

Regulatory Impact Statement

Contaminated Land Management Regulation 2008

Department of **Environment & Climate Change** NSW



Regulatory Impact Statement

Contaminated Land Management Regulation 2008

Submissions

This regulatory impact statement (RIS) and the draft proposed Regulation are being made available for public comment for a period of four weeks.

Submissions from the public will be considered before finalising the Regulation.

Additional copies of this document are available from DECC's website at www.environment.nsw.gov.au.

Comments on the draft Regulation and RIS should be submitted to:

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Proposed Contaminated Land Management Regulation 2008

1 Introduction

1.1 Purpose and content of the regulatory impact statement

In accordance with the *Subordinate Legislation Act 1989*, the Department of Environment and Climate Change NSW (DECC) has prepared this regulatory impact statement (RIS) to assess the economic, social and environmental costs and benefits of a proposed Regulation and its alternatives.¹

The Contaminated Land Management Regulation 1998 (the current Regulation) is due for automatic repeal on 1 September 2008. It is proposed that a new Regulation be made under the *Contaminated Land Management Act 1997* (CLM Act) immediately following the repeal of the current Regulation.

This RIS analyses a proposal to replace the current Regulation with a new Regulation which is to be known as the Contaminated Land Management Regulation 2008. This RIS consists of the following sections:

- Section 2 provides the environmental context for contaminated land management in NSW, including relevant legislative and policy arrangements and the objective of the CLM Act.
- Section 3 outlines the options considered, including the proposed Regulation and the alternative approaches considered in developing the proposed Regulation.
- Section 4 outlines the proposed Regulation.
- Section 5 considers the costs and benefits of the options.
- Section 6 presents the conclusions of the assessment.

1.2 Planned consultation

The draft Regulation and this RIS will be made available for public comment for four weeks. DECC welcomes written submissions from the public and will carefully consider matters raised before the Regulation is finalised.

A notice calling for submissions from the public will be published in the *NSW Government Gazette*, the *Sydney Morning Herald* and the *Daily Telegraph*. Submissions will be accepted until the close of business four weeks after advertisement.

¹ DECC exercises certain statutory functions and powers (including those set out in the *Protection of the Environment Operations Act 1997* and the CLM Act) in the name of the Environment Protection Authority.

2 Contaminated land management in NSW

Contaminated sites may result from previous use of the site or adjoining land, such as poor practice in the use, handling and disposal of hazardous material, or an unfortunate by-product of that use. Some contaminated sites pose a significant risk to human health and the environment, including pollution of surface water and groundwater.

The nature of site contamination is usually associated with the history of land use in the near vicinity of the site, production technology and waste management practices. Remediation to protect public health and the environment vary according to the proposed land use, the nature and extent of contamination, and the treatment technology available. Some examples of land uses which may lead to contamination include chemical use in agriculture, underground storage tanks, landfills, power stations, gas works, industrial facilities, mining and military sites.

2.1 Contaminated land in NSW

2.1.1 Scale of the problem

Some recent and historical land-use activities in NSW have resulted in the contamination of land and waterways by hazardous chemicals and wastes. Land contamination can have significant environmental, social and economic consequences, including the degradation of groundwater, surface waters and sediments; contaminant uptake by plants and animals; and potential human exposure to contamination. Sustainable management of contaminated land is consistent with State Plan Priority E1 (*A secure and sustainable water supply for all users*).

Some contamination can be extensive, like the former ICI facility (Orica Industrial Park) at Botany. Past operations at this site have resulted in contamination of the Botany Sands Aquifer. Apart from the environmental damage caused by this contamination, local residents and businesses are now unable to use this water resource, which previously provided good quality groundwater. This contamination is currently being remediated.

Site contamination can also spread and affect other industries. For example, in February 2006, the NSW Government prohibited all commercial fishing in Port Jackson (Sydney Harbour) and its tributaries until 2011 because elevated levels of dioxins had been detected in finfish and prawns. This resulted in social and economic disruption for the fishers who previously used Sydney Harbour.

The dioxin contamination in Sydney Harbour was primarily a result of previous production of herbicides and other chemicals at Rhodes and the previous disposal of waste materials at Rhodes Peninsula, adjacent to Homebush Bay. These activities ceased by 1976. In 1997 the NSW Government committed to the removal and destruction of contaminated material from parts of Homebush Bay.

Contaminated sites in NSW continue to be identified, and the problem is often not apparent until a site is prepared for sale or redevelopment; or there is a change in land use. Sites posing a 'significant risk of harm' (contaminated land with potential for immediate or long-term adverse effects on human health and the environment) are regulated via the CLM Act and its supporting Regulation. There were 247 contaminated sites regulated under the CLM Act in June 2006, with 77 sites having been successfully remediated.

2.1.2 Benefits of effective management

Effective management of contaminated land can deliver multiple benefits, which can be broadly categorised as follows:

Health benefits: Actions taken to improve human health may include reducing the magnitude of exposure to contaminants, reducing the number of exposure pathways, reducing the length of exposure, and providing information so that individuals can reduce their exposure.

Ecological benefits: Reducing contamination helps restore and maintain the ecosystem services that both people and biodiversity rely on. These services include clean air and water, and the ability of the environment to assimilate waste.

Amenity benefits: Contaminated sites often detract from the general amenity of the locality. This is exacerbated if the contamination makes surrounding plants die or look unhealthy or if discharge from the site is unsightly. Remediation can improve amenity by treating or removing contamination to reduce the health risk and stigma, and enabling the redevelopment of these sites.

Land supply: Remediated contaminated sites are more likely to have redevelopments approved and accepted by future buyers and the public than are unremediated contaminated sites. This brings back into use land which was precluded from use.

2.2 The NSW CLM Framework

The purpose of the NSW Government's Contaminated Land Management (CLM) Framework is 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. Key elements are the:

- **CLM Act**, which deals with the process for investigating and, where appropriate, remediating contaminated land. The Act provides that DECC can declare land, order a responsible person to take investigative or corrective actions or enter into voluntary agreements. It also establishes a hierarchy of responsibility for investigating and remediating contaminated land, and allows for the accreditation by DECC of site auditors of contaminated land, facilitating provision of an independent pool of experts to sign-off on sites that have been investigated and/or remediated.
- **State Environmental Planning Policy – Remediation of Land (SEPP 55)**, which was created under provisions of the *Environmental Planning and Assessment Act 1979* (EP&A Act), and complements the CLM Act. SEPP 55 provides for consistent State-wide planning controls for remediation of land. It facilitates and controls the remediation of land and the provision of relevant information to planning authorities, DECC and the public.
- **Planning Guidelines – Managing Contaminated Land**, which provide step by step assistance to planning authorities on how to act responsibly in making sure that land is cleaned up to allow safe use of the site. The guidelines also provide a list of industries that may result in land contamination.

The Framework deals with contaminated land through two avenues:

- 1 land-use planning processes that deal with future uses of a site
- 2 regulation by DECC of the necessary investigation and cleanup of contamination, given the current or approved use of the site.

The land-use planning processes embrace a preventive philosophy for contaminated land management. They aim to ensure that land is not allowed to be inappropriately used given its 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 redevelopment or rezoning. In particular, the processes include measures to ensure that :

- planning authorities (generally local councils) consider contamination issues when 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.

2.3 Objectives of the CLM Act

The general objective of the CLM Act is to establish a process for investigating and, where appropriate, remediating sites where contamination presents a significant risk of harm to human health or the environment.

The particular objectives of the Act are to:

- set out accountabilities for managing contamination if a significant risk of harm is identified
- set out the role of DECC 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.

2.4 The CLM Regulation

The CLM Regulation supports the CLM Act and helps maintain the quality control processes in the Framework. It prescribes:

- the rate at which DECC administrative costs in relation to CLM Act orders can be recovered
- the form by which DECC is to be notified that land has been contaminated
- the accreditation fees to be paid by site auditors
- some reporting requirements for accredited site auditors
- DECC reporting requirements in relation to CLM Act declarations, orders and decisions.

There are currently 31 site auditors accredited under the scheme, which allows them to sign-off NSW contaminated site reports. The Regulation supports the accreditation scheme, which reduces the risk of site auditors approving substandard remediation or not reporting potential contamination of which they become aware.

3 Alternative options

A recent review of the CLM Framework and the current Regulation identified the following issues:

- Information on the notification form is dated.
- There are no penalty infringement notices (PINs) for minor breaches of the CLM Act
- Site auditor accreditation fees have not been updated since 1998.
- The administration fee rate has not been updated since 1998.

These issues were investigated, and the proposed Regulation includes options to address them, thereby improving operation of the CLM Framework in NSW.

3.1 Options considered

Option 1: Automatic repeal (base case)

This option consists of the automatic repeal of the current Regulation on 1 September 2008, with no new Regulation introduced. This would result in the CLM Act operating without any prescribed fees, administrative provisions, record-keeping or specified response times that are relied on for the current management of contaminated land in NSW.

Because the Regulation supports the quality control processes prescribed under the Act, it ensures that the health, ecological, amenity and land supply benefits of the CLM Framework are realised. Under this option for example, there is a greater risk that site auditors may approve substandard remediation or not report potential contamination of which they become aware.

Option 2: Renew the current Regulation

Renewing the current Regulation without making any changes would continue the support for the quality control processes prescribed under the Act that ensure that the health, ecological, amenity and land supply benefits of the CLM Framework are realised.

Option 3: Proposed Regulation

This option consists of a new Regulation that continues to facilitate record keeping and reporting under the CLM Framework, but changes the notification form, introduces PINs, and updates the fees.

4 The proposed Regulation

The proposed Regulation would incorporate the following changes designed to improve the administration and effectiveness of the CLM Framework in NSW.

4.1 Updating the notification form

Section 60 of the CLM Act states that, as soon as practicable after becoming aware that land is contaminated in such a way as to present a significant risk of harm, a person must notify DECC that the land has been contaminated.

The form used to notify DECC has a postal address for the EPA (now part of DECC), which has been superseded. It is therefore proposed to update the form to include the current DECC postal address and other minor modifications.

4.2 The introduction of penalty infringement notices

A significant source of delay in progressing some CLM Act investigations and declarations is the incomplete, inaccurate or untimely provision of information to DECC. It is proposed to address this issue by the introduction of PINs that would allow DECC to issue small fines where minor breaches of the CLM Act have occurred (such as breaches of statutory timelines, submission of non-accredited site audits, or failure to comply with an investigation, remediation or maintenance order).

PINs would complement the existing penalty provisions relating to breaches of the CLM Act and would make the Act more consistent with other environmental legislation in NSW such as the *Protection of the Environment Operations Act 1997*. They would also encourage behavioural change, helping to reduce the delay and uncertainty that is currently experienced with some CLM Act processes.

4.3 Update the auditor accreditation fees

The accreditation fees for site auditors authorised under the NSW CLM Framework have not been updated since 1998, despite changes in the cost of administering the scheme.

It is proposed to update the auditor accreditation fees to appropriately recover costs. The new fees would be an initial application fee of \$1000 (increased from \$285) and a renewal fee of \$7000 per year (increased from \$3500). The calculation of the proposed auditor accreditation fees is outlined in section 5.2.3.

4.4 An updated administration fee rate for CLM Act orders

DECC currently undertakes a variety of work, including research, analysis, consultation and site inspections, to prepare and monitor CLM Act orders. The current Regulation sets a fee of \$40 per hour to be paid by site owners for the work undertaken by DECC. Labour costs have increased since the fee rate was set in 1998.

The proposed Regulation updates the administration fee to appropriately recover costs. The new fee would be \$60 per hour. The calculation of the proposed administration fees is outlined in section 5.2.4.

4.5 Other clauses of the proposed Regulation

The proposed Regulation contains several other unchanged clauses including:

- clause 5, which prescribes the time period for lodging an application for renewal of site auditor accreditation
- clause 6, which prescribes the particulars to be included in an accredited site auditor's annual return.
- clause 7, which prescribes the record of notices issued under section 28 of the CLM Act that DECC is to maintain
- clause 10, which prescribes the time period in which DECC is to provide a statement as to why it does not have reason to believe that the land is contaminated in such a way as to present a significant risk of harm.

The purpose of these clauses is to facilitate the administrative functions of the Regulation and the CLM Act. These clauses are mechanical in nature and would not result in any change in the impact on site owners, site auditors or DECC.

5 Costs and benefits

The costs and benefits of both the current Regulation and the proposed Regulation relative to the base case of no Regulation are discussed in this section.

The impact of the CLM Framework is that site owners undertake remediation of contaminated sites to mitigate the potential harm to human health and the environment from these contaminated sites. The following case study illustrates how this works with a common type of contaminated site – disused petrol stations.

Case Study 1: Service station contamination

The release of petroleum products stored in underground tanks via leaks and spills can contaminate the soil, groundwater, surface water and air.

Contaminants including benzene, toluene, and methyl tertiary butyl ether (MTBE) present a significant risk of harm, especially when a site is to be disturbed for redevelopment. For example, an Australian assessment of benzene found that it is a human carcinogen for which no safe level of exposure has been established (NICNAS 2001). Also, some water utilities in the US have had to close wells and arrange alternative water supplies due to MBTE contamination of groundwater.

Remediation of a typical site may cost up to \$200 000 and involve the removal and treatment of contaminated soil.

5.1 Costs of the current Regulation

Relative to the base case of no Regulation, the current Regulation results in costs to:

- site auditors to meet accreditation reporting requirements
- DECC to record and invoice the administrative costs associated with CLM orders and to invoice the site auditor accreditation fees.

Site auditors currently incur costs to become accredited and to satisfy the associated ongoing reporting requirements. The main element in this cost is the opportunity costs of the time they devote towards accreditation. This cost has not been estimated; however, if they are not accredited, they cannot work as site auditors.

The costs to DECC to record and invoice administrative costs and to invoice site auditor accreditation fees are not expected to be significant and have not been estimated. The DECC labour cost for all contaminated land management functions (preparing and monitoring CLM Act orders, administering the site auditor accreditation scheme, working with the public and local councils, public reporting and corporate and policy functions) is approximately \$1 million. Only a small portion of this cost relates to the Regulation. Most functions are prescribed by the Act and the cost of these functions would continue if there was no Regulation.

There are, however, financial costs to site owners of \$40 for each hour that DECC spends in preparing and monitoring a CLM order, and financial costs to site auditors of \$285 for the initial auditor accreditation application fee and \$3500 per year for the auditor accreditation renewal fee.

The site auditor fees help pay for the site auditor accreditation scheme. For example, in 2006–07, \$122 490 was received in auditor accreditation renewal fees, while the

cost to administer the scheme was \$272 740. The shortfall to administer the scheme was paid by NSW taxpayers.

Accreditation reduces the risk that auditors would approve substandard remediation or fail to identify and report potential contamination. If general revenue became unavailable to supplement site auditor fees, the continuation of the quality-control processes within the accreditation scheme may be at risk, resulting in less of the benefits of the CLM Framework being realised.

CLM Act orders also address the significant risk of harm to human health and the environment presented by contamination. In preparing and monitoring these orders, DECC helps to reduce this risk. If general revenue became unavailable to supplement CLM Act order fees, the continuation of the quality control processes performed by DECC in relation to CLM Act orders may be at risk, resulting in less of the benefits of the CLM Framework being realised.

5.2 Costs of the proposed Regulation

The proposed Regulation would result in costs similar to the current Regulation. These costs are small relative to the benefits of the proper management of contaminated land. The changes in the proposed Regulation are either administrative or allow for greater cost recovery of administrative costs.

5.2.1 Updating the notification form

This is an administrative change only. It may result in a small reduction in DECC costs from the current Regulation as less mail would require redirection from the old EPA address.

5.2.2 The introduction of PINs

PINs act as a deterrent and help to change behaviour. Currently those committing an offence under the Act may be prosecuted through the courts. As this has high upfront costs, minor offences may not be pursued.

Introducing PINs may decrease court costs but may also increase the cost of issuing PINs and recovering the fine. Overall however, introducing PINs is not expected to change costs.

Although the issue of a PIN imposes a financial penalty on the recipient, this penalty can be avoided by complying with the requirements of the Act.

5.2.3 Update the auditor accreditation fees

Site auditors currently contribute less than half DECC's costs in administering the accreditation scheme, with the remainder being paid by NSW taxpayers. The hourly cost of labour has increased substantially since the fees were set in 1998 and the scheme has proved more time consuming than was originally envisaged.

In updating the accreditation fees, several approaches were considered, including the abolition of fees, the adoption of the Victorian EPA approach to fees, and the fees in the proposed Regulation that are based on cost recovery principles.

1 Abolition of accreditation fees

This would result in no cost recovery of expenses DECC incurred in administering accreditation for the appropriate management of contaminated land in NSW (that is, it would result in full subsidisation). The budget shortfall under this option would be greater than \$600 000 over five years and this approach would be inconsistent with the polluter-pays principle.

Accreditation reduces the risk that auditors would approve substandard remediation or fail to identify and report potential contamination. If future budgets were constrained, the continuation of the quality control processes in the accreditation scheme may be at risk, resulting in less of the benefits of the CLM Framework being realised.

2 Victorian EPA approach to fees

The Victorian EPA operates a contaminated sites auditor scheme, which requires an annual registration fee of \$1700 and additional site-specific fees on a sliding scale based on the extent of the site.

This approach may enable more accurate allocation of accreditation costs to the site auditors that generate these costs. However, section 51 of the CLM Act currently requires that the accreditation fee is to be calculated on the basis of the period of time for which accreditation is granted. Adoption of the Victorian EPA approach is therefore not feasible under the existing Act.

3 New fees in the proposed Regulation

This approach involves updating the current system of auditor accreditation fees to reflect changes in the cost of administering the scheme.

The current system involves (i) an application fee and (ii) a renewal fee.

(i) The fee for applying for accreditation is designed to cover the cost of assessing and interviewing new site auditors. This involves convening an expert panel that includes a community environment group representative, an industry representative and an academic.

A review of the DECC and expert panel resources required to assess a new applicant to the accreditation scheme identified the costs summarised in Tables 1 and 2 below.

Table 1: Cost of assessing a new applicant

DECC Officer	EFT (hrs)	Cost (\$/hr)	Total (\$)
Administrative assistant	0.5	29.50	15
Audit officer	3.0	45.00	135
Manager	2.0	48.50	97
Director	0.2	61.50	12
Total labour cost			259
Overhead costs (30%) *			78
Total cost			337

* Overhead costs include superannuation, payroll tax, workers' compensation, and corporate and office overheads, and are estimated to add 30% to labour wage costs.

Table 2: Cost of convening the expert panel to interview a new applicant

DECC Officer	EFT (hrs)	Cost (\$/hr)	Total (\$)
Administrative assistant	0.2	29.50	6
Audit officer	4.5	45.00	203
Manager	4.5	48.50	218
Director	0.2	61.50	12
Total labour cost			439
Overheads (30%) *			132
Panel member costs **			148
Total cost			719

* Overhead costs include superannuation, payroll tax, workers' compensation, and corporate and office overheads, and are estimated to add 30% to labour wage costs.

** There are five panel members. The sitting fee is \$207 per day. Including reading time the average duration of an interview is one hour over a seven hour day ($\$207 \times 5/7 = \148 per applicant).

The average cost of assessing and interviewing a new site auditor applicant is approximately \$1000.

(ii) The accreditation renewal fee is designed to cover the cost of monitoring, auditing and administering the accredited site auditor scheme.

A review of the DECC resources required to manage the accreditation scheme identified the costs summarised in Table 3 below.

Table 3: Accreditation scheme costs

DECC Officer	EFT (year)	Cost (\$/yr)	Total (\$)
Administrative assistant	1.0	53 000	53 000
Audit officers	1.4	82 000	114 800
Manager	0.3	88 000	26 400
Director	0.1	112 000	11 200
Legal support	0.05	88 000	4 400
Total labour cost			209 800
Overheads (30%) *			62 940
Total cost			272 740

* Overhead costs include superannuation, payroll tax, workers' compensation, and corporate and office overheads, and are estimated to add 30% to labour wage costs.

The number of accredited site auditors has fluctuated over time and it is estimated that there would be around 37 in the foreseeable future. The average cost to DECC of administering the site auditor accreditation scheme is therefore approximately \$7000 per auditor.

The new fees under the proposed Regulation would not result in a change in the current cost of administering the accreditation scheme. However, the financial cost to site auditors would be: (1) an initial application fee of \$1000 (increased from \$285), and (2) a renewal fee of \$7000 per year (increased from \$3500).

This proposed change would mean that site auditors would pay nearly all the current (but not past) costs to administer the accreditation scheme. If the Regulation is not reviewed again for several years, this proportion may decrease over time.

5.2.4 An updated administration fee rate for CLM orders

Site owners currently contribute only about two-thirds of DECC's costs to prepare and monitor a CLM order, with the remainder being paid by NSW taxpayers. The hourly costs of labour have increased since the rate was set in 1998.

In updating the administration fee rate, several approaches were considered, including the abolition of the administration fee, a flat administration fee per CLM Act order, and the fees in the proposed Regulation that are based on cost recovery principles.

1 Abolition of the administration fee

This would result in no cost recovery of DECC's expenses incurred in relation to CLM Act orders for the appropriate management of contaminated land in NSW (it would result in full subsidisation). This approach would be inconsistent with the polluter-pays principle.

CLM Act orders address the significant risk of harm to health and the environment by contamination. In preparing and monitoring these orders, DECC helps to reduce this risk. If future budgets were constrained, the continuation of the quality control processes performed by DECC in relation to CLM Act orders may be at risk, resulting in less of the benefits of the CLM Framework being realised.

2 Flat administration fee per CLM Act order

This would result in an average fee being paid by each site owner regardless of the actual amount of work undertaken by DECC. In some instances the fee would exceed DECC's expenses, while in other instances DECC's expenses would exceed the fee.

Contaminated sites range from low complexity, where contamination is known and localised, to high complexity, where the extent of contamination is uncertain or over a wide area. DECC's time involved in issuing orders for a site ranges from a week to many months.

A flat fee per CLM Act order would be administratively simple but not equitable. It would also be difficult to ensure that DECC's costs were appropriately recovered because the number and complexity of sites with CLM Act orders in the future is not easy to predict.

3 New fees in the proposed Regulation

This involves retaining the current system while updating the administration fees. The fees charged would still be directly proportional to the number of hours spent by DECC on a CLM Act order.

DECC currently records time spent on each CLM Act order and recovers expenses through regularly billing the site owner at the rate set in 1998 of \$40 per hour. Since then the cost of labour has increased.

A review of DECC resources dedicated to CLM Act orders identified that for usual CLM Act orders, the median DECC time involved is 97 hours with a median cost of \$5938. The average hourly cost is around \$60 including DECC direct labour and overhead costs. The following table identifies the DECC resources required for low and medium complexity sites.

Table 4: DECC costs associated with CLM Act orders

DECC activity	Time involved with low complexity site (hrs)	Time involved with medium complexity site (hrs)	Cost per hour (\$)	Cost of low complexity site (\$)	Cost of medium complexity site (\$)
Site inspection/meeting	3	7	44	132	308
Review existing information	4	14	50	200	700
Meetings with owners, consultants or auditors	3	7	50	150	350
Draft notice	7	35	44	308	1540
Review and authorisation	2	4	57	114	228
Progress meetings	7	14	50	350	700
Review reports	14	35	44	616	1540
Legal review	3	7	50	150	350
Community consultation	7	21	50	350	1050
Total labour	50	144		2370	6766
Overhead costs (30%) *				711	2030
Total cost				3081	8796

* Overhead costs include superannuation, payroll tax, workers' compensation, and corporate and office overheads, and are estimated to add 30% to labour wage costs.

The new fees under the proposed Regulation would not result in a change in the current costs to prepare and monitor CLM Act orders. However, the financial cost to site owners would be \$60 per hour (increased from \$40). The administration fee can be waived under section 36(7) of the CLM Act for voluntary remediation proposals.

This proposed change would mean that site owners would pay nearly all the current (but not past) cost to prepare and monitor a CLM Act order. If the Regulation is not reviewed again for several years, this proportion may decrease over time.

5.3 Benefits of the current Regulation

The current Regulation supports the CLM Framework through supporting the quality control processes prescribed under the CLM Act. This ensures that the health, ecological, amenity and land supply benefits are realised. An example of the benefit from remediation is illustrated in the following case study.

Case Study 2: Tempe Tip

A major clean-up of contaminated land at the former Tempe Tip site transformed a large Sydney waste dump, which housed over 60 years of rubbish disposal, into 10 hectares of award-winning parklands.

The tip was contaminated with heavy metals and other hazardous wastes that were leaching into the groundwater and nearby Alexandra Canal. The EPA worked with an accredited auditor to develop the remediation plan that stopped contaminated leachate entering the canal and damaging the surrounding environment, and created highly valued open space and parklands for local residents.

The current Regulation helps realise more of this benefit than would be the case if there was no Regulation. For example, the accreditation reporting requirements prescribed in the current Regulation help ensure that auditors do not approve substandard remediation and are diligent in reporting potential contamination of which they become aware.

5.4 Benefits of the proposed Regulation

The proposed Regulation would result in more of the potential benefits from the CLM Framework being realised. It would also assist in cost recovery of NSW Government resources spent on facilitating ecologically sustainable development and on the management of contaminated sites. The impact of each of the changes included in the proposed Regulation is outlined below.

5.4.1 Updating the notification form

By making the notification form consistent with DECC's current mailing address, administrative efficiency is improved and more timely and accurate information would be provided to DECC.

5.4.2 The introduction of PINs

The behaviour change resulting from the introduction of PINs would mean that more timely action is taken to reduce potential harm to health and the environment. It would also make the CLM Framework more consistent with existing NSW environmental protection legislation where PINs are used for minor offences.

PINs are a mechanism for changing behaviour. Delays in site assessment and remediation may occur when statutory deadlines are not met, incomplete information is provided, or non-accredited auditors are used.

The prospect of issuing a PIN for these minor offences is expected to act as a deterrent and encourage compliance with the requirements of the Act. Although the issue of a PIN imposes financial penalty on the recipient, this penalty can be avoided by complying with the Act. Table 5 outlines the proposed range of issues to be addressed by PINS in the amended CLM regulation.

Table 5: Proposed PINs under the new CLM Regulation

CLM Act offences	Recommended CLM Act Penalty Notice amount
	Individual/Corporation
Fail to comply with an investigation order – s17(4)	\$1500 / \$5000
Fail to comply with a remediation order – s23(6)	\$1500 / \$5000
Fail to comply with a maintenance of remediation order – s28(4)	\$1500 / \$5000
Failure by a person to notify EPA in writing when a person becomes aware that the person’s activities have contaminated land presenting significant risk of harm – s60(1)	\$750 / \$1500
Failure by the owner of land to notify EPA in writing when the owner becomes aware that land is contaminated presenting significant risk of harm – s60(2)	\$750 / \$1500
Neglect or fail to comply with a requirement of an authorised officer – s89(1)	\$500 / \$1000
Non-accredited or suspended individual (a) purporting to carry out a statutory site audit (b) representing that the individual is prepared to carry out a statutory site audit – s48(1)	\$750
Body corporate (a) purporting to carry out a statutory site audit (b) purporting that it is capable of carrying out a statutory site audit – s48(2)	\$1500

5.4.3 Update the accreditation fees for site auditors

Reducing the gap between the auditor accreditation fees and the actual cost of administering the scheme provides the benefits of appropriate costs recovery. These benefits include improved efficiency with which Government services are produced and consumed, and improved equity by ensuring that those who use Government services or who create the need for regulation bear the costs (Commonwealth of Australia 2005).

The new auditor accreditation fee also reduces the risk that future budgetary constraints would threaten the continuation of the quality-control processes within the accreditation scheme. This means that a benefit of the new fees is the greater assurance that the benefits of the CLM Framework will be realised.

5.4.4 Update of the administration fee rate

Reducing the gap between the administration fee rate and the actual hourly cost to prepare and monitor a CLM Act order provides the benefits of appropriate cost recovery. These benefits include improved efficiency with which Government services are produced and consumed, and improved equity by ensuring that those who use Government services or who create the need for regulation bear the costs (Productivity Commission 2001).

The new fee of \$60 per hour also reduces the risk that future budgetary constraints would threaten the continuation of the quality control processes performed by DECC in relation to CLM Act orders. This means that a benefit of the new fees is the greater assurance that the benefits of the CLM Framework will be realised.

5.5 Summary of the costs and benefits

The repeal of the current Regulation with no new Regulation introduced (option 1) would result in the CLM Act operating without the quality assurance provisions for the identification and remediation of contaminated land within NSW. Potential benefits from the CLM Framework – which include health, ecological, amenity and land supply benefits – may therefore not be achieved.

Both options 2 and 3 would result in minimal costs to site auditors to meet accreditation reporting requirements and to DECC to record and invoice the administrative costs associated with CLM Act orders and to invoice the site auditor accreditation fees. However, option 3 would result in greater financial costs to site owners and site auditors than option 2.

The benefit from option 3 is expected to be greater than option 2 because of the reduced risk that future budgetary constraints would threaten the continuation of the quality-control processes, both within the accreditation scheme and performed by DECC in relation to CLM Act orders.

The proposed Regulation (option 3) would also result in more appropriate cost recovery, which improves efficiency and equity. Efficiency is improved when consumers and producers of regulated products or activities recognise the administrative costs involved in regulation. Cost recovery may also be more efficient than raising the general level of taxation, as well as being more equitable as taxpayers who may not directly benefit from the use of regulated products pay less of the cost (Productivity Commission 2001).

5.6 Distributional impacts

NSW benefits from the reduction of potential harm to human health and the environment under the NSW CLM Framework. The proposed Regulation would help ensure that this benefit continues to be as large as possible.

Currently, NSW taxpayers contribute a large proportion of the cost of maintaining the quality control processes within the Framework, like the site auditor accreditation scheme and preparing and monitoring CLM Act orders. The proposed Regulation would reduce the proportion that NSW taxpayers contribute and increase the proportion that site owners and site auditors pay.

Although the proposed Regulation would increase the financial burden on site owners and site auditors, it is considered appropriate to recover the costs of the direct management of the auditor accreditation scheme and CLM Act orders under the polluter-pays principle.

6 Assessment and conclusions

The CLM Act aims to reduce the significant risk of harm to humans and the environment from contaminated sites and ensure that contaminated land is managed with regard to the principles of ecologically sustainable development.

The current Regulation (option 2) supports the quality control processes prescribed under the Act that ensures that the health, ecological, amenity and land supply benefits of the CLM Framework are realised. The Regulation does this by reducing the risk that auditors would approve substandard remediation or not report potential contamination that they become aware of. Without the Regulation, future generations may inherit contamination that could have been prevented or remediated now, and potentially liable parties may avoid paying to remediate the contamination that they cause.

The cost of the current Regulation is minimal. It consists of site auditors meeting accreditation reporting requirements and DECC recording and invoicing the administrative costs associated with CLM Act orders and the site auditor accreditation fees.

The proposed Regulation (option 3) would result in similar costs to the current Regulation. However, with the changing level of cost recovery, site auditors and site owners would contribute more towards the cost of managing the site auditor accreditation scheme and the cost of preparing and monitoring CLM Act orders.

Option 1 (no Regulation) would not achieve the objective of establishing 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. It would also result in the foregoing of potential benefits from the CLM Framework.

Both options 2 and 3 would achieve the objective and help realise the potential benefits of the CLM Framework. With option 3, however, there would be more assurance that these benefits would be realised. There would also be additional benefits from more appropriate cost recovery.

The proposed Regulation (Option 3) is the preferred option for replacing the Contaminated Land Management Regulation 1998 when it is repealed on 1 September 2008.

References

Commonwealth of Australia (2005) *Australian Government Cost Recovery Guidelines* July 2005, Canberra, page 11.

NICNAS (2001) *Benzene Priority Existing Chemical Assessment*, Report No.21, National Industrial Chemical Notification and Assessment Scheme, Canberra, page 202.

Productivity Commission (2001) *Cost Recovery by Government Agencies*, Inquiry Report No. 15, Canberra, page 12.

Public consultation draft



New South Wales

Contaminated Land Management Regulation 2008

under the

Contaminated Land Management Act 1997

[The following enacting formula will be included if the Regulation is made:]
Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Contaminated Land Management Act 1997*.

Minister for Climate Change and the Environment

Explanatory note

The object of this Regulation is to remake, with some amendments, the provisions of the *Contaminated Land Management Regulation 1998* which is repealed on 1 September 2008 by section 10 (2) of the *Subordinate Legislation Act 1989*.

The amendments made by this Regulation are as follows:

- (a) the fees in relation to accreditation as a site auditor are increased as is the rate at which the Environment Protection Authority (the *EPA*) may recover certain costs,
- (b) a notification that land is contaminated is no longer required to be in a prescribed form, instead it is to be given in the manner and form approved by the EPA,
- (c) a number of offences under the Act are prescribed as offences in respect of which a penalty notice (on-the-spot fine) may be issued.

This Regulation also makes provision with respect to the following:

- (a) the time within which an application for renewal of accreditation as a site auditor must be made,
- (b) the particulars to be included in a site auditor's annual return,
- (c) the additional material that the EPA is to maintain a record of,
- (d) the time within which a statement of reasons for certain determinations of the EPA must be provided to persons requesting them,
- (e) savings and formal matters.

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Contaminated Land Management Regulation 2008

Explanatory note

This Regulation is made under the *Contaminated Land Management Act 1997*, including sections 34, 50 (2) (c), 51 (5), 52 (1) (c) and (9), 53D (3), 58 (1) (f), 92A, 106 (2) and 112 (the general regulation-making power).

Public consultation draft

Contaminated Land Management Regulation 2008

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Public consultation draft

Clause 1 Contaminated Land Management Regulation 2008

Contaminated Land Management Regulation 2008

under the

Contaminated Land Management Act 1997

1 Name of Regulation

This Regulation is the *Contaminated Land Management Regulation 2008*.

2 Commencement

This Regulation commences on 1 September 2008.

Note. This Regulation replaces the *Contaminated Land Management Regulation 1998* which is repealed on 1 September 2008 by section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Definition

(1) In this Regulation:

the Act means the *Contaminated Land Management Act 1997*.

(2) Notes in this Regulation do not form part of this Regulation.

4 Recovery of EPA's administrative costs associated with orders

(1) For the purposes of section 34 (a), (b) and (c) of the Act, the rate of \$60 per hour (or part of an hour) is prescribed in respect of costs involved in connection with preparing and serving, monitoring action under, and seeking compliance with, an investigation or remediation order.

(2) On service of an investigation or remediation order, the EPA is to give the person on whom the order is served written notification of the rate prescribed by this clause.

5 Accreditation fees

(1) For the purposes of section 50 (2) (c) of the Act, the prescribed application fee is \$1,000.

(2) For the purposes of sections 51 (5) and 52 (9) of the Act the prescribed accreditation fee is as follows:

(a) if the accreditation period is 1 year or less—\$7,000,

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Contaminated Land Management Regulation 2008

Clause 6

- (b) if the accreditation period is 2 years or less but more than 1 year—\$14,000,
- (c) if the accreditation period is greater than 2 years—\$21,000.

6 Time for making renewal applications

For the purposes of section 52 (1) (c) of the Act, an application for renewal must be made not more than 60 days and not less than 30 days before expiry of the current accreditation period.

7 Particulars to be included in annual returns

For the purposes of section 53D (3) of the Act, the prescribed particulars to be included in an annual return are the following particulars of each site audit as at the date of completion of the audit (or if the audit is not complete, as at the date of the annual return):

- (a) the location of the site (including Lot and DP numbers, street address, suburb and local government area),
- (b) the size of the site, its land zoning under the *Environmental Planning and Assessment Act 1979* and (if a change in zoning is proposed) its proposed zoning,
- (c) the date when the auditor received the request,
- (d) the date of commencement of the audit,
- (e) the date or expected date of completion of the audit,
- (f) the use or uses of the site that have given rise to the contamination for which remedial action was carried out,
- (g) the current use to which the site is being put and any proposed uses,
- (h) the auditor's opinion as to the suitability of the site for the current and proposed uses,
- (i) the name of the person who carried out the remedial work that was reviewed or is being reviewed by the auditor and the titles of the reports (if any) by that person that were or are being reviewed.

8 EPA's record of current declarations and orders

For the purposes of section 58 (1) (f) of the Act, a copy of any notice served under section 28 of the Act (that is, a notice requiring the maintenance of remediation action in relation to land) is prescribed.

9 Duty to report contamination

A notification under section 60 (1) or (2) of the Act (that is, a notification that land has been contaminated) is to be given in a manner and form approved by the EPA.

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Clause 10 Contaminated Land Management Regulation 2008

10 Penalty notices

For the purposes of section 92A of the Act:

- (a) each offence arising under a provision specified in Column 1 of Schedule 1 is prescribed as a penalty notice offence, and
- (b) the prescribed penalty for such an offence is the amount specified in relation to the offence in Column 2 of Schedule 1 (in respect of an individual) or in Column 3 of Schedule 1 (in respect of a corporation).

11 Reasons for certain decisions

A statement of reasons requested as referred to in section 106 (1) of the Act must be provided to the person making the request within 30 days after the EPA receives the request.

12 Saving

Any act, matter or thing that, immediately before the repeal of the *Contaminated Land Management Regulation 1998*, had effect under that Regulation continues to have effect under this Regulation.

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Contaminated Land Management Regulation 2008

Penalty notice offences

Schedule 1

Schedule 1 Penalty notice offences

(Clause 10)

Column 1	Column 2	Column 3
Offence	Penalty—Individual	Penalty—Corporation
Offences under the Act		
Section 17 (4)	\$1,500	\$5,000
Section 23 (6)	\$1,500	\$5,000
Section 28 (4)	\$1,500	\$5,000
Section 48 (1)	\$750	—
Section 48 (2)	—	\$1,500
Section 60 (1)	\$750	\$1,500
Section 60 (2)	\$750	\$1,500
Section 89 (1)	\$500	\$1,000
