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CONTAMINATED SITES LAW & POLICY

DIRECTORY



JURISDICTION	QUEENSLAND
ALL SECTIONS	PRE-RELEASE DRAFT

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JURISDICTION	QUEENSLAND
SECTION 1	Introduction
LEGISLATION	<i>Environmental Protection Act 1994</i>
DATE OF CURRENCY	PRE-RELEASE DRAFT

1.1 BACKGROUND INFORMATION

1.1.1 Number and Nature of Contaminated Sites

- In Queensland, contaminated land is essentially an historical problem resulting from poor environmental management and industrial waste disposal procedures.¹
- Activities such as service stations, cattle dips, tanneries, wood treatment sites, landfills, fuel storage and refuse tips have been identified as likely to cause land contamination in Queensland.² Various pollutants that are connected with these activities, such as arsenic, DDT and oil-based substances have polluted a number of sites and leached into waters below the surface, leaving certain sites unsuitable for a wide range of uses.
- In 2005-2006 the EPA approved 85 site management plans and issued 173 suitability statements.³
- Polluted sites are often discovered during the planning process when land is proposed to be changed from an industrial to a residential use. As in other jurisdictions, the majority of contaminated sites that require remediation pass through the land use planning process. In 2005-2006 the EPA issued 116 information requests under the *Integrated Planning Act* and set conditions through 568 concurrence agency responses under the *Integrated Planning Act*.⁴

1.1.2 Clean-ups Undertaken

- Between 1998 and 2003, the EPA reviewed approximately 1530 development applications for contaminated or potentially contaminated land. An estimated number of 300 (20%) of these development applications required some form of contaminated land investigation and/or remediation work.⁵
- Between 1998 and 2003, 560 sites across the State were removed from the Environmental Management Register (EMR) as a result of investigation or remediation works.⁶
- Between 1998 and 2003, permits were granted for the disposal of 408 500 m³ of contaminated soil to landfills.⁷

¹ *Environmental Protection Agency, Annual Report 2005-06, (2006) 66.*

² *Environmental Protection Agency, Annual Report 2002-03, (2003), 152.*

³ *Environmental Protection Agency, Annual Report 2005-06, (2006) 67.*

⁴ *Ibid.*

⁵ *Queensland Government, State of the Environment Report Queensland 2003, (2003), [4.32].*

⁶ *Ibid.*

⁷ *Ibid.*

1.1.3 Examples of Contaminated Sites in Queensland

Historical Contamination

*Newstead Gasworks Site*⁸

- The site of Newstead Gasworks is a former major industrial facility that manufactured gas from coal between the 1880s and the 1960s.
- Upon ceasing production in the 1960s, the site was contaminated with hydrocarbon tars, cyanide wastes, benzene and other carcinogenic chemicals.
- In 2004 the site was subject to remediation. The successful completion of the \$25-30 million remediation project provides useable land and delivers environmental and economic growth benefits, including an estimated \$1 billion residential and commercial development.

*Darra Works Site: Queensland Cement Limited*⁹

- The Darra Works site of Queensland Cement Limited (QCL) began closure in 1997, after approximately 80 years of operation.
- Upon closure in 1997, the site was contaminated with waste cement kiln dust, hydrocarbon and heavy metal wastes, buried drums of various chemicals and greases, and was on a large landfill area containing various potentially hazardous wastes.
- The site was subject to investigation and remediation. Approximately 1 000 000m³ of cement kiln dust waste with residual cementing properties was removed from the site for storage and re-used as a waste treatment material, for building foundations, and for potential use in treating acid sulfate soil. The area is now occupied with industrial and residential precincts.

Ross River Site

- The Ross River site in Townsville is a former cannery, which operated for over 20 years. Upon ceasing production, the site was contaminated with high concentrations of zinc, copper and lead.
- The 4 hectare site was subject to remediation. The contaminated soil was treated in situ by a variety of methods, with 2,700m³ of soil being treated.

Non-Historical Site Contamination

Narangba: Binary Industries Chemical Plant

- In August 2005, significant site contamination and environmental damage occurred as a result of a large fire at the Binary Industries chemical plant in Narangba. During the fire, drums of hazardous chemicals exploded and leached into soils, groundwater and catchments.
- The fire resulted in considerable contamination of the privately owned Binary Industries site as well as land owned by the Queensland Government and Caboolture Shire Council.
- Investigations show a large number of chemicals were stored at the site including chlorpyrifos, 2 4-D, glyphosate, diuron and copper chrome arsenate.¹⁰

⁸ See, *Environment Protection Agency, Annual Report 2003-04, (2004), 86.*

⁹ See, *Queensland Government, State of the Environment Report Queensland 2003, (2003), [4.32].*

¹⁰ *Environmental Protection Agency, Binary Fire Update November 2007, (2007).*

- In January 2007, the EPA announced that cleanup of contamination of the State and local government land was underway. By March 2007, more than 6087 tonnes of soil had been removed off site.¹¹
- The contaminated soil was transported in sealed trucks to a landfill facility for bioremediation. Once the soil had been through the bioremediation process, it was disposed of in a lined landfill or purpose-built mono-cell.¹²
- In March 2007, the EPA was still awaiting a court hearing in relation to its application to the Planning and Environment Court. The application seeks orders requiring the owners of the Binary Industries Chemical Plant to undertake a full cleanup and remediation of the factory site.¹³

1.2 GENERAL APPROACH

- As is the case in most Australian jurisdictions, the identification, assessment and remediation of contaminated land occurs through regulatory requirements (under the *Environmental Protection Act 1994*) and through the land-use planning process (under the *Integrated Planning Act 1997*). The approach in Queensland, however, contains a somewhat distinctive feature in that a referral process exists under the *Integrated Planning Act* whereby proposals to develop contaminated sites involving “sensitive” uses must be referred to the EPA as a “concurrence” agency. In this respect, this provides the EPA with an overriding power in the development application process in the land-use planning system.

1.3 SUMMARY OF LEGISLATION

1.3.1 Specific Legislation

- Identification, assessment and remediation of contaminated sites in Queensland occurs through the contaminated sites provisions of the *Environmental Protection Act 1994*. These provisions are particularised through the Environmental Protection Regulations 1998.

1.3.2 Other Legislation

- The operation of the contaminated land provisions of the *Environmental Protection Act* is supplemented by the *Integrated Planning Act 1997* and the Integrated Planning Regulations 1998. The latter two pieces of legislation provide the mechanism for the investigation and assessment of contaminated land under the land-use planning system in Queensland.
- As indicated below, the *Mineral Resources Act 1989* and the *Petroleum and Gas (Production and Safety) Act 2004* have a proactive role in reducing the risk of land contamination arising from mining and upstream petroleum operations, respectively.

¹¹ *Environmental Protection Agency*, Binary Remediation Project Weekly Update - 5 March–9 March 2007, (2007).

¹² *Environmental Protection Agency*, Binary Remediation Project Weekly Update - 15 February 2007, (2007).

¹³ *Environmental Protection Agency*, Binary Remediation Project Weekly Update - 5 March–9 March 2007, (2007).

1.4 ADMINISTRATIVE ARRANGEMENTS

- The dedicated contaminated sites provisions of the *Environmental Protection Act* are administered by the Queensland Environmental Protection Agency. To the extent that contaminated sites are identified and remediated through the land-use planning system the various planning authorities making decisions under the *Integrated Planning Act* in conjunction with the EPA, regulate the process.

1.5 DEFINITIONS

1.5.1 Contaminated Site

- “Contaminated land” - land contaminated by a hazardous contaminant (*Schedule 3, Dictionary*).
 - “Hazardous contaminant” – a contaminant, other than unexploded ordnance, that, if improperly treated, stored, disposed of or otherwise managed, is likely to cause serious or material environmental harm because of:
 - its quantity, concentration, acute or chronic toxic effects, carcinogenicity, teratogenicity, mutagenicity, corrosiveness, explosiveness, radioactivity or flammability; or
 - its physical, chemical or infectious characteristics (*Schedule 3, Dictionary*).
 - “A contaminant” can be:
 - A gas, liquid or solid;
 - An odour;
 - An organism (whether alive or dead), including a virus;
 - Energy, including noise, heat, radioactivity and electromagnetic radiation;
 - A combination of contaminants (section 11).
 - As the definition of “hazardous contaminant” refers to “serious or material environmental harm” the definitions of these two terms are relevant.
 - “Material environmental harm” – is environmental harm (but not an environmental nuisance):
 - That is not trivial or negligible in nature, extent of context; or
 - That causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than the threshold amount but less than the maximum amount; or
 - that results in costs of more than the threshold amount but less than the maximum amount being incurred in taking appropriate action to –
 - prevent or minimise the harm; and
 - rehabilitate or restore the environment to its condition before the harm (*section 16(1)*).
- “Maximum amount” means the threshold amount for serious environment harm which is \$5000 or any greater amount prescribed by the Environmental Protection Regulations (section 16(2)).**
- “Serious environmental harm” – is environmental harm (but not an environmental nuisance):

- That causes actual or potential harm to environmental values that is irreversible, of a high impact or widespread; or
- That causes actual or potential harm to environmental values of an area of high conservation value or special significance; or
- That causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than the threshold amount; or
- That results in costs of more than the threshold amount being incurred in taking appropriate action to –
 - prevent or minimise harm; and
 - rehabilitate or restore the environment to its condition before the harm (*section 17(1)*).

“Threshold amount” means \$50,000 or any greater amount prescribed by the Environmental Protection Regulations (Section 17(2)).

1.5.2 Application to Groundwater

- “Land” includes:
 - the airspace above land; and
 - land that is, or is at any time, covered by waters (*Schedule 3, Dictionary*).
- “Waters” means Queensland waters (*Schedule 3, Dictionary*).
- “Queensland Waters” means waters that are:
 - within the limits of the State; or
 - coastal waters of the State (*Acts Interpretation Act 1954*).¹⁴
- Whilst the definition of “Queensland waters” does not specifically refer to groundwater, it does appear that groundwater would be included in the definition.

1.5.3 Application to Naturally Occurring Substances

- The definitions above which collectively define contaminated land do not appear to exclude naturally occurring substances. For example, a naturally occurring virus existing in land with the likelihood of causing serious or material environmental harm would appear to fall within the relevant definition of contaminated land.
- Similarly, naturally occurring but elevated levels of cyanide or arsenic in soil would appear to fall within the definition of “hazardous contaminant” and therefore might lawfully qualify as “contaminated land”.
- “Notifiable activities” (identified in Schedule 2 of the Act as having the potential to contaminate land: see also Summary, Section 2.1.1) include the storage of hazardous mine wastes such as overburden and mining activities that expose faces containing hazardous contaminants. This can lead to contamination by naturally occurring substances.

¹⁴ There appears to be no statutory definition specifying that “waters” includes underground waters.

1.6 SCOPE

1.6.1 Contamination of Derelict Mine Sites

- There is no definitional limitation in the statutory regime under the *Environmental Protection Act* on including contaminated land arising from mining operations. However, the Department of Natural Resources, Mines and Water (DNRMW) is responsible for regulating mining operations including the decommissioning and remediation of mine sites.
- It appears that investigation and remediation of de-commissioned mine sites would occur through the Queensland Government's Abandoned Mine Lands Program.

1.6.2 Historical Contamination – Petroleum Exploration and Production

- Similarly, historically contaminated sites within petroleum exploration and production tenements are potentially captured by the contaminated land provisions of the *Environmental Protection Act*. Although the former Queensland *Petroleum Act* was introduced in 1923, the bulk of activities undertaken under petroleum tenements has occurred relatively recently (approximately the last 25 years). Relatively few production operations have been abandoned as yet so the degree of historical land contamination as a consequence of petroleum operations is relatively small.
- The introduction of the *Petroleum and Gas (Production and Safety) Act 2004*, which replaced the former *Petroleum Act*, has resulted in a division of responsibilities between the Environmental Protection Agency and the DNRMW with the former overseeing rehabilitation of land affected by petroleum operations.
- Again, it is not clear who, if anyone, assumes (or will assume) responsibility for identification, assessment and remediation of historical land contamination arising from petroleum operations in Queensland.

1.6.3 Indenture Acts and other Special Project Legislation

- It always remains open to the Queensland Government to enter into special arrangements with developers to address contaminated sites issues in the context of particular projects.
- Discussions with EPA officers indicate that this is not a course that has been generally adopted in Queensland and that the contaminated sites requirements of the *Environmental Protection Act* are applicable even to major developments.

1.6.4 The Crown

- The *Environmental Protection Act* binds "all persons including the State". On this basis it would appear that all State corporate bodies, statutory authorities and other Crown entities are bound by the Act and may be subject to all notices and other requirements regarding identification, assessment and remediation of contaminated land.

- It should be noted that where the Crown in any of its corporate forms (e.g. a statutory authority) is in ownership or occupation of land it is subject to the notification provisions of section 371 of the Act discussed in detail in Section 2 of this Summary.

REFERENCES

Environmental Protection Agency, Binary Remediation Project Weekly Update - 7 December 2006, (2006).

Environmental Protection Agency, Binary Fire Update November 2006, (2006).

Environmental Protection Agency, Binary Remediation Project Weekly Update - 15 February 2007, (2007),

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JURISDICTION	QUEENSLAND
SECTION 2	Responsibility for Cleanup
LEGISLATION	<i>Environmental Protection Act 1994</i>
DATE OF CURRENCY	PRE-RELEASE DRAFT

OVERVIEW

- There is no obligation on the Queensland EPA to actively or pro-actively identify contaminated sites in the State.
- Broadly speaking, owners or occupiers of land and local governments who become aware that land has been or is currently being used for a “notifiable activity” (specified industrial activities) or is contaminated must notify the EPA. When the Chief Executive of the EPA believes that land is or has been used for a “notifiable activity” or is contaminated he/she will enter it on the Environmental Management Register (EMR).
- Entry of land on to the EMR is pivotal to the operation of the contaminated sites provisions of the *Environmental Protection Act*. It is the presence of land on the EMR that permits the EPA to issue a notice to undertake a site investigation.
- Local governments are expected to notify the EPA when they are aware that land is being or has been used for “notifiable” activities. There is no specific provision under the Act allocating to the EPA or any other government agency responsibility for “orphan sites”.
- Private responsibility for assessing and remediating contaminated land is based on the “polluter pays” principle. On this basis the polluter of a contaminated land site will be primarily responsible for investigation and clean-up. In certain limited circumstances, local governments may be responsible. Otherwise, responsibility falls to the owners (including lessees, licensees and permittees).

2.1 PRELIMINARY IDENTIFICATION

2.1.1 The Registers

- Section 540 of the *Environmental Protection Act* establishes two registers used in relation to the identification, assessment and remediation of contaminated land:
 - Environmental Management Register (EMR); and
 - Contaminated Land Register (CLR).
- Broadly speaking, the Chief Executive of the EPA must enter on to the EMR any land that in the Chief Executive’s (EPA’s) view has been or is being used for a “notifiable activity” (industrial activity specified in Schedule 2 of the Act) or is contaminated (section 374). The EMR is the initial point for embarking upon a process of investigation and possible remediation.
- Only if land is on the EMR may the EPA issue a notice to a person to undertake a site investigation (see Summary, Section 4.2.1).

- If after receiving a site investigation report, the Chief Executive (EPA) confirms the particular land is contaminated and requires remediation the particulars of the land may be recorded on the CLR (subsection 384(2)(c)). The term “particulars of land” is not defined.

2.1.2 Pro-active Identification

- There is no obligation on the EPA or any other entity under the Act to undertake any proactive identification of potentially contaminated land. However, there appears to be an expectation that local governments will do so.
- The Draft Guidelines state that “under the *Environmental Protection Act* all local governments in Queensland are required to notify the Department of Environment of land that has been or is currently used for notifiable activities within their local government area for inclusion on the EMR”.¹⁵ Whilst the Draft Guidelines suggest a number of methods for acquiring such information (eg “historical information”) there is no suggestion that proactive identification must be undertaken.

2.1.3 Re-active Identification

Owners and Occupiers

- The owner or occupier of land who becomes aware of a “notifiable activity” (as specified in Schedule 2 of the Act) being carried out on the land must notify the EPA within 22 days of becoming aware of the notifiable activity (section 371) (see figure on following page). It is an offence not to do so (subsection 371(1)).

Maximum penalty:

- 50 penalty units - \$3750

- The owner or occupier of land who becomes aware that the land has been or is being contaminated (see Summary, Section 2.1) must notify the EPA within 22 days. It is an offence not to do so (subsection 371(2)).

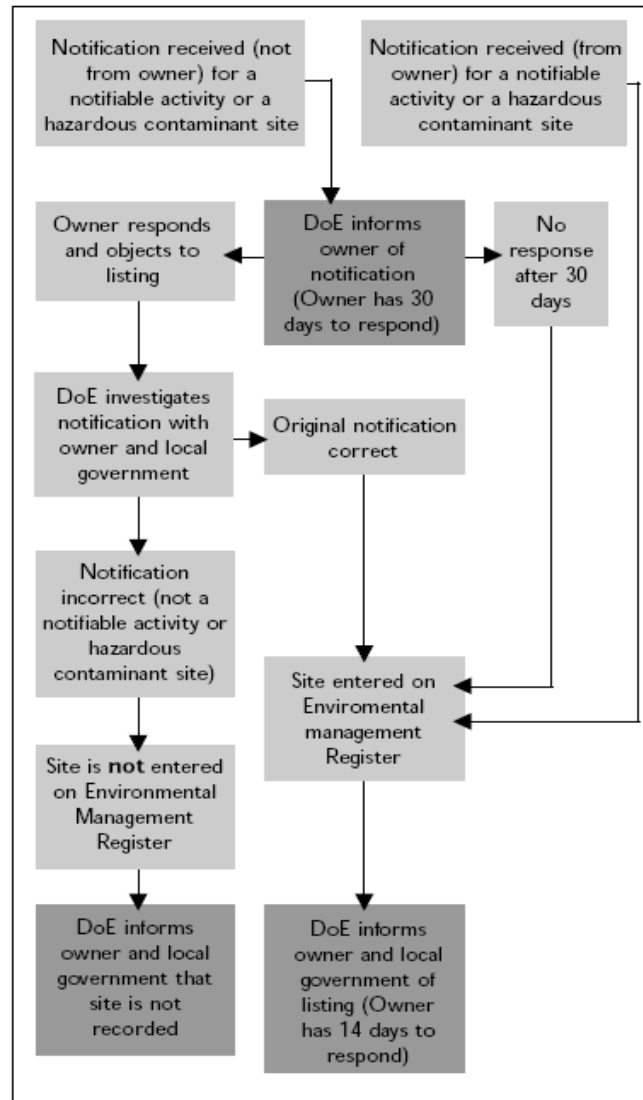
Maximum Penalty:

- 100 penalty units - \$7500

- No offence is committed if the EPA has already been notified under these provisions (subsection 371(3)).
- The EPA must consider any submissions made by the land owner and determine whether the land is being used for a notifiable activity or is contaminated and if it so determines must record particulars of the land on the environmental management register (EMR) (section 374).
- Within eight days of the decision, written notice of the decision (with reasons and a statement of review or appeal rights) must be given to the land owner and the relevant local government (subsections 374(5)-(7)).

Notification and registration procedures for recording land on the EMR and CLR

¹⁵ Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998), 12.



Source: Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998) 14.

Local Government

- Where a local government becomes aware that a notifiable activity is or has been carried out on land in its area it must within 22 business days of becoming aware of the circumstances give notice to the EPA (subsection 372(1)). Failure to comply appears not to be an offence.
- Where a local government becomes aware that land within its area has been or is being contaminated by a contaminant that the local government knows is a hazardous contaminant it must within 22 business days of becoming aware of the situation give notice to the EPA (subsection 372(2)). Failure to comply appears not to be an offence.
- This obligation does not apply if the EPA has already been given notice under the above provision (subsection 372(3)).
- The EPA will, after giving relevant notice to the owner of the land (see section 373) determine whether the land has been, or is being, used for a notifiable activity or is contaminated. If so, it must include the land on the EMR.

Notification to the Owner of the Land

- In a variety of circumstances where the EPA is given notice of or has reason to believe that notifiable activities are being or have been undertaken on land or has reason to believe that land is contaminated the EPA must within a reasonable period give notice to the owner of the land about the activity or the contamination (subsection 373(1) & (2)).
- The notice must:
 - Inform the owner of the EPA's belief;
 - State the grounds for the belief;
 - Indicate that particulars of the land may be included in the EMR;
 - Where an investigation has been undertaken, include a copy of the report;
 - Invite submissions from the owner about its use and whether it is contaminated;
 - Indicate that submissions must be accompanied by a statutory declaration (subsection 373(4)).

2.2 GOVERNMENT RESPONSIBILITY

2.2.1 The Situation Under the *Environmental Protection Act*

- There is no specific provision in the *Environmental Protection Act* recognising or addressing the issue of "orphan" sites. Neither is there any specific reference to the issue in the Draft Guidelines.¹⁶
- It appears that the only means by which an "orphan" site might be investigated and remediated is where a local government has in some way contributed to the condition of the land. The potential responsibilities of local government in such circumstances are addressed in detail in Sections 4 & 5 of this Summary.

2.2.2 Criteria for Identifying Orphan Sites

- As indicated above, the concept of an "orphan" site is referred to in neither the *Environmental Protection Act* nor the Draft Guidelines.¹⁷ However, as indicated elsewhere in this Summary (Sections 4.2 and 5.1.1), where the person responsible for contaminating the land is not known or cannot be located, the relevant local government can be required by the EPA in certain circumstances to undertake an investigation and, where necessary, remediation.

2.2.3 Funding

- There is no statutory provision for an "Orphan Sites" fund under the *Environmental Protection Act*. It is assumed that should the EPA undertake investigation and remediation where the public interest demands, for example where there exists an immediate threat to human health or the environment, the cost would be met out of general revenue.

¹⁶ Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998).

¹⁷ *Ibid.*

- It should be noted that “any person” may undertake a site investigation of land recorded on the EMR (see subsection 375(1)) presumably including the CEO of the EPA (as a corporate entity) or the Minister. A similarly broad power is provided with respect to remediation following submission of a site investigation report (subsection 390(1)). This would presumably permit the EPA to remediate land that its investigation report indicated required remediation.
- Overall, however, the use of these powers by the EPA would appear to be an unwieldy method for permitting government intervention to investigate and remediate contaminated land. This reflects a presumed government policy of relying on the market place rather than government intervention to address contaminated land issues in the State.

2.3 IMPOSITION OF PRIVATE RESPONSIBILITY

2.3.1 Identification of Polluter Pays Principle

- The object of the *Environmental Protection Act* may be stated simply as protecting Queensland’s environment by the application of the principles of ecologically sustainable development (ESD) (section 3).
- The Act specifies the means by which this object is to be achieved by a “cyclical” integrated management program divided into four phases. Phase 3 (implementing environmental strategies and integrating them into efficient resource management) is to be achieved by, among other measures, requiring persons who cause environmental harm to pay costs and penalties for the harm (subsection 4(6)(d)).
- As the identification, assessment and remediation of contaminated land in Queensland has its statutory framework within the *Environmental Protection Act*, it is clear that the “polluter pays” principle applies in that context.

2.3.2 Mechanisms for Imposing Private Responsibility

Powers and Relevant Criteria

Any Person to Conduct or Commission an Investigation

- Where particulars of land are recorded on the EMR any person may conduct or commission an investigation of the land to determine whether the contamination poses a health or other environmental risk. The report may be submitted to the EPA (subsection 375(1)).
- If the person proposing to undertake such an investigation is not the owner of the land, the consent of the owner must be obtained before the investigation commences (subsection 375(2)).

The EPA Requiring a Site Investigation

- Where the Environmental Protection Agency is satisfied that:
 - After a preliminary investigation, particulars of the land are recorded on the EMR because the land is contaminated;
 - The hazardous contaminant is in a concentration with the potential to cause serious or material environmental harm; and

- A person, animal or other part of the environment may be exposed to the contaminant, the EPA may require a site investigation to be conducted or commissioned by:-
 - the person who released the contaminant (if known);
 - the relevant local government;
 - the owner of the land (subsections 376(1) and (2)).
- The EPA may require a local government to conduct or commission an investigation but only in the following circumstances:
 - Where the person who released the contaminant cannot be found; and
 - The EPA reasonably believes that the land has been contaminated as a consequence of a local government land use approval, the local government did not comply with any one or more Acts in giving the approval and the local government should have known the land would be contaminated because of the approval; or
 - The local government granted a land-use approval contrary to any restriction on the use of the land recorded as a restricted site on the contaminated sites register which arises under the previous *Contaminated Land Act 1991*; or
 - Either under the previous Contaminated Sites Register or the current EMR or CLR, the local government has approved a land use contrary to recorded particulars and the use has caused environmental harm (subsection 376(3)).

Owner of Land to Conduct or Commission a Site Investigation

- The owner of land may be required by the EPA to conduct or commission a site investigation only where the person who released the contaminant cannot be found, the local government has not been required to conduct or commission an investigation and:
 - The EPA reasonably believes that the land was contaminated before the commencement of the *Contaminated Land Act 1991*; or
 - When the land was acquired by the owner, particulars of the land were recorded in the contaminated sites register under the previous Act or under the current EMR or CLR; or
 - The contamination occurred after the owner purchased the land (subsection 376(4)).¹⁸
- Where the owner is a mortgagee of the land, that owner cannot be required by the EPA to undertake or commission any site investigation (subsection 376(5)).
- A mortgagee of land is the “owner” of land if:
 - The mortgagee is acting as a mortgagee in possession and has the exclusive management and control of the land; or
 - The mortgagee (or a person appointed by the mortgagee) is in possession and has exclusive management and control of the land (see Schedule 3)
- The EPA may not require an investigation where a site management plan applies to the land and is being complied with (subsection 376(6)).

¹⁸ The EPA generally regards the issue of the liability of an “innocent” purchaser to not raise significant equity issues. Instances of, for example, contamination of new subdivisions has resulted in the Queensland Government intervening and taking responsibility for investigation and remediation measures (Interview with Greg O’Brien, Queensland Environmental Protection Agency, (October 2007)).

Persons Qualified to Conduct Investigations

- A site investigation may be conducted only by a person who is a member of an organisation prescribed under the Environmental Protection Regulations (Regulation 63C and Schedule 8A) and must have qualifications and experience relevant to the site investigation (section 381) (see Summary, Section 3).

Fees and Statutory Declaration

- In addition to the payment of the prescribed fee, a site investigation report, when submitted to the EPA must be accompanied by a statutory declaration from the person (where the investigation is voluntary) or recipient and the investigator. In the case of the recipient or person, the declaration must state, among other things, that the recipient or person has provided all relevant information to the investigator and that it is not known to be false or misleading (subsection 383(3)).
- The investigator's declaration must;
 - State the investigators' relevant qualifications and experience;
 - State that he/she has not knowingly included any false, misleading or incomplete information in the report;
 - State that he/she has not knowingly failed to reveal any relevant information or document; and
 - Certify that the report addresses all matters relevant to the declaration and that the opinions expressed are honestly and reasonably held (subsection 383(4)).

2.3.3 Potentially Liable Parties: Polluters, Owners and Occupiers

- The potential for persons to be required by the EPA to conduct a site investigation or remediation is based on the following hierarchy:
 - The polluter if known and can be located;
 - Local government (where the local government has been in some way responsible for the contamination);
 - The owner of the land (see section 376).
- The term "owner" includes a person holding the land under a lease, licence or permit under an Act (see Schedule 3).
- The recipient of a notice to investigate or remediate contaminated land may apply have the requirements of the relevant notice waived.
- In the case of a notice requiring investigation of land included in the EMR, the grounds on which the EPA may waive the requirements are:
 - financial hardship; or
 - where the recipient is the owner of the land, the owner's rights do not include exercising control over environmental management of the land (subsection 378(4)).
- In the case of application to waive the requirements of a notice to remediate land, the grounds on which the EPA may so waive are:
 - Financial hardship; or

- The contamination occurred while the recipient was carrying out an activity that was lawful apart from the *Environmental Protection Act* and the recipient complied with the general environmental duty under the Act; or
- The contamination occurred before the commencement of the former *Contaminated Land Act* and it would be unreasonable to require the recipient to remediate the land; or
- The recipient is the owner of the land but does not have control over environmental management of the land (subsection 392(4)).

Lenders

- In certain circumstances a mortgagee is regarded as an owner of land under the *Environmental Protection Act* as follows:
 - if the mortgagee is acting as a mortgagee in possession of the land and has exclusive management and control of the land; or
 - the mortgagee or a person appointed by the mortgagee, is in possession of the land and has the exclusive management and control of the land (Schedule 3).
- On this basis, there exists the potential for a mortgagee in possession to be subject to the issuing of an investigation or remediation notice in the circumstances anticipated by the Act.

Developers

- A developer who falls into any of the categories included in the hierarchy of potential liability referred to above is potentially liable for investigation and remediation of contaminated land.
- Otherwise, a developer is subject to the development approval process under the *Integrated Planning Act 1997*. Land prescribed under regulation as requiring assessment in relation to contamination is “assessable development” for the purposes of the *Integrated Planning Act* where a material change of use is proposed. The investigation process in this context is particularised by the *Integrated Planning Regulation 1998*. Presumably, a developer who assumed the status of either owner of the land during the development approval process or who is otherwise responsible for contamination of the land will be subject to the requirements of the contaminated land provisions of the *Environmental Protection Act*.
- A more detailed summary of the relationship between the land-use planning process in Queensland and contaminated sites management is contained in Section 7 of this Summary.

Liability of Corporations, Company Officers/Senior Managers

- The potential liability of corporations to comply with the requirements of the notification, assessment and remediation provisions of the Act is determined principally by their status as “persons” and the obligations imposed on persons under the Act.
- Where a failure to comply constitutes a criminal offence, liability for corporations and their officers is determined by the penal provisions of the *Environmental Protection Act*. It should be noted that under the *Queensland Penalties and Sentencing Act 1992* (section 181B), offences committed by corporations attract a maximum penalty five times that specified for a natural person.
- The executive officers of a company must ensure that the company complies with the *Environmental Protection Act* (subsection 493(1)). The executive officers with this responsibility include:
 - Any member of the governing body of the company; or

- Any person who is concerned with, or takes part in, the company's management, whatever the person's position is called and whether or not the person is a director of the company (Schedule 3).
- If a company commits an offence under the Act, each of the executive officers of the company also commits the offence of failing to ensure that the company complies with the Act. The maximum penalty for this offence is that prescribed for the contravention of the provision in question by an individual (subsection 493(2)).
- It is a defence in the case of "derivative" liability if the executive officer can prove:
 - if the officer was in a position to influence the conduct of the company in relation to the offence, that the officer took all reasonable steps to ensure that the company complied with the provision; or
 - the officer was not in a position to influence the conduct of the company in relation to the offence (subsection 493(4)).

2.3.4 Transferring Liability

- There is no reference in the *Environmental Protection Act* to the circumstances in which liability for the investigation or remediation of contaminated land can be transferred by contract or otherwise. It appears, therefore, that common law principles supplemented by statutory consumer protection provisions would apply to such transactions in Queensland (see Summary, Section 10).

2.4 NATURE AND EXTENT OF PRIVATE RESPONSIBILITY

2.4.1 Nature of Responsibility

Fault or No-Fault

- The liability of the polluter appears to be strict – that is the mens rea (mental element) of the person who initially contaminated the land does not depend upon any notion of fault such as negligence. In the case of an owner of land there is similarly no requirement for a specific mental element. However, liability is conditional: for example, in the case of a requirement to conduct an investigation, that the contamination occurred after the owner purchased the land (see Summary, Section 4.2.1)

Retrospective Liability

- The contaminated land provisions of the Act address sites that were contaminated before the introduction of the Act or its predecessor, the *Contaminated Lands Act*. In that sense they are retrospective, however, offences created under the Act are not retrospective in that they relate to such issues as failure to report, failure to comply with investigation and remediation notices and failure to notify prospective purchasers of land that is actually or potentially contaminated.

Joint or Joint and Several Liability

- The Act permits the EPA to identify those to whom investigation and remediation orders may be issued based on a hierarchy of polluter, local government or owner.
- The issue of joint or several liability would appear to apply most noticeably to the situation where more than one person "who released the contaminant" on the site is known and can be

located (see subsection 376(2)). Although the Act refers in such cases to “the person” in the singular, there would appear to be an implication that even where one of several persons who released contaminants contributed a small proportion of the total contamination load, that person, if financially capable, can be totally responsible for the investigation and the remediation. More particularly, it would appear that any of the contamination contributors can be criminally liable for failing to comply with an investigation or remediation order.

- However, the issue of who from a range of “joint polluters” will be criminally liable will largely depend upon the pre-existing determinations of the EPA as to who will be issued with the relevant investigation or remediation notices. In this sense, the issue of joint or several criminal liability would appear to be redundant.

2.4.2 Extent of Responsibility

- There appears to be no statutory constraint on the extent of responsibility for clean-up. It is apparent that a remediation notice must “state the work to be conducted or commissioned by the recipient to remediate the land” (subsection 391(5)). The scope of remediation will be determined largely by the contents of the site investigation report (subsection 384(1)).

2.5 EFFECTS OF BANKRUPTCY/ LIQUIDATION OR LOAN DEFAULT

- In certain circumstances a mortgagee is regarded as an owner of land under the *Environmental Protection Act* as follows:
 - if the mortgagee is acting as a mortgagee in possession of the land and has exclusive management and control of the land; or
 - the mortgagee or a person appointed by the mortgagee, is in possession of the land and has the exclusive management and control of the land (schedule 3).
- On this basis, there exists the potential for a mortgagee in possession to be subject to the issuing of an investigation or remediation notice in the circumstances anticipated by the Act.

2.6 CRIMINAL RESPONSIBILITY

2.6.1 Principal Offence – Contaminating Land or Groundwater

- Under the Act there is no specific offence of contaminating land or groundwater. However, a series of ancillary offences support the contaminated land identification, investigation and remediation regime.

2.6.2 Ancillary Offences

- Various offences created under the *Environmental Protection Act* are referred to throughout this Summary of Queensland contaminated sites law. Offences are summarised as follows:

Notification: Failure to Notify the EPA

- It is an offence for an owner or occupier of land to fail to notify the EPA within 30 days of becoming aware that a “notifiable activity” is being undertaken on the land (subsection 371(1)).

Maximum penalty:

- \$3750

- It is an offence for an owner or occupier of land to fail to notify the EPA within 30 days of becoming aware that the land has been or is being contaminated by a substance the person knows to be “hazardous contaminant” (subsection 371(2)).

Maximum penalty:

- \$7500

- An offence is not committed if the EPA has already been given notice under the subsection (presumably by either the owner or occupier as the case may be (subsection 371(3)).
- A local government is required to notify the EPA within 30 days of becoming aware that a notifiable activity has been or is being undertaken on land within its area (subsection 372(1)).
- No specific penalty is provided for failure to comply.
- A local government is obliged to notify the EPA within 30 days of becoming aware that land within its area has been or is being contaminated by a by contaminant know by council to be a hazardous contaminant (subsection 372(2)).
- Again, there is no specific penalty provided for failure to comply.
- The apparent obligations upon local government as described above do not apply if the EPA has already been given notice under the relevant subsection.

Investigation

- It is an offence to fail to comply with an investigation notice unless the administering authority waives the requirement (subsection 376(7)).

Maximum penalty:

- \$7500

- Where a person who is not the land’s owner submits an investigation report to the EPA that person must within 10 days of providing the report or relevant additional information provide a copy of the report or information to the owner of the land (section 386).

Maximum penalty:

- \$750

Remediation

- Failure to comply with a remediation notice unless granted a waiver by the EPA is an offence (subsection 391(7)).

Maximum penalty:

- \$750,000

Site Management Plans

- Failure to comply with the requirements of a notice to prepare or commission a site management plan is an offence (subsection 405(6)).

Maximum penalty:

- \$7500

Notice to Proposed Purchasers

- It is an offence for the owner of land to fail to provide to the prospective purchaser of land:
 - any particulars of the land recorded in the EMR or CLR and details of any site management plan;
 - information that the land is subject to any investigation or remediation notice; or
 - that it is subject to any order of the courts providing permission to enter the land to carry out investigation or conduct work (section 421).

Maximum penalty:

- \$3750

Disposal of Contaminated Soil

- It is an offence to remove and treat or dispose of contaminated soil from a site for which particulars are recorded in the EMR or CLR or to bring into the State and treat or dispose of contaminated soil from contaminated land outside Queensland (subsection 424(1)).

Maximum penalty:

- \$7500

- It is an offence for the holder of a disposal permit or a person acting under the holder to fail to comply with the conditions of the permit (section 425).

Maximum penalty:

- \$7500

2.6.3 The Mental Element

- None of the above offences specifies any requisite mental element. All would appear to be strict liability offences. These offences can be contrasted with other environmental offences created under the Act which specify in certain cases that the offence may be committed “wilfully” (attracting maximum penalties of \$1.5 million for a natural person or two years imprisonment).
- However, lesser maximum penalties apply where the offence omits the term “wilfully”, implying therefore that a strict liability version of the offence has been created (see for example, section 430 – contravening a condition of an environmental authority).
- By implication, the failure to create “two tiered” offences in the case of contraventions of the Act relating to contaminated land implies that they are all strict liability offences.
- As indicated above, all specified monetary penalties increase five-fold where they are committed by corporations.

REFERENCES

Department of Environment, *Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland*, (May 1998).

JURISDICTION	QUEENSLAND
SECTION 3	The Role of Private Professionals
LEGISLATION	<i>Environmental Protection Act 1994</i>
DATE OF CURRENCY	PRE-RELEASE DRAFT

OVERVIEW

- There are no specific qualifications or requirements for those who undertake the practical engineering work associated with remediation of contaminated sites.
- Under the Act, a site investigation may be undertaken only by a member of an organisation listed in the Environmental Protection Regulations (consultants).
- The Queensland EPA has not adopted the concept of “environmental auditor”. The EPA has, however, adopted the concept of third party reviewer (TPR) to provide quality assurance with respect to remediation and management of contaminated sites.

3.1 CERTIFICATION OF PRIVATE PROFESSIONALS

- The Act does not specify who may undertake practical remediation (engineering works for) of contaminated land. The Guidelines provide no advice in this respect. However, the validation report must honestly reflect the standard of remediation reached (see subsection 395(3)). This would imply that if the remediation work has been undertaken by an inexperienced or inappropriately qualified entity, the validation report will reflect this and put acceptance of the remediation by the EPA at risk. Presumably, the EPA would expect any site remediation plan (see Summary, above and Section 5.3.3) and any site management plan (see Summary, Section 5.2) to specify who is to undertake the relevant engineering work.
- There appears to be no statutory requirement that “site remediation engineers” or other persons responsible for remediating land be accredited in any way.

3.2 FUNCTIONS TO BE PERFORMED BY PRIVATE PROFESSIONALS

3.2.1 Site Investigation

- A site investigation may be conducted only by a person who is a member of any of the 12 organisations prescribed under the Environmental Protection Regulations and must have qualifications and experience relevant to the site investigation (section 381). Organisations include, for example, the Institution of Chemical Engineers Australia, the Institute of Engineers Australia and the Environment Institute of Australia.

3.2.2 Remediation

- After remediation has been undertaken, a validation report must be prepared by a person who is a member of an organisation prescribed in the Environmental Protection Regulations (subsection 395(1)).
- When submitted to the EPA, the validation report must be accompanied by a statutory declaration that, amongst other things:
 - States the qualifications and experience of the person who prepared the report;
 - States that the person has not knowingly included any false, misleading or incomplete information; and
 - States that the person has not failed to reveal an relevant information or document;
 - Certifies that the report addresses the relevant matters and is factually correct and that the opinions expressed are honestly and reasonably held (subsections 395(2) & (3)).
- The term “auditors” is not used in the Act or referred to in the Draft Guidelines.¹⁹ A person who is a member of a prescribed organisation must prepare a “validation report” after remediation (see, Summary, Section 5). The Draft Guidelines²⁰ specifically point out that “the qualification and experience requirements should not be interpreted as an accredited auditor system, but as a recognition of the competencies necessary for professional assessment of contaminated land”.

3.3 MONITORING AND AUDIT OF PERFORMANCE - THIRD PARTY REVIEWER

3.3.1 The Concept

- As indicated above, the EPA does not adopt the concept of “contaminated sites auditors”.
- However, the EPA has established a third party reviewer (TPR) system “to improve the safe management of [human health and environmental] risks and provide the public with assurance that affected land has been made suitable for the intended use”.²¹
- The system permits the grading of TPRs depending on their level of competence and the degree of contamination and risk posed by a particular site.
- The TPR is, in effect, a “delegate” of the EPA.
- The process has been developed to reflect the Site Contamination NEPM, particularly Schedule B10, *Guideline on Competencies and Acceptance of Environmental Auditors and Related Professionals*.

3.3.2 Practice

- The TPR system is site-specific and essentially involves oversight of the investigation and remediation of a site. The process involves:

¹⁹ Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998).

²⁰ *Ibid*, at 30.

²¹ Environmental Protection Agency, Operational Policy – Contaminated Land - Third Party Reviewer Terms of Reference, (date unknown).

- Review of the site assessment (presumably part of the site investigation report);
 - Independent site inspections and monitoring;
 - Liaison with the particular “land practitioner group” and the EPA;
 - Independent sampling to determine conformity with the Remediation Action Plan (RAP) which generally forms part of the Site Management Plan – see Summary, Section 5.2.1);
 - Determination of the suitability of low-risk sites for certification; and
 - Review of investigation and validation reports and associated risk assessments and preparation of a summary report including a statutory declaration regarding the future status and use of the site.
- A third party reviewer, nominated by the EPA, is required/appointed either by a condition imposed by the EPA through a remediation notice for a specific site, through a condition imposed in an approved SMP (see Summary, Section 5.2.1) or through requirements imposed through the “concurrence process” (see Summary, Section 7) under any relevant land use planning application.²²
 - In practice, a TPR is engaged at the investigation stage because the landowner or developer is aware that the TPR will be mandatory at the remediation stage and will have to indirectly, at least, review the investigation methods adopted as the basis for determining appropriate remediation strategies.²³
 - The EPA undertakes to process TPR-certified reports for removal of land from the EMR within 5 business days of receipt.

REFERENCES

Environmental Protection Agency, Operational Policy – Contaminated Land - Third Party Reviewer Terms of Reference, (date unknown).

²² Interview with Greg O'Brien, Queensland Environmental Protection Agency, (October 2007).

²³ *Ibid.*

JURISDICTION	QUEENSLAND
SECTION 4	Identification, Investigation and Assessment
LEGISLATION	<i>Environmental Protection Act 1994</i>
DATE OF CURRENCY	PRE-RELEASE DRAFT

OVERVIEW

- Following the identification of a potentially contaminated site, further investigation is necessary to determine whether the site presents sufficient risk to the environment or to human health to warrant remediation and/or ongoing management and monitoring.
- The EPA may issue a notice to undertake a site investigation to either the person who released the contaminant, to the relevant local government or the owner of the land. The EPA appears to adopt a three-stage approach to site assessment. Whether a Stage 1, 2 or 3 investigation is required will be reflected in the wording of the notice. In turn, this will be based on the information obtained by the EPA in determining whether to include the land on the EMR and the Technical Guidelines for Site Assessment, Remediation and Report Preparation contained in Appendix 6 of the Draft Guidelines.

4.1 THE SCIENTIFIC PROCESS

- This Section addresses that stage of the contaminated land management process that follows the identification of potentially contaminated sites (see Summary, Section 2). This element of the management process is designed to determine whether the site presents sufficient risk to human health or to the environment to necessitate remediating and, possibly, on-going management and monitoring.
- The literature on contaminated site identification, assessment and remediation tends to divide the investigation/assessment process into two or three elements depending upon the jurisdiction or preferred technical approach as follows:
 - Tier 1 (or Phase 1) assessment – investigation of suspected contaminated sites;
 - Tiers 2 & 3 (or Phase 2) – assessment(s) of differing detail and sophistication where it has been determined on the basis of a Tier 1 or Phase 1 assessment that a site is sufficiently contaminated to require further assessment.
- In relation to health risk assessment, the National Environment Protection (Assessment of Site Contamination) Measure 1999 adopts a variation to this as follows:
 - Data collection and evaluation of the chemical condition of the site;
 - Toxicity assessment of contaminants;
 - Exposure assessment for nearby populations; and
 - Risk characterisation (assessment) [see Schedule B4, page 14].
- The Queensland EPA appears to adopt a three stage approach to site assessment as follows:

- Stage 1 Investigation – a preliminary site investigation that may include a sampling program based on the site history and inspection that “is thorough enough so that if investigation levels are not exceeded, then the site can be considered to be uncontaminated” (Draft Guidelines,²⁴ and see Summary Section 4.2.4);
 - Stage 2 Investigation – a detailed site investigation where the preliminary site investigation indicates actual or potential site contamination (that is, levels above investigation threshold values). In that case “a full assessment of the type and extent of contamination, including off-site migration potential” (Draft Guidelines,²⁵ and see Summary Section 4.2.4);
 - Stage 3 Investigation – a health and environmental assessment and determination of remediation plan. Investigation of risk is undertaken whereby “the results obtained from the detailed site investigation are used to determine the potential human exposure and environmental impact of the contaminants on the current and proposed land uses” (Draft Guidelines,²⁶ and see Summary Section 4.2.4).
- The contaminated land provisions of the *Environmental Protection Act* do not distinguish between these various elements referring only to “site investigation” (see section 375).
 - The different stages are addressed in Section 4.2.4 of this Summary (“the Substance and Staging of Site Investigation”).

4.2 THE ADMINISTRATIVE PROCESS

4.2.1 Power and Relevant Criteria

Any Person to Conduct or Commission Investigation

- Where particulars of land are recorded on the EMR any person may conduct or commission an investigation of the land to determine whether the contamination poses a health or other environmental risk. The report may be submitted to the EPA (subsection 375(1)).
- If the person proposing to undertake such an investigation is not the owner of the land, the consent of the owner must be obtained before the investigation commences (subsection 375(2)).

The Environmental Protection Agency – Notice to Investigate

- Where the EPA is satisfied that:
 - After a preliminary investigation, particulars of the land are recorded on the EMR because the land is contaminated;
 - The hazardous contaminant is in a concentration with the potential to cause serious or material environmental harm; and
 - A person, animal or other part of the environment may be exposed to the contaminant, the EPA may require a site investigation to be conducted or commissioned by:-
 - the person who released the contaminant (if known);

²⁴ Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998) 27-29, 33.

²⁵ *Ibid.*

²⁶ Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998) 27-29, 33.

- the relevant local government;
 - the owner of the land (subsections 376(1) and (2)).
- The EPA may require a local government to conduct or commission an investigation only in the following circumstances:
 - Where the person who released the contaminant cannot be found; and
 - The EPA reasonably believes that the land has been contaminated as a consequence of a local government land use approval, the local government did not comply with any Act in giving the approval and the local government should have known the land would be contaminated because of the approval; or
 - The local government granted a land-use approval contrary to any restriction on the use of the land recorded as a restricted site on the contaminated land register under the Contaminated Land Act 1991; or
 - Either under the previous contaminated sites register or the current EMR or CSR, the local government has approved a land use contrary to recorded particulars and the use has caused environmental harm (subsection 376(3)).
 - The owner of land may be required by the EPA to conduct or commission a site investigation only where:
 - the person released the contaminant cannot be found, the local government has not been required to conduct or commission and investigation; and
 - The EPA reasonably believes that the land was contaminated before the commencement of the Contaminated Land Act 1991; or
 - When the land was acquired by the owner, particulars of the land were recorded in the contaminated sites register under the previous Act or under the current EMR or CLR; or
 - The contamination occurred after the owner purchased the land (subsection 376(4)).
 - Where the owner is a mortgagee of the land, that owner cannot be required by the EPA to undertake or commission any site investigation (subsection 376(5)).
 - The EPA may not require an investigation where a site management plan applies to the land and is being complied with (subsection 376(6)).

4.2.2 Procedures

Power to Determine that Investigation (Stages 1, 2 or 3) is Warranted

- The *Environmental Protection Act* itself does not distinguish between different investigation stages. The EPA is simply empowered to require an investigation if “after a preliminary investigation” it determines that the land is on the EMR because it is contaminated and has the potential to cause harm (subsection 376(1)).
- Whether a Stage 1, 2 or Stage 3 investigation is required will be reflected in the wording of the Notice issued under section 377.

- It appears that the term “preliminary investigation” is to be distinguished from the term “Stage 1 – Preliminary Site Investigation” as used in the Draft Guidelines.²⁷
- In the former case, it appears to be used to describe the process undertaken by the EPA in determining whether a formal site investigation should be required (see section 376). In the latter case, it described the formal first stage of a required site investigation.

Public Consultation

- There is no statutory requirement that the public be consulted at the stage of determining whether a site investigation will be required.

Notice to Undertake Site Investigation

- A requirement to conduct or commission a site investigation must be in the form of a written notice (subsection 377(1)).
- Where the recipient of the notice is not the owner of the land the owner must receive a copy of the notice (subsection 377(2)).
- The notice must:
 - State the grounds on which it is made;
 - Outline the facts and circumstances;
 - State the matters relevant to the investigation;
 - State the day on which the investigation report must be submitted to the EPA; and
 - State the review or appeal details.

Procedures where Recipient of Notice is not the Owner of the Land

- The recipient of the notice or the investigator may enter the subject land to conduct the investigation only:
 - With the consent of the owner and occupier;
 - If the recipient or investigator has given seven days written notice to the owner occupier (subsection 380(2)).
- The notice must inform the owner and any occupier of the intention to enter the land, the purpose of the entry and the days and times when entry is to be made (subsection 380(3)).
- The recipient and investigator are required to do as little damage as possible and may not enter any residential structure (subsections 380(4) & (5)).
- Compensation is due to the any person who incurs loss or damage as a consequence of the investigation (subsection 380(6)).

Persons Qualified to Conduct Investigations

- A site investigation and development of a site management plan (SMP) (see Summary, Section 5.2)) may be conducted only by a person who is a member of an organisation prescribed under the Environmental Protection Regulations and must have qualifications and experience relevant to the site investigation (section 381) (see Summary, Section 3).
- Although a third party reviewer (TPR) is formally required by the EPA only at the remediation stage a TPR will normally be appointed at the investigation stage because the landowner or

²⁷ Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998) 27.

developer as the case may be is aware that the TPR will be required under the Act at the remediation stage.

Fees and Statutory Declaration

- In addition to the payment of the prescribed fee, a site investigation report, when submitted to the EPA must be accompanied by a statutory declaration from the person (where the investigation is voluntary) or recipient and the investigator. In the case of the recipient or person, the declaration must state, among other things, that the recipient or person has provided all relevant information to the investigator and that it is not known to be false or misleading (subsection 383(3)). The investigator's declaration must:
 - State the investigators' relevant qualifications and experience;
 - State that he/she has not knowingly included any false, misleading or incomplete information in the report;
 - State that he/she has not knowingly failed to reveal any relevant information or document; and
 - Certify that the report addresses all matters relevant to the declaration and that the opinions expressed are honestly and reasonably held (subsection 383(4)).
- This process is supplemented by the Third Party Reviewer (TPR) System (see Summary, Section 3.3).

Action Required from EPA after Receipt of Report

- The EPA must within 28 days of receiving a site investigation report, consider it and determine whether the land is contaminated land (subsection 384(1)).
- After making its decision, the EPA may:
 - If it has decided that the land is not contaminated, remove particulars from the EMR;
 - If the EPA determines that the land is contaminated but can be used for stated uses without further management, leave particulars on the register and require the preparation of a site management plan;
 - If the EPA is satisfied that the land is contaminated and that remediation action is necessary, it can record particulars of the land on the CLR;
 - In any other case, leave particulars of the land on the EMR (subsection 384(2)).
- Within 10 days of making its decision, the EPA must give written notice of the decision to:
 - The owner of the land;
 - If a person other than the landowner submitted the report, that person;
 - If the decision is to remove particulars from the EMR, the relevant local government;
 - If the decision is to record particulars of the land on the CLR, the relevant local government and any registered mortgagee of the land (subsection 384(3)).
- The notice must contain the reasons for the decision and relevant review and appeal rights (subsection 384(4)).

Additional Information

- Where the EPA considers the investigation report to be inadequate it may require further site investigation and the associated report (subsection 385(1)).

- Where the EPA considers that further information about the site investigation report is required it may require that it be produced by the recipient or person, where the report is voluntary, as the case may be (subsection 385(2)).

Report to Owner of Land

- Where the person who submitted the report is not the owner of the land that person must provide a copy to the owner within 10 days of its receipt by the EPA (section 386).

Time Taken by the EPA

- If the EPA fails to make a decision within the 28 days specified under the Act (see above) it is taken to be a decision to leave the relevant particulars in the EMR (section 389).

4.2.3 Review and Appeal Rights

- The Act specifies in Schedule 1 a range of “original decisions” for which a “dissatisfied person” (specified under section 520) may seek review by the EPA. In the context of the Acts contaminated land investigation provisions, “original decisions” include:
 - Requirement for site investigation;
 - Refusal for application of waiver of requirement to conduct or commission a site investigation and report;
 - A decision as to whether the land is contaminated land;
 - A decision about particulars of land in CLR;
 - A requirement for further information about site investigation and report;
 - Extension of time to make decision about a site investigation report.

4.2.4 The Substance and Staging of Site Investigation

Sources

- As indicated in Section 4.2.2 of this Summary, the notice to conduct or commission a site investigation must “state the matters relevant for the site investigation” (subsection 377(3)(c)). It is assumed that these requirements will reflect the information obtained by the EPA in determining whether to include the land on the EMR and the Technical Guidelines for Site Assessment, Remediation & Report Preparation contained in Appendix 7 of the Draft Guidelines.²⁸

Required Elements – Stage 1 Investigation

- Appendix 5 of the Draft Guidelines²⁹ indicates that a Stage 1 – Preliminary Site Investigation includes the following components:
 - Site history;
 - Inspection of the site;
 - Basic sampling program to determine whether contamination is present; and

²⁸ Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998) 32-38.

²⁹ Ibid, at 27-29.

- Report preparation.
- As indicated above, if a preliminary (Stage 1) investigation indicates the presence of contaminants but not at levels that exceed investigation levels then the site can be considered uncontaminated.³⁰
- These investigation levels are specified in Appendix 9 of the Draft Guidelines.³¹ The sources are not specified. The levels include health based investigation levels in various “exposure settings” based on work undertaken by Taylor and Langley³² and Imray and Langley.³³
- A Stage 1 investigation that detects contaminants in excess of investigation levels requires a more detailed environmental and health risk assessment as described below.

Stage 2 Investigation

- The requirements for a Stage 2 Investigation are outlined in Appendices 5 and 7 of the Draft Guidelines.³⁴
- A Stage 2 Investigation is described as a “detailed site investigation” required when the results of the Stage 1 (Preliminary Site Investigation) indicate potential or actual contamination: that is, levels above the investigation threshold values specified in Appendix 9 of the Draft Guidelines.³⁵ Draft Guidelines specify that the Stage 2 Investigation should delineate the lateral and vertical extent of the contamination and provide information about:
 - Maximum and average concentrations of the various contaminants;
 - Volumes of soil requiring remediation;
 - Leachability and mobility of contaminants;
 - Potential for groundwater contamination; and
 - Possibility of off-site migration through soil, surface water or groundwater (page 27).
- Detailed guidance for sampling, chemical analysis, quality assurance and interpreting results are contained in Appendix 7 of the Draft Guidelines.

Stage 3 Investigation

- Appendix 5 of the Draft Guidelines³⁶ describes a Stage 3 Investigation as “health and environmental assessment and determination of remediation plan”. The Guidelines suggest that “the results obtained from the detailed site investigation should be used to determine the potential human exposure and environmental impact of the contaminants on the current and proposed land uses”.³⁷
- The Draft Guidelines state that where complete removal of the contaminants is an approved remediation strategy, detailed health and environmental assessments are not normally required.
- However, where contaminant levels above health and environmental investigation levels are to remain, a more definitive examination of the relevant risks is necessary.³⁸

³⁰ *Ibid*, at 33 [7.3.1].

³¹ *Ibid*, at 55-59.

³² Taylor, R. and Langley, A. *Exposure Scenarios and Exposure Settings*, (1998, 2nd ed).

³³ Imray, P. and Langley, A. *Health-based Soil Investigation Levels* (1997).

³⁴ *Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland*, (May 1998) 27-29, 32-38.

³⁵ *Ibid*, at 55-59.

³⁶ *Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland*, (May 1998) 28.

³⁷ *Ibid*.

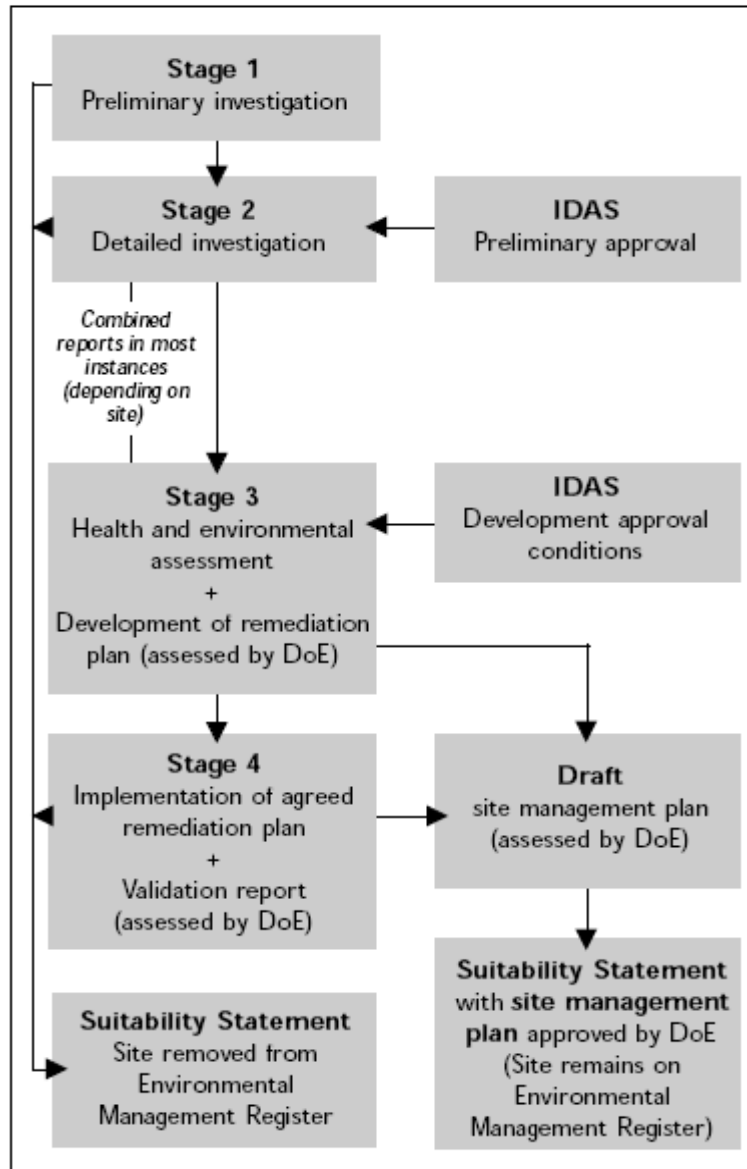
³⁸ *Ibid*, at 55-59.

- It is recognised by the Guidelines that in some instances qualitative risk assessment will be adequate. In other situations, a quantitative risk assessment will be necessary. For example, where it is proposed to leave contaminants which are significantly above threshold levels, where contamination is widespread or where numerous contaminants are present.
- Health and environmental risk assessments must follow the protocols described in the Contaminated Sites Monograph Series, the Health Risk Assessment and Management of Contaminated Sites and in the “NEPM for Contaminated Sites”.
- The Guidelines³⁹ indicate that the assessment may lead to site-specific remediation criteria for particular contaminants which can be used as clean-up levels.
- The diagram on the following page illustrates the staged assessment and site investigation process, including Stage 1 and Stage 2 discussed above.

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³⁹ *Ibid*, at 28.

Staged Assessment and Site Investigation Process



Source: Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998) 17.

REFERENCES

Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998).

Imray, P. and Langley, A. Health-based Soil Investigation Levels (1997), South Australian Health Commission: Adelaide.

Taylor, R. and Langley, A. Exposure Scenarios and Exposure Settings, (1998, 2nd ed), South Australian Health Commission: Adelaide.

JURISDICTION	QUEENSLAND
SECTION 5	The Remediation Process
LEGISLATION	<i>Environmental Protection Act 1994</i>
DATE OF CURRENCY	PRE-RELEASE DRAFT

OVERVIEW

- Where a person has voluntarily undertaken a site investigation and particulars of the land are recorded on the EMR or CLR, the person may undertake remediation (sometimes referred to as Stage 4) and submit a validation report.
- Provided particulars of the land are recorded on the registers, the EPA in order of priority, may require the polluter, the relevant local government or the owner of the contaminated land to remediate it.
- After remediation, a validation report must be prepared by a person who is an appropriately qualified member of an organisation specified in the Environmental Protection Regulations.

5.1 DEVELOPMENT AND APPROVAL OF A REMEDIATION PLAN

5.1.1 Responsible Parties

- A person who has voluntarily undertaken a site investigation may, after submitting the site investigation report to the EPA, and provided particulars of the land are recorded on the EMR or the CLR, undertake remediation and submit a “validation report” to the EPA (section 390(1)).
- If the person proposing the remediation does not own the subject land, that person must obtain the owner’s consent before commencing the work (section 390(2)).
- Where the particulars of land are recorded on the EMR or CLR, the EPA may required the following persons to remediate the land and submit a validation report:
 - the person who contaminated the land;
 - the relevant local government;
 - the owner of the land (subsection 391(1)).
- The EPA may require a local government to remediate land only in the following circumstances:
 - the land was contaminated because the local government gave an unlawful approval for the contaminating use and should have known that the approval would have resulted in land contamination (subsection 391(2)(a)); or
 - the land was recorded under the previous *Contaminated Land Act* as a “restricted site” and after the recording the local government gave approval for the land use contrary to the restriction (subsection 390(2)(b)); or
 - particulars of the land were recorded in the registers under either the previous Act or the *Environmental Protection Act*, the local government subsequently approved a land use

inconsistent with the particulars recorded and the use resulted in damage to human health or the environment (subsection 390(2)(c)).

- The EPA may require the owner of the contaminated land to remediate only if it cannot require the local government to do so under the above provisions and either the land was contaminated before the previous *Contaminated Land Act* commenced, or particulars of the land were recorded on the relevant registers under either the previous Act or the *Environmental Protection Act* or the contamination occurred after the owner acquired the land (subsection 390(3)).
- Where a mortgagee of land is the owner, the EPA cannot require remediation under this provision (subsection 390(4)).

5.1.2 Decision-Making Criteria

- There are no statutory criteria for determining when the EPA will require remediation of a contaminated site although any such decision must be based on the submitted site investigation report (subsections 384(2)(c) & 391(1)).
- The Draft Guidelines are also not specific as to the criteria to be used by the EPA when determining whether land listed on the CLR should be subject to remediation. Clearly, any such decision, whether made by the EPA or local government is bound to existing or proposed use of the land. The Draft Guidelines state that:
 - “Land that has been used for a notifiable activity or is recorded on the EMR or CLR will require an investigation and, possibly, remediation when a development application is made for a change of material use or re-configuring a lot”.⁴⁰
- Later, the Draft Guidelines state:
 - “When the results of a contaminated site investigation indicate that some remediation is required before the site would be suitable for the current or proposed use, a [remediation] plan must be prepared...”.⁴¹

5.2 SITE MANAGEMENT PLANS

5.2.1 The Concept

- Where particulars of land are recorded on the EMR because the land is contaminated, a site management plan (SMP) may be developed to manage the land (section 401).
- A SMP is used to apply conditions to the use of development of the land and will normally include any relevant remediation processes based on the remediation plan developed by the contaminated land consultants (subsection 401(2)).
- A SMP must:
 - State the objectives to be achieved and maintained under the plan;
 - State how the objectives are to be achieved; and
 - Provide for monitoring and reporting on compliance with the plan (section 402).

⁴⁰ *Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998) 13.*

⁴¹ *Ibid, at 37.*

5.2.2 Voluntary Preparation of an SMP

- A person may submit a draft site management plan to the EPA for approval (section 403).
- A draft SMP must include, amongst other matters, “details of the measures proposed to be taken to manage the risk of serious environmental harm to persons, animals or another part of the environment by the hazardous contaminant” (subsection 404(b)(iii)). It is also required that the SMP specify the relevant third party reviewer.⁴²

5.2.3 Mandatory Preparation of an SMP

- Where particulars of contaminated land are recorded on the EMR or CLR and the contamination may be managed by applying conditions to the use or development of the land the EPA may prepare or require the preparation of an SMP (section 405).
- The EPA may require the polluter, the relevant local government or the owner of the land, depending on the circumstances (see subsections 405(3) & (4)) to prepare an SMP (subsection 405(2)).
- Such a requirement would be imposed via a notice issued under section 406 of the Act.

5.2.4 Preparation and Approval of an SMP

- A SMP must be prepared by a person who is a member of an organisation prescribed by regulation and who has experience and qualifications relevant to the preparation of an SMP (section 410).
- For development or re-development applications, the SMP is likely to be detailed and definitive. SMPs for continuing land uses are more simple.⁴³
- The EPA must decide whether to approve an SMP submitted to it (section 411).
- Where the EPA does approve an SMP it must record the details of the plan in the EMR and provide to the person submitting the plan a certificate of approval for the plan, written notice of the approval and a suitability statement for the land (subsection 413(2)).
- An approval or authority by a local government under the *Integrated Planning Act* (or any other Act) must not permit the use or development of the land in a way that contravenes an SMP (section 417).

5.3 IMPLEMENTATION OF REMEDIATION PLAN (SMP)

5.3.1 Qualified Persons

- The Act does not specify who may undertake practical remediation (engineering works) of contaminated land. The Guidelines provide no advice in this respect. However, the validation report must honestly reflect the standard of remediation reached (see subsection 395(3)). This would imply that if the remediation work has been undertaken by an inexperienced or inappropriately qualified entity, the validation report will reflect this and put acceptance of the remediation by the EPA at risk. Presumably, the EPA would expect any SMP (see above) to specify who is to undertake the relevant engineering work.

⁴² Interview with Greg O'Brien, Queensland Environmental Protection Agency, (October 2007).

⁴³ Interview with Greg O'Brien, Queensland Environmental Protection Agency, (October 2007).

- There appears to be no statutory requirement that “site remediation engineers” or other persons responsible for remediating land be accredited in any way.

5.3.2 Health and Safety Factors

- The Draft Guidelines require that the required remediation plan include information regarding “health and safety considerations”.⁴⁴
- There is no statutory requirement that remediation plans contain provisions to protect adjacent communities or populations during the remediation process. However, the Draft Guidelines at Appendix 7 state that a proposed remediation plan must include, amongst other things, the following information:
 - The extent (if any) of public consultation and any local nuisance abatement required before and during remediation;
 - Plans to protect health and the environment during remediation, including health and safety considerations.
- It is assumed that as the EPA would specify in any notice to conduct or commission a site investigation “the matters relevant for the site investigation” (subsection 377(3)(c)). As the Draft Guidelines require that “site investigations must be conducted and reports prepared with reference to Appendix 7”⁴⁵ it is assumed that this is a requirement specified as a relevant matter (see above).

5.3.3 Supervision

- There is no statutory provision requiring that the EPA or any other agency oversee or supervise the remediation process. Again, it appears that it is assessment of the validation report prepared by the TPR after the process is complete (see section 395) that provides the basis for the EPA or the relevant local government (if the remediation has occurred under the Integrated Planning Act) to establish whether the remediation is satisfactory.
- Within 28 days of receiving the validation report, the EPA must determine whether the land is still contaminated (subsection 396(1)). Depending upon its decision, the EPA may:
 - Remove particulars from the EMR or CLR as the case may be;
 - If the land is determined to be partially remediated, leave particulars of the land on the EMR or (or transfer them from the CLR to the EMR as the case may be) and require the preparation of a site management plan (see below);
 - Otherwise, leave particulars of the land on the EMR or CLR (subsections 396(2) & (3)).

⁴⁴ Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998) 37.

⁴⁵ Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998) 16.

5.4 SIGN OFF (“FINALITY”)

- After remediation has been undertaken, a validation report must be prepared by a person who is a member of an organisation prescribed in the Environmental Protection Regulations (subsection 395(1)).
- When submitted to the EPA, the validation report must be accompanied by a statutory declaration that, amongst other things:
 - State the qualifications and experience of the person who prepared the report;
 - State that the person has not knowingly included any false, misleading or incomplete information; and
 - State that the person has not failed to reveal an relevant information or document; and
 - Certify that the report addresses the relevant matters and is factually correct and that the opinions expressed are honestly and reasonably held (subsections 395(2) & (3)).

REFERENCES

Department of Environment, *Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland*, (May 1998) 37.

Interview with Greg O'Brien, Queensland Environmental Protection Agency, (October 2007).

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JURISDICTION	QUEENSLAND
SECTION 6	Voluntary Remediation (“Brownfields” Measures)
LEGISLATION	<i>Environmental Protection Act 1994</i>
DATE OF CURRENCY	PRE-RELEASE DRAFT

6.1 INCENTIVES FOR VOLUNTARY REMEDIATION

- The Queensland Government does not have a formalised program that offers financial incentives for voluntary remediation of contaminated land.
- In urban Brisbane, “brownfields” development, as such, appears to be occurring as a result of intervention by and collaboration with the Brisbane City Council (BCC) through Urban Renewal Brisbane (formerly the Urban Renewal Task Force).
- Re-development of blighted land along the Brisbane River has occurred through negotiations between developers and the BCC that result in re-zoning of land such that there are incentives to developers to invest in investigation and remediation of land.
- It follows that “brownfields” development in Brisbane is occurring through a combination of market forces and associated re-zoning mechanisms.

6.2 SUPERVISORY MEASURES

- “Brownfields” development within re-zoned areas of Brisbane require development approval.
- Following any re-zoning negotiations, investigation, remediation and post-remediation management will be subject to the processes under the *Integrated Planning Act* (IPA) described in Section 7 of this Summary.

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JURISDICTION	QUEENSLAND
SECTION 7	Remediation under the Land-Use Planning System
LEGISLATION	<i>Integrated Planning Act 1997</i>
DATE OF CURRENCY	PRE-RELEASE DRAFT

OVERVIEW

- By far the greater proportion of contaminated sites in Queensland are identified, assessed and remediated through the land-use planning process. Although there is no formally collected data in this respect, it is estimated that approximately two thirds of site investigations and remediations are initiated through the *Integrated Planning Act* (IPA). Most contaminated sites are eventually subject to a development application.
- The *State Interest Planning Policy for Waste Management and Contaminated Land in Planning Schemes* encourages those preparing or amending Planning Schemes to ensure that any relevant issues associated with contaminated land are addressed in such instruments.
- Under the *Integrated Planning Act* assessment managers are required to refer to the EPA any application for approvals for a “sensitive use” on land that is potentially contaminated. As a “concurrence authority”, the EPA may impose conditions on any development consent granted by the assessment manager.

7.1 TYPES OF ACTIVITIES AFFECTED

- As is the case in other jurisdictions in Australia, the majority of instances of contaminated land identification, assessment and remediation in Queensland are driven by the market – that is, the need to develop or re-develop land. As local governments in Queensland have a “pivotal role in the decision-making process for land use planning”⁴⁶ it follows that they also have a significant role to play in the use to which contaminated or potentially contaminated land is put.
- On this basis, applications to “assessment managers” under the Integrated Development Assessment System (IDAS) established under the *Integrated Planning Act 1997* for subdivision or building approval may require consideration of the possible contamination of the site and the suitability of a contaminated site for the proposed development.
- Information about the location, nature and extent of contaminated land may be derived from the land use planning process under the IPA but such information may also be held by the State Government, more specifically the Environmental Protection Agency. The EPA in conjunction with local government has developed area management advices (AMAs) to provide to planning authorities information on areas where there is potential for widespread contamination and where detailed information is not available. Clearly this information assists planning authorities in their planning and development control decisions, particularly in the preparation of amendment of planning schemes.

⁴⁶ Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998) 12.

7.2 PLANNING SCHEME PREPARATION AND AMENDMENTS

- The process for making and amending planning schemes is presented in section 2.1.5 of the IPA with particular reference to the processes specified in Schedule 1 of the Act. These processes include consideration of “State interests” including a “standard or policy of the State” (see Schedule 1, section 10 of the IPA).
- The State Interest Planning Policy (SIPP) for Waste Management and Contaminated Land in Planning Schemes states that *“Planning Schemes should address relevant provisions and commitments of any final Regional Framework for Growth Management (RFGM), regional plans and State strategies, applicable to the area, to manage waste and contaminated land and to enhance or protect environmental values”*.⁴⁷
- The SIPP also indicates that through reciprocal arrangements with local government the relevant State agency will provide information to assist in the making and operation of planning schemes⁴⁸. The SIPP states that the Environmental Protection Agency *has “up-to-date information on the location of contaminated land which can be utilised during planning scheme preparation”*.⁴⁹
- Through the above processes and the utilisation of available information, local governments are able to address the land contamination issue when preparing or amending planning schemes. This can be particularly relevant where “preferred dominant land uses”, Local Area Plans and precinct/character areas are being identified in the planning scheme.⁵⁰

7.3 APPLICATIONS FOR DEVELOPMENT APPROVAL

7.3.1 Applications Involving Contaminated Land

- Applications for development approval are made, assessed and approved (or otherwise) under Chapter 3 of the IPA. “Assessable development” under the IPA includes making a material change to use of premises if all or part of the land forming part of the premises is on the EMR or CLR unless a suitability statement has been issued by the EPA, a site management plan has been approved and the development application is confined to certain specified types of development – essentially minor development or mining-related development (see Schedule 8 of the IPA).

7.3.2 The Essentials of the Development Application Process – Contaminated Land

- As in other Australian jurisdictions, the elements of the application process under the *Integrated Planning Act* of most importance with respect to the subject land’s contaminated status are as follows:
 - The provision of relevant information by the applicant (see sections 3.2.1 and 3.3.1);
 - The process of referral to the EPA (sections 3.3.1-3.3.20); and

⁴⁷ Environmental Protection Agency, *State Interest Planning Policy for Waste Management and Contaminated Land in Planning Schemes* (2000) 10.

⁴⁸ *Ibid*, at 13.

⁴⁹ *Ibid*.

⁵⁰ *Ibid*.

- The application of conditions to any approval (sections 3.5.29 – 3.5.32).

7.3.3 The Relevance of the Notification Process

- The obligation on local government to notify the EPA of knowledge of a “notifiable activity” that is or has been carried out on land and of land it knows to be contaminated (see Summary, Section 2.1.3) is critical to the process of ensuring the appropriate assessment and remediation of contaminated land in Queensland.
- The inclusion of land on either the EMR or CLR provides the basis for the decision-making role of the Environmental Protection Agency in the development application process because the presence or otherwise of the land on either of the Registers determines its future lawful use. It will be removed from either Register or be deemed suitable for particular uses only when the EPA is satisfied with the assessment and remediation that may have been undertaken.
- Where the EPA is satisfied with the assessment and/or remediation of the land it will issue a suitability statement specifying the uses to which the land may be put. This can then be used by the assessment manager in determining whether a development application should be approved and, if so, under what conditions.⁵¹

7.3.4 Referral by Assessment Managers to the EPA

- Referral of a development application to the EPA occurs by virtue of Schedules 2 and 8 of the Integrated Planning Regulations specifying the types of proposed uses of land in any development application that must be referred to that authority. It is this process that “picks up” the concept of “sensitive uses” referred to in the NEPM and that are generally adopted around Australia as flagging the need for relevant planning authorities to ensure that where a development application proposes the use of contaminated land for a sensitive use, assessment and remediation requirements are rigorously imposed.

7.3.5 Powers of the EPA

- The combination of the EPA’s powers under the *Environmental Protection Act* to issue (or refuse to issue) a suitability statement and the referral and concurrence requirements of the IPA in the development application and approval process provides the EPA with the power to impose assessment and remediation standards on developers.
- The EPA specifies in the Draft Guidelines⁵² that where application is made for a “preliminary approval” under section 3.1.5 of the IPA with respect to contaminated land a Stage 2 investigation (see Summary, Section 4.1) must be completed and referred to the EPA for assessment. For a complete development approval (that is, one that includes a development permit allowing the development to proceed a Stage 3 level investigation is required).

⁵¹ Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998) 16.

⁵² Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998) 16.

7.3.6 Development Approval Conditions

- It is the responsibility of the assessment manager under the IPA to ensure that any conditions imposed by the EPA, including any requirement for a site management plan (see Summary, Section 5.2) are included as conditions in the final development approval (IPA, section 3.5.29).

REFERENCES

Department of Environment, Draft Guidelines for the Assessment and Management of Contaminated Land in Queensland, (May 1998).

Environmental Protection Agency, State Interest Planning Policy for Waste Management and Contaminated Land in Planning Schemes, (2000).

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JURISDICTION	QUEENSLAND
SECTION 8	Post-Remediation Controls
LEGISLATION	<i>Environmental Protection Act 1994</i>
DATE OF CURRENCY	PRE-RELEASE DRAFT

OVERVIEW

- Depending on the nature of the remediation strategy adopted, it may be essential that long-term management and monitoring be maintained.
- An EPA-approved site management plan (SMP) is the appropriate vehicle for maintaining management and monitoring requirements. It appears that where contaminated land is subject to an approved site management plan and is also the subject of a development application under the *Integrated Planning Act*, the EPA as a concurrence authority, requires the site management plan to be a condition of any development approval granted. A local government must not approve a use of the land that contravenes the site management plan.
- A local government may not allow the development or use of land in contravention of a site management plan.
- Once an SMP is approved by the EPA the third party reviewer's role ceases. Monitoring of compliance with SMP conditions falls to the EPA which "spot-checks" various sites from time to time.

8.1 INSTITUTIONAL CONTROLS

- As indicated in Section 7 of this Summary, the future use and management of contaminated land is formalised through a combination of listings on the relevant register and the role of the EPA as a "concurrence authority".
- The assessment manager must ensure that any conditions imposed by the EPA are included as conditions in the final development approval. Additionally, a local government is prohibited from allowing development of land in contravention of the relevant site management plan (section 417).
- If it considers it necessary, the EPA may prepare an amendment to a site management plan or require the person who released the contaminant, the relevant local government or the owner to prepare an amendment (subsection 419(2)).

8.2 FUTURE CONDITIONAL USES OF THE LAND

8.2.1 Register Conditions

- Following the preparation of a site investigation report regarding land recorded on the EMR, the EPA may determine that the land is contaminated but can be used for particular uses with further management (subsection 384(2)(b)).
- In these circumstances particulars of the land are left on the EMR and the EPA may prepare a site management plan or require another person to do so (subsection 384(2)(b)).

8.2.2 Preparation and Approval of Site Management Plans

- Site management plans are plans used to manage land for which particulars are recorded on the EMR because the land is contaminated. This issue is addressed in detail in Section 5.2 of this Summary.
- Whilst an SMP is prepared after investigation of site contamination by the relevant consultant, it includes both remediation strategies and any necessary post-remediation management requirements.

8.2.3 Compliance with Site Management Plans

- A local government must not under the *Integrated Planning Act* allow the use or development of land or an activity to be undertaken on that land in contravention of the relevant site management plan (section 417).
- The *Environmental Protection Act* creates a series of offences in relation to site management plans as follow:
 - It is an offence to wilfully contravene a site management plan (subsection 434(1))

Maximum Penalty:

 - 1665 penalty units or two years imprisonment
 - It is an offence (strict liability) to contravene a site management plan (subsection 434(2))

Maximum Penalty:

 - 835 penalty units
 - It is an offence to wilfully contravene a condition of a development approval under the Integrated Planning Act that has arisen by virtue of a requirement of the EPA

Maximum Penalty:

 - 2000 penalty units or two years imprisonment.
 - It is an offence (strict liability) to contravene such a condition.

Maximum Penalty:

 - 1665 Penalty Units

8.2.4 Regulatory Oversight of Post Remediation Requirements

The Environmental Protection Agency

- The role of the third party reviewer (TPR) ceases once an SMP has been approved by the EPA.

- Monitoring of compliance with the conditions of the SMP (unless subject to a planning consent – see below) falls to the EPA which “spot checks” various sites from time to time.⁵³

Local Government

- Where local government has approved a use of land or an activity on land that has been subject to assessment and remediation processes under the *Environmental Protection Act* its decision, including any conditions, must reflect any requirements of the EPA under the referral and concurrence provisions of the *Integrated Planning Act*. It appears that any contravention of such conditions could be enforced by the assessing authority under the *Integrated Planning Act*.

8.3 FUTURE REVISION OF REMEDIATION CONDITIONS

- An amendment to a site management plan may be voluntarily prepared and submitted to the EPA (section 418).
- The EPA may with the agreement of the owner and occupier (if not the owner) of contaminated land amend a site management plan (subsection 419(1)).
- If it considers it necessary, the EPA may prepared an amendment to a site management plan or require the person who released the contaminant, the relevant local government or the owner to prepare an amendment (subsection 419(2)).

REFERENCES

Interview with Greg O'Brien, Queensland Environmental Protection Agency, (October 2007).

⁵³ Interview with Greg O'Brien, Queensland Environmental Protection Agency, (October 2007).

JURISDICTION	QUEENSLAND
SECTION 9	Public Participation
LEGISLATION	<i>Environmental Protection Act 1994</i>
DATE OF CURRENCY	PRE-RELEASE DRAFT

OVERVIEW

- The *Environmental Protection Act* does not provide for any formal involvement of the public in decision-making relating to the assessment and remediation of contaminated land.
- Where the land-use planning process involves contaminated sites the normal public comment and merit appeal processes under the *Integrated Planning Act* apply.
- In certain circumstances, civil enforcement proceedings may be brought by third parties under the *Environmental Protection Act* where offences have occurred. These proceedings can extend to offences involving the contaminated sites provisions of the Act.

9.1 PUBLIC REGISTER

- Where it is determined by the EPA that land has been, or is being used for a notifiable activity or is contaminated, the land must be included on the Environmental Management Register (EMR) (subsection 374(1)). Where the EPA considers that contaminated land requires remediation the land will normally be included on the Contaminated Land Register (CLR) (subsection 384(2)(c)).
- The EMR and CLR are not available for inspection by members of the public however on payment of the fee prescribed under the Environmental Protection Regulation members of the public are permitted to obtain extracts from the EMR (or CLR) (section 542).

9.2 PUBLIC CONSULATATION

- In determining whether remediation of a site is necessary, the *Environmental Protection Act* does not require consultation with the public generally or any particular sector or interested party other than those specified above.

9.3 THIRD PARTY APPEALS

- It should be borne in mind that a substantial proportion of contaminated land in Queensland is identified, investigated and remediated as part of the land use planning process under the *Integrated Planning Act 1997* and the Integrated Planning Regulation 1998.
- It is this process which includes opportunities for public comment and appeals against what might be regarded as inappropriate decisions regarding contaminated land.

9.4 CITIZEN SUITS

- Proceedings may be brought in the Planning and Environment Court for an order to remedy or restrain an offence against the *Environmental Protection Act*, or a threatened or anticipated offence (subsection 505(1)).
- Such proceedings may be brought by:
 - The Minister;
 - The EPA;
 - A person whose “interests are affected by the subject matter of the proceedings”;
 - Someone else with leave of the Court (subsection 505(1)).
- Interestingly, civil enforcement proceedings may be brought only in relation to offences. Consequently, any breach of the Act which does not carry a penalty is not enforceable using this method. In relation to contaminated land, therefore, the obligation on local councils to notify the EPA of a “notifiable activity” or contaminated land in its area would appear not to be enforceable under section 505 because no penalty is attached.
- The criteria that must be applied by the Court in determining whether to permit third parties whose interests are not directly affected to bring enforcement proceedings are summarised as follows:
 - Environmental harm has been or is likely to be caused;
 - The proceedings would not be an abuse of process;
 - There is a real or significant likelihood that the requirements for the making of the order would be satisfied;
 - It is in the public interest that the proceedings be brought;
 - The person has asked the Minister or the relevant local government to bring proceedings and this has not occurred; and
 - The person seeking leave is able to adequately represent the public interest in the proceedings (subsection 505(2)).
- The Court may have regard to any other matters it considers relevant to the issue of standing.
- In relation to the contaminated land provisions of the *Environmental Protection Act* it would appear that the enforcement provisions referred to here could be applied in the following significant circumstances:
 - Failure to notify the EPA of “notifiable activities” or contaminated land as required by the Act (other than in the case of failure by local government);
 - Failure to comply with an investigation or remediation notice;
 - Failure to comply with a requirement to prepare a site management plan;
 - Removal of contaminated soil in contravention of a disposal permit or in the absence of holding such a permit.
- The Court may not refuse to grant leave simply because the interests of the person applying are no different from the interests of someone else’s interests in the subject matter (subsection 505(3)).

- Once the Court is satisfied that an offence against the Act has been committed or will be unless restrained it may make any order it considers appropriate (subsection 505(5)).

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JURISDICTION	QUEENSLAND
SECTION 10	Liability in Tort and Contract
LEGISLATION	<i>Environmental Protection Act 1994</i>
DATE OF CURRENCY	PRE-RELEASE DRAFT

OVERVIEW

- Dealings with contaminated land potentially give rise to liability at common law and under statute. With respect to common law, the law of negligence can apply to situations such as negligent misstatement in dealings with land and negligent practices in undertaking assessment and remediation of land. The sale of contaminated land in some circumstances can give rise to contractual liability.
- Trade Practices legislation can apply to various dealings with contaminated land, including non-disclosure of the condition of the land. Where a vendor has failed to notify a prospective purchaser of the condition of the land, rescission of the contract may be permitted and a claim for damages may be made by the purchaser.

10.1 LIABILITY FOR HARM, DAMAGE OR LOSS SUFFERED

- Actions in negligence are civil in nature (non-criminal) usually seeking damages (compensation) for loss arising from the defendant's actions and injunctions to put and end to the damaging behaviour if it is continuing.
- Negligence actions are based on the existence of a duty of care to those who one might reasonably see as being adversely affected by one's actions. They are generally based on the common law.
- However, negligence actions may be brought where legislation specifically establishes or recognises that a duty of care exists in certain circumstances. For example, the duty of care owed to individuals by councils under the New South Wales *Environmental Planning and Assessment Act 1979*.
- In the case of contaminated land, the potential exists for common law actions in negligence in a variety of circumstances. For example, contaminants adversely affecting (damaging) others as a consequence of their off-site polluting impacts, negligent misstatement in commercial dealings and negligent provision of assessment and/or remediation services may justify an action in negligence.
- There have been several cases in Australia involving remediation of contaminated land that have based, in part at least, on alleged breaches of section 52 of the Commonwealth *Trade Practices Act* (TPA). That provision specifies that "a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". The Queensland case of *Manwelland Pty Ltd v. Dames and Moore Pty Ltd*⁵⁴ the plaintiff

⁵⁴ *Manwelland Pty Ltd v. Dames and Moore Pty Ltd* [2001] QCA 436.

successfully argued a breach of the provision, as well as negligence and breach of contract, for providing careless advice in relation to the remediation cost of a former gas works site.

- There is one leading example of a local council being held liable in common law negligence (as well as statutory duty) for development approval decisions in relation to contaminated land. In the case of *Alec Finlayson Pty Ltd v Armidale City Council*,⁵⁵ the Federal Court of Australia found the Armidale City Council liable for breaching its common law duty of care to a developer when approving a subdivision application over that land when it was clearly aware of its previous industrial use. Additionally, the court found that under the NSW *Environmental Planning and Assessment Act 1979* there was a statutory duty to take care that had been breached by the council.

10.2 LIABILITY FOR NON-DISCLOSURE

- In situation where the plaintiff is damaged by a misleading or deceptive statement, action may be brought in fraud, negligence or for a breach of section 52 of the Commonwealth TPA. In Queensland the equivalent provision appears under section 38(1) of the *Fair Trading Act 1989*.
- In the case of fraud and a breach of section 52 of the TPA, the misrepresentation may occur by silence depending on the circumstances of the case. Consequently, it is possible in commercial and property dealings involving contaminated land that damages may be successfully claimed where a transaction has proceeded in the absence of information known to one party being conveyed to the other.
- Although not a common law requirement, note should be made of the requirement that in certain circumstances the owner of land that is or may be contaminated is required to notify a prospective purchaser. Failure to do so is a criminal offence and also permits a person who proceeds with a purchase of contaminated land in those circumstances (that is where the required notification has not been provided) to rescind the agreement and recover any monies paid to the vendor (section 421, *Environmental Protection Act*).

REFERENCES

Alec Finlayson Pty Ltd v. Armidale City Council (1994) 123 ALR 1994; (1994) LGERA 225.

Manwelland Pty Ltd v. Dames and Moore Pty Ltd [2001] QCA 436.

⁵⁵ *Alec Finlayson Pty Ltd v. Armidale City Council* (1994) 123 ALR 1994; (1994) LGERA 225.