

RECENT DEVELOPMENTS

Western Australia

1. CONTAMINATED SITES BILL 2000

For most of the 1990's, the Western Australian Department of Environmental Protection (*DEP*) has been discussing how to assess and manage contaminated sites, including contaminated groundwater, in Western Australia. A public position paper was released in May 1997, followed by draft instructions for legislation in late 1998. Finally, in June 2000, the DEP released the Contaminated Sites Bill 2000.

Under the Bill, a site will be contaminated if there is a substance present in, on, or under the site, at a concentration that presents, or potentially presents, a risk of harm to human health or any environmental value.

Reporting and classification of contaminated sites

Any person may report a contaminated site to the Chief Executive Officer (CEO) of the DEP. However, owners and occupiers of contaminated sites and persons who have caused or contributed to the contamination, or suspect they have caused or contributed to the contamination, must report contaminated sites to the CEO.

Once reported, sites will be classified by the CEO under one of five classifications:

If the report provides no ground to indicate possible contamination, the site will be classified as *report not substantiated*.

If there are grounds to indicate possible contamination, the site will be classified as *possibly contaminated – investigation required*.

If the site is found not to be contaminated after investigation, it will be classified as *not contaminated – unrestricted use*.

If the land is contaminated but is suitable for restricted use, it will be classified as *contaminated – restricted use*.

If the site is contaminated to the extent that it requires remediation it will be classified as *contaminated – remediation required*. A memorial will also be lodged on the certificate(s) of title for the site.

Once a contaminated site has been remediated and is suitable for all uses it will be classified as *decontaminated*.

The Bill establishes a contaminated sites database, to be maintained by the CEO. The database will also contain information on contaminated underground water plumes, reports, certificates and notices given under the Act, management plans, memorials lodged on titles, disclosure statements, exemption certificates and written disclosures.

Database information will be available to the public, landowners, occupiers, public authorities and "interested persons", depending on the classification of the site.

Notices

The Bill proposes three types of notice that may be issued in relation to land: investigation, clean-up and hazard abatement.

Investigation notices specify action to be taken to investigate, monitor and assess the site and may only be issued where the CEO has a reasonable belief that a site is contaminated and appropriate action is not being taken. An investigation notice may require the preparation of a management plan.

A clean-up notice sets out the action to be taken to remediate a site and may be issued for *contaminated – remediation required* sites.

A hazard abatement notice is issued, if in the opinion of the CEO, there is a contaminated site with an immediate and serious risk to human health or any environmental value. A hazard abatement notice will set out the action to be taken to immediately control or reduce the risk of harm to human health or any environmental value.

All notices are binding and a person who fails to comply with a notice commits an offence. Subsequent landowners are also bound by notices. Mortgagees in possession are bound by hazard abatement notices and, after 45 days, all other notices issued in relation to a contaminated site.

Liability for remediation

Persons who may be held responsible for remediation under the Bill are as follows:

- (a) the person who caused or contributed to the contamination;
- (b) the person who caused or contributed to contamination before the commencement of the Act by an unlawful act;
- (c) the landowner, if a person who caused or contributed to the contamination is not responsible, cannot be found or is insolvent;
- (d) in the case of an insolvent body corporate who is the polluter, the directors of the corporation prior to its insolvency, or its related bodies corporate; or
- (e) in certain circumstances, the State.

A person who is responsible for remediation may transfer that responsibility to another with that other person's written agreement. However, the agreement must be approved by the CEO of the DEP, who must be given a statement that the transferor believes the transferee has sufficient assets to carry out the remediation and specifying the grounds on which that belief is based. The transfer may be cancelled within 45 days if the CEO is of the opinion that the transferee has insufficient assets to carry out the remediation.

Memorials

The Bill provides for a memorial to be lodged in respect of any land for which a notice has been issued or which is classified as *contaminated – remediation required* or *contaminated – restricted use*. A memorial may specify that land cannot be transferred, subdivided, amalgamated or developed without the written consent of the CEO. A memorial is to be withdrawn when land is classified as *decontaminated* or a notice is cancelled.

Certificates of Audit and Disclosure Statements

Certificates of contamination audit are the Government's site clearance mechanism. Certificates of contamination audit may only be issued for sites classified as *not contaminated – restricted use*, *contaminated – restricted use*, *contaminated – remediation required* and *decontaminated*.

The Bill also proposes a mechanism for existing landowners to report contamination on their land for which they are not responsible. Owners have 2 years from the commencement of the Act to make a disclosure statement in relation to their land. Following receipt of the statement, the CEO may issue an exemption certificate, exempting the owner from responsibility for remediation of contaminated sites. The CEO must issue an exemption certificate if the land was contaminated before the owner held title and, at the time of purchase, the owner did not know or suspect that the land was contaminated.

Part 8 of the Bill establishes an auditor accreditation scheme to enable the issue of contamination audit certificates. Auditors are intended to be independent third party reviewers of investigations and clean ups. The CEO is to accredit persons as contaminated sites auditors. Accreditation is for 2 years unless cancelled or suspended.

Appeals

Appeals against the decisions of the CEO made under the Act are to the Minister for the Environment, consistent with the current procedure under the *Environment Protection Act 1986*.

Guidelines

Soon after the release of the Contaminated Sites Bill, the DEP also released some of the administrative guidelines to be used in the implementation of the Act. The guidelines address matters such as sampling programs, obtaining certificates of contamination audit and disclosure statements and potentially contaminating activities, industries and land uses. The draft guidelines are open for public comment until the end of October.

NELA Submission

The NELA WA Division has prepared a submission on the Bill. A copy of the submission can be downloaded from the NELA website. Copies of the Bill and the draft guidelines are available on the DEP website (www.environ.wa.gov.au)

2. ENVIRONMENTAL PROTECTION AMENDMENT BILL 2000

In late July, the DEP also released the much awaited amendments to the *Environmental Protection Act 1986*. The NELA WA Division has also commented on the draft Bill. The submission can be found on the NELA website.

Environmental Harm

The Bill introduces the concept of “environmental harm” and the new offences of causing material environmental harm and serious environmental harm.

“Environmental harm” means:

- (a) removal or destruction of indigenous aquatic or terrestrial habitat;
- (b) contamination of biota;
- (c) alteration of the environment to the detriment or degradation of the environment, an ecosystem health condition or beneficial use,

but it does not include pollution, which is separately defined as the direct or indirect alteration of the environment as a result of a discharge or emission of waste, noise or odour. These new definitions overcome the restrictions placed on the concept of “pollution” in the *Palos Verdes* case in the early ‘90s which gave the phrase “pollution” its commonly understood meaning of physically impure or filthy. It should therefore be possible, once the amendments are operative, to control activities such as unauthorised land clearing, which would not have previously been captured by the definition of “pollution”.

The offences of material and serious environmental harm are similar to the offences as defined in the South Australian *Environment Protection Act 1993*. Material environmental harm involves some non-trivial or negligible harm to the environment, while serious environmental harm involves harm to the environment that is of a high impact or is irreversible.

Pollution abatement notices are renamed “environmental protection notices” under the Bill to embrace the broader scope of application of the notices to prevent environmental harm, as well as pollution.

Strategic Environmental Impact Assessment

The Bill also significantly amends Part IV of the *Environmental Protection Act* to allow for the assessment of future proposals that would, in isolation, be required to be referred to the EPA for assessment but which form part of a larger proposal (“strategic proposal”) and so can be assessed long before the individual proposal is actually implemented.

Future proposals which are assessed as strategic proposals will not be required to be referred to the EPA, unless there is new or additional scientific or technical information which justifies a fresh assessment, there is a significant change in the relevant environmental factors or there is “some other good reason” for requiring the proposal to be assessed.

There is also a significant number of other amendments to Part IV of the Act to reflect the current practice of the EPA and the Environment Minister in dealing with environmental impact assessments.

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