

# CONTAMINATED SITES

## Guidelines on the Duty to Report Contamination under the *Contaminated Land Management Act 1997*

Department of **Environment & Climate Change** NSW





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Guidelines on the Duty to  
Report Contamination under  
the *Contaminated Land  
Management Act 1997*

## *Limitations*

These guidelines should be used in conjunction with other relevant guidelines made or approved by the Department of Environment and Climate Change NSW under section 105 of the *Contaminated Land Management Act 1997* when assessing and managing contaminated land.

These guidelines do not include occupational health and safety procedures. The NSW WorkCover Authority should be consulted on such procedures. Appropriate action must be taken to manage any potential hazard and adequately protect the health of any workers on, or occupiers of, the site.

## *Disclaimer*

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# Contents

## Preface *iv*

## 1 Introduction 1

- 1.1 Background 1
- 1.2 About these guidelines 1
- 1.3 NSW Contaminated Land Management Framework 1
- 1.4 Contaminated Land Management Act 2

## 2 Duty to report contamination 3

- 2.1 The duty to report 3
- 2.2 Determining whether to report 3
  - 2.2.1 *Indicators of contamination* 6
  - 2.2.2 *Further investigation of land* 7
- 2.3 Notification triggers 8
  - 2.3.1 *Onsite soil contamination* 8
  - 2.3.2 *Offsite soil contamination* 9
  - 2.3.3 *Foreseeable contamination of neighbouring land* 10
  - 2.3.4 *Groundwater* 11
  - 2.3.5 *Surface water or groundwater discharging into surface water* 11
  - 2.3.6 *Foreseeable* 12
- 2.4 Other contaminants 12
- 2.5 Situations not intended to be captured by the duty to report 12
- 2.6 When does the duty to report arise? 13
  - 2.6.1 *Abilities, experience, qualifications and training* 14
  - 2.6.2 *Could reasonably have sought advice, and the circumstances of contamination* 14
  - 2.6.3 *When should a person seek advice about site contamination?* 15
  - 2.6.4 *Examples where further assessment is not needed* 15
  - 2.6.5 *Examples where advice should be sought* 18
- 2.7 Form of report 19
- 2.8 Failure to report 19

## 3 DECC regulatory actions 20

- 3.1 Evaluation of the significance of the contamination 20
- 3.2 Contamination significant enough to warrant regulation 20
- 3.3 Sites warranting regulation 21
- 3.4 Where regulation is not warranted 22

## References 23

## Appendices 24

- Appendix A: Notification triggers for groundwater and surface water 24
- Appendix B: Site contamination notification form 31

# Preface

## Background

This document revokes the former *Contaminated Sites: Guidelines on Significant Risk of Harm from Contaminated Land and the Duty to Report*, published in 1999. This document has been prepared in light of the amendments to the *Contaminated Land Management Act 1997* ('CLM Act') by the *Contaminated Land Management Amendment Act 2008* ('CLM Amendment Act 2008'). These guidelines are made under section 105 of the *Contaminated Land Management Act 1997*.

Various other guidelines, which may be updated from time to time, are referred to throughout this document. Where a reference guideline that is made by the Department of Environment and Climate Change (DECC) under section 105 of the CLM Act is updated, the relevant reference(s) in this document should be read as if they are part of the endorsed updated version. A reference in these guidelines to any other instrument (e.g. guidelines, standards) made under an Act should be read as a reference to that instrument as in force from time to time.

These guidelines relate to the duty to report under the CLM Act only. It should be noted that there may also be reporting duties required by other legislation, for example, under the *Protection of the Environment Operations Act 1997*.

The Environment Protection Authority (EPA) is part of DECC and exercises certain statutory functions and powers under the CLM Act. In these guidelines, references to DECC should be read as referring to the EPA. It is the latter, rather than DECC, that has powers and functions under the CLM Act.

## Commencement

These guidelines take effect upon publication in the Government Gazette, with the exception of Part 2 and Appendixes A and B of the Guidelines, which will take effect on 1 December 2009.

# 1 Introduction

## 1.1 Background

Land contamination<sup>1</sup> has the potential to arise from a range of industrial and other activities. The impacts of some activities are only temporary, whereas others carry the risk of leaving an unwanted legacy. In some instances, particularly when the land use has involved hazardous substances, that legacy may be threatening to humans or the environment, or it may affect the current or future use of the land.

Not all contamination will affect the land in such a way that it cannot be used productively for industrial, commercial, agricultural, residential or other purposes. To provide for effective management of contaminated land, it is necessary to distinguish situations where Department of Environment and Climate Change (DECC) regulation is warranted to protect humans or the environment from those where such regulation is not warranted.

The *Contaminated Land Management Act 1997* (CLM Act) establishes a legal framework that gives DECC powers to require the assessment and remediation of sites where contamination is significant enough to warrant regulation. Where DECC's intervention is not needed, the planning process will determine the appropriate use of sites in the future.

## 1.2 About these guidelines

These guidelines are made under section 105 of the CLM Act. They provide information on two key aspects of the duty to report contamination under the CLM Act. Section 2 of these guidelines sets out the duty of landowners and persons who have responsibility for the contamination to report to DECC. This includes a range of considerations for those who encounter land contamination and information on how to proceed where there is uncertainty. Section 3 of these guidelines outlines how DECC assesses and determines whether or not contamination is significant enough to warrant regulation.

## 1.3 NSW Contaminated Land Management Framework

The Contaminated Land Management Framework in NSW consists of two tiers:

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<sup>1</sup> 'Contamination' of land is defined under the CLM Act as the presence in, on or under the land of a substance at a concentration above the concentration at which the substance is normally present in, on or under (respectively) land in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment.

- DECC uses its powers under the CLM Act to deal with sites where the contamination is significant enough to warrant regulation. The contamination of these sites is generally posing an unacceptable risk to human health or the environment, given the site's current or approved use,<sup>2</sup> and needs to be addressed immediately.
- Local councils deal with other contamination under the planning and development framework, including State Environmental Planning Policy No 55 – Remediation of Land and the *Managing Land Contamination – Planning Guidelines*. This type of site, although contaminated, does not pose an unacceptable risk under its current or approved use. The planning and development process will determine what remediation is needed to make the land suitable for a different use.

## 1.4 Contaminated Land Management Act

The general objective of the CLM Act is to establish a process for investigating and, where appropriate, remediating land that DECC has reason to believe is contaminated, where that contamination is considered significant enough to warrant regulation under the CLM Act.

The particular objectives of the CLM Act are to:

- set out accountabilities for managing contamination if DECC considers the contamination is significant enough to require regulation
- set out the role of DECC in the assessment of contamination and the supervision of the investigation, remediation and management of contaminated sites
- provide for the accreditation of site auditors of contaminated land to ensure appropriate standards of auditing in the management of contaminated land
- ensure that contaminated land is managed with regard to the principles of ecologically sustainable development.

A number of amendments to the CLM Act commenced on 1 July 2009. A key amendment related to the duty to report is removal of reference to 'significant risk of harm' as a trigger for reporting contaminated land to DECC under the CLM Act. The duty to report is now based on trigger values above which notification is required. Details of these trigger values are given in Section 2.3 of these guidelines.

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<sup>2</sup> 'Approved use' of land is defined under the CLM Act as a use to which the subject land may be put without approval or development consent under Part 3A or 4 of the *Environmental Planning and Assessment Act 1979*.

## **2 Duty to report contamination**

### **2.1 The duty to report**

Under section 60 of the CLM Act, a person whose activities have contaminated land or a landowner whose land has been contaminated is required to notify DECC when they become aware of the contamination.

Such a person is required to notify DECC of contamination in any of the following circumstances:

- The level of the contaminant in, or on, soil exceeds a level of contamination set out in these guidelines with respect to a current or approved use of the land, and people have been, or foreseeably will be, exposed to the contaminant, OR
- The contamination meets a criterion prescribed by the regulations, OR
- The contaminant has entered, or will foreseeably enter, neighbouring land, the atmosphere, groundwater or surface water, and the contamination exceeds, or will foreseeably exceed, a level of contamination set out in these guidelines and will foreseeably continue to remain above that level.

Section 2.3 provides more information on the notification triggers and how they should be used in determining whether the contamination should be reported to DECC. Sections 2.5 and 2.6 clarify situations where the duty to report is not intended and some situations where the duty does arise.

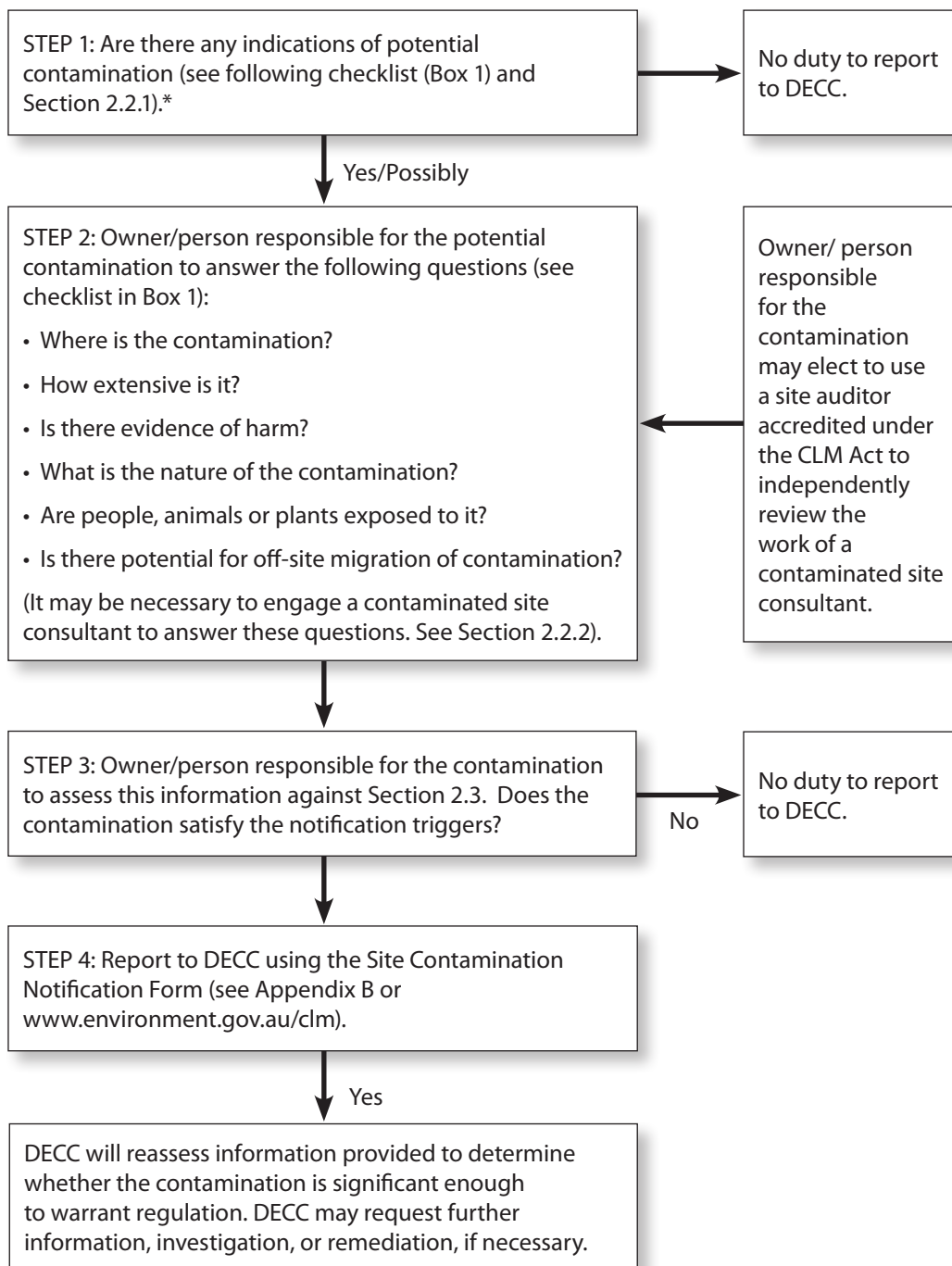
Although the duty to report contamination applies to certain persons in specific circumstances, as described above, any person at any time can report suspected contamination to DECC by calling the Environment Line on 131 555.

### **2.2 Determining whether to report**

To assess whether the contamination of a site should be reported, a review of the site activities and history, and a site inspection to look for indicators of contamination, should be undertaken. There may also be a need for a further, more detailed investigation.

Figure 1 shows the decision process that can be used by a site owner or a responsible person in assessing whether to report under section 60 of the CLM Act. Box 1 is a checklist for site owners or responsible persons to report contamination to DECC.

Figure 1: A decision process for use by site owners or responsible persons considering reporting contamination to DECC under the CLM Act.



\* Refer to sections 2.5 and 2.6 for situations and examples not intended to be captured by the duty to report.

## **Box 1: Checklist for use by site owners and persons responsible for contamination to report contamination to DECC**

### **STEP 1: Indications of possible contamination**

Owner/ person responsible for the potential contamination to review site history and records and to undertake a site inspection to check whether:

- the site or adjacent sites may be associated with potential contaminating activities
- the site or adjacent sites may be associated with complaints about pollution or illegal dumping of wastes
- there are gaps or doubts about the site history that the site could have associated with activities causing contamination
- there are any chemical or physical indicators of contamination, as per Section 2.2.1.

If the answers to all of the above are 'No', reporting to DECC is not required under section 60 of the CLM Act.

### **STEP 2: Assessing the site**

Once the indicators of contamination have been identified, check that:

- an investigation of the potential contaminants of concern in defining the nature, degree and extent of contamination has been conducted
- site investigation/s and reporting follow *Contaminated Sites: Guidelines for Consultants Reporting for Contaminated Sites* (NSW EPA 2000).
- the checklist for Exposure Assessment in Appendix VII of the *Contaminated Sites: Guidelines for the NSW Site Auditor Scheme*, 2nd edition (NSW DEC 2006) has been addressed.
- any evidence of, or potential for, migration of contaminants from the site and its adjacent sites has been appropriately addressed.
- results of the assessment are assessed against the notification requirements in Section 2.3 and Appendix A.

If a contaminated land consultant is engaged to clarify the level of contamination, check that:

- the consultant has appropriate qualifications and is experienced in contaminated site assessment and remediation (refer to 'Where to find a consultant?' on the DECC website for further information).
- the consultant is aware that the investigation is to provide information for assessment of reporting obligations under section 60 of the CLM Act.

### 2.2.1 *Indicators of contamination*

A review of the site activities and history provides a starting point to assess whether current or past use may have contributed to contamination of the site. This includes consideration of whether the site or adjacent sites may be associated with potentially contaminating activities; complaints about pollution or illegal dumping of wastes; and whether there are gaps in, or doubts about, the site history.

An inspection of the site and its surrounds may provide physical indicators of contamination or harm. Examples of indicators of contamination are:

- case(s) of a biologically plausible illness or health impairment among people who have had exposure to a particular contaminated site
- the presence of chemicals either on, or in, surface water or groundwater at the site (for example, abnormal colouration of the water, odours emanating from the water)
- visible signs of toxic responses to contaminants in flora and fauna (for example, unusual numbers of birds dying on or near the site, abnormal domestic animal or wildlife behaviour, dead vegetation within, or adjacent to, areas of otherwise normal growth)
- the finding of liquid or solid chemicals or chemical wastes on, or in, the soil during site works
- unusual odours emanating from the soil
- the entry of chemicals into on- or off-site service trenches
- the presence of discarded explosive materials on site
- the presence or the storage of bulk liquid dangerous goods on site
- the presence of illegal and/or uncontrolled landfills on site
- evidence of off-site migration of contaminants into adjacent or nearby environments (for example, migration to residential areas, creeks, rivers, wetlands, sediments or groundwater).

Note that this list is not exhaustive, and there may be additional indicators that are relevant to some sites.

In some cases the indicators themselves will provide enough evidence to conclude that the contamination should be reported to DECC. In those cases where the indicators suggest that

contamination is present but there is uncertainty as to whether the contamination should be reported to DECC, further investigation may be needed.

### 2.2.2 Further investigation of land

Where further investigation of the land is necessary to assess whether contamination should be reported to DECC, a site investigation should:

- describe past and present activities that potentially contaminated the land and the adjacent areas, including groundwater, surface water and sediments
- identify potential contamination types
- assess the site condition
- assess the nature, degree and extent of the contamination
- assess any harm that has been, or is being, caused by the contamination
- assess the possible exposure routes and exposed populations and the nature of any risk presented by the contamination.

A suitably qualified and experienced environmental consultant should be engaged to do the assessment. The consultant should use the publication *Contaminated Sites: Guidelines for Consultants Reporting on Contaminated Sites* (NSW EPA 2000) as a basis for conducting the investigation and preparing a report. Other guidelines made or approved under section 105 of the CLM Act should also be considered, including the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPC 1999), which provides a national framework for consistency and practical guidance for the assessment of contaminated sites. Important DECC guidelines related to site assessment include:

- *Contaminated Sites: Guidelines for Assessing Service Station Sites* (NSW EPA 1994)
- *Contaminated Sites: Guidelines for the Assessment and Management of Groundwater Contamination* (NSW DEC 2007).

The investigation should consider the nature, degree and extent of contamination; whether the contamination affects the existing or approved uses of the site and adjacent sites; and potential routes of exposure to humans and the environment. It should give a conclusion as to whether or not the contamination should be reported in consideration of Section 2.3.

Where uncertainties arise from information gathered during the site investigation, there may be a need to undertake a further investigation to obtain more information. Consideration could also be given to engaging an accredited site auditor to review the consultant's report and resolve any uncertainties.

Auditors may be used in other circumstances at the discretion of the person(s) initiating a site investigation.

## 2.3 Notification triggers

A landowner or a person whose activities have contaminated land is required to notify DECC that the land is contaminated if a substance contaminating the land (a 'contaminant') is present at levels above any of those specified by these guidelines and if certain other factors are met (see below).

### 2.3.1 Onsite soil contamination

For the purposes of s. 60(3)(b) of the CLM Act, notification of contamination in, or on, soil on the land is required if:

EITHER:

- the 95% upper confidence limit on the arithmetic average concentration<sup>3</sup> of a contaminant in, or on, soil on the land is equal to, or above:
  - the Health Investigation Level specified for that contaminant for the current or approved use of the land in the *National Environment Protection (Assessment of Site Contamination) Measure 1999*, or
  - (for any current or approved use of the land where the contaminant is benzene, toluene, ethyl benzene or total xylenes) the threshold concentration specified for benzene, toluene, ethyl benzene or total xylenes in soil in the *Contaminated Sites: Guidelines for Assessing Service Station Sites* (NSW EPA 1994),

OR

- the concentration of a contaminant in an individual soil sample from the land is equal to, or above, two and a half times:

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<sup>3</sup> An example for determining the 95% upper confidence limit on the arithmetic average concentration can be found in the *Sampling Design Guidelines* (NSW EPA 1995).

- the Health Investigation Level specified for that contaminant for the current or approved use of the land in the *National Environment Protection (Assessment of Site Contamination) Measure 1999*, or
- (for any current or approved use of the land where the contaminant is benzene, toluene, ethyl benzene or total xylenes) the threshold concentration specified for benzene, toluene, ethyl benzene or total xylenes in soil in the *Contaminated Sites: Guidelines for Assessing Service Station Sites* (NSW EPA 1994).

AND

- a person has been, or foreseeably will be, exposed to the contaminant or any by-product of the contaminant.

Further details on the concept of 'foreseeability' are provided in section 2.3.6.

### 2.3.2 Offsite soil contamination

For the purposes of s. 60(3)(a) of the CLM Act, notification of contamination in, or on, soil on neighbouring land is required if:

- the contaminant has entered neighbouring land, AND

EITHER:

- the 95% upper confidence limit on the arithmetic average concentration<sup>4</sup> of a contaminant in, or on, soil on the neighbouring land is equal to, or above:
  - the Health Investigation Level specified for that contaminant for the current or approved use of the land in the *National Environment Protection (Assessment of Site Contamination) Measure 1999*, or
  - (for any current or approved use of the land where the contaminant is benzene, toluene, ethyl benzene or total xylenes) the threshold concentration specified for benzene, toluene, ethyl benzene or total xylenes in soil in the *Contaminated Sites: Guidelines for Assessing Service Station Sites* (NSW EPA, 1994).

OR

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<sup>4</sup> Refer to the *Sampling Design Guidelines* (NSW EPA 1995) for determination of the 95% upper confidence limit on the arithmetic average concentration.

- the concentration of a contaminant in an individual soil sample from the land is equal to, or above, two and a half times:
  - the Health Investigation Level specified for that contaminant for the current or approved use of the land in the *National Environment Protection (Assessment of Site Contamination) Measure 1999* as in force from time to time, or
  - (for any current or approved use of the land where the contaminant is benzene, toluene, ethyl benzene or total xylenes) the threshold concentration specified for benzene, toluene, ethyl benzene or total xylenes in soil in the *Contaminated Sites: Guidelines for Assessing Service Station Sites* (NSW EPA 1994).

AND

- the concentration of the contaminant in, or on, the soil on the neighbouring land will foreseeably continue to remain above the specified concentration.

### 2.3.3 Foreseeable contamination of neighbouring land

For the purposes of s. 60(3)(a) of the CLM Act, notification of foreseeable contamination of neighbouring land is required if:

- the contaminant will foreseeably enter neighbouring land

AND

- the concentration of the contaminant in the neighbouring land will foreseeably be above:
  - the Health Investigation Level specified for that contaminant for the current or approved use of the land in the *National Environment Protection (Assessment of Site Contamination) Measure 1999*, or
  - (for any current or approved use of the land where the contaminant is benzene, toluene, ethyl benzene or total xylenes) the threshold concentration specified for benzene, toluene, ethyl benzene or total xylenes in soil in the *Contaminated Sites: Guidelines for Assessing Service Station Sites* (NSW EPA 1994).

AND

- the concentration of the contaminant on the neighbouring land will foreseeably continue to remain above the specified concentration.

### 2.3.4 *Groundwater*

For the purposes of s. 60(3)(a) of the CLM Act, notification of actual or foreseeable contamination of groundwater is required if:

- the contaminant has entered, or will foreseeably enter, groundwater

AND

- the concentration of the contaminant in the groundwater is, or will foreseeably be, above the concentration specified for that contaminant in Column 1 of Appendix A

AND

- the concentration of the contaminant in the groundwater will foreseeably continue to remain above the specified concentration.

Separate-phase contamination of groundwater (i.e. immiscible organic liquid), if found, requires notification regardless of the concentration in the groundwater.

### 2.3.5 *Surface water or groundwater discharging into surface water*

In the cases of:

- surface water, or
- groundwater discharging into a surface water body or other receptors within a 500-metre radius of the boundary of the contaminant source,

notification of actual or foreseeable contamination is required for the purposes of s. 60(3)(a) of the CLM Act if:

- the contaminant has entered, or will foreseeably enter, the surface water or groundwater

AND

- the concentration of the contaminant in the surface water or groundwater is, or will foreseeably be, above the concentration specified for that contaminant in Column 2 or 3 in Appendix A

AND

- the concentration of the contaminant in the surface water or groundwater will foreseeably continue to remain above the specified concentration.

### 2.3.6 *Foreseeable*

The key concept of 'foreseeable' in the CLM Act is to determine the likelihood of the presence of contamination or potential routes for contaminant migration.

Foreseeability depends on a number of considerations, including:

- the physical and chemical properties of the contaminants
- the quantity of the contaminants
- the location of the site
- the geological and hydrogeological conditions (soil stratigraphy, depth to groundwater, and direction and rate of groundwater or surface water flow)
- the potential fate and transport mechanisms.

To determine the foreseeable movement of contaminants through various media such as soil, groundwater, surface water or air, a sufficient number of samples should be collected to verify the extent of contamination in the relevant media and the results of the sampling compared with the relevant tables in these guidelines. Where relevant media have not been sampled, the potential movement of contaminants at levels above the trigger values should be assumed, except where negligible amounts of the contaminants have been released into the environment and at these quantities the environment and the human health are unlikely to be affected.

## 2.4 **Other contaminants**

In cases where there are no levels specified for any particular contaminants in any environmental media, other reputable regulatory criteria may be used as a reference. Alternatively, a site-specific risk assessment should be considered. Detailed site-specific human health or ecological risk assessments can be both complex and costly, and these considerations will guide decisions as to the level of assessment required.

## 2.5 **Situations not intended to be captured by the duty to report**

The duty to report is not intended to capture the notification of:

- widespread diffuse urban pollution that is not attributed to a specific industrial, commercial or agricultural activity
- sites without offsite contamination, where:

- the onsite contamination is not likely to migrate to an adjoining property, and
- any onsite contamination has been adequately addressed by the planning process under the *Environmental Planning and Assessment Act 1979*
- sites with substances that are at levels above the triggers but are below, or the same as, the natural background concentration
- sites that have already been notified to DECC under the CLM Act, where there has been no change in circumstances since the previous notification
- sites subject to a declaration, an order or a proposal under Part 3 of the CLM Act
- sites formerly subject to a declaration under Part 3 of the CLM Act but where no potentially contaminating activities have since been carried on
- sites where a site audit statement has been issued certifying that the site is suitable for the current or approved use, and no potentially contaminating activities have since been carried on at the site

While the duty to report under the CLM Act is not intended to capture the above scenarios, DECC may still choose to regulate these sites under the CLM Act or other legislation if it considers that the contamination is significant enough to warrant regulation. In doing so, DECC would consider the circumstances of each site in determining whether to intervene.

## **2.6 When does the duty to report arise?**

The duty to report arises when a landowner or a person whose activities have contaminated the land:

- is aware of the contamination, or
- should reasonably have become aware of the contamination.

The following factors are to be taken into account in determining when a person should reasonably have become aware of the contamination:

- the person's abilities, including his or her experience, qualifications and training
- whether the person could reasonably have sought advice that would have made the person aware of the contamination
- the circumstances of the contamination.

### 2.6.1 *Abilities, experience, qualifications and training*

DECC considers that a person should reasonably be aware of contamination on land if they have knowledge of:

- the substances that could cause contamination
- how to identify and assess those substances
- the behaviour of those substances in the environment
- how to assess the potential pathways by which those substances could move
- how to assess and identify the exposure pathways available to those substances.

### 2.6.2 *Could reasonably have sought advice, and the circumstances of contamination*

A range of factors might influence whether a person could reasonably seek advice about contamination. Although it is impossible to exhaustively describe those factors, these guidelines provide some examples as guidance.

For example, the following factors might affect whether a person should reasonably seek advice:

- the circumstances of the contamination (for example, whether there is evidence of the contamination)
- the site history
- the activities currently carried out at the site
- the activities carried out by the landowner
- whether the person, or anyone engaged by that person, is able to access the site to obtain further information about the contamination.

For example, where the person:

- is not a lessee (or sub-lessee) or lessor (or sub-lessor) of the site
- does not own the site
- has no control or management of the site, and
- has no financial interest in the site

then that person might have difficulty accessing a site.

If a person:

- undertakes potentially contaminating commercial or industrial activities on the site, or
- is involved in land development activities and the subject land has been associated with activities that may potentially contaminate land, water or groundwater

then that person should seek advice about the existence, and nature, of any contamination on the site.

If:

- potentially contaminating commercial or industrial activities have previously been carried out on the land, or the land is filled with materials from an unknown origin
- there is evidence of contamination, and
- no prior assessment has been conducted or a management plan for the site has not been developed and implemented

then the landowner or a person who has engaged in an activity that could potentially contaminate the land should seek further advice about the site and determine whether there is any contamination that should be notified to DECC.

### *2.6.3 When should a person seek advice about site contamination?*

The following scenarios provide some guidance in determining whether a person should seek advice about site contamination for the purposes of s. 60(9)(b) of the CLM Act. These examples are not exhaustive and are provided as guidance only. They do not constitute legal advice. The importance of seeking further advice about site contamination will depend on the particular circumstances in each instance, and these may differ from the examples given below. Landowners and persons carrying on potentially contaminating activities should obtain their own independent legal advice.

### *2.6.4 Examples where further assessment is not needed*

A person would not be expected to seek advice in the following situations:

Example 1:

- The site is currently used for residential purposes.
- The site has never been used for commercial or industrial purposes.

- The site has complete coverage with grass and/or pavements and/or buildings.
- Gardens are established at the site with clean topsoil.
- No indicators of contamination are present (for example, no dead or stressed vegetation, no surface indicators of chemical spills, no unexplained patches of bare earth, no chemical odours from drains or other subsurface locations; no unexplained animal deaths; no unexplained health issues).

Example 2:

- The site is in use for any purpose.
- The site was previously used for commercial or industrial purposes.
- The site has either been filled or not filled. If the site is filled, disturbance of the soil or cap is subject to an environmental management plan or a development consent and is carried out in accordance with that plan or consent.
- A site audit statement has been issued certifying that the site is suitable for the current or approved use.
- No potentially contaminating activities have been carried on at the site since the statement was issued.

Example 3:

- The site is currently used for public open space purposes (for example, parks, playgrounds, playing fields).
- Public access to the site is allowed.
- The site is completely covered with clean materials (for example, grass, soil, pavements).
- An appropriate Environmental Management Plan ('EMP') and Occupational Health and Safety Plan ('OH&S Plan') are being implemented at the site for users and visiting maintenance workers.

Example 4:

- The site is currently used for commercial, industrial or other purposes (for example, infrastructure or utility corridors).
- The site is fenced and members of the public are not able to access the site.
- An appropriate EMP and OH&S Plan are being implemented at the site for users and visiting maintenance workers.

- There is no evidence of contamination (for example, no dead or stressed vegetation, no surface indicators of chemical spills, no unexplained patches of bare earth, no chemical odours from drains or other subsurface locations; no unexplained animal deaths; no unexplained health issues; no reasons to suspect groundwater is being affected by the activities).
- There is no aboveground or underground storage of bulk liquid chemicals.

Example 5:

- The site is currently used for a commercial or industrial use.
- The site is fenced and members of the public are not able to access the site.
- An appropriate OH&S Plan is being implemented for users of the site and for visiting maintenance workers.
- There is underground storage of bulk liquid chemicals or fuels on the site.
- There is no evidence of contamination (for example, no dead or stressed vegetation, no surface indicators of chemical spills, no unexplained patches of bare earth, no chemical odours from drains or other subsurface locations (other than the underground storage location); no unexplained animal deaths; no unexplained health issues).
- There are groundwater monitoring wells at the site and no contamination has been detected.
- An appropriate EMP, including an ongoing groundwater monitoring plan, has been implemented in all 6-monthly monitoring periods to date.

Example 6:

- The site is currently used for commercial or industrial purposes, including associated infrastructure such as carparks, roads and open space.
- Public access to the site is allowed.
- The site is permanently covered (for example, by pavements and/or by floor slabs with small landscaped or grassed areas).
- An appropriate EMP and OH&S Plan are being implemented for users and visiting maintenance workers.

- There is no underground storage of bulk liquid chemicals or fuels on the site.
- There is no evidence of contamination (for example, no dead or stressed vegetation, no surface indicators of chemical spills, no unexplained patches of bare earth, no chemical odours from drains or other subsurface locations (other than the underground storage location); no unexplained animal deaths; no unexplained health issues).

Example 7:

- The site is currently used for industrial purposes.
- There are aboveground and underground storage systems at the site.
- Contamination is present in the groundwater at concentrations above the triggers but is confined within the boundaries of the site.
- A detailed site investigation has been conducted and the nature, degree and extent of contamination have thoroughly been defined.
- An appropriate OH&S Plan and EMP are being implemented for site users and visiting maintenance workers.
- The contaminants have been found not to pose on-site risks (for example, from vapour inhalation).
- Site investigations have confirmed that because the soils are of low permeability the contaminated groundwater is unlikely to move off site.
- Groundwater monitoring close to, or at, the hydraulic down-gradient site boundary continues to confirm that the contaminated groundwater will not migrate off site.

### 2.6.5 *Examples where advice should be sought*

A person would be expected to seek advice in the following situations to establish the nature and level of the contamination, to determine whether the contamination is likely to migrate to adjoining properties, and to determine whether there is a duty to notify:

Example 8:

- The site is currently used for commercial, industrial or open recreational purposes.
- Public access to the site is allowed.

- The site is uncovered, with access to soil and/or fill materials.
- Large areas of the site are filled with materials of unknown origin and the site is adjacent or close to a sensitive receptor (for example, the site is near land used for residential purposes or for child care use or near a waterway).

Example 9:

- The site is currently used for commercial or industrial purposes.
- The site is either fenced or not fenced and members of the public are, or are not, able to access the site.
- An appropriate OH&S Plan and EMP are being implemented site users, including visiting maintenance workers.
- There is underground or above-ground storage of bulk liquid chemicals or fuels on the site.
- There are no groundwater wells present at the site.
- No environmental assessment has been recently undertaken to assess whether any contaminants at the site have migrated, or are likely to migrate, to adjoining properties.

## **2.7 Form of report**

The CLM Act requires notification to be given in a form approved by DECC. A copy of the approved form is contained in Appendix B. Any supporting information related to the contamination should be attached in, for example, consultants' reports.

## **2.8 Failure to report**

A person who is required to report contamination to DECC but fails to do so may be subject to prosecution. If the person is convicted, the CLM Act currently provides for a maximum penalty of:

- 1500 penalty units (currently \$165,000), with a further penalty of 700 penalty units (currently \$77,000) for each day the offences continue, in the case of a corporation, or
- 700 penalty units (currently \$77,000), with a further penalty of 300 penalty units (currently \$33,000) for each day the offence continues, in the case of an individual.

### **3 DECC regulatory actions**

#### **3.1 Evaluation of the significance of the contamination**

When DECC receives a report under section 60 of the CLM Act, it will assess the information, and any other relevant information to which it has access, to determine whether the contamination is significant enough to warrant regulation. The matters that DECC must consider before declaring land to be significantly contaminated land are listed in section 12 of the CLM Act and are described in Section 3.2 of these Guidelines.

DECC has a general obligation under section 8 of the CLM Act to respond within a reasonable time to a person who has furnished information about actual or possible contamination of land, and to record what it has done and the reasons for doing it.

The information provided by a person in complying with the duty to report under section 60 of the CLM Act is not admissible as evidence in any proceedings against that person for an offence under any environment protection legislation administered by DECC (except for proceedings for an offence under s. 60 of the CLM Act).

#### **3.2 Contamination significant enough to warrant regulation**

The CLM Act has defined a process that DECC must follow before declaring land to be significantly contaminated land. In determining whether land is contaminated and whether that contamination is significant enough to warrant regulation, DECC must take into account:

- (a) whether the substances have already caused harm or are likely to cause harm (for example, in the form of toxic effects on plant or animal life)
- (b) whether the substances are toxic, persistent or bioaccumulative, or are present in large quantities or in high concentrations, or occur in combinations
- (c) whether there are exposure pathways available to the substances (that is, routes whereby the substance may proceed from the source of the contamination to human beings or into the environment)
- (d) whether the uses to which the land (and any land adjoining it) is currently being put are such as to increase the risk of harm from the substance (for example, using the land for the purposes

of child care, dwellings or production of food for human consumption)

- (e) whether the approved uses of the land and land adjoining it are such as to increase the risk of harm from the substances
- (f) whether the substances have migrated, or are likely to migrate, from the land, because of either the nature of the land or the substances
- (g) any relevant guidelines.

The CLM Act does not define the nature or level of contamination that requires regulation, as this is determined on a case-by-case basis. Determining whether or not contamination is significant enough to warrant regulation involves many considerations, including the type, nature, quantity and concentration of contaminants, how they manifest themselves, the characteristics they display and the nature of their impacts in a particular medium. It also involves broader considerations, such as the current use of the land, who might be exposed to the contaminants under that use, and whether they are likely to be exposed.

### **3.3 Sites warranting regulation**

Once DECC determines that it has reason to believe that the land is contaminated and the contamination is significant enough to warrant regulation, it may take any of a number of actions under Part 3 of the CLM Act. These actions could include:

- declaring the land to be 'Significantly Contaminated Land' (section 11 of the CLM Act)
- issuing Management Orders to require site assessment, remediation and/or monitoring (section 14 of the CLM Act)
- approving voluntary management proposals from interested parties to manage the land voluntarily (section 17 of the CLM Act)
- liaising and negotiating with landowners or land occupiers on appropriate solutions
- undertaking educational programs, public awareness programs and other measures to minimise the environmental and health implications of contamination (section 104 of the CLM Act)
- issuing a clean-up or prevention notice under the *Protection of the Environment Operations Act 1997*, regardless whether or not DECC is the appropriate regulatory authority.

In addition to regulatory actions, and if it is in the public interest, the Minister may also enter into voluntary offset arrangements with a person responsible for contamination of land. Under such arrangements, the person provides help (other than direct monetary help) to communities affected by the contamination (section 111A of the CLM Act).

The actions taken by DECC will depend on the nature of the site, the use to which it is put, the nature of the risk identified by DECC and the management options available for addressing the risk. DECC's primary goal in relation to managing contaminated land where the contamination is significant enough to warrant regulation is to ensure a reduction in the risk posed by the contamination, such that the existing land use may continue or the use for which there is a current approval may proceed.

### **3.4 Where regulation is not warranted**

In some circumstances a site may be contaminated but DECC may consider that the contamination is not significant enough to warrant regulation. A site may contain contaminants at levels above the triggers, but in view of the limited exposure pathways available the contamination will not be considered significant enough to warrant regulation.

Where DECC considers that a contaminated site does not warrant regulation under the CLM Act, the contamination issue should be addressed by the proponent and the planning consent authority as part of the development approval process. If the existing land use is proposed to be changed, the planning authority may require the site to be remediated to a level suitable for the proposed new use. Councils may also consider regulating the contamination, where warranted, under the *Protection of the Environment Operations Act 1997*.

## References

ANZECC & ARMCANZ 2000, *Australian and New Zealand Guidelines for Fresh and Marine Water Quality*, Australian and New Zealand Environment and Conservation Council and Agriculture and Resource Management Council of Australia and New Zealand, Paper No 4, October 2000

NEPC 1999, *National Environment Protection (Assessment of Site Contamination) Measure 1999*, National Environment Protection Council, Canberra

NHMRC & NRMCC 2004, *Guidelines for Drinking Water Quality in Australia*, National Health and Medical Research Council and Natural Resource Management Ministerial Council, Canberra

NSW DEC 2006, *Contaminated Sites: Guidelines for the NSW Site Auditor Scheme (2nd edition)*, NSW Department of Environment and Conservation, Sydney.

NSW DEC 2007, *Contaminated Sites: Guidelines for the Assessment and Management of Groundwater Contamination*. NSW Department of Environment and Conservation, Sydney.

NSW EPA 1994, *Contaminated Sites: Guidelines for Assessing Service Station Sites*, NSW Environment Protection Authority, Sydney.

NSW EPA 1995, *Contaminated Sites: Sampling Design Guidelines*, NSW Environment Protection Authority, Sydney.

NSW EPA 2000, *Contaminated Sites: Guidelines for Consultants Reporting on Contaminated Sites*, NSW Environment Protection Authority, Sydney.

## Appendix A: Notification triggers for groundwater and surface water

	Substance	Column 1	Column 2	Column 3
		Trigger value for drinking water <sup>1</sup> (µg/L)	Trigger value for fresh water <sup>2</sup> (µg/L)	Trigger value for marine water <sup>2</sup> (µg/L)
<b>Metals and metalloids</b>				
	Aluminium pH >6.5		55	ID
	Antimony	3	ID	ID
	Arsenic (total)	7		
	Arsenic (As III)		24	ID
	Arsenic (As V)		13	ID
	Barium	700		
	Boron	4000	370	ID
	Cadmium	2	0.2	5.5
	Chromium (as Cr III)		ID	27.4
	Chromium (as Cr(VI))	50	1	4.4
	Cobalt		ID	1
	Copper	2000	1.4	1.3
	Lead	10	3.4	4.4
	Manganese	500	1900	ID
	Mercury (total)	1		
	Mercury (inorganic)		0.6	0.4
	Molybdenum	50	ID	ID
	Nickel	20	11	70
	Selenium	10	11	ID
	Silver	100	0.05	1.4
	Tributyltin (as µg/L Sn)		ID	0.006
	Uranium	20	ID	ID
	Vanadium		ID	100
	Zinc		8	15
<b>Non-metallic inorganics</b>				
	Ammonia		900	910
	Bromate	20		
	Chlorine	5000	3	ID
	Chlorine dioxide	1000		
	Chlorite	300		
	Cyanogen chloride (as cyanide)	80	7	4
	Fluoride	1500		
	Hydrogen sulfide		1	ID
	Iodide	100		
	Nitrate (as nitrate)	50000	700	ID

	Substance	Column 1	Column 2	Column 3
		Trigger value for drinking water <sup>1</sup> (µg/L)	Trigger value for fresh water <sup>2</sup> (µg/L)	Trigger value for marine water <sup>2</sup> (µg/L)
	Nitrite (as nitrite)	3000		
	Sulfate	500000		
<b>Organic alcohols</b>				
	Ethanol		1400	ID
<b>Chlorinated alkanes</b>				
	Carbon tetrachloride	3	ID	ID
Chloromethanes	Dichloromethane (methylene chloride)	4	ID	ID
Chloroethanes	1,2-dichloroethane	3	ID	ID
	1,1,2-trichloroethane		6500	1900
	Hexachloroethane		360	ID
<b>Chlorinated alkenes</b>				
	1,1-dichloroethene	30		
	1,2-dichloroethene	60		
	Tetrachloroethene	50		
<b>Anilines</b>				
	Aniline		250	ID
	2,4-dichloroaniline		7	ID
	3,4-dichloroaniline		3	150
<b>Aromatic hydrocarbons</b>				
	Benzene	1	950	700
	Chlorobenzene	300		
	Ethylbenzene	300	ID	ID
	<i>o</i> -xylene		350	ID
	<i>p</i> -xylene		200	ID
	Toluene	800	ID	ID
	Trichlorobenzenes (total)	30		
	Total Xylenes	600		
Polycyclic aromatic hydrocarbons	Benzo(a)pyrene	0.01	ID	ID
	Naphthalene		16	70
Nitrobenzenes	Nitrobenzene		550	ID
Nitrotoluenes	2,4-dinitrotoluene		65	ID
	2,4,6-trinitrotoluene		140	ID
Chlorobenzenes and chloronaphthalenes	1,2-dichlorobenzene	1500	160	ID
	1,3-dichlorobenzene		260	ID
	1,4-dichlorobenzene	40	60	ID
	1,2,3-trichlorobenzene		10	ID

	Substance	Column 1	Column 2	Column 3
		Trigger value for drinking water <sup>1</sup> (µg/L)	Trigger value for fresh water <sup>2</sup> (µg/L)	Trigger value for marine water <sup>2</sup> (µg/L)
	1,2,4-trichlorobenzene		170	80
Polychlorinated biphenyls (PCBs) and dioxins	Aroclor 1242		0.6	ID
	Aroclor 1254		0.03	ID
<b>Phenols and xylenols</b>				
	Phenol		320	400
	2-chlorophenol	300	490	ID
	4-chlorophenol		220	ID
	2,4-dichlorophenol	200	160	ID
	2,4,6-trichlorophenol	20	20	ID
	2,3,4,6- tetrachlorophenol		20	ID
	Pentachlorophenol	10	10	22
Nitrophenols	2,4-dinitrophenol		45	ID
<b>Organic sulfur compounds</b>				
Phthalates	Dimethylphthalate		3700	ID
	Diethylphthalate		1000	ID
	Dibutylphthalate		26	ID
<b>Miscellaneous chemicals</b>				
	Acrylamide	0.2		
	Poly(acrylonitrile-co-butadiene-co-styrene)		530	250
	Chloroacetic acid	150		
	Di(2-ethylhexyl) phthalate	10		
	Dichloroacetic acid	100		
	Epichlorohydrin	0.5		
	Ethylenediamine tetraacetic acid (EDTA)	250		
	Formaldehyde	500		
	Hexachlorobutadiene	0.7	ID	ID
	Monochloramine	3000		
	Nitrilotriacetic acid	200		
	Styrene	30		
	Tributyltin oxide	1		
	Trichloroacetaldehyde (chloral hydrate)	20		
	Trichloroacetic acid	100		
	Trihalomethanes (THMs) (Total)	250		
	Vinyl chloride	0.3		
Pesticides	Acephate	10		
	Aldicarb	1		

	Substance	Column 1	Column 2	Column 3
		Trigger value for drinking water <sup>1</sup> (µg/L)	Trigger value for fresh water <sup>2</sup> (µg/L)	Trigger value for marine water <sup>2</sup> (µg/L)
	Aldrin	0.3	ID	ID
	Ametryn	50		
	Amitrole	10	ID	ID
	Asulam	50		
	Atrazine	40	13	ID
	Azinphos-methyl	3	0.02	ID
	Benomyl	100		
	Bentazone	30		
	Bioresmethrin	100		
	Bromacil	300	ID	ID
	Bromophos-ethyl	10		
	Bromoxynil	30		
	Carbaryl	30		
	Carbendazim	100		
	Carbofuran	10	1.2	ID
	Carbophenothion	0.5		
	Carboxin	300		
	Chlordane	1	0.08	ID
	Chlorfenvinphos	5		
	Chlorothalonil	30		
	Chloroxuron	10		
	Chlorpyrifos	10	0.01	0.009
	Chlorsulfuron	100		
	Clopyralid	1000		
	2,4-D	30	280	ID
	DDE		ID	ID
	DDT	20	0.01	ID
	Diazinon	3	0.01	ID
	Dicamba	100		
	Dichlobenil	10		
	Dichlorvos	1		
	Diclofop-methyl	5		
	Dicofol	3	ID	ID
	Dieldrin	0.3	ID	ID
	Difenzoquat	100		
	Dimethoate	50	0.15	ID
	Diphenamid	300		
	Diquat	5	1.4	ID
	Disulfoton	3		
	Diuron	30	ID	ID

	Substance	Column 1	Column 2	Column 3
		Trigger value for drinking water <sup>1</sup> (µg/L)	Trigger value for fresh water <sup>2</sup> (µg/L)	Trigger value for marine water <sup>2</sup> (µg/L)
	DPA (2,2-DPA)	500		
	EDB	1		
	Endosulfan	30	0.2	0.1
	Endothal	100		
	Endrin		0.02	0.008
	EPTC	30		
	Esfenvalerate		0.001	ID
	Ethion	3		
	Ethoprophos	1		
	Etridiazole	100		
	Fenamiphos	0.3		
	Fenarimol	30		
	Fenchlorphos	30		
	Fenitrothion	10	0.2	ID
	Fenoprop	10		
	Fensulfothion	10		
	Fenvalerate	50		
	Flamprop-methyl	3		
	Fluometuron	50		
	Formothion	50		
	Fosamine	30		
	Glyphosate	1000	1200	ID
	Heptachlor	0.3	0.09	ID
	Hexaflurate	30		
	Hexazinone	300	ID	ID
	Lindane	20	0.2	ID
	Malathion		0.05	ID
	Maldison	50		
	Methidathion	30		
	Methiocarb	5		
	Methomyl	30	3.5	ID
	Methoxychlor	300	ID	ID
	Metolachlor	300	ID	ID
	Metribuzin	50		
	Metsulfuron		ID	ID
	Metsulfuron-methyl	30		
	Mevinphos	5		
	Mirex		ID	ID
	Molinate	5	3.4	ID
	Monocrotophos	1		

	Substance	Column 1	Column 2	Column 3
		Trigger value for drinking water <sup>1</sup> (µg/L)	Trigger value for fresh water <sup>2</sup> (µg/L)	Trigger value for marine water <sup>2</sup> (µg/L)
	Napropamide	1000		
	Nitralin	500		
	Norflurazon	50		
	Oryzalin	300		
	Oxamyl	100		
	Paraquat	30	ID	ID
	Parathion	10	0.0004	ID
	Parathion methyl	100		
	Pebulate	30		
	Pendimethalin	300		
	Permethrin	100		
	Picloram	300		
	Piperonyl butoxide	100		
	Pirimicarb	5		
	Pirimiphos-ethyl	0.5		
	Pirimiphos-methyl	50		
	Profenofos	0.3	ID	ID
	Promecarb	30		
	Propachlor	50		
	Propanil	500		
	Propargite	50		
	Propazine	50		
	Propiconazole	100		
	Propyzamide	300		
	Pyrazophos	30		
	Quintozene	30		
	Silvex (see Fenoprop)			
	Simazine	20	3.2	ID
	Sulprofos	10		
	2,4,5-T	100	36	ID
	Tebuthiuron		2.2	ID
	Temephos	300	ID	0.005
	Terbacil	30		
	Terbufos	0.5		
	Terbutryn	300		
	Tetrachlorvinphos	100		
	Thiobencarb	30	2.8	ID
	Thiometon	3		
	Thiophanate	5		
	Thiram	3	0.2	ID

	Substance	Column 1	Column 2	Column 3
		Trigger value for drinking water <sup>1</sup> (µg/L)	Trigger value for fresh water <sup>2</sup> (µg/L)	Trigger value for marine water <sup>2</sup> (µg/L)
	Toxaphene		0.2	ID
	Triadimefon	2		
	Trichlorfon	5		
	Triclopyr	10		
	Trifluralin	50	4.4	ID
	Vernolate	30		
Surfactants	Alcohol ethoxylated sulfate (AES)		650	ID
	Alcohol ethoxylated surfactants (AE)		140	ID
	Linear alkylbenzene sulfonates (LAS)		280	ID

1 Trigger values of Column 1 are taken from the Health values of the *Guidelines for Drinking Water Quality in Australia* (NHMRC & NRMCC 2004).

2 Trigger values of Columns 2 and 3 are taken from the 95% species protection values of the *Australian and New Zealand Guidelines for Fresh and Marine Water Quality* (ANZECC & ARMCANZ 2000)

ID Insufficient data to derive a reliable trigger

# Appendix B: Site contamination notification form

<b>Contaminated Land Notification Form</b> <b>Section 60 of the <i>Contaminated Land Management Act 1997</i></b>	
This form should be completed by: (a) a person who becomes aware that the person(s) activities in, on or under land have contaminated the land, or (b) an owner of land who becomes aware that the land has been contaminated (whether before or during the owner's ownership of the land).	
<b>1. Where to send completed forms</b>  Contaminated Sites Department of Environment and Climate Change PO Box A290 SYDNEY SOUTH NSW 1232	<b>IMPORTANT</b> TYPE OR PRINT
<b>2. Reporter details</b>	
Name:	Telephone Number (business hours):  Fax Number (business hours):
Address:	I am: <input type="checkbox"/> the owner of the site <input type="checkbox"/> the person whose activities have contaminated the land
<b>3. Site details</b>	
Site or establishment name (if appropriate):	Street address:
Lot and DP number:	Local Government Area:
Owner(s):	Occupier(s):
<b>4. Cause of contamination</b>	
Previous/present activities that caused or could have caused the contamination (where known):	
<b>5. Contamination</b>	
Contaminants of concern:	Source of information on contamination:
<b>6. What aspects of the environment are affected?</b>	
<b>7. Who/what is potentially at risk?</b>	
Tick all that apply: <input type="checkbox"/> Air <input type="checkbox"/> Groundwater <input type="checkbox"/> Surface water <input type="checkbox"/> Sediments <input type="checkbox"/> Soil <input type="checkbox"/> Stormwater	Tick all that apply: <input type="checkbox"/> Drinking water catchment <input type="checkbox"/> Wetlands <input type="checkbox"/> Other: (Please specify) _____ <input type="checkbox"/> Residents <input type="checkbox"/> Workers on commercial/ industrial sites <input type="checkbox"/> School/kindergarten children <input type="checkbox"/> Threatened species <input type="checkbox"/> Aquatic life
<input type="checkbox"/> Plants <input type="checkbox"/> Animals <input type="checkbox"/> Other: (Please specify) _____	_____ _____

<b>8. Are any other sites affected or at risk?</b>		
Tick appropriate box:		
<input type="checkbox"/> No <input type="checkbox"/> Yes		
If 'yes' is ticked, indicate which of the matters listed in items 6 and 7 apply to other sites and where those sites are located:		
<b>9. Additional pages attached</b>		
If you have attached additional pages to this notification, indicate the number of pages below. When the notification is certified, the person/s who certify the notification must initial each page attached.		
Number of pages attached: _____		
<b>10. Certification (in the case of a notice lodged by a corporation or a body corporate)</b>		
I/We declare that the information in this form and any accompanying documents is not false or misleading in any material particular.		
Name:	Name:	COMMON SEAL AFFIXED IN ACCORDANCE WITH ANY RELEVANT LAWS
Position:	Position:	
Signature:	Signature:	
Date:	Date:	
<b>11. Signature (in the case of a notice lodged by one or more individuals)</b>		
I/We declare that the information in this form and any accompanying documents is not false or misleading in any material particular.		
Name:	Name:	
Signature:	Signature:	
Date:	Date:	
<p>If the notification is made by one or more individuals, the form must be signed by each individual concerned.</p> <p>If the notification is made by a company, the form must be signed:</p> <ul style="list-style-type: none"> <li>• by affixing the common seal of the company in accordance with the <i>Corporations Act 2001</i>, or</li> <li>• by two directors, or</li> <li>• by a director and a company secretary, or</li> <li>• if a proprietary company that has a sole director who is also the sole company secretary – by that director.</li> </ul> <p>If the notification is made by a body corporate, the form must be signed in accordance with any applicable laws.</p> <p>If the notification is made by a local council, the form must be signed:</p> <ul style="list-style-type: none"> <li>• by the general manager in accordance with s. 377 of the <i>Local Government Act 1993</i> ('LG Act'), or</li> <li>• by affixing the seal of the council in a manner authorised under the LG Act.</li> </ul> <p>If the notification is made by a public authority other than a local council, the form must be signed:</p> <ul style="list-style-type: none"> <li>• by the chief executive officer of the public authority, or</li> <li>• by a person delegated to sign on the public authority's behalf in accordance with its legislation. (Please note: a copy of the relevant instrument of delegation must be attached to this form.)</li> </ul>		