

POLLUTION LIABILITY

A GUIDE TO THE LIABILITY FOR POLLUTION IN SOUTH AFRICA

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1. INTRODUCTION

South Africa has some of the toughest environmental legislation in the world, and the protections are built into the Constitution. Our National Environmental Management Act (NEMA) and the Acts and Regulations that fall under it, such as the National Environmental Management: Waste Act (NEMWA), National Water Act (NWA), and National Environmental Management: Air Quality Act (NEMAQA), draw from international best practices, and are founded on our constitutional right to an environment that is not harmful to health or wellbeing, and which is protected for the benefit of present and future generations.

Environmental legislation in South Africa also codifies several international environmental law principles into our law:

The Polluter Pays Principle: if pollution has occurred, and you are responsible, you must bear the cost of any negative effects on the environment and public health.

The Preventative Principle: everyone must try to minimise environmental damage by requiring that action be taken to prevent, minimise and remediate environmental damage, i.e. the “reasonable measures”.

The Precautionary Principle: Because there is a shortfall in our knowledge, and, we are not aware of many long-term effects which our actions have, a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.

The principle of cradle-to-grave responsibility for producers: the principle that people retain responsibility for their waste, notwithstanding lawful transfer of the waste. This is amplified in the extended producer responsibility provisions which attach to certain products.

Criminal Liability: Unlawful polluting is a crime, attracting fines, penalties, possible jail time, as well as costs to remedy the pollution, and potentially civil damages due to third parties.



2. HOW COULD YOU BE LIABLE?

The rest of this document discusses how potential liability related to pollution of the environment arises in more detail – below we have summarised a few important considerations:

CAUSE AND CONTROL

NEMA imposes an obligation of various people who cause significant pollution or are linked to property on which it occurs to prevent significant pollution from occurring or to minimise and rectify such. In essence, you will be liable for clean-up costs, damages and loss caused to third parties (i.e. the environment itself like rivers, plus other users of the environment such as neighbours or communities). You may also be found criminally guilty if you unlawfully and intentionally or negligently caused significant pollution, directly or indirectly, or fail to carry out the necessary rehabilitation and remediation measures. Even if you are authorised through a permit to harm the environment (for instance through a licence to release or handle emissions, waste or hazardous substances), or the pollution cannot reasonably be avoided, the duty to minimise and rectify such pollution or environmental degradation remains. This duty cannot be transferred, but may be financed through an appropriate insurance product.

TIMING

It is no defence to say that the pollution is historic or happened before the inception date of a policy or legislation – the responsibility to take reasonable steps remains with the person who caused the pollution regardless of when the pollution happened. This also applies if you own or the control the land and even if the pollution was caused by a previous owner or user. It also applies if you don't know when it happened, or what happened to cause it, or even if the cause was indirect, like a seismic tremor which caused a pipe to leak on your site.

PERSONAL LIABILITY

Any person who is or was responsible, even partially or indirectly, faces the possibility of personal liability for the full clean-up costs and any damages incurred by the authorities or third parties, as well as criminal sanctions (i.e. up to R10 million or 10 years in prison or both) even where they acted in their capacity as employees, managers, agents and directors. In addition, directors may face damages claims by companies for losses or damages suffered by such companies as a result of the directors' conduct, should they not have fulfilled their fiduciary duties to the company.



COSTS AND DAMAGES

The law makes provision for holding a range of people responsible through imposing any or all of the following:

Criminal liability and consequences of conviction

- A person convicted of an offence in terms of NEMA could be liable to a fine of up to R10 million or to imprisonment of up to 10 years, or to both such fine and such imprisonment.
- A court convicting a person of an offence may cancel permits, order the forfeiture of items, award damages summarily and without pleadings and give judgment which is equivalent to a civil judgment, enquire and assess the monetary value of any advantage gained or likely to be gained as a consequence of the offence, order compensation or a fine equal to the advantage gained, order that the offender take remedial measures, and order the offender to compensate the prosecutor (including private prosecutors) for the cost of prosecuting for criminal liability.
- Directors, managers, agents and employees may face personal criminal liability equal to companies' liability if they are involved in the wrong-doing (or, in the case of the director, if they were directors at the time that the incident occurred, and they did not take all reasonable steps to prevent the commission of the offence).

Reasonable and specified measures

- A responsible person is required to take reasonable measures, at their own cost, to prevent significant pollution from occurring.
- The relevant authorities may order you to do so and if you don't, the government may take the necessary measures themselves and recover the costs from you.

Civil liability to third parties

- If the pollution causes damages to a third party, you may also be liable for their loss (i.e. if the third party's cattle die from contaminated water, or pollution spills onto the third party's land and they are required to incur clean-up costs).
- There is a possibility that directors could be civilly liable to the companies upon whose behalf they acted in certain circumstances.

TRANSFER OF (POTENTIALLY) CONTAMINATED LAND

Any seller, buyer, lessor or lessee who is in control of contaminated land has obligations to remedy such contamination. You are also obliged to report such contamination, which may trigger inspections by the government, who may make remediation orders. This contamination



status may need to be registered against the title deed and must be disclosed to any future potential purchasers until remediation is certified as complete.

The state will always have recourse against the seller of property who owned/controlled such property during the period in which the contamination occurred, whether or not the property was sold. Third parties and purchasers may claim against a seller of contaminated land in delict for damages in respect of damage to moveable and immoveable property (or the value thereof), clean-up costs, and other damages. However, these risks could potentially be mitigated through contractual indemnification, including potentially through insurance policies.

WHO COULD BE HELD LIABLE?

The Acts (NEMA and National Water Act) are very clear, very broad and almost identical in who they held liable for any act which may cause pollution. They are, anyone who is either:

- † An owner of land
- † A person in control of land,
- † A person who occupies or uses the land,

on which any activity or process is or was performed or undertaken; or any other situation exists, which causes, has caused or is likely to cause pollution.

In our view, this includes not only Directors, managers, agents and employees, but also shareholders, investors and even possibly lenders, depending on the degree of influence and control.

ROLE OF INSURANCE

Insurance can be used to protect a responsible person from the having to bear all the costs of remediation and cleaning up pollution, and the damages flowing from environmental and health damage caused by pollution:

- † The transfer of risk through insurance products in particular is an agreement to indemnify the insured for specified liability or costs should an uncertain future event occur. Utilising the mechanism of indemnification by the Insurer, through an insurance policy, allows the risk (but not the liability) to be transferred, and for Insurer either to step into the shoes of the insured, or if they fail to do so, for the insured to join them as third parties in any litigation proceedings launched by the state or a third party.
- † Insurance conforms to the purpose and theory of the 'polluter pays' principle, as premiums paid can serve as the internalisation of external costs, and ensures that the



liability for the clean-up costs are not borne by the state or innocent third parties affected by the pollution.

- † As insurers can afford clean-up costs of both foreseeable and unforeseeable events, and insurance cover mitigates the risk of civil liability, and statutorily imposed responsibility and the consequent costs of complying with same, which may be faced by insureds who do not have the funds available to carry out extensive clean-up operations both quickly and effectively.
- † Legal liability attaches to both gradual and historic pollution, as well as to sudden and accidental pollution. The risks of both may be mitigated by the responsible person through an appropriate insurance policy which covers potential liability arising from both forms of pollution.

SUDDEN & ACCIDENTAL VS GRADUAL & HISTORIC POLLUTION

- † Many general liability policies cover sudden and accidental pollution but they don't price it in. Why? Because cover specific to sudden and accidental pollution will only be covered if the pollution occurs in a sudden and accidental manner (i.e. following an explosion, fire, tank failure or pipe rupture). The time, place and circumstance in which the pollution occurred will need to be precisely identified, and has to be reported within the certain period after the event, as specified in the policy (normally 24 - 72 hours). As such, claims under sudden and accidental cover policies are often very difficult to prove, as it may be difficult to prove exactly when and how the pollution occurred, and may be repudiated by Insurers if these requirements are not met (depending on the terms of the policy).
- † The meaning of 'sudden and accidental' in environmental policies has been the subject of much debate world-wide, as the requirement that the pollution be 'sudden' is not always clear. Although the meaning of the word 'sudden' in a pollution liability policy has not been directly considered by the South African courts, it has commented on indirectly by the Supreme Court of Appeal in *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA), which held that it means 'happening quickly', rather than 'happening without warning' or 'unexpectedly'.
- † As you can see from the above, legal liability can accrue long before a claim is lodged, without anyone being aware of it. This is what we would call historic, or pre-existing pollution. And because pollutants are spread naturally by wind, rivers, ground water, rain runoff, sea currents, etc., the longer a pollutant is in the environment, the further it spreads. And as it spreads, there is more water and land to clean up, and there are more third parties that it may affect.



- Given the history of poor enforcement in South Africa, but with our very tough legislation, there is a lot of pollution which currently exists in our environment, which is not fully understood or covered, and from which future liability may still arise. The liability for this pollution resides with buyers and sellers, landlord and tenants, operators and directors of companies who owned or controlled potentially contaminated land over decades.



3. LEGAL FRAMEWORK

Below we set out in more detail how and when legal liability for pollution and environmental degradation, including liability in relation to contaminated land, may arise. In South Africa there are broadly three types of environmental liability imposed on a party who pollutes the environment:

Statutory Obligations to clean-up contaminated land and water, and remediate the environment, and to pay for the necessary clean-up and remediation operations, which are often referred to as "Ecological Liability". This Ecological Liability arises from various Acts which we detail below, and which arises from the 'reasonable and specified measures' required to be carried out in terms of NEMA.

- A responsible person is required to take reasonable measures to prevent significant pollution or environmental degradation from occurring, continuing or recurring, or where it cannot be reasonably avoided or stopped, to minimise and rectify such pollution or degradation. Such measures could include investigating, evaluating and assessing the impact on the environment, ceasing, modifying or controlling any act, activity or process causing the pollution or degradation, containing or preventing the movement of pollutants, eliminating the source of the pollution, and remedying the effects of the pollution. The responsible person is required to bear the cost of carrying out all such reasonable measures.



- † The relevant authorities may order a person who is causing, has caused, or may cause significant pollution of environmental degradation to cease any activity, operation or undertaking, investigate, evaluate and assess the impact of specific activities and report thereon, commence or continue to take specific measures, and to complete such measures before a specified reasonable date.
- † The failure to carry out the reasonable measures when ordered to do so by the relevant authorities, or in circumstances involving hazardous substances, may in itself also constitute an offence.
- † Ecological liability attaches to natural and legal persons, and where companies are the "responsible" party, personal liability may also attach to directors and employees in certain circumstances. Ecological liability is strict liability (i.e. it does not require negligence or intention to be proved) and extends to persons who own or are in control of property, or have a right to use property, on which pollution exists. Liability arises without fault, and purely due to being linked to the property on which the pollution occurs or exists.

Civil Liability in delict or contract, which arises between private individuals, who cause damage to the environment which results in the claimant suffering damages.

- † In the context of environmental liability, civil liability usually arises in delict, in circumstances where the defendant causes pollution or environmental degradation which damages the claimant's property, and results in the claimant incurring costs in cleaning up the pollution and remediating the environment, or as a result of which the claimant's property is damaged or devalued (i.e. if the third party's cattle die from contaminated water, or pollution spills onto the third party's land and they are required to incur clean-up costs). Compensation for damages can be claimed by the state and individuals who have suffered damages or have borne the cost of carrying out rehabilitation or preventing environmental damage, following the conviction of the defendant for certain offences, in terms of NEMA. Administrative fines imposed in terms of NEMA would also constitute civil liability.
- † Should a responsible person fail to comply with a directive in terms of NEMA, or comply inadequately, the authorities may undertake reasonable remedial measures and recover the costs incurred (either before or after acting), proportionally from the person in control of or with the right to use land when the activity or process was performed, or the situation came about, and from any person who negligently failed to prevent the activity or process being performed or the situation from coming about.



- † There is a possibility that directors could be civilly liable to the companies upon whose behalf they acted in certain circumstances.

Criminal Liability for offences prescribed in terms of statute, which offences carry a fine or imprisonment. There are also various other potential consequences which offenders face upon conviction in terms of NEMA.

- † Section 49A of NEMA contains offences, which includes amongst other things unlawfully and intentionally or negligently committing any act or omission which causes significant pollution or degradation of the environment (or is likely to cause same); unlawfully and intentionally or negligently committing any act or omission which detrimentally affects the environment (or is likely to do so); failure to comply with directive issued in terms of section 28 of NEMA; and failure to report and take all reasonable measures following an incident involving hazardous substances, in terms of section 30 of NEMA.
- † A person convicted of an offence in terms of NEMA could be liable to a fine of up to R10 million or to imprisonment of up to 10 years, or to both such fine and such imprisonment. This penalty may be in addition to other penalties imposed in terms of specific environmental legislation – for instance, in terms of NEMWA, a fine of up to R5 million or five years in prison (or both the fine and imprisonment) can be imposed in addition to any criminal sanction imposed in terms of NEMA.
- † A court convicting a person of an offence may cancel any permit issued in terms of NEMA, or a specific environmental Act listed in NEMA, if the rights conferred in terms of that permit had been abused, and disqualify the person from obtaining another permit for a period of 5 years.
- † A court convicting a person of an offence in terms of NEMA or a specific environmental Act listed in Schedule 3 may order the forfeiture of any item, including but not limited to any specimen, container, vehicle, vessel, aircraft or document that was used for the purpose of or in connection with the commission of the offence.
- † Where a person is convicted of an offence in terms of Schedule 3 of NEMA the court may order that the person (i) award damages discussed below under 'specified measures' and 'civil liability' summarily and without pleadings and give judgment which is equivalent to a civil judgment; (ii) enquire and assess the monetary value of any advantage gained or likely to be gained by the offender as a consequence of the offence, and in addition to any other punishment, order the award of damages or compensation or a fine equal to the advantage gained or that such remedial measures as the court determines must be taken by the offender.



- † A court may order a person found guilty of an offence under NEMA to compensate the prosecutor (including private prosecutors) for the cost of prosecuting for criminal liability.
- † Directors, managers, agents and employees may face personal criminal liability equal to companies' liability if they are involved in the wrong-doing (or, in the case of the director, if they were directors at the time that the incident occurred and they did not take all reasonable steps to prevent the commission of the offence).

Duty of Care: Obligation to carry out rehabilitation, remediation and bear the costs

NEMA imposes an obligation of various people to prevent significant pollution from occurring, continuing or recurring, and where it cannot be reasonably avoided or it is authorised by law, to minimise and rectify such pollution or degradation. Even if you have been authorised through a permit or law to harm the environment, or the pollution cannot reasonably be avoided, the duty to minimise and rectify such pollution or environmental degradation remains. This liability is imposed on those who cause such pollution, as well as owners of property on which the pollution exists, people who are in control or have a right to use such property, and extends even further than this in certain circumstances. In essence, you will be liable for clean-up costs, damages and loss caused to third parties (i.e. the environment itself like rivers, plus other users of the environment such as neighbours, or communities), if you:

- unlawfully and intentionally or negligently caused significant pollution, directly or indirectly;
- are the owner, person in control, or person who has the right to use land on which significant pollution exists (with directors, or managers and employees also facing potential criminal liability).

The duty of care cannot be transferred, and the relevant authorities can therefore pursue a person responsible for the pollution (whether through causation or ownership/control of land). However, through an indemnification from a third party, a responsible person may be able to transfer the risk of liability which may arise.

National Environmental Management Act (NEMA)

NEMA provides the structure for all environmental decision-making of individuals, institutions and the government.

Section 28(1) of NEMA provides that every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent the pollution or degradation from occurring, or, if the harm to the environment is



authorised by law or cannot be avoided or stopped, to reduce and rectify the pollution or degradation.

Determining who is liable is very broad. Section 28(1) of NEMA places an absolute duty of care on “every person” who causes, has caused or may cause significant pollution or degradation of the environment, and section 28(2) specifically records that such liability or prevent significant pollution or degradation from occurring, continuing or recurring, extends to the owners of land or premises, the person in control of land or premises, or a person how has a right to use the land or premises on or in which an activity or process was performed or undertaken, or any other situation exists, which causes or is likely to cause significant pollution or degradation of the environment. Section 19 of the NWA places that duty on “an owner of land, a person in control of land or a person who occupies or uses the land” on which any activity or process was performed or any other situation exists which causes, has caused or is likely to cause pollution of a water resource.

In terms of determining liability, where a person fails to honour their duty of care, and fails to comply with a directive from the authorities to take the necessary action, the Department of Environmental Affairs or Water may recover the cost of remedying pollution or environmental degradation jointly and severally from the following persons if they failed to take the measures required of them under section 28(1) of NEMA, in terms of section 28(8):

- any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or degradation or the potential pollution or degradation;
- the owner of the land at the time when the pollution or degradation (or the potential pollution or degradation) occurred, or that owner's successor in title;
- the person in control of the land or any person who has or had a right to use the land at the time when the activity or the process is or was performed or undertaken, or the situation came about; or
- any person who negligently failed to prevent the activity or the process being performed or undertaken, or the situation from coming about.

Where there is an unexpected, sudden and uncontrolled release of a hazardous substance, including from a major emission, fire or explosion, that causes, has caused or may cause significant harm to the environment, human life or property, section 30 of NEMA extends responsibility to clean up any such incident to the owner of the hazardous substance, the person who was in control of the hazardous substance, the employer of any responsible person who was acting within the course and scope of their employment, and to the person who actually caused the incident. A responsible person in such circumstances must carry out all reasonable measures to contain and minimise the effects of the incident, undertake clean-up procedures and remedy the effects of any incident, and assess the immediate and long-term effects of the incident. Such responsible persons will jointly and severally bear the responsibility to carry out the actions and the carry the costs thereof.



A court can substantially increase quantum paid as a fine upon conviction for offences listed in Schedule 3 (which includes the offences in terms of NEMA, including breach of section 28 duty of care and directions received, and section 30 responsibilities involving hazardous substances, and offences in terms of NWA) by imposing an additional fine for an amount equivalent to the monetary advantage gained by committing the offence, ordering the person convicted to undertake specified remedial action (e.g. to clean-up a contaminated site), to compensate the state or third parties for loss or damage suffered as a consequence of the offence, and to reimburse the authorities (or private prosecutor) for the reasonable costs of investigating and prosecuting the case (NEMA section 34(2), (3) and (4)). The costs of cleaning up polluted sites or rectifying harm to the environment can be enormous and many companies could be bankrupted if convicted of such offences.

Retrospective Liability

Section 28(1A) of NEMA creates retrospective liability for past failures to abide the duty of care, and states that section 28(1) applies to significant pollution or degradation which occurred before the commencement of NEMA, arises or is likely to arise at a different time from the actual activity that caused the contamination, or arises through an act or activity of a person that results in a change to pre-existing contamination. Other specific environmental management Acts also contain retrospective liability, including NEMWA.

And who is liable amongst the “responsible person or person in control of or owner of the land when pollution occurred”? Does the corporate veil shield individuals from liability? In terms of section 34 of NEMA, offences committed by a company which are listed in Schedule 3 may result in personal liability:

- † Sections 34(5) and (6) imposes liability managers, agents or employees who committed acts within the course and scope of their employment which constitute offences in terms of NEMA, and also imposes criminal liability on employers of such managers, agents or employees where the employer failed to take reasonable steps to prevent the act or omission in question; and
- † Section 34(7) imposes criminal liability on directors who failed to take all reasonable steps necessary under the circumstances to prevent the commission of the offence. This applies both to current directors, and directors who are no longer at the company, but who were directors at the time that the company committed the offence. Proof to the offence by the company constitutes *prima facie* evidence of the offence being committed by the director – ie the director must prove that they did in fact take all reasonable steps in the circumstances to prevent the company from committing the offence.

Schedule 3 of NEMA lists various pieces of national and provincial legislation, where an offence triggers the provisions of section 34(7) of NEMA, including NEMA itself and related



environmental legislation (such as NEMWA, NWA, the National Environmental Management: Air Quality Act No. 39 of 2004, and the National Forests Act 84 of 1998, amongst many others).

In addition to the governmental authorities and third parties harmed by pollution, section 33 of NEMA provides for private prosecution by any person acting in the public interest or in the interest of protecting the environment where the government refuses to prosecute any offenses which have been committed. Such private persons may also, in terms of section 28(12), apply to a court for an order directing the Director-General of the Department of Environmental Affairs or Department of Mineral Resources, or any provincial head of department, to take any of the steps listed in section 28(4) (ie directing a person who is causing, has caused or may cause significant pollution or degradation of the environment to cease any activity, operation or undertaking; investigate, evaluate and assess the impact of specific activities and report thereon; commence taking specific measures before a given date; diligently continue with such measures; and complete such measures before a specified date, having given sufficient notice to the affected person (unless urgent action is necessary)). Why? Because the environment belongs not just to the person owning the land (i.e. your neighbour), but every citizen of the country. Indeed, the State assumes responsibility for and is the custodian of the water, air, soil, beaches, sea, etc, which belong to the citizens of the country.

This comes from our Constitution, which gives every person a fundamental right to an environment that is not harmful to his or her well-being, and requires the environment to be protected for the benefit of the present and future generations.

NEMWA – Liability relating to waste and contaminated land

NEMWA takes liability for pollution even further. It is a specific environmental act under NEMA's framework, and regulates the management of waste in order to protect the health of people as well as the environment (plants, animals, land, air and water).

NEMWA govern various aspects of waste management, including waste disposal and storage, littering, extended producer responsibility, reduction, reuse and recycling, and contaminated land.

Section 36(5) of NEMWA provides that an owner of land that is significantly contaminated, or a person who undertakes an activity that causes land to be significantly contaminated, must notify the Minister of Environmental Affairs and the MEC of Environmental Affairs for that province of that contamination as soon as that person becomes aware of that contamination. It is an offence to contravene or fail to comply with these notification requirements, and that a person who is convicted of an offence under section 67(1)(b) is liable to a fine of up to R5 million or to imprisonment for up to five years, or to both a fine and imprisonment, in addition to any other penalty imposed in terms of NEMA.



NEMWA also provides that the Minister or the MEC may direct that a site assessment is to be conducted and, should the Minister or the MEC decide that an investigation area is contaminated and requires remediation, the land must be declared a remediation site and the Minister or the MEC must make a remediation order to neutralise that risk. The remediation order must address the following:

- the person who is responsible for undertaking the remediation ;
- the land to which the order applies ;
- the nature of the contamination ;
- the measures that must be taken to remediate the land or the standards that must be complied with when remediating the land ;
- the period within which the order must be complied with ;
- whether any limitations in respect of the use of the land are imposed ;
- the measures that must be taken to monitor or manage the risk ; and
- any other prescribed matter.

Should the Minister declare the land to be a remediation site and make a remediation order, or an order specifying monitoring and management of a risk, in terms of section 38(2) and (3) of NEMWA, non-compliance with such orders will constitute a criminal offence, with penalties of up to R10 million and/or 10 years in prison, in addition to any other penalty imposed in terms of NEMA, in terms of section 68(1) of NEMWA.

Transfer of contaminated land

With regards to the transfer of remediation sites, section 40 of NEMWA provides that:

- "(1) No person may transfer contaminated land without informing the person to whom that land is to be transferred that the land is contaminated and, in the case of a remediation site, without notifying the Minister or MEC and complying with any conditions that are specified by the Minister or MEC, as the case may be.
- (2)(a) For the purposes of ensuring compliance with this section, the Minister must notify the relevant Registrar of Deeds appointed in terms of the Deeds Registries Act of any land that has been declared as a remediation site.
- (b) The notification contemplated in paragraph (a) must identify the land sufficiently to enable the Registrar of Deeds to enter the necessary information in or on registers and documents kept by his or her Office."

Any known contamination must therefore be disclosed to a potential purchaser prior to transfer. If the land has been declared a remediation site, the relevant authority must also be



notified, and may vary the remediation order to impose liability on the purchaser if the land is transferred and the new owner assumes responsibility for the remediation in writing (in terms of section 38(5) of NEMWA).

Transfer of Liability through Insurance, and in Property Transfer

As ecological liability is imposed by statute, it cannot be transferred by agreement – in other words, a party who has the liability cannot 'opt out' of it. Where the authorities are empowered by law to approach a party who has ecological liability and to force them to carry out the necessary clean-up or remediation, or to bear the costs of such clean-up, no agreement between individuals can trump such empowerment (although there are certain circumstances in which the authorities arguably allow the transfer of certain environmental liability from one party to another in the context of mining rights transfers, and in relation to remediation orders, as discussed in more detail below). Similarly, in respect of civil liability, delictual liability cannot be transferred (although contractual liability can be transferred through cession and assignment).

However, although the above liability cannot be transferred from one individual to another by agreement, the risk of having to meet such ecological or civil liability, either as an expense to be incurred, or as a potential claim by a third party, can be transferred through an agreement.

The answer to the question, can environmental liability be transferred through an insurance product following the sale or transfer of potentially contaminated land, is therefore that the risk (although not liability) can be transferred.

Whilst the liability itself is not transferred, the party taking on the risk (in this instance the insurer), agrees to step into the shoes of the defendant (seller or buyer, depending on who takes out the policy), transferring the risk of incurring liability, and having to make payment, from the seller/buyer to the insurer (up to the limit of cover).

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