



**Guidelines on the Duty to  
Report Contamination under  
the *Contaminated Land  
Management Act 1997***

## Limitations

These guidelines should be used in conjunction with other relevant guidelines made or approved by the NSW Environment Protection Authority under section 105 of the *Contaminated Land Management Act 1997* when assessing and managing contaminated land.

These guidelines do not include occupational health and safety procedures and WorkCover NSW should be consulted on these. Appropriate action must be taken to manage any potential hazard and adequately protect the health of any workers on, or occupiers of, the site.

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Phone: 131 555 (NSW only - environment information and publication requests)

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## Abbreviations

CLM Act	<i>Contaminated Land Management Act 1997</i>
DEC	Department of Environment and Conservation (now the EPA and OEH)
EMP	environmental management plan
EPA	Environment Protection Authority
NEPC	National Environment Protection Council
OEH	Office of Environment and Heritage
POEO Act	<i>Protection of the Environment Operations Act 1997</i>
PSH	phase separated hydrocarbons
WH&S	work health and safety

## 1. Introduction

### 1.1 Background

Land contamination<sup>1</sup> has the potential to arise from a range of industrial and other activities. The impacts of some activities are only temporary, whereas others carry the risk of leaving an unwanted legacy. In some instances, particularly when the land use has involved hazardous substances, that legacy may be threatening to humans or the environment, or it may affect the current or future use of the land.

Not all contamination will affect the land in such a way that it cannot be used productively for industrial, commercial, agricultural, residential or other purposes. The Environment Protection Authority (EPA) must consider all factors that may contribute to the significance of contamination of land to determine whether regulation to protect humans or the environment is warranted.

The *Contaminated Land Management Act 1997* (CLM Act) establishes a legal framework that gives the EPA powers to require the assessment and remediation of sites where contamination is significant enough to warrant regulation. Where the EPA's intervention is not needed, the NSW planning and development framework will determine the appropriate use of sites in the future.

### 1.2 Contaminated Land Management Act 1997

The general objective of the CLM Act is to establish a process for investigating and, where appropriate, remediating land that the EPA has reason to believe is contaminated significantly enough to warrant regulation under the CLM Act.

The objects of the CLM Act are to:

- set out accountabilities for managing contamination if the EPA considers the contamination significant enough to require regulation
- set out the role of the EPA in the assessment of contamination and the supervision of the investigation, remediation and management of contaminated sites
- provide for the accreditation of site auditors of contaminated land to ensure appropriate standards of auditing in the management of contaminated land
- ensure that contaminated land is managed with regard to the principles of ecologically sustainable development.

The duty to report contamination to the EPA arises when the land is contaminated by a substance present at levels above those specified by these guidelines and where certain other factors are met. These guidelines provide details of the circumstances that can trigger the requirement to notify the EPA.

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<sup>1</sup> Contamination of land is defined in section 5 of the CLM Act as “the presence in, on or under the land of a substance at a concentration above the concentration at which the substance is normally present in, on or under (respectively) land in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment.”

### 1.3 NSW contaminated land management framework

The contaminated land management framework in NSW consists of two tiers:

- The EPA uses its powers under the CLM Act to deal with sites where contamination is significant enough to warrant regulation – given the site’s current or approved use,<sup>2</sup> the contamination of these sites generally poses an unacceptable risk to human health or the environment and needs to be addressed.
- Local councils dealing with other contamination under the NSW planning and development framework, including [State Environmental Planning Policy No. 55 – Remediation of Land](#) and [Managing Land Contamination Planning Guidelines SEPP 55 Remediation of Land](#) (EPA 1998). These types of sites, although contaminated, would generally not pose an unacceptable risk under their current or approved use(s). The planning and development process will determine what remediation is needed to make the land suitable for a different use.

### 1.4 About these guidelines

These guidelines are made under section 105 of the CLM Act. They provide information on two key aspects of the duty to report contamination under the CLM Act. Section 2 of the guidelines sets out the duty of landowners and those who have responsibility for contamination to report it to the EPA. It should be noted that the EPA has a duty to examine and respond to information it receives about actual or possible contamination of land from any party; this is not limited to the person responsible for the contamination.<sup>3</sup>

There are a range of considerations for anyone<sup>4</sup> who encounters land contamination and how they should proceed when the degree of contamination is uncertain. Section 3 outlines how the EPA assesses and determines whether contamination is significant enough to warrant regulation.

These guidelines revoke the July 2015 edition of the Contaminated Sites: Guidelines on the Duty to Report Contamination under the *Contaminated Land Management Act 1997*.

Various other guidelines, which may be updated from time to time, are referred to throughout this document. Where a reference guideline that has been made by the EPA under section 105 of the CLM Act is updated, the relevant reference(s) in this document should be read as if they are part of the endorsed updated version. A reference in these guidelines to any other instrument (e.g. guidelines, standards) made under an Act should be read as a reference to that instrument.

These guidelines relate to the duty to report under the CLM Act only. It should be noted that there may also be reporting duties required by other legislation. For example, pollution incidents causing or threatening material harm to the environment are required to be reported under section 148 of the *Protection of the Environment Operations Act 1997*.

These guidelines take effect upon their publication in the *NSW Government Gazette*.

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<sup>2</sup> Approved use of land is defined under section 4(1) of the CLM Act as “a use to which the subject land may be put without approval or development consent under the *Environmental Planning and Assessment Act 1979*.”

<sup>3</sup> The person responsible for contamination of land is defined in section 6(1) of the CLM Act as: “the person that caused the contamination, the contamination occurred because an act or activity of the person resulted in the conversion of a substance to one that caused contamination, an owner or occupier of the land who knew or ought reasonably to have known that contamination would occur but failed to take reasonable steps to prevent contamination, and a person carrying out activities on land that generates or consumes the same substances as those that comprise the contamination unless the person establishes that they did not cause the contamination.”

<sup>4</sup> This may be an individual or a corporation.

## 2. Duty to report contamination

### 2.1 Duty to report

Under section 60 of the *Contaminated Land Management Act 1997* (CLM Act) the following people are required to notify the EPA as soon as practical after they become aware of the contamination:

- anyone whose activities have contaminated land<sup>5</sup>
- an owner of land that has been contaminated.<sup>6</sup>

A person is taken to be aware of the contamination if it is considered they should have reasonably been aware of the contamination.<sup>7</sup> Section 2.6 lists the factors that are taken into account in determining when a person should have reasonably been aware of the contamination, including their abilities and whether they could have sought advice.

Such a person is required to notify the EPA of contamination in the following circumstances:

- the level of the contaminant in, or on, soil is equal to or above a level of contamination set out in Schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013) or other approved guideline value<sup>8</sup> with respect to a current or approved use of the land, and people have been, or foreseeably will be, exposed to the contaminant  
OR
- the contamination meets a criterion prescribed by the regulations<sup>9</sup>  
OR
- the contaminant or a by-product has entered, or will foreseeably enter, neighbouring land, the atmosphere, groundwater or surface water, and is above, or will foreseeably be above, a level of contamination set out in *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013) or other approved guidelines and will foreseeably continue to remain equal to or above that level.<sup>10</sup>

Section 2.3 of these guidelines provides more information on the notification triggers and how they should be used in determining whether the contamination should be reported to the EPA. In addition, Section 2.5 clarifies situations where the duty to report is not intended and Section 2.6 presents some situations where the duty to report does arise.

Although the duty to report contamination applies to the person responsible for the contamination, anyone at any time can report suspected contamination to the EPA by calling Environment Line on 131 555.

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<sup>5</sup> Section 60(1) of the CLM Act.

<sup>6</sup> Section 60(2) of the CLM Act.

<sup>7</sup> Section 60(5) of the CLM Act.

<sup>8</sup> Guidelines are made or approved under section 105 of the CLM Act.

<sup>9</sup> At the time of publication of these guidelines, the Contaminated Land Management Regulation 2013 does not prescribe any criterion.

<sup>10</sup> Section 60(3) of the CLM Act.

## 2.2 Determining whether to report

To assess whether the contamination of a site should be reported, a review of the site's activities and history, and a site inspection to look for indicators of contamination, should be undertaken. There may also be a need for a further, more detailed investigation.

Figure 1 in Appendix 1 shows a decision process that can be used by a site owner or a person responsible for a site to assess whether to report under section 60 of the CLM Act. This is followed by a checklist for site owners or responsible persons when reporting contamination to the EPA.

### 2.2.1 Indicators of contamination

A review of the site's activities and history provides a starting point to assess whether current or past use(s) may have contributed to contamination of the site. This includes consideration of whether the site or adjacent sites may be associated with potentially contaminating activities;<sup>11</sup> complaints about pollution or illegal dumping of wastes, as well as whether there are gaps in, or doubts about, a site's history. This step is equivalent to 'stage 1' investigations consistent with the [Contaminated Sites: Guidelines for Consultants Reporting on Contaminated Sites](#) (OEH 2011).

The person responsible for the contamination can undertake a review of the site's history and records, and conduct a site inspection to identify indicators of contamination. The person responsible may also use a suitably qualified and experienced environmental consultant to undertake this review.

An inspection of the site and its surrounds may provide physical indicators of contamination or harm. Examples of indicators of contamination are:

- case(s) of a biologically plausible illness or health impairment among people who have had exposure to a particular contaminated site
- the presence of chemicals on or in surface water or groundwater at the site (for example, abnormal colouration of the water, odours emanating from the water)
- visible signs of toxic responses to contaminants in flora and fauna (for example, unusual numbers of birds dying on or near the site, abnormal domestic animal or wildlife behaviour, dead vegetation within or adjacent to areas of otherwise normal growth)
- liquid or solid chemicals or chemical wastes found on or in the soil during site works
- unusual odours emanating from the soil
- the entry of chemicals into on-site or off-site service trenches
- the presence of discarded explosive materials on site
- the presence or the storage of bulk liquid dangerous goods on the site with potential for leakage or spillage
- the presence of illegal and/or uncontrolled landfills on site
- evidence of off-site migration of contaminants into adjacent or nearby environments (for example, migration to residential areas, creeks, rivers, wetlands, sediments or groundwater).

Note that this list is not exhaustive and there may be additional indicators that are relevant to some sites as well as other notification requirements where immediate risks are identified. For example, there is a duty to report pollution incidents under the POEO Act.

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<sup>11</sup> Potentially contaminating activities could include those industries and associated chemicals listed in Appendix A of the [Managing Land Contamination – Planning Guidelines](#).

In some cases the indicators themselves provide enough evidence to conclude that the contamination should be reported to the EPA. In those cases where the indicators suggest that contamination is present but there is uncertainty about reporting it to the EPA, further investigation outlined in Section 2.2.2 will be needed.

### 2.2.2 Further investigation of land

Where further investigation of the land is necessary to assess whether contamination should be reported to the EPA, a site investigation should be conducted to:

- describe past and present activities that potentially contaminated the land and the adjacent areas, including groundwater, surface water and sediments
- identify potential contamination types
- assess the site condition
- assess the nature, degree and extent of the contamination
- assess whether any harm has been or is being caused by the contamination
- assess the possible exposure routes, exposed populations and the nature of other risk(s) presented by the contamination.

This step is equivalent to 'stage 2' investigations consistent with the [Contaminated Sites: Guidelines for Consultants Reporting on Contaminated Sites](#) (OEH 2011). A suitably qualified and experienced [environmental consultant](#) should be engaged to do the investigation.

The consultant should use the [Contaminated Sites: Guidelines for Consultants Reporting on Contaminated Sites](#) (OEH 2011) as a basis for conducting the investigation and preparing a report. Other [guidelines made or approved under section 105 of the CLM Act](#) should also be considered, including the [National Environment Protection \(Assessment of Site Contamination\) Measure 1999](#) (NEPC 2013), which provides a national framework for consistency and practical guidance for the assessment of contaminated sites.

Important guidance related to site assessment includes:

- [Contaminated Sites: Guidelines for the NSW Site Auditor Scheme](#), 2nd edition (DEC 2006) and future revisions of the guidelines.
- [Sampling Design Guidelines](#) (EPA 1995)
- [Contaminated Sites: Guidelines for the Assessment and Management of Groundwater Contamination](#) (DEC 2007)
- [Technical Note: Investigation of Service Station Sites](#) (EPA 2014)
- [Managing asbestos in or on soil](#) (NSW Government 2014).

The investigation should conclude whether the contamination must be reported to the EPA based on consideration of the information on the notification triggers in Section 2.3 of these guidelines.

When uncertainties arise from information gathered during a site investigation, further detailed site investigations may be needed to obtain more information. Uncertainties or unquantified risks should not be used as reasons to delay reporting.

The person responsible may also elect to use a site auditor accredited under the CLM Act to independently review the work of a contaminated site consultant and resolve any uncertainties. Site auditors may be used in other circumstances at the discretion of those initiating a site investigation.

## 2.3 Notification triggers

A landowner or person whose activities have contaminated land is required to notify the EPA that the land has been contaminated by a substance (a 'contaminant') that is present at levels specified in the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013) or other approved guidelines, and where certain other factors are met as described below.

See Sections 2.5 and 2.6.3 of these guidelines for situations that are not intended to be captured by the duty to report and examples where further assessment is not needed or where advice should be sought.

### 2.3.1 On-site soil contamination

For the purposes of section 60(3)(b) of the CLM Act, notification of contamination in, or on, soil on the land is required where:

- the 95 % upper confidence limit on the arithmetic average concentration of a contaminant in or on soil is equal to or above the Health Investigation Level and/or Health Screening Level for that contaminant for the current or approved use of the respective on-site land, as specified in Section 6, Schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013)

OR

- the concentration of a contaminant in an individual soil sample is equal to or more than 250% of the Health Investigation Level and/or Health Screening Level for that contaminant for the current or approved use of the respective on-site land, as specified in Section 6, Schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013)

AND

- a person has been or foreseeably will be exposed to the contaminant or a by-product of the contaminant.

Further details on the concept of 'foreseeability' are provided in Section 2.3.7 of these guidelines.

### 2.3.2 Off-site soil contamination

For the purposes of section 60(3)(a) of the CLM Act, notification of contamination in, or on, soil on neighbouring land is required where:

- the 95% upper confidence limit on the arithmetic average concentration of a contaminant in or on soil is above the health investigation level and/or health screening level for that contaminant for the current or approved use of the respective off-site land, as specified in Section 6, Schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013)

OR

- the concentration of a contaminant in an individual soil sample is more than 250% of the health investigation level and/or health screening level for that contaminant for the current or approved use of the respective off-site land, as specified in Section 6, Schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013)

AND

- the concentration of the contaminant in or on the soil on the neighbouring land will foreseeably continue to remain above the specified concentration.<sup>12</sup>

Further details on foreseeable contamination of neighbouring land are provided in Section 2.3.3 and details on the concept of 'foreseeability' in Section 2.3.7 of these guidelines.

### 2.3.3 Foreseeable contamination of neighbouring land

For the purposes of section 60(3)(a) of the CLM Act, notification of foreseeable contamination of neighbouring land is required where:

- the contaminant will foreseeably enter neighbouring land

AND

- the concentration of the contaminant on the neighbouring land will foreseeably be above the health investigation level and/or health screening level for that contaminant for the current or approved use of the respective off-site land, as specified in Section 6, Schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013)

AND

- the concentration of the contaminant on the neighbouring land will foreseeably continue to remain above the specified concentration.

### 2.3.4 Asbestos in, or on, soil

For the purposes of section 60(3)(b) of the CLM Act, notification of asbestos contamination is required where:

- friable asbestos<sup>13</sup> is present in or on soil on the land

AND

- the level of asbestos (% weight for weight) in an individual soil sample is equal to or above the health screening level of friable asbestos in soil (0.001%) specified in Section 4.8, Schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013)

AND

- a person has been, or foreseeably will be, exposed to elevated levels<sup>14</sup> of asbestos fibres by breathing them into their lungs.

Further details on the concept of 'foreseeability' are provided in Section 2.3.7 of these guidelines.

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<sup>12</sup> For example, if chronic or ongoing risks are present on a neighbouring site due to the presence of the contaminating substance, notification would be required, but if a risk is no longer present (such as where contamination on neighbouring land has been removed), notification would not be required.

<sup>13</sup> Friable asbestos is usually in the form of loose asbestos that is not bound together. The most common forms of friable asbestos are thermal lagging used on steampipes and boilers, as fire protection, ceiling insulation and the like, and raw asbestos waste from asbestos products manufacturing. Friable asbestos can usually be broken up or crumbled using hand pressure to generate free fibres. If disturbed, friable asbestos has the potential to generate significant quantities of airborne fibres and because of this requires a high level of control.

<sup>14</sup> Elevated levels of airborne asbestos are concentrations at or above 0.01 fibres/mL determined using the membrane filter method in accordance with the [Guidance Note on the Membrane Filter Method for Estimating Airborne Asbestos Fibres 2nd Edition \[NOHSC:3003\(2005\)\]](#) (National Occupational Health and Safety Commission, 2005).

For situations that are not intended to be captured by the duty to report, see Section 2.5 and example 8 in Section 2.6.3 of these guidelines. Bonded asbestos cement<sup>15</sup> (fibro) and naturally occurring asbestos<sup>16</sup> are not intended to be captured by these guidelines.

### 2.3.5 Groundwater or surface water

For the purposes of section 60(3)(a) of the CLM Act, notification of actual or foreseeable contamination of groundwater or surface water on the site is required where:

- the contaminant has entered or will foreseeably enter groundwater or surface water

AND

- the concentration of the contaminant in the groundwater or surface water is, or will foreseeably be, above the groundwater investigation level for that contaminant as specified in Section 6, Schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013)

AND

- the concentration of the contaminant in the groundwater or surface water will foreseeably continue to remain above the specified concentration.

If separate-phase contamination of groundwater (i.e. immiscible organic liquid) is found, the EPA is required to be notified regardless of the concentration in the groundwater, unless the situation falls under one of the scenarios described in Section 2.6.3 of these guidelines.

Further details on the concept of 'foreseeability' are provided in Section 2.3.7 of these guidelines.

### 2.3.6 Vapour intrusion

In the case of risks associated with the vapour inhalation pathway (also known as vapour intrusion), notification of actual or foreseeable contamination is required for the purposes of sections 60(3)(a) and (b) of the CLM Act where:

- the concentration of a contaminant in an individual soil vapour sample from the land is equal to or above the interim soil vapour health investigation level for volatile organic chlorinated compounds for the current or approved use of the respective on-site or off-site land as specified in Section 6, Schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013)

OR

- the concentration of a contaminant in an individual soil sample from the land is equal to or above the soil health screening level for vapour intrusion for the current or approved use of the respective on-site or off-site land as specified in Section 6, Schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013)

OR

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<sup>15</sup> Bonded asbestos cement comprises bonded asbestos-containing material which is in sound condition (although possibly broken or fragmented), and is restricted to material that cannot pass a 7 mm x 7 mm sieve. This sieve size is selected as it approximates the thickness of common asbestos cement sheeting and for fragments to be smaller than this would imply a high degree of damage and potential for fibre release.

<sup>16</sup> Naturally occurring asbestos is asbestos minerals found naturally in association with geological deposits including rock, sediment, or soil. Asbestos minerals are commonly found around the world in ultramafic rock formations including serpentinite (chrysotile [white]) and amphibole (actinolite, amosite [brown], anthophyllite, crocidolite [blue] and tremolite) as well as in soils where these rock types are located.

- the concentration of a contaminant in a groundwater sample from a site is equal to or above the groundwater health screening level for vapour intrusion for the current or approved use of the respective on-site or off-site land as specified in Section 6, Schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013)

OR

- the concentration of a contaminant in an individual soil vapour sample from the land is equal to or above the soil vapour health screening level for vapour intrusion for the current or approved use of the respective on-site or off-site land as specified in Section 6, Schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013)

AND

- the concentration of the contaminant will continue to remain equal to or above the specified concentration

AND

- a person has been or foreseeably will be exposed to the contaminant or any by-product of the contaminant.

Further details on the concept of 'foreseeability' are provided in Section 2.3.7 of these guidelines.

Note that under some circumstances, contaminated soil or groundwater may impact air quality. Where air quality has been affected and a person has been, or foreseeably will be, exposed to elevated levels of vapour, it is recommended that this is reported to the EPA by calling Environment Line on 131 555.

As required by Schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013) immediate action including, but not restricted to, notification is required where potentially explosive or acutely toxic gas concentrations are present in buildings or in ground services (such as utility trenches, sumps or drains) which may connect a ground gas source to a building, neighbouring building or off-site in ground services. For the purpose of this guideline, a potentially explosive or acutely toxic gas concentration is a concentration that is greater than 25% of the lower explosive limit for the gas in air, or greater than 25% of the acute toxicity of the gas in air.

Notification is not required if approved management measures are in place to control gas entry into buildings or in ground services.

Emergency management actions should be implemented as necessary. This includes notification to the EPA, emergency services and potentially affected parties including service providers, and relocation of building occupants if required.

### 2.3.7 Foreseeable

The CLM Act uses the key concept of 'foreseeable' to determine the likelihood of the presence of contamination or potential routes for its migration.

Foreseeability depends on a number of considerations, including:

- the physical and chemical properties of the contaminants
- the quantity of the contaminants
- the location of the site
- the geological and hydrogeological conditions (soil stratigraphy, depth to groundwater, and direction and rate of groundwater or surface water flow)
- the potential fate and transport mechanisms.

To determine the foreseeable movement of contaminants through various media, such as soil, groundwater, surface water or air, enough samples need to be collected to allow verification of the extent of contamination in the relevant media and the results compared with the appropriate references in these guidelines. Where relevant media have not been sampled the potential movement of contaminants at levels above the notification trigger values should be assumed. An exception to this is when negligible amounts of contaminants that are unlikely to affect human health and the environment have been released into the environment.

## 2.4 Other contaminants

In cases where no levels are specified for a particular contaminant in various environmental media, other reputable regulatory criteria may be used as a reference. The *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 2013) emphasises that a site-specific risk assessment should be conducted where criteria are not readily available. Detailed site-specific health risk assessments or ecological risk assessments can be complex and costly, and site-specific considerations will guide decisions on the level of assessment required.

## 2.5 Situations not intended to be captured by the duty to report

The duty to report is not intended to capture the notification of:

- widespread diffuse urban pollution that is not attributed to a specific industrial, commercial or agricultural activity
- sites without off-site contamination where
  - on-site contamination is not likely to migrate to a neighbouring property, and
  - any on-site contamination has been assessed and the site found to be suitable for the proposed use in accordance with the requirements under the *Environmental Planning and Assessment Act 1979*
- sites with contaminants that are at levels above the triggers but are equal to, or below, the ambient background concentration
- sites with non-friable asbestos materials (fibro) in or on soils, or naturally occurring asbestos,
- incidents of illegal dumping
- stockpiles of waste that are subject to the POEO Act
- sites that have already been notified to the EPA under the CLM Act, where there has been no change in circumstances since the previous notification
- sites subject to a declaration, order or proposal under Part 3 of the CLM Act
- sites formerly subject to a declaration under Part 3 of the CLM Act but where no potentially contaminating activities have since been carried out
- sites where a site audit statement has been issued certifying that the site is suitable for the current or approved use, no potentially contaminating activities have since been carried out and there are no off-site impacts.

While the duty to report under the CLM Act is not intended to capture the above scenarios, the EPA may still choose to regulate these sites under the CLM Act or other legislation if it considers that the contamination is significant enough to warrant regulation. In doing so, the EPA would consider the circumstances of each site in determining whether to intervene.

It should also be noted that while the situations listed above may not require notification under the CLM Act, there may be notification requirements under the POEO Act and other legislation.

## 2.6 Situations when the duty to report may arise

The duty to report arises when a landowner or a person whose activities have contaminated the land:

- is aware of the contamination, or
- should reasonably have become aware of the contamination.

The following factors are to be taken into account in determining when a person should reasonably have become aware of the contamination:

- the person's abilities, including their experience, qualifications and training
- whether the person could reasonably have sought advice that would have made them aware of the contamination
- the circumstances of the contamination.

### 2.6.1 Abilities, experience, qualifications and training

The EPA considers that a person should reasonably be aware of contamination on land if they have knowledge of:

- the contaminants present that could cause contamination
- how to identify and assess those contaminants
- the behaviour of those contaminants in the environment
- how to assess the potential pathways by which those contaminants could move
- how to assess and identify the exposure pathways available to those contaminants.

### 2.6.2 Reasonability of seeking advice and the circumstances of contamination

A range of factors might influence whether a person can reasonably seek advice about contamination. Although it is impossible to exhaustively describe these factors, some examples are provided as guidance below.

For example, the following factors might affect whether a person should reasonably seek advice:

- the circumstances of the contamination (for example, whether there is evidence of the contamination)
- the site history (including consideration of historic activities causing on-site contamination or waste stockpiles)
- the activities currently carried out at the site
- the activities carried out by the landowner
- whether the person, or anyone engaged by them, is able to access the site to obtain further information about the contamination; for example, they might have difficulty accessing the site where they are not a lessee (or sub-lessee) or lessor (or sub-lessor) of the site, do not own the site, and have no control or management of the site or financial interest in it.

Where a person:

- undertakes potentially contaminating commercial or industrial activities on a site, or
- is involved in land development activities on land that has been associated with activities which may potentially contaminate land, water, groundwater or air

they should seek advice about the existence, and nature, of any contamination on the site.

Where:

- potentially contaminating commercial or industrial activities have previously been carried out on the land or the land is filled with materials from an unknown origin
- there is evidence of contamination, and
- no prior assessment has been conducted or a management plan for the site has not been developed and implemented

the landowner or a person engaged in an activity that could potentially contaminate the land should seek further advice about the site and determine whether any contamination needs to be notified to the EPA.

### 2.6.3 When a person should seek advice about site contamination

A range of scenarios are provided below as guidance in determining whether a person should seek advice about site contamination for the purposes of section 60(9)(b) of the CLM Act. These examples are not exhaustive and do not constitute legal advice. The importance of seeking further advice about site contamination will depend on the particular circumstances in each instance and these may differ from the examples given below. Landowners and anyone carrying out potentially contaminating activities should obtain independent legal advice.

#### **Examples where further assessment is not needed**

A person would not be expected to seek advice in the following situations.

Example 1

- The site is currently used for residential purposes.
- The site has never been used for commercial or industrial purposes.
- The site has complete coverage with well-maintained grass and/or pavements and/or buildings.
- Gardens are established at the site with clean topsoil.
- No indicators of contamination are present (for example, no dead or stressed vegetation, no surface indicators of chemical spills, no unexplained patches of bare earth, no soil staining, no chemical odours from drains or other subsurface locations, no unexplained animal deaths, no unexplained health issues).
- **No duty to report.**

Example 2

- The site is in use for any purpose.
- The site was previously used for commercial or industrial purposes.
- Site contamination is appropriately contained and disturbance of the cap is subject to:
  - an environmental management plan (EMP) and is carried out in accordance with that plan, or
  - a development consent and is carried out in accordance with that consent, or
  - a site audit statement has been issued certifying that the site is suitable for the current or approved use and no potentially contaminating activities have been carried out at the site since the statement was issued.
- **No duty to report.**

#### Example 3

- The site is currently used for public open space purposes (for example, parks, playgrounds, playing fields).
- Public access to the site is allowed.
- The site contamination is completely covered with clean materials (for example, clean soil stabilised by healthy vegetation such as grass, pavements).
- An appropriate EMP and work health and safety (WH&S) plan are being implemented at the site for users and visiting maintenance workers.
- **No duty to report.**

#### Example 4

- The site is currently used for commercial, industrial or other purposes (for example, infrastructure or utility corridors).
- The site is fenced and members of the public are not able to access the site.
- An appropriate EMP and WH&S plan are being implemented at the site for users and visiting maintenance workers.
- There is no evidence of contamination (for example, no dead or stressed vegetation, no surface indicators of chemical spills, no unexplained patches of bare earth, no chemical odours from drains or other subsurface locations, no unexplained animal deaths, no unexplained health issues, no reasons to suspect groundwater is being affected by the activities).
- There is no aboveground or underground storage of bulk liquid chemicals.
- **No duty to report.**

#### Example 5

- The site is currently used for a commercial or industrial use.
- The site is fenced and members of the public are not able to access the site.
- An appropriate WH&S plan is being implemented for users of the site and for visiting maintenance workers.
- There is underground storage of bulk liquid chemicals or fuels on the site.
- There is no evidence of contamination (for example, no dead or stressed vegetation, no surface indicators of chemical spills, no unexplained patches of bare earth, no chemical odours from drains or other subsurface locations (other than the underground storage location), no unexplained animal deaths, no unexplained health issues).
- There are groundwater monitoring wells at the site and no contamination has been detected.
- An appropriate EMP and/or an ongoing groundwater monitoring plan have been implemented in all six-monthly monitoring periods to date.
- **No duty to report.**

#### Example 6

- The site is currently used for commercial or industrial purposes, including associated infrastructure such as carparks, roads and open space.
- Public access to the site is allowed.

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- The site is permanently covered (for example, by pavements and/or by floor slabs with small landscaped or grassed areas).
- An appropriate EMP and WH&S plan are being implemented for users and visiting maintenance workers.
- There is no underground storage of bulk liquid chemicals or fuels on the site.
- There is no evidence of contamination (for example, no dead or stressed vegetation, no surface indicators of chemical spills, no unexplained patches of bare earth, no chemical odours from drains or other subsurface locations (other than the underground storage location), no unexplained animal deaths, no unexplained health issues).
- **No duty to report.**

Example 7

- The site is currently used for industrial purposes.
- There are aboveground and underground storage systems at the site.
- A detailed site investigation has been conducted and the nature, degree and extent of contamination have been thoroughly defined.
- Contamination is present in the groundwater at concentrations above the triggers but is confined within the boundaries of the site.
- There are phase separated hydrocarbons (PSH) present on the site.
- Site investigations have confirmed that, because the soils are of low permeability, the contaminated groundwater is unlikely to move off site.
- Groundwater monitoring close to, or at, the hydraulic down-gradient site boundary continues to confirm that the contaminated groundwater will not migrate off site.
- The contaminants have been found not to pose on-site risks (for example, from vapour inhalation).
- An appropriate WH&S plan and EMP are being implemented for site users and visiting maintenance workers.
- **No duty to report.**

Example 8

- Structures with asbestos-containing materials are on site
- The site is currently used for residential purposes.
- The site has never been used for commercial or industrial purposes.
- The site has complete coverage with grass and/or pavements and/or buildings.
- Gardens are established and maintained at the site with clean topsoil.
- All visible non-friable asbestos fragments in or on the surface soils have been removed and disposed of at an appropriate waste facility.
- **No duty to report.**

**Examples where advice should be sought**

A person would be expected to seek advice in the situations below to establish the nature and level of contamination and whether it is likely to migrate to adjoining properties and thus determine whether there is a duty to notify.

#### Example 9

- The site is currently used for commercial, industrial or open recreational purposes.
- Public access to the site is allowed.
- The site is uncovered, with access to soil and/or fill materials.
- Large areas of the site are filled with materials of unknown origin and the site is adjacent or close to a sensitive receptor (for example, land used for residential purposes or child-care or land close to a waterway).
- **Seek further advice**

#### Example 10

- The site is currently used for commercial or industrial purposes.
- The site is fenced or not fenced and members of the public are, or are not, able to access the site.
- An appropriate WH&S plan and EMP are being implemented for site users, including visiting maintenance workers.
- There is underground or aboveground storage of bulk liquid chemicals or fuels on the site.
- No groundwater wells are present on the site.
- No environmental assessment has been recently undertaken to assess whether any contaminants at the site have migrated, or are likely to migrate, to adjoining properties.
- **Seek further advice.**

#### Example 11

- Structures with asbestos-containing materials are on site
- The site is currently used for residential, commercial or industrial purposes.
- The site has incomplete coverage with grass and/or pavements and/or buildings.
- There are visible non-friable asbestos fragments in or on the surface soils.
- **Seek further advice.**

#### Example 12

- The site is currently used for industrial purposes.
- There are aboveground and underground storage systems at the site.
- There is PSH present on the site and it is unclear whether the plume is migrating off site.
- Concentrations of contaminants in groundwater are unknown.
- **Duty to report.**

## 2.7 Form of report

The CLM Act requires notification using a form approved by the EPA. The approved [notification form](#) may be downloaded from the EPA website. Any supporting information related to the contamination (such as consultant reports) should be attached to the form.

## 2.8 Failure to report

A person who is required to report contamination to the EPA but fails to do so may be subject to prosecution. If they are convicted, the CLM Act currently provides for a maximum penalty of:

- \$1,000,000 with a further penalty of \$77,000 for each day the offence continues, in the case of a corporation, or
- \$250,000 with a further penalty of \$33,000 for each day the offence continues, in the case of an individual.

### 3. EPA regulatory actions

#### 3.1 Evaluating the significance of the contamination

When the EPA receives notification of contamination under section 60 of the *Contaminated Land Management Act 1997* (CLM Act), it will assess the information provided and other relevant information to determine whether the contamination is significant enough to warrant regulation. Matters the EPA must consider before declaring land to be significantly contaminated land are listed in section 12 of the CLM Act and described in Section 3.2 of these guidelines.

The EPA has an obligation under section 8 of the CLM Act to respond within a reasonable time to anyone who has provided information about actual or possible contamination of land and record what the EPA has done and the reasons for doing it.

The information provided by a person in complying with the duty to report under section 60 of the CLM Act is not admissible as evidence in any proceedings against that person for an offence under environment protection legislation administered by the EPA (except in proceedings for an offence under section 60 of the CLM Act).

#### 3.2 Contamination significant enough to warrant regulation

The CLM Act defines the process the EPA is required to follow before declaring land to be significantly contaminated. In determining whether contamination of land is significant enough to warrant regulation, the EPA must take into account:

- whether the substances have already caused harm or are likely to cause harm (for example, in the form of toxic effects on plant or animal life)
- whether the substances are toxic, persistent or bioaccumulative, or are present in large quantities or high concentrations, or occur in combinations
- whether there are exposure pathways available to the substances (that is, routes by which the substances may proceed from the source of the contamination to human beings or into the environment)
- whether the uses to which the land (and any land adjoining it) is currently being put are such as to increase the risk of harm from the substances (for example, using the land for the purposes of child-care, dwellings, or production of food for human consumption)
- whether the approved uses of the land and land adjoining it are likely to increase the risk of harm from the substances
- whether the substances have migrated, or are likely to migrate, from the land because of the nature of the land or the substances themselves
- relevant guidelines.

The CLM Act does not define the nature or level of contamination that requires regulation, as this is determined on a case-by-case basis. Determining whether contamination is significant enough to warrant regulation involves many considerations, including the type, nature, quantity and concentration of contaminants, how they manifest themselves, the characteristics they display, and the nature of their impacts in a particular medium. It also involves broader considerations such as the current use of the land, receptors that might be exposed to the contaminants under that use, and the likelihood of exposure.

### 3.3 Sites warranting regulation

Once the EPA determines that the contamination of land is significant enough to warrant regulation, it may take any of a number of actions under the CLM Act. These actions could include:

- declaring the land to be 'significantly contaminated land' (section 11 of the CLM Act)
- issuing management orders to require site assessment, remediation and/or monitoring (section 14 of the CLM Act)
- approving proposals from interested parties to manage the land voluntarily (section 17 of the CLM Act)
- liaising and negotiating with landowners or land occupiers about appropriate solutions
- undertaking educational and public awareness programs and other measures to minimise the environmental and health implications of the contamination (section 104 of the CLM Act)
- issuing a clean-up or prevention notice under the *Protection of the Environment Operations Act 1997* (POEO Act), regardless of whether or not the EPA is the appropriate regulatory authority (section 46 of the CLM Act).

In addition to regulatory actions, and if it is in the public interest, the Minister may also enter into voluntary offset arrangements with a person responsible for contamination of land. Under these arrangements, the person would provide help (other than direct monetary help) to communities affected by the contamination (section 111A of the CLM Act).

The actions taken by the EPA will depend on the nature of the site, the use to which it is put, the nature of the risk identified by the EPA and the management options available for addressing the risk. The EPA's primary goal in managing contaminated land, where the contamination is significant enough to warrant regulation, is to ensure the risk posed by the contamination is reduced so that the existing land use may continue or a land use currently approved may proceed.

### 3.4 Where regulation is not warranted

In some circumstances a site may be contaminated but the EPA considers that the contamination is not significant enough to warrant regulation. A site may contain contaminants at levels above the trigger levels but, because of the limited exposure pathways available, the contamination will not be considered significant enough to warrant regulation.

Where the EPA considers that a contaminated site does not warrant regulation under the CLM Act, the contamination issue should be addressed by the proponent and the planning consent authority as part of the development approval process. If the existing land use is proposed to be changed, the planning authority may require the site to be remediated to a level suitable for the proposed new use. Local councils may also consider regulating the contamination, where warranted, under the POEO Act.

## 4. Glossary

Acceptable risk	The acceptability of risk depends on scientific data, social, economic and political factors, and the perceived benefits arising from exposure to an agent.
Ambient background concentration	Of a contaminant is the soil concentration in a specified locality that is the sum of the naturally occurring background and the contaminant levels that have been introduced from diffuse or non-point sources by general anthropogenic activity not attributable to industrial, commercial or agricultural activities.
Approved use of land	A use to which land may be put without approval or development consent under the Environmental Planning and Assessment Act 1979.
Assessment of site contamination	A set of formal methods for determining the nature, extent and levels of existing contamination of a site and the actual or potential risk to human health or the environment on or off-site resulting from that contamination.
Concentration	The amount of material or agent dissolved or contained in unit quantity in a given medium or system.
Contaminant	A chemical existing in the environment above background levels and representing, or potentially representing, an adverse health or environmental risk.
Contaminated groundwater	Groundwater that has contamination at such a level that the condition of groundwater is such that it is not suitable for the current or realistic future use or presents the likelihood of causing an unacceptable environmental or human health impact in the discharge environment.
Contamination	The condition of land or water where any chemical substance or waste has been added as a direct or indirect result of human activity at above background level and represents, or potentially represents, an adverse health or environmental impact.
Contamination of land	The presence in, on or under the land of a substance at a concentration above which the substance is normally present in, on or under land in the same locality and which presents a risk of harm to human health or any other aspect of the environment.
Ecological investigation level (EIL)	The concentration of contaminants above which further appropriate investigation and evaluation will be required. EILs depend on specific soil physicochemical properties and land-use scenarios and generally apply to the top 2 metres of soil.
Ecological risk assessment	A set of formal, scientific methods for defining and estimating the probabilities and magnitudes of adverse impacts on plants, animals and/or the ecology of a specified area posed by a particular stressor(s) and frequency of exposure to the stressor(s). Stressors include chemicals, changes in physicochemical properties such as temperature, other human actions and natural catastrophes.
Ecological screening level (ESL)	For petroleum hydrocarbons are the concentrations above which further appropriate investigation and evaluation will be required. ESLs broadly apply to coarse- and fine-grained soils and various land uses. They are generally applicable to the top 2 metres of soil.

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Ecologically sustainable development	Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.
Effect	The change in state or dynamics of an organism, system, or population caused by exposure to a chemical.
Exposure	Occurs when a chemical, physical or biological agent makes contact with the human body through breathing, skin contact or ingestion; for example, contaminants in soil, water and air.
Exposure assessment	The evaluation of the exposure of an organism, system, or population to a chemical (and its derivatives).
Exposure pathway	The means by which a contaminant makes contact with the exposed population.
Groundwater	All water occurring below the land surface.
Groundwater investigation level	The concentration of a groundwater parameter at which further investigation (point of extraction) or a response (point of use) is required. Includes Australian water quality guidelines, drinking water guidelines, guidelines for managing risk in recreational water criteria and site-specific derived criteria.
Health investigation level (HIL)	The concentrations of a contaminant above which further appropriate investigation and evaluation will be required. HILs are generic to all soil types and generally apply to the top 3 metres of soil.
Health risk assessment	The process of estimating the potential impact of a chemical, biological or physical agent on a specified human population system under a specific set of conditions.
Health screening level (HSL)	For petroleum hydrocarbons are the concentrations above which further appropriate investigation and evaluation will be required. HSLs depend on physicochemical properties of soil, as these affect hydrocarbon vapour movement in soil, and the characteristics of building structures. HSLs apply to different soil types, land uses and depths below surface > 4 m and have a range of limitations.
Land use	Is based on the human purposes or economic activities that are conducted on a piece of land. This Measure specifies three land-use categories: (1) areas with high ecological value, (2) urban residential and public open space, and (3) commercial and industrial land.
National Environment Protection Measure	A measure made under section 14(1) of the <i>National Environment Protection Council Act 1994</i> (Cwlth) and the equivalent provisions of the corresponding Acts of participating states and territories.
Receptor	Is the entity (organism, population, community, or set of ecological processes) that may be adversely affected by contact with, or exposure to, a contaminant of concern. Sensitive groups refer to sub-populations with susceptibility and vulnerability factors.
Remediation	Of contaminated land includes: (a) preparing a long-term management plan (if any) for the land, and (b) removing, dispersing, destroying, reducing, mitigating or containing the contamination of the land, and (c) eliminating or reducing any hazard arising from the contamination of the land (including by preventing the entry of persons or animals on the land).

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Risk	The probability, within a certain timeframe, that an adverse outcome will occur in a person, a group of people, plants, animals and/or the ecology of a specified area that is exposed to a particular dose or concentration of a chemical substance; that is, it depends on the level of toxicity of the chemical substance and the level of exposure to it.
Risk assessment	The process of estimating the potential impact of a chemical, physical, microbiological or psychosocial hazard on a specified human population or ecological system under a specific set of conditions and for a certain timeframe.
Sensitive receptors	Refers to sub-populations with both susceptibility and vulnerability factors. These human populations at higher risk due to environmental factors. Examples of vulnerability factors include age, existing or past illness, poverty and other social determinants, smoking, poor nutrition, poor sanitation, behaviour more often associated with severe or profound intellectual disability (for example, pica).
Site	The parcel of land being assessed for contamination.
Soil	A complex heterogeneous medium consisting of variable amounts of mineral material, organic matter, pore water and pore air and is capable of supporting organisms, including plants, bacteria, fungi, protozoans, invertebrates and other animal life.
Source	The contaminant that is considered to represent a potential risk and requiring assessment.
Toxicity	The quality or degree of being poisonous or harmful to plant, animal or human life.

Note: This Glossary has been reproduced from the [Contaminated Land Management Act 1997](#) and the [National Environment Protection \(Assessment of Site Contamination\) Measure 1999](#) (NEPC 2013).

## 5. References

DEC 2006, Contaminated Sites: Guidelines for the NSW Site Auditor Scheme, 2nd edition, NSW Department of Environment and Conservation, Sydney, [www.epa.nsw.gov.au/clm/guidelines.htm](http://www.epa.nsw.gov.au/clm/guidelines.htm)

DEC 2007, Contaminated Sites: Guidelines for the Assessment and Management of Groundwater Contamination, NSW Department of Environment and Conservation, Sydney, [www.epa.nsw.gov.au/clm/guidelines.htm](http://www.epa.nsw.gov.au/clm/guidelines.htm)

EPA 1995, Sampling Design Guidelines, NSW Environment Protection Authority, Sydney, [www.epa.nsw.gov.au/clm/guidelines.htm](http://www.epa.nsw.gov.au/clm/guidelines.htm)

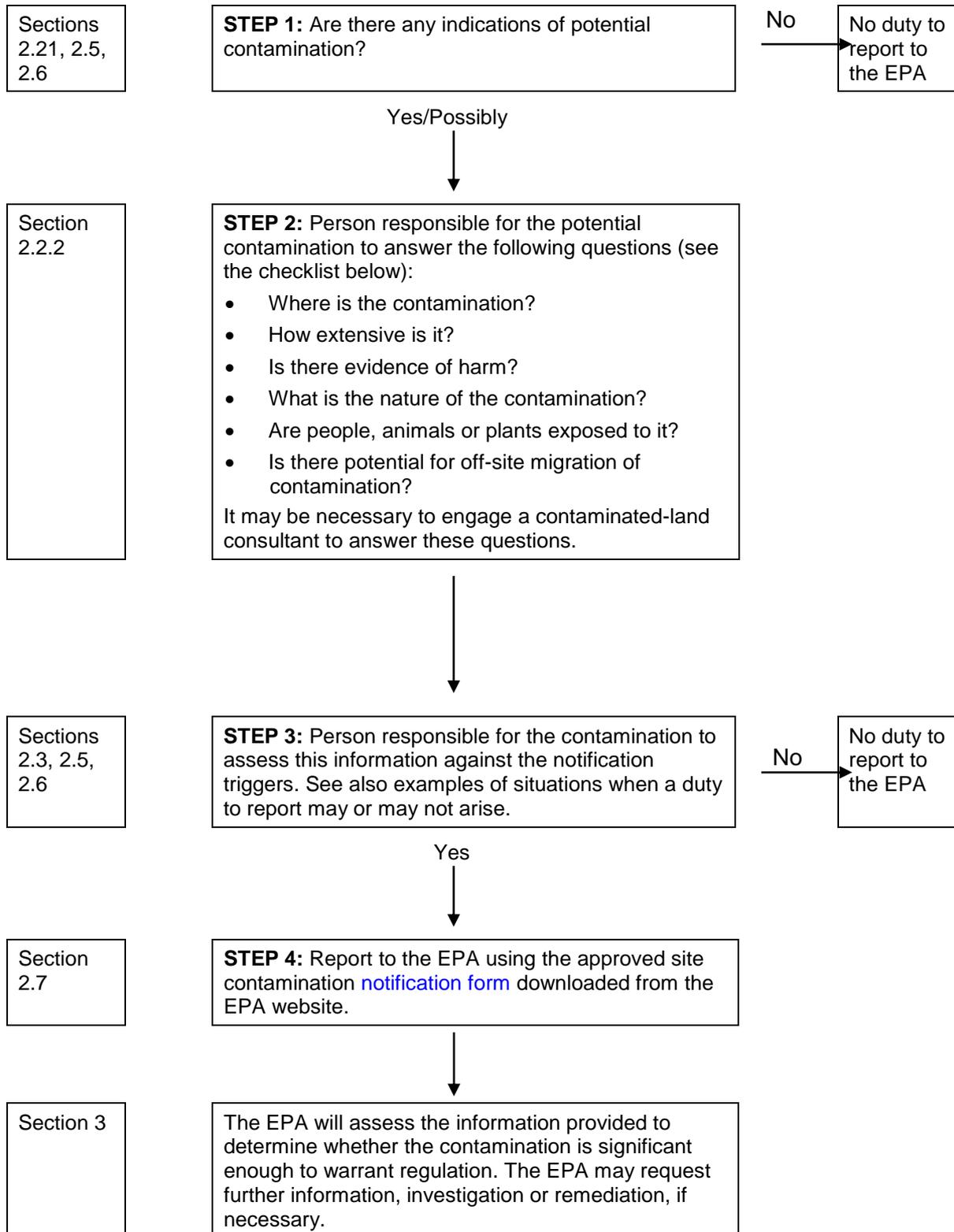
EPA 1998, Managing Land Contamination Planning Guidelines SEPP 55 – Remediation of Land, NSW Environment Protection Authority, Sydney, [http://www.epa.nsw.gov.au/resources/clm/gu\\_contam.pdf](http://www.epa.nsw.gov.au/resources/clm/gu_contam.pdf)

EPA 2014, Technical Note: Investigation of Service Station Sites, NSW Environment Protection Authority, Sydney, [www.epa.nsw.gov.au/clm/otherguidance.htm](http://www.epa.nsw.gov.au/clm/otherguidance.htm)

NEPC 2013, National Environment Protection (Assessment of Site Contamination) Measure 1999, National Environment Protection Council, Canberra, [www.scew.gov.au/nepms/assessment-site-contamination](http://www.scew.gov.au/nepms/assessment-site-contamination)

OEH 2011, Contaminated Sites: Guidelines for Consultants Reporting on Contaminated Sites, NSW Office of Environment and Heritage, Sydney, [www.epa.nsw.gov.au/clm/guidelines.htm](http://www.epa.nsw.gov.au/clm/guidelines.htm)

## 6. Appendix 1: Decision process and checklist for persons responsible for reporting potential contamination to the EPA



**Figure 1: Decision process for use by persons responsible for reporting contamination to the EPA under the *Contaminated Land Management Act 1997*.**

## Checklist for use by persons responsible for reporting contamination to the EPA

### Step 1: Indications of possible contamination

Person responsible for the potential contamination to review site history and records and undertake a site inspection to check whether:

- the site or adjacent sites may be associated with potentially contaminating activities
- the site or adjacent sites may be associated with complaints about pollution or illegal dumping of wastes
- there are any gaps in the site history or doubts about whether the site could have been associated with activities causing contamination
- there are any chemical, physical or biological indicators of contamination, as per Section 2.2.1 of these guidelines.

If the answer to all of the above points in Step 1 is 'no', reporting to the EPA is not required under section 60 of the *Contaminated Land Management Act 1997* (CLM Act). If the answer to any of the above points in Step 1 is 'yes' proceed to Step 2.

### Step 2: Assessing the site

Once the indicators of contamination have been identified check whether:

- an investigation of the potential contaminants of concern has been conducted to define the nature, degree and extent of contamination
- site investigation(s) and reporting have followed the requirements of Contaminated Sites: Guidelines for Consultants Reporting on Contaminated Sites (OEH 2011) and Schedule B2 (Guideline on Site Characterisation) of the [National Environment Protection \(Assessment of Site Contamination\) Measure 1999](#) (NEPC 2013)
- site investigation(s) and reporting have followed the requirements of Schedule B1 (Guideline on Investigation Levels for Soil and Groundwater) of the National Environment Protection (Assessment of Site Contamination) Measure 1999 (NEPC 2013)
- the checklist for Exposure Assessment in Appendix VII of the Contaminated Sites: Guidelines for the NSW Site Auditor Scheme, 2nd edition (DEC 2006) has been considered (or exposure assessment in future revisions of the site auditor guidelines)
- any evidence of, or potential for, migration of contaminants from the site and its adjacent sites has been appropriately addressed
- the results of the assessment are assessed against the notification triggers in Section 2.3 of these guidelines.

A contaminated land consultant engaged to clarify the level of contamination should:

- have appropriate qualifications and be experienced in contaminated-site assessment and remediation (refer to [Where to find a consultant?](#) on the EPA website or Schedule B9 of the National Environment Protection (Assessment of Site Contamination) Measure 1999 (NEPC 2013) for further information)
- be aware that the investigation is to provide information for assessment of reporting obligations under section 60 of the CLM Act.

If the answers to all of the above in Step 2 are 'yes' and the assessment indicates no contamination, reporting to the EPA is not required under section 60 of the CLM Act.