

Contaminated sites compliance statement

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1. Regulation of contaminated land

In New South Wales, the *Contaminated Land Management Act 1997* (CLM Act) enables the Environment Protection Authority (EPA) to regulate land that is significantly contaminated and poses a risk to human health and the environment.

Under the CLM Act, the EPA can declare land to be significantly contaminated and order a person or persons responsible to take investigative or remediation actions, or approve a voluntary management proposal for the management of the significantly contaminated land. The CLM Act also establishes a hierarchy of responsibility for managing contaminated land.

Other contaminated sites not regulated by the EPA are managed through the land-use planning process under the *Environmental Planning and Assessment Act 1979*.

The EPA manages a range of programs to facilitate the regulation of contaminated sites. The EPA administers the NSW site auditor scheme, makes or approves guidelines for use in the assessment and remediation of contaminated sites, and administers the public record of regulated sites under the CLM Act.

The EPA has also been awarded a major grant from the Environmental Trust to provide financial assistance for the remediation of significant contamination as well as to improve the capacity of regional councils for the handling and management of contaminated sites.

2. Compliance and escalation

2.1 Compliance policy

The EPA's [Compliance Policy](#) summarises the EPA's general approach to compliance and enforcement of legislation that it administers.

It describes the EPA's approach to regulation and compliance, the EPA's response to environmental issues and non-compliance, and the EPA's regulatory performance. The Policy guides EPA decision-making to ensure that its compliance activities and actions are consistent, fair and credible.

2.2 Contaminated sites compliance statement

The EPA's Contaminated Sites Compliance Statement details the approach taken to compliance and enforcement of the CLM Act and Contaminated Land Management Regulation 2013.

The overall objective of the EPA's compliance activities in relation to contaminated land is to improve environmental and human health outcomes. Consistent with the EPA's Compliance Policy, a risk-based approach and an escalated regulatory response to compliance is taken towards the regulation of contaminated land.

Figure 1 shows the relationship between the risk of harm to human health and the environment, and the compliance behaviour of the person/s responsible for the contamination.

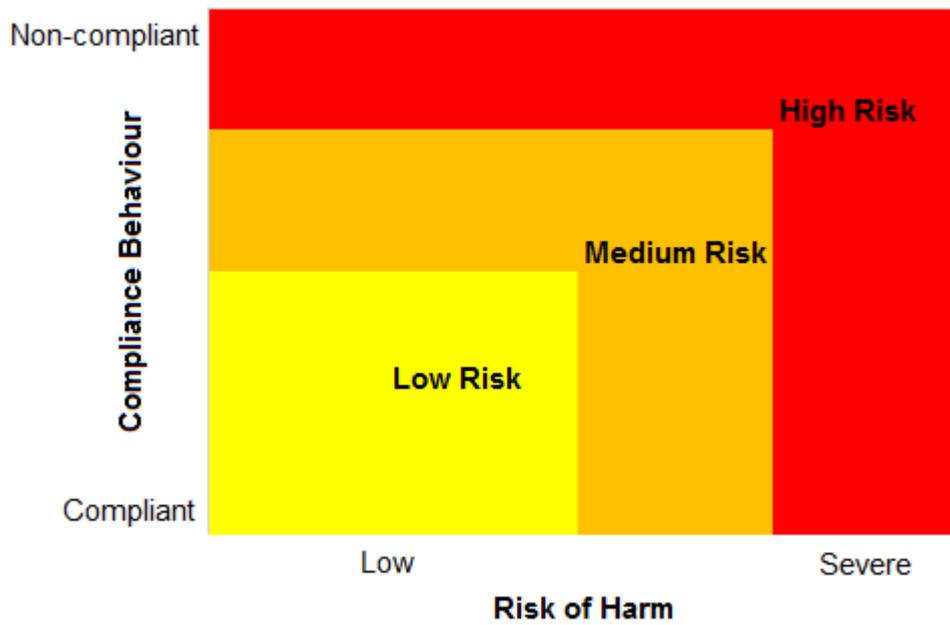


Figure 1: The EPA's risk-based approach

2.3 Appropriate and escalated compliance response

The EPA uses a range of tools to ensure compliance with the CLM Act. **Figure 2** shows how the EPA's regulatory response to non-compliance escalates from issuing advisory letters and formal warnings; official cautions; notices, directions and orders; penalty notices; enforceable undertakings and initiating prosecutions.



Figure 2: The EPA's escalating regulatory response to non-compliance

When identifying the appropriate compliance tools and escalating its response the EPA considers many of the following factors:

- the enforcement measures necessary to ensure compliance and bring about the best human health and environmental outcome
- the seriousness of the contamination, based on its actual or potential impacts on the environment and the community
- the potential or actual risk of harm to human health and the environment
- voluntary action to mitigate any harm
- failure to notify the EPA of contamination
- failure to comply with EPA requests, directions or statutory notices
- cooperation with the EPA and willingness to commit to appropriate remedial actions
- whether effective measures to address impacts are already in place
- the history of compliance with EPA legislation and the frequency of offences committed
- whether false or misleading statements have been made about the contamination
- culpability, including any mitigating or aggravating circumstances
- public interest and community expectation about the action taken to provide specific or general deterrence.

Section 4 provides further information about the compliance tools the EPA uses to respond to non-compliances.

3. Compliance with statutory instruments

Under the CLM Act the EPA may serve the following written orders on a person directing them to carry out certain activities in relation to significantly contaminated land:

- preliminary investigation order
- management order
- ongoing maintenance order.

The EPA can also approve a voluntary management proposal for the management of significantly contaminated land.

3.1 Preliminary investigation order

A preliminary investigation order enables the EPA to order a person to carry out a preliminary investigation of a site to determine whether the site is contaminated with the substances specified in the order.

Importantly, a preliminary investigation order may be served on a broader range of people than a management order or ongoing maintenance order. A preliminary investigation order may be served on any one or more of the following persons:

- a person who the EPA reasonably suspects may have been responsible for contamination of the land with the specified substance
- an owner of the specified land
- a notional owner of the specified land
- a person who carried on activities on the specified land, but only if the activities either generate or use the specified substance or the substances used may be converted by reacting with each other or by natural processes into the specified substances
- a public authority.

The EPA will order a person to undertake preliminary investigation of a site when a person fails to:

- voluntarily undertake site investigation work in a timely manner, or
- cooperate with the EPA while undertaking site investigation work.

The EPA may also order a person to undertake preliminary investigation of a site where there is community interest in the site, regardless of the cooperation or willingness of the person to undertake the site investigation work. This would provide transparency as the EPA's requirements for the investigations would be documented in the EPA's record of notices.

3.2 Voluntary management proposal

A proponent (including the person responsible for contamination, land owner, future land owner and so on) may provide the EPA with a proposal for voluntary site management of significantly contaminated land.

Where the EPA is satisfied with a voluntary management proposal, the EPA may approve the proposal subject to conditions, with the ability to add further conditions if subsequently required.

Where the approved voluntary management proposal is not complied with, the EPA may withdraw its approval of a proposal and issue a management order.

Where delays in achieving agreed milestones under the proposal are expected to occur, the EPA must be informed in advance of the milestone date.

The EPA will escalate from a voluntary management proposal to a management order where the proponent fails to:

- meet agreed milestones, and
- request an extension from the EPA prior to the milestone date.

3.3 Management order

The EPA may order an appropriate person or a public authority to carry out any action in relation to the management of significantly contaminated land.

The order will clearly outline actions, a schedule of deliverables and outcomes.

If a management milestone is not met, for example a remedial action plan is not received as scheduled, enforcement action will be taken unless an extension has been granted by the EPA.

Where the order includes a remedial technology trial, a clear measure of the success of the technology within a definitive timeframe, for example two years, needs to be specified. Options for more active remediation to be implemented need to be specified where timely outcomes are not achieved through the trial.

Where assessment and/or remediation of contamination is complex and likely to take an extended period of time or where specific tasks are required, staged orders will be used as a more effective means of regulation.

When considering regulatory options for subsequent stages, it is possible to progress regulation of the site management voluntarily through the appropriate person submitting a voluntary management proposal, subject to approval from the EPA.

3.4 Ongoing maintenance order

The EPA may order a person to carry out any ongoing management of the land that is specified in the order including actions such as reporting to the EPA.

Where a site has been subject to a management order, approved voluntary management proposal or a section 35 or 36 notice under the *Environmentally Hazardous Chemicals Act 1985* (NSW) and continued management actions are required on the site, an ongoing maintenance order will be issued. Examples of management actions include maintaining the integrity of a capping system or monitoring of groundwater to ensure the effectiveness of the remediation.

The order will clearly outline actions, a schedule of deliverables and outcomes.

If a maintenance milestone is not met, for example a groundwater monitoring report is not received as scheduled, enforcement action will be taken unless an extension has been granted by the EPA.

3.5 Clean-up notices

The EPA may issue clean-up notices under the *Protection of the Environment Operations Act 1997* (POEO Act) in relation to significantly contaminated land.

A clean-up notice can be issued when the EPA reasonably suspects that a pollution incident has occurred or is occurring or when the release of a pollutant is likely or imminent.

A clean-up notice may direct actions to be taken to prevent, minimise, remove, disperse, destroy or mitigate pollution resulting from or likely to occur from an incident. The notice details the specific clean-up action required and a time frame for completion.

The EPA will issue a clean-up notice where:

- an immediate response to a pollution incident is required in order to prevent contamination from occurring, and
- where clean up actions under statutory orders would be too slow.

3.6 Prevention notices

The EPA may issue prevention notices under the POEO Act in relation to significantly contaminated land.

A prevention notice can be issued when the EPA reasonably suspects that an activity has been or is being carried out in an 'environmentally unsatisfactory manner'.

Notices specify preventive actions that must be taken to improve environmental performance such as installing or repairing controls to prevent water pollution. A prevention notice may order that plant or equipment is not operated until the EPA is satisfied appropriate controls are in place.

The EPA will issue a prevention notice where:

- the person or business being regulated needs to take proactive actions in order to prevent contamination from occurring, and
- where preventative actions under statutory orders would be too slow.

3.7 Requests for extensions

Where the person or business being regulated fails to meet a management milestone they must request an extension from the EPA.

The request must be made in writing and the person or business being regulated must outline:

- detailed reasons for the delay
- a revised time period within which the milestone will be achieved
- a statement explaining why enforcement action should not be taken.

The request for an extension must be made 21 days prior to the milestone date.

It should not be assumed that an extension will automatically be granted by the EPA.

3.8 Reasonable timeframe for responses

Where the person or business being regulated has failed to meet their compliance obligations, or where the EPA has requested a response or further information, that person has 21 days to respond after which the EPA will escalate its regulatory response in accordance with this compliance statement.

For example, where a site is subject to a voluntary management proposal and the proponent has failed to meet a remediation milestone, the proponent has 21 days after receiving an advisory letter to provide a written explanation detailing:

- the reason for the delay
- a revised time period
- a statement explaining why the approval of the voluntary management proposal should not be withdrawn and a management order issued.

If the proponent fails to provide the written explanation detailed above within 21 days, the EPA will escalate its regulatory response by issuing a management order.

4. Compliance tools

The EPA has a range of compliance tools available for choosing the most appropriate compliance action and escalating its response. The choice of approaches and compliance tools depends on the issue and context.

4.1 Advisory letters

Advisory letters will be issued where it is considered possible that a non-compliance or breach with a statutory instrument or statutory obligation has occurred to remind the person or business being regulated of their compliance responsibilities.

The EPA will issue an advisory letter when:

- a person or business being regulated is failing to comply with a statutory instrument, or
- an inspection/audit of a site indicates that the person or business being regulated is not complying.

4.2 Formal warnings

Formal warnings will be used to achieve prompt voluntary compliance with obligations under the CLM Act. In these cases, the seriousness of the non-compliance is usually at the lower end of the scale so that further enforcement action is not considered necessary.

The EPA will issue a formal warning when:

- an advisory letter has been issued, and
- the person or business being regulated continues to not comply with a statutory instrument.

4.3 Official cautions

The EPA will issue an official caution if the offence is one for which a penalty notice may be issued. A caution is used rather than a penalty notice if the issuing officer has reasonable grounds to believe that an offence has been committed and believes a caution is appropriate in the circumstances. This might be in situations where the offence is minor in nature or was unknowingly or unintentionally committed.

The EPA will issue an official caution where a penalty notice may be issued for an offence and the issuing officer considers a caution is appropriate.

4.4 Penalty notices

Penalty notices may be issued for minor breaches when the facts appear obvious and a penalty notice is likely to be a viable deterrent. It allows the person served with the notice to pay a fine rather than have the alleged offence dealt with in court. Penalty notices are primarily used to deal with one-off breaches that can be remedied easily.

Penalty notices will be issued for failing to comply with a statutory instrument or statutory obligation under the CLM Act.

Under the amendments to the CLM Act that commenced on 1 January 2015, the EPA can prescribe several different penalties in a penalty notice based on the number of times that an offender has been convicted or for a paid penalty notice for the same offence within a 5-year period.

The CLM Act also now provides for the liability of offenders for continuing offences and the continuing effect of notices, orders and conditions under the CLM Act and the regulations under the Act.

The EPA will issue a penalty notice when:

- the person or business being regulated is not complying with a preliminary investigation order, management order or ongoing maintenance order
- a person has failed to notify contaminated land in accordance with s. 60 of the CLM Act
- a person has provided false or misleading information.

4.5 Enforceable undertakings

An enforceable undertaking¹ is an alternative to administrative action where there has been a serious breach of legislation.

Under the CLM Act, the EPA is able to accept a written undertaking by a person to take action to deal with an actual or potential breach of the Act. This gives the EPA a legislative basis for negotiating environmental improvements, which are enforceable through the NSW Land and Environment Court.

The EPA will apply to the Land and Environment Court for an order listed below if the EPA considers that the person who gave the undertaking has breached any of its terms.

The Court may make any of the following orders:

- an order directing the person to comply with that term of the undertaking
- an order directing the person to pay to the State an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach
- any order that the Court thinks appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach
- an order suspending or revoking any environment protection licence under the POEO Act held by the person
- an order requiring the person to prevent, control, abate or mitigate any actual or likely harm to the environment caused by the breach
- an order requiring the person to make good any actual or likely harm to the environment caused by the breach
- any other order the Court considers appropriate.

The EPA may seek an enforceable undertaking from a person where:

- the person or business being regulated is not complying with a statutory instrument, and
- an advisory letter/formal warning/official caution has been issued and the person or business being regulated has failed to respond, or
- the person or business being regulated has a history of failing to comply with statutory instruments.

4.6 Prosecutions

For serious breaches or repeat offences, prosecution may be the most appropriate option. In these situations the EPA will follow its [Prosecution Guidelines](#).

The EPA may seek to prosecute a person or business being regulated where:

- the EPA has escalated its response to a non-compliance with a statutory instrument, and
- the person or business being regulated has failed to adequately respond, or
- there is a serious breach of the CLM Act.

¹ An enforceable undertaking is both a statutory instrument and a compliance action under the CLM Act.

5. Compliance monitoring

5.1 Inspections, audits and campaigns

The EPA undertakes site inspections, compliance audits and campaigns as a means of monitoring compliance and raising awareness about the EPA's requirements.

The EPA generally gives notification of an inspection/audit via email or phone prior to the inspection/audit. The EPA also has the power to carry out unannounced inspections/audits.

During the inspection/audit the EPA will provide information on statutory obligations where appropriate and if a non-compliance is identified the EPA may advise of the non-compliance on site.

The EPA follows up with formal notification of any non-compliance and specifies the corrective actions required and the time frames to comply. A follow up inspection/audit may be carried out to determine compliance.

5.2 Investigations

The EPA undertakes investigations to assess detected or reported contamination or non-compliance with the CLM Act to determine the priority for further compliance and enforcement action.

During an investigation authorised officers gather evidence of the incident or non-compliance in order to establish whether an offence has occurred, the severity of the offence, and the identity of those who may be responsible.

This evidence may take the form of videos, photographs, samples and physical evidence, witness statements and records of interview, consistent with legislative powers and EPA policies such as the [EPA Code of Ethics and Conduct](#).