Draft Guidelines for consultants reporting on contaminated land

Thank you for the opportunity to comment on the draft Consultants reporting on contaminated land: Contaminated Land Guidelines. Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

Please note that the following comments are provided in draft form pending consideration by the LGNSW Board. We will advise of any changes to the submission after the Board’s consideration.

The EPA is reviewing its guidance for consultants reporting on the management of contaminated land to make sure it fully explains what information consultants’ reports need to contain and in what format so as to allow efficient review by regulators, site auditors, and other interested parties.

Replacing the existing guidelines for consultants (2011), these guidelines:
- describe the stages of reporting on the management of contaminated land and the objective of the reports for each stage
- provide checklists of reporting requirements for consultants to use when reporting on contaminated sites.

LGNSW supports the updating of these guidelines to better align with the National Environment Protection (Assessment of Site Contamination) Measure 1999. Importantly, from local government’s perspective, this update provides the opportunity to improve on the information being supplied by consultants to councils in their role as consent authorities and regulators.

Overall the draft guidelines provide quite a good framework and level of detail for consultants and councils to understand what should be in the reports. However, there are some elements of the document that could be improved, which are outlined below.

Section 1.5 of the guideline describes what must be included in a Remedial Action Plan and outlines that for major remediation projects that require the use of remediation technologies or processes, additional technical detail is to be provided in the form of a ‘Technology Assessment’. This report should provide further evidence that the chosen technology will achieve the remediation goals for the site. While this extra information will certainly assist councils in their consent role, it may be beyond their technical capacity to assess. For example, in relation to emerging technology or contaminants (eg PFAS) or trial remediation techniques,
the technology/technique may have been proven overseas but not in Australian conditions and assessed accordingly. It is recommended that councils have access to technical support from the EPA or independent reviewers to cross-check and provide advice on these more complex cases.

Section 1.7 relates to long-term site management and monitoring for situations where a full clean up of a site is not feasible or on-site containment of the contamination is proposed. Councils have noted that the ‘feasibility’ threshold will differ across NSW, depending on land values and access to service providers, equipment etc. As a result, in some situations land may be remediated to a lower level than is ideal (but still within the legal requirements) and a long-term monitoring and management regime put in place under an Environment Management Plan (EMP).

This gives rise to a number of concerns. Firstly, there needs to be some guidance around what ‘feasible’ remediation means in practice, which councils can refer to when under pressure from the land owner/developer to accept a lower level of remediation and put an EMP in place.

Secondly, the process enables EMPs to be approved by accredited site auditors, however it usually falls to council to regulate their implementation. The Guidelines for the NSW Site Auditors recommend that auditors consult with the consent authority on the legality of the draft EMPs before approving. It is recommended this be made an explicit requirement for auditors to ensure that the EMP is enforceable.

Similarly, a matter for consideration in the preparation (and then approval) of an EMP is whether/how neighbours have been consulted and any offsite impacts that may arise. An auditor is required to ensure there is no offsite migration of contamination from the site or that there is potential migration the EMP will manage that risk. Even though contamination may not leave the site, other impacts, such as the operation of pumps, regular truck movements can affect neighbours. The guideline needs to include a requirement to document what consideration has been given to offsite impacts and what consultation with neighbours has taken place, and this be provided to council, as part of the ‘enforceability’ check.

An EMP can include active or passive management systems to manage contamination or the risk of offsite impacts from contamination. Active management systems usually incorporate mechanical components and/or require regular maintenance and inspection). However in some cases councils have reported EMPs that place the onus on residents to arrange quarterly sampling or maintenance of sophisticated equipment, which they do not have the capacity to do themselves or is otherwise very expensive. Before approving an EMP with active management systems site auditors should also be required to consider the feasibility of those actions being implemented (relevant to proposed land use/ownership) and/or consult with council on this aspect. This will also ensure that council is aware of the ongoing management required (for compliance purposes) and can inform the enforceability of the EMP.

Having clear and adequate documentation provided by consultants is essential to councils undertaking their consent authority and regulatory roles in relation to contaminated land. The consequences of inadequate reports can be far-reaching and significantly affect developers, councils and the people who live or work on or near these sites. For example, legislation introduced in 2018 imposes serious penalties for offences relating to land pollution involving asbestos (either knowingly or unknowingly), including executive liability offences, which could be triggered for councils if consultants’ reports are inadequate. LGNSW has continued to express our significant concern regarding the legislation’s potential impact on councils.
In summary, the draft guideline provides a useful framework and an accepted baseline for all parties that use contaminated sites reports. LGNSW considers that our recommendations above will assist in making sure that the information being provided in consultants reports can be readily used by councils and enable councils’ to effectively regulate sites into the future.

Should you wish to clarify any of the above points, please contact Susy Cenedese, Strategy Manager Environment, on (02) 9242 4080 or susy.cenedese@lgnsw.org.au

Yours sincerely

Tara McCarthy
Chief Executive