

LGNSW Feedback - Contaminated Land: EPA Review of CLM Notations on Planning Certificates

Background:

In 2020 the NSW Environment Protection Authority (EPA) conducted a review of contaminated land information on local council planning certificates in NSW (the Review). The purpose of the Review was to better understand how local councils present contaminated land information on their planning certificates, and where necessary, to work with councils to make such information clearer and more consistent.

The Review focused on the provision of information as it relates to section 59(2) of the *Contaminated Land Management Act 1997*, but it also looked at contaminated land information in general. It examined planning certificates for a sample of contaminated sites across NSW and looked at the range of associated council policies and procedures.

The Review found that councils vary greatly in how they provide contaminated land information on planning certificates and identified a range of issues and solutions. The EPA has prepared a report that details the findings of the Review, makes recommendations on how the identified issues can be addressed, and provides guidance for councils regarding the presentation of contaminated land information.

The EPA contacted LGNSW to seek feedback from councils on the report. Feedback is to be provided to the EPA by email to CLM.Consultation@epa.nsw.gov.au before 25 February 2022.

Consultation:

LGNSW organised and facilitated an online forum and survey of council staff involved in planning and asbestos and the CRCB program officers to review the recommendations in the review and provide feedback to the EPA. Over 90 officers attended the forum. During the forum councils' recommendations were consolidated into consensus feedback on the review including recommendations to be considered by the EPA and DPE.

Councils that registered and participated in the online forum are listed below:

Ballina Shire	Dubbo Regional	Mid- Western Regional	Randwick City
Bayside	Fairfield City	Moree Plains Shire	Shellharbour City
Blacktown City	Georges River	Mosman	Singleton
Blue Mountains City	Glen Innes Severn	Murray River	Tenterfield Shire

Burwood	Goulburn Mulwaree	Narrabri Shire	Tweed Shire
Byron Shire	Gunnedah Shire	Newcastle City	Tweed Shire
Camden	Hunter Joint Organisation and Central Table land JO (for the Contaminated Land Programs)	North Sydney	Upper Hunter Shire
Campbelltown City	Inner West	Northern Beaches	Warrumbungle Shire
Cessnock City	Junee Shire	Northern Beaches	Waverley
City of Newcastle	Lachlan Shire	Penrith City	Wingecarribee Shire
City of Parramatta	Lake Macquarie City	Port Macquarie-Hastings	Wollondilly Shire
City of Ryde	Lithgow City	Port Stephens	Wollongong City
City of Sydney	Liverpool City	Queanbeyan Palerang Regional	Yass Valley
Coffs Harbour City	Maitland City	RAMJO	

2.2. Recommendations for councils

The following tables lists the **EPA Review Recommendations** for councils as contained in the Review and the corresponding **Councils Feedback to the Review Recommendations**.

2.2.1. Information required under section 59(2) of the CLM Act

EPA Review Recommendations	Councils Feedback to the Review Recommendations
<p>a. Items under section 59(2)(a)–(e) of the CLM Act are prescribed matters for the purposes of the EP&A Act and must be included on section 10.7(2) EP&A Act planning certificates. Councils should make every effort to complete this when producing planning certificates as it is a legislative requirement</p>	<p>Issue a1: The EP&A Act makes no mention of section 59(2)(a)–(e) of the CLM Act, it also makes no mention of contaminated land at all. Further the EP&A Regulation only refers to section 59(2)(a)–(e) of the CLM Act as a note in schedule 4 of the EP&A regulation.</p> <p>Feedback a1: Items listed in section 59(2) of the CLM Act should be incorporated into the list of prescribed items in schedule 4 of the EP&A Regs (or schedule 2 of the new Regs) and not appear as a note to schedule 4.</p>

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<p>b. When sites are not regulated by the EPA and section 59(2)(a)–(e) is not applicable, councils should still list each of the matters and clearly indicate that the item does not apply to the site.</p>	<p>Issue b1: As the requirement to include section 59(2)(a)–(e) notifications only appears as a note in schedule 4 of the EP&A Reg councils take different approaches to this.</p> <p>Feedback b1: See recommendation a1. Additionally, councils may benefit by being provided with a best practice planning certificate template to use at their discretion.</p>
<p>Councils should check the EPA’s Record of Notices register when creating planning certificates, to confirm the status of a site. Furthermore, if a council is unsure of a site’s regulatory status (or if a Notice/Order does not match council records), then it should contact the EPA.</p>	<p>Issue b1: The EPA Record of Notices register only lists what has been notified under s11 of the CLM Act. Further, s11 of the CLM Act requires the EPA to notify the local authority of any new notification under s11 of the CLM Act. It is up to the EPA to notify council, not for council to search the public record.</p> <p>Feedback b1: That the EPA:</p> <ul style="list-style-type: none"> • confirms with all councils its responsibilities under s11 of the CLM Act to formally notify each council and verifies that this is occurring; • clarifies the form of the notifications to councils; • confirms to whom the notification is directed at council; and • the EPA works with councils to ensure this occurs in accord with the requirements of the CLM Act. <p>Issue b2: The s11 notification does not provide information on the site as is required by 59(2)(a)–(e) of the CLM Act or section 10.7(2) EP&A Act. It is very difficult for councils to translate the</p>

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	<p>information as presented in the s11 notice into the requirements of section 10.7(2) planning certificates. Further s59 of the CLM Act states that the EPA must notify councils of the status of the prescribed items in s59, it is not up to the council to request this from the EPA.</p> <p>Feedback b2: For the purposes of councils recording information on planning certificates, that information should be provided to councils as per the format prescribed in s59 of the CLM Act. Councils also recommend that a secure portal or some other process be established by the EPA where all past and future s59 notifications can be stored for councils to access should the need arise.</p>
<p>c. Councils should consider providing as much guidance as possible to help people search for any potential contamination information pertaining to a site.</p>	<p>Issue c1: Councils agree in principle, however councils are not the custodian of all information pertaining to sites. Information on sites is distributed among many state agencies and information brokers.</p> <p>Councils should not be relied on to provide all of this information, it should be shared equally between EPA, councils and other sources of information, otherwise this could be viewed as a form of cost shifting.</p> <p>Feedback c1: That the EPA and DPE, in consultation with councils, develop standardised guidance to help people search for any potential contamination information pertaining to a site including all of the government agencies and authorised information vendors.</p>

2.2.2. Information recommended by section 10.7(5) of the EP&A Act

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<p>d. Where available, councils could consider including site information relevant under section 10.7(5) of the EP&A Act, such as potentially contaminating activities, council site investigations, notifications of remediation and council-held audit statements.</p>	<p>Issue d1: Information that is recorded on the section 10.7(5) part of the planning certificate is not prescribed in the EP&A Act nor the EP&A Regulation. Councils report that this leads to contradictory interpretations of what to record and can result in inconsistencies within and between councils. There are also varying levels of resources and expertise in councils across the state which can also contribute to inconsistent approaches.</p> <p>Councils also advise that there are many additional sources of information about land contamination that could be included on planning certificates but are not prescribed in the CLM Act or the EP&A Act. Sources of additional information include but are not limited to: development applications; Clause 18 of State Environmental Planning Policy No 55- Remediation of Land; police notification; fire & rescue notifications; Section 308 of the Protection of the Environment Operations Act 1997 (POEO Public Register; and Section 60 of the Contaminated Land Management Act 1997 (list of notified sites)</p> <p>To do this effectively councils would need to develop and implement complex Contaminated Land Information Systems, including Contaminated Land Registers and automation of contaminated land information on Section 10 Certificates. This is an expensive undertaking that is not available to all councils.</p>

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	<p>Feedback d1: EPA and DPE, in consultation with councils, develop limited prescribed contaminated land information to be included on the section 10.7(5) part of the planning certificate, including the format of that prescribed information, in addition to the requirements of section 59(2)(a)–(e) of the CLM Act and section 10.7(2) EP&A Act. This would give councils greater clarity and confidence about the information they are expected to include on these certificates.</p> <p>Provision should be made for emerging contamination issues such as clandestine drug laboratories.</p> <p>Councils should also be provided with clearer guidance on when or if this information can be removed from planning certificates.</p> <p>Additionally, EPA and DPE should collaborate with councils to develop, maintain and resource the required Contaminated Land Information Systems, including Contaminated Land Registers and automation of contaminated land information on Section 10 Certificates, to provide these services to communities. Best practice examples of how to do this can be seen at Newcastle and City of Sydney Councils.</p> <p>Issue d2: Councils report that the 10.7(5) part of the planning certificate is most often provided separately and in addition to the 10.7(2) parts of the planning certificate, at an additional cost. (To minimise their costs customers often will only request the 10.7(2) certificate.) This results in</p>

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	<p>customers and proponents not receiving all of the relevant information about the site such as the limitations on using and developing the site due to contamination. This also results in the council having to issue the planning certificate twice (if the customer makes a subsequent request for the 10.7(5) certificate) which is an additional cost and time burden. Councils also report that customers and proponents are often shocked at the unexpected financial impacts of contaminated land, and on occasions this has led to the cancellation of property purchases as they have only been asked to issue the s10.7(2) planning certificate as per minimum legislative requirements.</p> <p>Feedback d2: DPE, as part of their ongoing consultation with councils about planning certificates, consider the merits and options of merging both section 10.7(2) and section 10.7(5) planning certificates into one planning certificate.</p> <p>Issue d3: There is evidence (see 2018 National asbestos awareness and attitudes survey, Asbestos Safety and Eradication Agency) that applicants for development are largely unaware of the presence of asbestos when considering and planning for development. The research also shows that where unexpected finds of asbestos occur (once development has commenced) this can lead to unlicensed removal and illegal dumping. Councils are significantly affected by the dumping of asbestos, leading to public health risks and significant clean-up costs.</p>

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	<p>Feedback d3: That planning certificates also include a section to indicate the presence of asbestos, where council or the planning authority becomes aware of the presence of asbestos (in addition to the loose fill asbestos requirements). Eg: asbestos in building, or on/in soil.</p>
<p>e. Where practicable, councils should provide copies of reports, statements and further information about the site under section 10.7(5) of the EP&A Act with the planning certificate when it is issued. This will provide transparency and reduce the risk of a contaminated land notation being overlooked.</p>	<p>Issue e1: Many councils have received contradictory legal advice that, on the one hand, giving too much information is a privacy and commercial in confidence risk, and on the other that withholding information is a GIPA and legal risk. Further, councils report that the fee charged for planning certificates does not cover the incurred cost to councils of researching and providing additional information.</p> <p>Feedback e1: That the EPA and DPE, in consultation with councils, develop stronger and clearer guidelines on what councils must legally provide on planning certificates. Further, that once clearer guidelines are established, the full cost of providing this service be evaluated and the legislated cost of planning certificates are adjusted accordingly.</p> <p>Issue e2: Councils report that to do this effectively they need to develop and implement complex Contaminated Land Information Systems, including Contaminated Land Registers and automation of contaminated land information on Section 10 Certificates. This is an expensive undertaking that is not available to all councils.</p> <p>Feedback e2: EPA and DPE should collaborate with councils to develop, maintain and resource the required Contaminated Land Information Systems,</p>

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	including Contaminated Land Registers and automation of contaminated land information on Section 10 Certificates, to provide these services to communities. Best practice examples of how to do this can be seen at Newcastle and City of Sydney Councils.
f. When potentially contaminating activities are known to council, they should be included on the planning certificate	See Feedback d1, d2, e1, and e2
g. (planning certificates) Clearly state if there is a site audit statement available for the specific site	See Feedback d1, d2, e1, and e2
h. (councils could) Provide more context when using the suggested Remediation of Land SEPP guideline text around contaminated-land policy that restricts development	See Feedback d1, d2, e1, and e2,

2.2.3. Council policies and records

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i. Councils should consider developing a contaminated-land policy or guidelines	<p>Issue i1: Many councils do already have contaminated-land policy or guidelines. An example of this is the model contaminated land policy promoted by the council regional capacity building program (CRCB) funded by the EPA. However, this program only supports a proportion of regional councils, not all.</p> <p>Feedback i1: That the EPA continue to fund, and expand the CRCB program to develop, promote</p>

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	<p>and deliver consistent contaminated-land policies, processes, procedures and guidelines to all councils.</p> <p>Issue i2: Councils report that it is difficult to implement contaminated-land policies as there is a lack of prescribed information councils are required to attach to planning certificates under s10.7(5) of the EP&A Act. This lack of prescribed information leads to wide interpretations of what should and should not be recorded and provided on planning certificates. This leads to poor service outcomes, for contaminated land that is not regulated by the EPA. There are also widely varying levels of resources and expertise in councils across the state which can also be a barrier to developing and/or updating such policies.</p> <p>Feedback 12: See recommendations d1, d2, e1, and e2</p>
<p>j. Where financially and logistically possible, councils could maintain their own databases of contaminated land, for better oversight of contaminated sites within their local government areas.</p>	<p>Issue j1: Development and implementation of contaminated land databases by councils is not a legislative requirement. Therefore, the cost of implementing such systems is contestable and not a high priority within already-limited council budgets. Councils that do report having these systems, state that it requires at least 1FTE for at least 5 years to make databases operational, plus software procurement, and training for council staff. There are also the additional ongoing costs of keeping this database up to date and fit for purpose. Many councils do not have the resources to implement this additional service.</p> <p>Feedback j1: That the EPA further explore the cost benefit of councils implementing this, including</p>

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	<p>identification of long-term funding streams to ensure databases are effective for the lifetime of contaminated land within the community.</p> <p>See also recommendation e2.</p>

2.2.4. Other information

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<p>k. (planning certificates) Clarify the appropriate entity to direct enquiries to. eg: This site is regulated by XXX [insert Council or the NSW EPA as relevant] and contaminated-land enquiries should be directed to it on XXX [insert relevant contact details].</p>	<p>Issue l1: Councils do not have the resources to review and update all of their planning certificates retrospectively at once. Further, state agency names may change more often than a planning certificate is requested from councils.</p> <p>Feedback l1: That the EPA and DPE recognise that this is resource intensive and agree that this can only reasonably be done going forward on an as requested basis.</p>
<p>l. (planning certificates) Correctly name the NSW Environment Protection Authority to enable members of the public to identify it easily and ensure integrity in the document</p>	<p>Issue l1: The error is acknowledged. However, councils do not have the resources to review and update all of their planning certificates retrospectively at once.</p> <p>Feedback l1: That the EPA and DPE recognise that this is resource intensive and agree that this can only reasonably be done going forward on an as requested basis.</p>
<p>m. (councils could) Edit the planning certificate before publication to make it easy to understand, help avoid misinterpretation and maintain integrity in the document</p>	<p>Issue m1: Sector best practice is moving towards automated issuing of planning certificates. Many councils already have this service in place. Councils also in general have limited staff resources. As such</p>

there will be fewer and fewer staff able to edit planning certificates before they are issued.

Feedback m1: Councils agree that planning certificates should be easy to understand, however this can only reasonably be done going forward on an as requested basis. Councils do not have the resources to review and update all of their planning certificates retrospectively at once.