

1 November 2019

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Dear Stephen and Cathy

RE WHERE CONTAMINATED LAND OR WASTE & POLLUTION LAWS APPLY

The Australian Sustainable Business Group (ASBG) wishes to clarify in detail the cross over between waste and pollution laws and contaminated land laws. Both the *Protection of the Environment Operations Act 1997* and the *Contaminated Land Management Act 1998* have significant overlap when it comes to the management of cleaning up a site, including remediation actions, but also during general earthworks or demolitions where unexpected finds occur. Confusion is particularly high around the meaning and use of what is called the on-site / off-site rule for waste.

This interpretation has entered a new phase of confusion with recent changes to waste laws and the outcomes of the EPA v Grafil CCA case, which changed not only the interpretation of asbestos waste, but also the overall definition of waste. Grafil case and recent changes to environmental laws, especially those affecting asbestos waste are discussed and clarification is requested.

In addition, many ASBG members report poor understanding of the on-site /off-site rule by many EPA officers resulting in poor regulatory decisions in apparent breach of the rule, considerable argument, delays and consumption of staff resources in resolving this issue. A clear concise public document describing how the EPA will apply waste laws to on-site activities and remediation actions would benefit the EPA and organisations complying with it, would be the best outcome.

1 CURRENT ISSUES

There are four main sections:

- The on-site / off-site rule
- Use of Pollution of Land Offence
- Use of Clean Up Notices
- Other offences

1.1 On-site / off-site rule

For practical and legal reasons the EPA has interpreted when a waste becomes a waste and when it is not. At many past events run by ASBG and at other group meetings, the EPA has repeatedly described its *on-site / off-site rule* in varying levels of detail. This rarely written rule is considered to follow this concept:

- A material is not a waste material unless it has been transported off-site.
- Off-site means the group of land lots which are either described on an Environment Protection Licence (EPL), a Development Application or another suitable legal instrument.

Consequently, contaminated material generated on-site can be handled and managed according to CLM Act and WHS legislation; it is not waste. Only if the material goes off-site does it become a waste and only then will waste laws be applied by the EPA.

In discussions with the EPA *the site* can include multiple lots, which can be separated by easements, such as roads etc, permitting the internal transport, storage and use of materials for remediation and or clean up across the entire site. For example, Local Government has been permitted to include its road network as a single site and movement of materials around the roads is not considered to breach the on-site rule.

In this submission use of the term *remediation* means an official action to remedy a sites contamination, which is covered under a regulatory instrument such as SEPP 55. *Clean Up* in this submission means any action which uncovers contamination and that contamination is directly managed such as an unexpected find.

Generally remediation work is approved by Council using [Remediation of Land SEPP 55](#) and often part of a Development Application. Alternatively, remediation can be covered overseen by an EPL, or other actions such as management Orders or Voluntary agreements. In each oversight instrument a list of all the lots which comprise the site are used, in essence connecting them as *the site*.

The on-site / off-site rule is in part founded under the [POEO Act, largely under Schedule 1](#) and the definitions regarding waste facilities or scheduled waste facilities, which all include the phrase:

...meaning the receiving of waste [waste type] from off site...

This is a logical interpretation otherwise all other EPL sites would be also considered waste facilities if they 'accepted' waste generated from on-site.

Also the ASC NEPM defines:

site means the parcel of land being assessed for contamination.

As a consequence, the practical application of the on-site / off-site rule permits the transport of materials around the 'site' bounded by the lots listed in the legal instrument. Demolition of buildings and earthworks often require moving and processing of materials on-site to the criteria detailed in the Assessment of Contaminated Sites NEPM and its schedules (ASC NEPM). Contaminated materials stockpiled and or used on the site are not considered as wastes and assessed against contaminated land remediation criteria.

For Local Government, construction and the remediation industry, unexpected finds are a common occurrence. Asbestos is the most common contaminant. With the judgement of [EPA v Grafil CCA](#) case the gap between an acceptable level of asbestos under the ACS NEPM and asbestos waste has grown to the absurd level:

- ASC NEPM → a small piece [7 x 7 mm] of bonded asbestos per m² is permitted
- POEO Act → any *presence* asbestos in waste classifies the waste as asbestos waste¹.

Consequently, regulatory action can be taken for stockpiles that contain asbestos and which have inadvertently been applied off-site such as on a land lot not listed under the instrument.

In addition, the EPA v Grafil CCA case re interpreted the definition of waste² to the effect that where each "or" linking the (a) to (d) definitions should be replaced by an "and or", substantially changing the meaning of the

¹ The amount of asbestos that the material contains or its relative proportion to the volume of material are not relevant to whether the material contains asbestos. [EPA v Grafil CCA at 329]

definition of waste. This expanded definition appears to undermine the on-site / off-site rule. For example, a stockpile of material from one part of a remediation process, because it has been simply discarded or unwanted on-site can be defined as a waste. If this approach is applied rather than the on-site off site rule then most remediation activities would be breaching the POEO Act under pollution and waste laws.

ASBG is concerned that black letter law application of waste and pollution law can find movement of contaminated materials an illegal activity, even when where there is no environmental harm during the movement. In both clean up and remediation the outcome is to improve the environment, by cleaning up contamination.

C1 ASBG would asks the EPA to clarify:

- ***EPA's interpretation of when a material becomes a waste from the perspective of its location of generation and moved position, both on-site and off-site***
- ***The types of regulatory instruments which can combine lots to form a site where the on-site / on-site rule is recognised by the EPA***
- ***Where the set of lots under a regulatory instrument includes combined lots owned by different persons, is still recognised as a single 'site'***
- ***Where a stockpile of contaminated material generated from the site, has not left a site (still on-site) it is not considered a waste.***
- ***That contaminated material can be processed / treated on the site of its generation without being declared a waste***
- ***Use of case studies to describe gray area scenarios***

A number of ASBG case studies are listed in the appendix have been chosen to identify the gray areas associated with this section. It would be appreciated if they are reviewed as to the issues they may cause the EPA in its application of its legislation.

1.2 Pollution of Land Offence

Site clean up activities should not cause environmental harm during its operation, as a remediation's purpose is to rectify legacy contamination. Nevertheless, movement of materials around a site is often required to achieve operational requirements achieving a cleaner site as an outcome. However, undertaking such actions can trigger various pollution and waste laws. ASBG considers that clear boundaries are needed so that cleanup activities can operate in a manner to achieve the outcome of rectification, and only be subject to pollution a offences where environmental harm from poor remediation or clean up practices are performed on the site.

By its nature [POEO Act s142A Pollution of Land](#) captures the act of contamination of land its self. So movement of a contaminated material from one area to another can be considered to breach this section. Again operational activities by their need for material movement can, in strict interpretation, breach this section, but enforcement of this nature is impractical and would impede the outcome of achieving a cleaner and better environmental outcome than what was started with. The key to this section is in the definition of:

"land pollution" or "pollution of land"

means placing in or on, or otherwise introducing into or onto, the land (whether through an act or omission) any matter, whether solid, liquid or gaseous:

² In the context of the definition of "waste" in the Dictionary to the POEO Act, the word "or" does not have the effect of making each paragraph in the definition mutually exclusive, so that a substance can only fall within one but not more than one paragraph. Rather, the context suggests that the word "or" is used to indicate that a substance may fall within one or more of the paragraphs of the definition if the substance meets the criteria in those paragraphs. In particular, the use of the same word "or" between each of the five paragraphs cannot be read as causing paragraph (d) to operate to the exclusion of the other paragraphs. .I.e. "Or" can be in effect changed to "and or"[EPA v Grafil CCA at 118]

(a) that causes or is likely to cause degradation of the land, resulting in actual or potential harm to the health or safety of human beings, animals or other terrestrial life or ecosystems, or actual or potential loss or property damage, that is not trivial, or
(b) that is of a prescribed nature, description or class or that does not comply with any standard prescribed in respect of that matter,
but does not include placing in or on, or otherwise introducing into or onto, land any substance excluded from this definition by the regulations.

The problem under the Pollution of Land offence is that it can be triggered by common operational actions. Here the moved materials do not need to be classified as a waste, just that it causes degradation to the land to trigger this section. Expanded specific actions were recently added were the following definitions of pollution of land under [POEO \(General\) Regulation 2009 s109](#):

"pollution of land" in the Dictionary to the Act, the following matter is prescribed--

- (a) hazardous waste,*
- (b) restricted solid waste,*
- (c) more than 10 tonnes of asbestos waste,*
- (d) more than 5 tonnes of waste tyres or more than 500 waste tyres.*

Note : *Placing smaller amounts of asbestos waste or waste tyres on land may fall within paragraph (a) of the [definition](#) of "land pollution" in the Dictionary to the Act and may also give rise to water pollution.*

During remediation moving contaminated materials, especially hazardous or restricted waste or asbestos waste may trigger this provision if the on-site off-site rule does not apply. To provide a safety valve to permit reasonable remediation works to proceed without the threat of prosecution under s142A the following clauses were included:

(1A) Matter referred to in subclause (1) is excluded from the [definition](#) of "land pollution" or "pollution of land" in the Dictionary to the Act if the matter is placed in or on, or otherwise introduced into or onto, land on which the matter was generated--

- (a) in accordance with an approved voluntary management proposal, management order or ongoing maintenance order under the [Contaminated Land Management Act 1997](#) or a public positive covenant or restriction imposed under [section 29](#) of that Act, or
- (b) as part of category 1 remediation work carried out under *State Environmental Planning Policy No 55-- Remediation of Land* .

However, most remediations are not SEPP 55 Category 1, nor covered under the criteria under (1A)(a). This exposes most civil works to liability under s142A, even if they are a SEPP 55 Cat 2. As there is no volume limit unexpected finds of hazardous and restricted wastes are especially exposed to s142A.

Asbestos would be the leading unexpected find, which has a 10 tonne threshold under s142A. In practice any stockpile from a demolition and or earth works from a pre 1980s building is at risk of containing asbestos, even at trace levels. Limiting stockpiles on demolition sites, road works or other earth works to 10 tonnes because they may contain asbestos would be highly impractical. It may also prevent the source separation of asbestos containing materials on site (when it is not classified as asbestos waste) where the outcome serves to reduce waste to landfill and or provide a source of fill materials acceptable under the ASC NEPM criteria.

Safework NSW's document [Managing asbestos in or on Soil: Guide](#) uses the ASC NEPM criteria to assess contaminated soils and requires the use of suitably qualified persons to supervise the removal and source separation of asbestos—when it is not asbestos waste. So there are workable criteria for the management of unexpected finds of asbestos on sites, but s142A could apply even if these Guidelines or others are followed.

ASBG contends that if unexpected finds are managed in an appropriate manner, especially if the practices follow a published guideline the application of s142A, they should not be used against such activities. Perhaps further guidance is required to ensure that most civil works is not operating under a very difficult set of criteria, including the prohibition of the stockpiling of materials which might contain asbestos.

C2 ASBG would asks the EPA to clarify, the manner in which s142A can apply where the materials are all managed on-site where:

- **Material movement occurs during a remediation activity, which is covered under a Cat 2 classification under SEPP 55**
- **Contaminated material stockpiles are made, but not under SEPP 55, and the types of guidelines required to be followed to avoid application of the section**
- **Unexpected finds occur and are stockpiled in volumes, which exceed the amounts for asbestos, hazardous, restricted wastes or waste tyres under the section.**

Note the on- site / off-site rule includes, for example, all lots which are covered under an EPL, or other planning instrument.

1.3 Use of Clean Up Notices

Under the [POEO Act s91 Clean Up Notices](#) the EPA can issue a Clean Up Notice where it reasonably suspects or a pollution incident has been caused. In the past³ the EPA has issued Clean Up notices on contaminated groundwaters, but has since preferred to use the CLM Act to deal with such trans-boundary issues of contamination. Application of Clean Up Notices has similar aspect to that of s142A. Clarification that this is currently the main approach used would be helpful.

For the common issue of managing contaminated materials and unexpected finds, such as asbestos contamination in soils, depositing such stockpiles for internal management on other areas on the site is a common operational requirement. Often the project requires materials to remove from one area to others to ensure other activities can occur where the unexpected find was found. Use of another lot, not being the lot where the waste was found, but is part of the site, is commonly required to achieve this operational requirement.

The issue is does the movement from one lot to another result in a pollution incident from which a Clean Up Notice? The answer appears to be:

- Depending on how it is done, and
- If the material can be considered a waste.

If the management of the material is undertaken in accordance with an appropriate set of guidelines, such as ASC NEPM or a NEMP or Managing Asbestos in Soils Guide or other accepted methods, should be the first step. The first step is based on the timing, how long the 'stockpile' or deposit is there. Is it intended to stay on site, such as it meets ASC NEPM criteria or has other approval etc. Alternatively it could be stockpiled for a variety of reasons such as for disposal, but it could be stockpiled to be screened and source separated where the hot spots are pulled out, or may undergo on-site processing or treatment. There are many guidelines, which specify how this should be done to avoid environmental harm.

For the material to be considered a waste ASBG expects the on-site / off site rule would apply. However, that is not how the POEO Act's definition of waste appears to work legally, especially after the EPA v Grafil CCA case.

Redeposited material, which includes any substance deposited in the environment, discarded or rejected [timing issue here] and or intended for recycling processing and or recovery can all result in any movement of material being classified as a waste. Consequently, any movement of any material which is not fit for purpose even after processing can be considered a waste under strict interpretation. This appears independent of the on-site / off-site rule. Depositing of waste anywhere on any lot, even its own lot of generation, can be

³ Orica ground water contamination at Banksmeadow.

considered a waste and hence a pollution incident. This can be especially true if the volumes are larger than specified under the s142A Pollution of Land offence then a Clean Up Notice may be issued.

C3 ASBG asks the EPA to clarify how Clean Up Notices may be applied to sites That are undergoing demolition or earthworks processes on site, and where:

- **Deposition and stockpiling of materials on-site is occurring for the purposes of:**
 - **disposal off-site as the next step**
 - **recycling on-site and off-site as the next steps**
 - **on-site use as the next step, or**
- **Where unexpected finds occur and how they should be managed from an on-site perspective.**

C4 ASBG asks the EPA to clarify how what Guidelines and or other documents can be used to avoid the triggering of a Clean Up Notice when moving contaminated materials around a site using the on-site rule?

1.4 Other Offences

The on-site / off-site rule also plays a significant part in the following section of the POEO Act:

- **143 Unlawful transporting or depositing of waste:** If a contaminated material is considered a waste then its transport to neighbouring lot can trigger this section. This section only permits the use of an *approved notice* as a defence. The application of this section hangs on whether the material is considered a waste or an on-site material.
- **144 Use of place as waste facility without lawful authority:** This is perhaps less of a liability as the site must receive waste to be a waste facility. However, adjoining lots could be interpreted as receiving waste if the on-site rule⁴ is by-passed.
- **144AAA Unlawful Disposal of Asbestos Waste:** This only applies to a *person disposing of asbestos waste off the site*. However, with the EPA v Grafil CCA case changing the definition of waste, depositing of asbestos waste on adjoining lots could be liability. So 'off the site' could mean the adjacent lot even if it is considered on-site.
- **144AAB Reuse and Recycling of Asbestos Waste Prohibited:** The on-site rule should see any asbestos containing material on-site as not being a waste. To do otherwise would prevent demolition works from undertaking separation of asbestos from other parts of the structures foundations and other parts of the site.

C5 ASBG asks the EPA to clarify the on-site rule applies to the above sections and as such contaminated materials on site will not be classified or considered wastes.

2 CONCLUSION

A clear set of policy guidelines is called for to avoid organisations to second guessing the regulator. It appears that The [Review of the EPA's Contaminated Land Management Act 1997 Procedural Guide for EPA Officers](#) started a process along this path, but it appears short on the cross over with waste and pollution laws. Nevertheless, ASBG looks forward to this Procedural Guide being prepared and providing clarity on this important issue.

Unexpected finds, especially those involved with asbestos are a common issue to industry, Government and especially local Government. Ensuring the use of Pollution of Land offence and Clean Up Notices are only applied where necessary to prevent environmental harm, and not to the letter of the law. Well managed stockpiles of materials on site derived during a remediation, demolition or earthworks on a site can continue to be used so practical management of the site can continue. Contaminated materials and or unexpected finds can also be appropriately managed using clear guidance to avoid environmental liabilities due to definitional issues rather than

⁴ Assumes the lots are part of one site.

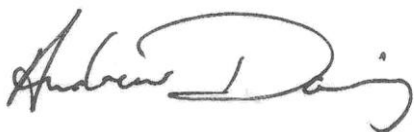
resulting environmental harm as an outcome of the project. Environmental outcomes should be the key goal, and intermediate steps used which to achieve this outcome.

Without clear communication of how environmental criteria are to apply. It appears creeping variations in the interpretation and use of existing regulatory instruments and policies have changed the criteria required, but with no public discussion and in most case no warnings of the “new criteria” for this environmental performance.

Good governance must be based on a clearly defined set of rules and as a consequence, ASBG looks forward to the EPA’s clarifications above in the application of the use of waste laws, pollution of land offence and clean up notices are used when dealing with on-site management of materials, soils, contamination and unexpected finds.

Should you require further information, clarification or details on the submission please contact me on 02 9453 3348.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Andrew Doig', with a large, stylized flourish at the end.

Andrew Doig

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APPENDIX Case studies:

1. Unexpected find

Site A is with made up of multiple lots is having earthworks prepared in compliance to its Development Application (DA). The site was not considered to be contaminated and did not trigger SEPP 55 according to the Council approval process, only a preliminary site investigation was undertaken. During earthworks an unexpected asbestos find was made of low levels of bonded asbestos. This was recorded and documented under WHS laws. It comprised of about 4,000 tonnes of material which was stockpiled on site. Does this avoid waste and pollution law?

2. Reuse on-site

Site A continues: Preliminary investigations found most of the soil, about 3,200 tonnes met the ASC NEPM criteria. It was stockpiled on the adjoining lot, which was listed under the DA. Given the low concentrations the material was considered acceptable for use as a fill material on the site. Is this acceptable or is the stockpile considered waste?

3. Processing on-site

Site A further continues: Where the remaining 600 tonnes was stockpiled on another lot, but not the lot of generation. It was covered and kept moist, though the concentrations, all non-friable, were about twice that permitted under the ASC NEPM. A careful sorting and a screening program commenced where asbestos pieces larger than 4 mm were removed. The reject material, about 100 tonnes was stockpiled ready for landfilling. The treated material easily met the ASC NEPM criteria and SafeWork NSW's *Managing Asbestos in Soils* criteria in storage and handling. Is this acceptable or are further approvals required, such as containment and capping? Alternatively would both the second and no stockpiles be considered a waste due to the on-site / off-site rule?

4. Immobilisation on-site

Site B has lead contamination, which has concentrations less than ASC NEPM Schedule B1 for commercial sites [limit 1500 mg/kg] is found in soils on site. Site B's zoning will not change from being industrial. The lead material generates very low leachability <0.01 mg/l. The DA includes the use of large concrete foundations and hard stand areas. The option of blending the lead contaminated soil at 8% with concrete to be used in the foundations is considered not to breach contaminated land criteria. As all the blending takes place on the site it is not considered a waste using the on-site / off-site rule. What are the additional approvals required?

5. Detailed Site investigation

Site C: During a detailed site investigation a hydrocarbon plume is detected. The investigation found its source occurred off-site on an adjacent lot. As both lots in question are now also owned by the same organisation it is then later added to the DA to capture the entire plume. All reporting under the CLM Act and SEPP 55 have been undertaken / amended including the DA, which was only part way through the approval process when the plume was identified. The Council in reviewing the small size of the plume and its low concentration classifies it as a Cat 2 under SEPP 55. The contaminants were found in the groundwater. Would this trigger a Clean Up Notice? Can the owner change the lots covered and claim an on-site action in this way to enable more effective remediation operation?

6 Clean up of a site

Site D has hydrocarbon (BTEX ~ 4,000 mg/kg), lead (5,000 mg/kg) and Cr(VI) ~ 3,500 mg/kg contamination in soil and elevated levels in groundwater. About 20,000 tonnes of soil requires to be treated on-site and 25 ML litres pa of groundwater treated. The site comprises of multiple lots with sources of contamination originating on different lots.

Contaminated soils are moved across the site to a stockpile ready for the non-thermal treatment system. The site is now closed and is to be redeveloped into residential land. The site had an EPL, but this was surrendered after the site closed. The contamination was reported to the EPA under the CLM Act in 2008. All the lots covering the original industrial site are on a Development Application. The Council applied SEPP

55 and declared the site a Cat 2 remediation as the scale of remediation was not large, with soil treatments taking about 3 -5 months. Groundwater treatment will take about 18 months. A suitable treatment system has been selected which generates a soil below the residential Sch B1 criteria, a sewerable liquid and a soil trackable waste. The solid underflow is to be immobilised and is proposed to be sent to landfill. This is to be processed in 9 tonne batches. A proprietary treatment system is used – roll on roll off unit modified for this site’s unique contaminants.

Is the contaminated soil and groundwater considered contaminated on-site material (not waste)?

Is the site subject to an EPL ?

Are there any waste approvals or conditions which apply to the site, especially the immobilised underflow?

Would the roll on roll off treatment plant be considered a *Mobile Plant*?

7 Clean Up of a Landfill

Site E: A closed old non-putrescible landfill is undergoing remediation. Being an old landfill, much of the material on site was accepted as waste. However, the most cost effective solution for the site is to move the disposed material from one area to another and make another engineered cell, which is capped and contained according to specified requirements subject to approval by a Contaminated Site Auditor.

The key issue is does the remediation come under CLM Act or waste laws? If under CLM Act, the material (old waste) is not considered waste. If under the POEO Act and waste laws the old waste is also considered waste. Which would apply?

Note: if the contaminated material on site is considered to be waste:

- Its movement, even to another ‘cell’ on the site, can attract the waste levy
- If the material on site is also contaminated with asbestos, it would be classified as asbestos waste preventing it from being processed (remediated) to remove recyclable materials.

While a landfill has old waste, many contaminated sites are in fact old areas of disposed waste materials, just not formally licensed to be as such. So when does old waste cease to become waste once remediation commences?