

Test Your Environmental Law IQ: Is Seller Liable for Pollution It Paid Buyer to Remediate?



SITUATION

The owner of a paper manufacturing plant sells the facility and land, which has been polluted as a result of the plant's operation. So the owner agrees to pay the buyer \$5 million to remediate the contamination and dredge a lagoon. In return, the buyer agrees to assume liability for the environmental problems on the site. But the buyer doesn't use the money to do the environmental work. In fact, it files for bankruptcy soon after the sale. A new owner buys the property from the bankruptcy court with the understanding that it needs remediation. The Ministry of Environment then orders all three companies to clean up the property as required by environmental law.

QUESTION

Can the government order the previous owner to remediate the property'

- A. No, because the property hasn't been abandoned.
- B. No, because the new owner bought the property knowing it

was contaminated.

C. Yes, because prior property owners can be held liable for contamination.

D. Yes, because the previous owner's attempt to contract out of its remediation duties under environmental law was illegal.

ANSWER

C. The MOE *can* order the previous owner to remediate the site.

EXPLANATION

A property owners' liability for pollution doesn't necessarily end when it sells the land. This scenario, which is based on a real Ontario case, illustrates how liability for cleaning up pollution can follow a property owner after it has ceased to own the land and even when someone else now does.

The previous owner argued that because it had already paid \$5 million to have the environmental issues on the property addressed, it would be unfair to let the MOE order it to pay for the same work again. The Ontario Environmental Review Tribunal wasn't sympathetic. The fact that the old owner paid someone else to remediate the property doesn't relieve it of its duties under environmental law, which requires the remediation work to actually be done not just paid for, explained the Tribunal. So the MOE can hold the old owner responsible for remediating the property now. Theoretically, the old owner could still go after the buyer in a civil lawsuit for failing to live up to its end of the sales agreement. However, such a right is of little value when the buyer has filed for bankruptcy.

WHY WRONG ANSWERS ARE WRONG

A is wrong because former property owners *can* be held liable for remediating pollution on land that's not abandoned and

currently has an owner. When a site has been abandoned and there's no one taking responsibility for cleaning up the pollution, the government may have no choice but to go after former owners. But nothing in the environmental law says that prior owners can be held liable for remediation *only* for so-called 'orphan sites.' In fact, most environmental laws allow the government to issue remediation orders to various people, including:

- An owner or previous owner of the source of the pollution;
- A person who is or was in occupation of the source of the pollution; or
- A person who has or had the charge, management or control of the source of the pollution.

B is wrong because the old owner isn't off the hook just because the new owner bought the property knowing it needed remediation. Under environmental law, different parties can be held 'jointly and severally' liable for cleaning up contaminated property. That is, the government can require *both* the new property owner and the old one to remediate the pollution.

D is wrong because although a contract that relieves you of your environmental obligations isn't enforceable, it also isn't illegal *per se*. The old owner's contract with the buyer couldn't relieve the old owner of its duties under environmental law. But the old owner could've better protected itself from liability for the pollution by getting sufficient guarantees in the agreement that the buyer would fulfill its environmental duties, such as requiring the \$5 million to be used solely for the environmental work.

SHOW YOUR LAWYER

Superior Fine Papers Inc. v. Director, Ministry of the Environment, Case Nos. 09-076/09-090/09-091, Ontario

Environmental Review Tribunal, May 20, 2011