AEBN Contaminated Land Seminar:

Preparing for new laws, Best practice options and Managing the risks

7 October 2020

9.30am start – 1.00pm (20 min break at 11.05am)

Proud Principal Partner

MinterEllison

Proud Webinar Partner

PETER J RAMSAY & ASSOCIATES

Australian Environment Business Network (AEBN)

www.aebn.com.au

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7 October 2020

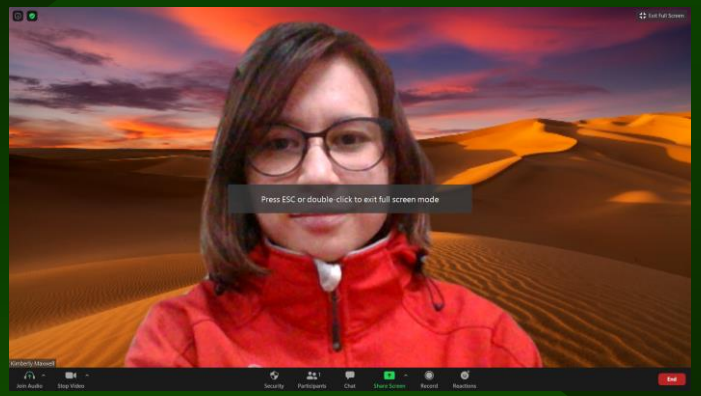
Webinar Guidance

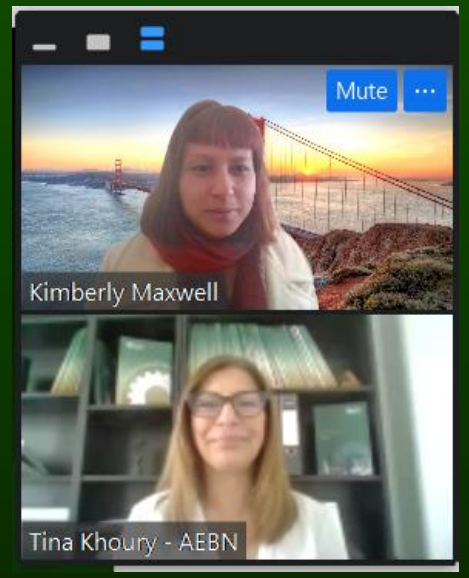
Kim Maxwell
Webinar Specialist
Australian Environment Business Network (AEBN)

Zoom Tips for Delegates!

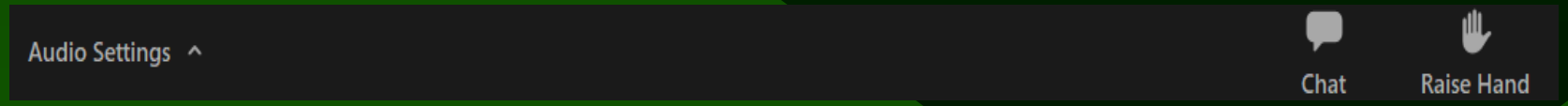
- Double click your screen for Full Screen Mode.
- Toggle between different speaker views in the floating box.

Full screen mode





- QUESTIONS: To ask a question, please click on CHAT (located on the toolbar on the bottom of your screen).



AUSTRALIAN ENVIRONMENT BUSINESS NETWORK

AEBN Contaminated Land Seminar:

Preparing for new laws, Best practice options and Managing the risks

7 October 2020

Preparing your organisation for new Victorian contaminated land laws
and changes from across Australia

Josh Dellios
Partner
MinterEllison

Proud Principal Partner

MinterEllison

Australian Environment Business Network (AEBN)
www.aebn.com.au

Updates in contaminated land laws from across Australia

Joshua Dellios (Vic)
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Partner

Tim Hanmore (Qld)
Partner

Matthew Cole (NSW)
Senior Associate

MinterEllison

7 October 2020

Overview of this presentation

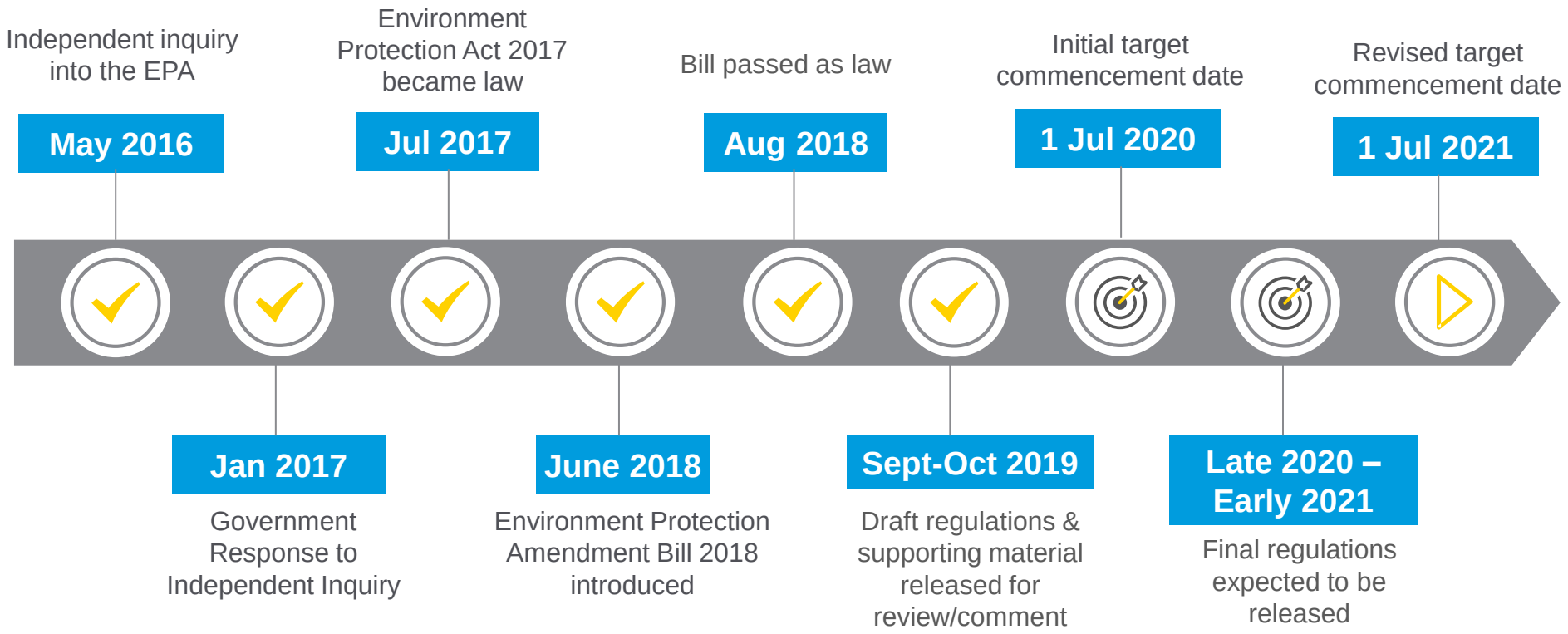
1 Victoria: New framework recap & how to prepare	2 Victoria: Updates	3 New South Wales: Updates	4 ACT: Updates
5 Queensland: Updates	6 South Australia: Updates	7 NT: Updates	8 WA: Updates
9 Commonwealth: Updates	10 Tasmania: Updates		

Victoria’s new contaminated land framework: A recap

Josh Dellios

Partner

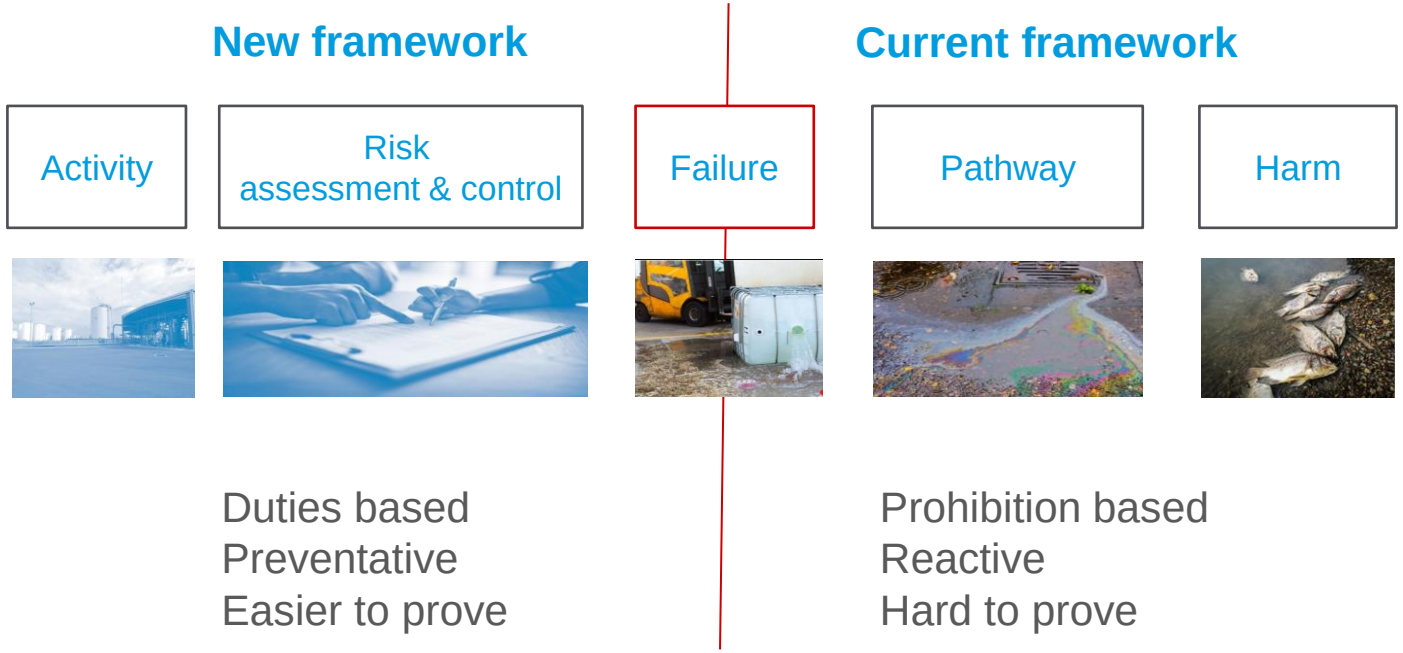
Key milestones



Key aspects of the new regime

- General environmental duty
- Duty to notify ‘notifiable contamination’
- Duty to manage contaminated land
- Waste
- Duty to notify pollution incidents
- Duty to take action to respond to harm from a pollution incident
- Statutory notices
- New audit framework

Overarching principle of the new framework



General environmental duty

Who does it apply to?	A person who is **engaging in an activity** that **may** give rise to a **risk of harm** to **human health** or the **environment** from **pollution or waste**
What does it require?	Requires the person to eliminate or otherwise reduce those risks, **so far as reasonably practicable**
Key points (8)	1. Scalable (applies to everyone) 2. What does 'so far as **reasonably practicable**' mean? 3. Will **evolve** over time (with the 'state of knowledge') 4. Cornerstone of the new framework (can apply in addition to other duties & licence requirements) 5. Does not **require** harm and harm **≠** breach 6. Criminal **offence** (unique to Victoria) 7. How to ensure **compliance** (documenting robust decision-making processes in line with statutory requirements will be key) 8. Risk allocation: who is '**engaging in an activity**'? Ensure appropriate rights in contracts to discharge duty and coverage where third party action results in a breach of your statutory duty

Contaminated land

New **mandatory reporting** of 'notifiable contamination'

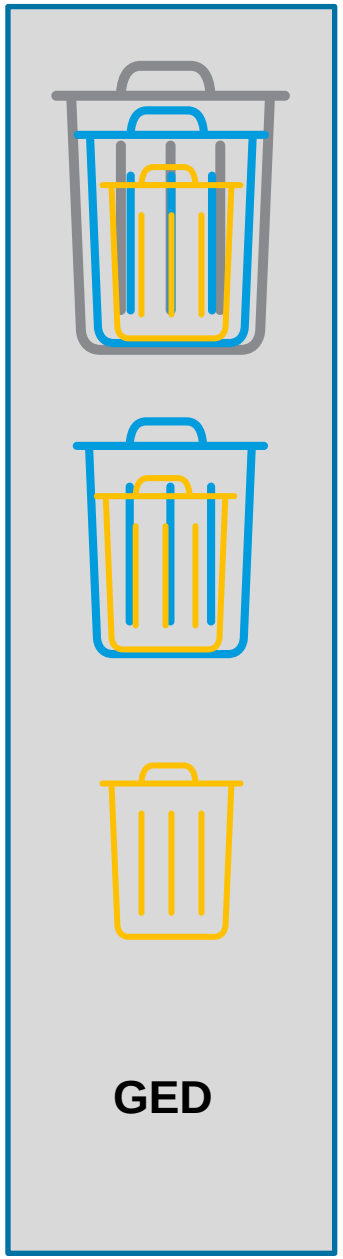
Who does it apply to?	Applies to person in **management or control** of land
What does it require?	Requires the person to notify the EPA **as soon as practicable**
Key points (9)	1. What is '**notifiable contamination**'? (draft Regs propose a risk-based framework similar to NSW) 2. Includes land contaminated **before** the Act commences 3. Applies if the person was **actually aware** or **reasonably should have been aware** of contamination 4. Higher duty for more sophisticated persons (skills, knowledge & experience etc) 5. Who is in **management or control**? 6. Statutory right to **recover costs** of complying with duty from person who caused or contributed to contamination 7. Criminal offence for **non-compliance** 8. How will the information be **used?** 9. Some activities may have **notification consequences** (eg pre-bid assessments / baseline reporting etc**)**

Contaminated land

New **duty to manage** contaminated land

Who does it apply to?	Applies to person in **management or control** of contaminated land
What does it require?	Requires that person to eliminate or otherwise reduce risks of harm to human health or the environment so far as is reasonably practicable ▪ **Identify** & **assess** contamination ▪ Provide **measures** to minimise risk of harm (including clean-up) ▪ Must **clean-up** NAPL & remove source (Draft Regs) ▪ **Provide information** to people affected + person coming into management or control etc
Key points (6)	1. Must be **above background level** + create a **risk of harm** 2. Who is in **management or control**? 3. Statutory right to **recover costs** of complying with duty from person who caused or contributed to contamination (creates an opportunity + need to ensure measures are adopted to minimise risk of liability post-exit). Also consider **timing of conducting clean-up** and ways to **limit exposure** 4. Non-compliance may result in a **statutory notice** (no civil penalty or criminal offence until non-compliance with notice) 5. Seek to limit occupation areas to land that is necessary & where you know the contamination risk 6. Be careful of **short-term** contracts with **occupation rights**

Waste



Industrial waste

Any waste that comes from trade, commerce or industry

+ household waste when gathered at a waste facility

- Must only deposit waste at an **authorised place**
- Must take **all reasonable steps** to ensure waste will be transported and received at a place authorised to receive industrial waste

Priority waste

Industrial waste which requires additional controls due to a need to reduce the risk of harm, ensure proper management or encourage resource recovery and efficiency

- Must take all reasonable steps to **contain and isolate** the waste
- Must **consider alternatives** to waste disposal (including avoidance, reuse and recycling)

Reportable priority waste

Waste with the highest risk level and highest controls

- Must **only be transported** subject to a permit or registration
- **Mandatory reporting** to EPA each time the waste is exchanged

Other matters

- Pre-cIf no pre-classification, then mirror codes, otherwise assess and get designation
- Classification framework
- EPA can reclassify

Waste: Contaminated soils (Draft Regs)

Classification	▪ Must be classified as Category A, B, C, D or fill material ▪ Category A, B & C similar to current EP (IWR) Regs

Controls	▪ Category A-D soils are ‘reportable priority waste’
	▪ Category D can be disposed, or safely contained at project site (subject to 5 year permit & orders)
	▪ Fill material
	  ▪ Will be industrial waste & can be disposed of
	  ▪ Can also be subject to a ‘Declaration of Use’ (allows onsite containment, off-site storage for up to 60 days etc)

Pollution incidents

New **mandatory reporting** of ‘notifiable incidents’

Who does it apply to?	Applies to a person who is engaging or has engaged in an activity that results in a ‘**notifiable incident**’
What does it require?	Must notify the EPA **as soon as practicable** after the person becomes aware or reasonably should have been aware of the incident (but respond to the issue first)
Key points (3)	1. What is a ‘**notifiable incident**’? ▪ A pollution incident that causes or threatens to cause **material harm** to human health or the environment ▪ **Material harm** includes actual or adverse effects on human health or the environmental that is not negligible, or where rehabilitation costs will be more than $10k. 2. Criminal offence for non-compliance 3. Also must take action to **restore** the affected area to the state it was in before the pollution incident occurred

Notices

Overview	▪ EPA has a more **tailored** set of regulatory notices at its disposal ▪ **Includes** improvement notices, prohibition notices, notices to investigate, environmental action notices & site management orders
Environmental action notice	▪ Can be **issued to** the person who caused or permitted circumstances, the current owner or occupier, or the previous owner or occupier ▪ Costs of compliance can be **recovered** from the polluter ▪ Compliance with an EAN can be directed to a **related entity** or **officer** in limited circumstances
Site management order	▪ Can **be issued** to current owner or occupier ▪ Costs of compliance can be **recovered** from the polluter ▪ Compliance with a SMO can be directed to a **related entity** or **officer** in limited circumstances ▪ The order is binding on each **subsequent owner, occupier or person in management or control of** the land and operates as a 'statutory charge' on the land

Environmental audits

Objective

- Reformed audit process which increases flexibility and reduces cost
- Also increases scope of what can be audited (eg verification of matters required by improvement notices, notices to investigate, site management orders, permissions, financial assurance etc)

Preliminary risk screen audit

- Purpose is to determine if a detailed audit is necessary and if so to recommend scope
- Based on a desktop study and site inspection (may include sampling)

Scaled assessment audit

- Purpose is to assess risk of harm and recommend measures to manage the risk

PRSA & audit to be provided

- To EPA and local council (in most cases)
- To person who proposes to come into management or control to avoid cost consequences

Roadmap to prepare

Now
Mid 2020

Mid-late 2020
Release of final Regs, ERS etc

1 July 2021
New framework commences

SCOPING & PREPARATION

Legal advice/scoping
- Understand applicability, scope & extent of new statutory duties and new regulatory framework
- Understand implications for current or proposed activities

Gap analysis/benchmarking
- Compare current operations, systems and processes to requirements under new framework
- Identify compliance gaps & prioritised focus areas

Resourcing plan and Budget (preparation)
- Prepare resourcing plan & budget based on identified gaps

Working Group establishment
- Create intra-group team with responsibility for implementation

STAGE 1 IMPLEMENTATION (Pre-release Of Regs)

Policy, procedure and management system updates
- Update governance systems to reflect new framework (eg to ensure effective implementation of GED, ensure pollution incident response and reporting reflects statutory requirement etc)

Capacity building
- Senior leadership team
- Board
- Whole of organisation
- Third parties/contractors

Resourcing plan and and budget (approval)
- Obtain senior leadership team & board approval to resourcing plan & budget

Working Group meetings
- Working Group to meet regularly drive change management, ensure milestones achieved, manage budget and report to senior leadership team / Board on progress

Contract reviews / risk allocation
- Review current contracts to see who has responsibility for statutory duty to notify contamination, pollution incidents etc
- Review new contracts where term extends beyond 1 July 2020, particularly where a change in use or occupation (eg leases, licences or contracts of sale) or where contract involves third parties doing works which may give rise to environmental risks
- Update precedents to ensure responsibility for compliance with new statutory duties is appropriately allocated, manage non-compliance risk

Duty to notify (Stage 1)
- Identify sites for which organisation has management or control
- Collect previous contamination reports & conduct desktop review
- Identify any higher risk sites where there is information gaps so that any further work required to discharge duty can be scoped & programmed

STAGE 2 IMPLEMENTATION (Post-release Of Regs)

Risk control updates
- Upgrade risk controls to eliminate or otherwise minimise risk so far as is reasonably practicable (incl. operational controls, capital works to update physical controls where required etc.)

Gap analysis/benchmarking
- Update gap analysis to ensure it reflects final regulatory framework

Change management roll-out
- Training & toolbox talks (site-based & with specific areas of the organisation)
- Updates to systems, processes and tools

Duty to notify (Stage 2)
- Identify whether sites meet notification thresholds / whether any exceptions apply
- Implement further work plan where required
- Prepare notices/management plans

GOVERNANCE, RISK MANAGEMENT & ASSURANCE

Internal reviews
- Operational compliance
- Governance framework
- Management systems
- Resourcing capacity & capability
- Availability of director and senior officer due diligence defence

Assurance (internal / external audits)
- Operational compliance
- Governance framework
- Management systems
- Availability of director and senior officer due diligence defence

Duty to notify (implementation)
- Submit notifications
- Conduct further work where required
- Maintain register & implement system for periodic review & for new site acquisitions

Victoria: Updates

Compliance changes: Victoria

Draft amendments to Victorian Planning Provisions

- **Purpose:** to align the planning system with the new EP Act's environment protection framework
  - Provide a **risk-based** and **proportionate** process for assessing and dealing with contamination

Public consultation closed: **2 June 2020** → Expected finalisation of changes: end of **September 2020** → Changes come into effect: **1 July 2021**

Key proposed changes

New definitions	***Potentially contaminated land*** now includes land where **known past or present activities or events on the land or offsite** have the **potential to have caused contamination** ***Sensitive use*** is defined as a '*residential use, child care centre,* ***kindergarten****, pre-school centre, primary school,* ***secondary school*** *and* ***children's playground, even if ancillary to another use***'

Assessing contamination - PRSAs and environmental audits	• If an **EAO applies** to the land, an **environmental audit** will be required for a **sensitive, agriculture or public open space use**
	  • Any recommendations **must** be included as **permit conditions**
	• If an EAO does not apply, responsible authorities may still require PRSAs and/or environmental audits early in the application process
	  • Particularly for **sensitive, agriculture or public open space uses** or where the state of land contamination is **unknown**

Key points	• Responsible authorities will have heightened focus on contamination issues – applicants and proponents should adopt a **proactive response** • Contamination issues should be **addressed early in the planning process** (i.e. before or during the planning application/amendment stage)

Compliance changes: Victoria

VCAT Environment and Resources List

What is it?	As of 1 July 2020, the Environment and Resources list operates as a **separate** list within the Planning and Environment Division.
Aim	Provides a **specialised approach** to deal with environmental disputes
Key points (3)	1. **Jurisdiction**: decisions under various pieces of environment legislation, including the new EP Act in 2021 2. Deals with **two** types of applications: a) Applications for review of a decision (e.g. EPA decisions regarding permissions) b) Applications for orders (e.g. enforcement orders or declarations) 3. Created in response to the new EP Act and the *Melbourne Strategic Assessment (Environment Mitigation Levy) Act 2020.* Both provide for a number of review rights

Authorised Version

Environment Protection (Management of Tunnel Boring Machine Spoil) Regulations 2020

S.R. No. 62/2020

TABLE OF PROVISIONS

New South Wales: Updates

Matthew Cole

Senior Associate

New South Wales

***Contaminated Land Management Act 1997* (NSW)**	• Key legislation – overview of provisions • Most recent amendments came into force January 2019 – inconsequential amendments to formatting to reflect changes made to the *Environmental Planning and Assessment Act 1979* • Subordinate legislation: *Contaminated Land Management Regulation 2013.* No amendments have been made to this regulation since it commenced
Amendments to legislation	• *State Environmental Planning Policy No 55—Remediation of Land* • 29 November 2019 - *State Environmental Planning Policy (Community Participation Plans) Amendment 2019.* Repealed clause 13 ('Advertising of development application') • 17 April 2020 – State *Environmental Planning Policy Amendment (Minor Amendments) 2020.* Repealed clause 6 ('Contamination and remediation to be considered in zoning or rezoning proposal')

Policy Documents	• The PFAS National Environmental Management Plan 2.0 published May 2020 by the Commonwealth Department of Agriculture, Water and Environment has been endorsed for use in NSW
	• Statutory Guidelines made under s105 of the CLM Act:
	  • Assessment and Management of Hazardous Ground Gases
	  • Consultants Reporting on Contaminated Land
	• Non statutory guidelines endorsed by NSW EPA: Practice Note for Managing Runoff from Service Station Forecourts (June 2019).

Queensland: Updates

Tim Hanmore

Partner

What we'll discuss today

- High level understanding of how contamination is regulated in Queensland
- What are the key risks for landowners, occupiers, developers?
- How can these risks be managed

Threshold concept 1 - what is ‘contamination’?

The EP Act	Definitions

Environmental Protection Act 1994 (Qld) (**EP Act**)

Contamination *of the environment is the release of a* ***contaminant*** *into the environment*

DO NOT USE AS A DEFINED TERM

Contaminated land *means land contaminated by a* ***hazardous contaminant***

Contaminant *includes a gas, liquid or solid, an odour or an organism, energy, including noise, heat, radioactivity and electromagnetic radiation*

Hazardous contaminant *means a contaminant, other than explosive ordnance, that is* ***likely to cause serious or material environmental harm***

Threshold concept 2: Who is responsible?

Hierarchy of liability under EP Act

Polluter pays

Polluter

- Can be later developer who spreads old contamination

Relevant local government

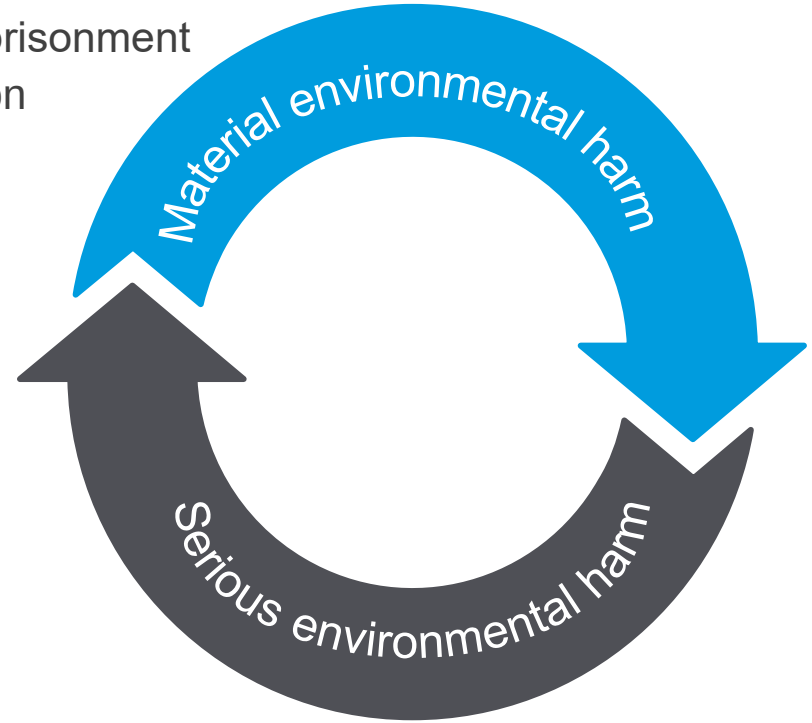
- For example, for failure to properly regulate

Owner

- Can be liable even if not polluter

Threshold concept 3 - offences and penalties for causing contamination

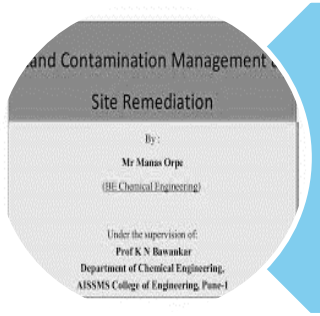
Wilful and unlawful
$600k individual/2 years' imprisonment
$3 million corporation



Wilful and unlawful
$800k individual/5 years' imprisonment
$4 million corporation

Threshold concept 4 – the EP Act contamination registers

Environmental Management Register (EMR)



Contaminated Land Register (CLR)

‘Low Risk’ to human health or the environment
QUITE COMMON

Contamination found to be present and remediation is necessary
UNUSUAL

Obligations and exposure to orders from QLD Dept of Environment & Science (DES)

How is land placed on the Environmental Management Register (EMR)?

DES becomes satisfied that either…
(s 371)

Notifiable activity
(Schedule 3) eg
Chemical manufacturing
Service stations
Landfills
Pistol ranges etc....

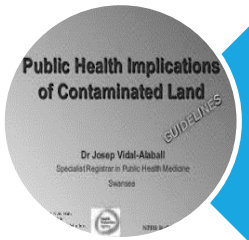
OR

The land is 'contaminated land'

Environmental Management Register (EMR)

How is land placed on the Contaminated Land Register (CLR)?

Already on EMR	Criteria – DES is satisfied that …	CLR



Environmental Management Register (EMR)

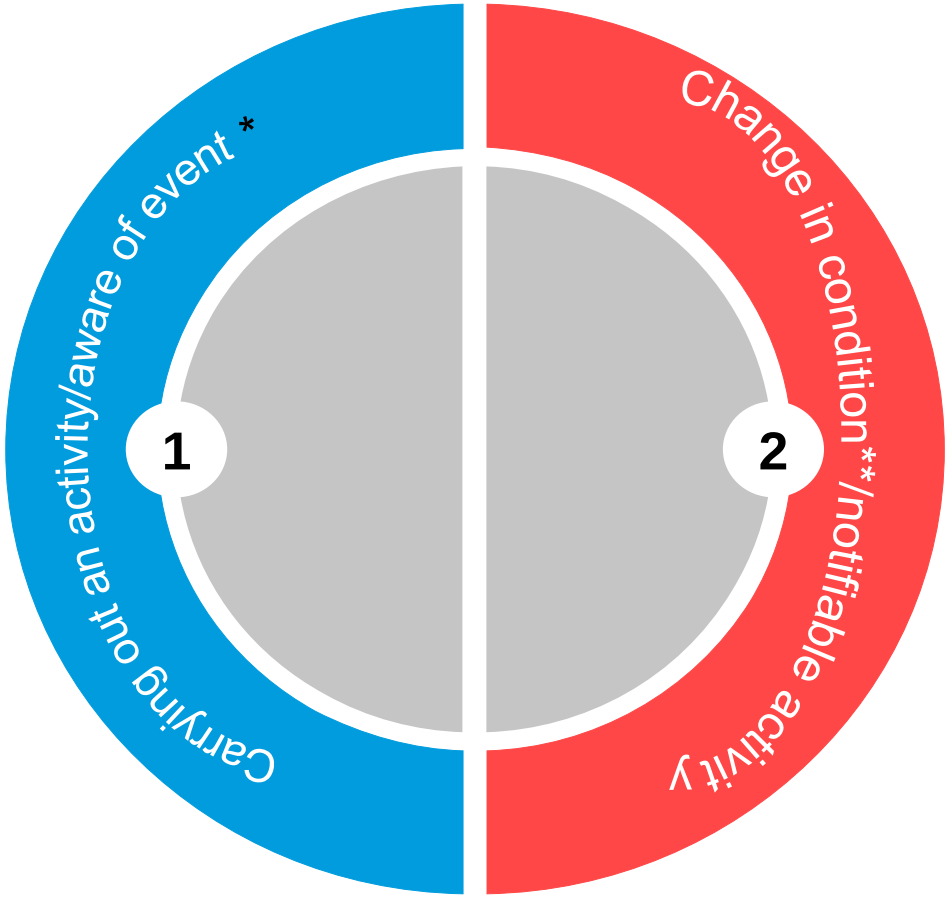
Land is contaminated

and

Remediation is necessary

Contaminated Land Register (CLR)

Duty to notify



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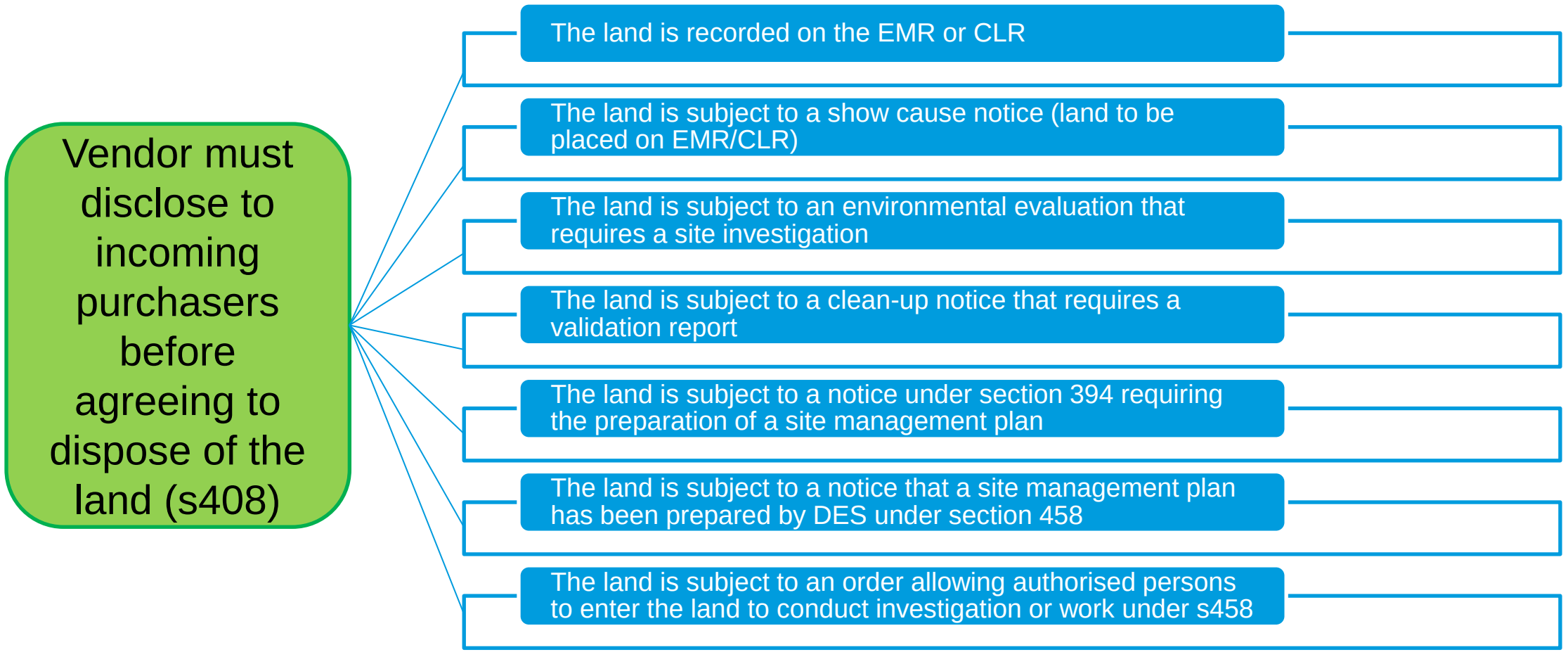
Notify DES (Chapter 7, Part 1, Div 2) Generally, within 24 hours after becoming aware, unless a reasonable excuse

Note: duty also applies to employees (including contractors), employers, some owners and occupiers, local governments

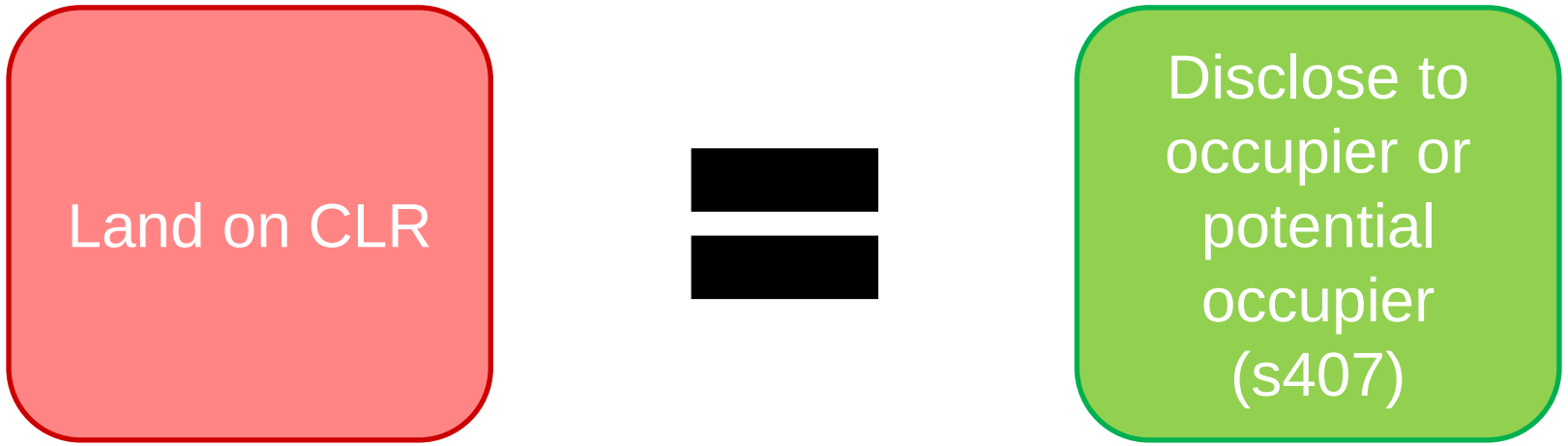
*Event that causes or threatens to cause serious or material environmental harm, unless authorised by various types of licences etc

** Change in condition of contaminated land

Disclosure to buyers



Disclosure to occupiers



Failure to disclose

Vendor can issue a notice after agreeing to dispose of the land and if the purchaser does not rescind within 21 business days it is taken to have waived that right

When does remediation occur?

- In response to a notice (or series of notices) from DES - compulsory
- Conditions to remediate under a (PDA) development approval and/or an environmental approval
- Voluntarily

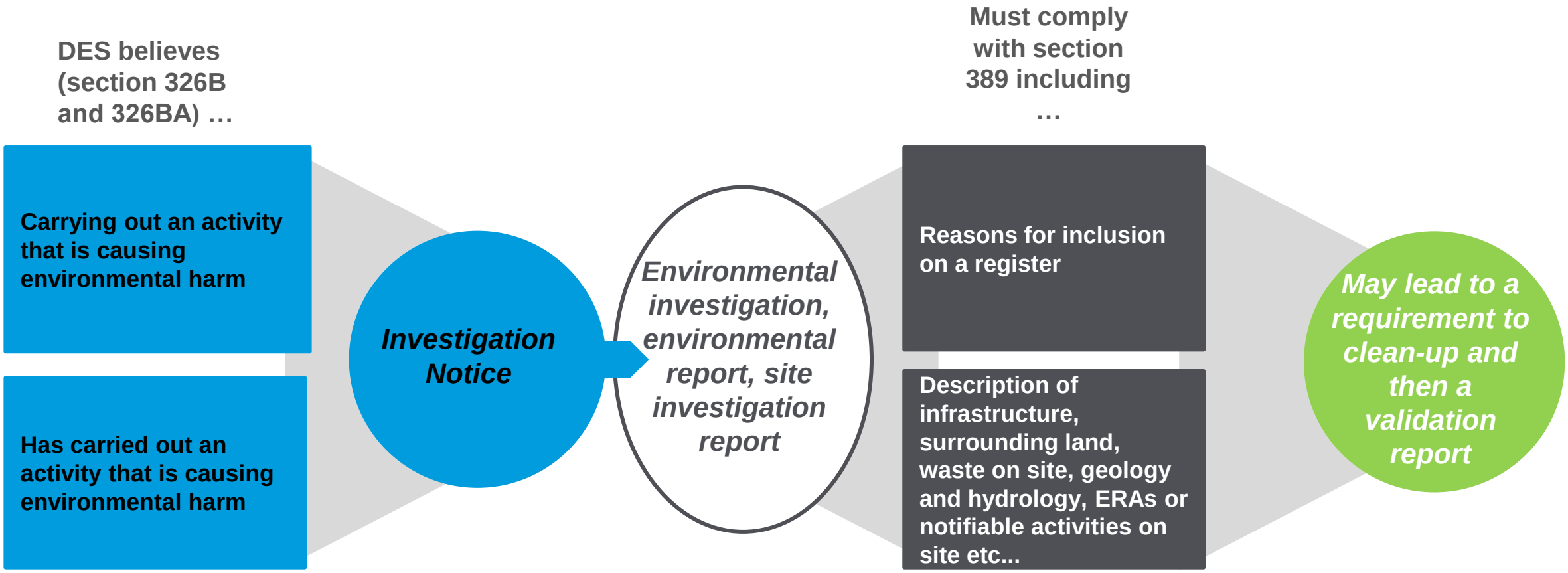
Compulsory investigation and remediation of contaminated land

- Audit notices
- Investigation notices
- Clean-up notices
- EPOs
- Site management plan requirements

Audit notices

- DES can require an environmental audit to be undertaken about an environmental authority (section 322)
- DES can also require an environmental audit to be undertaken in other limited circumstances (section 323)
- DES can undertake its own environmental audits (section 326) at the cost of the holder of the environmental authority

Investigation notices



Compulsory remediation – clean-up notices

- A clean-up notice can be issued under Chapter 7 Part 5B of the EP Act in respect of a contamination incident and can require the following (363H):
  - contamination to be minimised or prevented
  - rehabilitation and restoration of the environment, including by mitigation or remedy of the effects of the activity
  - assessment of the nature of the harm
  - production of reports (including a validation report)
- Costs recoverable as a debt owed by polluter?

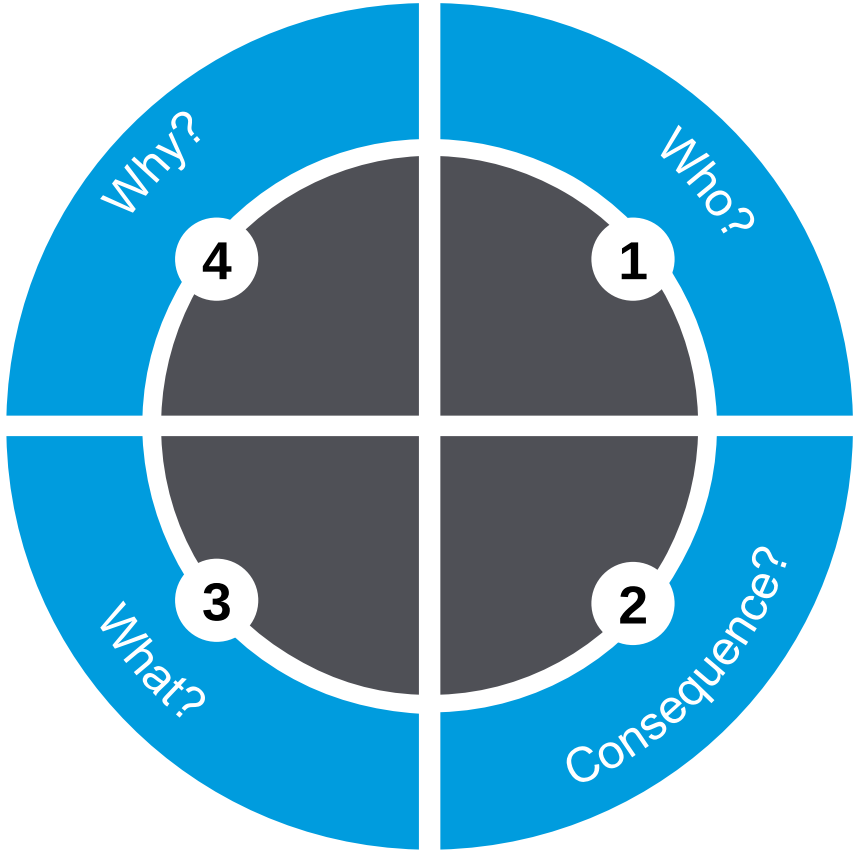
Compulsory remediation – clean-up notices (cont)

Clean-up notices

- A clean-up notice can be issued to a person DES reasonably believes is a ‘prescribed person’ for the incident (s363G) – that is:
  - A person causing or who has caused or who is permitting or has permitted the contamination incident to happen
  - an occupier at the time of the incident
  - the owner or person in control of a contaminant involved in the incident
  - relating to contaminated land, ‘prescribed responsible persons’ (includes local governments and owners)
- Also to a parent corporation, executive officer

Compulsory remediation – environmental protection orders

EPOs can be issued in certain circumstances to ensure compliance with other notices

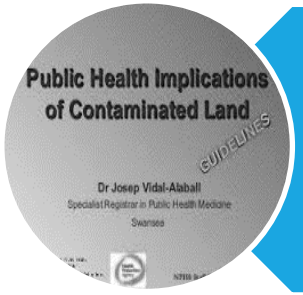
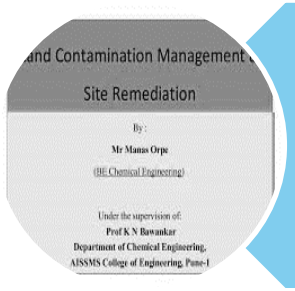


Wide class of people to whom these can be issued – even broader now with the 2016 Chain of Responsibility amendments (CoRA) to the EP Act

Can impose a 'reasonable requirement' on the recipient relevant to the circumstances leading to the issuing of the order

Significant penalties for contravention – used to escalate non-compliance with some of the other notices provisions, or in case of an emergency

Compulsory remediation – land on the registers

Register	Implications
 Environmental Management Register	• Investigation notice - further investigation • Site management plan • Remove from/leave on EMR • Transfer to CLR • Contaminated land investigation documents
 Contaminated Land Register	

Contaminated land investigation documents – site investigation report, validation report, draft site management plan, and site suitability statements

- Can be required under the various notice-issuing powers, or can be prepared voluntarily
- Contents prescribed by Chapter 7 Part 8 Div 3 of EP Act
- Effect – to manage the contamination so that the land can be safely used for something
- Land can be moved on to EMR with site management plan, used for purposes set out in site suitability statement, may be removed from registers entirely if safe to use for all purposes
- Third party auditors required to certify compliance

Investigation and remediation standards

- What is the purpose of contaminated land investigation?
- What is the remediation standard required?
  - Removal from register – ‘suitable for any reasonably foreseeable use’
  - Remain on register with or without site management plan

South Australia: Updates

Jeremy Hill

Partner

South Australia

House of Assembly—No 86
As laid on the table and read a first time, 23 September 2020

South Australia

Environment Protection (Disposal of PFAS Contaminated Substances) Amendment Bill 2020

A BILL FOR

An Act to amend the *Environment Protection Act 1993*.

Prepared as a result of Southern Waste ResourceCo application for receipt/disposal of PFAS at existing McLaren Vale landfill

Bill proposes no new landfill depot licences for receipt of PFAS within:

- Greater Adelaide Area
- 50km from land used for primary production
- 5km of a township

South Australia

The Corporation of the City of Campbelltown v Caltex Petroleum Pty Ltd (No 2) [2019] SAERDC 24

Caltex hydrocarbon plume

Redevelopment of adjacent Council leisure centre

Council incurred various expenses and made a claim for reimbursement under *Environment Protection Act 1993* (SA)

Following expenses in dispute:

- The supply and installation of a waterproofing membrane ($140,000)
- Dust and air monitors and monitoring ($118,000)
- Legal expenses ($23,000)

Court found expenses were incurred to prevent or mitigate injury, loss or damage caused by the hydrocarbon plume and that Council's conduct was reasonable

Caltex ordered to reimburse Council for expenses incurred and interest

Northern Territory: Updates

Northern Territory

Environment Protection Act 2019

Came into operation on 28 June 2020.

Waste Management & Pollution Control Act continues, but the Environment Assessment Act is repealed.

Requirement for an environmental approval:

If a proposed action or strategic proposal has the potential to have a significant impact on the environment, or meets a referral trigger, an environmental approval is required.

Northern Territory

Duty to notify of incidents

Where an incident causes or threatens material environmental harm or significant environmental harm

Applies only to actions under environmental approvals or actions undergoing environmental assessment

Duty to notify as soon as practicable (and in any event within 24 hours)

Applies to approval holder, auditor, owner, occupier. Note broad definitions.

Northern Territory

Enforcement: new enforcement options and remedies

- Environment Protection Notices
- Emergency provisions
- Stop Work Notice
- Closure Notice
- Civil orders and penalties, and offences

Western Australia: Updates

Nada Raphael

Partner

Western Australia: Contaminated Sites

Contaminated Sites Act 2003 (WA)	• CS Act came into effect on 1 December 2006. • CS Act is separate to the *Environmental Protection Act 1986* (WA) • Last review of the CS Act conducted in 2015, which recommended that no amendments be made to the CS Act.
Leading case authorities on interpretation of the CS Act	• *Viva Energy Australia Pty Ltd v Contaminated Sites Committee* [2018] WASC 89 • *Caltex Australia Petroleum Pty Ltd v Contaminated Sites Committee* [2017] WASC 155 • *Coffey LPM Pty Ltd v The Contaminated Sites Committee* [2014] WASC 504 • *Coffey LPM Pty Ltd v The Contaminated Sites Committee* [2013] WASC 98 • *Re Contaminated Sites Committee (Comprised Of The Chairperson, James (Jim) Malcolm And Others); Ex Parte Coffey LPM Pty Ltd* [2012] WASC 242 • *BP Australia Pty Ltd v Contaminated Sites Committee* [2012] WASC 221
Endorsement of PFAS NEPM 2.0	• Interim PFAS guidelines published in 2017 under review. • WA Minister for Environment has endorsed the PFAS National Environmental Management Plan 2.0, which was released in 2020.

Proposed reform: environmental protection and waste

Environmental Protection Bill 2020

Key points

1. Proposes to amend the *Environmental Protection Act 1986* (WA). Most significant reform to environmental legislation in WA since the Act came into effect.
2. **Status**: Bill introduced into parliament on 16 April 2020.
3. **Relevant amendments** include:
   a. an increase to the threshold amount for causing:
      i. 'material environment harm' from $20,000 to $50,000; and
      ii. 'serious environmental harm' from $100,000 to $500,000;
   b. changes to the defence provisions to clarify that an environmental licence does not provide a defence for an emission that is not regulated by that licence.

Waste reform

Key points

1. Government discussion paper: 'Waste not, want not: Valuing waste as a resource', which propose amendments to the *Environmental Protection Act 1986* (WA), *Waste Avoidance and Resource Recovery Act 2007* (WA), and the *Waste Avoidance and Resource Recovery Levy Act 2007* (WA).
2. **Relevant amendments** include:
   a. amending definition of waste so that 'waste derived materials' are no longer waste;
   b. a regime for determinations to be made by the Director General of the DWER which consist of:
      i. a product specification, which applies to the producer; and
      ii. a declaration, which applies to the user.

Other waste reform project

Gazetted 28 June 2019: Amendments to the *Waste Avoidance and Resource Recovery Regulations 2008* (WA) to require record keeping and reporting of waste and recycling data from local governments, waste recyclers and licensees of major regional landfills

Commenced 1 October 2020:
Western Australia's Container Deposit Scheme – Containers for Change

Gazetted 9 June 2020:
Amendments to the *Environmental Protection (Controlled Waste) Regulations 2004* (WA)

Amended December 2019:
Uncontaminated fill thresholds in the Landfill Waste Classification and Waste Definitions 1996 (as amended 2018)

Proposed amendments to the *Waste Avoidance and Resource Recovery Levy Act 2007* (WA) to require the use of weighbridges for Category 63, 64 and 65 landfill premises to calculate leviable waste

Commonwealth: Updates

Amanda Johns

Specialist Consultant

Compliance changes: Commonwealth

PFAS National Environment Management Plan 2.0 (PFAS NEMP 2.0)

Published 5 May 2020

What is it?	PFAS NEMP 2.0 provides nationally agreed guidance on the environmental management of PFAS contamination ▪ Focuses on the **prevention** and **management** of PFAS contamination
Aim	To recognise the need for **adaptable, jurisdiction-based regulation** ▪ Victoria is yet to implement the revised plan
Key changes (4)	1. New decision tree for soil reuse – outlines the process for a screening risk assessment 2. Updates to environmental guideline values 3. Updated guidance for on-site containment of PFAS-contaminated material 4. Updated guidance on wastewater management

Compliance changes: Commonwealth

National Remediation Framework (NRF)

What is it?

The NRF was designed to complement the National Environment Protection (assessment of Site Contamination) Measure (**ASC NEPM**)

ASC NEPM provides a **national process** for **assessing** whether a site is **contaminated**

The **NRF** provides a **nationally consistent approach** to **remediating** and **managing contaminated sites**

Key points (4)

1. Has been endorsed as best practice by **all jurisdictions**
2. It is non-binding. Compliance with State-based legislation and regulations is still necessary (the NRF **does not supersede** these requirements)
3. Provides guidance on the entire remediation process, including:
    a. Remediation action plan **development**
    b. Remediation action plan **implementation**
    c. Post-remediation considerations

Tasmania: Updates

Compliance changes: Tasmania

Environmental Legislation (Miscellaneous Amendments) Bill 2019

Key points (3)

1. Proposes to amend the *Environmental Management and Pollution Control Act 1994*
2. **Status**: the Government is currently considering public responses to the draft Bill (submissions closed 4 October 2019)
3. **Key changes** include:
   a. Amending of the definition of '**clean fill**' to create two categories of clean fill
   b. Allowing the EPA to **publish** environmental monitoring information **without the permission** of regulated parties
   c. Changes to '**level 2 activities**' (activities **assessed and regulated** by the EPA) - particularly in relation to waste depots, land application of biosolids and aquaculture feed works
   d. Creating a new offence of conducting a '**level 2 activity**' without a **planning permit** or **environmental authorisation**

Environmental Management and Pollution Control (Underground Petroleum Storage Systems) Regulations 2020

Key points (3)

1. **Purpose:** to better protect the owners and operators of underground petroleum storage systems (UPSS), the public and the environment from the impact of fuel leaks
2. Came into effect on **3 February 2020**
3. **Key changes** include:
   a. Stricter requirements to **notify** the EPA of **possible leaks**
   b. Stricter requirements to use **independently verified** methods when **testing** for leaks

QUESTIONS?

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MinterEllison

The contents of this presentation provides general information only and should not be used as a substitute for legal advice

AUSTRALIAN ENVIRONMENT BUSINESS NETWORK

AEBN Contaminated Land Seminar:

Preparing for new laws, Best practice options and Managing the risks

Morning Tea Break

Please return at 11.20am for 11.25am (sharp)

Proud Principal Partner

MinterEllison

Proud Webinar Partner

PETER J RAMSAY & ASSOCIATES

Australian Environment Business Network (AEBN)

www.aebn.com.au

AEBN Contaminated Land Seminar:

Preparing for new laws, Best practice options and Managing the risks

7 October 2020

Best practice options for implementing contaminated land management to ensure compliance, with key consideration to implementing approaches to comply with the new Victorian legislation

Peter Ramsay
Managing Director

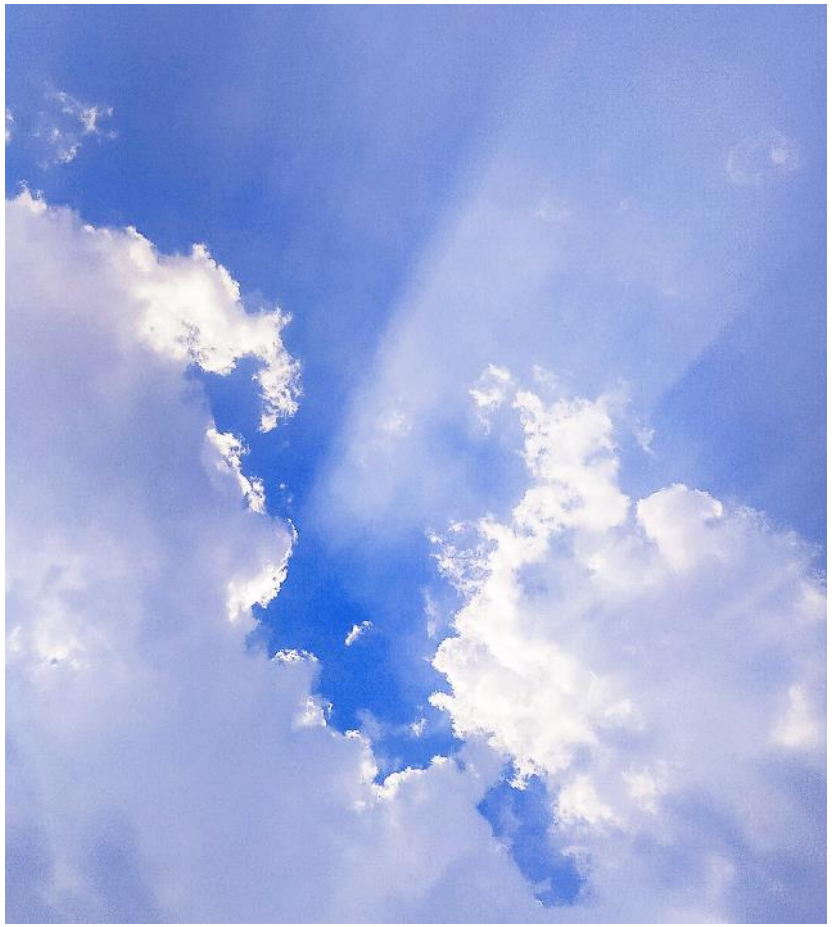
Andrew Green
Associate

Peter J Ramsay & Assoc

Proud Webinar Partner

PETER J RAMSAY & ASSOCIATES

Australian Environment Business Network (AEBN)
www.aebn.com.au



Best Practice Options for Implementing Contaminated Land Management to Ensure Compliance

Key considerations when implementing approaches to comply with the new Victorian legislation

Mr Peter Ramsay, Principal Consultant & Managing Director
and
Mr Andrew Green, Associate

7 October 2020

Presentation Overview

- Review of the upcoming Environment Protection Amendment Act 2018
- General Environmental Duty (GED)/Duties Frameworks
- Overview of Low/Medium/High Risk Activities together with the Duties Framework as they relate to contaminated land
- Recommended steps to ensure compliance with the new Victorian legislation:
  - Identifying Hazards
  - Assessing Risk
  - Implementing Control Measures
  - Control Checks
- Part one of presentation presented by Peter Ramsay, part two by Andrew Green

Note: This presentation is for information only and is not intended to present legal or consulting advice.

Company Background

- Commenced in 1988 – 32nd anniversary this year
- Assist clients to achieve sustainability
- Implement innovative, cost effective solutions
- Services include:
    - Site investigation and remediation
    - Environmental Auditing (Peter is an EPA Appointed Environmental Auditor for Contaminated Land and Industrial Facilities in Victoria and a Site Auditor in NSW)
    - Industrial facility management
    - Environmental Health and Safety
    - Cleaner production
    - Corporate social responsibility
- Servicing Melbourne, Sydney and Brisbane, with capabilities to deliver a wide range of projects nationally and internationally (particularly the Pacific region through the Inogen alliance)

Environment Protection (EP) Amendment Act 2018

- Intended to commence in July 2021 (Extended due to the COVID-19 Omnibus (Emergency Measures) Bill 2020 with a long-stop date of 1 December 2021)
- Focuses on **preventing** waste and pollution impacts rather than managing impacts after they have occurred (i.e. preventative rather than ‘reactive’)
- Introduces the criminally enforceable General Environmental Duty (GED)
- Breach of GED could lead to criminal or civil penalties

General Environmental Duty (GED)

- Definition: *"A person who is engaging in an activity that may give rise to risks of harm to human health or the environment from pollution or waste must minimise those risks, so far as* ***reasonably practicable****."*
- Reasonably practicable means putting in controls that are proportionate to the risk (Refer to EPA Pub.: 1856 for additional guidance)

General Environmental Duty (GED)

- Under the GED, businesses must:
  - Assess risks of harm to human health and the environment;
  - Put processes in place to minimise risk;
  - Respond quickly and seriously to EPA's advice and suggestions;
  - Work to minimise environmental impact and repair damage; and
  - Answer questions and provide information to EPA when requested

Duties Framework

- General Environmental Duty (GED) (preventative)
- Duty to restore
- Duty to notify of event
- Duty to manage contamination
- Duty to notify of contamination
- Duty to manage industrial waste disposal
- Duties for priority waste

Permissions to Perform Prescribed Activities

- Work in conjunction to the GED
- Ensure performance standards and conditions are met across a range of activities
- Three tiers of Permissions based on level of risk to human health/environment (EPA Draft Pub.: 1799.1):
  1. Licences (three types) for high-risk prescribed activities
  2. Permits for medium-risk prescribed activities
  3. Registrations for low-risk prescribed activities

Permissions to Perform Prescribed Activities

- Risk-based approach
- Allows EPA to target varying levels of risk with appropriate conditions/permissions
- Permissions Scheme (Pub. 1799.1) outlines:
  - The role of the permission holder in ensuring compliance
  - What EPA consider when assessing an application for a permission
  - How permissions work to manage risk
- EPA will now have oversight over many medium risk activities/businesses which were previously regulated in a reactive manner (i.e. service stations, motor mechanics, dry cleaners etc.)

Managing ‘Low Risk’ Activities

- The GED is unlikely to impact your activities if your business:
  - Doesn’t cause pollution/contamination
  - Only produces small amounts of domestic-type waste
- ‘Low Risk’ activities may include:
  - Retail
  - Offices
  - Cafes/Bars/Restaurants
  - Pharmacies
- ‘Low Risk’ does not mean risk free!

Source: TimeOut, 2020

Medium to High Risk Activities

- Medium to high risk activities include:
  - Handling and storing liquids
  - Disposing of chemicals
  - Receiving, storing or treating waste
  - Discharging industrial wastes
- Risk rating (and level of permitting) is based on thresholds (EP (Scheduled Premises) Regulation, 2017)
- Businesses should follow a risk management process (as per the 'four step' approach we will describe further)

Source: EPA Victoria, 2020

Fulfilling Your Duty to Mange Contaminated Land

- Duty to **Manage** contaminated land
  - Requires investigation and assessment; and remediation/management (where necessary)
  - ‘Legacy’ contamination captured ‘polluter pays’
  - Identify any contamination: a person in management or control of a site should reasonably know about and assess that contamination
  - Manage the contamination by minimising risks to human health and the environment so far as **reasonably practicable**
  - Notify people who may be affected by the contamination

Fulfilling Your Duty to Notify of Contaminated Land

- Duty to **Notify** of contaminated land
  - Notify EPA as soon as practicable if contamination may pose a significant risk to human health of the environment.
  - Contamination will be notifiable if it meets a certain threshold/criteria (to be set out in the proposed legislation and future regulations)
  - ‘Land’ includes groundwater and buildings/structures on the land
  - May tie in asbestos and other hazardous building materials
  - Publicly accessible database with site history, audit history and regulatory actions

Risk Management Process

- Information on hazards and risks is necessary to fulfil your duties with respect to the management and notification of contaminated land
- The ‘implementation’ and ‘checking’ of controls provides for a completed risk management process
- Use the four step ‘risk management process’ provided in EPA’s ‘Self Assessment Tool’
- Applies to all activity risk levels, however may be most applicable to ‘medium’ and ‘high’ risk activities
- Other aspects which may exacerbate hazards risk:
  - Where there are a large number of sites (even sites with ‘low’ risk activities)
  - The location of sites (i.e. inner city, near sensitive ecosystems/receptors)
  - The size of site (i.e. large landholdings)
  - Where there are varied activities across sites (where activities/risks may be flying ‘under the radar’)

Source: EPA Victoria, 2020

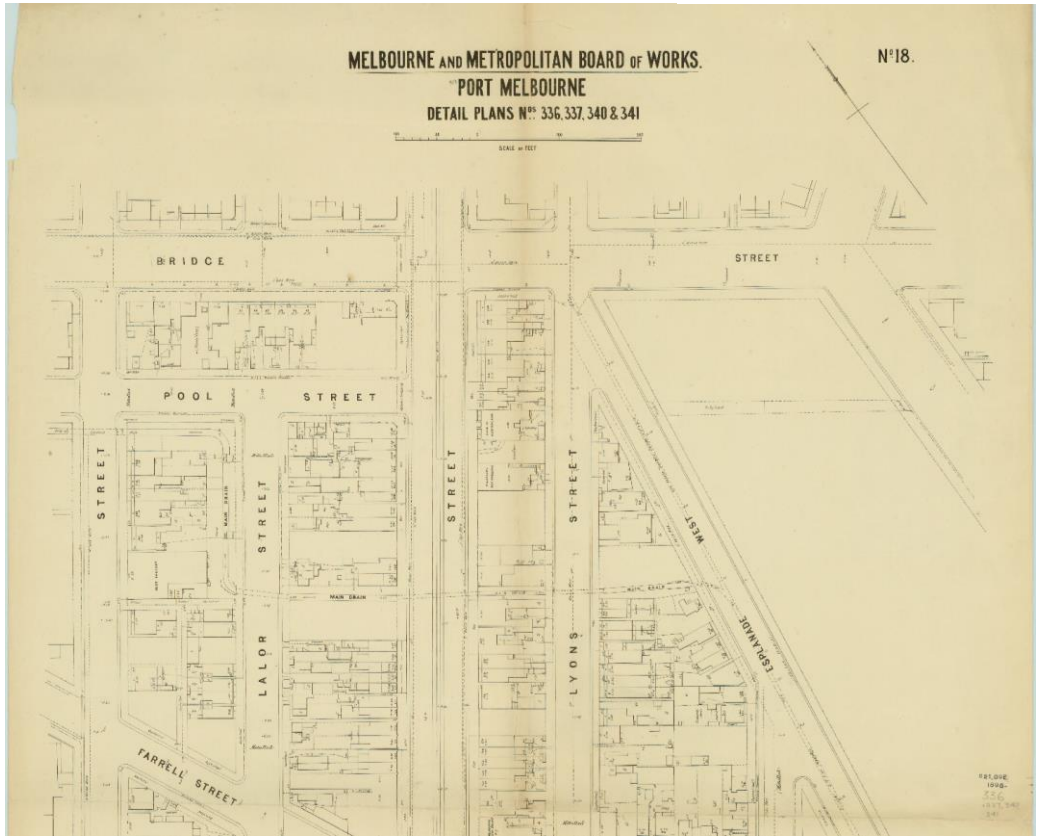
Identify Hazards

- Desktop review (initial review, often internal)
- Engagement of Environmental Consultants
- Planning phase
  - Determine scope
  - Set realistic timelines
- Investigation
  - Undertake investigation (PSI/DSI)
- Engagement of an Auditor
  - there may be a regulatory requirement for Auditor involvement/oversight, it is recommended that Auditor engagement be initiated at the outset of the process

Desktop Review

IDENTIFY HAZARDS 1

- Necessary for prioritisation of further investigation (PSI/DSI) where there are many sites and/or limited time/funds for further investigation
- May include the development of a risk matrix with key information on sites (i.e. location, geology, hydrogeology, site history, current activities/hazards, proximity to receptors, compliance history etc.)
- EPA's website includes guidance on key hazards by industry
- May be completed with or without the assistance of a consultant (i.e. consultant could assist with setup and review or complete entire exercise)
- Useful in the development of the scope for any further investigation



Source: State Library of Victoria, 2020

Engaging a Consultant

- Often necessary to provide specialist expertise to assist in identifying risks
- Ask for recommendations from colleagues, Auditors
- Typically about the people involved in the project team, not necessarily the firm
- Focus the decision on someone who you can work with
- Essential to have trust – open collaborative relationship, particularly when problem solving
- Do not engage someone who tells you what you want to hear – when necessary, good consultants tell you what you don't want to hear
- Establish consistent scope – Auditor involvement can help

Engaging a Consultant

- Do not focus on initial cost – only part of the equation
- If a quote is cheap, scrutinise it!
- Often costs blow out due to inadequate assessment
- Avoid having to repeat work – do it right the first time

Engaging a Consultant

- Ensure they have recent experience dealing with the issues you are likely to encounter (industry/sector-based experience is a good start)
- Ensure you have pragmatic, skilled people who can deal with groundwater, soil vapour, risk assessment etc.
- Evaluate the Consultants attitude to criticism:
  - For example, some consultants tend to argue with Auditor's/the Regulator for argument sake – this often adds to time and costs
- Be prepared to step in and manage Consultants if decision making is slow

Engaging an Environmental Auditor

- Often the involvement of an Environmental Auditor is required by a Notice issued by EPA
- Same principles for engagement apply as with a Consultant
- Use the EPA Auditor List as a basis
- Meet the Auditor and their team at proposal stage (face to face, preferably on-site if possible)
- Ensure that the Consultant and Auditor have worked together before and will communicate effectively
- Ensure that the Auditor is accessible and will communicate with all parties
- Maintain a positive relationships with all consultants

Part Two: Presented by Andrew Green, Associate

Site Investigation – Summary

- Staged Approach
  - Initial desktop review (optional depending on number of sites – good for prioritising on basis of risk)
  - Preliminary Site Investigation (PSI)
  - Detailed Site Investigation (DSI)
- Sufficient investigation will result in the identification of all key hazards and reduces uncertainty/liabilities
- Feed findings of investigations into master planning
  - Change land uses to minimize remediation
  - Divest less contaminated land to generate funds

Site Investigation - Guidelines

- All investigations need to be performed in accordance with the National guidelines:
  - *National Environment Protection (Assessment of Site Contamination Measure) 1999 (as amended 2013)*
    - Known as ASC NEPM or the 'NEPM'
  - Ratified by the State governments across Australia (i.e. through SEPPs in Victoria)
  - Provide guidance on investigation of contaminated land (including PSIs and DSIs)
  - Western Australia Department of Health – Asbestos (May 2009) is referred to in the NEPM and is relevant for the identification and management of asbestos in soil
- NSW EPA Service Station Technotes (April 2014)
  - These technotes provide detailed guidance on the investigation, remediation and validation of service station sites, and are often used nationally in the absence of specific guidance (note that the NEPM does not provide guidance on remediation/validation)
- PFAS NEMP
  - Provides National guidance for the assessment and management of per-and poly-fluoroalkyl substances (PFAS). Not included in ASC NEPM, however the guidance has been adopted by the heads of all state and territory EPAs
- Audit system guidelines (these are state based and can be very prescriptive)

Preliminary Site Investigation (PSI)

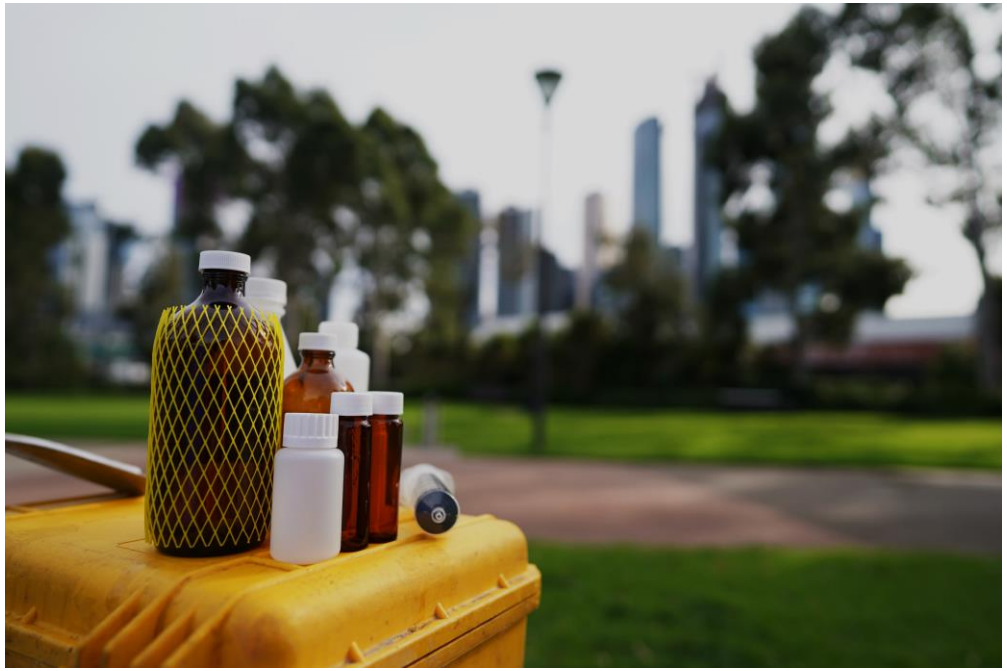
- Based on guidance in the NEPM
- Site history and documentation review – provide the consultant with all documentation you have
- Preparation of a Conceptual Site Model (CSM) – allows for strategic assessment
- Preliminary sampling (optional)
- Can only conclude site is suitable if no evidence of potential contamination, or contamination is localised
- Provides a ‘snapshot’ of the site – alludes to whether there are issues which need to be further assessed

Detailed Site Investigation (DSI)

- Based on guidance in the NEPM
- May be performed following a PSI (i.e. as a result of a recommendation of the PSI)
- Site history review
- Preparation of Conceptual Site Model (CSM)
- Soil sampling in accordance with Australian Standard:
  - Grid based sampling (to identify ‘hot spots’
  - Targeted sampling (to investigate specific areas/structures)
- Necessary to satisfy current 53X Environmental Audit requirements in Victoria

Detailed Site Investigation (DSI)

- Need to consider issues such as:
  - Soil contamination
  - Groundwater pollution
  - Soil vapour impacts
  - Surface water impacts
- Uses generic site investigation criteria from ASC NEPM
- Can incorporate a site specific human health or ecological risk assessment where elevated contaminant levels are identified



Assess Risks

- Detailed risk assessment may be necessary where significant contamination is identified
- Site specific assessment of risk for the designated land use
- Must consider risks to both human health and the environment
  - Human Health Risk Assessment (HHRA)
  - Environmental Risk Assessment (ERA)

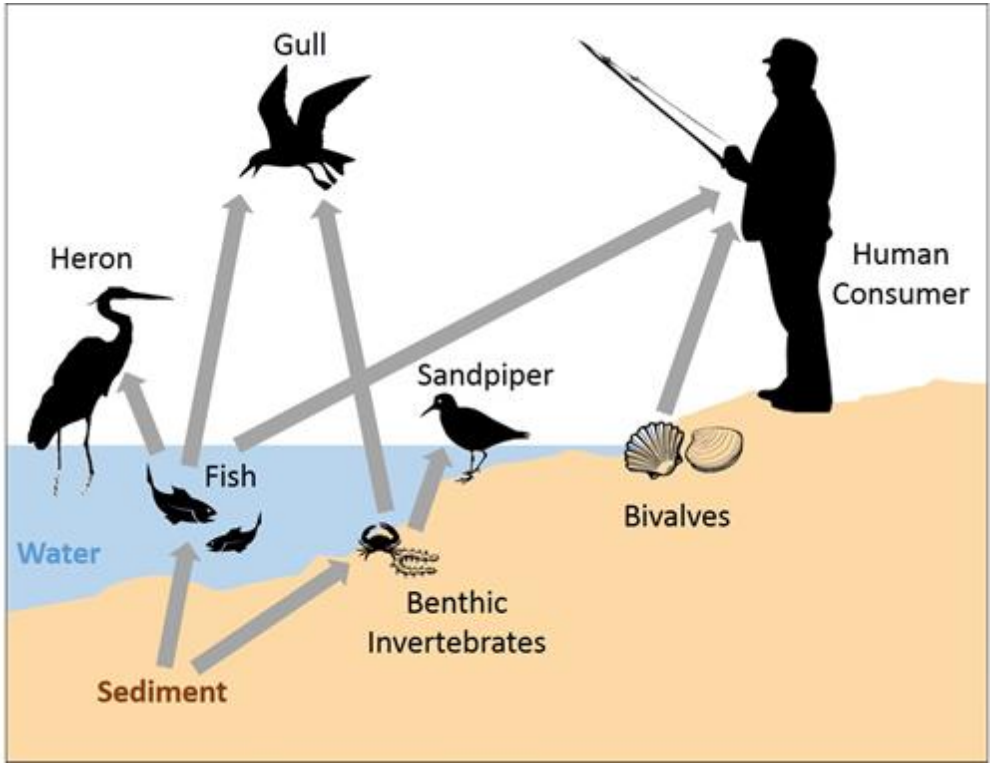
			Impact			
			0 Acceptable	1 Tolerable	2 Unacceptable	3 Intolerable
			Little or No Effect	Effects are Felt but Not Critical	Serious Impact to Course of Action and Outcome	Could Result in Disasters
Likelihood	Improbable	Risk Unlikely to Occur				
	Possible	Risk Will Likely Occur				
	Probable	Risk Will Occur				

Assess Risks

- Consider specific exposure scenarios:
  - Commercial workers
  - Residents (both acute and chronic exposures)
  - Maintenance workers in sub-surface excavations
  - Ecological receptors
- Perform further investigation based on results of the PSI/DSI to allow further understanding of risk:
  - Additional soil/groundwater sampling
  - Continuous monitoring (soil vapour/ground gases)
- Refine the Conceptual Site Model (CSM) based on findings

Human Health and Ecological Risk Assessments

- HHRAs and ERAs involve a detailed study of actual site-specific risk
- They go beyond generic guidelines to reduce conservatism
- **Pros:** May negate the need for expensive remediation/controls, or minimise the amount/level of remediation/controls necessary
- **Cons:** Cost (depending on scale of remediation/controls that may have otherwise been performed/constructed), may show that remediation and/or controls are still necessary



Implementation of Control Measures

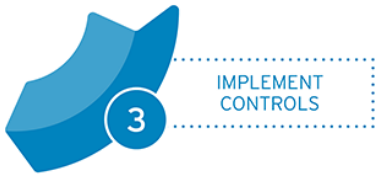
IMPLEMENT CONTROLS 3

- Once assessment of the potential risks has been completed (i.e. following PSI>DSI>risk assessment), control measures must be implemented to address the identified risks
- Control measures may include one or a combination of the following (in order of preference):
  - Elimination of hazard:
    - Including soil and groundwater remediation
  - Engineering controls:
    - Capping and/or containment of contamination
  - Administrative controls:
    - Preparation of a Management Plan to manage contamination
    - Alternate land uses to manage contamination

Elimination of Hazard

- Removing a hazard or risk from a site such that it no longer poses a risk of contamination
- For example:
  - Removing refuelling infrastructure and using off-site depots/mobile delivery
  - Substitution of a hazardous substance with a non-hazardous substance (i.e. use of non-PFAS containing firefighting foams)
  - Removing bulk chemical/waste storage in favour of smaller scale solutions
- Provides the most certainty on risk reduction, however, can be the most expensive/least viable

Elimination of Hazard: Remediation



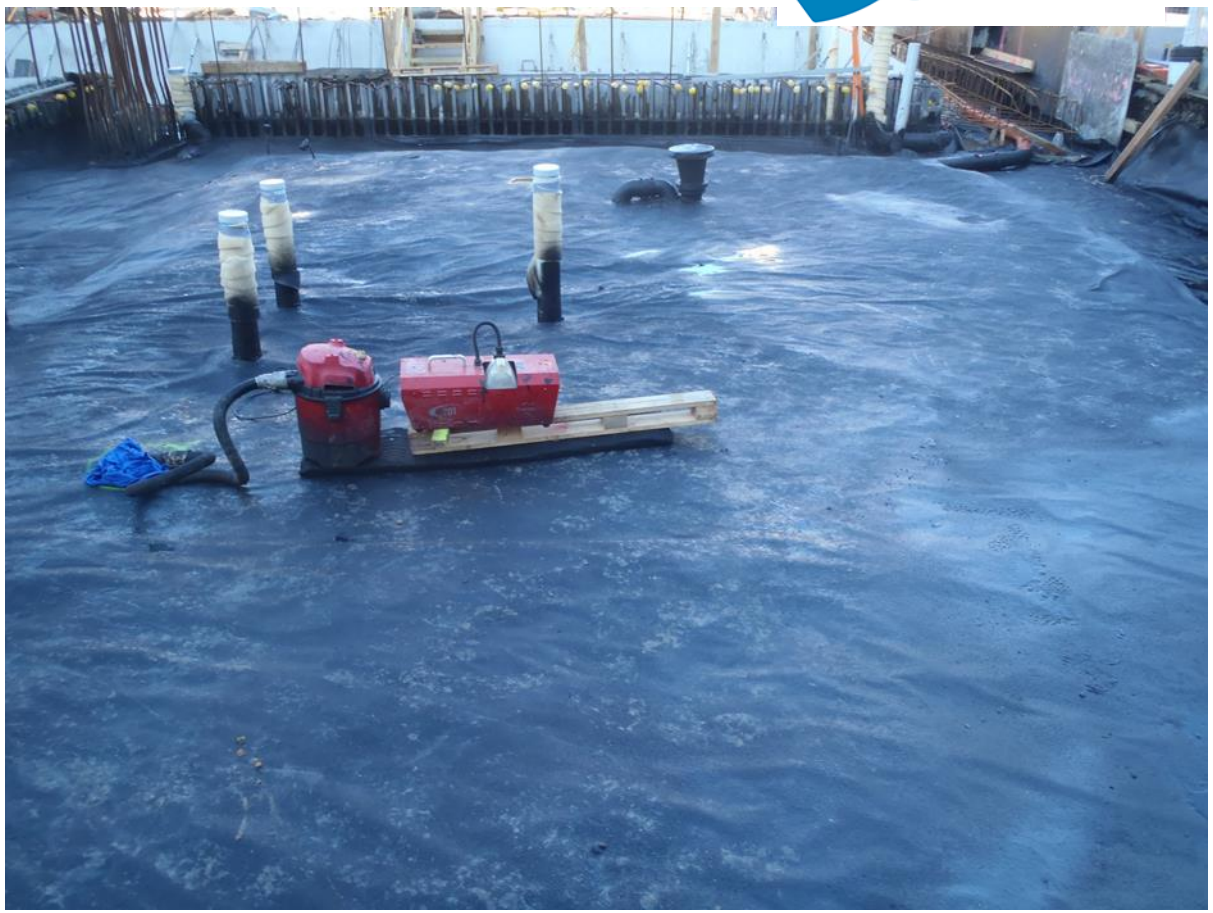
- Preparation of a Remediation (Clean Up) Plan
  - There is currently no prescriptive guidance in Victoria, however there is a national framework (CRC CARE 'National Remediation Framework'). NSW Service Station Tech guidance is also relied upon
  - Council approval may be required (particularly for excavation and off-site disposal of soil) – important to check!
- Undertake remediation
  - On-site treatment of soil/groundwater/vapour
  - Off-site treatment of soil
  - Excavation and off-site disposal of soil
  - Disposal of treated groundwater to sewer
- Prepare remediation and validation report to document outcomes of remediation (often required by EPA)

Engineering Controls

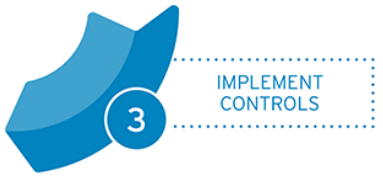
- Implementation of engineering controls which lessen risk (however residual risk remains and often administrative controls are also required)
- For example:
  - Replacement of below ground fuel storage tanks with above ground tanks
  - Installation of a capping/containment system
  - Moving chemical storage into a bunded area, away from stormwater inlets

Engineering Controls: Capping & Containment

- Need to ensure acceptable risk, even if capping is breached (i.e. include failsafe redundancies in design)
- Need a management plan
- Ensure risk to groundwater is addressed
- Works Approval in Vic needed for large containment >1,000m^3
- Effective for asbestos contamination in soil (refer to WA DOH)

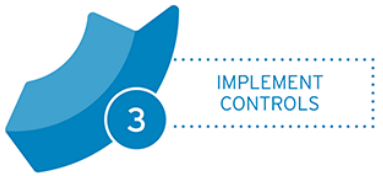


Administrative Controls: Management Plans



- If residual contamination presents a potential acute risk (if exposed) then an Environment Management Plan (EMP) may be necessary (i.e. asbestos contamination in soil):
  - If PPE need to reduce risk to workers
  - If groundwater monitoring is considered necessary
  - If soil vapour mitigation systems are required
- Can include significant ongoing obligations
- The management plan must reduce risk to acceptable levels
- Cost associated with implementation (i.e. ongoing monitoring/consulting fees)
- Carefully check contents of the EMP - need to look at long term

Administrative Controls: Alternate Land Uses



- Based on the results of the assessment, certain land uses may not be considered acceptable
- More sensitive land uses may be required to be moved off-site/to a different area of the site
- Should be outlined as part of the relevant management plan

Check Controls

- Once control measures have been implemented, a system of checking/auditing the control measures must be undertaken. This may include:
  - Fulfilling regulatory compliance obligations (i.e. EPA's Annual Performance Statement)
  - Internal auditing of controls/systems
  - External auditing of controls/systems
- Involvement of an Environmental Auditor (this is not limited to any one stage in the cycle, and EPA may require Auditor involvement for all stages)

Internal Auditing

- Conducting regular internal compliance audits to identify gaps/areas of non-compliance
- Just as relevant for unlicensed facilities as it is for licensed facilities
  - Compliance with Australian Standards and State environmental regulations is still required for unlicensed facilities
  - Non-compliances can be addressed by EPA in the form of Clean-Up Notices (CUN) and Pollution Abatement Notices (PANs) for both licensed/unlicensed facilities (EPA Victoria)

Source: ABC, 2019

Existing Reporting Requirements

- Annual Performance Statements are already required for all licensed facilities in Victoria in accordance with EP (Scheduled Premises) Regulation, 2017
  - Must prepare APS annually
  - Addresses performance against each license condition
  - Requires explanation of all non-compliance incidents and actions taken
  - Does NOT replace the need for immediate reporting of non-compliances
- Some Licences include requirements for annual Environmental Audits of facility operations or on a basis determined by a monitoring program (i.e. closed landfills). These culminate in the preparation of Environmental Audit Reports
- EPA issues Licences on the basis of their experience with risks associated with specific industries – therefore these provide a good starting point as the key risks which may exist at a site/facility
- APS and Environmental Audit Reports are public documents (assessible via EPA's website)
- Reports prepared for regulatory compliance are often good for a business from a risk management perspective

External Auditing Schemes

- Independent environmental assessment by a person qualified by the regulator
- Victorian Environmental Audit System – to be updated under EP Act 2018
  - Preliminary Risk Screen (PRS) assessment
    - Rapid, low cost assessment based on desktop study & site inspection, which may include sampling
  - Scaled Audit
    - PRS helps auditors focus audit on material risks
    - May results in remedial action being taken to manage risks
- There is a potential for mandatory reporting requirements for permitted industries/facilities (based on operations output/emissions).

Summary

1

Follow the four step risk management process outlined in this presentation and recommended by EPA:

1) Identify hazards
2) Assess risks
3) Implement controls
4) Check controls

2

Approach consultant and Auditor engagement with due care and consideration

3

Provide the consultant and Auditor with as much background information as possible

4

Prioritise investigation and control measures on the basis of risks

5

Start sooner rather than later, commencing now will assist in the long run, even without the finalisation of EPA guidelines - July 2021 is not too far away!

Questions?

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AUSTRALIAN ENVIRONMENT BUSINESS NETWORK

AEBN Contaminated Land Seminar:

Preparing for new laws, Best practice options and Managing the risks

7 October 2020

Q&A with Panelists

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Peter J Ramsay & Assoc

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