

Emergency Pollution Clean Up Program Interim Guidelines

August 2018

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The Emergency Pollution Clean Up Program (EPCUP) has been funded and managed by the NSW Environmental Trust for 20 years.

From 2018, the management of this funding is now the responsibility of the NSW Environment Protection Authority (EPA).

The Guidelines are intended for use by applicants seeking funds for the clean-up of emergency pollution and for EPA officers who are delegated to assess and/or authorise those funds.

Introduction

The purpose of EPCUP is to avoid significant risk to the environment or public health in NSW by contributing funds towards the removal, dispersal or mitigation of serious pollution when measures need to be taken immediately (i.e. emergency pollution).

How it works

State agencies including the EPA, emergency service organisations and local councils may become involved in clean up activities following an emergency pollution event.

In most cases a responsible party is identified and will be in a position to undertake and fund clean up under the polluter-pays principle. However sometimes the responsible party is unknown, unavailable, unwilling (despite a legal obligation to do so) or unable to pay for emergency pollution clean up within the timeframe required to avoid or minimise harm to the environment or public health.

Under these circumstances the organisation responsible for coordinating the clean up in the absence of the responsible party may apply for funding under EPCUP.

Where/when it is an organisation's obligation to clean up emergency pollution, the organisation should do so, irrespective of whether their application seeking funding is approved or not.

EPCUP is not to be used to fund applicants who have contracted out operations to minimise their internal costs. That is, organisations should not be reliant upon EPCUP to meet their legal duty-of-care obligations.

Note: For incidents related to illegally dumped asbestos or other hazardous orphaned waste please refer to the EPA's *Illegally Dumped Asbestos Clean Up Program Interim Guidelines*.

How to use these guidelines

The Guidelines explain the type of situations that are eligible for funding. It is not possible to identify every scenario that can be funded; therefore an eligibility test (see Assessment criteria below) has been developed against which individual situations can be assessed.

The application process outlined below describes the steps applicants and the EPA must take to access and provide funding.

In certain circumstances there may be inadequate information or a limited timeframe available to respond to emergency pollution situations. In such situations the principles outlined in the Guidelines should be applied as thoroughly as possible without constraining the need to make quick decisions.

Applicants who often deal with emergency pollution should read the Guidelines in full and contact pollution.cleanup@epa.nsw.gov.au or environment line on 131 555 (available 24 hours) with any questions. Following the Guidelines will enable applicants to apply for funding quickly and efficiently when the need arises.

Funding

The budget for EPCUP is \$500,000 per financial year. Only those instances that meet the program eligibility criteria can be funded.

Delegations

When an applicant seeks funding, the proposed clean up actions must be authorised by the EPA. Only officers listed in Table 1 can authorise funds for clean up.

Table 1 EPA Instrument of Delegation of Ministerial Functions – Schedule B

Delegated Officers	Authorisation
EPA CEO and Chairperson	\$5,000,000
Chief Environmental Regulator	\$1,500,000
Director – Hazardous Incidents and Environmental Health	\$500,000
Director – Waste and Resource Recovery	\$500,000
Director – North, South and Metro	\$250,000
Manager – Hazardous Incidents	\$100,000

Eligibility

Assessment criteria

The following considerations must be addressed before funding will be authorised by the EPA:

1. The proposed clean up measures are safe, environmentally sound and cost effective. Cost effectiveness should be assessed within the context of the necessity to respond within a limited timeframe (see *Conditions of funding*).
2. There is, or is likely to be, undue delay in starting the clean up because:
 - there are substantial difficulties in establishing who the responsible party is for the clean-up costs or
 - there is major uncertainty about the likely payment of clean up costs by the responsible party.
3. There is a leak, spill or other escape of a substance AND as a result (taking into account the particular circumstances of the situation and the precautionary principle), there is likely to be serious pollution with the potential to pose a significant risk to the environment or public health.
4. Measures to either remove, disperse or mitigate the pollution need to be taken immediately.

Who can apply

Any organisation can apply for funds for clean up of emergency pollution in NSW, **except those listed below:**

- the person who caused the pollution;
- the person responsible for the material (e.g. the transporter of the material) or the owner of the material;
- the owner or occupier of the premises, if directly involved in the dumping/pollution;
- the clean up contractor.

Eligible activities

Funds can be considered for, but not limited to; the following clean up actions (provided the situation satisfies the *assessment criteria*):

- sampling, analysis, identification and quantification of the material
- assessments of risk to human health or the environment from the material in the event the material is not cleaned up
- removal, storage, treatment and disposal of the material, including the cost of collection, treatment, transport to, and disposal of, the material at an appropriate waste facility
- temporary storage of materials but only when:

- the EPA is of the opinion it is not practical or lawful to store the materials in existing storage facilities provided by public authorities (including council) or emergency service organisations; or
- NSW Fire & Rescue deems the materials to be unsafe to store at storage facilities provided by public authorities (including council) or emergency service organisations.

Ineligible activities

Funds **cannot** be used for the following:

- salaries, capital equipment or infrastructure of public authorities (including councils) or emergency response organisations
- clean up actions that are required only to satisfy occupational health and safety issues of an organisation or individual or their employees
- clean up actions that are used to assist an organisation or individual in fulfilling their general, day-to-day legal responsibilities in the management for their waste
- clean up actions responding to circumstances involving only the emission of noise or odour or only aesthetic pollution.

Note: Funds can only be used for additional costs incurred (outside ordinary business) by council for engaging a contractor to do clean up work. Please contact the EPA if you are uncertain.

Conditions of funding

In order to ensure equity and fair use of funding available, the following conditions apply for expenditure of funds. If these conditions are breached the EPA may deny or withhold payment:

- Applicants must provide the EPA with all relevant paperwork required to process a claim. Failure to provide the required documents **within three months** of the EPA authorising a claim will result in the claim being void and cancelled, except in exceptional circumstances.
- The funds can only be used for services/activities that protect the environment or public health.
- The funds will be paid to the applicant directly. Funds will not be paid to individual sub-contractors.
- The applicant must make all fair and reasonable efforts to identify, locate and seek payment from the responsible party before EPA funds will be paid.
- All services/activities being funded must be undertaken by appropriately qualified and experienced people and be carried out in a competent manner.
- All wastes must be transported by appropriate waste transporters and disposed of at appropriate waste facilities.
- Where applicable, WasteLocate must be used to lawfully transport waste. Evidence of this must be provided to the EPA.
- Funds will only be paid on receipt of a correctly completed *Form for Seeking Payment of Funds* with relevant supporting information.
- The EPA reserves the right to withhold payment until a site inspection is undertaken by the EPA and the EPA is satisfied the authorised works were appropriately undertaken and have been adequately completed. The decision to undertake a site inspection is for the EPA to make.
- The authorisation of EPA funds is based on the information available at the time. A refusal is not intended to provide a guarantee that the material is safe.
- The *NSW Crimes Act 1900* contains a number of provisions which make it a criminal offence to dishonestly obtain money.

Application process

Applicants are to follow these steps when applying for clean up funds:

Authorisation

Step 1

Endeavour to identify and locate the responsible party and obtain agreement that they will clean up the material and rehabilitate the site if necessary. Consider issuing a statutory order or direction if required. If agreement cannot be obtained with the responsible party within the timeframe dictated by the need to minimise risk to the environment or public health, proceed to Step 2.

If you cannot identify or locate the responsible party within the limited timeframe, proceed to Step 3.

Step 2

If you are not authorised to issue a statutory order or direction to the responsible party, requiring them to carry out the necessary clean up work, then contact the EPA or council to discuss whether an order/direction can be issued. Contact the EPA either by:

- speaking with the EPA officer at the scene, if one is in attendance; or
- phoning the Environment Line (ph:131 555, available 24 hours) who will transfer you to an appropriately authorised officer who can deal with your inquiry.

If an order/direction cannot be issued or the responsible party fails to comply with the order/direction, proceed to Step 3.

Step 3

Identify what action(s) are required for clean up, plan the clean up and obtain a cost estimate for the clean up action(s). Consult with the EPA or NSW Fire & Rescue if necessary.

Step 4

Assess the situation against the assessment criteria in these Guidelines. If you believe your situation is eligible for funding, proceed to Step 5.

Step 5

Prior to authorising the funds, the EPA will ask you to explain how the situation satisfies the relevant assessment criteria and will ask you for a cost estimate. **You must provide this information before the funds can be authorised.**

In the event the time taken to seek prior spending authorisation from the EPA would cause the potential for serious pollution (such as a large spill of toxic material) you may proceed with the clean up and subsequently apply to claim costs from the EPA. In these circumstances, the onus is on you, the applicant, to prove to the EPA's satisfaction that the criteria used by the EPA for authorising spending for EPCUP apply. You will also need to demonstrate that genuine attempts were made to contact the EPA or provide a reason as to why contact was not attempted.

Step 6

If the EPA assesses the funding request is eligible they will authorise the claim which applies to an upper limit of agreed funding. This upper limit may be varied later in consultation with an EPA officer. Once a claim has been authorised, the EPA is obliged to pay for the agreed clean up provided the applicant abides by the *Conditions of funding* which are outlined in these Guidelines. If these Conditions are breached, the EPA may withhold payment.

There are two types of authorisation:

- **Immediate authorisation:** which will mean the claim is processed as outlined in this section and payment is made within the three-month limit; **or**
- **Pending authorisation conditional to available funds:** funding for this program is limited to \$500,000 in any one financial year. Should the expenditure in any one financial year approach this limit, any new authorisations will be subject to funds being available at the end of the financial year. In this situation, a claim will be authorised, however funds may not be paid until June. Should funding become available the EPA will advise organisations that have pending authorisations to submit all documentation and issue an invoice. Pending authorisations will be paid in order of receipt until the \$500,000 limit is reached.

Organisations should note that in most circumstances it is likely that an immediate authorisation will be given if the incident/organisation is eligible for funding.

Clean up

Step 7

Proceed with and complete clean up as agreed with the EPA. The applicant must pay for the clean up at this stage. You will be reimbursed after Steps 8 – 10 are complete.

Payment

Step 8

If the limited timeframe did not allow for investigation at Step 1, endeavour to identify and locate the responsible party and seek reimbursement of clean up costs from the responsible party.

If the responsible party cannot be identified or payment is not received, proceed to Step 10. Generally, it is expected additional investigation will be undertaken after the situation has been cleaned up and the EPA officer should be advised of this outcome. That is, additional investigation should have occurred since Step 1 and you will be required to demonstrate this. Failure to adequately investigate may affect future approvals under EPCUP.

Step 9

Complete the *Form for Seeking Payment of Funds* and other documentation provided by the EPA.

You must attach all supporting documentation, such as invoices, evidencing your payment of clean up costs, laboratory results and other requested information. Any invoices you raise seeking reimbursement must be billed to the Environment Protection Authority PO Box A290 Sydney South 1232. The funds will be paid to the applicant directly. Funds will not be paid to individual sub-contractors.

The completed form and supporting documents should be submitted to the EPA by post to the address above or emailed to pollution.cleanup@epa.nsw.gov.au.

The EPA will provide approval for processing and payment if appropriate.

Step 10

After the EPA has verified the information provided, and is satisfied that the application meets all the funding requirements, payment will be made to the applicant.

Step 11

If the responsible party is subsequently identified and measures to seek reimbursement from that party have been successful, the applicant must in turn reimburse the EPA.

Failure to submit all required documentation

The applicant has three months from the date a claim is authorised by the EPA to complete the clean-up activities and submit all relevant documentation. The EPA can withdraw approval for funding if this timeframe is exceeded. The EPA will inform the applicant in writing should approval for funding be withdrawn.

Disputing a funding decision

If you would like to dispute a decision regarding payment of EPA funds for EPCUP, please contact Environment Line on 131 555 (available 24 hours).

Further information

To organise authorisation of EPA funds please email pollution.cleanup@epa.nsw.gov.au or call 131 555 (available 24 hours).

Environment Protection Authority

Address: PO Box A290, SYDNEY SOUTH NSW 1232;
Phone: 131 555 (available 24 hours)
Email: pollution.cleanup@epa.nsw.gov.au
Web: www.epa.nsw.gov.au

Glossary

Appropriate waste facility	Premises lawfully authorised to accept, store, treat, reprocess, sort and/or dispose of waste.
Clean up	<p>In relation to a pollution incident, includes:</p> <ul style="list-style-type: none">• action to prevent, minimise, remove, disperse, destroy or mitigate any pollution resulting or likely to result from the incident, and• ascertaining the nature and extent of the pollution incident and of the actual or likely resulting pollution, and• preparing and carrying out a remedial plan of action. <p>It also includes (without limitation) action to remove or store illegally dumped asbestos waste that has been disposed of unlawfully.</p>
Environment	As defined in the <i>Protection of the Environment Operations Act 1997</i> .
Occupational health	<p>Includes:</p> <ul style="list-style-type: none">• the health of people working with the material involved• the health of people employed by the company responsible for the situation, and• the agencies responding to the situation.
Occupier	Of premises means the person who has the management or control of the premises.
Premises	<p>Includes:</p> <ul style="list-style-type: none">• a building or structure, or• land or a place (whether enclosed or built on or not), or• a mobile plant, vehicle, vessel or aircraft.
Public health	Non-occupational health.
Responsible party	<p>Can be any of the following:</p> <ul style="list-style-type: none">• the person who dumped the waste, caused the waste to be dumped• the person responsible for the waste or the owner of the waste; or• the owner or occupier of the site or premises, whether directly involved in the dumping or not.
Waste	As defined in the <i>Protection of the Environment Operations Act 1997</i> .
WasteLocate	As defined in the <i>Protection of the Environment Operations Act 1997</i> .