

# Contaminated Land Management Compliance Statement



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ISBN 978 1 925790 52 8  
EPA 2018P0997  
July 2018

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# 1. Regulation of contaminated land

In NSW, the *Contaminated Land Management Act 1997* (CLM Act) enables the Environment Protection Authority (EPA) to regulate land that is significantly contaminated and poses a risk to human health and the environment.

Under the CLM Act, the EPA can declare land to be significantly contaminated and order a person or persons responsible to take investigative or remediation actions, or approve a voluntary management proposal for the management of the significantly contaminated land. The CLM Act also establishes a hierarchy of responsibility for managing contaminated land.

Other contaminated sites not regulated by the EPA are managed through the land-use planning process under the *Environmental Planning and Assessment Act 1979*.

The EPA manages a range of programs to facilitate the regulation of contaminated sites. The EPA:

- administers the NSW site auditor scheme
- makes or approves guidelines for use in the assessment and remediation of contaminated sites
- administers the public record of regulated sites under the CLM Act.

## 2. Compliance and escalation

### 2.1 Compliance Policy

The EPA's [Compliance Policy](#) summarises the EPA's general approach to compliance and enforcement of the legislation that it administers.

It describes the EPA's:

- approach to regulation and compliance
- response to environmental issues and non-compliance
- regulatory performance.

The Policy guides EPA decision-making to ensure that its compliance activities and actions are consistent, fair and credible.

### 2.2 Contaminated Land Management Compliance Statement

The EPA's Contaminated Land Management Compliance Statement details the approach taken to compliance and enforcement of the CLM Act and Contaminated Land Management Regulation 2013.

The overall objective of the EPA's compliance activities in relation to contaminated land is to improve environmental and human health outcomes. Consistent with the EPA's Compliance Policy, a risk-based approach and an escalated regulatory response to compliance is taken in the management of contaminated land.

When identifying the appropriate compliance tools and escalating its response the EPA considers many of the following factors:

- the enforcement measures necessary to ensure compliance and bring about the best human health and environmental outcome
- the seriousness of the contamination, based on its actual or potential impacts on the environment and the community
- the potential or actual risk of harm to human health and the environment
- voluntary action to mitigate any harm
- failure to notify the EPA of contamination

- failure to comply with EPA requests, directions or statutory notices
- cooperation with the EPA and willingness to commit to appropriate remedial actions
- whether effective measures to address impacts are already in place
- the history of compliance with EPA legislation and the frequency of offences committed
- whether false or misleading statements have been made about the contamination
- culpability, including any mitigating or aggravating circumstances
- public interest and community expectation about the action taken to provide specific or general deterrence.

Section 4 provides information about the compliance tools the EPA uses to respond to non-compliances.

## 3. Compliance with statutory instruments

Under the CLM Act the EPA may serve orders on a person directing them to carry out certain activities in relation to significantly contaminated land. The EPA can also approve a voluntary management proposal for the management of significantly contaminated land.

### 3.1 Preliminary investigation order

A preliminary investigation order enables the EPA to order a person to carry out a preliminary investigation of a site to determine whether the site is contaminated with the substances specified in the order.

Importantly, a preliminary investigation order may be served on a broader range of people than a management order or ongoing maintenance order. A preliminary investigation order may be served on any one or more of the following persons:

- a person who the EPA reasonably suspects may have been responsible for contamination of the land with the specified substance
- an owner of the specified land
- a notional owner of the specified land
- a person who carried on activities on the specified land, but only if the activities either generate or use the specified substance or the substances used may be converted by reacting with each other or by natural processes into the specified substances
- a public authority.

The EPA will order a person to undertake preliminary investigation of a site when a person fails to:

- voluntarily undertake site investigation work in a timely manner, or
- cooperate with the EPA while undertaking site investigation work.

The EPA may also order a person to undertake preliminary investigation of a site where there is community interest in the site, regardless of the cooperation or willingness of the person to undertake the site investigation work. This would provide transparency as the EPA's requirements for the investigations would be documented in the EPA's record of notices.

The preliminary investigation order will clearly outline actions, a schedule of deliverables and outcomes.

**If a milestone is not met (for example, a site investigation report is not received as scheduled) enforcement action will be taken unless an extension has been granted by the EPA.**

## 3.2 Voluntary management proposal

A proponent (including the person responsible for contamination, land owner or future land owner) may provide the EPA with a proposal for voluntary site management of significantly contaminated land.

Where the EPA is satisfied with a voluntary management proposal, the EPA may approve the proposal subject to conditions, with the ability to add further conditions if subsequently required.

Where delays in achieving agreed milestones under the proposal are expected to occur, the EPA must be informed in advance of the milestone date.

If the approved voluntary management proposal is not complied with, the EPA may withdraw its approval of a proposal and issue a management order.

The approach taken to escalating to a management order will take into consideration the factors listed in sub-section 2.2 above.

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**The EPA will escalate from a voluntary management proposal to a management order where the proponent fails to meet milestones and does not request an extension from the EPA prior to the milestone date.**

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## 3.3 Management order

The EPA may order an appropriate person or a public authority to carry out any action in relation to the management of significantly contaminated land.

The order will clearly outline actions, a schedule of deliverables and outcomes.

Where the order includes a remedial technology trial, a clear measure of the success of the technology within a definitive timeframe (for example, two years) needs to be specified.

Options for implementation of more active remediation need to be specified where timely outcomes are not achieved through the trial.

Where assessment and/or remediation of contamination is complex and likely to take an extended period of time or where specific tasks are required, staged orders will be used as a more effective means of regulation.

When considering regulatory options for subsequent stages, it is possible to progress regulation of the site management voluntarily through the appropriate person submitting a voluntary management proposal, subject to approval from the EPA.

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**If a management order milestone is not met (for example, a remedial action plan is not received as scheduled) enforcement action will be taken unless an extension has been granted by the EPA.**

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## 3.4 Ongoing maintenance order

The EPA may order a person to carry out any ongoing management of the land that is specified in the order, including actions such as reporting to the EPA.

Where a site has been subject to a management order, approved voluntary management proposal or a section 35 or 36 notice under the *Environmentally Hazardous Chemicals Act 1985* (NSW) and continued management actions are required on the site, an ongoing maintenance order will be issued. Examples of management actions include maintaining the integrity of a capping system or monitoring of groundwater to ensure the effectiveness of the remediation.

The order will clearly outline actions, a schedule of deliverables and outcomes.

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If an ongoing maintenance order milestone is not met (for example, a groundwater monitoring report is not received as scheduled) enforcement action will be taken unless an extension has been granted by the EPA.

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### 3.5 Prevention notices

The EPA may issue prevention notices under the *Protection of the Environment Operations Act 1997* (POEO Act) in relation to significantly contaminated land.

A prevention notice can be issued when the EPA reasonably suspects that an activity has been or is being carried out in an 'environmentally unsatisfactory manner'.

Notices specify preventive actions that must be taken to improve environmental performance, such as installing or repairing controls to prevent water pollution. A prevention notice may order that plant or equipment is not operated until the EPA is satisfied appropriate controls are in place.

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The EPA will issue a prevention notice where:

- the person or business being regulated needs to take proactive actions to prevent contamination from occurring, and
  - preventative actions under statutory orders would be too slow.
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### 3.6 Clean-up notices

The EPA may issue clean-up notices under the POEO Act in relation to significantly contaminated land.

A clean-up notice can be issued when the EPA reasonably suspects that a pollution incident has occurred or is occurring or when the release of a pollutant is likely or imminent.

A clean-up notice may direct actions to be taken to prevent, minimise, remove, disperse, destroy or mitigate pollution resulting from or likely to occur from an incident. The notice details the specific clean-up action required and a time frame for completion.

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The EPA will issue a clean-up notice where:

- an immediate response to a pollution incident is required to prevent contamination from occurring, and
  - clean-up actions under statutory orders would be too slow.
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### 3.7 Requests for extensions

Where the person or business being regulated becomes aware that they will not meet a management milestone they must request an extension from the EPA.

The request must be made in writing and the person or business being regulated must outline:

- detailed reasons for the delay
- a revised time period within which the milestone will be achieved
- a statement explaining why enforcement action should not be taken.

The request for an extension must be made at least 21 days prior to the milestone date.

The EPA will assess the request and may approve an appropriate extension.

## 4. Compliance tools

The EPA has a range of compliance tools available and the choice of approaches and regulatory tools depends on the issue and context.

When compliance monitoring identifies non-compliance, its significance is evaluated to determine the most appropriate response to take. 'Significance' involves establishing the level of risk to the environment as a result of the non-compliance as well as other factors, such as the offender's attitude to compliance, including whether the breach was intentional, opportunistic or unintentional (as mentioned in the EPA's Compliance Policy).

### 4.1 Advisory letters

Advisory letters are usually issued where it is considered possible that a breach has occurred but not enough evidence is available to prove the offence. Advisory letters remind the person or business of their compliance responsibilities and the need to meet and avoid any future breaches.

### 4.2 Show cause letters

A show cause letter invites the recipient to provide an explanation for an alleged breach of environment protection legislation. The letter is an opportunity for an individual or business to provide reasons why the EPA should not proceed with further enforcement action, such as issuing a penalty notice or commencing a prosecution. The letter may request details of the incident, the recipient's response to the incident and any mitigating circumstances.

### 4.3 Formal warnings

Formal warnings are used for incidents where the aim is to avoid escalating environmental harm or the opportunity exists to achieve prompt voluntary compliance with legislative requirements. In these cases, the seriousness of the non-compliance is usually at the lower end of the scale, so further enforcement action is not considered necessary.

Formal warnings remind people and businesses about statutory requirements and can lead to an escalation of enforcement action if the issue is not addressed.

### 4.4 Official cautions

The EPA may issue an official caution if the offence is one for which a penalty notice may be issued. A caution is used rather than a penalty notice if the issuing officer has reasonable grounds to believe that an offence has been committed but believes a caution is appropriate in the circumstances. This might be in situations where the offence is minor in nature or was not knowingly or deliberately committed. In deciding whether to issue a caution, the officer must exercise their discretion, based on the facts of the individual case and with regard to relevant EPA guidelines.

Issuing an official caution does not prevent the EPA from taking alternative enforcement action later for the alleged offence, if it becomes apparent that a different response would be more appropriate.

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**The EPA will issue an official caution where a penalty notice may be issued for an offence but the issuing officer considers a caution is appropriate.**

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## 4.5 Penalty notices

Penalty notices may be issued for minor breaches when the facts appear obvious and a penalty notice is likely to be a viable deterrent. It allows the person served with the notice to pay a fine rather than have the alleged offence dealt with in court. Penalty notices are primarily used to deal with one-off breaches that can be remedied easily.

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The EPA may issue a penalty notice when a person or business:

- is not complying with a preliminary investigation order, management order or ongoing maintenance order
  - has failed to notify the EPA of contaminated land
  - carries out, or makes representations about their ability to carry out, a statutory site audit without being accredited to do so.
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## 4.6 Enforceable undertakings

An enforceable undertaking is an alternative to administrative action where there has been a serious breach of legislation. (An enforceable undertaking is both a statutory instrument and a compliance action under the CLM Act.)

Under the CLM Act, the EPA is able to accept a written undertaking by a person to take action to deal with an actual or potential breach of the Act. This gives the EPA a legislative basis for negotiating environmental improvements, which are enforceable through the NSW Land and Environment Court.

The EPA will apply to the Land and Environment Court to make an order if the EPA considers that the person who gave the undertaking has breached any of its terms.

The Court may make any of the following orders:

- an order directing the person to comply with the breached term of the undertaking
- an order directing the person to pay to the State an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach
- any order that the Court thinks appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach
- an order suspending or revoking any environment protection licence under the POEO Act held by the person
- an order requiring the person to prevent, control, abate or mitigate any actual or likely harm to the environment caused by the breach
- an order requiring the person to make good any actual or likely harm to the environment caused by the breach
- any other order the Court considers appropriate.

The EPA's [Guidelines on Enforceable Undertakings](#) set out further details on their use.

## 4.7 Prosecutions

For serious breaches or repeat offences, prosecution may be the most appropriate option. In these situations, the EPA will follow its [Prosecution Guidelines](#).

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The EPA may seek to prosecute a person or business being regulated where:

- the EPA has escalated its response to a non-compliance with a statutory instrument, and the person or business being regulated has failed to adequately respond, or
  - there is a serious breach of the CLM Act.
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## 5. Compliance monitoring

### 5.1 Inspections, audits and campaigns

The EPA undertakes site inspections, compliance audits and campaigns as a means of monitoring compliance and raising awareness about the EPA's requirements.

The EPA generally gives prior notification of an inspection or audit via email or phone. It also has the power to carry out unannounced inspections or audits.

During the inspection or audit the EPA will provide information on statutory obligations where appropriate and if a non-compliance is identified the EPA may advise of the non-compliance on site.

The EPA follows up with formal notification of any non-compliance and specifies the corrective actions required and the time frames to comply. A follow-up inspection or audit may be carried out to determine compliance.

In addition to assessing compliance, campaigns can be used to raise awareness about particular issues and the EPA's requirements. They are often conducted in partnership with other regulators, such as local councils, to proactively address common or widespread issues.

### 5.2 Investigations

The EPA undertakes investigations to assess detected or reported contamination or non-compliance with the CLM Act to determine the priority for further compliance and enforcement action.

During an investigation authorised officers gather evidence of the incident or non-compliance in order to establish whether an offence has occurred and, if it has, the severity of the offence, and the identity of those who may be responsible.

Evidence may take the form of videos, photographs, samples and physical evidence, witness statements and records of interview, consistent with legislative powers and EPA policies, such as the [EPA Code of Ethics and Conduct](#).