

Resources – new liability for site contamination

May, 08

New EPA powers to deal with site contamination in South Australia

The South Australian Environment Protection Authority (**EPA**) will soon have new powers to deal with recent and historical site contamination - including contamination caused by the resources industry - with the progressive roll-out of a new site contamination regime in SA.

The *Environment Protection (Site Contamination) Amendment Act 2007 (SA)* received assent on 1 November 2007. The provisions of the Amendment Act are expected to fully commence by 1 February 2009. The EPA issued draft Site Contamination Regulations on 25 April 2008 for public comment.

Under the amendments, the EPA can issue site investigation orders (requiring assessment of the nature and extent of potential contamination) and site remediation orders (requiring work to treat, contain, remove or manage contamination), regardless of when the contamination occurred. In the past, the EPA was limited to dealing with contamination that was recent or causing ongoing harm.

The EPA may issue a site remediation order if the EPA is satisfied that site contamination exists at a site and considers that remediation is required.

Site contamination will exist at a site if chemical substances introduced to the site are present on or below the site in concentrations above background levels resulting in:

- (a) actual or potential harm to the health or safety of human beings that is not trivial, taking into account current or proposed land uses; or
- (b) actual or potential harm to water that is not trivial; or
- (c) other actual or potential environmental harm that is not trivial, taking into account current or proposed land uses.

The draft Regulations also propose that anyone who owns land that is being used for “chemical or physical extraction or processing of metalliferous ores, storage of mining or exploration waste in, for example, tailings dams, overburden or waste rock dumps, mining or processing of minerals or operation of laboratories or pilot facilities for processing or testing of minerals” can be issued with a site assessment order.

The amendments provide that the appropriate person to be issued with an order will be the person who **caused the site contamination** at the site. If it is not practicable to issue the order to that person (for instance, if that person cannot be identified, has ceased to exist or has insufficient assets to

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cover the costs of compliance with the order), the order can be issued to the **current owner** of the land in certain circumstances (essentially involving knowledge that the activities that caused the contamination had occurred on the land prior to purchase, or during the owner's ownership).

A person is deemed to have caused contamination if the person was the **occupier of the land** when there was an activity at the land that caused or contributed to site contamination. "Occupier" includes a licensee or a holder of a right to use or undertake operations on the land. This will **include** leases and licences under the *Mining Act* and *Petroleum Act*.

The existing exclusions for the resources industry remain, in that neither the *Environment Protection Act* nor the site contamination amendments apply in relation to -

- (a) **petroleum exploration activity** undertaken under the *Petroleum Act* 2000 or the *Petroleum (Submerged Lands) Act* 1982; or
- (b) **wastes** produced in the course of an activity (not being a prescribed activity of environmental significance) authorised by a lease or licence under the *Mining Act* 1971, the *Petroleum Act* 2000 or the *Roxby Downs (Indenture Ratification) Act* 1982 **when disposed of to land within the area of the lease or licence**; or
- (c) **wastes** produced in the course of an activity (not being a prescribed activity of environmental significance) authorised by a lease under the *Mining Act* 1971 **when disposed of to land within the area of a miscellaneous purposes licence** under that Act adjacent to the area of the lease.

However, the new regime **does** apply to contamination caused by the resources industry outside these exclusions – for instance, from leaks and spills of fuels, oils or chemicals, from roads, airstrips and amenities associated with an exploration or mining site, from deliberate injection of substances into aquifers, and from operation of processing and treatment facilities.

Given the high costs of compliance with orders, and significant penalties for failure to comply, resources companies should keep their obligations and liabilities under the *Environment Protection Act* in mind and maintain a vigilant stance in respect of minimising their impacts on land and groundwater.

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