

# **ENVIRONMENTAL LAW AND LIABILITY 101:**

## **SIMON FRASER UNIVERSITY - ENSC 406**

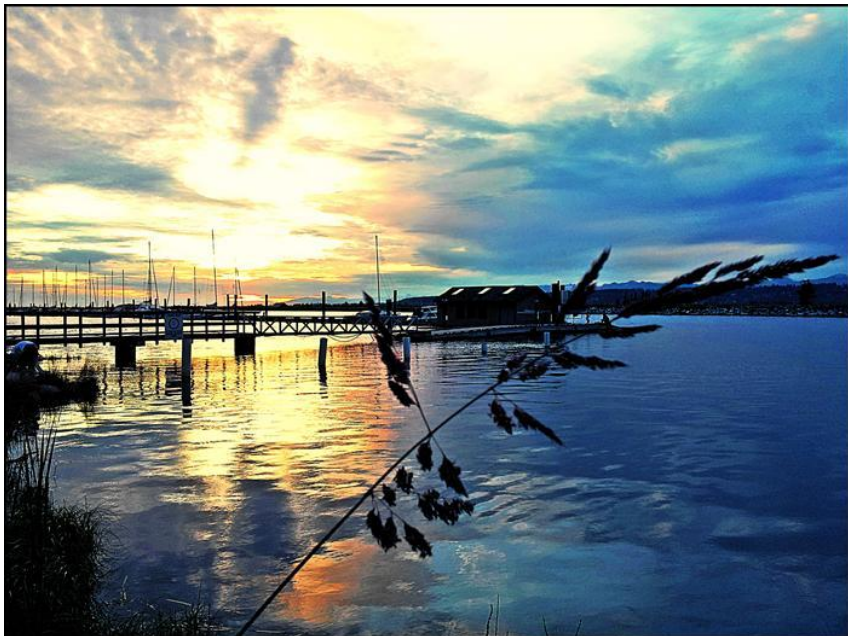
**EDITED, UPDATED AND PRESENTED BY  
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# Vancouver



# British Columbia



# Just Beneath the Surface ...



# Below Ground and above Ground



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6/19/2017  
**BERNARD LLP**  
BARRISTERS & SOLICITORS

# Smelter near Columbia River, BC

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## Teck smelter spills chemical solution into Columbia River

FEB 2 Posted by Zig Zag



Teck smelter in Trail, BC.

*Up to 25,000 L of sodium hydroxide solution flowed into sewer leading to the river near Trail, B.C.*

CBC News, Feb 01, 2014

A mining and smelting company spilled a large volume of chemical solution into a domestic sewer line near Trail, B.C., on Tuesday.

Teck Resources says an incident at the Trail Smelter caused between 12,000 and 25,000 litres of a sodium hydroxide solution to flow into a sewer line. That line leads to the Regional District sewage plant, which discharges into the Columbia River.

Follow

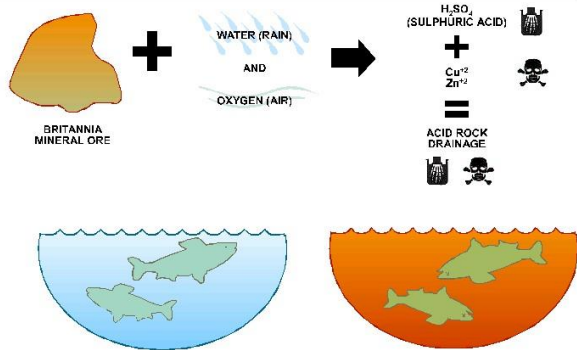


# Britannia Beach Mine – Then and Now



Figure 1: Britannia Mine - What is Acid Mine Drainage?

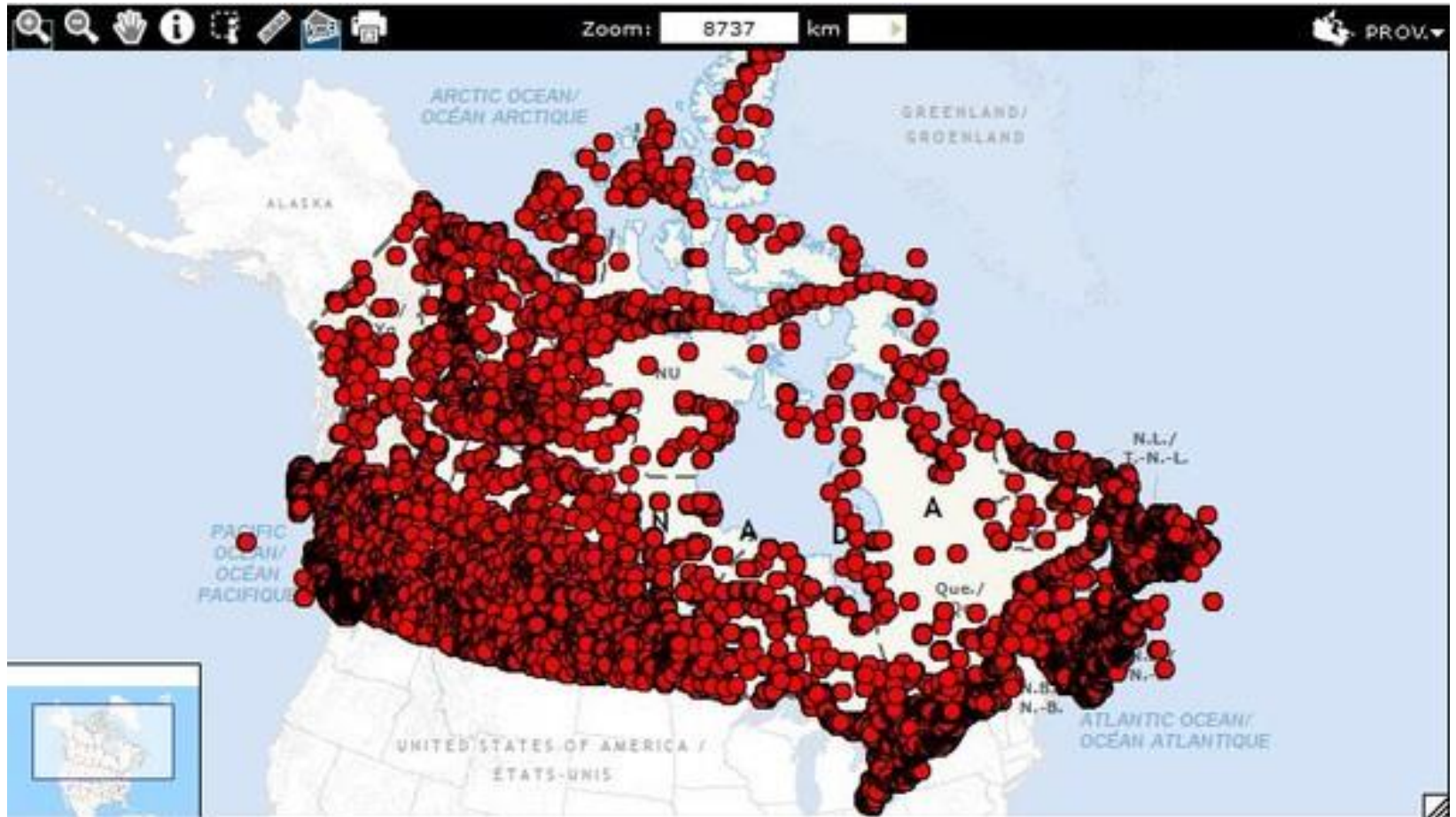
The natural mineralization at Britannia contains metal sulphides which when exposed to air and water react to form a sulphuric acid solution containing dissolved metals. This mixture is known as Acid Rock Drainage or Acid Mine Drainage and can be very toxic to aquatic life.



## B.C.'s 13 priority contaminated sites



# Contaminated sites across Canada ?



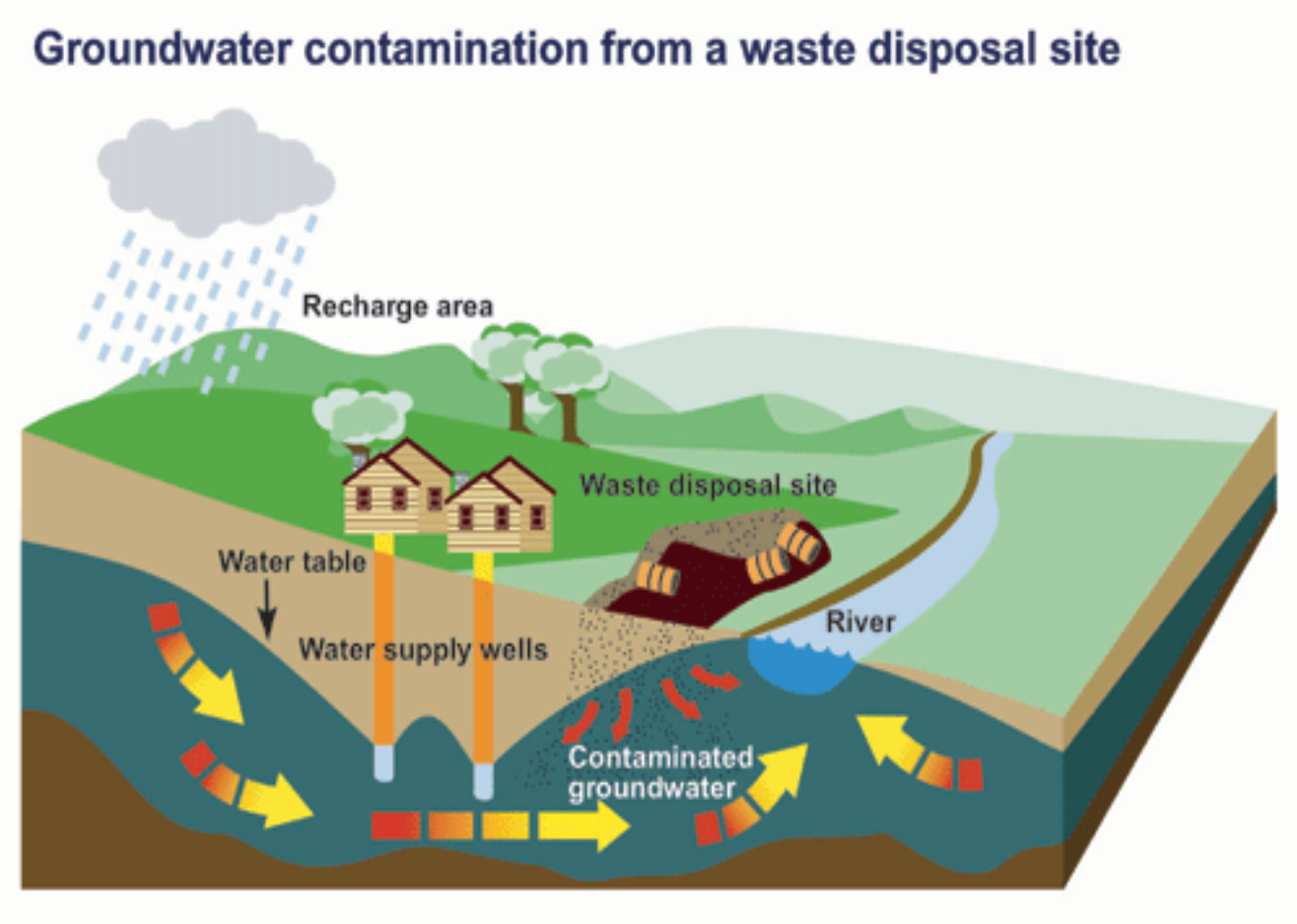
# What is a Contaminated Site?

An area of land in which the soil or underlying groundwater or sediment contains a substance that exceeds provincial environmental quality standards.

Most common hazardous substances found at BC sites:

- heavy metals
- chlorophenols
- organic chemicals
- polychlorinated biphenyls (PCBs)

# Groundwater Contamination Process



# Why worry?

- Contaminants pose a threat to human health, the environment and safety.
- Effects can be extremely harmful
- Contaminants can cause disease in people, especially children, injure wildlife, impair reproductive capacity in birds and accumulate in the food chain.

# How many Contaminated Sites in BC?

## Over 9000 Sites listed in the BC Site Registry

- 33% in Surrey and the Lower Mainland
- 16% in Fort St. John
- 15% in Nanaimo and Vancouver Island
- 7% in the Southern Interior
- Remainder scattered throughout the Province

# Legal Regime

- Common Law
- Contract Law
- Statutory Laws
  - Federal
  - Provincial
  - Municipal

# Common Law Liability

- Common law is derived from judgments in courts
- Distinct from laws created by governments
- Developed over time
- Two Branches
  - Tort Law
  - Contract Law

# Torts

- A tort is a civil wrong which results in an injury or harm constituting the basis for a claim by the injured party
- Tort law can be used to provide remedies against both individuals and businesses that pollute the air, land, and water to such an extent that it amounts to a nuisance

# Private Nuisance

- Landowners or occupiers of land may have caused a “private nuisance” where:
  - *Pollution from their land unreasonably interferes* with the use and occupation by a neighbor of his or her own land; or
  - The pollution causes actual damage to another property or causes injury to the health of the occupier of the property.

# Negligence

- A landowner or occupier may be held liable for damages in negligence where his or her conduct falls below a reasonable standard.
- Standard is that of the “reasonable man”
- Damage is reasonable foreseeable

# The Principle of Rylands v. Fletcher

- Case of Rylands v. Fletcher (1868), 37 L.J. Ex. 161 (H.L.)
- Established the principle that a tortfeasor may be liable for unintended and non-negligent harm
- May not be able to escape liability even where precautions were taken

*Rylands v Fletcher* [1868] UKHL 1 was a decision by the House of Lords which established a new area of English tort law.

- Rylands employed contractors to build a reservoir, playing no active role in its construction. **When the contractors discovered a series of old coal shafts improperly filled with debris, they chose to continue work rather than properly blocking them up.**
- The result was that on 11 December 1860, shortly after being filled for the first time, Rylands's reservoir burst and flooded a neighbouring mine, run by Fletcher, causing £937 worth of damage.
- Fletcher brought a claim under negligence, through which the case eventually went to the Exchequer of Pleas.<sup>[1]</sup> The majority ruled in favour of Rylands; **however, Bramwell B, dissenting, argued that the claimant had the right to enjoy his land free of interference from water, and that as a result the defendant was guilty of trespass and the commissioning of a nuisance.**
- Bramwell's argument was affirmed, both by the Court of Exchequer Chamber and the House of Lords, leading to the development of the "Rule in *Rylands v Fletcher*"; that "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape".
- This doctrine was further developed by English courts, and made an immediate impact on the law. Prior to *Rylands*, English courts had not based their decisions in similar cases on strict liability, and had focused on the intention behind the actions rather than the nature of the actions themselves

# Rylands v. Fletcher

- “A person who, for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if he does not do so, is **prima facie** answerable for all the damage which is the natural consequence of its escape.”
- Liability not determined by carelessness.
- ***prima facie** is a Latin expression meaning on its first encounter or at first sight. The literal translation would be "at first face" or "at first appearance", from the feminine form of primus ("first") and facies ("face"), both in the ablative case.*

# Limits of Tort Law

Proof of Causation

Finding the Right Defendant

Cost of Litigation

Application of Limitation Periods

# Contract Law

- The primary way to allocate risk and *liability in any real estate transaction*, whether it is a lease or a purchase, is through a contract.
- The express representations and warranties about the quality and condition of land will establish who is responsible for any pre-existing contamination

# Rule of Caveat Emptor

- The rule of caveat emptor or “Buyer Beware” requires that the purchaser must form his own judgment.
- Courts have been more willing to find a duty to disclose on the part of the vendor when it comes to contaminated sites.

# Caveat Emptor does not apply ...

- *Aldred v. Colbeck*, 2010 BCSC 57
- Vendors negligently misrepresented the status of a buried oil tank on the property to the prospective purchaser.
- Court ruled that the doctrine of Caveat Emptor does not apply

# Statutory Liability in BC

## Provincial

- Environmental Management Act (EMA)
- Contaminated Sites Regulation (CSR)

## Federal

- Fisheries Act
- Canadian Environmental Protection Act (CEPA)

# Contaminated Site

## CSR Definition:

- An area of land in which the soil or any ground water beneath it or any underlying sediment contains substances which are in such quantities or concentrations so as to exceed prescribed risk based standards.

# Identification of Contaminated Sites

- Spills
- Land Development (eg. Rezoning, demolition, building permits, soil relocation)
- Site Profile triggers
- Site Investigations
- Site Registry

# What is a site profile?

- A site profile is a simplified screening form for identifying potentially contaminated sites.
- Usually prepared by either the property owner or a consultant hired by the owner
- Form is filed with the Provincial Government
- May trigger a site investigation

# Timelines and Steps

- 15 days to determine if a site investigation is necessary
- All approvals at the local government level are suspended until a legal instrument is issued by the Ministry

# What is a site investigation?

A site investigation is the key means of gathering information to determine if a site is contaminated.

Land owners can have an investigation done without government involvement, but it should be carried out by experienced consultants

Usually done in two stages – Phase I and Phase II

# Phase I and Phase II Environmental Reports

- Preliminary Site Investigation
  - Searching existing records
  - Interviewing individuals involved with the site
  - General location and degree of contamination
- Detailed Site Investigation
  - Sampling to determine the location, extent and impact of contamination

# Legal Instruments

Determination that the site is not contaminated

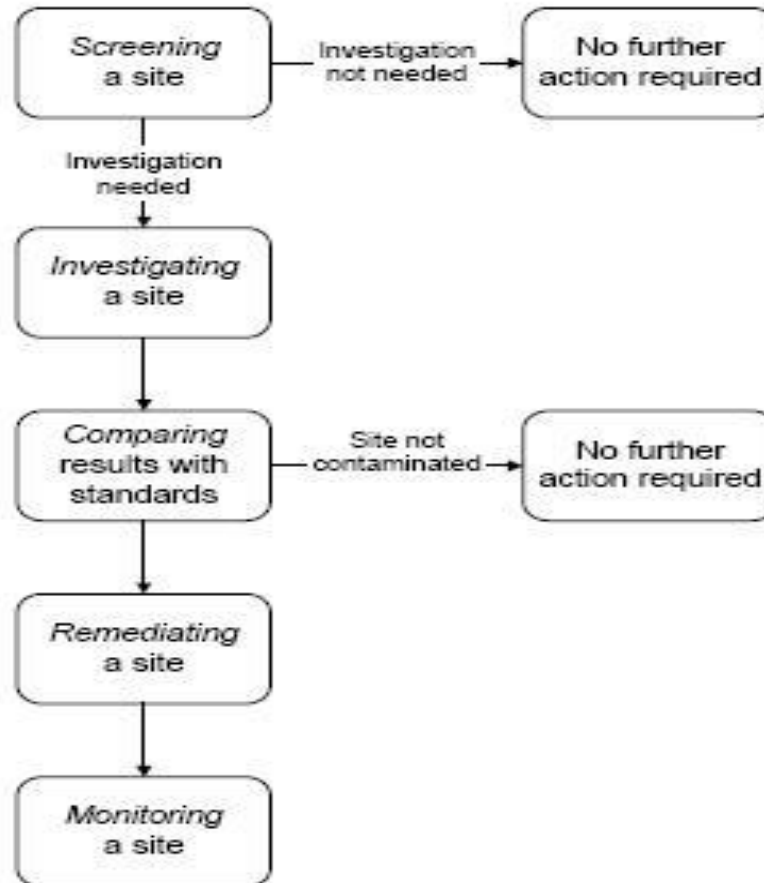
Voluntary Remediation Agreement

Approval in Principle of a remediation plan

Certificate of Compliance confirming the  
satisfactory remediation of the site

Release notice from the Director

# Steps in Site Identification/Clean Up



# What are Environmental Quality Standards

*Numerical standards* are acceptable concentrations of substances in soil, surface water, groundwater, vapor and sediments.

*Risk-based standards* are acceptable risk levels from exposure to substances at sites.

# Who has to clean up a Contaminated Site?

- Liability for clean up is grounded in the “**Polluter Pays principle**”
- Those who **cause the contamination** should be responsible for paying for the clean up costs.

# Responsible Persons:

- “Owner” means a person in possession of, has the right of control of, or occupies or controls the use of the property”.
- “Operator” means a person who is or was in control of or responsible for *any* operation located at a contaminated site.

# Beazer East, Inc. v. British Columbia

- De facto control rather than actual day to day control over operations at the site are determinative of liability
- “... in using the word ‘responsible’ the Legislature intended to include persons who brought about an operation in the sense of *causing* the operation to be carried on or carried out”

On March 30, 2000, the Environmental Appeals Board (EAB) rendered a decision on an appeal respecting a 1997 order by the regulator (the "manager" at the Ministry of Environment, Lands and Parks) (98WAS.01C6).

\* The order to investigate and remediate a contaminated **site in Burnaby** was issued to: Beazer East, Inc. (Beazer), a U.S. firm which today stands in the shoes of the parent of a subsidiary (Koppers International Canada Limited, or KICL) which owned and operated the site from 1969 to 1982; *Atlantic Industries Ltd. (Atlantic), a New Brunswick-based company which through a series of corporate amalgamations after 1982 acquired KICL*; and Canadian National Railway Company (CNR), which is the former owner of the subject lands. Beazer and Atlantic appealed the order. CNR did not appeal, but was a Third Party in the appeal and argued in favor of the order.

- The Board agreed with Beazer that the Legislature did not intend to impose liability on operators simply on account of "the legal relationship between a company and its owners."
- The Board identified many indicia of direct and indirect control which a parent could exercise over a subsidiary's site. The Board in this case found that *the parent controlled the site by: extensive financial controls; control over the lease with the landlord (CNR); signing of the indemnification agreement with CNR and a previous operator; reliance on its environmental staff to deal with the contamination; and, active involvement in defending against charges brought against the subsidiary in 1981 and 1982. The extensive financial controls appeared to weigh especially heavily in the Board finding that Beazer, as a parent, was an "operator."*
- *The Board found Atlantic to be "responsible for remediation" and properly subject to the order: The Panel finds that Atlantic is a previous owner and operator of the Site by virtue of the 1993 amalgamation and is, therefore, a responsible person within the meaning of the Act. In Black & Decker, the Supreme Court of Canada is very clear that, upon amalgamation, no new company is created and no old company is extinguished. As the Court stated: "The effect is that of blending and continuance as one and the self same company." (p. 397); The Panel finds that when Atlantic amalgamated with KICL, it took on the liabilities and "sins" of KICL.*

# Beazer (continued)

- Evidence of Control and Responsibility:
  - Financial control of the subsidiary
  - Control of organizational and decision making structures
  - Control over the lease for the site
  - Involvement in the environmental affairs of the subsidiary

# Exemptions from Liability

- Government involuntarily acquiring ownership of contaminated land
- Innocent Purchaser
- Site is contaminated by migration from an adjacent property
- Consultant assisting a developer in the remediation of site (barring negligence)

# Exemptions Continued

- Construction contractors and transporters of contaminated soil who did not contribute to the contamination at the site
- Secured creditors who only act to protect their financial interest and do not in any way cause the contamination

# Liability for Remediation

- Section 47(1) of the Environmental Management Act:
  - “person who is responsible for remediation of a contaminated site is **absolutely, retroactively and jointly and separately liable** to any person or government body for reasonably incurred costs of remediation of the contaminated site”

# Allocation of Liability

- **Clean Up First – Allocate Liability Later**
- Where there is more than one Responsible Person:
  - The EMA must not be construed as prohibiting the apportionment of a share of liability to one or more responsible persons (s.47(2))
  - Cost Recovery Action (s.35 of Contaminated Sites Regulation - CSR)

# Clean Up of Contaminated Sites

## Independent Remediation –

- Done without the involvement of the Ministry of Environment - MOE
- Usually where remediation is more routine and the risks are low
- Done with the assistance of environmental consultants

# Certificate of Compliance

- Once a site has been remediated to the satisfaction of the Director, he or she may issue a certificate of compliance
- Once issued, a responsible person is protected from future liability if another person subsequently changes the site's use

# Conclusion

- Remediation is expensive!
- Liability for clean up is broad!
- Take precautions!
  - Exercise Due diligence
  - Contract out of Risk and Liability wherever possible
  - Gate
- ✓ Enbridge Northern Gateway Pipeline Project
- ✓ **Keystone XL Pipeline**

# Environment is a Hoax



6/19/2017

# Tutorial-6 This week

- ✓ Enbridge Northern Gateway Pipeline Project
- ✓ **Keystone XL Pipeline**

1 The Project

2 Regulatory Process

3 Challenges

4 Environmental Management and Protection

5 Closing Thoughts