Moose Jaw River and Baildon Coulee, thus, degrading the quality of these valuable water resources. The volume of contaminant is presently unknown.

Action: Preliminary site evaluation has been performed. Department is currently investigating current ownership of site.
2. City of Regina Landfill, Regina

Nature of the Problem: The City of Regina Existing Landfill is situated above the Regina Aquifer system, which provides approximately 20% of the city's water supply. No contamination has been detected in the deep Regina aquifer which is used for the city water supply. The Regina Aquifers Sensitivity Mapping and Land Use report prepared by Environment and Resource Management identified that the landfill is located in an area of high groundwater sensitivity. Groundwater monitoring has been in place at the landfill for the past several years to monitor the water qualities of the two aquifer zones.

Scope of the Problem: Some contaminants have reached the shallower Condie aquifer due to the combination of an insufficient protective subsurface liner and high groundwater table. The contaminants are suspected of originating from household and industrial waste disposed at the landfill. The latest tests conducted on the groundwater samples revealed unacceptable levels of Chloride, Nitrate and Sulphate.

Action: The City is presently developing proposals for a new site. The development of remediation plans on the old site would be dependant on a decision on future site location.

3. Consumers' Cooperative Refineries Ltd, Regina

Nature of the Problem: The refinery is situated above the Regina Aquifer system, which provides approximately 20% of the city's water supply. No contamination has been detected in the deep Regina aquifer which is used for the city water supply. A petroleum refinery has been operated at this site since the early 1900's. A major expansion took place in the late 1980's which allowed the facility to process heavy oil. When first sited the facility was quite removed from the city of Regina, however growth of the city has almost engulfed the refinery complex.

Scope of the Problem: The refinery complex processes light and heavy crude oil into retail fuel products. The refining process results in the production of several waste streams such as coke, oil sludges, tank bottoms, oily waste water and oil contaminated soils. Due to operational practises through the years there have been accidental spills at the site which have resulted in contaminated soil and groundwater areas. These operational practises were acceptable at that time. Certain areas are contaminated to such an extent that there is free product floating on the water table. Inappropriate landfilling of sludges, catalysts, caustics and petroleum/hydrocarbon contaminated soils also present environmental concerns. The site requires remediation due to the high levels of hydrocarbons in the soil and water, the heavy metals in the soils, elevated pH (caustic) levels in the soil and the inappropriate storage of waste materials.
Action: The department is involved in ongoing discussions with the company. A waste management plan for the site is currently under review by the department. Remediation involving product recovery has been initiated at some sites and an intensive groundwater quality monitoring program is in place. A new wastewater treatment facility was recently completed which has eliminated an important source of groundwater contamination.

4. Federal Pioneer Ltd. (F.P.L.), Regina

Nature of the Problem: F.P.L. is located in an commercial part of the city less than 100 metres from a residential area. The company was involved in manufacturing electrical transformers containing PCBs used as a coolant.

A spill of up to 21,000 litres of pure PCB liquid occurred in 1976 at the F.P.L. plant as a result of an underground line break. Due to the absence of a disposal facility for large volume of PCB contaminated soil and a cost-effective technology to destroy PCBs in soil at the time of the spill, FPL was allowed to isolate the PCB contamination by constructing underground bentonite walls and paving the entire surface of the site. These steps were taken to prevent groundwater and surface water infiltration into the contaminated zone. Also, highly contaminated surface soil was excavated and placed into a storage cell on the site. Presently, the site is owned by SaskPower. The site is used for storage by SaskPower.

Scope of the Problem: The site is located nearby a residential area and situated above the Regina Aquifer. As stated above, the bentonite walls seems to be providing an effective protection against the infiltration of groundwater into the site. Concerns exist about whether complete containment of the PCB contaminant has been achieved.

Action: SaskPower is currently maintaining the site and supplying monitoring data to the department. Investigation of remedial technologies will be performed by Sask Power.
5. **Interprovincial Co-operatives Ltd. (IPCO), Saskatoon**

**Nature of the Problem:** The IPCO property is located near Warman Road and is approximately 0.5 kilometres from the South Saskatchewan River. Herbicides including 2,4-5 T and 2,4-D were first produced by IPCO in 1961. From 1963 to 1970 IPCO injected waste herbicides into a deep disposal well. In addition to the disposal well, large amounts of wastes were discharged into a pit on the property. Waste by-products discharged into the pits consisted of spoiled batches of products and solid wastes such as steel barrels, concrete rubble and wood. The pit and disposal well were remediated and decommissioned during the 1980's.

**Scope of the Problem:** Some residual contamination remains on the property. Surface water may infiltrate the contaminated soil which may allow contamination to pass thorough and reach the groundwater. This groundwater may discharge directly into the South Saskatchewan River. Such migration can persist for many years. Currently, the site is inactive and owned by a private company.

**Action:** Study of the site is ongoing. Department will be meeting with stakeholders again in the immediate future.

6. **Magnum Oil Company Ltd., Saskatoon**

**Nature of the Problem:** Magnum Oil is located approximately 8 kilometres north of Saskatoon on Highway #12. They operate a small refinery on a seasonal basis which recycles used motor oil obtained from the local farmers and the citizens of Saskatoon. The recycled oil is sold from a small depot in Saskatoon. The recycled product includes various grades of motor oil. Spent acid clay (an oily sludge containing hydrocarbons, acids and heavy metals) is a waste dangerous good in the process which is being disposed of in unlined disposal pits on the property.

**Scope of the Problem:** Sampling and testing conducted on the spent acid clay by SEPS (1989) revealed that it contained high concentrations of Lead, Zinc and Hydrocarbons. The pH of the acid clay sludge is extremely low, thus, making it highly corrosive. The lack of proper waste dangerous good storage may potentially lead to contamination of a nearby well, the groundwater and/or the surrounding soils.

**Action:** Department presently reviewing remediation proposals for the site.
7. Northern Petroleum Refinery, Kamsack

Nature of the Problem: The Northern Petroleum site is located on Kamsack's western boundary. The Assiniboine River is located approximately 300 metres north of the site. A petroleum refinery was in operation at this site for approximately 30 years until a fire shut down operations. The operation ceased and most of the equipment was dismantled. However, the site was never properly decommissioned and oil pits and petroleum-contaminated soil still exist at the site.

Scope of the Problem: The refining process requires the use of several products such as catalysts, acids, bases, which then results in the production of several waste streams such as coke, waste caustics, oil sludge, tank bottoms and oil contaminated soils. The local soil is sandy which allows precipitation to percolate contamination to the underlying aquifer. If a severe contamination at the site exists, the contamination could eventually find its way into the Assiniboine River.

In 1990, preliminary soil analysis was carried out on the site. The soil was contaminated with Benzene, Lead, Phenol and Toluene but the contaminant concentrations did not exceed the levels outlined in the CCME Environmental Quality criteria for Contaminated Sites for Industrial and Commercial sites. The 1991 soil analysis results were similar. The soil testing carried out on the site is considered to be inadequate to accurately judge the site contamination status. The site requires intensive and comprehensive soil sampling to verify the 1990/91 soil analysis results. Presently, the contaminants are not known to have reached the aquifer or the river.

Action: The department has done preliminary test drilling at the site and confirmed that there is a contamination problem. The site may qualify as an orphan site under the Federal/Provincial Contaminated Sites Program.

8. NWR Salvage Operations, Saskatoon

Nature of the Problem: NWR Salvage operated a battery salvage and scrap iron yard 8 kilometres west of Saskatoon since 1987. Activities included open burning of tires, battery casing and scrap material and the dumping and spreading of sulphuric acid (extremely corrosive acid) obtained from the battery salvage operations.

Scope of the Problem: Soil testing conducted in September 1991 by Saskatchewan Environment and Resource Management revealed that the site was highly contaminated with lead and sulphuric acid, posing a serious threat to local groundwater supplies and active wells in the area.
Action: Environment and Resource Management staff attempted to assist NWR with their waste management, but NWR did not clean up the site. On June 4, 1992, the owner of NWR was found guilty of violating the Environmental Spill Control Regulation of Saskatchewan by the provincial court. A jail term and fine were levied.

Further pollution at the site has ceased; an investigation into the appropriate actions to ensure site clean up has begun.

9. Prince Albert Industrial Park Site

Nature of the Problem: Located within the City of Prince Albert, this site is heavily contaminated with creosote and other wood preservative chemicals including pentachlorophenol. This pollution is the result of wood treatment operations in the area dating back to the 1930s and terminating in 1976. A storm sewer installed in 1979 compounded the problem by speeding up the contamination escape into the North Saskatchewan River.

Scope of the Problem: Immediate danger exists 100 metres downstream from the sewer outfall on the river bank. Contamination levels outside this area are no immediate threat. Long term effects of the pollution are of concern.

Action: In 1991 the department initiated a stakeholder clean-up process for this site. Stakeholders have developed a remediation plan for the site and meetings are continuing.

The province and the federal government have agreed to fund the cleanup under the Development and Demonstration of Site Remediation Technology agreement (DESRT) that is designed to assist in bringing new technologies to commercial viability. A bioreactor that can be operated under aerobic and/or anaerobic conditions will remediate the contamination on this property.

The total projected cost for this project is $1.62 million over the next 2 years. The Federal Government is contributing $725,000 towards the cost of the project.

10. SaskPower Estevan Generating Station

Nature of the Problem: The old power station which is located 10 kilometres south of Estevan is no longer in operation. A large ash storage lagoon approximately 400 metres north of the Souris River was used to store the ash slurry, a by-product of burning coal.
The ash lagoon covers an area of 8 hectares and has no liner to prevent seepage into the soil or groundwater beneath it. Contaminants include barium, boron and sulphate in a highly corrosive mixture which would be very destructive to local water supplies which are used for domestic purposes.

**Scope of the Problem:** The material itself is dry ash which is stable and doesn't pose any immediate health hazards. The chief concern is the potential contamination of local ground water supplies from leachate seeping down from the lagoon.

**Action:** Sask Power has indicated they are committed to undertake remedial activities at the site. The department has been involved in ongoing discussions with the company to develop a clean-up plan. Surface waters and plant discharges have been monitored over the past several years, this information will form the basis for a remedial plan.

11. **Shragge Steel, Regina**

**Nature of the Problem:** Shragge Steel is located in the older part of Regina's downtown area. The site was used for metal smelting, car battery and scrap materials storage and hardware/steel sales. Past activities have lead to a high level of heavy metal contamination of the soil. The contaminated soil is currently contained primarily within the building structure. The building provides an adequate containment and prevents the contaminant from spreading. The City of Regina is concerned about the structural integrity of the building which poses a potential danger to the public due to its dilapidated condition.

**Scope of the Problem:** In March 1991 a soil testing program was conducted by the City of Regina on the Shragge Steel property. The analysis on the soil samples revealed that the site was contaminated with cadmium, chromium, copper, lead, mercury, PCB and various hydrocarbons. The greatest concern for this site is the high concentrations of lead and the close proximity to the downtown core population. The contaminants will be adequately isolated from the people and the environment, as long as the building remains over the contaminated area.

**Action:** The site is presently secure. Further investigation is required to determine extent of contamination and the required cleanup.
12. **Weyerhaeuser Canada Pulp Mill, Prince Albert**

**Nature of the Problem:** Weyerhaeuser Canada’s pulp mill, approximately 20 kilometres east of Prince Albert has been in operation since 1968. Over the years, solid wastes were landfilled on the site or sent into the river. Weyerhaeuser’s landfill site is approximately 62 hectares in size. Within the landfill is an industrial sludge disposal area of about 9 hectares.

For about 15 years three environmentally dangerous wastes were dumped into this unlined and unprotected industrial sludge disposal site. They were disposed along with various other potentially less dangerous wastes. The three potentially dangerous wastes disposed in the sludge disposal site makes up a small fraction of the total volume but they have tainted a large portion of the total waste volume. The total waste volume at the sludge disposal site is estimated at one million cubic metres.

**Scope of the Problem:** The contaminants in the active industrial sludge disposal site are known to have reached the local groundwater. An analysis on the groundwater has revealed that it is contaminated with unacceptable levels of Arsenic, Chromium, Iron, Lead and Sodium. Due to the geology of the Weyerhaeuser location, the contaminated groundwater can flow through an upper sand layer and discharge directly into the North Saskatchewan River.

**Action:** The company has cleaned up several of its contaminated areas on its property. The department is engaged in an ongoing discussion with the company to develop a clean-up plan for the remaining sites.
**List 2 - Sites Requiring Future Action**

A site where there is minimal impact on the public and the environment.

Generally, pollution at these sites is low level, contained in a stable situation, and will be cleaned up as the property is developed in the future. Environment and Resource Management will continue to monitor the safety of these sites.

<table>
<thead>
<tr>
<th>Location</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture Canada:</td>
<td>Agriculture Canada experimental Indian Head farm, the site was used as an open pit for agricultural waste disposal (dead animals and pesticide waste). The site has been converted to a landfill and allowed to revegetate.</td>
</tr>
<tr>
<td>Amoco:*</td>
<td>Tank bottoms, weathered oil and spill debris disposed of in pits. Oily materials are beginning to resurface.</td>
</tr>
<tr>
<td><em>Note</em> Ownership of this site is currently under review.</td>
<td></td>
</tr>
<tr>
<td>Chemtec: Regina</td>
<td>Chemical manufacturing company Regina with past chemical spills and inadequate storage and disposal.</td>
</tr>
<tr>
<td>Dept. of National Defense Dana</td>
<td>Former Canadian Forces Base. Lime pits and unknown pits - possibly domestic waste, chemical solvents and cleaners, herbicides, pesticides, PCB and waste oil.</td>
</tr>
<tr>
<td>Dominion Bridge:</td>
<td>Potential minor PCB and solvent Regina contamination.</td>
</tr>
<tr>
<td>Gunnar/Lorado:</td>
<td>Tailings left from uranium mines that were not effectively decommissioned in the 1960’s</td>
</tr>
</tbody>
</table>
### Location

<table>
<thead>
<tr>
<th>Site</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kindersley Landfill:</td>
<td>A municipal sanitary landfill with known past contamination of asbestos, paints, solvents, septic effluent and waste oil. Large quantities of waste oil from oil patches and other waste dangerous goods buried in the landfill.</td>
</tr>
<tr>
<td>Kleyson:</td>
<td>Salt contamination at a potash-related Esterhazy trucking facility.</td>
</tr>
<tr>
<td>Lehner Wood Products:</td>
<td>Pentachlorophenol, other wood Prince Albert treating chemicals and waste water. Contamination at the site as a result of wood preservation processes.</td>
</tr>
<tr>
<td>Lloydminster Abandoned Landfill:</td>
<td>Municipal landfill suspected of being contaminated with waste oil.</td>
</tr>
<tr>
<td>Lloydminster Active Landfill:</td>
<td>Municipal landfill suspected of being contaminated with waste oil.</td>
</tr>
<tr>
<td>Moose Jaw Asphalt:</td>
<td>An industrial site having soil and water contaminated by hydrocarbons and asphalt. Current owners have initiated remediation.</td>
</tr>
<tr>
<td>Prince Albert Current Landfill:</td>
<td>Municipal landfill. The hydrogeology of the site is characterized by high groundwater table and leachate movement towards the N. Sask. River.</td>
</tr>
</tbody>
</table>
Future Action Sites contd...

<table>
<thead>
<tr>
<th>Location</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Simpson Timber Company: Hudson Bay</td>
<td>A timber processing sawmill. The Gas/Diesel contaminated soil is being treated on site.</td>
</tr>
<tr>
<td>Watkins Farm near Moose Jaw:</td>
<td>Gravel and rock quarry located on a farm near Moose Jaw. Diesel fuel was released into a coarse gravel area.</td>
</tr>
</tbody>
</table>

List 3 - Sites Requiring Further Study

These are sites where the risk from pollution is considered to be low but where further study is required to verify the extent. Ongoing monitoring of the sites to ensure safety standards, will be conducted by Environment and Resource Management. The Contaminated Sites Program will coordinate these monitoring programs.

<table>
<thead>
<tr>
<th>Location</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alsask Dept. of National Defense</td>
<td>Used oil and antifreeze were dyked and burned in the disposal pits.</td>
</tr>
<tr>
<td>Mobile Oil: RM of Storthoaks #31</td>
<td>Brine contamination as a result of oil and gas extraction.</td>
</tr>
<tr>
<td>RM of Bengough #40 Pit:</td>
<td>Pit filled with dead cattle result of Anthrax outbreak.</td>
</tr>
</tbody>
</table>
Further Study Sites contd...

<table>
<thead>
<tr>
<th>Location</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prince Albert Former Landfill:</td>
<td>Municipal landfill with no documented decommissioning and potential for industrial wastes.</td>
</tr>
<tr>
<td>Prince Albert Former Snow Dump:</td>
<td>Unsecured dump site for snow, asphalt, concrete and construction materials near the North Sask River.</td>
</tr>
<tr>
<td>RM of Corman Park</td>
<td>Unknown waste material present at a dump site. Large impact on the native flora.</td>
</tr>
</tbody>
</table>
| SPMC  
Sask. Hospital North Battleford:          | General refuse disposed on-site.                                                                         |
| Sask Power Site  
R.M. of Emerald #277:                    | Underground electrical cable with PCB insulation.                                                     |
| Star Valley Reclaimer:  
Kisbey                                           | Waste motor oil, crude oil and petroleum products dumped and spread on site in heavy concentrations.    |
| Swift Current Light & Power:                  | PCB contamination remediated by PPM Canada. Final audit of the site is required.                       |
| Yorkton Dept. of National Defense:            | Former Canadian Armed Forces base suspected to be contaminated with radioactive materials, PCB's and asbestos |
Generic Sites:

The 1991 consultant's report listed a number of sites which the department feels warrant investigation, however, relative to the named sites, they are low priority at this time.

These sites fall into five generic categories. All of these groups warrant further study.

**Landfills:**
Possible industrial waste contaminations (waste oil, solvents, paints, freon, asbestos, etc...) and possible groundwater concerns at industrial and municipal sites in the province.

**Mines:**
Active and inactive mine sites typically store large quantities of mine tailings. Inactive mine sites include: Rottenstone, Western Nuclear, Box Mine, Anglo-Rouyn and Prince Albert.

**Sewage Lagoons:**
Potential leakage.

**Abandoned & Operational Underground Storage Tanks:**
Potential soil and groundwater contamination from petroleum products.

**Industrial Sites**
Locations where a contamination problem exists as a result of current or former industrial activity. Fire, spills and other accidents may have lead to the release of the chemicals.