

Draft Submission on Proposed Remediation of Land SEPP

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Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing all NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community based system of local government in the State.

LGNSW welcomes the opportunity to make a submission to the Proposed Remediation of Land SEPP.

Note that this is a draft submission awaiting review by LGNSW's Board. Any amendments will be forwarded in due course.

Purpose

The *State Environmental Planning Policy No 55--Remediation of Land* (SEPP 55) is being reviewed as part of the NSW Government's broader review program that aims to ensure all State Environment Planning Policies, SEPPs, are up-to-date and relevant.

The current SEPP 55 and its associated *Managing Contaminated Land Planning Guidelines* have been in place for almost 20 years, and both need to be updated to respond to changes in federal and state legislation and policy, and to reflect new land remediation practices.

Background

Councils encounter many situations where they are required to deal with land contamination issues. Some of the circumstances include where councils act as:

- A regulator under the *Protection of the Environment Operations Act 1997* (generally as a result of pollution incidents).
- A Planning Authority, where rezoning or development proposals may potentially increase the likelihood of exposure to harmful substances or their release into the environment.
- An owner / operator of land that may be subject to contamination (eg council roads, derelict gasworks and landfills, council depots, etc).
- A co-regulator with the NSW Environment Protection Authority (EPA) for contaminated lands, particularly as a repository of information for parties who may have an interest in land (eg section 149 certificates, contaminated land registers etc).

Councils are an important stakeholder in relation to the management of contaminated land and feature significantly in the current and proposed arrangements for regulating and managing contaminated land under the Proposed Remediation of Land SEPP.

The proposed changes

The Explanation of Intended Effect states the aim of the new SEPP is the better management of remediation works by aligning the need for development consent with the scale, complexity and risks associated with the proposed works. The new SEPP will continue to categorise remediation works into two categories:

- Category 1 remediation works that require development consent
- Category 2 remediation works that can be undertaken without development consent.

Category 1 remediation works will continue to be assessed and determined by the relevant consent authority. The new SEPP will include a detailed list of Category 1 remediation works that can only be undertaken with consent. Examples of these works include remediation that involves large scale excavation of contaminated soil or onsite remediation.

For remediation works that can be undertaken without development consent (Category 2), proponents will need to:

- engage a certified contaminated land consultant to verify the remediation works are Category 2 works
- notify council 30 days before work commences
- comply with standard operational requirements such as standard hours of operation
- provide council with a notice of completion, including validation from a certified contaminated land consultant that the remediation has been satisfactorily completed.

The requirement for a planning authority to consider contamination issues when rezoning land will be given effect through a direction under section 117 of the Environmental Planning and Assessment Act 1979.

Response to Key Policy Changes

LGNSW provides the following comment on the Explanation of Intended Effect for the Remediation of Land SEPP and the associated *Contaminated Land Planning Guidelines*.

Categories of Remediation Work

LGNSW is supportive of retaining the categorisation of works, and standardising the approach to categorisation State-wide. However we recommend that the SEPP provide the capacity to recognise and include special areas of contamination that would have otherwise been considered under local contaminated land policies, such as PFAS contamination in Williamstown or lead contamination in Lake Macquarie.

With regard to the criteria for Category 1 and 2 remediation work, we note that many of the criteria in SEPP 55 have been retained. If there is potential for the new criteria and provisions to contradict the retained provisions, guidance is required as to which criteria and provisions prevail.

In addition, the EIE states that the new category 1 classes incorporate the provisions of clause 9 (a) to (e) of SEPP 55. However there are several existing sub-clauses that do not appear to be accounted for in the proposed SEPP. These are:

9 Category 1 remediation work: work needing consent

...

(b) carried out or to be carried out on land declared to be a critical habitat, or

...

(e) carried out or to be carried out in an area or zone to which any classifications to the following effect apply under an environmental planning instrument:

(i) coastal protection,

...

(iii) habitat area, habitat protection area, habitat or wildlife corridor,

(iv) environment protection,

(v) escarpment, escarpment protection or escarpment preservation,

(vi) floodway,

- (vii) littoral rainforest,
- (viii) nature reserve,
- (ix) scenic area or scenic protection,
- (x) wetland.

It is unclear how these areas will be given consideration with regard to land contamination as they are no longer explicitly referred to, and LGNSW recommends this be addressed and explained in a draft SEPP.

LGNSW welcomes the addition of the requirement for reports associated with Category 2 remediation works to be prepared and/or approved by a certified consultant. This will assist with improving consistency of assessments and give additional confirmation to councils that the proposed measures are appropriate.

The proposed SEPP specifies that Category 1 remediation works include those that:

- Excavate and remove from site, contaminated soil, where the volume of soil exceeds 3,000m³ or where the excavation exceeds 3,000m², or
- Remove from site stockpiled contaminated soil or other waste materials including asbestos waste, where the volume of soil or material exceeds 3,000m³.

The significance and risks posed by asbestos contamination, and indeed many other chemicals, is determined by its concentration rather than the volume of excavation. This could lead to heavily contaminated soil not requiring consent if lower than the volume or area threshold, and soil with very little contamination requiring consent if it is above the volume or area threshold.

In situations where the original excavation is estimated to be below 3,000m² but during the process it is discovered that additional excavation is required which takes it above the Category 1 threshold, does the site then become subject to Category 1 requirements? If so, what is the process to effect this change? In addition, guidance is required in situations where Category 2 remediation work commences but it becomes apparent that the work should now be classified as Category 1 (eg as the extent of the contamination is now known to be more significant, or the type of contamination now meets category 1 criteria). LGNSW recommends that the SEPP and guidelines should be clear on the requirements and process to be followed where a category change is triggered eg, stop work and/or re-categorise the works.

Thresholds up to 3,000m³ or 3000m² in a residential area would mean many truck movements and heavy machinery which may have a significant impact on local traffic conditions. Councils would want to have input on proposals approaching this threshold to ensure residents are not adversely impacted.

Given the above points, LGNSW suggests that DP&E consider setting volume / area thresholds based on either the level of soil contamination and/or the zoning of the property.

Certified Practitioners

The terminology used by the proposed SEPP and Guidelines around certified practitioners is confusing, and the roles and responsibilities of the different sub-groups of practitioners and when each must or may be used is still unclear. A certified practitioner seems to encompass the two groups of 'certified contaminated land consultant' (consultant) and 'site auditor' (auditor). An auditor is accredited under the *Contaminated Land Management Act 1997* (CLM

Act) and must comply with specific requirements under that Act, whereas a certified consultant has been vetted by an industry scheme to have an acceptable standard of competency.

The proposed SEPP and Guidelines need to provide clear and detailed descriptions of what consultants and auditors are allowed or required to do (eg provide advice, prepare site audit reports) and the differences in proficiency between the two groups. In addition, the situations where a site audit is required (as opposed to optional) needs to be articulated because currently the SEPP, Act and guidelines all cross-reference one another but none appear to provide a definitive description. We recommend against using the global term 'certified practitioner' and instead being specific about whether a consultant or auditor is to be used.

LGNSW notes that the EPA lists site auditors on its website, and provides links to the industry-run schemes where certified consultants can be searched for. It would be helpful if this information was centrally located.

Compliance with SEPP

The new SEPP proposes to retain the requirement for a proponent to notify a council prior to commencement and after completion of category 2 remediation work. There are circumstances where proponents have failed to give council advice within adequate timeframes, yet there are no penalty provisions within the SEPP. LGNSW recommends that simple regulatory tools be made available to councils to enforce this requirement.

Discretion to consent authority

The SEPP will include a new provision to give a consent authority discretion to waive the requirement for an investigation if it knows that the land is not contaminated or is otherwise suitable for the proposed use. The consent authority must have sufficient evidence or information about the status of the land to properly exercise this discretion.

LGNSW recommends that councils be given clear guidance as to what constitutes sufficient evidence or information in this context.

In cases where council is not the consent authority, LGNSW recommends that council should be consulted and included in the decision-making process.

Local Policies

Many councils have invested time, effort and extensive consultation with their communities regarding their local policies on contaminated land. There is little indication in the EIE that these policies have been accounted for in the proposed remediation work listed in Category 1 and Category 2. There is a need for advice and support for councils to review these policies and transition to the new arrangements.

LGNSW notes that through the Contaminated Land Management Program of the NSW Environmental Trust, the EPA coordinated a regional capacity building program to provide capacity and assistance for the management of contaminated sites in regional and rural NSW. Funding was used to employ a contaminated land project officer for up to 3 years in each of three regional groups of councils. The program and the additional support it provided was highly-valued by councils and LGNSW would strongly support a continuation of the program, particularly to assist regional and rural councils adapt to the new SEPP and guidelines.

Standard Operational Requirements – Category 2 works

Councils should be able to provide local input on the Standard Operational Requirements proposed for category 2 works.

Strategic Planning and use of Ministerial Directions

The matters to be considered by a planning authority when preparing an environmental planning instrument will no longer be included in the SEPP but will instead be included in a s117 Ministerial direction. The Contaminated Land Planning Guidelines are to provide the guidance on contamination issues to be addressed at the rezoning stage.

LGNSW strongly believes that removing policy direction from a SEPP undermines the rationale for, and ‘backbone’ of, the SEPP, and reduces transparency and visibility to third parties.

As we have outlined in previous submissions on proposed SEPPs, LGNSW supports the approach to plan making proposed under *A New Planning System for NSW: White Paper* in 2013 as:

- the hierarchy of plans in NSW would be better integrated;
- the NSW SEPPs would ‘present the state’s broad planning objectives, priorities and policy directions’¹;
- each subordinate plan would follow similar elements, where applicable, such as: vision, objectives, policies, actions and monitoring/reporting and delivery; and
- the system would create a ‘clear line of sight between each successive layer of planning’², meaning that the policies and actions in one plan would be advanced in the subsequent plan in a consistent manner.
- This approach considered SEPPs as the pinnacle of the hierarchy of plans for NSW with LEPs at the bottom rung and regional plans in between. This approach has been followed by the NSW Government with the recent strengthening of NSW regional plans and district plans in Sydney.

LGNSW is concerned that DP&E has significantly changed its approach to the role of a SEPP by moving all references to plan making policy to the s117 Ministerial Direction. This approach has been more widely adopted under the review process and will result in many new and updated Ministerial Directions being created on an increasingly wide range of plan making matters.

LGNSW believes this is a substantial shift and a backward step because it will:

- undermine the legitimate role of a SEPP as a plan to provide long term guidance to councils on planning issues of state and regional significance;
- reduce community consultation on plan making matters at a state level, because Ministerial Directions are not required to be placed on public exhibition in any form and can be amended with minimal notice;
- make the task of plan making more susceptible to the policy and political imperatives of the government of the day;
- reduce transparency, as Ministerial Directions are not identified on zoning certificates and not understood to be ‘plans’ within the hierarchy of plans under the EP&A Act; and

¹ *A New Planning System for NSW: White Paper*, 2013, page 65

² *Ibid.*, page 66

- make the planning system less clear – as Ministerial Directions are not well understood by the public and are difficult to find.

LGNSW seriously questions the increasing use of Ministerial Directions by the DP&E to deliver state planning policies. Where Ministerial Directions were once more sparingly used, in exceptional circumstances, it appears they are to now become the primary means of delivering planning policy direction to councils. SEPPs should have this role. LGNSW cautions the DP&E from taking such a short sighted view. The local government sector strongly urges DP&E to reconsider the increasing reliance on Ministerial Directions, as they will result in a more fragmented and less coherent planning framework, and one that increases the Minister's discretion to interfere in local planning matters.

Advertising of SEPPs for 28 Days

LGNSW recommends that preliminary SEPPs be routinely exhibited for 28 days in their final form, similar to the exhibition period for LEPs.

Planning Guidelines

The planning guidelines provide greater detail on the process for initial evaluation, investigation, assessment of contaminated land, and the decision-making process of the consent authority. However there are some aspects that would benefit from further clarity in the document such as:

- providing further guidance around the level of information or investigation that is acceptable in identifying previous land uses, for both proponents and the consent authority eg page 23 refers to contaminated land as land that the consent authority 'knows is contaminated'.
- Requiring the proponent to discuss long-term environmental management plans with council / consent authority during drafting, so as to ensure that plans are legally enforceable.

Conclusion

The proposed SEPP and associated guidelines are an improvement to the existing documentation. There are some elements, such as the Category 1 thresholds for excavated material and the discretion of the consent authority – both in relation to information exchange and council involvement in decision-making on category 2 remediation – that require further guidance.

As we have raised in other submissions on the new SEPPs, LGNSW is concerned that DP&E has significantly changed its approach to the role of a SEPP by moving all references to plan making policy to the s117 Ministerial Direction and we strongly urge DP&E to reconsider its approach.

Should you wish to discuss this submission, please contact Susy Cenedese, Strategy Manager Environment, LGNSW susy.cenedese@lgnsw.org.au or Daniel Adler, Asbestos Project Manager, LGNSW Daniel.adler@lgnsw.org.au or 9242 4000.