

prensa update

March 2015

Making Sense of Mandatory Reporting of Site Contamination

For asset owners or managers with properties in different states of Australia, it is important to remain up to date with mandatory reporting obligations in the various jurisdictions. In recent years a number of states have adopted the mandatory reporting of contaminated land. Some states have changed their trigger levels since the original introduction of these requirements. This update is aimed at consolidating the current requirements and clarifies some misunderstandings regarding these obligations.

It should be remembered that all states have mandatory reporting of pollution (i.e. a significant fuel or chemical spill that impacts a public roadway or waterway) and releases into the environment which are separate from the notification requirements associated with owning or occupying contaminated land. Some states also have mandatory reporting of underground petroleum storage systems or the decommissioning of such systems.

The obligations applicable to the mandatory reporting of site contamination for each state and territory are summarised below.

New South Wales Requirements

Section 60 of the Contaminated Land Management Act 1997 (CLMA 1997) imposes the requirement for mandatory reporting of contaminated sites to NSW EPA. NSW EPA published Guidelines on the duty to report contamination in June 2009, which came into effect on 1st July 2009.

The key requirements of these Guidelines include:

- The obligation to report applies where the owner of the land or the polluter is “aware of the contamination”, or “should reasonably have become aware of the contamination” by reason of, for example, their resources or expertise available to them.
- The duty to notify applies to the polluter or the owner of the land as soon as reasonably practicable after the person becomes aware.
- The notification triggers defined in the Guidelines include the health investigation levels (HILs) and health screening levels defined in the National Environment Protection (Assessment of Site Contamination) Measure (NEPM) 1999 (NEPC 2013), which was revised in 2013 and came into effect on 16th May 2013.
- The notification triggers for groundwater are provided in Appendix A of the Guidelines.

The current legislation provides for owners to enter into a voluntary management proposal with NSW EPA or where the risks are greater NSW EPA may impose Preliminary Investigation Orders, Management Orders or Maintenance Orders.

The NSW Guidelines are currently under review, with a draft version of the updated Guidelines released for comment in July 2014, which references the updated NEPM 1999 Guidelines (NEPC 2013) in relation to the trigger levels for soil and groundwater. These draft Guidelines also include notification triggers relating to soil vapour and asbestos in soil and once finalised later in 2015, will revoke the 2009 Guidelines.



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Victorian Requirements

In Victoria the obligation of mandatory reporting of contaminated land is limited to auditors appointed under the Environment Protection Act 1970. This requirement is the same in all states where the Statutory Environmental Audit or Third Party Reviewer system is in place (VIC, NSW, WA, SA, ACT, QLD).

An EPA appointed environmental auditor may be engaged by any individual or organisation from private or public sectors. Where an auditor is appointed they must notify EPA with 7 days of engagement to conduct an environmental audit, or as soon as practicable after they become aware of an imminent environmental hazard during the course of an environmental audit. An imminent environmental hazard is any situation that requires immediate attention to prevent a state of danger to human beings or the environment.

No mandatory reporting obligations currently exist for owners of contaminated land under the Victorian Environment Protection Act 1970.

Queensland Requirements

Sections 320 to 320G of the Environmental Protection Act 1994 detail the obligations relating to the duty to notify of environmental harm.

A person has a duty to notify where while carrying out an activity (the primary activity) becomes aware that an event has happened that causes or threatens serious or material environmental harm (a notifiable event) because of the person's or someone else's act or omission in carrying out the primary activity, or another activity being carried out in association with the primary activity.

The Environmental Protection Act 1994 defines serious environmental harm as being (amongst other things) harm requiring greater than \$50,000 to remediate while material harm has a \$5,000 threshold.

A person who is an employee/contractor who causes or becomes aware of a notifiable event, they must notify their employer within 24 hours of becoming aware of the event, or where the employer is not available, the administering authority (DEHP and/or local council) in writing within 24 hours of becoming aware of the event.

Once notified, the employer must then notify the authority in writing within 24 hours of becoming aware of the event and notify the owners of occupiers of the affected land as soon as reasonably practicable after becoming aware of the event.

South Australian Requirements

On 1st July 2009 the SA Environment Protection Act 1993 was amended by the Environment Protection (Site Contamination) Amendment Act 2007, which extended the mandatory notification requirements to owners, occupiers, site contamination auditors and site contamination consultants who become aware of non trivial site contamination that affects or threatens groundwater.

This amendment was introduced in line with South Australia's focus on protecting a diminishing natural resource and the EPA has published guidelines on the determination of whether actual or potential harm to groundwater has occurred.

In South Australia the notification must be made by one of the owner, occupier, auditor or site contamination consultant as soon as reasonably practicable after becoming aware of the contamination.

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Western Australian Requirements

The Contaminated Sites Act 2003 requires that land owners, occupiers and people known or suspected to have polluted are to notify contaminated land to the authority (Department of Environment Regulation or DER).

Where the contamination is suspected this must be done as soon as is reasonably practicable after the contamination occurs. For known contamination this must occur with 21 days.

DER provides Guidelines for Reporting of a Known or Suspected Contaminated Site (2006) and defines Known Contaminated Sites as those where contamination poses, or has the potential to pose, a risk of harm to human health, the environment or any environmental value.

The guidelines state that where contaminant concentrations exist above documented assessment levels AND there is a known pathway AND a known receptor, the site is contaminated for the purposes of reporting.

It is noted that the Contaminated Sites Act and associated guidelines are currently being reviewed and updated by DER to reflect changes to the NEPM guidelines and current industry practice. The updated requirements for notifying DER will be described in the new guideline, *Identification, reporting and classification of contaminated sites in Western Australia*, which is currently being developed by DER.



Tasmania

Section 74B of Tasmania's Environmental Management and Pollution Control Act 1994 (EMPCA) states that when a person knows or should reasonably believe that the land they own or occupy is or is likely to be a contaminated site, they must notify the Director of EPA Tasmania. Notification must occur with 24 hours of knowing or believing the land is contaminated.

The EMPCA defines a contaminated site as:

- land (or groundwater) that contains a pollutant at concentrations above naturally occurring levels, which is (or is likely to be) causing serious or material environmental harm or environmental nuisance; or
- land that contains a pollutant at concentrations above naturally occurring levels, which is likely to cause serious or material environmental harm or environmental nuisance in the future is not managed appropriately.

The EMPCA defines serious environmental harm as being harm requiring greater than \$50,000 to remediate while material harm has a \$5,000 threshold.

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ACT Requirements

In the Australian Capital Territory, the lessee or occupier of land must notify EPA in writing (under Section 23A of the Environment Protection Act 1997) as soon as practicable after becoming aware that land is contaminated such that there is, or likely to be, a significant risk of harm to human health. The same obligation exists where the contamination poses a serious or material risk of environmental harm.

The ACT Contaminated Sites Environment Protection Policy, November 2009 defines what constitutes serious and material harm and includes examples. These definitions are consistent with other states where material environmental harm would result if the remediation costs exceed \$5,000 and significant harm would result if remediation costs exceed \$50,000.

Northern Territory

Section 14 of the Northern Territory Waste Management & Pollution Control Act 2009 details a duty to report incidents causing or threatening to cause pollution. There are, however, no specific duties dealing with the reporting of contaminated land.

Implications of Mandatory Reporting

Most land owners are generally aware of these reporting obligations, however, asset owners and managers of national portfolios may be more familiar with reporting obligations which apply in one state and therefore fail to observe obligations for properties located in other jurisdictions. Where obligations have changed (such as in QLD), or will change in the near future (NSW and WA) asset owners and managers need to review the status of what information they have (or ought to have) on their properties to ensure they are compliant with the most recent guidelines. Consideration needs to be given to mandatory reporting where land contamination is routinely assessed such as in due diligence audits and asset sales.



For more information on this topic please contact William Meszaros (0488 555 461).

To receive a tabulated summary of reporting obligations across jurisdictions please email admin@prensa.com.au.