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# COMMENTS ON THE MINISTRY OF ENVIRONMENT & ENERGY'S STANDARD AGREEMENT BETWEEN LENDERS AND MOEE TO CLARIFY LIABILITY

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Ministry of Environment & Energy*

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## **I. INTRODUCTION**

On April 4, 1995 the Ministry of Environment and Energy (MOEE) placed its *Agreement Between Lenders and MOEE to Clarify Liability* (Agreement) on the Environmental Registry.

The objective of the Agreement is to help reduce uncertainty surrounding potential liability of lenders under environmental laws and to encourage redevelopment of contaminated sites.

Although there is need for policy clarifying the liability of lenders, there are specific provisions in the Agreement which are overly broad and go beyond the ambit required to achieve the stated objective of the Agreement.

The purpose of this document is to provide specific comments and to recommend alternative wording to some of the provisions of the Agreement.

## **II. General Comments - The Lack of Context for the Draft Agreement**

It is difficult, if not impossible to provide a meaningful assessment of the implications of the draft agreement in the absence of any indication of the circumstances under which the MOEE proposes to enter into such agreements. The "Global" title of the draft Agreement suggests that it might be employed in all situations in which a "lender" is involved in the designation and remediation of a contaminated site. In effect, "lenders" would be granted an exemption from any liability or responsibility for the clean-up of contaminated sites in the province.

The Canadian Environmental Law Association (CELA) and the Canadian Institute for Environmental Law and Policy (CIELAP) have indicated to the Ministry on numerous occasions that such an approach would be potentially unfair to responsible parties who are not "lenders," and would constitute a serious strategic error on the part of the province in the development of a legal and policy framework for the remediation of contaminated sites. CELA and CIELAP continue to hold this position. There are numerous circumstances under which a "lender" may bear some degree of direct or indirect responsibility for the contamination of a site.<sup>1</sup> Financial institutions should not be permitted to escape such responsibilities, particularly in isolation from any discussion of the position of other potentially responsible parties, or the remediation of "orphan" sites.

**Recommendation No. 1** - The MOEE should prepare guidelines indicating the circumstances under which it will consider entering into such agreements and the type of situations that warrant terminating the Agreement. These guidelines should be released for public comment and finalized before the finalization of the contents of the draft Global Agreement which has been presented by the Ministry.

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<sup>1</sup>.See, for example, G.Ford, The Consequences of the Bill 220/90 Amendments to the Environmental Protection Act: Defining Responsible Persons and Their Liabilities under Administrative Orders (Toronto: Canadian Institute for Environmental Law and Policy, 1994) (Study prepared under contract to MoEE).

### **III. COMMENTS ON THE AGREEMENT**

In the context of the foregoing concerns, CELA and CIELAP have the following specific comments regarding the proposed draft Agreement.

#### **Section 1 - Definitions**

Section 1 of the Agreement fails to provide any specific definition of lender. It is unclear therefore, precisely who will be entitled to enter into an Agreement with the MOEE. It is recommended that the Agreement provide a definition of a lender.

Under section 1(e) the definition of the term "Responsible Person" should incorporate the identical wording for that term as provided under the *Environmental Protection Act*, to ensure consistency with the Act.

**Recommendation No. 2** - It is recommended under section 1 of the Agreement that:  
A specific definition of lender be provided for purposes of the Agreement.

Under section 1(e) the definition of Responsible Person should be amended to incorporate wording identical to section 1 of the *Environmental Protection Act* which states, "Responsible Person" means the owner, or the person in occupation or having the charge, management or control of a source of a contaminant.

**Section 2 - Immunity from Environmental Laws in order to undertake Investigations and other actions with respect to the Property.**

Section 2 provides lenders with the immunity to undertake any kind of investigations with respect to property.

The term "investigation of any kind" in section 2(i) is overly broad and extends protection to lenders well beyond the ambit necessary for lenders to ascertain clean up costs of a property. Under the present wording of section 2, lenders may carry out investigations under the terms of the Agreement, which would not relate to environmental matters.

Section 2(ii) provides protection for "any action taken by a lender" to preserve or protect the value of the property. The failure to specify the types of action which will be protected under section 2(ii) is a matter of concern. Lenders could rely on this section to protect the value of the property in ways which may be at odds with ensuring environmental protection of the property. The Agreement should not provide lenders with blanket immunity from liability under environmental laws for action which does relate to the protection and preservation of the natural environment.

Section 2(b) provides the MOEE with authority to exempt a lender from complying with environmental laws for any other actions or steps the lender takes with respect to the property. This clause is overly broad. It provides the MOEE with unfettered discretion to exempt a lender

for actions which may not be related to the purposes of environmental legislation and should be deleted.

**Recommendation No. 3** - It is recommended that section 2 be amended as follows:

Under section 2(i) the term "any kind of investigations" be amended to "an environmental investigation."

Under section 2(ii) the words "but not limited to" be deleted from the first sentence.

Section 2(b) be deleted.

### **Section 3 - Notification of entry upon Property**

Section 3 requires the lender to provide written notice prior to entering upon property or taking action with respect to the property. However, there is no specific time frame within which the lender must comply with the Director's request. One week would appear to be a sufficient amount of time for a lender to provide written notice.

**Recommendation No. 4** - It is recommended that with respect to Section 3, the lender be requested to provide the Regional Director with written notice upon one week of receiving the Regional Director's request.

#### **Section 4 - Requirement to provide Reports**

Section 4 imposes a requirement on the lender to provide copies of reports prepared as a result of any environmental investigation to the Regional Director. Again, there is no time frame provided as to when the lender should comply with the request. A two week time frame would seem to be sufficient.

**Recommendation No. 5** - It is recommended that the lender comply with the requirements of section 4 within two weeks of receiving the Regional Director's request.

#### **Section 5 - Notification of Dangerous Conditions on the Site**

Section 5 imposes a notification requirement on the lender to advise the MOEE in the event that conditions on the site may be a immediate danger to public health and safety. However, section 5 fails to provide a specific time frame for compliance.

The notification requirement in section 5 is a matter of importance and urgency. It is imperative, therefore, that the lender notify the MOEE forthwith if a dangerous condition exists on the site, so that the MOEE can promptly determine the appropriate steps it should take to address the situation.



Section 5 also provides the lender with assurances that the failure to give notice will not result in loss of any rights or protection acquired under the Agreement.

The final clause in section 5 severely undermines the notification provisions. If there is no threat of sanctions for failure to provide notice, there will be no motivation for lenders to comply with sections 3, 4, and 5 of the Agreement. In order to ensure that lenders are deterred from violating sections 3, 4 and 5 of the Agreement, the MOEE should retain authority to void the agreement, in the event the lender fails to comply with the notification provisions.

**Recommendation No. 6** - It is recommended that the lender be required to comply with the requirements of section 5 forthwith. The MOEE should also retain authority under section 5 to void the Agreement if the lender fails to comply with the notification provisions.

### **Section 6 - Immunity from Environmental Laws for Environmental Contamination on the Property**

Section 6 provides immunity to lenders and lender representatives from liability under environmental laws with respect to any environmental problem existing prior to the time, or at the time the lender, or any lender representative enters onto the property, or takes action for one or more of the purposes described in section 2 of the Agreement.

In order to encourage lenders to undertake environmental investigations to ascertain the costs of remediating contaminated property, it is necessary to provide lenders with certainty, as to the extent of their liability.

However, there is no valid policy rationale to support the creation of special provisions to exempt lenders as responsible parties, who are in a position of charge, management or control from liability for environmental problems which occur after the lender enters onto the property or takes action for one or more of the purposes described in section 2 of the Agreement.

**Recommendation No. 7** - It is recommended that words "or at the time" be deleted from the fourth line in section 6.

**Section 7 - Responsibility for Contamination Caused or Aggravated by the Lender or Lender Representative**

Section 7 of the Agreement makes lenders or the lender representative responsible under environmental laws for any discharge or spill of any contaminant, or the deposit of waste which is caused or aggravated by the lender or any lender representative.

Under the *Environmental Protection Act* persons in charge, management or control may be held

liable for pollution offences, provided they were in a position to control or influence the polluting activity. Liability will attach, regardless of whether the person responsible, caused or aggravated the pollution on the property.

There is no valid policy rationale to exempt lenders from liability under environmental laws when other responsible persons could be held liable, regardless of whether or not, they caused or aggravated the pollution incident.

**Recommendation No. 8** - It is recommended that in section 7 the phrase "which is caused or aggravated by the lender and or any lender representative, but such responsibility is limited to the extent of the cause or aggravation" be deleted from section 7.

### **Section 8 - Termination Rights**

Section 9 provides for the termination rights by both the MOEE or the lender. However, termination of the Agreement by the MOEE takes effect on 60th day following the lender's receipt of the termination notice. Termination of the Agreement by the lender, on the other hand, takes effect immediately.

The provision of a grace period following receipt of the termination notice by the lender could

be problematic in some situations. For example, if the MOEE decides to terminate the Agreement because the lender's actions is causing or aggravating the pollution on the site, the 60 day grace period provides additional time to the lender to cause further harm to the natural environment.

There will be instances however, when the lender will need additional time to terminate any steps or actions it took pursuant to section 2 of the Agreement.

In order to ensure that the 60 day grace period is not subject to abuse and also to provide the lender with the sufficient time to terminate its operation on the site, the MOEE should retain discretion on a case by case basis, to grant additional time to the lender.

**Recommendation No. 9** - It is recommended that the termination of the Agreement either by the MOEE or the lender, take effect upon receipt of the notice of termination. The MOEE should retain authority to provide the lender with a sixty day grace period to terminate any action or steps taken or begun, prior to the effective date of termination for any of the purposes described in section 2 of the Agreement.

### **General**

**Recommendation No. 10** - The Agreement should indicate which MOEE official has authority to sign the Agreement on its behalf.

#### **IV. SUMMARY AND CONCLUSION**

Although there is a need for clarification of lender liability under environmental laws, the Agreement should seek to balance the need to provide incentive for lenders and lender representatives to undertake remediation of contaminated property whilst ensuring they are not provided carte blanche immunity from complying with environmental laws.

The above comments on the Agreement have been provided with a view to assisting the MOEE in achieving this goal.

