

**Issues Paper:
Review of the Contaminated Land
Management Act 1997**



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Foreword

I am very pleased to provide the New South Wales community with this issues paper as part of the review of the *Contaminated Land Management Act 1997*. The legislation requires that the Act be reviewed as soon as possible after its first five years in operation. As the Act was enacted on 17 December 1997, it is now time for the review to be undertaken.

Since 1997 a 'state of the art' Contaminated Land Reform Package has been progressively introduced by the New South Wales Government to ensure that the impacts of contamination are minimised. The reform package establishes clearer roles and responsibilities between those that caused the contamination, the owners of the sites, planning authorities and the regulators dealing with contaminated land.

The package consists of the following 3 components:

- the *Contaminated Land Management Act 1997* (CLM Act)
- State Environmental Planning Policy 55 – Remediation of Land (SEPP 55)
- the *Managing Land Contamination – Planning Guidelines*.

Under the CLM Act, the EPA regulates sites that are judged to pose a 'significant risk of harm'. Planning authorities, including local councils, manage other contaminated sites under the planning laws.

This review provides an opportunity to assess the CLM Act's effectiveness and to determine if the provisions are still appropriate. The review is required by section 116 of the CLM Act and a report of the review will be tabled in Parliament in December 2003.

This paper discusses issues that have a bearing on the achievement of the CLM Act's objectives which have emerged with the day-to-day implementation of the Act. The EPA and I would like to hear your views on these issues and would welcome your comments. You may also be interested in attending one of the public consultation sessions that the EPA will be holding in the near future.

I encourage you to participate in the review of the CLM Act to ensure continuous improvement in the management and clean up of land contamination in New South Wales.

Bob Debus MP

Minister for the Environment

Further Information

The Issues Paper is available on the EPA website at www.epa.nsw.gov.au. Printed copies are available from the EPA's Pollution Line on 131 555.

Where to send your submission

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Submissions close on 15 August 2003

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Introduction

The Contaminated Land Reform Package

The New South Wales Government's Contaminated Land Reform Package was announced in 1995. The Package was a response to widespread concerns that the then existing laws and administrative processes were not dealing adequately with contaminated sites across the State. The need to deal with these sites had become particularly acute with the increasing redevelopment of former industrial and agricultural sites for residential purposes, a trend which has continued apace.

The broad purpose of the reforms has been to provide a clear, efficient and comprehensive framework of laws, guidelines and administrative arrangements for the management of contamination at sites across the State.

The package deals with contaminated land through two avenues:

1. the land use planning processes which deal with future uses of a site
2. the CLM Act processes which provide effective regulatory control of investigation and clean up given the current or approved use of the site.

The land use planning processes are underpinned by State Environmental Planning Policy No. 55 – Remediation of Land (SEPP 55), the *Managing Land Contamination – Planning Guidelines* (Planning Guidelines) and a variety of other guidelines.

Land use planning processes

The land use planning processes embrace a preventative philosophy of contaminated land management by aiming to ensure that land is not allowed to be put to an inappropriate use given its land use history. The processes involve the identification and investigation of any contamination at an early stage in the environmental planning and assessment process and any necessary remediation being made an integral part of any redevelopment or rezoning.

In particular, the processes include measures to ensure that:

- planning authorities (generally local councils) consider contamination issues when they are making rezoning and development decisions;
- local councils provide information about land contamination on planning certificates that they issue under section 149 of the *Environmental Planning and Assessment Act 1979* (EP&A Act); and
- land remediation is facilitated and controlled through SEPP 55.

The Contaminated Land Management Act

The CLM Act establishes a legal framework which enables the New South Wales Environment Protection Authority (EPA) to regulate the assessment and remediation of contamination that poses, or is likely to pose, what the Act refers to as 'a significant risk of harm to human health or the environment'. The objectives of the Act are set out in detail later in this issues paper. However, in broad terms the Act specifies who is responsible for investigating and remediating the contamination, gives the EPA a range of duties and powers to ensure that the contamination is addressed and establishes a scheme to ensure that the public has appropriate information about it. The Act also enables the EPA to make or endorse guidelines for its own use, for example, in determining significant risk of harm and for the use of land owners, developers, site auditors, government departments and other

stakeholders. These guidelines include, for example, the National Environment Protection (Assessment of Site Contamination) Measure.

Prevention of contamination

The EPA also administers other laws which give it and some other State and local government authorities a range of powers to protect the environment. The exercise of these powers can help to reduce the likelihood of contamination developing in the first place. The principal law is the *Protection of the Environment Operations Act 1997*.

The review of the Contaminated Land Management Act 1997

The CLM Act was assented to on 17 December 1997. Section 116 of the Act requires the Minister for the Environment to undertake a review of the Act as soon as possible after the fifth anniversary of the assent to the Act (which was 17 December 2002).

The purpose of the review is to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. A report on the outcome of the review must be tabled in each House of Parliament by December 2003.

Site auditor provisions excluded from the CLM Act review

Government has already reviewed and proposed changes to the accredited site auditor scheme that is established by the legislation. As a result, this current review is not looking at the provisions in the CLM Act which establish and regulate the accredited site auditor scheme. Amendments to those provisions – which are in Part 4 of the Act – are already in progress as the need for them became apparent some time ago. The aim of those amendments will be to ensure that the EPA's requirements and expectations of accredited site auditors are very clear and that the EPA has sufficiently strong and flexible powers to deal appropriately with auditors whose work is unsatisfactory. Consultation on the proposed amendments was conducted in 2002, principally through a public discussion paper entitled *Consultation Paper: Proposals to Amend the NSW Site Auditor Scheme under the Contaminated Land Management Act 1997*. (The discussion paper is available on the EPA's website at www.epa.nsw.gov.au/siteauditorconsultationpaper.pdf or from the EPA's Pollution Line on 131 555.) A draft Bill with the amendments is being prepared for consideration by Parliament in the Autumn 2003 session.

Review of SEPP 55 and Planning Guidelines

In relation to the land use planning component of the Contaminated Land Reform Package, the EPA and the Department of Urban and Transport Planning are currently preparing a consultation program for the second half of 2003 during which the effectiveness of the Planning Guidelines and SEPP 55 will be reviewed.

This issues paper

This paper discusses the CLM Act's objectives and the issues that have emerged with the day-to-day implementation of the Act. The Minister and the EPA encourage anyone who has an interest in the Act to put forward their views on these objectives, how successfully the Act is achieving them and whether any changes in the legislation should be made. Comments on these issues are welcome. Information on where to send your comments is on page 4 of this paper.

Objectives of the CLM Act

The general objective of the CLM Act is to establish a process for investigating and (where appropriate) remediating sites where contamination presents a significant risk of harm to human health or some other aspect of the environment.

The particular objects of the Act are to:

- set out accountabilities for managing contamination if a significant risk of harm is identified
- 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.

Are the objectives of the CLM Act still valid? If they are, are the terms of the Act still appropriate to achieve those objectives or are changes needed?

An efficient contaminated land management process

Before the introduction of the New South Wales Government's Contaminated Land Reform Package, no clear framework was available for the management of contaminated sites in New South Wales. The pre-Reform Package framework was piecemeal, with poorly integrated components. As a consequence, the processes for managing contaminated land were unclear, inefficient and inequitable. Also, the processes did not ensure that there was sufficient public transparency in critical decision-making about this land.

The CLM Act has been a very significant part of the response to these inadequacies. It aims to bring greater certainty into contaminated land management by making it clear:

- why and when the EPA will need to intervene in the regulation of contaminated sites
- who the EPA will direct to take action to reduce the risk of harm caused by serious contamination
- the associated rights and obligations of the individuals or bodies that caused the contamination, the owners of contaminated land and public authorities.

Under section 60 of the CLM Act, a person whose activities cause a contamination that poses a significant risk of harm, has the obligation to notify the EPA when they become aware of the contamination. It places the owner of the land concerned under the same obligation.

The following table sets out the number of section 60 notifications that the EPA has had about contaminated sites since the section came into force on 1 July 1999.

Notifications under s.60 CLM Act	Total	1999	2000	2001	2002	2003
	121	29	22	31	34	5

Once this notification takes place there are several steps which can be taken by the EPA that culminate in the assessment and, where necessary, remediation of the site.

The main steps are:

- deciding, according to criteria set out in the Act, whether the contamination of a site poses or is likely to pose a significant risk of harm to human health or the environment
- informing the public of the risk of harm by placing a notice in the New South Wales Government Gazette and in the newspaper declaring the site to be an investigation area or, if information about the contamination is sufficient for remediation to be the next step, a remediation site
- deciding, according to a hierarchy listed in the Act, who is responsible under the Act for assessing or remediating the contamination
- issuing the person responsible with an investigation order or, if information about the contamination is sufficient, a remediation order or, alternatively, agreeing to a voluntary investigation or remediation proposal put forward by any person.

The process also involves giving affected parties notice of proposed declarations and giving the public an opportunity to comment on the future regulation of a site.

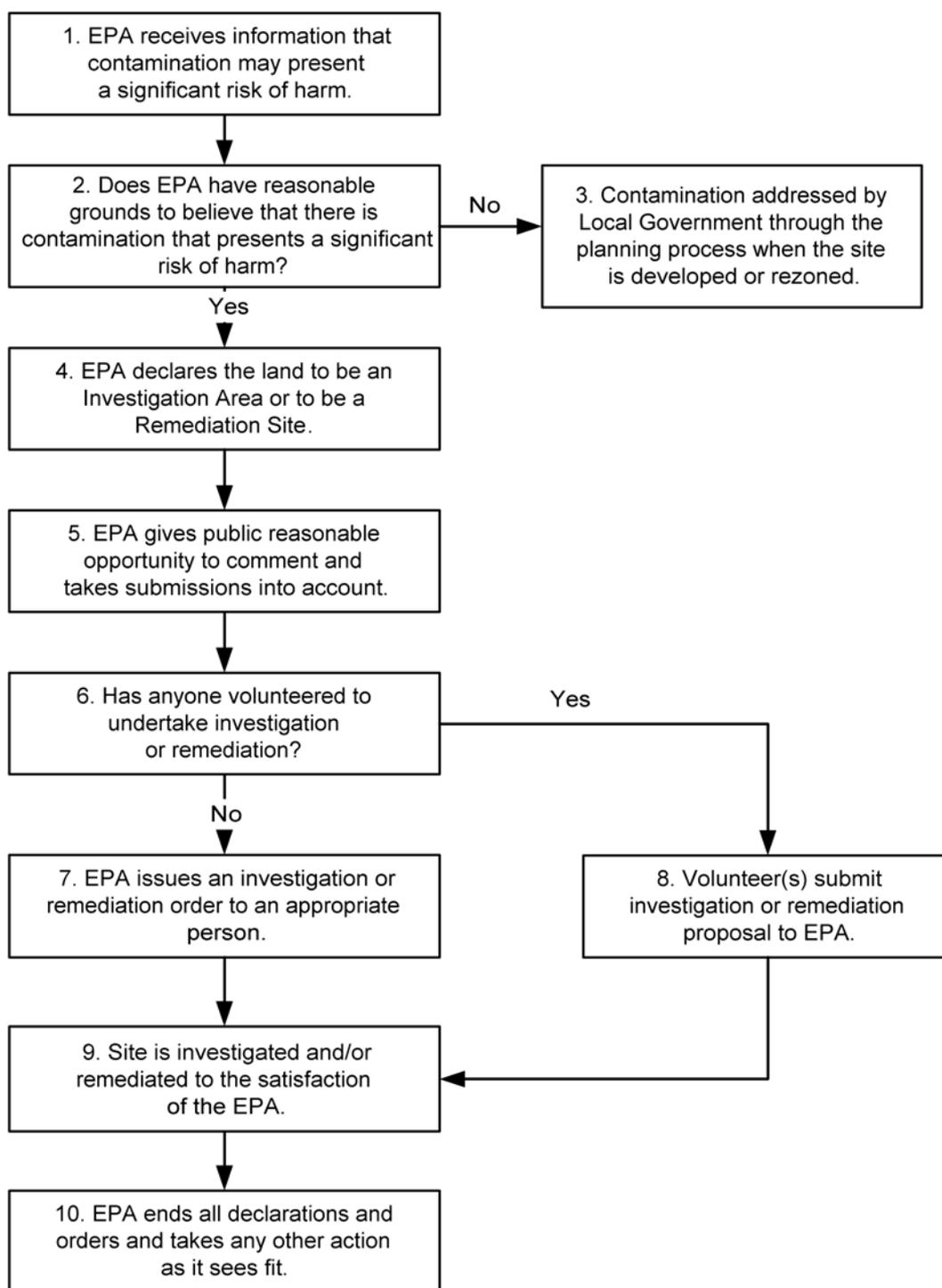
Figure 1 illustrates the principal steps in the process.

Regulatory actions taken by the EPA under the CLM Act

The table below sets out the number of declarations and orders the EPA has issued and of voluntary proposals to which it has agreed.

Regulatory Action	Total	1998	1999	2000	2001	2002	2003
Declaration of Investigation Area	7			1	1	2	3
Declaration of Remediation Site	23	1		8	2	7	5
Investigation Order	2				1		1
Remediation Order	3				3		
Voluntary Investigation Proposal	12		2	3	4	2	1
Voluntary Remediation Proposal	25		3	5	5	9	3
Maintenance of Remediation Notice	17	12	3	2			

FIGURE 1 - STEPS IN REGULATING SITES UNDER THE CONTAMINATED LAND MANAGEMENT ACT 1997



Significant risk of harm

The principal reason for the EPA determining whether the contamination of a site poses a significant risk of harm is to identify whether the site requires the EPA's involvement and regulation under the CLM Act or whether it can be dealt with adequately by planning authorities under the land use planning process. Broadly speaking, the former are 'significant risk of harm' sites and the latter are not.

The factors that the EPA must consider in making its determination are listed in section 9 of the CLM Act. They are:

- whether the contamination has caused harm
- the nature and amount of substances causing the contamination
- whether there are pathways for the contaminants that could result in human beings or other aspects of the environment being exposed to them
- the current use of the land concerned and the use approved by councils
- the movement or potential for movement of the contamination
- relevant guidelines made or endorsed by the EPA (the basic ones being the EPA's *Guidelines on Significant Risk of Harm from Contaminated Land and the Duty to Report*).

In reaching a decision on whether the EPA should regulate a site, the EPA applies a 'weight of evidence' approach and the principles of ecologically sustainable development. It considers factors such as what the contamination is, where it is, how much there is, the amount of exposure that people, animals or plants have to the contamination and whether harm has already occurred.

Other guidelines that provide the criteria for the consideration of significant risk of harm include, for example, the EPA's *Guidelines for the NSW Site Auditor Scheme* and *Guidelines for Assessing Service Station Sites*, the *Australian Water Quality Guidelines for Fresh and Marine Water Quality* and the *National Environment Protection (Assessment of Site Contamination) Measure*. The list of the guidelines made or endorsed by the EPA can be found at the EPA's website at www.epa.nsw.gov.au.

The concept of significant risk of harm is clearly also of critical importance to polluters and landowners, given their obligation under section 60 of the CLM Act to notify the EPA of contamination that poses such a risk. The EPA's *Guidelines on Significant Risk of Harm from Contaminated Land and the Duty to Report* describes the concept of contamination of land posing a significant risk of harm, and provides a range of issues to be considered when deciding on whether or not the contamination should be reported to the EPA.

The EPA is aware that there have been cases where it has not been notified of contamination that poses a significant risk of harm despite the notification duty under section 60 of the CLM Act.

Is it clear as to what type of contamination must be reported to the EPA?

Some people have expressed the view to the EPA that the term ‘significant risk of harm’ is emotive and that its use to identify site contamination can cause unnecessarily heightened concern about the contamination. A different phrase, such as ‘regulated sites’ or ‘priority sites’ may be less emotive but still convey the importance of scrutiny and clean up.

Should the concept of ‘significant risk of harm’ be reconsidered?

The steps and phases involved in the process

The process in the CLM Act is designed to be clear, transparent and fair. However, its stepwise nature and separate investigation and remediation phases can have implications for the flexibility and speed with which the EPA and responsible parties can respond to a contamination.

Under the CLM Act whether a site should be treated as being at the investigation or remediation stage hinges on the degree of certainty about the contamination. This has practical consequences. For example an investigation order can only be issued if the site has been declared an investigation site – not if it has been declared a remediation site. However, in practice, when a site is being remediated an element of investigation will often still be necessary and it can be possible to undertake some remediation while investigating the full extent of the contamination concerned. If the EPA considers that both investigation and remediation will be required this could necessitate it issuing two declarations – an investigation area declaration and a remediation site declaration.

It is clearly important that contaminated sites are assessed and remediated as efficiently and effectively as possible. There may be some opportunities to streamline the process under the CLM Act by removing the delineation in the Act between the investigation and remediation phases. However, some people may prefer to retain the delineation because they consider that identifying a site as requiring ‘investigation’ can avoid unnecessary concern about the contamination. The investigation could, after all, demonstrate that the contamination is not a significant problem and requires no remediation.

Should consideration be given to removing the delineation in the Act between the investigation and remediation phases?

The usefulness of declarations

The EPA cannot order the investigation or remediation of a site unless it has first gazetted and published the relevant declarations. The declarations identify the site as requiring investigation or remediation but do not identify the party that may be responsible for doing this.

Declarations were intended to act as a means of informing the affected parties and the public at large and eliciting useful information from them about a site. In practice, however, declarations have not led to information coming from the public and it could be argued that they delay the EPA taking appropriate regulatory action to address the site contamination. The public should be provided with the sort of information that

declarations provide but there could be other appropriate ways of providing this information to the public.

Does the declaration process fulfil its purpose or should some other means be used for informing the public about sites that require investigation or remediation? Are the number of regulatory steps involved appropriate?

Voluntary investigation and remediation processes

Under the CLM Act the EPA can agree to a voluntary investigation or remediation proposal. This approach has reduced the stigma of being regulated which historically implied inaction by companies. The EPA's agreement is based on the information available at the time and on its view that the proposal will deal with the contamination sufficiently. However, more contamination may be discovered which goes beyond the scope of the proposal or it may become apparent once the proposal has been implemented that different work was needed. In this situation, the proponent may of course agree to do whatever extra is required. But if the proponent does not, the EPA's capacity to require the proponent to deal with the additional contamination and any further work that is required may be limited.

Is the CLM Act's scheme for voluntary investigation and remediation proposals achieving its purpose?

Responsibility for the investigation or remediation of contamination

The 'polluter pays' principle

One of the key principles underlying the CLM Act is that the responsibility for investigating and remediating contamination under the Act should be borne by the polluter. However, the Act recognises the fact that sometimes this simply will not be possible. It attempts to deal equitably with these situations by allocating the responsibility to the person who is most likely to have the greatest immediate interest in, and benefit from, the contamination issues being resolved and has a legal right to the site that will enable them to ensure that the necessary work is done.

The EPA is given the power by the Act to order 'an appropriate person' to investigate or remediate a site and it is an offence for the person not to comply. The CLM Act lists the categories of people who come within the appropriate person concept. The EPA's order must be issued to someone in the first category in the list or, if that is not practicable, to someone in the second category or, if that too is not practicable, to someone in the third category.

The list is as follows:

1. a person who had 'principal responsibility' for the contamination (whether or not there are others who also had responsibility)
2. an owner of the land (whether or not they had any responsibility for the contamination)
3. a 'notional owner' of the land, for example, a mortgagee in possession (whether or not they had any responsibility for the contamination).

Does the CLM Act clearly identify who the EPA can order to investigate or remediate contaminated land?

In several cases the EPA has identified the polluter as being a company that no longer exists and so cannot be ordered to investigate or remediate the contamination. Another company with which the polluter had a close corporate relationship (e.g. a subsidiary or holding company relationship) when the contamination occurred may still exist. The existing company may also have been involved in the activities of the polluter that caused the contamination. The existing company may put forward a voluntary investigation or remediation proposal but if it does not the EPA could have to look to the owner of the land to carry out the necessary work.

There is a fairly detailed scheme in the CLM Act to discourage companies from trying to avoid their investigation and remediation responsibilities under an investigation or remediation order by winding up or transferring the land concerned to another party. In such circumstances, the EPA may apply to the Court to direct the directors of the company to investigate or clean up. However, the scheme does not deal with situations where a winding up or land transfer was not carried out for this reason.

Is the CLM Act's hierarchy of 'appropriate persons' suitable in situations where the polluter was a company that no longer exists but another company with which it had close relationship does still exist?

Information about contaminated sites

One of the principles underlying the Contaminated Land Reform Package is that people should have ready access to appropriate information about contaminated sites so that they can make informed decisions about those sites. The CLM Act endeavours to do this in a number of ways.

The EPA must keep a public record containing:

- a copy of all declarations and orders issued by it under the Act
- a copy of all site audit statements that relate to land covered by a declaration or order
- a note of all voluntary investigation and remediation proposals to which it has agreed
- a copy of all notices issued by the EPA under section 28 of the CLM Act to require the maintenance of remediation.

(The public record also includes notices previously issued under sections 35 and 36 of the *Environmentally Hazardous Chemicals Act 1985*, which are treated as either current or former investigation or remediation orders.)

The EPA is also obliged to tell local councils about these declarations, orders and voluntary proposals and tell them when they are no longer in force or have been fully implemented, as the case may be.

Councils must refer to current declarations, orders and voluntary proposals and site audit statements on the planning certificates that they issue, under section 149(2) of the EP&A Act, to people (such as prospective purchasers or developers) inquiring about the site.

The EPA's public record can be accessed at the EPA's offices and its Pollution Line (131 555) also answers callers' queries about information that is on the public record. (The EPA is also arranging for the public record to be accessible on the EPA website from the second half of 2003.)

Site contamination that is posing or likely to pose a significant risk of harm and that requires investigation or remediation is also made known through declarations that are published in the New South Wales Government Gazette and local newspapers.

Has the public availability of information about contaminated sites improved with the CLM Act? Does the Act ensure that sufficient and appropriate information is available at the appropriate time and in an appropriate manner and form?

Planning authorities can also use planning certificates issued under section 149(5) of the EP&A Act to give the public additional factual information about contamination of land, whether it be contamination that poses a significant risk of harm or not. The Planning Guidelines help the authorities to decide what sort of information they could usefully put on these certificates and when.

Planning certificates issued under section 149 of the EP&A Act accompany the standard contract for the sale of land.

Conclusion

This issues paper has sought to raise some of the issues that have emerged over the relatively short history of the CLM Act. The overriding aim of the Act has been, in conjunction with the other elements of the Contaminated Land Reform Package, to ensure that contamination is addressed appropriately, given the risks that it poses, and that this is achieved through equitable and efficient processes.

However, the rapid pace of redevelopment of land particularly in the urban environment has placed great demands on the scheme.

Your comments on the various issues raised in this paper will assist in identifying adjustments that may be necessary to ensure that the scheme meets its objectives in the face of these demands.

Has the CLM Act generally resulted in better environmental and public health outcomes? Do you have any other issues you feel need to be examined in the legislative review?