

National Environment Protection (Assessment of Site Contamination) Measure – NEPM Variation

Deadline for submissions: Friday, 26 November 2010

Submittor Details

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Document	[eg, NEPM, Schedule #)			
Comment N°	Section	Page & Line	Comment	Suggested Action and References (if necessary)
1	All		See attached submission on Consultation	See R1
2	All		See attached submission on Consultation education	See R2
3	All		See attached submission on Risk assessment education	See R3
4	All		See attached submission on Auditor demand	See R4, R5 and R6
5	B1 Ch 3.7 and B6		Application of Aesthetics requires clarity and increased certainty	See R7

26 November 2010

Ms Kerry Scott,
Project Manager,
NEPC Service Corporation,
Level 5/81 Flinders Street
ADELAIDE SA 5000

Dear Kerry

The Australian Sustainable Business Group (ASBG) welcomes the opportunity to comment on the Review of the *Assessment of Contaminated Sites National Environment Protection Measure* (ACS NEPM).

The Australian Sustainable Business Group (ASBG) is a leading environment and energy business representative body that specialises in providing the latest information, including changes to environmental legislation, regulations and policy that may impact industry, business and other organisations. We operate in NSW and Queensland and have over 150 members comprising of Australia's largest manufacturing companies.

The discussion paper raises a number of issues or considerations which can be summarised as:

- Consultation on the NEPM its Schedules and supporting documentation
- Overview of the impact of the total changes on businesses including:
 - Sampling and investigation implications
 - Risk assessment
 - Auditor implications
- Aesthetics its reference and usage

Overall the review process and the thrust of the outcomes of the review of the ACS NEPM is welcomed and supported. Increase in details and options available especially for remediation practices provide for increased flexibility and serve to lower remediation costs. This is largely achieved by the increase in type and number of investigation thresholds, variations according to soil types and the recognition of European and North American approaches to risk assessment for contaminated site remediation.

Use of investigation levels as clean up criteria has been a concern with the current NEPM, but there is little doubt that such conservative approaches will continue. Such action is the result of the complexity and expertise required to understand the risks and the level at which they can be adequately managed without being over managed with the consequential heavy cost increases. Decision makers will be in difficult position as they have to win over the trust of those their decision impacts on. Such a task is made more difficult if the decision makers themselves are not familiar with or do not understand the science supporting the end result

ASBG particularly congratulates the draft NEPM team on the development of pragmatic and effective, both from an environmental and health basis, investigation criteria for asbestos. One member commented that if this was in a few years ago it would have saved over \$2 million in landfill and clean up bills on one

of their sites. It appears a lot of unnecessary costs have been allocated to asbestos remediation where in fact the risks have been minimal.

1. CONSULTATION

The development of this review commenced many years ago, at least five if not more. As the consultation period commenced on 18 October 2010 and ends on 26 November 2010 this provides little time in which to digest and interpret the over 1,400 pages of highly technical documentation contained in the draft NEPM and its schedules. Exacerbating the degree of the difficulty of this task is the supporting documentation which is of similar, but larger scale. Hence, only those who have been involved within the review process have the background knowledge to make detailed responses to any technical issues in question.

Industry and business can only therefore provide selective responses to the science and coverage of the draft NEPM. As a consequence of this, ASBG has provided a review of the impact of these changes and makes recommendations largely in this area to assist in the NEPM's implementation.

Due to the comparative short consultation compared to the scale of change proposed there is an element of 'trust us we are experts'. ASBG acknowledges that some of the best Australian minds in the contaminated site profession have been sourced, but the question remains, have they got it right? A deeper and more fundamental question is will the general public and decision makers also accept the outcomes of audited risk assessments where limits 10 times or higher than the investigation limits are proposed?

There are two issues here:

- 1) The need to be able to review the NEPM's schedules if technical errors are identified
- 2) Education and promotion of the NEPM and what it does and why it should be trusted and what degree should that trust extend.

Ongoing Changes

The enormity of the changes to the NEPM means there is little time to process and provide good review of the science supporting it. However, due to the processes involved in achieving approval from the Environment Protection and Heritage Council, such large lump changes are necessary to avoid delays in decision making at the high level. It appears that if a problem is detected in the NEPM schedules then it may be another 13 year wait until these can be corrected. This is not acceptable.

ASBG proposes that the ACS NEPM be permitted special permission to make technical changes to the NEPM, similar to regulatory amendments in an ad hoc manner as issues arise. This process can be on-going so that issues can be fixed, well at least every 6 months or as frequently the replacement to the EPHC meets.

R1 ASBG recommends the EPHC provide powers to the NEPC Service Corporation to consider and adopt technical changes to the ACS NEPM on an-going and as needs basis provided the changes are lodged and with the EPHC.

Gaining public trust of the ACS NEPM is a major challenge. Under the NEPM it is covered by a schedule, but this tends to make the payer of the remediation responsible for public and community consultation. Such approaches tarnish community consultation as the land owner or developer is considered to have a vested commercial interest.

Assisting in the process of cleaning up Australia's contaminated land the EPHC at the National level also has a responsibility to promote the good work it has achieved in the development of the ACS NEPM. Such

action should greatly assist in speeding up remediation, lowering its costs by reducing especially planning approval disputes over remediation projects. Similar assistance has resulted from the Stockholm Convention's lists of acceptable technologies for cleanup of contaminated land as the international recognition of such provides a much better level of trust to the public than those acting alone.

R2 ASBG recommends an educational and promotional program on the ACS NEPM be developed and implemented in a continuous basis to assist in satisfying community concerns over contaminated site remediation its risks and what is involved.

2. OVERVIEW ON THE CHANGES

The main changes which are the focus of this submission include:

- Investigation and sampling
- Risk assessments
- Increased use of auditors

Investigation and Sampling

Rather than discuss the changes, this submission will investigate the impacts of the draft NEPM as if it were implemented. The increased investigation and sampling options under the draft NEPM are welcomed, but do carry with them an increased cost which needs to be recognised.

Support for the increased scope of investigation limits are many and include:

- A more fitting set of investigation limits for the land use type and soils types on which it is made
- Lower costs of remediation if investigation limits are again used as clean up criteria, which will largely affect smaller remediation projects as the entry level costs for a set of risk assessment criteria is economically unviable.
- Greater certainty over the issues and types of contamination investigated on suspect sites. This should lead to less errors and less legal action due to more appropriate and complete assessments having been undertaken.
- The treatment of asbestos is greatly welcomed as it provides a conservative, but far more cost effective means in dealing with this highly emotive and commonly found substance.

In order to meet the draft requirements an increase in the number and types of samples will be required in most cases. This will lead to increased costs. However, such costs are considered to be limited as the establishment costs of a sampling program will be in the majority. Once a sampling regime has been set, economies of scale should limit costs for additional sampling and analysis further. Guestimates of up to 25% increase in such costs have been provided by some members to ASBG, though many sites are thought to be lower than this.

There are other considerations. Phase 1 assessments and their sampling regimes are expected to increase. This is due in part to the NEPM changes, but also to jurisdictional requirements, such as:

- Increased complexity of the NEPM and state regulator's more conservative approach its use.
- NSW's new duty to report contamination and its removal of 'no knowledge' as a defence,
- NSW Local Government's predicted increased conservative approach to potentially contaminated land involved in property developments

ASBG is concerned the complexity of the NEPM will result in increased use of phase 1 assessments on most industrial land. Many of these will not result in the need for remediation.

So in conclusion of this part, the changes to investigation and sampling will result in higher costs. Where remediation is required then even if based on investigation limits alone there should be some reduction in the costs for remediation. In the longer run the sheer number of phase 1 investigations will result in overall increased costs especially for industrial land transactions.

Risk Assessments

The greatly expanded schedules B4, B5s and B6 provide an internationally acceptable use of risk assessments in site remediation. This brings Australia up to speed with the rest of the developed world in this type of management. Overall it is a welcomed approach. However, members have commented that the more complex and top end on site clean ups will use even more comprehensive risk assessments schemes than provided in the NEPM. While welcomed there are a few issues with this change including:

- Community acceptance of increased clean up criteria much higher than the investigation levels
- Acceptance of the new risk assessment processes and their application and implementation to specific sites to:
 - the environmental regulators,
 - planning approval decision makers and
 - site auditors.

Education on the risk assessment processes to the regulators, auditors, consent authorities, land owners and the communities is a necessary but challenging requirement. ASBG is concerned there is no national educational program planned to illuminate stakeholders on the greatly expanded risk assessment approaches under the draft NEPM.

R3 ASBG recommends the EPHC support a national educational program on the new risk assessment processes under the ACS NEPM to be delivered to key stakeholders by a mix of jurisdictional and industry across Australia.

Increased Auditor Demand

A major consequence of the draft NEPM is the anticipated increase in demand for contaminated site auditors. ASBG's considers the following reasons support this prediction:

- Use of the new risk assessment processes will require more time and effort from contaminated site auditors due to:
 - The newness of the risk assessment processes
 - Requirement to be satisfied the consultant undertaking the risk assessment has covered it an acceptable level.
 - Level of familiarisation by the auditor of the expertise of the consultant and their capability of its implementation
 - Type of risk assessment used and whether it has been used here or overseas
 - The level of familiarisation of the risk assessment process used by the auditor
- Planning consent authorities which are less confident with the massive changes to the NEPM will increase their reliance on the use of auditors to assess industrial land transfers.

ASBG expects the increased use of auditor time reviewing consultants using the new risk assessment process will diminish over time as the auditors become more use to the new processes and gain increased confidence with consultancies which use them. This however, favours the larger consultancies over the smaller ones, as they more likely be able to draw on international experiences and build their use of risk assessment processes at a faster pace.

The second point is perhaps the more important as there will be again an education gap following the implementation of the draft NEPM. This issue is particularly acute in NSW where Local Government, rather than environmental regulatory agencies, have planning decision making powers over contaminated land development. Many NSW Councils lack resources and knowledge in this area to deal with the current contaminated site legislation. A doubling of the NEPM will simply make them more cautious. Turing to auditors will result shifting Council's risks to the auditor and their professional liability insurance.

ASBG considers a simple fix is to provide more auditors. The problem is that there is a predicted shrinkage of the number of auditors as a number are expected to retire soon.

Again the means to assist in correcting this issue includes:

- Increasing the number of auditors
- Running educational programs for planning consent authorities on contaminated land and the NEPM changes
- Contaminated site consultants prepare capability statements on their key risk assessment methodologies for pre assessment by land owners and contaminated site auditors.

The last dot point should help in preparing contaminated site consultants to demonstrate up front they have the capability and capacity to undertake risk assessments at least up to the standard in Schedule B6. While this should not be a mandatory condition, it should be a recommended one. If such statements are comprehensive enough, and perhaps, call up overseas experience with the risk model, this should better prepare both the land owner and the site auditor for dealing with that consultancy. The outcome being lower cost remediation and more efficient use of resources.

R4 ASBG recommends increasing the number of contaminated site auditors to cater for the increased predicted demand following the implementation of the draft NEPM.

R5 ASBG recommends support for educational programs for planning consent authorities to better understand the changes to the NEPM and other contaminated site legislation.

R6 ASBG recommends that contaminated site consultants provide risk assessment capability statements in compliance with schedule B6 for review by clients and site auditors.

3. AESTHETICS

Members have commended there is a lack of clarity in the application of aesthetics in the NEPM's schedules. Only two schedules refer to the need to consider aesthetics including:

- Schedule B1 under Investigation Levels for Soil and Groundwater and
- Schedule B6, Risk Assessment on Groundwater

Reference to aesthetics in S-B1 and S-B6 includes:

- *Assessment of petroleum impacts must also evaluate risks to groundwater and involve appropriate consideration of aesthetics.*
- *The recreational and aesthetics sections of the AWQG have been superseded by the GMRRW¹.*
- *S-B1 Chapter 3.7 Aesthetics Considerations*

¹ Guidelines for Managing Risks in Recreational Waters – chapter 10

- *There are no specific numeric aesthetic guidelines but site assessment requires balanced consideration of the quantity, type and distribution of foreign material and any realistic concerns relating to land use. Aesthetics are partly considered in the numeric 'management limits' as discussed in this Schedule.*

Members have expressed some concern that the GMRRW are not suitable for contaminated site remediation as very few sites will contain recreational waters where the public or even private individuals will be swimming in such water bodies.

ASBG is concerned the aesthetic limits do not follow a logical pathway for application. Such uncertainty can be abused by either over emphasising or under emphasising aesthetics in contaminated site assessment.

R7 *ASBG recommends that the use of aesthetics requires to be re-written to improve its certainty of application and clarity of use.*

Given the concerns over the application of aesthetics under the NEPM documents this should be subjected to a separate review and public consultation. Given the general acceptance of the draft NEPM documents apart from this issue ASBG considers that as a whole the changes be adopted soon and aesthetics be dealt with as an *ad hoc* and on-going issue.

4. CONCLUSION

Overall the draft NEPM is a welcome improvement and will provide a more flexible and pragmatic set of criteria for the management of contaminated land.

Use of educational programs will improve the knowledge and understanding of the NEPM and how it is applied to contaminated sites resulting in less disputes and smoother planning approvals of remediation. This will provide a better environmental outcome as more contaminated land is cleaned up resulting less risk to Australians.

Provision for more contaminated site auditors will assist in the independent assessment of remediation activity and lower the costs of the third party sign off of cleaned land.

The one exception is aesthetics which should be addressed as an ongoing matter in the continual improvement of the Contaminated Sites Assessment NEPM.

Should you wish further clarification on the above submission please contact me on (02) 9453 3348.

Yours sincerely



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