LAND CONTAMINATION SEMINAR

Following the introduction of a new federal National Environmental Protection Measure for the assessment of contaminated land, there have been a number of recent amendments to the regulatory processes and requirements for dealing with contaminated sites in Queensland.

The Queensland Government is also presently undertaking a reform program to review, modernise and streamline the contaminated land provisions in the Environment Protection Act 1994 (Qld).

The purpose of this seminar is to provide an overview of recent changes and developments, including draft policy, and to provide practical insight as to how to navigate the regulatory requirements.

SPEAKERS

Brad May Managing Director, CDM Smith

Brad will speak about the current requirements for the assessment, management, remediation and validation of contaminated sites in Queensland in light of the recent changes due to the introduction of the new NEPM and other developments.

Lindsay Delzoppo/David Cook Director/Manager of Waste and Land Contamination Assessments and Project Support Team, Department of Environment and Heritage Protection

Lindsay and David will generally discuss the regulatory framework and requirements for the assessment of contaminated sites, the relevant guidelines and supporting policy and proposed reforms.

Rebecca Hoare Partner, Norton Rose Fulbright

Rebecca will address the processes, requirements and challenges in obtaining approvals for the development and redevelopment of contaminated land and the legal implications for proponents under the new regime.

CHAIR Kelly Alcorn – Partner, HWL Ebsworth

WHEN Monday 21st July 2014

WHERE Corrs Chambers Westgarth, Level 35 Waterfront Place, 1 Eagle Street, Brisbane

PROGRAM 5.00 pm Registration and pre-seminar drinks
          5.30 pm Seminar begins
          6.30 pm Questions/discussion
          7.00 pm Seminar concludes Beverages and finger food served

CPD POINTS CPD points for QELA seminars may be claimed on the basis of one point for every hour (excluding breaks), providing that the seminar content is relevant to the solicitor or barrister’s area of practice.

DISCLAIMER While QELA endeavours to encourage debate, the views expressed by speakers are not to be taken as being the views of QELA. QELA is a non-political organisation, the objects of which are to educate and inform members on issues of interest.
REGISTRATION AND TAX INVOICE

To register for this seminar, please complete the form below and send to QELA by:

Contamination Seminar
Monday 21st July 2014
Corrs Chambers Westgarth

Email    info@qela.com.au
Mail     Level 5, 149 Wickham Terrace Spring Hill QLD 4000

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Practical Aspects of Contaminated Land Investigations and Recent Changes to Guidelines

July 2014

Brad May
Managing Principal /Director

CDM Smith
About CDM Smith

- Founded in 1947
- Employee owned / operated
- Nearly 6,000 staff / 120+ offices worldwide
- Over $1.3 billion in annual revenues
- Our core businesses include water, environment, transportation, energy, and facilities
Our Clients

- Goodman
- North Queensland Bulk Ports
- Macquarie University
- MetroCoal
- John Holland Group
- Bandanna Energy
- Arrow Energy
- Thiess Services
- Brickworks
- OneSteel
- Patrick

- City of Sydney
- Molopo Energy
- NSW Maritime
- Moreton Bay Regional Council
- Redland City Council
- Queensland Government
- Clayton Utz
- Westside Corporation
- Enviro Pacific Services
- Norton Rose
- AGL

- Adani Mining
- SEWPAC
- Queensland Water Commission
- Hancock Coal
- LinkWater
- Waratah Coal
- Xstrata Coal
- BHP Billiton Mitsubishi Alliance
- SunWater
- Seqwater; and
- Cokal.
Outline

• How is contamination managed and regulated.
• Relevant Queensland guidance.
• How common is contaminated land?
• The site assessment process and triggers.
• Changes in the NEPM and assessment approach.
• HSLs, what does this mean for my site?
• Vapour intrusion assessment process.
• Engaging an appropriate environmental consultant (SQP) and CL Auditor.
How is contaminated land managed?

- Environmental Protection Act (1994) administered by EHP:
  - Environmental Protection Regulations 1998 (Ep Reg) and relevant amendments;
  - EHP endorsed guidelines;
  - Environmental Management Register (EMR);
  - Contaminated Land Register (CLR).
- Sustainable Planning Act (2009) planning provisions:
  - Material Change of Use;
  - Lot reconfiguration.
Relevant Guidelines in Qld

- NEPM has been adopted by EHP and industry since May 2014.
Relevant Guidelines in Qld

- Health Screening Levels for Petroleum Hydrocarbons in Soil and Groundwater (CRC CARE Health Screening Levels) (Friebel and Nadebaum 2011).
- Canada-wide standard for petroleum hydrocarbons (PHC) in soil (CCME 2008).
- Guidelines for the Assessment, Remediation and Management of Asbestos-Contaminated Sites in Western Australia (WA Asbestos Guidelines) (DoH and DEC 2009).
Common Contaminated Sites
Common contaminated sites

- Common land uses, or Notifiable Activities, that give rise to contamination have been outlined the EP Act such as:
  - Petroleum storage and distribution sites, including service stations;
  - Coal Gas Works;
  - Railway works and yards;
  - Defence land;
  - Battery manufacturing and recycling plants;
  - Chemical manufacturing plants;
  - Chemical storage;
  - Metal treatment sites – smelters, foundries, engineering works, galvanising plants
  - Mineral processing
  - Dry cleaners;
  - Gun, pistol or rifle range;
  - Wood treatment plants;
  - Landfill sites;
  - Mine wastes.
Common contaminated sites

Source: Qld State Library Photographic Archive
Common contaminated sites
Common contaminated sites

Source: NSW State Library Photographic Archives
How is contamination assessed?

- The presence of contamination is identified by employing a systematic staged approach set out in guidelines endorsed by QLD EHP.

- **Stage 1 Preliminary Site Investigation:**
  - Desk-top assessment;
  - Historical records and title;
  - Site inspection;
  - Assessment of relevant historical and current activities;
  - If no significant contamination is indicated through assessment no further investigation is required.
How is contamination assessed?

- **Stage 2 Detailed Site Investigation**
  - Intrusive investigation – collection of samples of environmental media and chemical analysis for chemicals of potential concern and comparison with published health-based and environmental investigation levels
What environmental media may be impacted?

The following environmental media commonly host contamination:

- **Fill materials** that have been imported onto a site or derived from the site (waste);
- **Natural soil** may be contaminated by spills or leakage of contaminants or by mixing with contaminated materials;
- **Groundwater** may be contaminated by activities on the site or on adjacent sites;
- **Surface water** may be contaminated by activities on the site or on adjacent sites; and
- **Soil vapour** may be contaminated by the presence of volatile contaminants within soil or groundwater.
How is contamination assessed?

- Stage 3 Risk Assessment and Remediation options
  - Investigation used to determine the potential human exposure and environmental impact.
  - Remediation options and site specific clean up criteria.
- Stage 4 Remediation and Validation
  - SMP/RAP sets remediation goals and program to ensure the site will be suitable for the proposed use/s.
  - Documents procedures and plans to reduce risk to acceptable levels.
  - Validation Report documents that the remediation works have been completed successfully.
Assessments of the environmental condition of land may be undertaken for many reasons, including:

- Voluntary environmental compliance programs.
- Due diligence purposes in property transactions.
- Removal of the site or property from the EMR or CLR.
- Satisfying the requirements of a Notice from QLD EHP under the EP Act.
- Addressing a complaint from a member of the public or a neighbour.
- Planning triggers such as information request under SPA such as MCU or lot re-configuration.
- Supporting a waste disposal application under s242 of EP Act.
Practical Changes in the Assessment Process

- Health Investigation Levels for listed contaminants in soil.
- Interim soil vapour HILs for chlorinated compounds.
- Soil Health Screening Levels (HSL) for petroleum hydrocarbons.
- Ecological Investigation Levels.
- Ecological Screening Levels (ESL) of petroleum hydrocarbons.
- Groundwater Investigation Levels and Management Limits for hydrocarbons in soil.
Screening Levels

- Soil based HILs and EILs for always available for investigations but often adopted as clean up or remediation criteria.
- A more site specific and risk based approach has been formalised through the NEPM particularly for hydrocarbons and vapour.
- Soil HSL for petroleum hydrocarbons take into account, soil types, depth of impact, hydrocarbon fractions, landuse and site configuration and degradation.
- Soil petroleum ESLs take into consideration the depth, soil types and ages of contamination.
- Groundwater HSL also need to assess Management Limits for TPH fractions.
Vapour Risk Assessment

- HILs for organic chlorinated compounds to allow a Tier 1 assessment or vapour intrusion pathways.
- Petroleum hydrocarbons HSL for both soil and groundwater then look to complete vapour sampling and risk assessment.
- Comparison with the soil vapour HSLs for vapour intrusion assessment:
  - Site specific variables: size of slab, building parameters, biodegradation.
- Assessment of vapour risk is specialised, need to be familiar with limitations and application in the assessment process.
- There are practical limitations to the screening approach.
Application and data collection of VRA

- NEPM has a strong focus on the CSM
- Need to understand and demonstrate the conceptual site model (CSM).
- Facilitates the SAQP and develop appropriate data collection program.
- Primary pathways to exposure to vapour intrusion risk.
Correct installation of sampling points is paramount.

Reliable data is essential for effective assessment and withstand scrutiny.

Site specific consideration for sample location, slab size or future works

Active sampling or passive?

Quality control in the field is essential for reliable and defensible results.
Management of Vapour Risk

- Vapour risk can be effectively managed in new developments.
- Liquid Boot gas vapour barrier system.
- Geosynthetic membrane systems.
- Sub slab depressurisation systems.
- Removal of preferential pathways.
- More challenging for existing buildings and infrastructure.
SQP and TPRs (CL Auditors)??

- EHP have been moving away from a traditional technical assessor of application and investigation report to more of an policy enabling regulator.
- The EP Act requires that contaminated site investigation reports submitted to EHP (or Auditor) for assessment are prepared by a Suitably Qualified Person as outlined in s564 of the EP Act.
- The SQP process has moved to a self-assessment approach.
- No pre-qualification requirements for SQPs.
- EHP or and Auditors will provide guidance, however the decision on the suitability of the SQP will rest with the SQP.
- The self assessment must be completed before undertaking works and evidence of the assessment kept for 5 years.
- Statutory Declaration will still be required with all submissions to the Department or Auditor.
Contaminated Land Auditors

- The EHP introduced as external review process conducted by Third Party Reviewers (TPRs). This has been replaced through the Green Tape Reduction Act with CLA.
- The process is consistent with NEPM Schedule B10 and the various Auditors schemes adopted across Australia.
- The process is aligned with the 2013 NEPM Schedule B9 and at present is voluntary but may become mandatory in the future.
- Submission of an application to EHP, no formal interview or review process.
- Persons who are considered to be the State’s most qualified and experienced contaminated land professionals.
- Who are accredited by the State to provide direction and advice relating to land contamination matters such as investigation reports and SMPs.
CLA Guidelines/Prescribed Criteria

- Draft prescribed Code of Conduct Environmental Protection Act 1994 Code of professional conduct for auditors approved under Chapter 12, Part 3A.
- Prescribed Criteria under Section 115C of the Environmental Protection Regulations 2008.
- Transitional arrangements under both the EP Act and SPA.
Planning Issues

- The Department of State Development, Infrastructure and Planning (SDOIP) outlines a process to investigate the land as set out in the EP Act.

  - Table 12.1.1: MCU and reconfiguring a lot - contains an acceptable outcome for the sites with potential or actual contamination;
  - AO1.1 A site investigation report or a validation report has been certified by an Auditor under the Environmental Protection Act 1994 that the land is suitable for its intended use; OR
  - AOI.2 A draft site management plan has been certified by an auditor under the Environmental Protection Act 1994 and states that the land is suitable for the stipulated intended use.
Selection of an environmental consultant and Auditor

- Everything rests of engagement of an appropriate environmental consultant and the Auditor.
- Specific expertise is generally required for assessment and reviewing of:
  - Complex industrial sites;
  - Groundwater, particularly where Dense Non-aqueous Phase Liquids or Light Non-aqueous Phase Liquids have been identified;
  - Land contaminated by asbestos materials;
  - Vapor assessment;
  - Land contaminated by radioactive substances;
  - Unexploded Ordnance.
When to engagement consultant and Auditor

- As soon as possible!!
- Pre purchase due diligence of property especially with history of industrial use.
- In parallel or prior to the referral process:
  - Stage 1 Investigation – 4 - 6 weeks to prepare;
  - Stage 2 Investigation – 6 - 12 weeks to complete field works, analytical and reporting;
  - Remediation works – 4 weeks to 3 years or more!!
Questions and Answers
Proposed SPA amendments
Contaminated Land
Current SPA process

**Triggers:**
1. Material change of Use for potentially affected land.
2. Material change of Use for sensitive use.
3. Reconfiguring a lot.
4. Material change of Use on UXO-affected land.

**Assessment process:**
- Assessable development.
- Referral to State for assessment for advice.
- Development permit (with conditions).
Proposed SPA amendments

Triggers

   - all or part of the premises is on the CLR or the EMR; and
   - the premises the subject of the proposed MCU is not currently being used for a sensitive purpose; and
   - the MCU is completely or partly for:
     - a sensitive purpose; or
     - a commercial purpose involving an accessible underground facility, including for example, a basement carpark, workshop or office

A sensitive purpose includes a use that is a child care centre, community care centre, community residence, dual occupancy, dwelling house, educational establishment, health care services, hospital, hostel, multiple dwelling, relocatable home park, residential care facility, retirement facility, short-term accommodation, tourist park.

Commercial purpose is a broad term which generally refers to any premises that sell goods or provide a service to the public. It includes but is not limited to a number of land uses including shops, offices, restaurants and medical centres.

2. Existing Assessable development trigger on land designated as “substantial” zone for UXO.
Compliance Assessment process

✓ Compliance assessment trigger in Schedule 18 of Sustainable Planning Regulation
✓ Assessment against approved form (compliance assessment guideline)
✓ Approved form - Compliance permit

Compliance Assessment commenced on 4 July 2014 with SP Act amendments.
Approved auditors under the EP Act (compliance assessor)

- EHP has developed a framework and/or guidance for:
  - approving auditors who have demonstrated high level qualifications and experience in contaminated land.
  - auditor’s expected professional code of conduct.
  - the criteria the auditor must assess contaminated land matters against the prescribed criteria.
  - the auditor’s role in evaluating and certifying contaminated land reports.
  - Cancelling or suspending an auditor’s approval.
What it means for Development?

- Contaminated land assessment that triggers compliance assessment occurs outside of other development assessment processes.
- Local Government and EHP will receive a copy of the compliance permit.
- Notification provisions regarding contaminated land obligations remain the same.
- UXO still assessable development and referred to SARA but it is planned to move towards compliance assessment.
- Department of Defence have approved auditors who will assist in this assessment process.
Main differences

- More streamlined, clearer trigger, reduces red tape
- No State referral so no EHP/SARA involved in decision.
- It enables those qualified and experienced professionals in contaminated land to be involved in the assessment process
- It enables EHP to focus more on compliance.
- Compliance assessor works with SQP and applicant through the process until compliance is achieved.
- Compliance permit issued before proposed use starts.
- Copy of reports/permit also provided to EHP to keep EMR/CLR up-to-date.
- EHP will approve site management plans and other statutory functions under the EP Act (removal or list on EMR/CLR).
Tools that will assist SPA assessments

- Compliance assessor will be given compliance permit template and assessment guideline to assess compliance against.
- EHP has developed a general SPA guideline for applicants to use.
- A number of mechanisms under the EP Act such as Site Management Plans, validation reports and Site Investigation Reports can still be used to manage any development on contaminated land that does not trigger compliance assessment.
- Further review and proposed amendments to the EP Act will align legislative mechanisms to ensure human health and the environment is adequately protected (Proposed).
Any questions

- Email enquiries: wlca@ehp.qld.gov.au
- Phone: 13 QGOV (13 74 68)
Land Contamination Seminar
Development of contaminated land – the new regime
Rebecca Hoare
Partner, Environment and Planning
Norton Rose Fulbright Australia
21 July 2014
Introduction

- Brief overview of former framework
- Overview of new framework
- Challenges and opportunities
Key Terms

Contaminated Land

- Land contaminated by a hazardous contaminant (Sch 4, Environmental Protection Act (EP Act))

Environmental Management Register/Contaminated Land Register

- Registers kept under the EP Act
- EMR – notifiable activities, not necessarily contaminated land
- CLR – land included when action needs to be taken to remediate to prevent serious environmental harm to a person, animal or another part of the environment
Development Permit
• MCU of a potentially affected premises
• Making a potentially sensitive MCU if all or part of the premises is:
  • used, or was last used for an industrial activity; or
  • in an area for which an area management advice has been given for natural mineralisation or industrial activity

Applications
• Assessed against relevant provisions of the State Development Assessment Provisions

Assessment manager
• Chief Executive (depending on circumstances)
• Receive advice from Department of Environment and Heritage Protection (EHP)

Concurrence Agency: Chief Executive
• MCUs (above)
• Reconfiguring a lot if all or part of the premises:
  • are potentially affected premises; or
  • in an area for which an area management advice has been given for unexploded ordnance
• Receive advice from EHP
Overview and Policy Objective

- Change to compliance assessment by approved auditor
- Fewer triggers
- Reduce red tape
- User pays system
- Reduce delays
Development Permit

- MCU of a potentially affected premises
- Making a potentially sensitive MCU if all or part of the premises is:
  - used, or was last used for an industrial activity; or
  - in an area for which an area management advice has been given for industrial activity.

Applications

- Assessed against relevant provisions of the State Development Assessment Provisions

Assessment manager

- Chief Executive (depending on circumstances)
- Receive advice from Department of Environment and Heritage Protection (EHP)

Concurrence Agency: Chief Executive

- MCUs (above)
- Reconfiguring a lot if all or part of the premises:
  - are potentially affected premises; or
  - in an area for which an area management advice has been given for unexploded ordnance
- Receive advice from EHP
New Triggers

Compliance assessment

• MCU of premises if:
  • All or part of the premises are on the EMR/CLR; and
  • The premises are not being used for a ‘sensitive land use’; and
  • The MCU is completely or partly used for:
    • a sensitive land use; or
    • A commercial purpose involving an accessible underground facility (e.g. basement car park, workshop or office)

Compliance assessor

• An individual approved as an auditor under the EP Act (Chapter 12, part 3A, division 2)
• No scope for a corporate entity to be approved as an auditor
• Currently 8 approved auditors in Queensland

Assessment

• Against the ‘Contaminated land assessment guideline – version 1’ (EHP)
• Decision about whether the land is suitable for the proposed land use in relation to the nature of the contamination and risks to human health and the environment
**UXO**

- Application for MCU or ROL is referred to SARA if all or part of the premises is an area for which EHP has issued an area management advice for unexploded ordnance to the relevant local government
- Currently two such AMAs

**Other MCUs**

- Where MCU does not trigger requirement for compliance assessment, applicant should still consider the risks associated with the land use
- Assessment manager may require further assessment of contaminated land
- Site assessment will require SQP
- Consider appointing an approved auditor to audit and certify the work of the SQP

**Other ROLs**

- Land on the EMR/CLR
- Once reconfigured, all lots are included on the EMR/CLR – regardless of whether contamination is present on any particular lot
- Expensive and time consuming to then commission site investigations and make separate applications to remove from EMR
- Suggest addressing this issue before ROL application is lodged (e.g. site investigation etc)
Compliance Assessment Process under SPA

Request compliance assessment
- Directly to compliance assessor
- IDAS Form 32
- Pay prescribed fee

Compliance assessor assesses request against the Contaminated Land Assessment Guideline (Guideline)

Action notice (section 405 SPA)
- Compliance assessor gives applicant an ‘action notice’ if the development does not achieve compliance with the Guideline
- Action notice sets out action required to achieve compliance
- Prescribes ‘reasonable period’ within which the person may request compliance assessment after taking the required actions
Compliance Assessment Process under SPA

**Applicant’s Action**
- Comply with the action notice and request compliance assessment again within prescribed period;
- Make representations to compliance assessor about the action notice resulting in a new action notice (can only occur once); or
- Let compliance assessment request lapse.

**Decision**
- Within prescribed time, compliance assessor must decide the request and either give a compliance permit or an action notice
- No provision for a decision notice for a refusal
- Compliance assessor must give a copy of compliance permit to EHP (EHP may then decide to remove land from EMR/CLR)

**Deemed approval**
- If compliance assessor does not issue compliance permit or action notice within prescribed time, request is taken to be approved without conditions
Compliance Permit

Specifies the proposed land use is suitable, provides reasons and is supported by a compliance assessment report (and site management plan, if required)

Must be in the approved form

Attaches to the land and binds owner, successors in title and any occupier

Conditions must be reasonable and relevant
Compliance Permit

Takes effect on the day the permit is granted or any appeal is finally decided or withdrawn

Lapses if the development is not completed within the period stated in the permit or prescribed by regulation

Changes to permit can be requested by written notice to the compliance assessor
Appeals

Can appeal against
- A decision to give an action notice
- A decision to impose a condition on a compliance permit
- A decision on a request to change or withdraw an action notice
- A decision to refuse to change a compliance permit
- All appeals must be started within 20 business days

Notice of appeal and parties
- Appellant must give compliance assessor notice of appeal within 10 business days
- Compliance assessor is automatically a respondent to the appeal

Effect of appeal
- Development must not be started until the appeal is decided or withdrawn unless otherwise allowed by the Court
Key Legal Issues

**Drafting issues**
- Under SPA, compliance assessors must be either a local government, a public sector entity or an entity nominated by the local government or the chief executive of the public sector entity.
- Query whether prescribing auditors under a regulation satisfies the requirement for the chief executive of EHP to nominate the auditors.

**Implications**
- If approved auditors are not nominated by the chief executive of EHP, provisions in SPA and the SP Regulation regarding prescribed fees and decision making timeframes do not apply.
- Uncertainty around process.
Key Legal Issues

Deemed approvals

- If decision not made within prescribed timeframes, compliance permit deemed to be granted with no conditions imposed
- Seems a dangerous position, given the importance of ensuring contaminated land is developed appropriately

Role of approved auditors

- New role – no longer advisory but fulfilling a statutory decision making function
- Will be parties to an appeal as individuals – lawyers, experts, potential for costs
- Potential for declaratory proceedings
- Potential personal liability (e.g. negligence)
- Only 8 approved auditors – query whether need for more auditors to ensure delays are not experienced
Tips

1. Engage SQP early to address compliance criteria and meet the outcomes set out in the Guideline.
2. Liaise with compliance assessor early.
3. Don’t forget – you may still need a development permit.
If unexpected serious contamination is discovered, work must cease, remedial action taken and compliance assessor notified – consider also, duty to notify under EP Act

Auditors:
- Consider and prepare for potential personal liability (PI Insurance, partnership agreements, employment contracts)
- Consider impact of legal proceedings
- Code of Conduct
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