CONTAMINATED LAND - THE PROPOSED SOUTH AUSTRALIAN LEGISLATIVE APPROACH AND ITS IMPLICATIONS FOR LOCAL GOVERNMENT AUTHORITIES

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Introduction

This paper will outline the proposals of the South Australian Government to establish a legislative approach to the problem of contaminated land. The relevant proposals for the identification and remediation of contaminated sites in South Australia were put forward in a Green paper released by the Minister of Environment and Planning on 18 September 1991. Public submissions were sought with respect to the Green Paper until 31 December 1991. The State Government is now considering these submissions before introducing relevant legislation in the latter half of 1992.

The contaminated land initiative will be linked with a separate, but related, exercise being undertaken by the Minister of Environment and Planning, whereby a new Environment Protection Act is to be adopted in place of a number of existing environment related Acts (including the *Beverage Container Act, 1975*; the *Clean Air Act, 1984*; the *Marine Environment Protection Act, 1990*; the *Noise Control Act, 1976*; the *Waste Management Act, 1987*; and the *Water Resources Act, 1990*). The intention is to develop a single Act which will provide a comprehensive and coordinated system for environmental protection in South Australia.

The proposed legislation also will establish an Environmental Protection Authority which will comprise a small body of experts with an independent chairperson. It is envisaged that in addition to its licensing, monitoring and environmental auditing functions, the new EPA will administer the proposed system for identification and remediation of contaminated land. The relevant statutory measures will be incorporated in the new Environment Protection Act. As noted above, this Act is intended to be introduced in the latter half of 1992.

The Contaminated Land Problem in South Australia

Whilst regional land contamination problems in relation to lead at Port Pirie and radioactive substances in the Maralinga lands in the far west of the State have attracted considerable attention in recent years, it is problems with urban land-use in metropolitan Adelaide that have brought the issue into sharper focus politically. Although information concerning the location of contaminated sites (known or suspected) has only been collated systematically since the Minister for Environment and Planning established a Contaminated Lands Task Force in August 1990 (following the publicity surrounding a contaminated site at Bowden which was being developed for residential use), information gathered by the South Australian Health Commission had indicated by April 1991 that approximately 70 sites in South Australia were contaminated to varying degrees. According to the Green Paper, most of these sites are located in the western suburbs of Adelaide, the remainder being distributed through the metropolitan area and, to a lesser extent, in rural areas.

The Green Paper conceded however that the extent of land contamination may be far more extensive than is currently appreciated. Contamination can be caused by a wide variety of industrial and government land uses,

and may be the result of gradual deposits of contaminants over long periods of time, even extending into decades. As is evident in the inner western suburbs, contamination may have been caused by industrial activities that have long since ceased.

Typical contaminants found in Adelaide include heavy metals, arsenic, cyanide and aromatic hydrocarbons.

The problem extends to agricultural land use also. Since 1986, the South Australian Department of Agriculture has quarantined stock on more than 200 properties because of unacceptable organochlorine levels in soil, as evidenced by levels in the stock. Arsenic contamination of soil arising from its past use as a sheep dip has also

been investigated by the Department in some 50 sites., These problems affect not only the viability of rural enterprises, but also threaten the quality of both ground and surface water and may preclude the rezoning of rural land for residential purposes.

The land contamination issue clearly affects local government very directly, as some councils have learned already to their considerable discomfort. Councils may find themselves involved with land contamination issues in their capacity as owners or occupiers of land, a prime example being the operation of waste dumps. Where solid waste landfill operations are managed by a council, the problem of long-term contamination from the site will need to be thoroughly considered. Existing sites which have been in operation for a considerable period of years and where few protective measures may have been adopted (eg, to prevent the leaching of contaminants into ground-water) could pose serious problems for councils in their capacity as owners or occupiers of land. As will be seen later in this paper, the fact that the relevant operation may be undertaken by a private commercial firm pursuant to a lease from a council may not enable the council to avoid liability for remediation should contamination be present at the site.

The other way in which local government is directly affected by the land contamination issue is in its capacity as a planning authority. Where councils are considering applications for planning authorisation, or where they are engaged in the preparation of a supplementary development plan which provides for the rezoning of particular land, the question of possible land contamination could easily arise. This is particularly so where the development or rezoning proposals envisages the conversion of land used previously for industrial purposes to residential use.

A wider consequence of the way in which Councils may exercise their powers in relation to planning matters with or without regard to land contamination issues is the possibility that civil liability may attach for the negligent disregard of such issues. Where the health of ratepayers has been affected by land contamination, civil law actions may be pursued against all parties, including councils, who are perceived to have contributed to the problem - if only by having failed to recognise its existence at the time of exercising relevant planning powers. This possibility is enhanced by the adoption in October 1990 of a Planning Practice Advisory Circular which prescribed procedures for planning authorities to follow when preparing supplementary development plans or assessing development applications.

It is crucial therefore that councils should be well informed about their legal responsibilities and powers in relation to contaminated land, both under the existing law and in the light of the legislative package which the State Government proposes to introduce before the end of 1992. A broad overview of current and proposed requirements will be presented in the rest of this paper.

The current position in South Australia

The Green Paper acknowledges that current laws do not adequately address the land contamination issue. Indeed, it is this deficiency which provides the principal reason for the Green Paper. Nevertheless, there are some existing legislative provisions and informal policy statements which could bear upon the issue, even if not entirely adequately. These measures fall into two broad categories:

- powers relevant to the exercise of planning functions;
- duties in relation to disclosure, assessment and remediation.

1. **Planning Powers**

In October 1990, the Minister for Environment and Planning issued Planning Practice Advisory Circular No. 17, entitled "Land Contamination", in which procedures relating to contaminated land were prescribed for planning authorities to follow when preparing supplementary development plans and assessing development applications.

If an SDP affects "existing industrial or commercial land or land which has a known history of potentially contaminating activity or has been filled", councils are advised by the Circular "to report in the Statement of Investigations on the suitability of the affected land for the use proposed"., Whilst it can be expected that this approach will be imposed on councils to some extent through the Advisory Committee on Planning (ACOP), the practical difficulty is that the history of the usage of land being rezoned may not be well known to ACOP.

This is a procedure therefore which has a considerable potential to be disregarded by councils. Whilst councils may have some degree of knowledge of a relevant history, some may lack the desire to pursue the relevant inquiries. The Circular's test of a "known history of potentially contaminating activity" poses as many questions as it solves in this regard, and provides little guidance for councils who are generally supportive of the Circular's aims.

The Circular is also silent on the matter of the exact process to be followed by councils, should some contamination be disclosed which may affect the suitability of the land for the proposed use. If the

relevant land is privately owned, the council may be entitled to request a site assessment and to be provided with evidence of any necessary remediation before proceeding with the SDP.

Whilst councils may feel disinclined to get involved in inquiries concerning possible land contamination on sites that are being rezoned, they do so at the risk of incurring civil liability subsequently should problems emerge, eg, where the relevant land has been developed for residential use. The existence of the Advisory Circular should at least be treated as relevant to determining the "standard of care" which is to be expected of councils today in exercising such powers. It puts councils on notice that they ought to address the issue of land contamination carefully and routinely at least wherever some "known history" of potential or actual contamination is available to them.

Similar considerations arise with respect to the consideration by councils of development applications. Where land "may have been contaminated through industrial activity or landfill", the Circular urges planning authorities to "request applicants to examine and report on the history of uses" of the relevant land. Beyond this initial level of assessment, it would appear that planning authorities are entitled to require a detailed assessment of the extent of contamination pursuant to Regulation 12 of the Development Control Regulations. A list of industries that may be site contaminators is appended to the Circular for the guidance of planning authorities. Consultation by councils with the Department of Environment and Planning also is urged where they are involved in land contamination questions as the relevant planning authority.

Once more, there is reason to question the extent to which councils will involve themselves with these procedures. At present, the issues involved may seem too complex, and the risk of some future civil liability for inaction too remote, for councils to be troubled greatly by the Circular's prescriptions. There is also, once again, a rather vague delineation by the Circular of the circumstances in which the

suggested procedures should be followed in relation to development applications. These considerations have contributed to the view within the State government that a more comprehensive legislative approach to the problem is required, a key feature of which is to assign greater responsibility to the proposed EPA rather than Councils to address the problem.

2. **Duties to disclose, assess and remediate**

The capacity of authorities, either within the State Government or at the local government level, to direct that action be taken to identify or remediate contaminated sites is extremely limited under existing legislation. A thorough overview of these matters in the Green Paper clearly demonstrates the shortcomings of the law currently in this regard and provides a strong justification for the proposed, specific legislation.

Nevertheless, some measures do exist which are of relevance presently and should therefore be borne in mind by local government authorities - at least pending the introduction of the new scheme. In relation to disclosure of known land contamination, an amendment to the *Land Agents Brokers and Valuers Act, 1973*, which came into effect on 1 July 1991, requires an agent to inform a prospective purchaser of land of prescribed particulars of any ... "prescribed matters". New regulations made under the Act identify information held by the South Australian Waste Management Commission concerning contaminated sites as a "prescribed matter". There are approximately 1500 sites on the Commission's List, excluding petrol stations. This information has been available to purchasers who make enquiry through the LOTS avenue, but the effect of the amendment is to render mandatory its disclosure by the agent to the purchaser. Clearly, a growing number of land transactions will be affected by this requirement as the size of the Commission's list increases.

The power to order an assessment of land suspected of being contaminated does not exist in any specific form in current environmental legislation. However, as was noted before, a council may be able to invoke Regulation 12 of the Development Control Regulations to provide further particulars of a development application in the form of a detailed assessment of the extent of contamination.

The Green Paper also notes that local government may be able to require an assessment pursuant to S15 of the new *Public and Environmental Health Act*. This section enables councils to require the owner of premises in an "insanitary condition" to "take action to improve the condition of the premises". However, as the Green Paper observes, this provision virtually begs the question where it is not clear whether a site is actually contaminated. In such circumstances, the prerequisite of a known "insanitary condition" will not be able to be satisfied. Thus, if a site is merely suspected of being contaminated and an assessment is required to establish the actual position, S15 will be of little assistance to a council.

Where a site is known to be contaminated, and where a distinct health risk is involved as a result, S15 could possibly be utilised by a council to direct a remediation program. However, in such a case,

councils may rightly feel reluctant to take on responsibility for this technical and specialist task. Remediation also could be ordered by the Minister of Water Resources under Sections 55 or 56 of the *Water Resources Act, 1990* in order to prevent pollution of water courses. Under this Act, remedial action also may be taken directly by the Minister, who may then recover the costs from the landowner.

Similarly, under very recent amendments to the *Dangerous Substances Act, 1979* (see the *Dangerous Substances (Cost Recovery) Amendment Act, 1991*, which inserts S29a in the principal Act), a government authority (including any local government body) may recover costs and expenses which it has incurred as a result of the escape of a dangerous substance onto or into land or water, or into the air. Whilst the term "escape" might be interpreted as extending to the creation of land contamination over

a lengthy period of time through the steady deposit of dangerous substances, the legislation is directed primarily at specific "incidents" in the nature of emergencies - such as the Garden Island situation in Melbourne in 1991, when a series of chemical containers caught fire and exploded. Nevertheless, this Act, like the *Water Resources Act*, envisages that some remedial action may be directed by government authorities, or taken independently in order to avert a serious danger to public health (with consequential cost recovery by the relevant authority from the parties responsible).

The need to formalise duties with respect to the notification, assessment and remediation of contaminated land, so as to provide a clear and comprehensive approach to the land contamination problem, and also to ensure that the relevant powers are wielded by the most appropriately qualified bodies, provides the strongest justification for the State Government's proposed legislative approach. This approach will now be outlined, particularly with reference to the potential ramifications for local government.

The proposed South Australian Legislative approach to Contaminated Land

The Green Paper issued in September 1991 outlines a detailed and comprehensive system for dealing with the problem of land contamination. Where issues are particularly controversial or complex, it considers options rather than presents a single proposal. If its proposals are adopted, local government will be relieved to a large extent of any responsibility for supervising the assessment and remediation of contaminated sites. But, on the other hand, new responsibilities will attach to local government authorities particularly in relation to the identification of sites. Also, potential liability may attach to councils in their capacity as owners or occupiers of contaminated sites under the new scheme.

There are six broad elements of the scheme outlined in the Green Paper as follows:

1. identification of sites;

2. site assessment;

3. a register of sites;

4. remediation;

5. "clearances" of suspected or contaminated land; and

6. provisions for liability and government funding in relation to remediation.

Each of these elements will be outlined below with particular reference to their implications for local government.

1. **Identification of Sites**

There are two strategies proposed for the identification of contaminated sites. One is to impose a freeze on transactions in the nature of the sale or development of any land which has been used in the past or is used presently for certain, prescribed purposes. The types of uses likely to be prescribed by a schedule to the new Act will accord closely to those outlined in the current Planning Advisory Circular.

The purpose of the freeze is to enable an initial assessment of the land to be undertaken. The constraints on the development of such land will cover both applications for planning authorisation and proposals by councils to rezone. In the former case, an assessment will be required automatically of the owner or occupier. In the latter case, councils will be empowered to require an initial assessment by the owner or occupier of the relevant land. Depending on the outcome of the initial assessment of the land, there will be either a "clearance" issued by the EPA and the freeze thus lifted, or if contamination is found to exist, further consequential requirements will apply.

Councils have to acquaint themselves with their responsibilities in this regard. In particular, they will need to take great care not to proceed to process development applications in relation to land which may be contaminated, as this would be likely to place them in breach of the legislation. The likely consequence would be that a civil remedy would be available against the council. It seems unlikely that a criminal penalty would be imposed in such circumstances (see further below, regarding liability and funding).

Councils will also be affected in their capacity as owners or occupiers of relevant land by these particular provisions. Proposals to develop or rezone such land could be affected by the requirement for an initial assessment of the land.

The other strategy for identification of contaminated sites is a program of proactive consultation and information gathering which is to be undertaken by the EPA. In this regard, councils are likely to be the first and most common port of call for the EPA, as it is in councils' records that the most useful evidence of historical land-use is likely to be found. There will be obvious and quite significant resource implications if councils are to be asked to assist in the provision of such information to the EPA on a regular and routine basis.

Questions of civil liability also could arise where councils provide inaccurate or incomplete information to the EPA and health impacts are subsequently experienced by persons on or in the vicinity of the particular site. Of course, councils also may be asked by the EPA to provide information about land which they own or occupy themselves, as a precursor to further directions by the EPA concerning remediation of such land.

2. The Register of Sites

It is proposed that there should be a Register of Sites, comprising three separate lists, as follows:

- sites undergoing initial assessment;
- chemically contaminated sites; and
- sites certified either as not contaminated or as having been satisfactorily remediated.

The Register would be maintained by the EPA. However, there are several areas of uncertainty in relation to the Register which are identified in the Green Paper, as follows:

- first, whether public access should be allowed to the list of sites undergoing initial assessment, given that the information could affect the commercial value of a property not yet proven to be contaminated (note however that the question of commercial value would be irrelevant in practical terms pending the completion of the initial assessment if a freeze is imposed on any transaction relating to the land);

- second, whether the proposed freeze should apply to commercial transactions (ie, sale, lease etc) as well as development proposals, particularly if the purchaser is financially capable of undertaking any necessary remediation;

- and third, whether the list of chemically contaminated sites should be replaced by a procedure for the placement of a caveat on the title of land determined by the EPA to be contaminated.

The rationale for the third option is rather fragile. The Green Paper identifies the problem of resources required to maintain the proposed list and the risk of legal liability in the event of reliance by other parties upon inaccurate information as the principal reasons for contemplating the caveat option. If the State government is to act seriously to address the problem of land contamination, it might reasonably be expected to commit at least the resources necessary to identify relevant sites and to maintain the proposed Register. It should also be expected to employ personnel with sufficient expertise to ensure that questions of civil liability for negligent misrepresentation can be readily avoided. If this is not the case, there is cause for grave doubt about the seriousness of the government's commitments to its proposed scheme.

It is perhaps a little ironic that councils may face potential civil liability, as indicated before, in relation to failure to provide correct information concerning particular sites to the EPA, yet the State Government might seek to establish a system for registration and clearance of sites which enables the EPA to avoid a similar type of liability should it present inaccurate information. Clearly, the same rules should apply in each context as far as possible.

3. **Site Assessment**

An initial site assessment will be required automatically of any owner or occupier of land when the land is, or has been, the subject of a scheduled use and is proposed to be developed or made the subject of a commercial transaction (eg, sale or lease). In this situation, the initial assessment will be provided directly to the EPA and the role of the relevant local government authority will be minimal. As noted before, the principal burden upon councils in such circumstances is simply to ascertain whether a scheduled use is involved and to not proceed with the processing of a development application in such circumstances. In the case of a proposed rezoning, councils are likely to have greater involvement insofar as the Green Paper envisages that they will be able to require an owner or occupier of scheduled land to undertake an initial assessment.

A residual power is envisaged to enable the EPA to require an assessment of any site suspected of contamination to be provided by the owner or occupier (eg, where its proactive program of site identification reveals new, suspected sites), or to be undertaken by the EPA itself where no convenient owner or occupier can be found.

The initial assessment is to be made available to the EPA and the South Australian Health Commission for a determination as to whether contamination is present at levels sufficient to warrant the preparation of a remediation plan and the undertaking of remedial work. Where such a conclusion is drawn, the site would be entered on the List of Chemically Contaminated Sites (if such a List is in fact established). A right of appeal in relation to such determinations is recommended for aggrieved land holders, but not for third parties dissatisfied by a decision that land is not contaminated. Appeals would be heard by a specialist tribunal.

4. **Remediation**

The EPA will be empowered to require remedial action to be taken by the polluter or an owner or occupier of the site. Remedial action will usually include the preparation of a remediation plan in consultation with both the EPA and the public. Oversight of remedial activities will also be undertaken by the EPA, although once more the dual questions of resources and potential legal

liability have led to the proposition that clearances following remediation might be issued by accredited private auditors rather than the EPA. Where no appropriate polluter, owner or occupier can be found, or where the relevant party fails to comply with EPA directions, the EPA can adopt and implement its own remediation plan.

Given that the costs of remediation can be very substantial (according to the Green Paper, the remediation of relatively low-level contamination may routinely cost $250,000), the criteria applied by the EPA or auditors for remediation of a site will be of considerable relevance to those parties required to undertake remediation. The Green Paper notes that this issue is the subject of a world-wide debate at present. Certainly, the debate has extended to Australia where proposals developed in 1990 by the Australia and New Zealand Environment and Conservation Council (ANZECC) and the National Health and Medical Research Council (NH & MRC) for a uniform approach to the subject of remediation criteria have proved extremely contentious.

Underlying this debate is an issue as to whether to seek to clean-up all contaminated sites to the same absolute standard, or to develop remediation criteria that are specific to each contaminated site. The Green Paper seeks to combine these approaches by proposing an absolute standard for the investigation of sites but allowing site specific criteria to be developed for actual remediation (which may be different from the investigation level). Potential savings in remedial costs are anticipated as a result of this 'combined' approach to remediation.

5. Clearances

Consistent with the combined approach to remediation, it is envisaged that 'conditional' clearances may be issued following remediation, where a site has been cleaned-up to a standard which renders it suitable only for certain uses. Details of such a clearance would be recorded on the List of Sites Cleared. Local government authorities will need to keep themselves informed of any such land within their boundaries. It may be assumed that the legislation will prohibit the undertaking or authorisation of activities which do not conform with the conditions attached to a clearance.

As was noted before, the issue of clearances may not be the responsibility of the EPA, but rather of private auditors.

6. Liability and Funding

This aspect of the Green Paper presents possibly the most contentious, and certainly some of the most complex, of all its proposals. At the same time, it is these provisions upon which the viability of the entire scheme will ultimately depend.

The scheme is based firmly on the polluter-pays principle, so that wherever possible the party who is directly responsible for the contamination of land will be required to undertake remedial action or to reimburse the EPA for any such action which it takes by itself. In this regard, the Green Paper contemplates the extension of liability to the directors and managers of companies where they have been in control of the relevant activities. Hence, substantial personal liability could attach to such parties for contamination of land by companies with which they are involved. It is an interesting

question as to whether councillors or senior council staff could also attract liability under such provisions.

In addition to polluters, the Green Paper envisages that liability should also be able to attach to owners or occupiers of contaminated land, but canvasses the possible exemption from liability of such

parties where they can establish that they are "innocent purchasers". Hence, parties who unwittingly allow others to contaminate their land may remain liable, even though they were not aware of the possibility of contamination. Councils who licence waste disposal operations on their own land could easily fall into this category.

In this regard, it should be pointed out that the Green Paper proposes that liability should be strict (that is to say, that it does not depend on establishing an absence of care sufficient to constitute negligence), and will also be joint and several (which means that any relevant party can be sued where several are potentially liable). These provisions are based on American precedents with respect to the Superfund legislation.

The Green Paper also canvasses the possibility that liability could extend to a range of other parties, including generators and transporters of waste and lending institutions. It recommends firmly that the Crown should be bound by the proposed legislation.

Finally, it is important to note that the Green Paper also recommends that a "citizen suit" provision be incorporated in the legislation so as to enable any member of the public to enforce its implementation. Harking back to a point made much earlier in this paper, such a provision could be used, for example, to enable individual citizens to seek injunctive relief against a council on the basis that it has wrongly proceeded to handle a development application for a site which is within the scheduled use category.

Conclusions

The extensive obligations which will arise from the proposed legislative approach to land contamination have direct and extensive ramifications for local government authorities, both in their capacity as planning authorities and as owners or occupiers of land which may be contaminated. This is so despite the fact that much of the administrative responsibility for the proposed scheme will be vested in the new EPA.

There are still considerable responsibilities which may be incurred by councils under the legislation and there is also the potential for liability to arise for councils (or even possibly councillors or council staff) in relation to contaminated sites owned or occupied by councils. These represent serious consequences of the proposed legislative package which will require sober contemplation by all local government authorities.

In the meantime, councils should ensure that they are well acquainted with existing arrangements for dealing with contaminated sites, particularly in relation to the handling of development applications and rezoning proposals, where Planning Practice Advisory Circular No. 17 is highly relevant.

Finally, councils cannot afford to ignore the potential for civil liability to arise where health impacts are experienced by persons exposed to contaminated land, either due to the failure of a council to recognise and act upon a reasonably apparent risk, or to the negligent performance of responsibilities which are to be imposed on councils under the proposed legislative package.