

Explanatory paper—Draft Environment Protection (Site Contamination) Regulations 2008

1. Introduction

The *Environment Protection (Site Contamination) Amendment Act 2007* (the Amendment Act) passed both Houses of the Parliament and was assented on 1 November 2007. Certain provisions of the Amendment Act came into operation on 10 December 2007, with the remaining provisions suspended until a day to be fixed by proclamation. It is anticipated that the Amendment Act will be fully operational by February 2009.

The legislation assigns responsibility for site contamination, establishes a statutory audit system for South Australia and gives the Environment Protection Authority (EPA) powers to deal with site contamination.

The Amendment Act forms part of a set of measures intended to ensure that site contamination is adequately managed in South Australia. The other measures will comprise:

- (site contamination) regulations pursuant to the *Environment Protection Act 1993* (EP Act)
- amendments to planning processes under the *Development Act 1993*
- amendments to the questions relating to environment protection on the 'Form 1, section 7 statement' pursuant to the Land and Business (Sale and Conveyancing) Regulations 1995
- a series of supporting publications including codes of practice, guidelines and information sheets.

The draft site contamination Regulations are the subject of this consultation process. The other measures will be subject to separate consultation.

The Government of South Australia has prepared the draft Regulations to support the Amendment Act. They are known as the draft Environment Protection (Site Contamination) Regulations 2008 (draft Regulations). This explanatory paper has been prepared to accompany the draft Regulations and is intended to provide an explanation for each draft regulation (refer to Section 3 of this document).

Both the Amendment Act and the draft Regulations are available from the EPA website (www.epa.sa.gov.au).

2. Consultation

Consultation is being undertaken on the draft Regulations over a six-week period commencing 25 April 2008. Comments on the draft Regulations are invited to assist the government in the preparation of these Regulations.

To assist in providing comments on the Regulations, the EPA has prepared a feedback form. The form is a Microsoft® Word document, which can be downloaded from the EPA website (www.epa.sa.gov.au).

Completed response forms should be emailed to scregulations@epa.sa.gov.au. Alternatively, they can be posted to the EPA at the address shown in Section 5 of this document, and should be attentioned to: Principal Adviser Site Contamination.

Submissions close at 5.00 pm on Friday 6 June 2008.

3. Discussion

Draft regulation 1—Short title

Draft regulation 1 names the Regulations.

Draft regulation 2—Commencement

Draft regulation 2 provides for the Regulations to commence on a date to be fixed by proclamation.

Draft regulation 3—Interpretation

Draft regulation 3 provides several terms and their definitions that are used throughout the Regulations.

Draft regulation 4—Interpretation—occupier

Section 103A of the Amendment Act defines an occupier of land for the purpose of assigning responsibility for site contamination. The section allows a person of a particular kind to be prescribed by regulation as an occupier. This draft regulation prescribes responsibility to a person who owned or had operational control over a tank, pipeline or any works or structure. Where site contamination has resulted from a tank or pipeline, the draft regulation enables the person in control to be held responsible, rather than the person who merely managed the day-to-day activities at the site. For example, the franchisee of a petrol station may have no actual control over the installation and maintenance of underground storage tanks and associated pipelines. If site contamination occurred from a leaking tank, the person who had actual control would be held responsible.

Draft regulation 5—Potentially contaminating activities

Sections 103C and 103H of the Amendment Act introduce the concept of ‘potentially contaminating activities’ that are to be prescribed by regulation. This draft regulation prescribes these activities.

There are essentially two components to this draft regulation.

The first component (5(a) and 5(b)) relates to activities undertaken in the course of a business. Section 3(1) of the EP Act states: ‘*business* includes a business not carried on for profit or gain and any activity undertaken by government or a public authority’.

For this component, a list of ‘potentially contaminating activities’ has been prepared (draft Schedule 1, Part 1). The schedule also contains a description for each activity. In many cases, the definition for each activity is important as it provides limits or thresholds.

In addition, a list of chemical substances has also been prepared (draft Schedule 1, Part 3), which is intended to capture other business activities that manufacture or store listed substances over a set threshold. If a business has manufactured or stored these chemical substances at a weight or volume exceeding the threshold, then the manufacture or storage will also be deemed as a potentially

contaminating activity. The purpose of the storage threshold is to exclude minor storage of the listed substances.

The second component of this draft regulation (5(c)) relates to activities that were undertaken at a site other than in the course of a business. For this component, two activities have been listed (Schedule 1, Part 2). One is the importation of fill from a site where a potentially contaminating activity has occurred. Importing fill that is contaminated can result in the same risk to human health or the environment as that found at the original source site. The second activity is hydrocarbon storage, but does not include above-ground heating oil tanks used for domestic heating. Again this is limited by volume to exclude minor storage.

Draft regulation 6—Causing site contamination

Section 103D of the Amendment Act determines who caused site contamination. Part (2) of this section of the Amendment Act is intended to ‘capture’ those who have caused site contamination as a result of a change of land use. This draft regulation is intended to define what is meant by ‘change’ in land use.

Draft regulation 7—Liability for property damage etc caused by person entering land

Section 103M of the Amendment Act assigns liability for damage that is caused by a person who enters land to fulfil the requirements of an order. Draft regulation 7 exempts a person from liability if they were acting on behalf of an owner or occupier.

Draft regulation 8—Recovery of costs and expenses incurred by the EPA

Clause 103R of the Amendment Act allows the EPA to recover costs under specific circumstances in relation to non-compliance with or pursuance of orders. This draft regulation allows the EPA to recover the costs of registering an order in relation to land and the cost of removing the registration of an order in relation to land. The draft regulation also provides a prescribed interest rate of 24% for non-payment by the specified date of an amount recoverable. This draft regulation is consistent with existing provisions in the EP Act where the recovery of costs is provided for in relation to Environment Protection Orders, Clean-up Orders and Clean-up Authorisations.

Draft regulation 9—Eligibility for accreditation

Section 103V of the Amendment Act allows for the making of regulations relating to the accreditation of a site contamination auditor (auditor). Draft regulations 9-21 are provided for this purpose.

Draft regulation 9 prescribes mandatory criteria that a person must meet in order to be eligible for accreditation as an auditor. The draft regulation also prescribes criteria that the EPA may take into account when making a decision in relation to a person’s application for accreditation.

Draft regulation 10—Application for accreditation

Draft regulation 10 sets out the procedures that a person must follow when applying for accreditation as an auditor. The draft regulation also allows the EPA to conduct criminal and accreditation checks in relation to that person, as well as requiring fee payment for undertaking the criminal check during assessment of their application for accreditation.

Draft regulation 11—Grant of accreditation

Draft regulation 11 prescribes grounds for the EPA to refuse an application for accreditation. The draft regulation also allows the EPA to renew an accreditation or consider a subsequent application without reassessing the person's knowledge, qualifications or other criteria listed under draft regulation 9.

Draft regulation 12—Conditions of accreditation

Draft regulation 12 allows the EPA discretion to place certain conditions on an auditor's accreditation. The draft regulation also prescribes other 'standard' conditions that must apply equally to every auditor. Non-compliance with a condition can result in disciplinary action under draft regulations 13 and 16.

Draft regulation 13—Offence to contravene certain conditions of accreditation

Draft regulation 13 provides offence and penalty provisions for non-compliance with certain conditions of accreditation.

Draft regulation 14—Annual fee

Draft regulation 14 provides for the requirement of an auditor to pay an annual accreditation fee by a prescribed time. The draft regulation also sets a penalty for late payment of an annual fee. Non-payment of an annual fee can also result in disciplinary action under draft regulation 16.

Draft regulation 15—Term and renewal of accreditation

Draft regulation 15 limits an auditor's accreditation to a maximum of five years before renewal is required. The draft regulation provides details of when and how an auditor must apply for renewal and sets a penalty for late payment of a renewal fee. The draft regulation also provides a mechanism for the EPA to consider or refuse an auditor's application for renewal.

Draft regulation 16—Disciplinary action against site contamination auditors and voluntary suspension

Draft regulation 16 establishes a mechanism for the EPA to take disciplinary action against an auditor. The draft regulation prescribes details of when and how this can occur. The consequences of the disciplinary action can be suspension or cancellation of accreditation, subject to limitations described in the draft regulation. The EPA can also disqualify a person from obtaining accreditation permanently or for a specified period of up to three years, subject to limitations described in the draft regulation. Disqualification means that a person cannot apply for accreditation while disqualified.

Draft regulation 16 also allows for an auditor to apply for a voluntary suspension of accreditation, subject to the approval of the EPA and payment of the prescribed fee. This draft regulation is intended to allow for unforeseen circumstances that may arise where a person needs to temporarily cease being accredited as an auditor. Various conditions are provided for voluntary suspension of accreditation.

Draft regulation 17—Surrender of accreditation

Draft regulation 17 allows a person to surrender, with the approval of the EPA, their accreditation. This could occur during a period of accreditation or at the end of a term of accreditation.

Draft regulation 18—Return of certificate of accreditation and identity card

Draft regulation 18 provides a requirement, under certain circumstances, for an auditor to return the Authority's certificate of accreditation and the identity card that was issued to the auditor. The draft regulation also provides a mechanism for the reissue of a certificate or identity card. There are penalty provisions for non-compliance.

Draft regulation 19—Appeals

Draft regulation 19 establishes a person's rights of appeal against specific decisions made by the Authority in relation to a person's application for accreditation or an auditor's existing accreditation. An appeal is subject to the conditions described in the draft regulation.

Draft regulation 20—Register of site contamination auditors

Draft regulation 20 places an obligation on the EPA to establish and maintain a public register of auditors. The draft regulation also lists the information that is to be kept on the register in relation to each auditor.

Draft regulation 21—No application fee for person entitled to accreditation under *Mutual Recognition (South Australia) Act 1993*

Draft regulation 21 provides a waiver for the application fee for auditors whose accreditation is recognised under mutual recognition legislation.

Draft regulation 22—Annual returns by auditors

Section 103Y of the Amendment Act requires an auditor to submit an annual return and that the return be completed in accordance with a form prescribed by the draft regulation. Draft regulation 22 requires that draft Schedule 3 be used by auditors to fulfil this requirement.

Draft regulation 23—Notifications by auditors after commencement or termination of audit

Section 103Z of the Amendment Act requires an auditor to notify the EPA in the event of commencement or termination of an audit. The section also requires the notification to be lodged in a form prescribed by regulation. Draft regulation 23 requires that draft Schedule 4 be used by an auditor to fulfil these requirements.

Draft regulation 24—Site contamination audit report summary and statement

Section 103Z(4)(a) and (b)(i) of the Amendment Act requires the provision of an audit report to the person who commissioned the audit. The section also requires that the audit report be presented to the EPA.

Section 103Z(4)(b)(ii) of the Amendment Act requires the provision of a site contamination audit statement to the council for the area in which the audit was undertaken or to any other prescribed body. Draft regulation 24(2) requires that the statement be completed in accordance with draft Schedule 5, as well as compliant with the conditions described in the draft regulation.

The Amendment Act defines a '*site contamination audit statement*, in relation to a site contamination audit, means a copy (that must comply with the regulations) of the summary of the findings of the audit certified, in the prescribed form, by the site contamination auditor who personally carried out or directly supervised the audit'.

Draft regulation 24(1) requires that the statement be completed in accordance with draft Schedule 5.

Draft regulation 25—Site contamination audit statements to be provided to prescribed bodies

Section 103Z(4)(b)(ii) of the Amendment Act requires the provision of an audit statement to the council for the area in which the audit was undertaken or to any other prescribed body. Where the council is not the relevant authority under the *Development Act 1993*, draft regulation 25 defines the relevant authority (for example, the Development Assessment Commission) as the prescribed body.

Draft Schedule 1, Part 1—Activities carried on in course of business

Draft Schedule 1 relates to draft regulation 5. Part 1 provides details of activities that have the potential to cause site contamination when undertaken in the course of a business. In some cases, the definitions provide thresholds or exclusions for an activity.

Draft Schedule 1, Part 2—Activities carried on other than in course of business

Draft Schedule 1 relates to draft regulation 5. Part 2 provides details of activities that have the potential to cause site contamination when undertaken at a site, other than in the course of a business. Only two activities are listed. One is the importation of fill from a site where a potentially contaminating activity has occurred. Importing fill that is contaminated can provide the same risk to human health or the environment as that existing on the original site. The second activity is hydrocarbon storage. Above-ground heating oil tanks are excluded, as are tanks below a certain volume. The latter threshold is intended to exclude minor storage of hydrocarbons.

Draft Schedule 1, Part 3—Listed substances

Draft Schedule 1 relates to draft regulation 5. Part 3 provides details of chemical substances that have the potential to cause site contamination when manufactured (either directly or indirectly) in the course of a business. There is no threshold for

the manufacture of a listed substance. There is a threshold in draft regulation 5 for storage to exclude minor or incidental storage from the definition of potentially contaminating activities. This list is intended to ‘capture’ the use of specific chemical substances that may not be used in an activity listed in Part 1.

Draft Schedule 2—Fees

Draft Schedule 2 provides a list of fees relating to auditor accreditation. The fees have been calculated on a cost recovery basis and are consistent with similar fees in other Australian jurisdictions.

Draft Schedule 3—Annual returns by auditors

Draft Schedule 3 relates to section 103Y of the Amendment Act and draft regulation 22. The draft schedule provides a pro-forma for annual returns to ensure auditors provide all of the information required in a consistent manner, correct order and correct format.

Draft Schedule 4, Part 1—Notification by auditor after commencement of audit

Schedule 4, Part 1 relates to clause 103Z of the Amendment Act and draft regulation 23. The draft schedule provides a pro-forma for the notification of the commencement of an audit. This draft schedule is intended to ensure auditors provide all the information required at audit commencement in a consistent manner, correct order and correct format.

Draft Schedule 4, Part 2—Notification by auditor after termination (before completion) of audit

Draft Schedule 4, Part 2 relates to clause 103Z of the Amendment Act and draft regulation 23. The draft regulation provides a pro-forma for notification of the (early) termination of an audit. This relates to termination that occurs prior to the normal completion of an audit, which can be initiated for several reasons. This draft schedule is intended to ensure auditors provide all the information required at audit termination in a consistent manner, correct order and correct format.

Draft Schedule 5—Site contamination audit statement

Draft Schedule 5 relates to section 103Z of the Amendment Act and draft regulation 24. Audit statements will form an important part of the development process. It is important that audit statements are provided in a consistent manner, correct order and correct format. It is also important that audit statements provided to the EPA meet this criteria. Draft Schedule 5 is provided for this purpose.

4. Future consultation/workshops

The EPA is in the process of drafting proposed changes to the *Development Act 1993* and changes to the questions relating to environmental particulars under the regulations pursuant to the *Land and Business (Sales and Conveyancing) Act 1994*.

Guidelines for auditors and other publications are being developed to assist auditors and the public to understand their responsibilities under the site contamination legislation. Appropriate, targeted consultation will be conducted for these documents as they are developed.

In 2008, the EPA will be conducting workshops across the state on the new legislation.

5. Further Information

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