

LEGAL COMPLIANCE - EPA CLOSED LANDFILL GUIDELINES

IPWEA (VIC) Information Seminar

16 April 2013

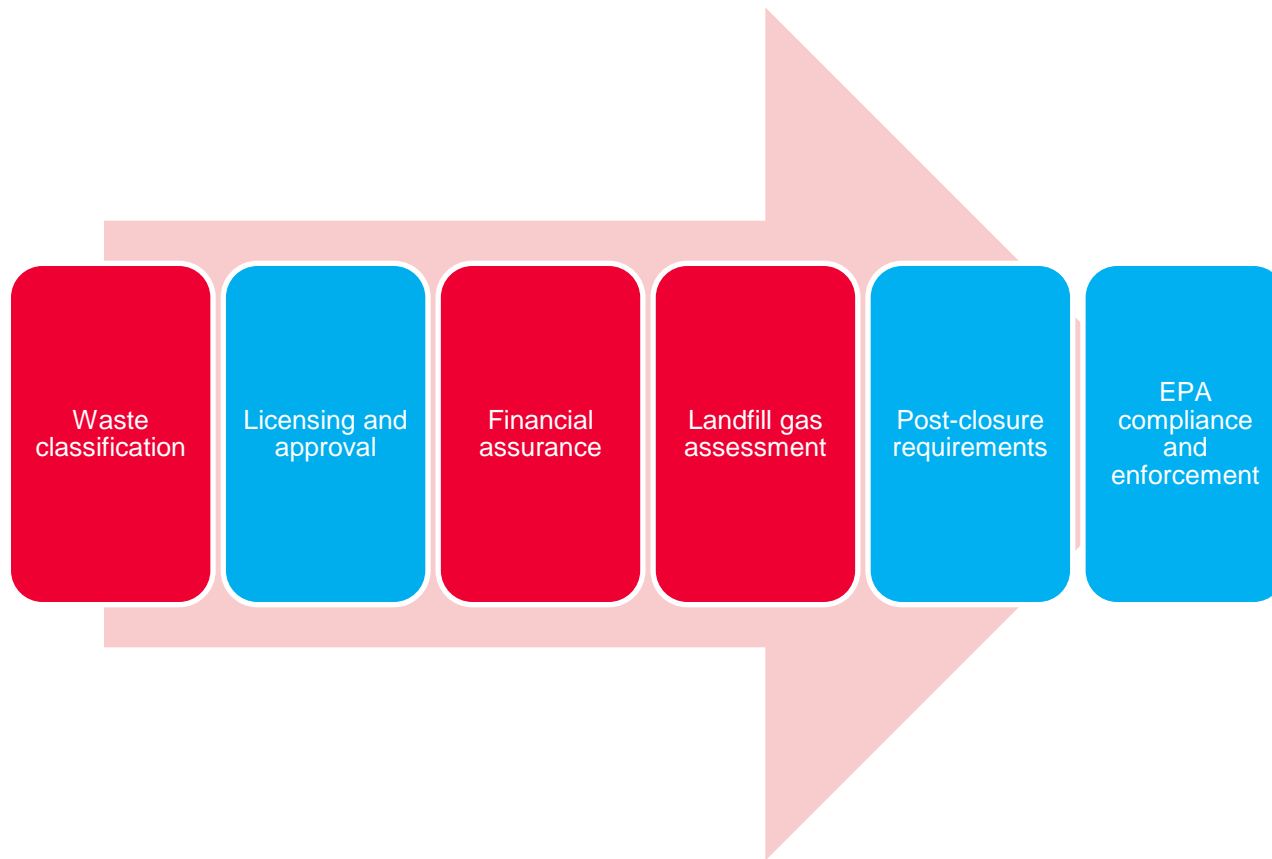
KING & WOOD MALLESONS
MARK BEAUFOY, PARTNER

OUTLINE

- EPA regulation of landfills
- Potentially contaminated land (PCL), former landfills and land use change
- EPA compliance and enforcement

EPA REGULATION OF LANDFILLS

EPA REGULATION OF LANDFILLS



LICENSING & APPROVAL

Environment Protection (Scheduled Premises & Exemptions) Regulations 2007 – Landfills (A05)

- *Landfills used for the discharge and deposit of solid wastes (including solid industrial wastes) onto land except premises with solely land discharges or deposits, used only for the discharge or deposit of mining wastes and in accordance with the Extractive Industries Development Act 1995 or the Mineral Resources (Sustainable Development) Act 1990*
- Municipal landfill facilities occupied by a municipal council and serving less than 500 people are exempt from works approval and licensing
- Financial assurances are required (costs of remediation and post-closure liabilities)
- Approximately 80 licences for landfills – municipal and shire councils, private operators, some corporate licences for multiple sites (e.g. SITA Australia, Greater Geelong City Council)
- Reformed licences , standard conditions

LICENSING & APPROVAL

ENVIRONMENTAL LICENCE	
PERFORMANCE REQUIREMENTS	
General conditions	
G1	Waste from the premises must not be discharged to the environment except in accordance with this licence.
G2	You must immediately notify EPA of non-compliance with any condition of this licence.
G3	By 30 September each year you must submit an annual performance statement to EPA for the previous financial year in accordance with the <i>Annual performance statement guidelines</i> (EPA Publication 1320).
G4	Documents and monitoring records used for preparation of the annual performance statement must be retained at the premises for seven years from the date of each statement.
G6	You must maintain a financial assurance calculated in accordance with the EPA method.
G6.1	You must submit a financial assurance to EPA by 30 June 2011.
G7	In accordance with the method and frequency specified in section 50SB of the Act you must: (a) calculate the amount of landfill levy payable, (b) prepare a landfill levy statement, and (c) submit to EPA both the statement and fee payable.
Amenity conditions	
A1	Offensive odours must not be discharged beyond the boundaries of the premises.
A2	Unacceptable noise (including vibration) must not be emitted beyond the boundaries of the premises.
A3	Nuisance dust must not be discharged beyond the boundaries of the premises.
Waste acceptance conditions	
WA1	Only wastes listed in Schedule 2 may be accepted at the premises.
WA2	Wastes accepted at the premises may only be treated or disposed of in accordance with Schedule 2.
Waste management conditions	
WM3	You must ensure that litter is not deposited beyond the boundaries of the premises.
Landfill conditions	
L1	You must implement a monitoring program, verified by an environmental auditor appointed pursuant to the Act, which enables both you and EPA to determine compliance with this licence.
L2	You must engage an environmental auditor appointed pursuant to the Act to conduct the environmental audits at the frequency specified in the verified monitoring program.
L3	By the end of each day's operations waste must be covered with a layer of soil at least 0.30 metres thick or using another method of cover approved by EPA.
L4	Waters contaminated by leachate must not be discharged beyond the boundaries of the premises.
L5	You must prevent emissions of landfill gas from exceeding the levels specified in <i>Best Practice Environmental Management (Siting, Design, Operation and Rehabilitation of Landfills)</i> (EPA Publication 788).
L6	You must progressively rehabilitate landfill cells in accordance with <i>Best Practice Environmental Management (Siting, Design, Operation and Rehabilitation of Landfills)</i> (EPA Publication 788).
L7	You must not start constructing a new cell without written EPA approval.
L8	You must ensure that an independent annual survey is conducted for each landfill cell to: (a) determine the quantity of waste deposited and verify the amount of landfill levy payable, (b) demonstrate the need for any new cells, and (c) confirm that cell heights are less than the approved pre-settlement contour plan.
Discharge to water requirements	
DW1	Stormwater discharged from the premises must not be contaminated with waste.

PERFORMANCE REQUIREMENTS
Discharge to land requirements
DL1 You must not contaminate land or groundwater.

POST-CLOSURE REQUIREMENTS

Closed Landfill Guidelines

Publication number 1490 December 2012
Authorised and published by EPA Victoria, 200 Victoria Street, Carlton

Introduction

The environmental risks posed by a landfill site continue for a significant period of time after waste acceptance has ceased. To control these risks clause 16(4) of the *Waste Management Policy (Siting, Design and Management of Landfills, No. 5264 Tuesday 14 December 2004)* states once a licensed landfill site has closed, the Environment Protection Authority (EPA) will require, through a notice, the occupier of the site to undertake ongoing aftercare until such time as the site does not pose a risk to human health or the environment, as determined by the Authority.

EPA requirements for environmental management of landfills have changed as part of the licence reform program. These changes have required landfill operators to better identify and manage the environmental impacts of their landfill. Post closure pollution abatement notices (PC PANs), which are used to regulate environmental risks from closed landfill sites upon surrender of the landfill licence, have been changed in line with the licence reform program and current best practice guidelines.

There are many closed landfills across Victoria in widely varying states of management and regulation. EPA will assess whether a closed landfill should receive a PC PAN or, in some cases, receive a reformed PC PAN to replace an existing notice. The decision is based on:

- Information gathered using desktop assessments of monitoring data
- Environmental audits
- Inspection records or other data requested from the current or former site occupier
- EPA conducting its own monitoring or requiring an audit of the closed landfill under Section 53V of the *Environment Protection Act 1970* (the EP Act).

The reformed PC PANs also introduce requirements to manage leachate levels at un-engineered sites and at sites that are not engineered to current standards, based on a hydrogeological assessment (HA).

This document provides guidance to assist landfill operators with rehabilitation and aftercare management requirements for closed landfills, and assist with seeking EPA approval for construction or augmentation of landfill caps. It identifies the steps to be taken by landfill operators during preparation of an environmental monitoring program, a HA, a rehabilitation plan and an aftercare management plan, as well as ongoing auditing of landfill rehabilitation and aftercare. Where a landfill operator can demonstrate, through robust assessment, that further work to protect the environment is not required, the PC PAN will account for this through site specific requirements or removal of standard requirements.

Guidance is also provided to environmental auditors for conducting environmental audits and the verification of landfill operators' plans and assessments.

Guidance on understanding landfill PC PAN requirements is provided in Appendix L2. These guidelines reference the most recent version of EPA Publication 788, *Best Practice Environmental Management - Siting, Design, Operation and Rehabilitation of Landfills* (the landfill BPEM), which is the primary guidance document and waste management policy for landfill management in Victoria.



- Post-closure pollution abatement notices (PC PANs) (s.31A)
- Implementing environmental monitoring program
- Implementing a rehabilitation plan
- Managing landfill in accordance with aftercare management plan
- Leachate and landfill gas
- 'verification by an environmental auditor'
- reporting and annual performance statements
- Note: procedural fairness (draft PC PAN); appeal under s.35 *Environment Protection Act 1970* within 21 days

PCL, FORMER
LANDFILLS AND LAND
USE CHANGE

PCL, FORMER LANDFILLS AND LAND USE CHANGE

Department of
Sustainability and
Environment

Potentially Contaminated Land

General Practice Note June 2005

This General Practice Note is designed to provide guidance for planners and applicants about:

- how to identify if land is potentially contaminated
- the appropriate level of assessment of contamination for a planning scheme amendment or planning permit application
- appropriate conditions on planning permits
- circumstances where the Environmental Audit Overlay should be applied or removed.

What is potentially contaminated land?



Potentially contaminated land is defined in Ministerial Direction No. 1 – *Potentially Contaminated Land*, as land used or known to have been used for industry, mining or the storage of chemicals, gas, wastes or liquid fuel (if not ancillary to another use of land). This practice note also deals with land that may have been contaminated by other means such as by ancillary activities, contamination from surrounding land, fill using contaminated soil or agricultural uses.


How is potentially contaminated land considered in the planning system?

The planning system is the primary means for regulating land use and approving development and is an important mechanism for triggering the consideration of potentially contaminated land.

The *Planning and Environment Act 1987* requires a **planning authority** when preparing a planning scheme or planning scheme amendment to 'take into account any significant effects which it considers the scheme or amendment might have on the environment or which it considers the environment might have on any use or development envisaged in the scheme or amendment' (Section 12).

Ministerial Direction No. 1 – *Potentially Contaminated Land* (Direction No. 1) requires **planning authorities** when preparing planning scheme amendments, to satisfy themselves that the environmental conditions of land proposed to be used for a sensitive use (defined as residential, child-care centre, pre-school centre or primary school), agriculture or public open space are, or will be, suitable for that use.





BEST PRACTICE ENVIRONMENTAL MANAGEMENT

SITING, DESIGN, OPERATION AND REHABILITATION OF LANDFILLS

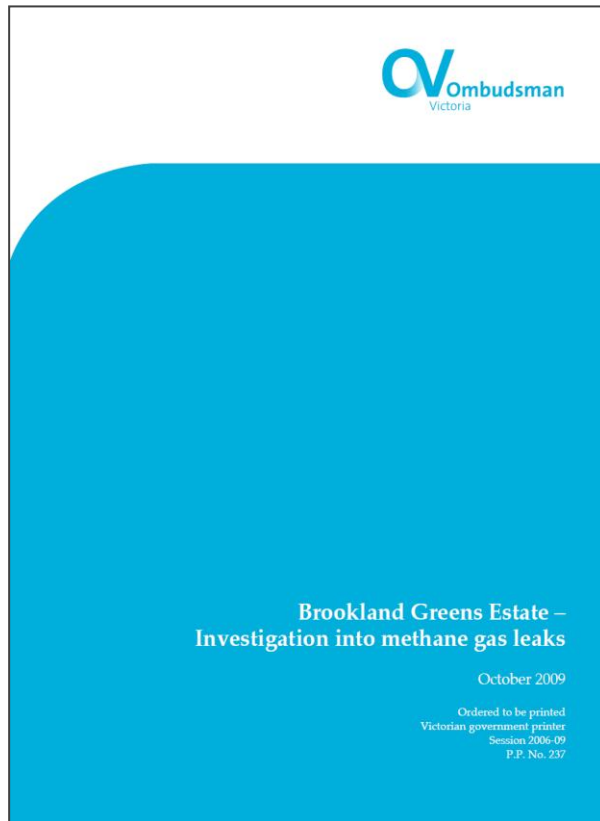
Publication 788.1* September 2000

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* This replaces publication 788, released October 2001.

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PCL, FORMER LANDFILLS AND LAND USE CHANGE



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POTENTIALLY CONTAMINATED LAND ADVISORY COMMITTEE

ISSUES AND OPTIONS PAPER

Lester Townsend, Chair

John Glossop, Member

Catherine Wilson, Member

September 2011

POTENTIALLY CONTAMINATED LAND ADVISORY COMMITTEE

REPORT


Lester Townsend, Chair


John Glossop, Member


Catherine Wilson, Member

9 MARCH 2012

POTENTIALLY CONTAMINATED LAND



State Government response to the recommendations of the Potentially Contaminated Land Advisory Committee Report

April 2013



PCL, FORMER LANDFILLS AND LAND USE CHANGE



CONTAMINATED ENVIRONMENTS WORKSHOP

EPA Victoria invites you to attend a workshop on the Management of Victoria's Contaminated Environments.

EPA recently released our **5 Year Plan**, which details how we will protect Victoria's environment and improve our performance as a regulator. One of the plan's three strategic priorities is on **Dealing with Past Pollution** and a key commitment is to comprehensively review the state of contaminated environments in Victoria.

This Contaminated Environments Review will involve three stages:

1. Development of a discussion paper on what is and isn't working (due Dec – Feb 2011 – 12).
2. Review of the discussion paper (February 2012).
3. Release of the Contaminated Environments Review, which will step through the issues identified in the discussion paper and map EPA's role over the next five years (late July 2012).

As part of stage 1, EPA invites you to attend a workshop to bring together the ideas of those working with or otherwise affected by contaminated environments.

If you are interested in and able to attend a workshop, please email contaminated.land@epa.vic.gov.au by COB Wednesday 23 November with the following details:

- your name
- who you are representing (e.g. EPA/Mr Smith)
- your preferred workshop date and time
- any dietary requirements.

We will send you an email confirming your session.

EPA will be hosting workshops on the following days and times, at a location within the CBD:

Thursday, 1 December 2011
10.00am – 12.30pm
Thursday, 1 December 2011
2.00pm – 4.30pm
Monday, 5 December 2011
6.00pm – 8.30pm
Tuesday, 6 December 2011
10.00am – 12.30pm
Tuesday, 6 December 2011
2.00pm – 4.30pm

At this stage, invitations are limited to those directly invited or their delegates. There will be another opportunity for input into the review once the discussion paper is released.

Please note: EPA has tried to be as comprehensive as possible in developing its stakeholder list for these workshops. If you have received this invitation in error, please either forward it to a more suitable candidate within your business or disregard it.

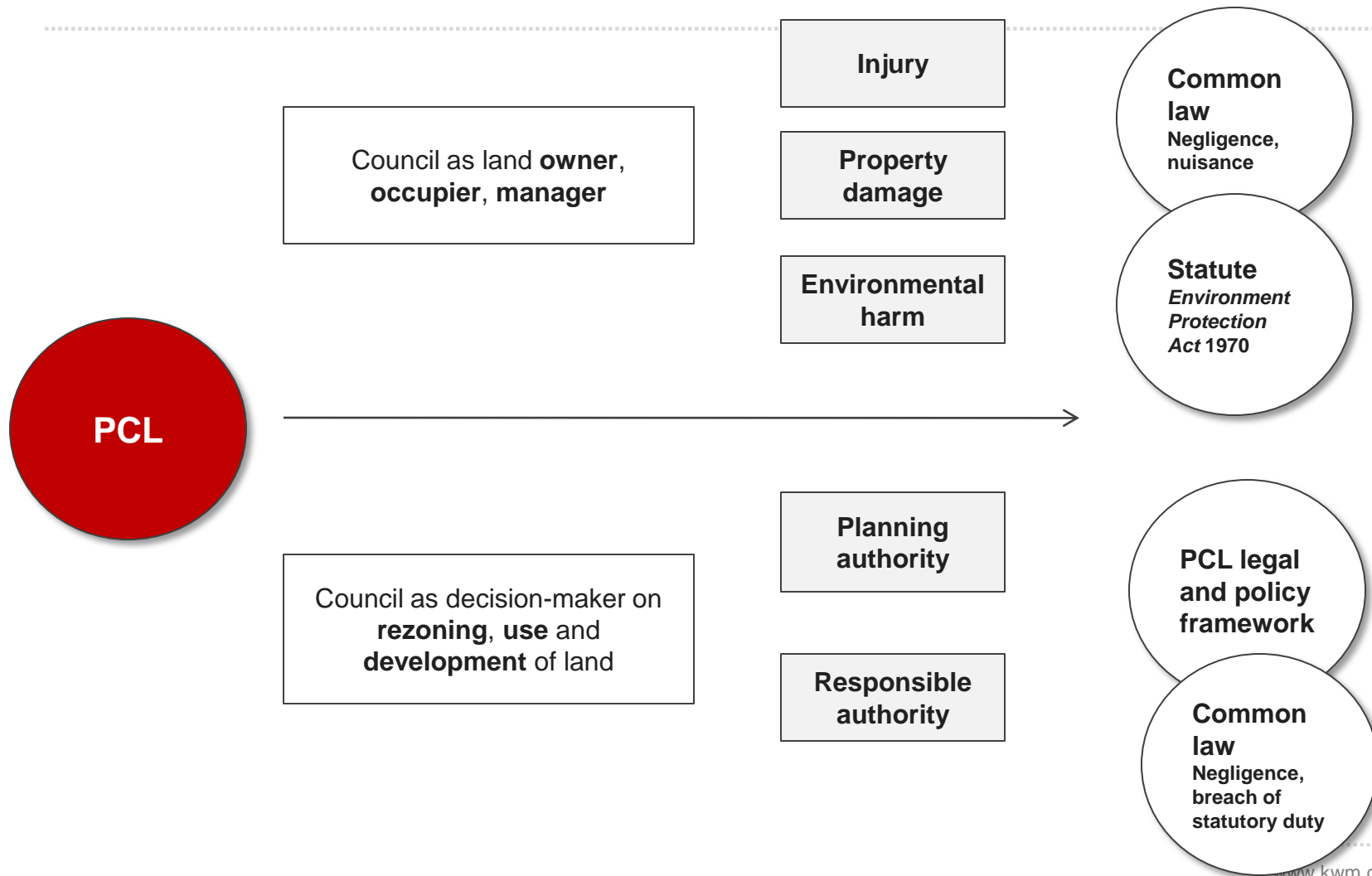
 

EPA Contaminated Environments Strategy

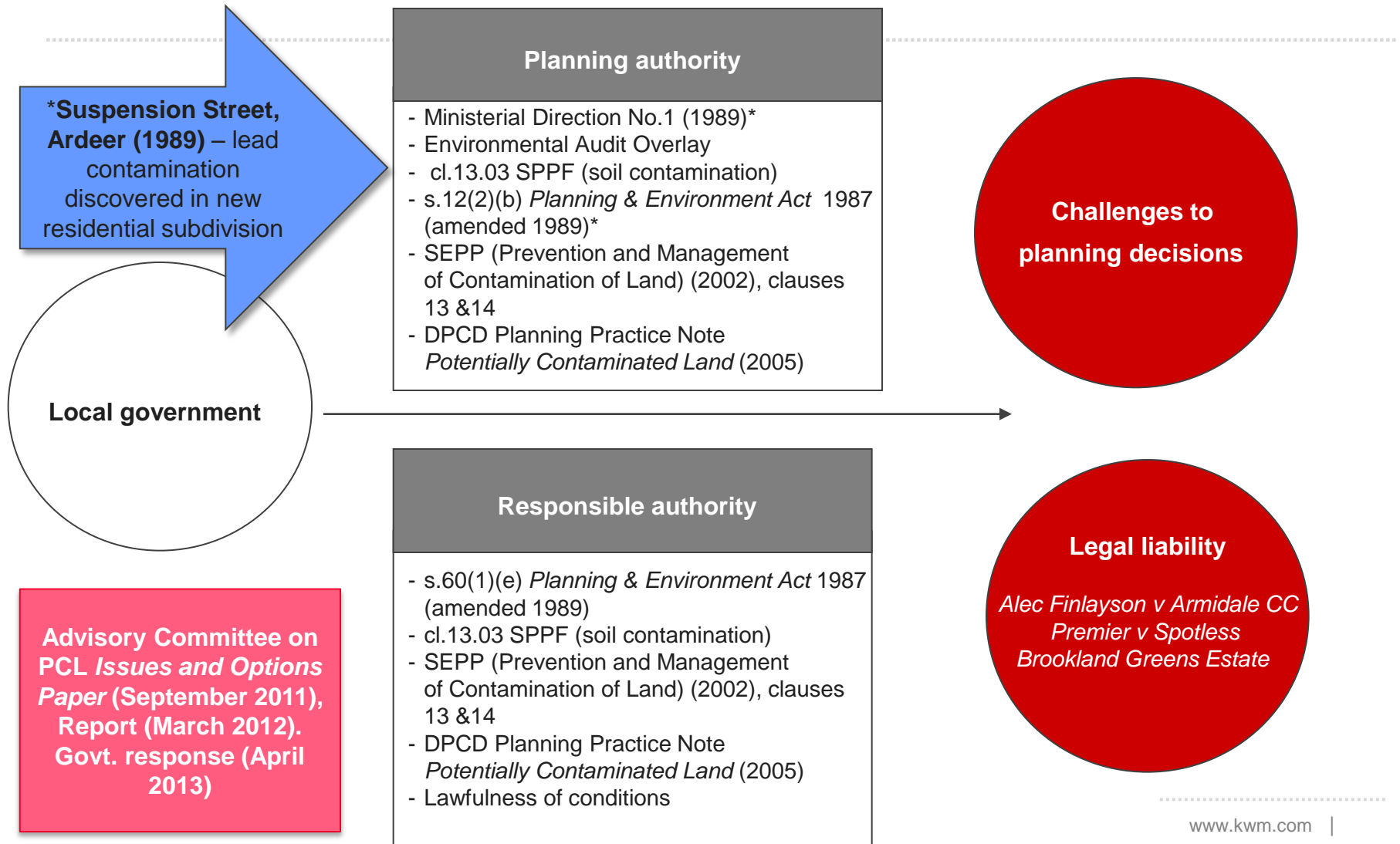
ENVIRONMENT PROTECTION AUTHORITY



PCL - SOURCE OF LEGAL OBLIGATION AND POTENTIAL LIABILITY



PCL LEGAL AND POLICY FRAMEWORK



PCL LEGAL AND POLICY FRAMEWORK

Ministerial Direction No.1 – Potentially contaminated land

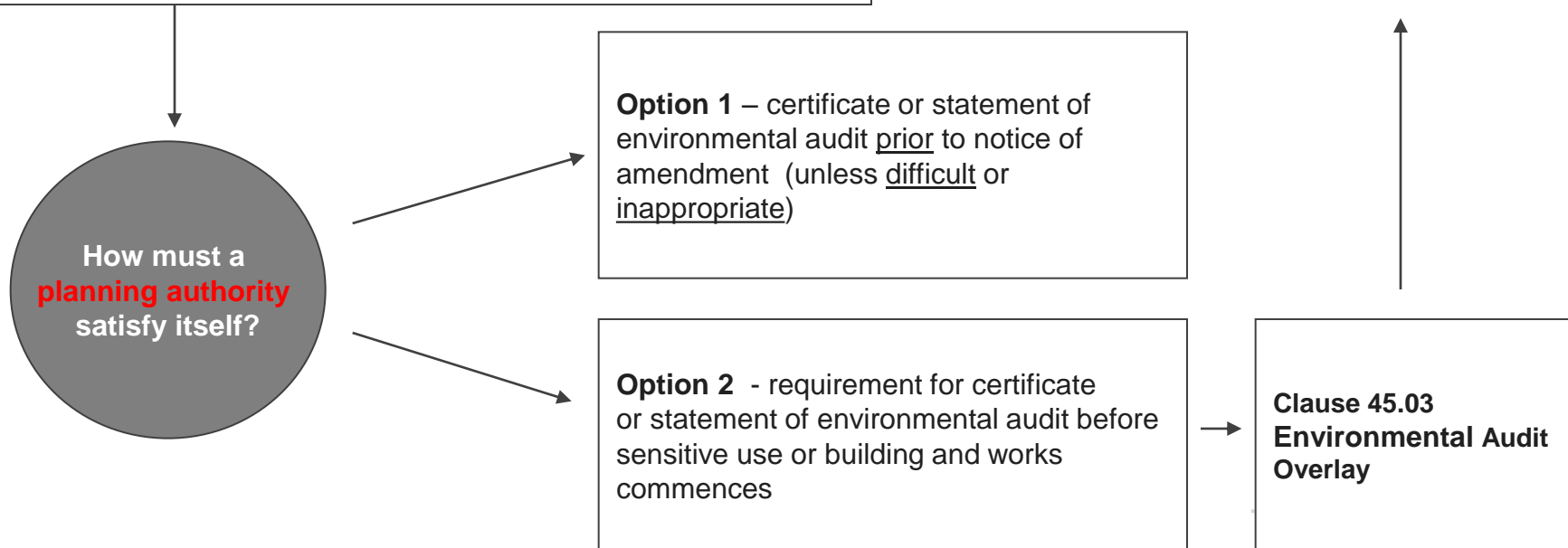
If potentially contaminated land is proposed to be rezoned to allow:

- a) Residential use
 - b) Public open space
 - c) A child care centre, pre-school centre or primary school,
- it is important that planning authorities deliberately satisfy themselves that the environmental conditions of the land are suitable for those uses.

Section 12(2)(e) *significant effects environment may have on use and development in the scheme or amendment*

EAO

- Certificate or Statement required before use or buildings and works commence
- *all* buildings and works associated with the sensitive use (irrespective of how minor) will trigger the need to undertake an environmental Audit
- *remove* if land not PCL, Certificate issued, Statement issued and conditions minor or complied with



PCL LEGAL AND POLICY FRAMEWORK

What matters must
a **responsible**
authority consider?

Section 60(1)(e) – *any significant effects which the responsible authority considers the environment may have on the use or development*

**DPCD Planning Practice Note:
Potentially Contaminated Land (2005)**

- Identification of PCL (high, medium and low)
- Level of assessment and timing (during permit application process?)
- Statement conditions and Section 173 agreements
- Permit conditions

**State Environmental Protection Policy
(Prevention and Management of
Contamination of Land) (2002),
Clauses 13 & 14**

Lawfulness of permit conditions
- Must relate to planning, to the land concerned, principles of fairness and nexus

PCL REGULATORY FRAMEWORK

DPCD Planning Practice Note: Potentially Contaminated Land (June 2005)

Table 2 – Assessment matrix

PROPOSED LAND-USE	POTENTIAL FOR CONTAMINATION (as indicated in Table 1)		
	High	Medium	Low
<i>Sensitive Uses</i>			
<i>Child care centre, pre-school or primary school</i>	<i>A</i>	<i>B</i>	<i>C</i>
<i>Dwellings, residential buildings etc.</i>	<i>A</i>	<i>B</i>	<i>C</i>
<i>Other Uses</i>			
<i>Open space</i>	<i>B</i>	<i>C</i>	<i>C</i>
<i>Agriculture</i>	<i>B</i>	<i>C</i>	<i>C</i>
<i>Retail or office</i>	<i>B</i>	<i>C</i>	<i>C</i>
<i>Industry or warehouse</i>	<i>B</i>	<i>C</i>	<i>C</i>

A: Require an environmental audit as required by Ministerial Direction No.1 or the Environmental Audit Overlay when a planning scheme amendment or planning permit application would allow a sensitive use to establish on **potentially contaminated land**.

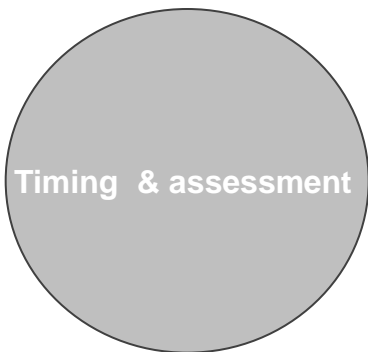
An environmental audit is also strongly recommended by the SEPP where a planning permit application would allow a sensitive use to be established on land with 'high potential' for contamination.

B: Require a site assessment from a suitably qualified environmental professional **if insufficient information** is available to determine if an audit is appropriate. **If advised that an audit is not required**, then default to C.

C: General duty under section 12(2)(b) and Section 60(1)(a)(iii) of the Planning and Environment Act 1987.

PCL REGULATORY FRAMEWORK

DPCD Planning Practice Note: Potentially Contaminated Land (June 2005)



Where applicant submits an environmental assessment of land, planning or responsible authority may require the applicant to **contribute financially to an independent review** of information by a suitably qualified environmental professional

Where land potentially contaminated and permit application may allow a sensitive use, environmental audit should be required unless proponent can demonstrate that site has **never been used for a potentially contaminating activity or that other strategies or programs are in place** to effectively manage contamination

There may be... circumstances where the land is known to be contaminated and it would be appropriate for the level of assessment to be fully assessed **as part of the application process**

Generally an environmental audit should be provided **as early as possible in the planning process**. This may not always be possible or reasonable and **requiring an environmental audit as a condition of permit may be acceptable** if the RA is satisfied the level of contamination will not prevent the use of the site

VCAT DECISIONS ON PCL

Over 28 decisions relating to PCL between 2002 to date...key themes:

- Strategies or programs in place to effectively manage contamination
- Timing of environmental audit or environmental assessment
- Finding flexibility through permit conditions to the application of the EAO for minor works

More information –

Advisory Committee on Potentially Contaminated Land *Issues and Options Paper* (September 2011), Report (March 2012), Govt. response (April 2013)

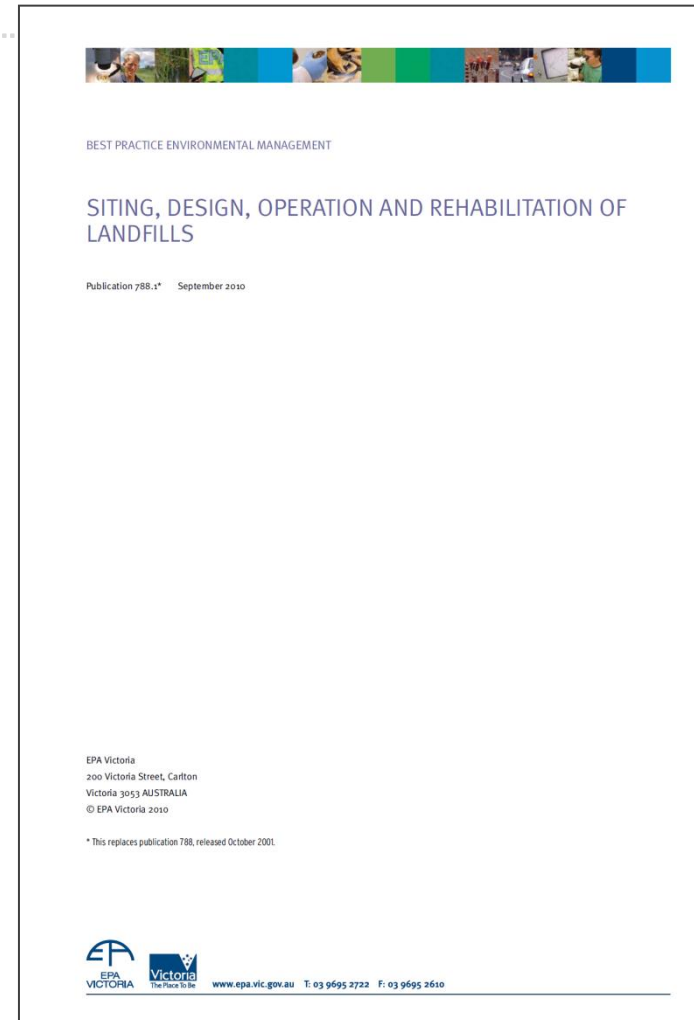
<http://www.dpcd.vic.gov.au/planning/panelsandcommittees/current/contaminated-land-advisory-committee>

“Potentially contaminated land in Victoria – challenges for local government” (2010) 15 *Local Government Law Journal* 170

LANDFILL BPEM

PCL cf. landfill risks

- PCL generally at site or adjacent land
- Landfill risks (landfill gas, leachate) in wide buffer around former landfill and requires specialist knowledge and experience for assessment and management
- Responds to recommendations of Ombudsman's report *Brookland Greens Estate* (October 2009)
- Public submissions and workshops 2010, *Response to Comments* (September 2010) on 'Buffers, planning application and audit requirements' – *'EPA will be preparing further guidance to provide to councils and auditors'* - not yet, but EPA is now starting this work
- The Landfill BPEM is a guideline adopted by the EPA – not referred to in the planning scheme (yet), but is a relevant consideration under s.60(1A)(g) when considering a planning permit application



LANDFILL BPEM

Landfill BPEM – key recommendations affecting planning and responsible authorities

- Post-closure and aftercare requirements **500m (putrescible)** or **200m (solid)** buffer distances
- Appropriate buffer distances must be maintained between the landfill and sensitive land uses (receptors) to protect those receptors from any impacts resulting from failure of landfill design or management or abnormal weather conditions (which can affect the generation of landfill gas)
- Where the recommended buffers are unavailable, it must be demonstrated that risks are mitigated to the same standard
- All buildings and structures should be considered, including:
 - **Buildings and structures used for sensitive or non-sensitive uses**
 - **Change of use**
 - **Infrastructure installation**
 - **Installation of pipelines**

LANDFILL BPEM

Landfill BPEM – key recommendations affecting planning and responsible authorities (cont.)

- In considering a new planning scheme amendment or planning permit application for proposed development of works within the recommended landfill buffer, responsible and planning authorities **must be provided with sufficient information by the proponent** to be satisfied that the proposed development or rezoning will not be adversely impacted by its proximity to the landfill site.
- Where the proposed development or works encroaches into the recommended buffer or increases the extent of development within an already encroached buffer, **EPA recommends the planning of responsible authority require an environmental audit under Section 53V of the *Environment Protection Act 1970*.**
- Where a planning responsible authority has **relevant and sufficient information from previous assessments or audits**, then this may be relied on in making a decision.
- The EPA's recommendations apply to any buildings or structure (including subsurface structures such as stormwater drains or service trenches) located near a landfill. In the event that a building or structure is located within the recommended buffer, monitoring will be required in accordance with the EPA landfill gas risk assessment requirements.

LANDFILL BPEM

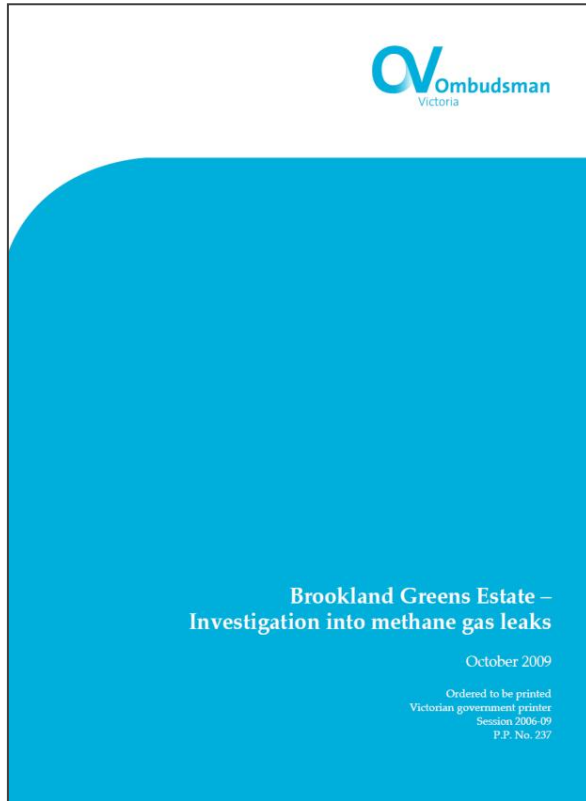
Rojin Investments Pty Ltd v Brimbank City Council

- Application to construct 8 double storey dwellings on land currently used for residential purposes
- Land adjacent to former landfill and within 200 metre buffer distance specified in BPEM
- Council required condition on permit requiring the developer to undertake preliminary assessment of risk of methane gas emissions
- Tribunal supported the decision-making framework and permit conditions for the Landfill BPEM established by Brimbank
- Accepted that Landfill BPEM is a useful guideline for Councils
- Permit condition requiring a risk assessment rather than a full audit held to be reasonable in the circumstances
- Tribunal commented that *‘the statutory regime in place is far from ideal’* but that it is *‘appropriate to take a cautious approach’*

See also ***Sunshine Investments Pty Ltd v Brimbank CC***

EPA COMPLIANCE & ENFORCEMENT

COMPLIANCE & ENFORCEMENT



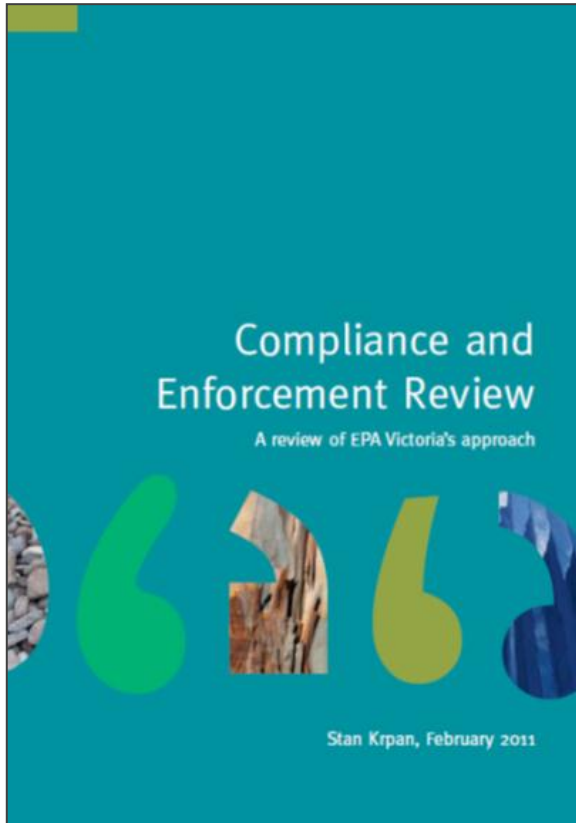
My investigation identified that the EPA failed to take adequate enforcement action in relation to the landfill for a number of years. This was not as a result of shortage of powers as the Act affords the EPA extensive statutory powers and an array of enforcement tools. In my view, the EPA ineffectively utilised the enforcement tools at its disposal.

- Victorian Ombudsman, 2009, p.149

The EPA's monitoring and inspection activities lack coherence, purpose and coordination. This combined with poor business information because of the EPA's lack of data reliability, poor analysis and reporting and inadequate communication of its rationale for decisions, means that there is neither sound compliance nor effective enforcement regimes. As a consequence, there is little assurance that hazardous waste is stored or disposed of appropriately.

- VAGO 2010

COMPLIANCE & ENFORCEMENT



- 400 plus page report released 15 February 2011

Common to these reviews and my observations during the review was confusion in EPA as to the organisation's purpose and neglect of its role as the regulator and its responsibility for enforcement of the law

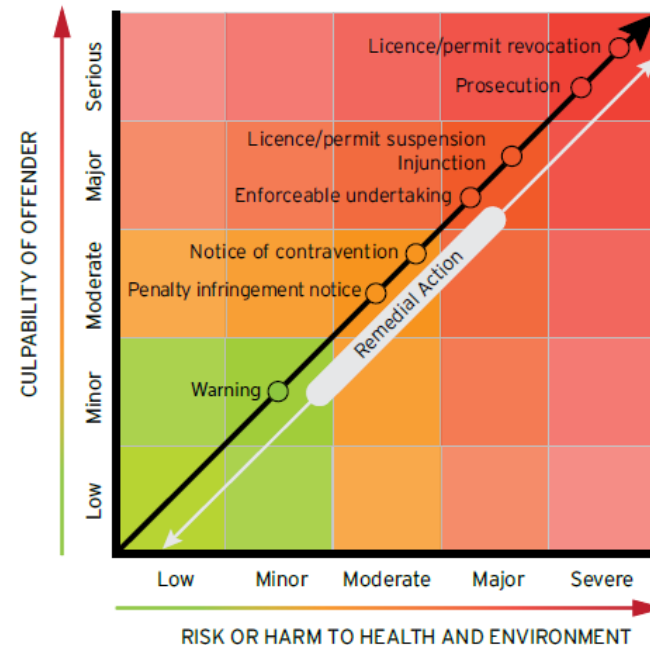
- 119 recommendations for reform:
 - More responsibility for decision making and provision of expertise
 - Focus on compliance and enforcement
 - Clearer and more transparent regulation and enforcement
 - More notices (clean up notices, pollution abatement notices, PINs)
 - More prosecutions

COMPLIANCE & ENFORCEMENT

EPA Victoria Compliance and Enforcement Policy



10. EPA's enforcement response



COMPLIANCE & ENFORCEMENT

Annual Compliance Plan 2012-13

An outline of EPA's key compliance and enforcement priorities and projects in 2012-13

ENVIRONMENT PROTECTION AUTHORITY



- Lists EPA activities and targets for the first time, including 'maintenance activities' – for example:

Licences

- 100% of inspected sites get an inspection report
- 300 licensed sites inspected

Annual Performance Statement

- 100% of APS reviewed 300 APS reviewed as part of licence inspections
- 20 detailed field based audits

Remedial notices

- 90% inspected within 10 working days of due date
- 90% revoked or sanctions prepared within 28 days

Statutory approvals

- 95% high-risk temporary discharge approvals visited
- 30% Works Approval get detailed field inspection

Regulatory programs

- 50 targeted inspections: waste transport certificates, EREP and NPI sites

Post closure landfills

- 100% past licensed and closed landfills that currently have a notice inspected

Contaminated sites

- 90 contaminated sites from the Priority Site register inspected

PENALTIES, DIRECTOR & OFFICER LIABILITY

Act	Section	Max. penalty / Officer liability	Sentencing, defences and due diligence
<i>Environment Protection Act</i>	<p>Pollution offences</p> <p>Intentionally, recklessly, negligently pollutes, permits an environment hazard</p> <p>Intentionally or negligently provides false information</p>	<p>\$340,000 (\$170,000 continuing offence)</p> <p>\$1.4M</p> <p>\$350,000, 7 years imprisonment</p> <p>\$350,000</p>	<p>Recent prosecutions (15 in 2012) – penalties up to \$150,000</p> <p>7 enforceable undertakings with compliance costs estimated at up to \$600,000</p>
<i>Environment Protection Act</i>	s.66B	Each person who is a director or concerned in the management of the corporation is deemed to be also guilty	<p>s.66B(1A)</p> <p>‘Did not know’ (removed in 2006)</p> <p>Not in a position to influence the corporation</p> <p>Used all due diligence to prevent the contravention</p> <p>EPA Compliance & Enforcement Policy, factors to be considered in prosecuting company officers, including whether the officer:</p> <ul style="list-style-type: none"> - exercised due diligence (degree of knowledge, capacity for decision making, action/inaction of others) - failed to take reasonable steps to prevent the incident - degree of culpability - past advice or warnings provided to the officer, including whether the officer should have reasonably known about past advice or warnings

DUE DILIGENCE

- Factors in legislation reflect the case law on due diligence (*Tesco Supermarkets v Nuttrass*; *State Pollution Control v Kelly*; *R v Bata Industries*)
- ‘Reactive’ approach to environmental management is not acceptable (*EPA v Sydney Water*)
- Standards, policies and practices (such as EMS) must be implemented and put into practice (*EPA v Transgrid*; *EPA v Great Southern*)
- Understand the environmental aspects of business or action, method/system for managing environmental impact and **your role in it**
- Review management system to ensure current regulatory requirements updated
- Have incident management systems in place (what to do when the regulator visits / issues notice!), good document/data management and know (or get advice) on your legal obligations and rights in the event of an incident or investigation

QUESTIONS & CONTACT



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