

## Pollution



# Contaminated Land

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Sydney:	02 9262 6989
Northern Rivers:	1800 626 239
Rest of NSW:	1800 626 239

## Overview

Contamination of land is defined as land where a substance is present at a concentration higher than is normally found on land in the same area, where that substance presents a risk of harm to human health or the environment.<sup>1</sup>

Contaminated sites are usually the result of poor industrial practices in which the storage, handling and disposal of chemicals has not been well-managed.

The [Contaminated Land Management Act 1997 \(NSW\)](#) establishes a process for the EPA to identify, investigate, and remediate land that it considers to be contaminated significantly enough to require regulation.<sup>2</sup>

Contaminated land is also regulated under the [Environmental Planning and Assessment Act 1979 \(NSW\)](#), and [State Environmental Planning Policy 55 - Remediation of Land](#), whether or not the EPA regulates the site under the [Contaminated Land Management Act 1997 \(NSW\)](#).

Water and land pollution, which may cause contamination, is regulated under the [Protection of the Environment \(Operations\) Act 1997 \(NSW\)](#). For more information on pollution, see our [Fact Sheet on Air, Water and Noise Pollution](#).

<sup>1</sup> *Contaminated Land Management Act 1997 (NSW)*, s. 5(1).

<sup>2</sup> *Contaminated Land Management Act 1997 (NSW)*, s. 3(1).

The handling of hazardous chemicals and hazardous waste in NSW is regulated under the [Environmentally Hazardous Chemicals Act 1985 \(NSW\)](#), and the use of pesticides is regulated under the [Pesticides Act 1999 \(NSW\)](#). For more information on the regulation of hazardous chemicals and pesticides, see our [Fact Sheet on Chemicals and Pesticides](#).

## Identification and remediation of significantly contaminated land

Contaminated land is regulated in NSW under the *Contaminated Land Management Act 1997 (NSW)*. The Act seeks impose the obligation and cost of remediating contaminated land on the person who caused the contamination, rather than on the community.

The Act sets out a process for identifying, remediating and managing contaminated land. It does not contain any provisions relating to a person's right to obtain damages for contamination (e.g. because of damage to person or property). However, the Act does not limit or restrict a person from seeking a remedy or damages under any other legislation or at common law.<sup>3</sup>

### What is 'contaminated land'?

Contamination of land means the presence of a substance in, on or under the land at a higher concentration than normally found at that site, where that substance presents a risk of harm to human health or the environment.<sup>4</sup> It includes land where contamination has migrated onto it from another site.<sup>5</sup>

### What is 'remediation'?

'Remediation' refers to the process of addressing contamination by removing, dispersing, destroying, reducing or mitigating the contamination of land. It can also include eliminating or reducing any hazard arising from the contamination, or preparing a long-term management plan for the land.<sup>6</sup>

### Who is responsible for regulating contaminated land?

The Act is administered by the EPA, an independent statutory body separate from the Office of Environment and Heritage. Information about the Act and the regulation of contaminated land by the EPA can be accessed on the EPA's [website](#).<sup>7</sup> The Environment Minister is the responsible Minister.

The EPA is only responsible for regulating contaminated sites that it considers to be significant enough to require regulation. However, the EPA has a general duty to examine and respond to any information that it receives of actual or possible

<sup>3</sup> *Contaminated Land Management Act 1997 (NSW)*, s. 110.

<sup>4</sup> *Contaminated Land Management Act 1997 (NSW)*, s. 5.

<sup>5</sup> *Contaminated Land Management Act 1997 (NSW)*, s. 5(4).

<sup>6</sup> *Contaminated Land Management Act 1997 (NSW)*, s. 4 Definitions, 'remediation'.

<sup>7</sup> <http://www.epa.nsw.gov.au/clm/>

contamination of land.<sup>8</sup> In cases where the contamination does not reach the threshold of 'significant', the responsibility for regulating the site falls to the relevant local council.

The EPA has produced [guidelines](#)<sup>9</sup> to assist landowners, developers, site auditors and the public to understand the methods for assessing and managing contaminated land under the Act.<sup>10</sup>

In carrying out its obligations to regulate contaminated land, the EPA must have regard to the principles of ecologically sustainable development (ESD), which include the precautionary principle, inter-generational equity, the need to conserve biodiversity, and the polluter-pays principle.<sup>11</sup>

### **How can I report contamination?**

If you are concerned that a site might be contaminated or you wish to report a contaminated site, you should call the EPA [Environment Line](#) on 131 555, or notify the EPA in writing. The EPA has issued [guidelines](#) on a person's duty to report contamination.

If a member of the public informs the EPA of the actual or possible contamination of a site, then the EPA must:<sup>12</sup>

- respond to the complainant within a reasonable time; and
- state (in writing if the complainant notified them in writing) what the EPA has done in relation to the information and the reasons for doing it.

If the EPA decides *not* to regulate a site (because the EPA has formed the view that the site is not sufficiently contaminated so as to warrant a declaration that the land is significantly contaminated or to impose a management order), the EPA must provide a written statement of reasons to the complainant within 30 days of receiving a request for reasons.<sup>13</sup>

Where the EPA is of the opinion that the site is not 'significantly contaminated' the responsibility for regulating the site falls to the local council.

### **Who can be held responsible for contaminated land?**

Generally, the Act applies the 'polluter-pays' principle by imposing responsibility on the person who caused the contamination.

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<sup>8</sup> *Contaminated Land Management Act 1997* (NSW), s. 8.

<sup>9</sup> <http://www.epa.nsw.gov.au/clm/guidelines.htm>

<sup>10</sup> *Contaminated Land Management Act 1997* (NSW), s. 105.

<sup>11</sup> *Contaminated Land Management Act 1997* (NSW), s. 9.

<sup>12</sup> *Contaminated Land Management Act 1997* (NSW), s. 8(2).

<sup>13</sup> *Contaminated Land Management Act 1997* (NSW), s. 106; *Contaminated Land Management Regulation 2013* (NSW), cl. 13.

A person can be held responsible for the contamination of land if:<sup>14</sup>

- the person caused the contamination of the land;
- the person carried out an activity which converted a benign substance into a substance that caused contamination; or
- the person is the owner or occupier of the land and knew or ought reasonably to have known that contamination of the land would occur, and failed to take reasonable steps to prevent the contamination.

A person who disturbs contamination on a site (e.g. by excavating a site and exposing contamination), can also be held responsible.<sup>15</sup>

The EPA has a broad discretion to issue orders and directions to those responsible for contamination.

Public authorities, such as local councils, are also bound by the Act and must comply with any order or direction of the EPA.<sup>16</sup>

### ***Developers can become responsible***

A developer who wishes to redevelop a contaminated site (e.g. by redeveloping an ex-petrol station into a childcare centre) may become liable for any significant contamination when they lodge a development application.<sup>17</sup> This is because if the change of use is approved, it may result in an increased risk of harm, even if the contamination itself does not change.

### ***No contracting out of responsibility***

A person who is responsible under the Act for causing contamination cannot contract out of their statutory liability for causing that contamination. A person who is responsible for contamination continues to be responsible for that contamination even if they enter a contract that provides for someone else to be responsible for the contamination.<sup>18</sup>

### **Investigation and remediation procedures**

The EPA can issue orders and directions to ensure that contaminated land is identified and, if necessary, remediated.<sup>19</sup> It is an offence not to comply with these orders and directions, and there are significant penalties for any failure to comply.<sup>20</sup>

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<sup>14</sup> *Contaminated Land Management Act 1997* (NSW), s. 6(1).

<sup>15</sup> *Contaminated Land Management Act 1997* (NSW), s. 6(2).

<sup>16</sup> *Contaminated Land Management Act 1997* (NSW), s. 31.

<sup>17</sup> *Contaminated Land Management Act 1997* (NSW), s. 6(2)(b), 6(4).

<sup>18</sup> *Contaminated Land Management Act 1997* (NSW), s. 6(6).

<sup>19</sup> *Contaminated Land Management Act 1997* (NSW), Part 3.

<sup>20</sup> *Contaminated Land Management Act 1997* (NSW), Part 3.

### ***Preliminary investigation orders***

Once the EPA becomes aware that a site may be contaminated, it can order a person to carry out a preliminary investigation within a specified time.<sup>21</sup> The investigation should determine whether the land is contaminated, and if so, with what substance and to what extent.<sup>22</sup>

The following people can be served with a preliminary investigation order:<sup>23</sup>

- The person whom the EPA reasonably suspects of causing the contamination;
- The land owner;
- A notional owner (e.g. a mortgagee in possession);<sup>24</sup>
- A public authority.

### ***Declaration of significantly contaminated land***

If the EPA has reason to believe that contamination is significant enough to warrant regulation under the Act, it can declare the land to be 'significantly contaminated land'.<sup>25</sup>

The declaration must be published in the [NSW Government Gazette](#), and any person then has 21 days to make submissions to the EPA on whether the EPA should serve a management order in relation to the land.<sup>26</sup> In addition, the EPA has a [policy](#) which requires it to serve a copy of the notice to the owner of the land, those persons who the EPA has reason to believe are responsible for the contamination, the occupier of the land and the local council. The declaration will also be recorded on the EPA website.

### ***Management orders***

Once the EPA has made a declaration that land is significantly contaminated, it can issue a management order directing somebody to carry out management actions such as remediation work on the land.<sup>27</sup> The EPA can also direct a person to submit a plan of management describing how the person proposes to address the contamination.<sup>28</sup>

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<sup>21</sup> *Contaminated Land Management Act 1997* (NSW), s. 10.

<sup>22</sup> *Contaminated Land Management Act 1997* (NSW), s. 10.

<sup>23</sup> *Contaminated Land Management Act 1997* (NSW), s. 10(3).

<sup>24</sup> *Contaminated Land Management Act 1997* (NSW), s. 7.

<sup>25</sup> *Contaminated Land Management Act 1997* (NSW), ss. 11, 12.

<sup>26</sup> *Contaminated Land Management Act 1997* (NSW), s. 11(2).

<sup>27</sup> *Contaminated Land Management Act 1997* (NSW), ss. 14, 15.

<sup>28</sup> *Contaminated Land Management Act 1997* (NSW), s. 14(1)(b).

The EPA can issue a management order to:<sup>29</sup>

- a person who is responsible for the significant contamination of the land;
- an owner of the land (whether or not they are responsible for the contamination); and
- a notional owner of the land (e.g. mortgagee in possession, whether or not they are responsible for the contamination).

In deciding who to issue the order to, the EPA must follow the hierarchy set out above as far as practicable. For example, The EPA must target the person responsible for causing the contamination over the owner of the land, if possible.<sup>30</sup>

A management order can require a person to carry out the following actions:<sup>31</sup>

- investigate the nature and extent of any significant contamination or harm;
- remediate the land;
- monitor the effectiveness of the remediation;
- erect a fence, wall, bund or other barrier on the land;
- treat, store, contain or remove any solids or liquids, including any soil, sand, rock or water;
- vacate the land or cease carrying on activities on it; or
- refrain from further disturbing the land below a certain depth.

Remediation works may require development consent under [SEPP 55 - Remediation of Land](#).

### **Director and manager responsibility**

If a company which owns contaminated land is wound up or sells the land, a director of the company can be ordered to comply with a management order, at their own expense.<sup>32</sup> These orders can only be made by the Land and Environment Court (not by the EPA), and can only be made within 2 years of the company being wound up or the land being sold.<sup>33</sup>

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<sup>29</sup> *Contaminated Land Management Act 1997* (NSW), s. 13.

<sup>30</sup> *Contaminated Land Management Act 1997* (NSW), s. 13(3).

<sup>31</sup> *Contaminated Land Management Act 1997* (NSW), s. 16.

<sup>32</sup> *Contaminated Land Management Act 1997* (NSW), ss. 63, 64, 65.

<sup>33</sup> *Land and Environment Court Act 1979* (NSW), s. 20(1)(caa).

The purpose of these orders is to ensure that directors cannot avoid responsibility for remediating contaminated land simply by winding up the company which owns the land, or by selling the land.

### ***Voluntary management proposals***

A person can proactively approach the EPA with a voluntary management proposal setting out how they propose to manage a significantly contaminated site, which the EPA can approve.<sup>34</sup> This may avoid a management order being issued.

### **Ongoing maintenance orders**

Remediation work is often carried out over a long period of time, and a site may require monitoring for many years.

The EPA can issue a landowner or occupier an ongoing maintenance order if the land has been the subject of a management order or an approved voluntary management proposal.<sup>35</sup> For example, an ongoing maintenance order can require a person to maintain fences and notices, to notify the EPA of any change in ownership or occupancy, or can restrict the things that a site can be used for.

### **Statutory site audits**

The EPA can require a person to carry out a site audit for the purpose of complying with an obligation under the Act.<sup>36</sup> A site audit usually involves identifying the nature and extent of contamination of a site. Site audit reports and statements are carried out and prepared by site auditors who are accredited under the Act.<sup>37</sup>

### **Public registers**

The EPA is required to keep a [public register](#) of:<sup>38</sup>

- All declarations by the EPA that land is significantly contaminated, or has ceased to be contaminated;
- All preliminary investigation orders;
- All management orders;
- Any active voluntary management proposals; and
- Any ongoing maintenance orders.

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<sup>34</sup> *Contaminated Land Management Act 1997* (NSW), s. 17.

<sup>35</sup> *Contaminated Land Management Act 1997* (NSW), s. 28.

<sup>36</sup> *Contaminated Land Management Act 1997* (NSW), s. 47.

<sup>37</sup> *Contaminated Land Management Act 1997* (NSW), ss. 50-53.

<sup>38</sup> *Contaminated Land Management Act 1997* (NSW), s. 58.

## Duty to report contamination

The Act requires people to report contamination to the EPA if<sup>39</sup>

- the contamination might enter neighbouring land, the atmosphere, groundwater or surface water; or
- the level of contamination is likely to be above the level prescribed in the [Regulation](#) or [Guidelines](#).

Further, a person whose activities have caused contamination of land, or an owner of land that has been contaminated (whether before or during that person's ownership) must notify the EPA.<sup>40</sup>

Failure to notify the EPA in these circumstances carries significant penalties. For example, a corporation which fails to notify of contamination it has caused can incur a maximum penalty of \$165,000, plus \$77,000 for each day the offence continues.

The EPA can still declare a site to be significantly contaminated or make a preliminary investigation order or management order, whether or not it has been notified that the site is contaminated.<sup>41</sup>

The EPA has published [Guidelines](#)<sup>42</sup> on the duty to report contamination.

If you are unsure about whether you should report contamination to the EPA, you should seek legal advice.

## Community offset arrangements

If the Environment Minister considers that it is not practicable to remediate the contamination within a reasonable time, the Minister can enter into an offset arrangement with a person who is responsible for the contamination.<sup>43</sup> An offset arrangement may require the person to provide facilities or services to a local community, or to carry out an environmental project.

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<sup>39</sup> *Contaminated Land Management Act 1997* (NSW), s. 60.

<sup>40</sup> *Contaminated Land Management Act 1997* (NSW), s. 60.

<sup>41</sup> *Contaminated Land Management Act 1997* (NSW), s. 60(8).

<sup>42</sup> Access the Guidelines here: <http://www.epa.nsw.gov.au/clm/guidelines.htm>

<sup>43</sup> *Contaminated Land Management Act 1997* (NSW), s. 111A.

## Appeals

### ***Merit appeals***

A person who is issued with a management order can appeal the order in the Land and Environment Court on the merits. The appeal must be commenced within 21 days of receiving the management order.<sup>44</sup>

The Act does not allow a merits appeal to be brought against any other types of orders or decisions by the EPA, such as declarations of significant contamination. However, an appeal by way of judicial review may be available.

For more information on going to Court and starting proceedings in the Land and Environment Court, see our [Fact Sheet on the Land and Environment Court](#).

### ***Judicial review***

In circumstances where a decision was not made in accordance with the process and powers set out under the Act, any person can challenge the decision in the Land and Environment Court.<sup>45</sup>

For more information on going to Court and starting proceedings in the Land and Environment Court, see our [Fact Sheet on the Land and Environment Court](#).

## Enforcement

### ***Clean-up and prevention notices***

The EPA can issue a clean-up notice or direction, or a prevention notice in relation to contaminated land.<sup>46</sup>

For more information on clean-up and prevention notices, see our [Fact Sheet on Air, Water and Noise Pollution](#).

### ***Penalty notices***

For [some offences](#) under the Act, an authorised officer can issue a penalty notice.<sup>47</sup>

Payment of the penalty will not be regarded as an admission of liability.<sup>48</sup>

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<sup>44</sup> *Contaminated Land Management Act 1997* (NSW), s. 61(1), 62; *Land and Environment Court Act 1979* (NSW), s. 17(h).

<sup>45</sup> *Contaminated Land Management Act 1997* (NSW), s. 96.

<sup>46</sup> *Contaminated Land Management Act 1997* (NSW), ss. 46, 109(4).

<sup>47</sup> *Contaminated Land Management Regulation 2013* (NSW), cl. 11; Schedule 1.

<sup>48</sup> *Contaminated Land Management Act 1997* (NSW), s. 92A(5).

### ***The EPA can remediate the site and seek costs from the responsible person***

If a person fails to comply with a direction or order to investigate or remediate land, the EPA or another public authority can step in and carry out the work themselves, and recover the costs from the person responsible.<sup>49</sup>

### ***Criminal prosecutions***

The EPA can prosecute a person (including a corporation) for offences under the Act (e.g. a failure to comply with a management order or ongoing maintenance order).<sup>50</sup> The Land and Environment Court can impose significant fines for such offences, e.g. a fine of up to \$137,500 with a daily penalty of up to \$66,000 if a corporation fails to comply with a management order.<sup>51</sup>

Less serious prosecutions are heard in the Local Court, although the maximum penalty that a Local Court can impose is limited to \$11,000.<sup>52</sup>

The Act allows any person to commence criminal proceedings in the Land and Environment Court for offences under the Act. However, they must obtain the permission of the Court first.<sup>53</sup> The Court must not grant leave unless it is satisfied that the EPA has failed to take enforcement action within 90 days of being asked to do so, the proceedings are not an abuse of the court process, and the evidence discloses a prima facie case that an offence was committed.<sup>54</sup>

### ***Civil enforcement proceedings***

The Act allows any person to bring civil enforcement proceedings to enforce the Act.<sup>55</sup> Civil enforcement proceedings are where a person alleges that there has been a breach of the law, and asks the Court to make orders to remedy or restrain that breach. The Court can make a range of orders, including a declaration (that the law has been breached), an injunction or a remediation order.

For more information on civil proceedings in the Land and Environment Court, see our [Fact Sheet on the Land and Environment Court](#).

### **Development of contaminated sites**

[SEPP 55 - Remediation of Land](#) establishes a Statewide approach to the regulation of development on contaminated sites (whether or not they are also regulated by the EPA).

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<sup>49</sup> *Contaminated Land Management Act 1997* (NSW), ss. 30, 34, 35, 37, 39, 40; *Land and Environment Court Act 1979* (NSW), s. 20(1)(caa).

<sup>50</sup> *Contaminated Land Management Act 1997* (NSW), ss. 91, 93, 94.

<sup>51</sup> *Contaminated Land Management Act 1997* (NSW), ss. 14(6), 97.

<sup>52</sup> *Contaminated Land Management Act 1997* (NSW), s. 92.

<sup>53</sup> *Contaminated Land Management Act 1997* (NSW), s. 95.

<sup>54</sup> *Contaminated Land Management Act 1997* (NSW), s. 95(2).

<sup>55</sup> *Contaminated Land Management Act 1997* (NSW), s. 96.

In particular, [SEPP 55 - Remediation of Land](#):

- requires contamination to be taken into account in rezoning decisions;<sup>56</sup>
- establishes when development consent is and is not required to remediate or develop a contaminated site;<sup>57</sup> and
- requires consent authorities to consider any contamination when deciding whether to grant consent to a development application.<sup>58</sup>

Remediation work and any development carried out on a remediated site may require development consent. Remediation which is ordered by the EPA may also require development consent before the work can be carried out.

### ***Rezoning must consider contamination***

Local councils, together with the NSW Department of Planning and Environment, control land use by making local environmental plans (LEPs) which establish various land use zones within their local government area. These establish whether land can be used, for example, as residential, commercial, industrial or educational uses. Read our [Fact Sheet on Local Environment Plans & State Environmental Planning Policies](#) for more information about LEPs.

*SEPP 55 - Remediation of Land* requires local councils to consider the implications of any actual or potential contamination before rezoning land, including whether the land will be suitable for its proposed uses.<sup>59</sup>

For example, if land is to be rezoned to allow a sensitive use, such as residential, educational, recreational or child care purposes, a council must consider the potential for the site to be contaminated.<sup>60</sup> This applies if it is known that the site is contaminated, or if it is merely a possibility, having regard to the activities that the site was previously used for. Before rezoning such land, the council must obtain and consider a preliminary investigation report on the actual or potential contamination.<sup>61</sup>

### ***EPA must notify local councils of contamination***

Local councils should be aware of site contamination because they have access to past land use records which should indicate whether contaminating activities have occurred on a site. The EPA also has an obligation to notify local councils

<sup>56</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 6.

<sup>57</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 9.

<sup>58</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 7.

<sup>59</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 6(1).

<sup>60</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 6(1), 6(4).

<sup>61</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 6(2).

of any contamination. The EPA must inform the local council as soon as is practicable if land in their local government area:<sup>62</sup>

- is declared to be significantly contaminated (or ceases to be);
- is subject to a management order;
- is subject to a voluntary management proposal; or
- is subject to an ongoing maintenance order.

### ***Section 149 planning certificates***

Any person can obtain a planning certificate for a parcel of land which identifies the planning constraints on that land (e.g. the zoning, and SEPPs which apply, etc.). This is called a 'section 149 certificate', or a 'planning certificate'.<sup>63</sup>

In addition to any zoning constraints, a planning certificate must also identify whether the land is:<sup>64</sup>

- significantly contaminated;
- subject to a management order;
- subject to an approved voluntary management proposal;
- subject to an ongoing maintenance order; or
- subject to a site audit statement.

### **When remediation work requires development consent**

[SEPP 55 - Remediation of Land](#) sets out when development consent is and is not required for remediation work and any redevelopment of a contaminated site.<sup>65</sup> The SEPP generally overrides any LEP, but does not override the provisions of another SEPP which can also require development consent for remediation activities.<sup>66</sup>

### ***Category 1 work requires development consent***

Remediation work which requires development consent is classified as Category 1 remediation work. It includes any work that is:<sup>67</sup>

- designated development,<sup>68</sup>

<sup>62</sup> *Contaminated Land Management Act 1997* (NSW), ss. 4, 59.

<sup>63</sup> *Environmental Planning and Assessment Act 1979* (NSW), s. 149.

<sup>64</sup> *Contaminated Land Management Act 1997* (NSW), s. 59(2).

<sup>65</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 8.

<sup>66</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 8(1), 19(3).

<sup>67</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 9.

- carried out on land that is declared to be critical habitat for threatened species;
- likely to have a significant effect on critical habitat or a threatened species;
- development which requires development consent under a SEPP,<sup>69</sup> or
- to be carried out in an environmentally sensitive zone, such as a coastal area.

The consent authority for remediation work will usually be the local council, unless an environmental planning instrument specifies otherwise.<sup>70</sup>

### ***Category 2 work requires notification***

All other remediation work is classified as Category 2 remediation work and does not need require development consent unless an exception applies.<sup>71</sup> However, a person who proposes to carry out Category 2 remediation work must give at least 30 days written notice to the relevant council before starting the work.<sup>72</sup>

### **Development applications for remediation work**

#### ***Notification required***

A development application for Category 1 remediation work must be publicly notified. This means that notice of the development application must be published in a newspaper, the development application must be placed on public exhibition, and public submissions must be invited for at least 30 days after the date of publication.<sup>73</sup>

Read our [Fact Sheet on Development Applications and Consents](#) for more information on notification.

#### *Development consent: additional considerations*

[SEPP 55 - Remediation of Land](#) sets out additional considerations which a consent authority must consider where contamination is involved.<sup>74</sup>

Before granting development consent, a consent authority must consider:

- whether the land is contaminated;

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<sup>68</sup> See: *Environmental Planning and Assessment Regulation 2000*, Schedule 3 for a list of developments that qualify as designated development.

<sup>69</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 19(3).

<sup>70</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 10.

<sup>71</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 14.

<sup>72</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 16.

<sup>73</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 13.

<sup>74</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cls. 7,12.

- if the land is contaminated, whether the land is suitable (or will be suitable, after remediation) for the proposed use; and
- if the land requires remediation to make the land suitable for the proposed use, that the land will be remediated to the required standard before the new use begins (e.g. the council may impose conditions to ensure that this occurs).

Before considering an application for development consent to change the use of a site which is suspected of being contaminated, the consent authority must consider a report specifying the findings of a preliminary investigation of the land.<sup>75</sup> The developer must carry out the preliminary investigation and provide the report to the consent authority.<sup>76</sup>

Upon lodging a development application for a change of use, the developer can also become liable under the Act for the clean-up of any significant contamination on the site.<sup>77</sup> This is because if the change of use is approved, it will result in an increased risk of harm, even if the contamination itself does not change.

**Case study: Failure of developer's site assessment to provide detailed history of land use results in consent being refused<sup>78</sup>**

Wallarah Minerals (the Company) wanted to build a dwelling on land located at Marulan which was zoned 1(a) (General Purposes) and lodged a development application with the local council. The land had been used as a crushing and screening plant for refractory materials for more than 40 years since the 1960s..

*SEPP 55 - Remediation of Land* required the council to consider a report specifying the findings of a preliminary investigation of any contamination of the land before granting development consent. A preliminary site assessment report was carried out by the Company, but it focused only on recent uses of the land and did not consider what the site had been used for before 1990. The Council refused development consent and the Company appealed to the Land and Environment Court (LEC).

The LEC refused to grant development consent. It held that the requirements of *SEPP 55 - Remediation of Land* had not been met because a *full* investigative report into the past uses of the land had not been carried out. There still existed potential for the site to be contaminated. The Court could not grant development consent until a full report was done to determine whether any remediation was required.

<sup>75</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 7(2).

<sup>76</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 7(3).

<sup>77</sup> *Contaminated Land Management Act 1997* (NSW), ss. 6(2)(b), 6(4).

<sup>78</sup> *Wallarah Minerals Pty Ltd v Mulwaree Shire Council* [2000] NSWLEC 238

## Standard of remediation

All remediation work, whether carried out under a development consent or not, must be carried out in accordance with the [contaminated land planning guidelines](#) published by the EPA.<sup>79</sup> A notice of completion of remediation work on any land must be given to the local council within 30 days of the work being completed.<sup>80</sup>

## Contaminated land offences

The Act does not contain any offence provisions which prohibit a person from *causing* land to become contaminated.

Instead, these offence provisions are contained in the [Protection of the Environment \(Operations\) Act 1997 \(NSW\)](#) and include:

- wilfully or negligently disposing of waste without lawful authority (e.g. an environment protection licence);<sup>81</sup>
- using land as a waste facility without lawful authority;<sup>82</sup>
- wilfully or negligently causing any substance to leak, spill or escape;<sup>83</sup>
- polluting land, without lawful authority;<sup>84</sup> and
- polluting water, including groundwater.<sup>85</sup>

For more information on pollution offences, see our [Fact Sheet on Air, Water and Noise Pollution](#).

## Glossary

### Key to terms used in this Fact Sheet

**Act** means the *Contaminated Land Management Act 1997* (NSW)

**Environment Minister** means the NSW Minister for Environment

**EPA** means the [NSW Environment Protection Authority](#)

<sup>79</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cl. 17:

<http://www.epa.nsw.gov.au/clm/guidelines.htm>

<sup>80</sup> *State Environmental Planning Policy No 55 – Remediation of Land*, cls. 17(2), 17(3), 18.

<sup>81</sup> *Protection of the Environment Operations Act 1997* (NSW), s. 115.

<sup>82</sup> *Protection of the Environment Operations Act 1997* (NSW), s. 144.

<sup>83</sup> *Protection of the Environment Operations Act 1997* (NSW), s. 116.

<sup>84</sup> *Protection of the Environment Operations Act 1997* (NSW), ss. 142A-E.

<sup>85</sup> *Protection of the Environment Operations Act 1997* (NSW), s. 120.

**Regulation** means the *Contaminated Land Management Regulation 2013* (NSW)

**SEPP** means a State Environmental Planning Policy

### Useful legal texts

- *Environmental & Planning Law in New South Wales*, by Lyster, Lipman, Franklin, Wiffen and Pearson, The Federation Press (2012), Chapter 14, pp. 627-670
- *The Environmental Law Handbook: Planning and Land Use in NSW*, by Farrier and Stein (eds.) 5<sup>th</sup> edition (2011).