RECENT DEVELOPMENTS

Australian Capital Territory
Contaminated Land: Environment Protection (Amendment) Bill 1998

The ACT Government recently tabled draft contaminated lands management legislation in the Legislative Assembly. The legislation seeks to amend the *Environment Protection Act 1997*, which commenced operation on 1 June 1998[1]. The Act has established an integrated pollution control and environmental protection scheme. The amendment Bill will lie on the table for 3 months to allow for public comment. It has also been referred to the Urban Services Committee of the Assembly for inquiry. The Government intends to reintroduce the Bill, redrafted if necessary, following public comment and the inquiry.

Aims

The Bill aims to:

- give the Environment Management Authority (EMA) power to make orders for assessment and remediation of contaminated land
- provide for independent audits of assessment and remediation implement the polluter-pays principle
- establish a Contaminated Lands Register open to the public

Powers of the Environment Management Authority

The Bill creates a duty for lessees (all land in the ACT is held under leasehold) and occupiers to notify the EMA of any likely contamination on their land. If, as a result of such notification, or otherwise, the EMA believes that land is contaminated, it may make an assessment order directed, in order of priority, to the polluter, the lessee or a "notional lessee". Alternatively, the EMA may itself assess the land. A "notional lessee" includes a person with a defined interest in the land, such as a mortgagee in possession, but does not include financial institutions in defined circumstances. The person subject to an assessment order must also commission an audit of the assessment. If, as a result of the audit, the EMA believes that the land is contaminated, it may make a further order for remediation or may itself remediate the land. An audit is again required following the carrying out of the remediation order.

Public notification

Remediation orders are to be added to categories of EMA documents available for public inspection and are to be included in a Register of Contaminated Lands. They are to be removed from the Register if the EMA is satisfied, following the audit of the remediation, that the land is not likely to cause a risk to human health or of serious or material environmental harm. Persons subject to assessment and remediation orders may also be required to give progress reports to the public and make the final reports available to any person.

Recovery of costs

The Bill provides for recovery of costs by the EMA in relation to assessment and remediation, including recovery in cases of insolvency or where corporations have been wound up or have disposed of land and orders have not been complied with. The Bill also establishes a right for persons subject to orders, who were not responsible for the contamination, to take action to

[1] The features of the Act were described in "Recent Developments" (1998) 1 & 2 AELN 23

recover costs from those who were responsible.

Review rights
The Bill provides that certain decisions of the EMA, such as making orders or refusing to remove entries from the Register, are reviewable in the ACT Administrative Appeals Tribunal.

Comparison with NSW legislation
The Bill is broadly based on the recently enacted NSW legislation, the *Contaminated Lands Management Act 1997*[2]. However, the Bill does not go as far as the NSW legislation in such areas as:

- imposing a duty on the EMA to respond to information from the community and to minimise the risk of harm through education and public awareness activities
- addressing possible conflicts of interest for auditors
- the comprehensiveness of the Register
- imposing liability on government agencies for contamination arising from past authorised activities, such as sheep dipping[3]
- third party enforcement

The future of the Bill
The period for public comment will soon close and the Urban Services Committee will shortly hold a public hearing on the Bill. It is anticipated that the Committee will report to the Assembly before the end of the year and that legislation for the management of contaminated lands in the ACT should finally be in place by the end of the year.

Rosemary Budavari
Solicitor, Environmental Defender's Office (ACT).

Water Resources Bill 1998 (ACT) - An update

The Water Resources Bill 1998 was introduced into the ACT Legislative Assembly in August. The ACT Government sees it as an important element of the effort to meet its targets for Council of Australian Governments' (COAG) waters reforms. The Bill is currently before the Standing Committee for Urban Services. The Committee is considering the Bill and amendments proposed by both the Government and the Greens. It is expected that the Committee will report to the Assembly before the end of the year.

Objects
The objects of the Bill are:
(a) to ensure that the use and management of the water resources of the Territory sustain the physical, economic and social well being of the people of the Territory while protecting the ecosystems that depend on those resources;
(b) to protect waterways and aquifers from damage and, where practicable, to reverse damage that has already occurred; and
(c) to ensure that the water resources are able to meet the reasonably foreseeable demands of future generations.

Crown rights to water
The Bill establishes that the right to control the Territory's water, other than certain groundwater, is vested in the

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[2] The Act was described in "Recent Developments" in (1997) 4 AELN 5

[3] Sheep dipping and landfills are recognised by the ACT Commissioner for the Environment as the major sources of contamination of land in his State of the Environment Report 1997.

ACT Government and exercisable by the Minister. Groundwater rights on land leased prior to commencement of the Bill will remain with the lessee. New leases and renewed leases will reserve the water rights to the ACT. It is understood that the ACT Government is currently examining the potential to manage water on leased land through lease covenants or separate conservation agreements.

Environmental flow guidelines
The Bill provides for environmental flow guidelines which will be used to determine the environmental flow necessary to ensure that a waterway or aquifer can sustain aquatic ecosystems. The guidelines will be disallowable instruments. The Government has prepared draft environmental flow guidelines for public comment.

Water resources management plan
The Bill requires that the water management plan be prepared by the Environment Management Authority (EMA). The management plan must include environmental flow requirements for individual waterways and aquifers in the Territory, or parts thereof. It must detail the proposed water allocations for the next ten years and provide a breakdown of allocation use e.g. urban water supply, industry or other use. It must also include any action to be by the EMA to manage the water resources of the Territory.

The EMA must make a draft management plan available for public comment and consider whether it is appropriate to revise the plan in accordance with public comment. The Plan is then submitted to the Minister for approval, but as a disallowable instrument will also be considered by the Legislative Assembly.

Allocation and licensing of water
The Bill establishes a system of water allocations and water licences. Allocations provide a general right to take water under the control of the ACT Government. Allocations will only be made where provision for the allocation exists in the Water Resource Management Plan and it is environmentally sound to do so. An allocation could be for a particular volume or rate of flow of water to be taken from some point in the ACT downstream to the mouth of the Murray River. The amount of water which could be taken under an allocation would be less downstream from the ACT due to losses to evaporation and percolation into streambeds.

An allocation is a right to certain water and can be traded as an asset. The Bill provides for the reasonably open transfer of allocations between individuals whether in the ACT or not. Approval by the EMA is required before an allocation is transferred so that the ACT can keep track of who possesses its allocations.

In most cases, a licence to take water is required before water can be physically taken at a particular place within the ACT. This is intended to ensure that taking water at a particular point does not interfere with environmental flows or cause environmental damage and that the applicant has a satisfactory environmental record. This Bill includes a number of exceptions to this rule for lower volume uses considered incidental to ownership of land adjacent to a waterway or otherwise in the public interest e.g. drinking water for stock or use in a bushfire.

Allocations can be reduced by the EMA if harm is occurring to ACT

water resources through mechanisms such as climatic change or recognition that environmental flows are not adequate. Such reductions are permanent. Licences to take water will also be reduced by the amount of water by which an allocation has been reduced. The Minister can also restrict the right to take water during shortages caused by drought or other temporary conditions.

Nicola Davies
Director, Conservation Council of the South-East Region and Canberra

New South Wales

Contaminated Land Management Act 1997

This Act, which has been discussed in previous issues, with the exceptions of parts 1, 4, 8 and 10 and other sections which commenced on 1 June, commenced operation on 1 September 1998.

Two key features of the Act are the concept of "significant risk of harm" from contaminated land and the duty to report such sites to the EPA. The EPA has released draft guidelines which readers can obtain directly from the EPA.

Also the EPA has published a list of site auditors accredited under the Act, which is available via the EPA's home page (www.epa.gov.au/clm/auditors.html).

Contaminated Land Management Regulations 1998

These regulations also commenced operation on 1 September 1998. The regulations prescribe certain matters necessary for the proper functioning of the Act, such as the levels of fees, the matters to be included in auditor's annual returns, and they detail the usual transitional provisions.

State Environmental Planning Policy No 55-

SEPP 55 is a crucial component of the new regime relating to contaminated land. It seeks to facilitate the remediation of contaminated sites and provide appropriate mechanisms to reduce risks of harm to the environment and the community.

Having commenced on 1 September 1998, SEPP 55 should bring some overdue certainty to the issue of what type of remediation requires development consent. Previously, provisions in SEPP 4 arguably allowed some remediation, but this was resisted by many consent authorities and there was always the uncertainty of how these provisions applied where the remediation was otherwise designated development.

Despite what other environmental planning instruments say, SEPP 55 allows a person to carry out remediation work. For category 1 remediation works, development consent is required. If the site is a "remediation site" under the Contaminated Land Management Act, the development is State Significant Development and the Minister is the consent authority. Category 2 remediation works do not require consent, but the consent authority must be notified of certain matters prior to it commencing.

Planning authorities and consent authorities must consider contamination issues in rezoning matters and in assessing and determining development applications. For certain risky sites, a preliminary investigation (or a more detailed investigation) will be required before consent can be granted.

Managing Land Contamination: Planning Guidelines SEPP 55 Remediation of Land