

**A Review of the *Contaminated Land
Management Act 1997***

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Minister's Foreword

Managing contaminated sites is a priority for the New South Wales Government. We are committed to the ongoing improvement of the management of these sites to ensure that human health and the environment are protected. The current review of the *Contaminated Land Management Act 1997* (CLM Act) in 2003 reflects our commitment.

Contaminated sites can be a serious environmental and human health issue if they are not managed properly. They also have major economic, legal and planning implications. Since 1997, the Contaminated Land Management Framework has been progressively introduced to ensure that contaminated sites are appropriately managed to minimise such impacts.

In very broad terms, the management framework consists of two tiers:

- The EPA uses its powers under the CLM Act to deal with contamination that is posing an unacceptable risk to human health or the environment (given the site's current or approved use) and that needs to be addressed immediately.
- Local councils deal with other contamination under the planning and development framework, including State Environmental Planning Policy No. 55 – Remediation of Land and the *Managing Land Contamination – Planning Guidelines*. This type of site, although contaminated, does not pose an unacceptable risk under its current or approved use. The planning and development process will determine what remediation is needed to make the land suitable for a different use.

Public consultation has been a very important aspect of the CLM Act review. It has included the release of an issues paper in July 2003, followed by a series of public workshops held by the EPA in various regional centres around NSW.

This report summarises the findings of the review. It draws on the results of public meetings and written submissions and on general feedback from the public and within the Department of Environment and Conservation. The Government will now be considering its response to the review whether legislative reform is appropriate.

I am pleased to submit this report to the Parliament.

Bob Debus MP

Minister for the Environment

Report note:

Formation of the Department of Environment and Conservation (NSW)

On 24 September 2003 the staff of the Environment Protection Authority (EPA) became part of the Department of Environment and Conservation (DEC). However, certain statutory functions and powers, including those in the *Contaminated Land Management Act 1997*, continue to be exercised in the name of the EPA, a statutory body created by the *Protection of the Environment Administration Act 1991*. The term 'EPA' is used in this report when referring to those statutory functions and powers.

Background to the review

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.

The Act dictates the purpose of the review, namely to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The provisions in the CLM Act that establish and regulate the accredited site auditor scheme are not being considered in this review. This is because the government has already reviewed and proposed changes to these provisions. The proposals were the subject of a discussion paper that was published in 2002, and a Bill that will amend the provisions is currently being considered by the New South Wales Parliament.

Review consultation process

On 4 July 2003, the EPA released the *Issues Paper: Review of the Contaminated Land Management Act 1997* (the 'Issues Paper') for public comment. The paper posed particular questions about the Act, but comments on any other aspects related to the Act were also invited.

The release of this paper was followed by a series of five public consultation meetings held in Wollongong, Armidale, Newcastle, Parramatta and Sydney. In total, 135 participants attended these forums. They were run by an independent facilitator and were open to anyone who wished to contribute to the review of the Act.

At the meetings participants were divided into small discussion groups, each with its own facilitator, and the outcomes of the discussions were reported back to the full gathering. Participants' comments in both the discussion groups and the report-back sessions were recorded in writing, and participants were sent a copy.

A further 13 written submissions were received by the EPA from a variety of organisations and individuals.

About this report

The Department of Environment and Conservation (DEC) has considered all of these submissions and the feedback it received on the CLM Act at the public consultation sessions. In this report it has summarised the issues raised that have a bearing on the review of the CLM Act.

A number of suggestions were made about how to enhance the management of contaminated sites by local councils. For example, several people – including some local council staff – considered that council staff were generally not well equipped to consider the contamination issues raised by the development and rezoning proposals that come before council. In particular, they considered that council staff did not have the knowledge needed to assess technical reports written by environmental consultants. One result of this may be an over-reliance by councils on EPA-accredited site auditors to review those reports.

These issues are not directly relevant to the review of the CLM Act, because councils do not have powers under the Act. Councils' management of contaminated sites relies largely on processes and powers under the *Environmental Planning and Assessment Act 1979* (EP&A Act). However, these comments will be considered in the upcoming review of the *Managing*

Land Contamination – Planning Guidelines (the ‘Planning Guidelines’) and State Environmental Planning Policy No. 55 – Remediation of Land (SEPP 55).

A number of comments were also made about how the CLM Act is administered, rather than about the Act itself. Many of these comments related to concerns about delays in the regulatory process (such as the time taken by the EPA to determine whether contamination of which it has been notified posed a significant risk of harm). These issues fall beyond the scope of the CLM Act review but are very important. They will be taken into account by the DEC in the development of appropriate changes to its administrative practices and procedures.

The Contaminated Land Management Framework in New South Wales

The New South Wales Government’s Contaminated Land Management Framework 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.

The broad purpose of the framework has been to provide a clear, efficient, comprehensive and integrated package 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. land-use planning processes that deal with future uses of a site
2. CLM Act processes that enable the EPA to regulate the necessary investigation and clean-up of contamination, given the current or approved use of the site concerned.

The land-use planning processes embrace a preventive philosophy of contaminated land management. They aim 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 the integration of any necessary remediation into 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 EP&A Act
- land remediation is facilitated and controlled through SEPP 55.

The CLM Act is relatively new legislation administered by the EPA. It came into effect in three stages: the site auditor provisions on 1 June 1998, all other provisions except section 60 on 1 September 1998, and section 60 on 1 July 1999. (Section 60 places a duty on landowners and contaminators to notify the EPA of contamination that poses a ‘significant risk of harm’ – see below.)

The Act establishes a legal framework that enables the 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’. 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 whether there is a significant risk of harm) and for the use of landowners, developers, site auditors, government departments and other stakeholders. These guidelines include, for example, the National Environment Protection (Assessment of Site Contamination) Measure.

The EPA also administers other laws that 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*.

Objectives of the CLM Act

The general objective of the CLM Act was 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.

Issue addressed: 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?

The principal comments were:

- The objectives of the Act are needed and worthwhile.
- They should be expanded to reflect local councils' roles in managing contaminated sites.
- Some of the principles of ecologically sustainable development (ESD, referred to in the objectives) – namely the principle of intergenerational equity and the polluter pays principle – have not been achieved.
- An alternative to the principles of ESD should be considered, given that the government has limited resources.

The fact that the Government has finite resources is not inconsistent with the principles of ecologically sustainable development, and hence the principles should continue to underpin the objectives of the CLM Act. The DEC will consider whether the objectives require amendment in light of these comments. .

The site regulation process

Before the introduction of the New South Wales Government's Contaminated Land Management Framework, the scheme for the management of contaminated sites in NSW was piecemeal, with poorly integrated components. As a consequence, the processes for managing

contaminated land were unclear, inefficient and inequitable, with insufficient public transparency of critical decision-making.

The CLM Act aims to bring greater certainty into contaminated land management by clarifying:

- why and when the EPA needs to intervene in the regulation of contaminated sites
- who the EPA can 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.

The processes of the CLM Act commence with the EPA receiving notification of contamination that poses, or may pose, a significant risk of harm. Section 60 of the CLM Act requires a person whose activities cause contamination that poses a significant risk of harm to notify the EPA when they become aware of the contamination. It places the owner of the land concerned under the same obligation. The EPA may also become aware of site contamination through other channels, for example, from calls to the DEC's Pollution Line (the Department's public telephone service), referral of sites by local councils, and detection during the DEC's other regulatory work.

Once this notification has occurred, the main steps of the EPA's regulatory process are:

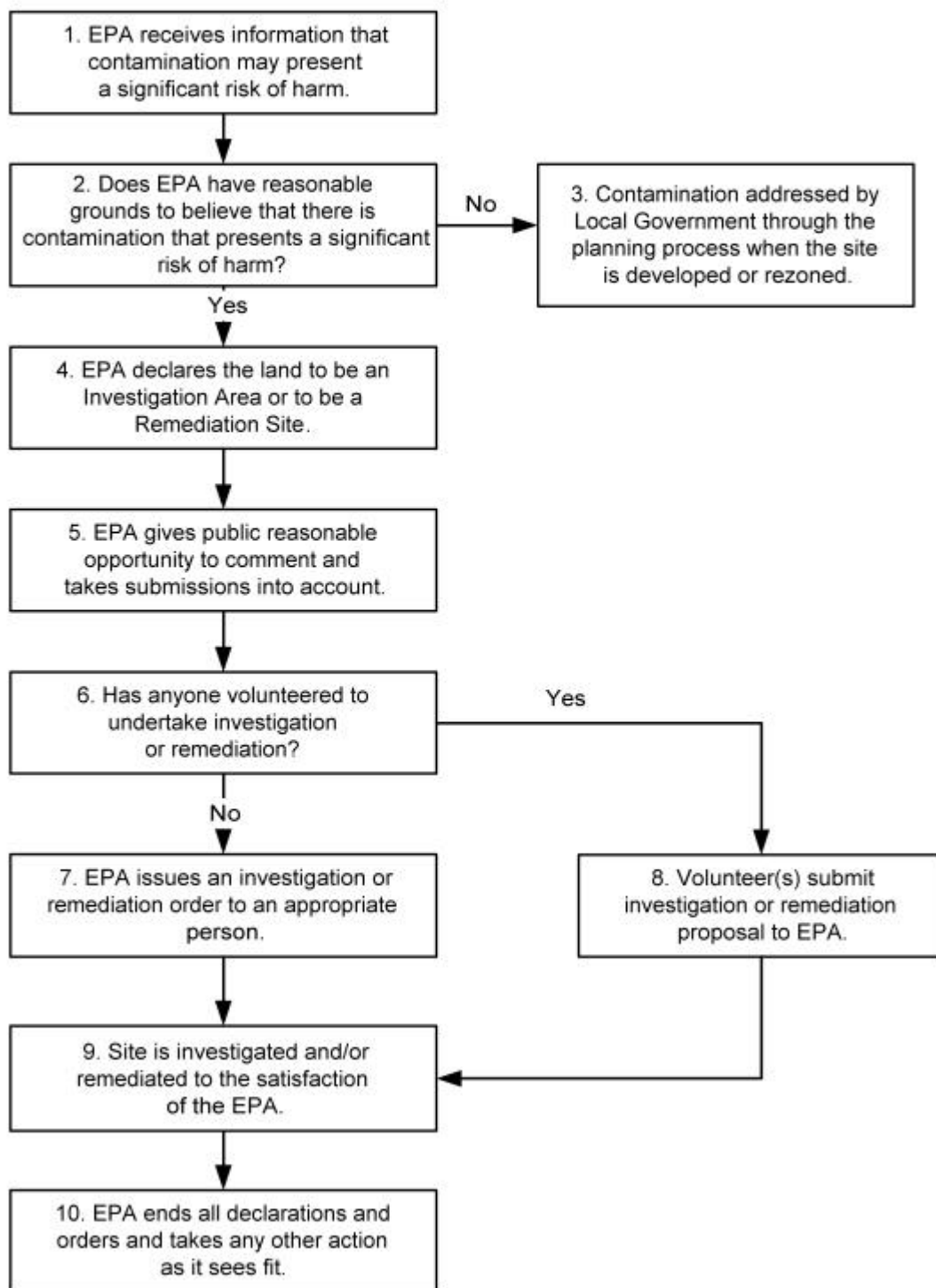
- deciding, according to criteria set out in the Act, whether the contamination poses a significant risk of harm to human health or the environment or whether there is reason to believe that it does
- informing the public of the risk of harm by placing a notice in the New South Wales Government Gazette 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 can be required under the Act to assess or remediate the contamination
- issuing that person 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 the site. Figure 1 illustrates the principal steps in the process.

Issue addressed: Is the site regulation process too slow?

The Issues Paper posed several questions about particular aspects of the regulatory process. However, the main focus of respondents was on the overall timeliness of the process. A key comment from respondents about the CLM Act was that the EPA's regulatory responses are generally too slow.

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



There are four major reasons for the slowness of the response:

- The CLM Act is relatively new legislation; it did not fully commence until July 1999. The EPA and stakeholders have needed time to familiarise themselves with the Act's processes, particularly in the first couple of years after commencement.
- The information that the EPA receives about contamination is often insufficient for it to be able to determine whether the contamination poses a significant risk of harm. Therefore, the EPA often has to follow up the notifiers for more information and has limited tools to enforce timely responses from them or to require them to obtain more information to enable EPA's determination.
- In the interests of accountability and transparency, the CLM Act regulatory process contains many steps, which take time. The large number of steps and the formality of the process inevitably result in a somewhat rigid decision-making process.
- The assessment processes are resource-intensive for the EPA.

The EPA has been implementing various strategies and streamlining its internal administrative process in an effort to reduce delays. These changes appear to be reducing the time it takes to make a 'significant risk of harm' determination. The DEC will continue to explore possible changes to the CLM Act to ensure that there is continued improvement in operational efficiency.

Issue addressed: Should we keep the delineation between the investigation and remediation stages?

The Issues Paper raised the following issue for discussion:

- Are the number of regulatory steps involved appropriate, and should consideration be given to removing the delineation in the Act between the investigation and remediation phases?

The principal comments on this topic were as follows:

- Most considered that separate investigation and remediation stages should remain.
- Some considered that consolidating the investigation and remediation stages would speed up regulatory actions.
- The efficiency of the staged approach could be improved, for example, by allowing further investigation to be undertaken within the remediation stage.

It is evident that respondents would like the delineation between the investigation and remediation stages to remain. This appears to be in part because of a belief that if a site is tagged as one that so far requires only investigation as opposed to clean-up, it is less likely to cause unnecessary alarm (or possibly to affect the property value of the site) than having a tag that does not make that distinction. (It may also be related to concerns with the "significant risk of harm" terminology – see below.) However, the flexibility to allow some investigation during the remediation stage was not opposed. The DEC will take these comments into account in considering any proposals for legislative changes.

Issue addressed: Should the declaration process be revised?

Some people thought that the current declaration process is working well. Other comments were that the EPA should adopt a more proactive approach to providing information about contamination to those most likely to be affected by the contamination. The gazettal and publishing of declarations were considered by some as not being an effective way of communicating this information. Alternatives suggested included targeted consultation and

publishing of the declaration in the local paper, even if the site is in the Sydney metropolitan area. (Currently declarations of Sydney sites only appear in the *Sydney Morning Herald*.)

It was also suggested that declarations should not be issued at the initial investigative stage because they can unduly alarm the community. Nevertheless, it was considered imperative to ensure early community involvement.

The current declaration process may not be the most effective or appropriate way of ensuring that information about a contaminated site reaches those who are likely to have an interest in the information. The DEC is exploring the best mechanism to ensure that the public have information about the status of a site. Minor amendments to the CLM Act may be needed. .

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

- There was general agreement that the voluntary approach should be encouraged because it reduces costs.
- Some considered that a site should not be declared where the EPA agrees to a voluntary proposal, and that declarations may be a disincentive for people to come forward with voluntary proposals.
- There was a view that the voluntary approach should involve the community more.
- Some thought that voluntary agreements were not flexible enough to respond to situations where the agreed strategy proved to be unsuccessful.

There is a general agreement that the voluntary proposal approach should be encouraged. Some respondents were concerned about sites being declared even though the EPA subsequently agreed to a voluntary proposal. This concern appears to have arisen because of a perception that declaring these sites to pose a 'significant risk of harm' stigmatises them. The DEC is considering changes to the CLM Act to enhance the voluntary proposal approach. .

Significant risk of harm

'Significant risk of harm' is a pivotal concept in the CLM Act. It refers to the status of a site where contamination is considered to be serious and require EPA intervention. Broadly speaking, this determination is made at two stages:

- site polluters and owners: they have a duty to notify the EPA when they become aware that the site contamination is posing a significant risk of harm.
- the EPA, in deciding whether or not investigation or remediation, or both, is required to address contamination that it has been notified about.

In making its decision, the EPA must consider the principle of ecologically sustainable development and the factors listed in section 9 of the CLM Act. These factors 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 humans or components 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 (currently the EPA's *Guidelines on Significant Risk of Harm from Contaminated Land and the Duty to Report* are the principal reference).

Issue addressed: Should the term 'significant risk of harm' be reconsidered?

'Significant risk of harm' was the topic on which most people provided comments during the review of the Act. Some people thought that the concept and its flexibility were good, and that the EPA's *Guidelines on Significant Risk of Harm from Land Contamination and the Duty to Report* help to clarify the concept. However, the principal comments were that:

- the term is too emotive
- the process for determining whether contamination poses a 'significant risk of harm' is too complex and difficult to understand
- the EPA's determination of whether contamination needs a regulatory response should better reflect industry-standard risk assessment principles and methodologies.

The DEC is considering whether an amended term should be used to publicly describe a site that requires investigation or clean-up. Consideration will also be given to having a simpler and more easily understood trigger for the duty to notify.,

The use of industry-standard risk assessments (which are site-specific risk assessments) to determine whether or not the EPA should regulate a site poses some uncertainties. This is because industry-standard risk assessments cannot completely address the EPA's duty to adopt a precautionary approach and be mindful of intergenerational equity.

Duty to notify

Issue addressed: Is it clear what type of contamination must be reported to the EPA?

As noted already, under section 60 of the CLM Act there is a duty to notify the EPA of contamination that poses a significant risk of harm.

- Most people who commented on this issue had concerns about using the 'significant risk of harm' concept as a basis for notifying the EPA of contamination because of what they considered to be the complex and uncertain nature of the concept.
- Some people thought that there should be a duty to report more sites to the EPA , including those that *may* have a potential to pose serious threat.
- Some people suggested that consultants and site auditors should also have a duty to notify – not just the polluter and the landowner. However, others disagreed.

The DEC is considering whether there are better triggers for the duty to notify the EPA of site contamination than the 'significant risk of harm' concept..

The determination of whether there is a significant risk of harm depends on a weighing-up of the factors listed in section 9 of the CLM Act in light of the EPA guidelines. There will inevitably be an element of subjectivity in the determination. In some cases it could be unfair to expect site owners and polluters to carry out a determination and arrive at the same EPA conclusion, particularly as failure to notify carries criminal penalties.

One alternative would be a set of more concrete, 'yes' or 'no' criteria as triggers for notification. However, it is not possible to lay down a fixed set of numbers (for example, concentrations of particular contaminants, distance of the contamination source from potential

receiving waters) by which it will be decided in all cases whether the EPA will need to be told about a site. The important applicable parameters will vary from site to site in terms of their relevance and comparative importance.

Changing the trigger for notification would not necessarily dictate a move away from the significant risk of harm concept (or a similar concept) as the basis for the EPA's subsequent determination of whether investigation or remediation is required. It could be quite appropriate for there to be a duty to notify the EPA about contamination but for the EPA to decide that the contamination does not require EPA regulation.

Responsibility for the investigation or remediation of contamination

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. The EPA is given the power by the Act to order 'an appropriate person' to investigate or remediate a site. 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).

As an alternative, or in addition, to issuing an order to the 'appropriate person' from the above list, the EPA can issue an order to a public authority to investigate or to remediate regardless of whether it is an appropriate person.

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

The people who commented on this issue thought it was clear in the CLM Act whom the EPA can order to investigate or remediate contamination.

However, some thought it was an undue burden on local councils for them to be ordered to remediate where they are not the 'appropriate person' person according to section 12 of the CLM Act.

There will be the rare case in which a public authority, such as a local council, is ordered to deal with contamination that would not otherwise be its responsibility. This is likely to be done only in the public interest after extensive communication with that authority. The burden on the authority can be eased by the authority using the cost-recovery provisions in the Act.

Issue addressed: 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 a close relationship does still exist?

Respondents offered the following comments on situations where the polluter no longer exists, cannot be identified or cannot afford the investigation or clean up:

- Some people were uncomfortable with site owners becoming responsible for investigation or clean-up and considered that the CLM Act should enforce the ‘polluter pays principle’ more strongly before passing that responsibility to site owners.
- It was suggested that where there had been a series of polluting activities by different polluters but the principal polluter no longer existed, all the polluters who had contributed to the contamination in a substantial way should share responsibility.
- Several people considered that the directors of a sister or parent company to a polluting company and/or the sister or parent company itself should be responsible for the investigation and clean-up where the polluting company no longer existed.

The DEC is considering whether the concept of the ‘person principally responsible’ for contamination requires clarification

However, it will continue to be appropriate for the site owner to become responsible for investigating or remediating a site if a person who contributed to the contamination cannot be identified, no longer exists, or cannot afford to pay for the work to be done. The site owner is the party most likely to benefit from the contamination being addressed.

Corporate structures sometimes allow individuals and organisations that the community consider to be ‘morally’ responsible for contamination to escape that responsibility. Attempts to ‘lift the corporate veil’ to ensure that this does not happen would be a very significant step. The DEC is considering whether or not amendments are warranted to address this issue,

Information about contaminated sites

One of the principles underlying the Contaminated Land Management Framework 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 the regulatory instruments issued under Part 3 of the CLM Act. 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 instruments and when they are no longer in force or have been fully implemented. The councils must then record the information on planning certificates issued under section 149 (2) of the EP&A Act.

Councils can also use planning certificates to give the public additional factual information about contamination of land, whether or not the contamination poses a significant risk of harm. The Planning Guidelines help them 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.

Issue addressed: Is information on contaminated sites appropriately available?

The principal comments were:

- The current process under which the EPA notifies councils of information that must then be recorded on planning certificates is a good process.
- Information about contaminated sites should be made available to the public earlier.

- There should be a more extensive register that includes all contaminated sites in NSW, including potentially contaminated sites, not just ‘significant risk of harm’ sites.

There was also a view that people who own contaminated land should have greater responsibility to pass information about the contamination on to prospective purchasers of the land.

The suggestion that there be a more extensive public register of contaminated sites than that currently kept by the EPA may be based on the assumption that the information about contaminated sites held at and beyond the time of registration is complete and comprehensive, and that land can be readily classified as contaminated or not contaminated. However, the EPA’s register can record only the contaminated sites that are reported to it. It would not be practicable for the EPA to have to seek out from councils all the information that they have about site contamination and to keep that information up to date. Moreover, the information that councils have about contamination of a site can already be recorded on, and disseminated through, council planning certificates.

Miscellaneous issues

Issue addressed: 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?

Respondents offered the following comments in relation to the EPA’s role in managing contaminated land:

- The EPA should have an advisory role in relation to stakeholders.
- The EPA should be responsible for the investigation and remediation of all contaminated sites, not just sites that pose a significant risk of harm.

There is clearly a role for the EPA in advising the community, local government, environmental consultants and site auditors about contaminated sites issues. It aims to carry out this role through the development of regulations, policies and guidelines and participation in workshops and seminars. DEC is considering whether action is required to improve local councils’ role in managing contamination issues. The suggestion that the EPA be made responsible for the investigation and remediation of *all* contaminated sites, including those currently being managed by local councils under the planning process, is not sustainable because

- many sites do not pose a significant risk of harm;
- the need for action at many sites only arises when a change of land-use is under consideration;
- decisions on land-use change and development proposals are managed by councils, with site clean-up being only one of many factors to be considered.

In their roles as planning consent authorities, councils must consider the suitability of sites for proposed uses anyway; involving the EPA would result in inefficient ‘double handling’ of sites.

Conclusions

The *Contaminated Land Management Act 1997*, which was fully commenced by 1 July 1999, is still relatively new legislation. There is general agreement that the Act has improved the management of contaminated sites in NSW. However, as with all new legislation, the day-to-

day operation of the Act and scientific and policy developments since its commencement highlighted areas that can be improved.

The DEC is considering whether changes are necessary to enhance the operation of the Act, including as regards:

- flexibility in the regulatory process to enable more timely regulatory action.
- an alternative to the term ‘significant risk of harm’ which may help to remove the unwarranted stigma associated with some contaminated sites.
- triggers for the duty to notify the EPA of contamination.
- the application of the ‘polluter pays’ principle.

DEC is currently evaluating proposals to address these issues, in conjunction with better administration of the Act, to ensure the protection of human health and the environment from contaminated sites.