

EPA Information

Site contamination: Responsibility for assessment and remediation of site contamination

Issued May 2009

EPA 814/09: This information sheet provides guidance regarding the 'appropriate person' to be issued with a site contamination assessment order or a site remediation order under the Environment Protection Act 1993 and associated responsibilities.

Introduction

Site contamination can occur as a result of the introduction of chemical substances to a site above background concentrations. There are several factors that must be considered when determining whether or not the presence of the chemical substances is deemed as site contamination. Section 5B of the *Environment Protection Act 1993* (EP Act) defines 'site contamination'¹.

In specified circumstances² the Environment Protection Authority (EPA) can issue a site contamination assessment order or a site remediation order to the 'appropriate person'. The 'appropriate person' is determined in accordance with the EP Act.

¹ For information on what constitutes site contamination, refer to *EPA Information Sheet: Site Contamination—What is site contamination?* (2009).

² Refer to sections 103H and 103J of the EP Act.

Appropriate persons

Polluter pays principle

The EP Act adopts the 'polluter pays principle'. This means the person who caused the site contamination is responsible for implementing and funding the assessment, remediation and, if necessary, independent auditing by a site contamination auditor³. However, site contamination is often historical in nature, and the person or company who caused the site contamination may no longer exist or may not be the same person or company who currently own or occupy the site. In order for the polluter pays principle to be successful, the determination of the appropriate person must be retrospective in its application. This allows historical site contamination that occurred prior to the commencement of the EP Act to also be addressed.

Where site contamination exists

Where the EPA is satisfied⁴ that site contamination exists, the person who caused the site contamination at the site will be the 'appropriate person' and can be issued with a site contamination assessment order or site remediation order. However, the EP Act sets out some circumstances where it is not considered practicable⁵ to issue an order to the person who caused the site contamination. In such cases the EPA may issue the order to the site owner, if the owner is the 'appropriate person' for the purposes of section 103C of the EP Act.

Where site contamination is suspected to exist

If the EPA merely suspects site contamination exists because a potentially contaminating activity of a kind prescribed by regulation has occurred at the site⁶, the Authority can only issue a site contamination assessment order to the owner of the site, provided the owner is an 'appropriate person' for the purposes of section 103C of the EP Act. In such cases section 103H(3) provides that 'the order must be limited in its application to site contamination on or below the surface of the site'.

Section 103C of the EP Act provides:

103C—General provisions as to appropriate persons

- (1) Subject to this Part, the appropriate person to be issued with a site contamination assessment order or a site remediation order in respect of a site under Division 3 is—
 - (a) the person who caused the site contamination at the site; or

³ For information on selecting and using an environmental auditor, refer to EPA Information Sheets, *Site Contamination—Using an environmental auditor (2007)*. Another Information Sheet, *Site Contamination—Using an environmental auditor* is currently undergoing review. These will be published on the EPA website <www.epa.sa.gov.au/contamination> as they become available.

⁴ Refer to section 103J(1)(a) of the EP Act.

⁵ Refer section 103C(3) of the EP Act.

⁶ Refer to section 103H(1)(b) of the EP Act. For information on potentially contaminating activities, refer to *EPA Information Sheet: Site Contamination—Potentially contaminating activities (2009)*.

- (b) if it is not practicable to issue the order to that person, the owner of the site provided that—
 - (i) before the person acquired the site, the person knew, or ought reasonably to have been aware, that chemical substances were present, or likely to be present, on or below the surface of the site such as to require, or be likely to require, remediation; or
 - (ii) —
 - (A) before the person acquired the site, the person knew, or ought reasonably to have been aware, that the activity that caused the site contamination at the site had been carried on at the site, or while the person was the owner, the person knew, or ought reasonably to have been aware, that the activity that caused the site contamination at the site was being carried on at the site; and
 - (B) the activity is an activity of a kind prescribed by the regulations as a potentially contaminating activity.
- (2) However, if the basis for issuing a site contamination assessment order is only the Authority's suspicion under section 103H(1)(b) as to the existence of site contamination at the site, subsection (1) of this section does not apply and the appropriate person to be issued with the order is the owner of the site.
- (3) For the purposes of subsection (1), it is not practicable to issue a site contamination assessment order or a site remediation order to a person if the person—
 - (a) has died or, in the case of a body corporate, ceased to exist; or
 - (b) cannot, after reasonable inquiry, be identified or located; or
 - (c) would, in the opinion of the Authority, for any reason, be unable to carry out, or meet the costs and expenses of, the action required or authorised under the order.

Section 103G of the EP Act allows the court to order that a director of a body corporate is the appropriate person in certain circumstances.

More than one appropriate person

If there are two or more appropriate persons (eg multiple polluters), the EPA may determine that the order be issued to any one or more of them. Two or more people issued with an order are jointly and severally liable to comply with the requirements of the order.

Section 103F of the EP Act states the following:

103F—Order may be issued to one or more appropriate persons

If, in the application of this Division, there are 2 or more persons to whom it is practicable to issue an order under Division 3 as appropriate persons, the Authority may determine that—

- (a) any 1 of the persons is the appropriate person to be issued with the order; or
- (b) 2 or more of the persons are the appropriate persons to be issued with the order (with the effect that the persons are jointly and severally liable to comply with the requirements of the order).

Causing site contamination by changing site use

The EP Act defines who is to be taken to have caused site contamination⁷. Typically this is the person who occupied the land 'when there was an activity at the land that caused or contributed to the site contamination'⁸. However, 'if site contamination would not have resulted at a site but for a change of use of a kind prescribed by regulation ... the person who brought about the change of use of the site is to be taken to have caused the site contamination for the purposes of'⁹ the EP Act.

For example, an industrial site may have chemical substances in the soils that present no risk to human health, water or the environment based on its current land use, and hence the definition of 'site contamination' is not met. However, if a person decides to develop the site to a sensitive use¹⁰ (which as a consequence of the change in use results in harm or potential harm to human health), the definition of 'site contamination' may now be met. As the site contamination only arose due to the change in land use, the person who brought about the change is taken to have caused the site contamination for the purposes of section 103D(2) and therefore is the 'appropriate person' to be issued with a site contamination assessment order or a site remediation order.

Section 103D of the EP Act states the following:

103D—Causing site contamination

- (1) For the purposes of this Act, a person is to be taken to have caused site contamination if the person was the occupier of land when there was an activity at the land that caused or contributed to the site contamination.
- (2) If site contamination would not have resulted at a site but for a change of use of a kind prescribed by regulation (whether the change occurred before or after the commencement of this Part or this Act), the person who brought about the change of use of the site is to be taken to have caused the site contamination for the purposes of this Act.
- (3) The operation of subsection (2) in a particular case is not to be taken to exclude the possibility of another person or persons also having caused the site contamination under subsection (1).
- (4) For the purposes of subsection (2), a person does not bring about a change of use of a site because the person was a relevant authority that granted a consent or approval in respect of the site under the *Development Act 1993*.

⁷ Refer section 103D of the EP Act.

⁸ Section 103D(1) EP Act.

⁹ Section 103D(2) EP Act.

¹⁰ Sensitive use is defined in section 3(1) of the EP Act and means:

- use for residential purposes; or
- use for a pre-school within the meaning of the *Development Regulations 1993*; or
- use for a primary school.

Orders

Sections 103H(3) [Site contamination assessment orders] and 103J(3) [Site remediation orders] states 'If the order is issued to an appropriate person as an owner of the site as distinct from a person who caused the site contamination, the order must be limited in its application to site contamination on or below the surface of the site'.

These orders are subject to legislative rules defined in the EP Act and are appealable within 14 days of issue.

Site contamination assessment order

As noted earlier, section 103H of the EP Act allows the EPA to issue a site contamination assessment order to an appropriate person(s).

If the EPA suspects (due to a potentially contaminating activity¹¹ of a kind prescribed by regulation having taken place), or is satisfied that site contamination exists at a site, it may issue a site contamination assessment order to the appropriate person to determine the nature and extent of the site contamination. However, if the basis for issuing a site contamination assessment order is only the EPA's suspicion as to the existence of site contamination at a site, then the appropriate person to be issued with the order is the current owner¹².

Site remediation order

Section 103J of the EP Act allows the EPA to issue a site remediation order to an appropriate person(s).

If the EPA is satisfied that site contamination exists at a site and considers remediation¹³ is required, it may issue a site remediation order to the appropriate person. The order may require the treatment, containment, removal or management of the chemical substances present at the site.

Voluntary proposals

As an alternative to orders, a person may submit a voluntary proposal (under sections 103I and 103K of the EP Act) to the EPA to assess or remediate a site. For further information refer to EPA Information Sheet: Site Contamination—Voluntary proposals¹⁴.

Enforcement

It is an offence not to comply with a site contamination assessment order or site remediation order and the penalties for non-compliance are substantial. In addition, if the requirements of a site contamination assessment order or site remediation order are not complied with, the EPA can undertake any action required by the order or engage other

¹¹ For information on potentially contaminating activities, refer to EPA Information Sheet, *Site Contamination—Potentially contaminating activities (2009)*.

¹² Refer section 103C(2) of the EP Act.

¹³ 'Remediate' is defined in section 3(1) of the EP Act.

¹⁴ EPA information sheet to be published.

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persons to do so on its behalf. The EPA can then recover the costs and expenses incurred by undertaking this work from the person to whom the order was issued.

Refusal of entry onto land

Where an order has been issued that requires assessment or remediation of land not currently occupied by the person who caused the site contamination, permission must be obtained from the occupier/owner of this land to gain access and carry out the necessary assessments or remediation. If permission is withheld or withdrawn to access the land, the EPA may issue a site contamination assessment order or a site remediation order to the owner/occupier of the land as if they were the appropriate person. For further information, refer to EPA Information Sheet: Site Contamination—Granting third parties access to land affected by site contamination¹⁵.

Transfer of liability

Section 103(E) of the EP Act allows for the total or partial transfer of liability for site contamination from vendor to purchaser or transferee in certain circumstances. For further information refer to *EPA Information Sheet: Site Contamination—Transfer of liability (2009)*.

Appeals

Persons issued with a site contamination assessment order or site remediation order may appeal (under section 106 of the EP Act) to the Environment, Resources and Development Court against the order or any variation of the order. An appeal must be made within 14 days after the order is issued or the variation made. It is recommended that persons appealing should seek appropriate legal advice.

Further reading

EPA Guidelines for Compliance and Enforcement of the Environment Protection Act 1993 (2007), available at <www.epa.sa.gov.au>.

Disclaimer

This publication is a guide only and does not necessarily provide adequate information in relation to every situation. This publication seeks to explain your possible obligations in a helpful and accessible way. In doing so, however, some detail may not be captured. It is important, therefore, that you seek information from the EPA itself regarding your possible obligations and, where appropriate, that you seek your own legal advice.

¹⁵ EPA information sheet to be published.

FURTHER INFORMATION

Legislation

Legislation may be viewed on the internet at: <www.legislation.sa.gov.au>

Copies of legislation are available for purchase from:

Service SA Government Legislation Outlet 101 Grenfell Street Adelaide SA 5000	Telephone: Facsimile: Internet:	13 23 24 (08) 8204 1909 < shop.service.sa.gov.au >
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For general information please contact:

Environment Protection Authority GPO Box 2607 Adelaide SA 5001	Telephone: Facsimile: Freecall (country): Internet: Email:	(08) 8204 2004 (08) 8124 4670 1800 623 445 < www.epa.sa.gov.au > < epainfo@epa.sa.gov.au >
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The EPA welcomes written comments on and suggestions for improvements to any of its site contamination publications. These should be addressed to the Manager Site Contamination at the above address.