



Duty to Report Contamination

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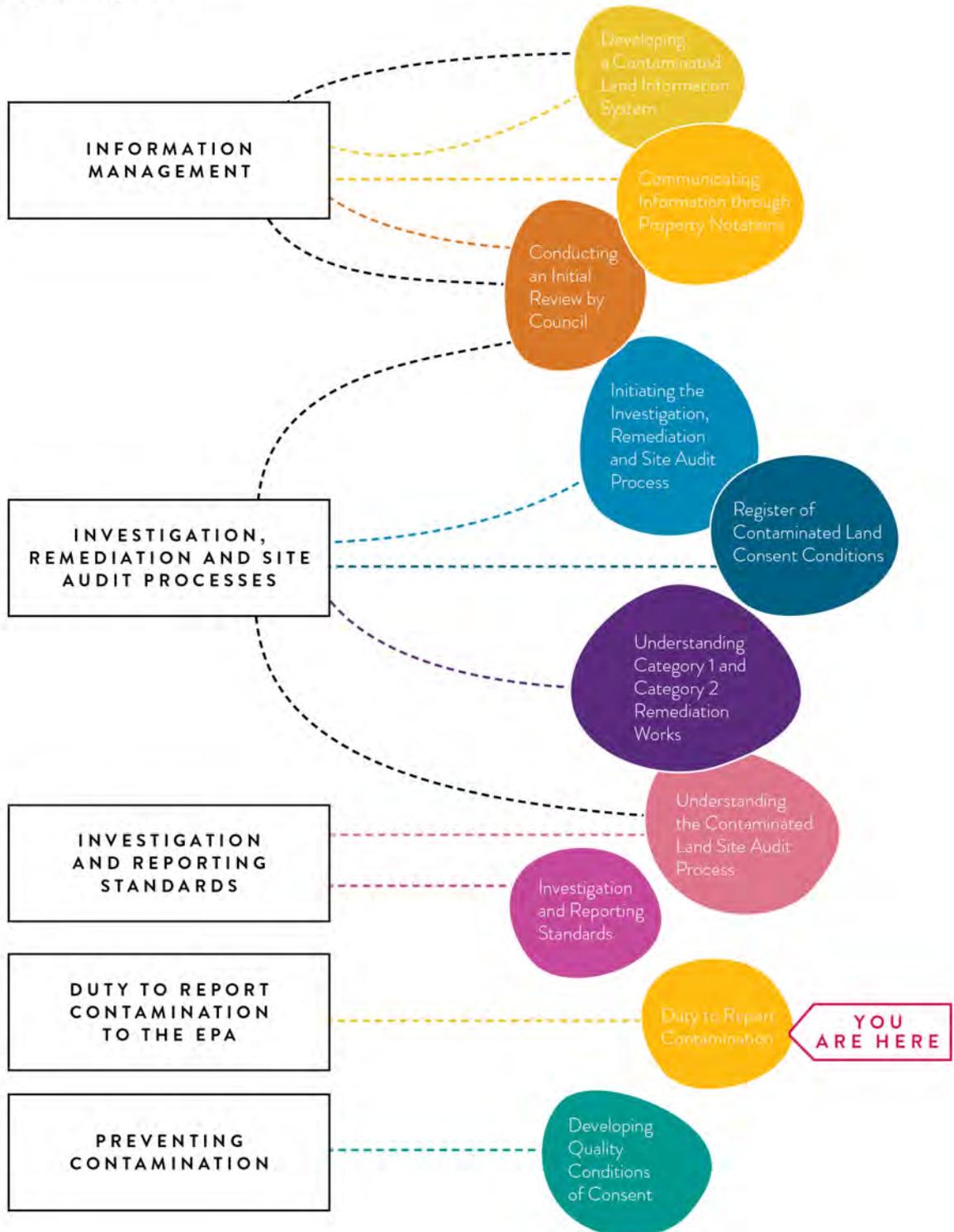
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**MODEL REGIONAL
CONTAMINATED LAND POLICY -
LAND USE PLANNING:
FOCUS AREAS**

**SUPPORTING RESOURCES
AND GUIDES**



1. What is the Duty to Report Contamination?

Contaminated land in New South Wales (NSW) is primarily managed through two avenues:

1. Sites where contamination is considered Significant Enough to Warrant Regulation (SEWR) are the management responsibility of the NSW Environment Protection Authority (EPA) through the powers provided to it under the *Contaminated Land Management Act 1997*.
2. Other sites are managed by Councils via land use planning instruments, through the powers provided to it under the *Environmental Planning and Assessment Act 1979*.

The duty to report contamination to the NSW EPA, for the NSW EPA to assess if it is SEWR, is a requirement under Section 60 of the *Contaminated Land Management Act 1997*, with updates provided through the *Contaminated Land Management Amendment Act 2008*. Specific details, including examples of cases when there would, or would not be, a duty to report, are presented in the NSW EPA (2015), *Guidelines on the Duty to Report Contamination under the Contaminated Land Management Act 1997* (herein referred to as the Duty to Report Guidelines).

2. Who should Report?

The following people are required to report contamination as soon as practical after they become aware of any contamination that meets the triggers for the duty to report:

- Anyone whose activities have contaminated land
- An owner of land that has been contaminated (noting that the duty applies to the owner regardless of whether the contamination happened before or during their ownership of the land).

However, although the above people have the duty to report contamination, anyone can at any time report suspected contamination to the NSW EPA. The interests of both affected individuals and the community at large are better served by the early consideration of the risk posed by contamination. Hence, although there is no duty to report contamination for Council as the regulatory authority for land use planning (noting there is a duty to report for Council as land owners) the *MODEL Contaminated Land Policy – Land Use Planning* (Hunter Joint Organisation, 2020), includes the following statement relating to reporting contamination where it is uncertain if the polluter or owner has reported:

Policy Statement:

- Where Council considers that contamination on a site triggers the duty to report contamination, and it is not clear if the polluter or site owner has reported the contamination, it will notify the EPA for possible action under the *Contaminated Land Management Act 1997*.

Advisory Note:

According to Guidelines on the Duty to Report Contamination under the Contaminated Land Management Act 1997 (NSW EPA, 2015) "A person who is required to report contamination to the EPA but fails to do so may be subject to prosecution. If they are convicted, the CLM Act currently provides for a maximum penalty of:

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

3. What are the Triggers?

The triggers for the duty to report are presented in Duty to Report Guidelines. In summary, the duty to report contamination arises when (NSW EPA, 2015):

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

The details on how the requirements should be interpreted are presented further in the Duty to Report Guidelines, which also provides a checklist for people assessing if there is a duty to report contamination. The checklist was adapted for Council and is included in Attachment A.

The Duty to Report Guidelines state the following in relation to indicators of contamination present on a Site:

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

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

The Guidelines note that the list is not exhaustive and there may be additional indicators that are relevant to some sites as well as other notification requirements where immediate risks are identified. For example, there is a duty to report pollution incidents under the *Protection of the Environment Operations Act 1997*.

In some cases the indicators themselves provide enough evidence to conclude that the contamination should be reported to the NSW EPA. In those cases where the indicators suggest that contamination is present but there is uncertainty about reporting it to the NSW EPA, further investigation will be needed. The Duty to Report Guidelines state that site assessments should be undertaken to:

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

Advisory Note:

Although this document includes a summary of the triggers for the duty to report for informative purposes, the Duty to Report Guidelines should be consulted when assessing a site for reporting requirements under Section 60 of the Contaminated Land Management Act 1997.

4. What happens after the Site is Notified?

Once the Site is notified, the NSW EPA will assess if the notified contamination is considered significant enough to warrant regulation (noting that the concept of “significant risk of harm” referred to in the Contaminated Land Management Act 1997 was removed by the Contaminated Land Management Amendment Act 2008, and hence is no longer referred to in this context). Section 12 of the *Contaminated Land Management Act 1997* outline the matters that the NSW EPA must consider in their assessment. The levels and nature of contamination is not defined as the sites are to be assessed on a case-by-case basis.

Where the NSW EPA considers the contamination significant enough to warrant regulation, there are a number of actions it can take, as follows:

- Declaring the land as “significantly contaminated land” (section 11 of the *Contaminated Land Management Act 1997*, previously referred to as “declaration of an investigation area” and “declaration of a remediation area”)
- issuing management orders to require site assessment, remediation and/or monitoring (section 14 of the *Contaminated Land Management Act 1997*, previously referred to as “investigation orders” and “remediation orders”)
- approving proposals from interested parties to manage the land voluntarily, known as “approved voluntary management proposals” (section 17 of the *Contaminated Land Management Act 1997*, previously known as “voluntary investigation proposals” and “voluntary remediation proposals”)
- liaising and negotiating with landowners or land occupiers about appropriate solutions
- undertaking educational and public awareness programs and other measures to minimise the environmental and health implications of the contamination (section 104 of the *Contaminated Land Management Act 1997*)
- issuing a clean-up or prevention notice under the Protection of the Environment Operations Act 1997 (*Protection of the Environment Operations Act 1997*), regardless of whether or not the NSW EPA is the appropriate regulatory authority (section 46 of the *Contaminated Land Management Act 1997*).

When contamination is considered significant enough to warrant regulation by the NSW EPA, it needs to be notified to Council. NSW EPA must also provide a list of notices that are written for all regulated sites. Section 58 of the *Contaminated Land Management Act 1997* requires the EPA to make copies or details of these notices available to the public. The register is available on the NSW EPA webpage:

<http://www.epa.nsw.gov.au/prclmapp/searchregister.aspx>

Where the contamination is not considered significant enough to warrant regulation, the contamination issues are to be dealt with through the planning process with Council as the Regulatory Authority.

Attachment A – Checklist for Duty to Report Contamination

The following checklist is adapted from the *Guidelines on the Duty to Report Contamination under the Contaminated Land Management Act 1997* (NSW EPA, 2015).

Checklist for the Duty to Report Contamination under the <i>Contaminated Land Management Act 1997</i>		
Item to Check	Yes / No	Comment
Project Site:		
Assessed by/date:		
Step 1: Indications of possible contamination		
Review of site history, records and undertake a site visit to inspect the following:		
May the site or adjacent sites be associated with potentially contaminating activities?		
May the site or adjacent sites be associated with complaints about pollution or illegal dumping of wastes?		
Are there any gaps in the site history or doubts about whether the site could have been associated with activities causing contamination?		
Are there any chemical, physical or biological indicators of contamination (refer to Section 2.2.1 of these Duty to Report Guidelines).		
If the answers to all above questions are No, there is no duty to report contamination to the NSW EPA under Section 60 of the <i>Contaminated Land Management Act 1997</i> . If the answer to any of the above questions is Yes, please proceed to Step 2.		
Step 2: Assessing the Site		
Once the indicators of contamination have been identified, check the following:		
Has an investigation of the potential contaminants of concern been conducted to define the nature, degree and extent of contamination?		
Have site investigation(s) and reporting followed the requirements of Contaminated Sites: Guidelines for Consultants Reporting on Contaminated Sites (EPA 2020) and Schedule B2 (Guideline on Site Characterisation) of the National Environment Protection (Assessment of Site Contamination) Measure 1999 (NEPC 2013)?		
Have site investigation(s) and reporting followed the requirements of Schedule B1 (Guideline on Investigation Levels for Soil and Groundwater) of the National Environment Protection (Assessment of Site Contamination) Measure 1999 (NEPC 2013)?		

Has the checklist for Exposure Assessment in Appendix VII of the Contaminated Sites: Guidelines for the NSW Site Auditor Scheme, 2nd edition (2017) been considered (or exposure assessment in future revisions of the site auditor guidelines)?		
Has any evidence of, or potential for, migration of contaminants from the site and its adjacent sites been appropriately addressed?		
Are the results of the assessment assessed against the notification triggers in Section 2.3 of the Duty to Report Guidelines?		
Was the Contaminated Land Consultant engaged a certified consultant, or qualified and experienced in accordance with Schedule B9 of the National Environment Protection (Assessment of Site Contamination) Measure 1999 (NEPC 2013)?		
Was the Contaminated Land Consultant engaged aware that the investigation is to provide information for assessment of reporting obligations under section 60 of the <i>Contaminated Land Management Act 1997</i> .		
If the answer to all questions in Step 2 is Yes, and the assessments undertaken indicate that no contamination is present, there is no requirement to report to the NSW EPA under Section 60 of the <i>Contaminated Land Management Act 1997</i>		