

Victoria's new Environment Protection laws: contaminated land duties and permissions regime

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Legal | Mediation | Advisory

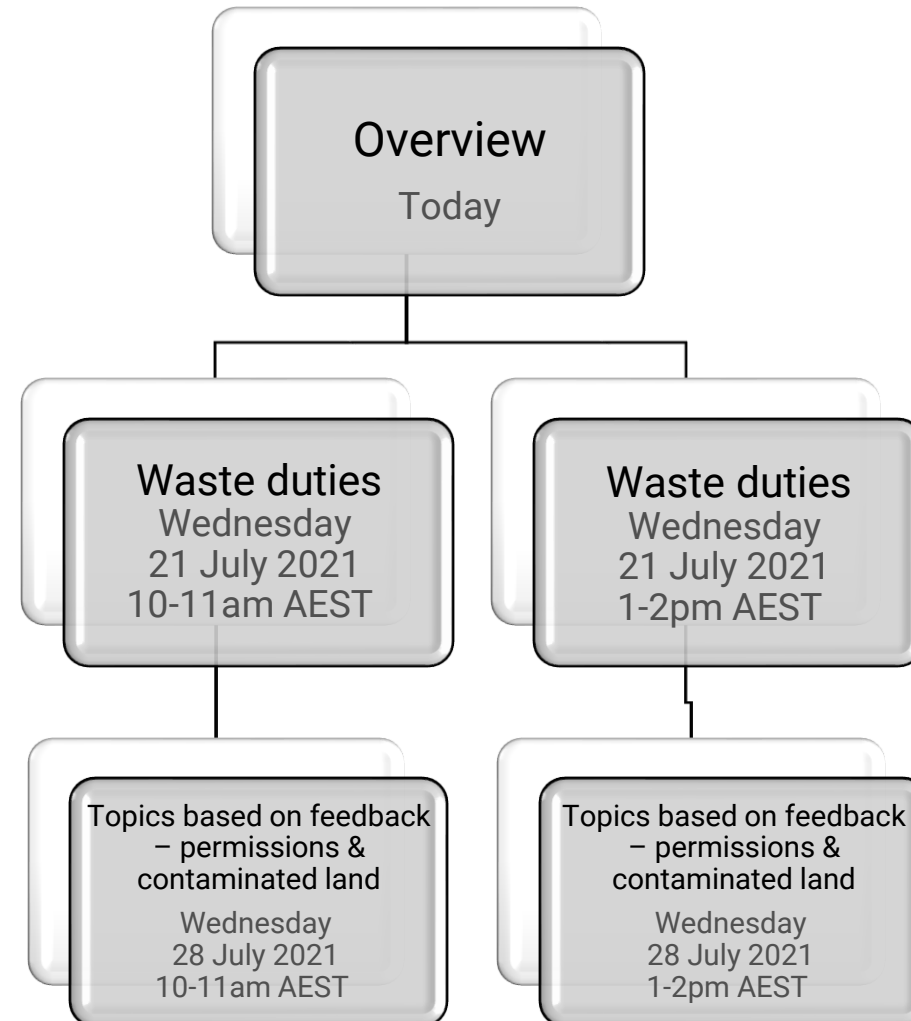
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It does not constitute legal or other professional advice and should not be relied on as a statement of the law.
It is intended only as a general guide and may contain generalisations.
You should obtain professional advice for your specific circumstances.

New EP laws workshop series



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Stream 1:
larger dairy
manufacturing
sites



Stream 2:
small- to medium-sized
(SME) dairy manufacturing
businesses

Today's agenda

- The general environmental duty (GED)
- Contaminated land duties
- Duties in relation to pollution incidents
- Permissions
 - New regime
 - Transitional provisions



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Commencement of new regime



Commencement
1 July 2021

- *Environment Protection Act 2017*
- Environment Protection Regulations 2021
- Other EPA guidance documentation

A change of approach



Has pollution occurred?



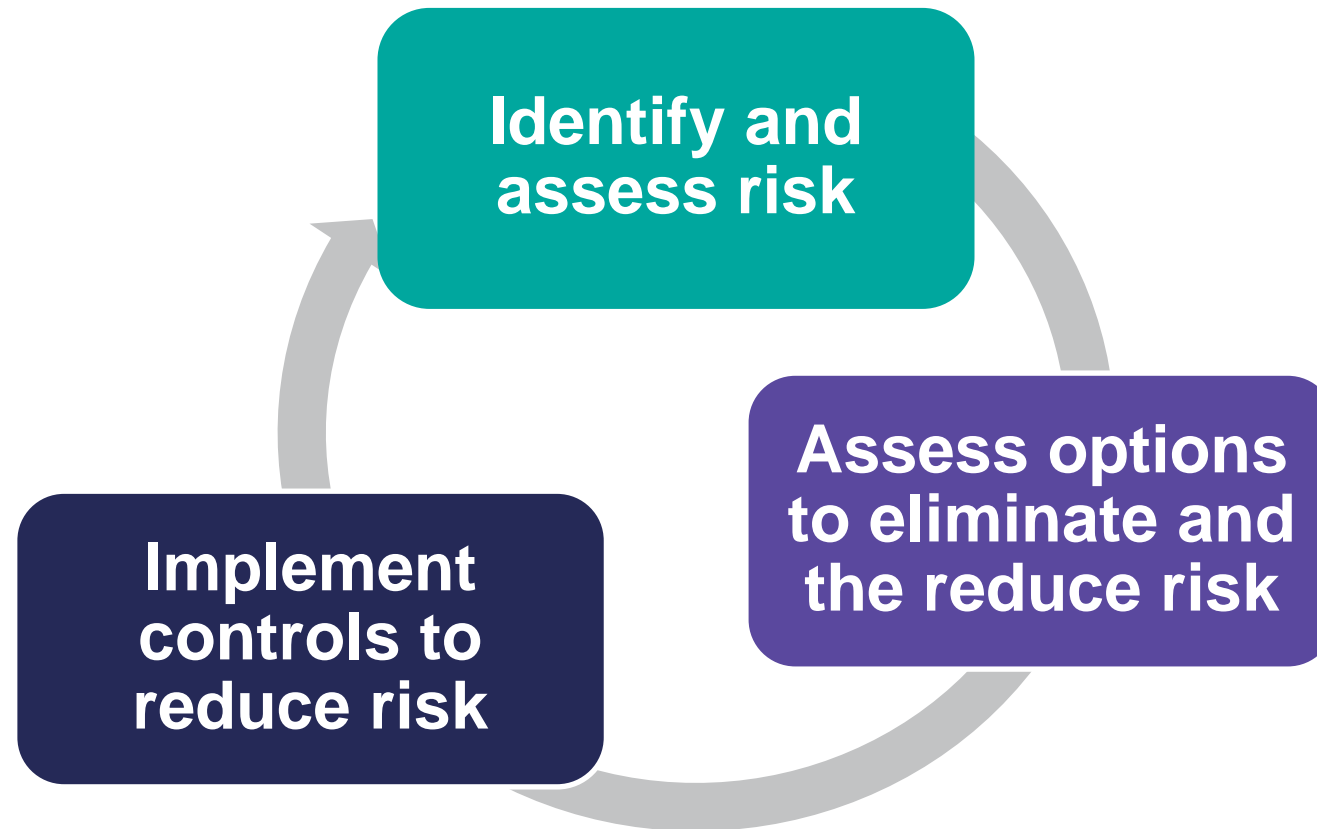
Are systems and processes in place to eliminate/minimise risks to human health and environment?



A duties-based framework

- **General environmental duty (GED) – based on OHS duties**
- Duties to:
 - manage contamination
 - notify of certain levels of contamination
 - respond to harm and remediate after an incident
 - notify of certain pollution incidents
 - manage waste (industrial waste/priority waste/reportable priority waste)

General Environmental Duty



A change of approach



Have I met the
minimum
standards?

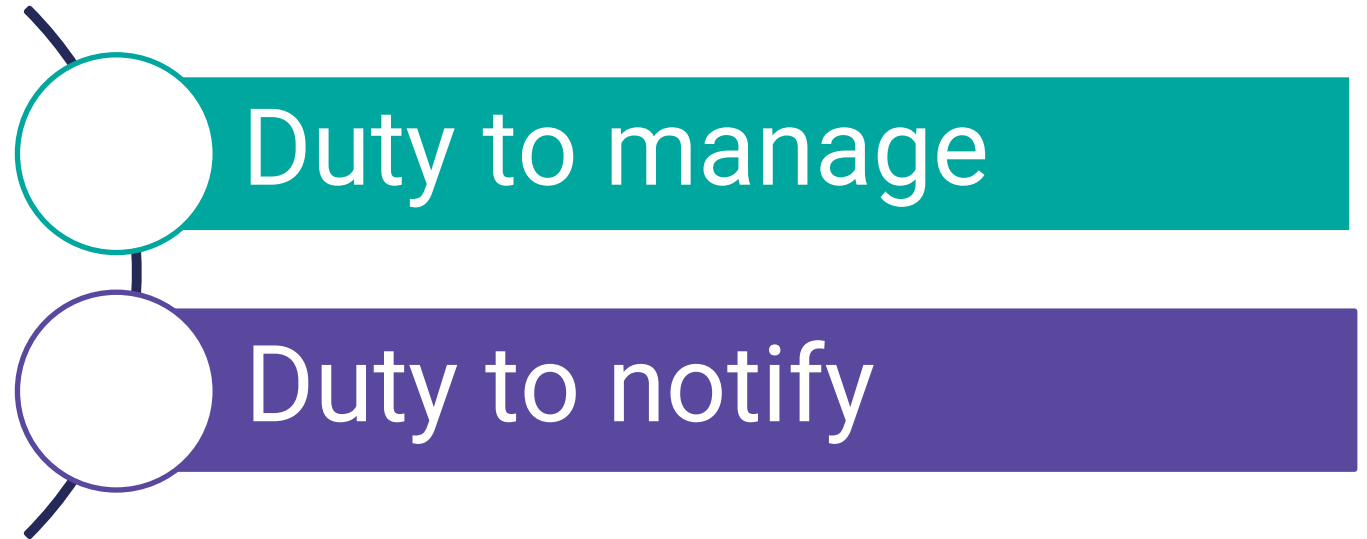


Have I done all
reasonably
practicable to
eliminate/minimise
risks to human health
and environment?

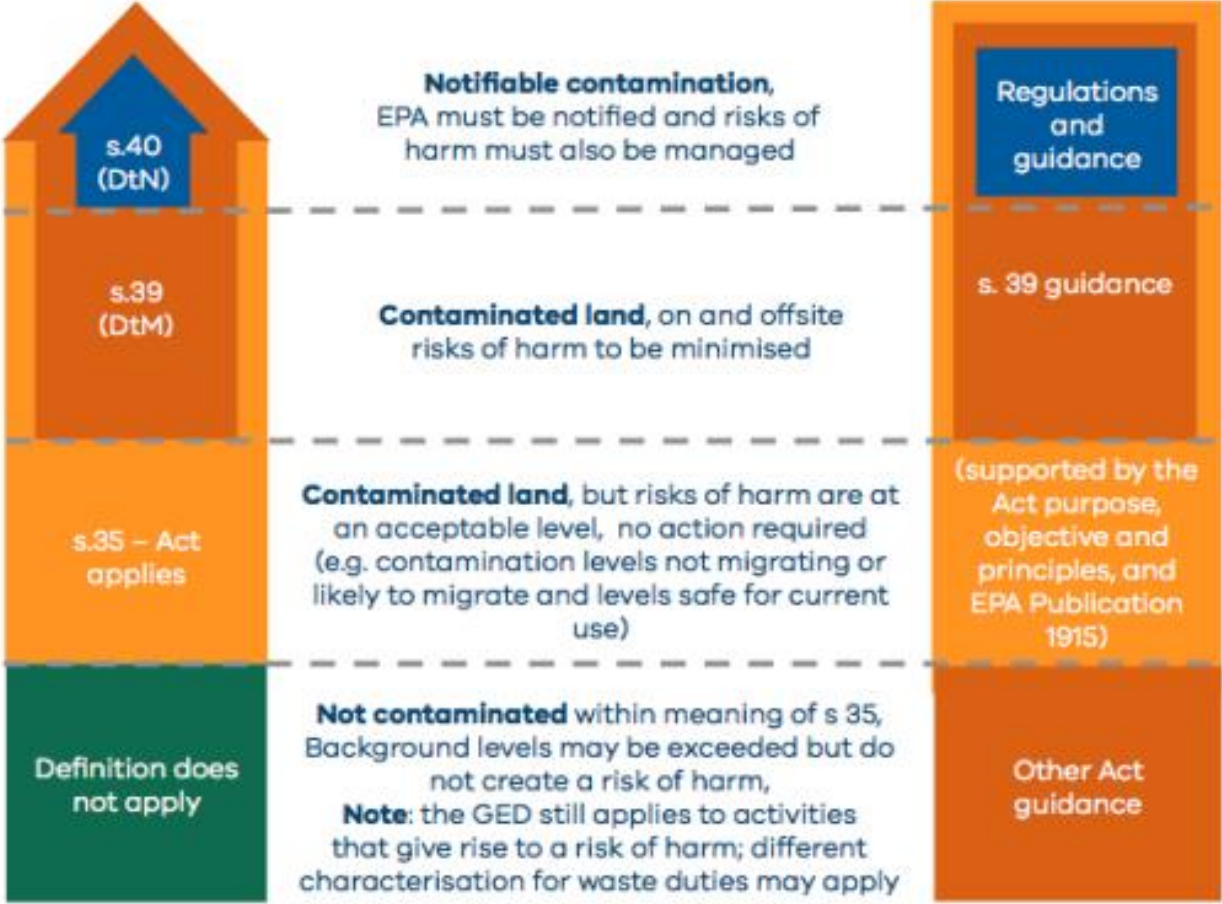
New duties: Contaminated Land



- New duties bring Victoria into line with other states
- Act specifically applies to land that is contaminated before, on or after the commencement of the Act
 - Historical or legacy contamination
 - New contamination



New duties: Contaminated Land



Source: EPA Publication 1940, February 2021

New duties: Contaminated Land



What is 'contaminated land'?

The Act defines *contaminated land* in section 35 as follows:

*Subject to subsection (2), **land** is contaminated if **waste**, a chemical substance or a prescribed substance is present on or under the surface of the **land**, and the **waste**, chemical substance or prescribed substance³—*

- (a) is present in a concentration above the **background level**; and*
- (b) creates a risk of **harm** to **human health** or the **environment**.⁴*

Source: EPA Publication 1940, February 2021

- [Contaminated land: Understanding section 35 of the Environment Protection Act 2017](#) (publication 1940) sets out EPA's understanding of the meaning of 'contaminated land'

Duty to manage contaminated land



Primary CL duty: section 39

- Positive duty to minimise risks of harm to human health and the environment from contaminated land, so far as is **reasonably practicable**
- Minimising the risk of harm to human health and the environment requires:
 - elimination of risks of harm to human health and the environment so far as reasonably practicable; and
 - if it is not reasonably practicable to eliminate risks of harm to human health and the environment, to reduce those risks so far as reasonably practicable
- Person in management or control of contaminated land (includes groundwater)
 - hold a legal interest in the land, such as owner, leaseholder or committee of management
 - have access to the land or use of the land – practical control
 - could be held concurrently by more than one party e.g. tenant and landlord under lease

Duty to manage contaminated land

Primary CL duty: section 39



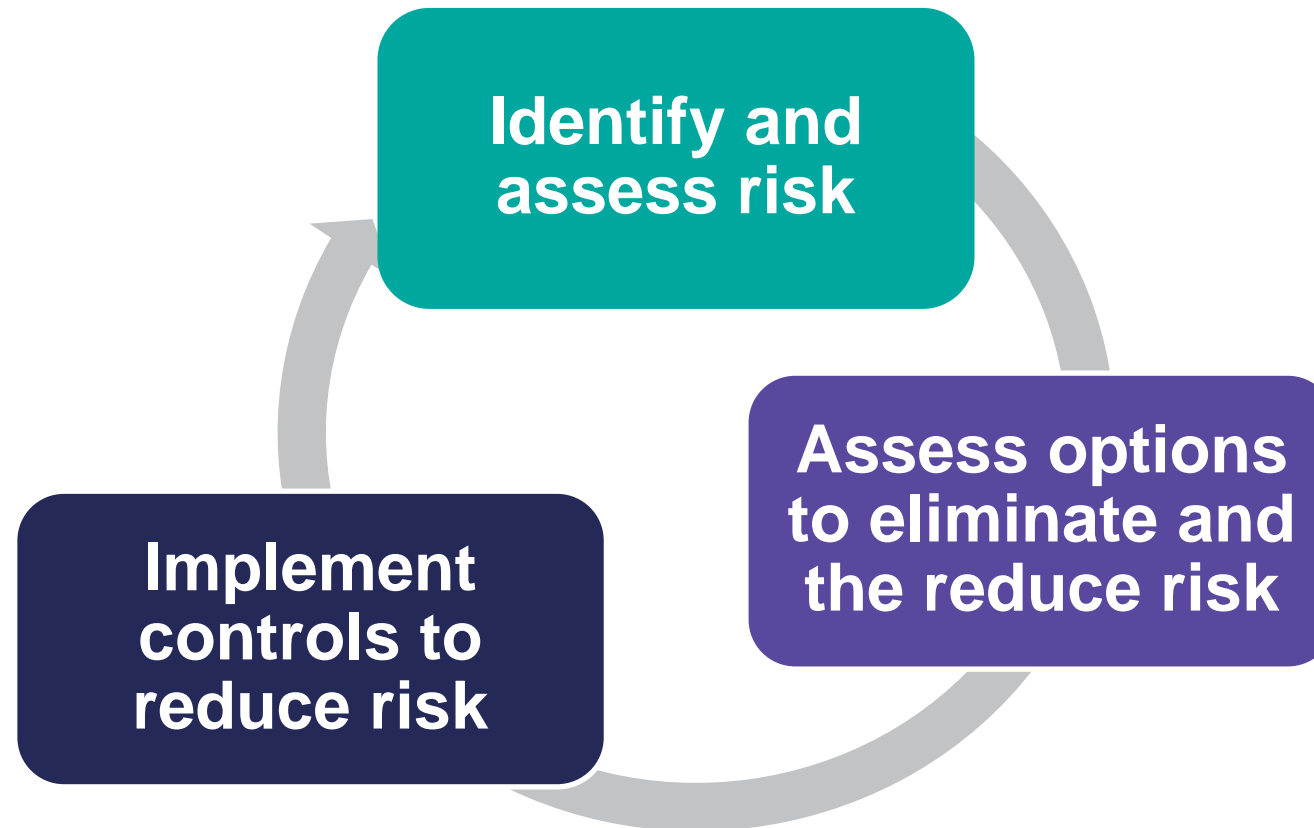
- Identify, assess and manage contaminated land
 - Based on what you know or **ought reasonably know** – ‘State of knowledge’
 - Could include clean up where reasonably practicable
 - Return land to state that does not pose a risk to human health and the environment
- Provision of adequate information to:
 - any person that may be affected by the contamination
 - any person who is reasonably expected to become a person in management or control of the contaminated land to comply with the duty to manage contaminated land



Figure 3 Steps in controlling hazards and risks

Source: EPA Publication 1977, June 2021

Duty to manage contaminated land



Duty to manage CL



Division 2—Duties relating to contaminated land

39 Duty to manage contaminated land

- (1) A person in management or control of contaminated land must minimise risks of harm to human health and the environment from the contaminated land so far as reasonably practicable.
- (2) For the purposes of subsection (1), minimising risks of harm to human health and the environment from contaminated land includes (but is not limited to) carrying out any of the following—
 - (a) identification of any contamination that the person knows or ought reasonably to know of;
 - (b) investigation and assessment of the contamination;
 - (c) provision and maintenance of reasonably practicable measures to minimise risks of harm to human health and the environment from the contamination, including undertaking clean up activities where reasonably practicable;
 - (d) provision of adequate information to any person that the person in management or control of the contaminated land reasonably believes may be affected by the contamination, including—
 - (i) sufficient information to identify the contamination; and
 - (ii) the results of investigation and assessment referred to in paragraph (b); and

- (iii) the risks of harm to human health and the environment from the contamination;
- (e) provision of adequate information to enable any person who is reasonably expected to become a person in management or control of the contaminated land to comply with the duty to manage contaminated land.

Note

See section 6 in relation to the concept of minimising risks of harm to human health and the environment.

- (3) A person in management or control of land may recover in a court of competent jurisdiction, as a debt due to the person, any reasonable costs incurred in complying with a duty under section 39(1) or 40(1), including any reasonable costs incurred by the person in taking action under this section, against any person responsible for causing or contributing to contamination of the land.

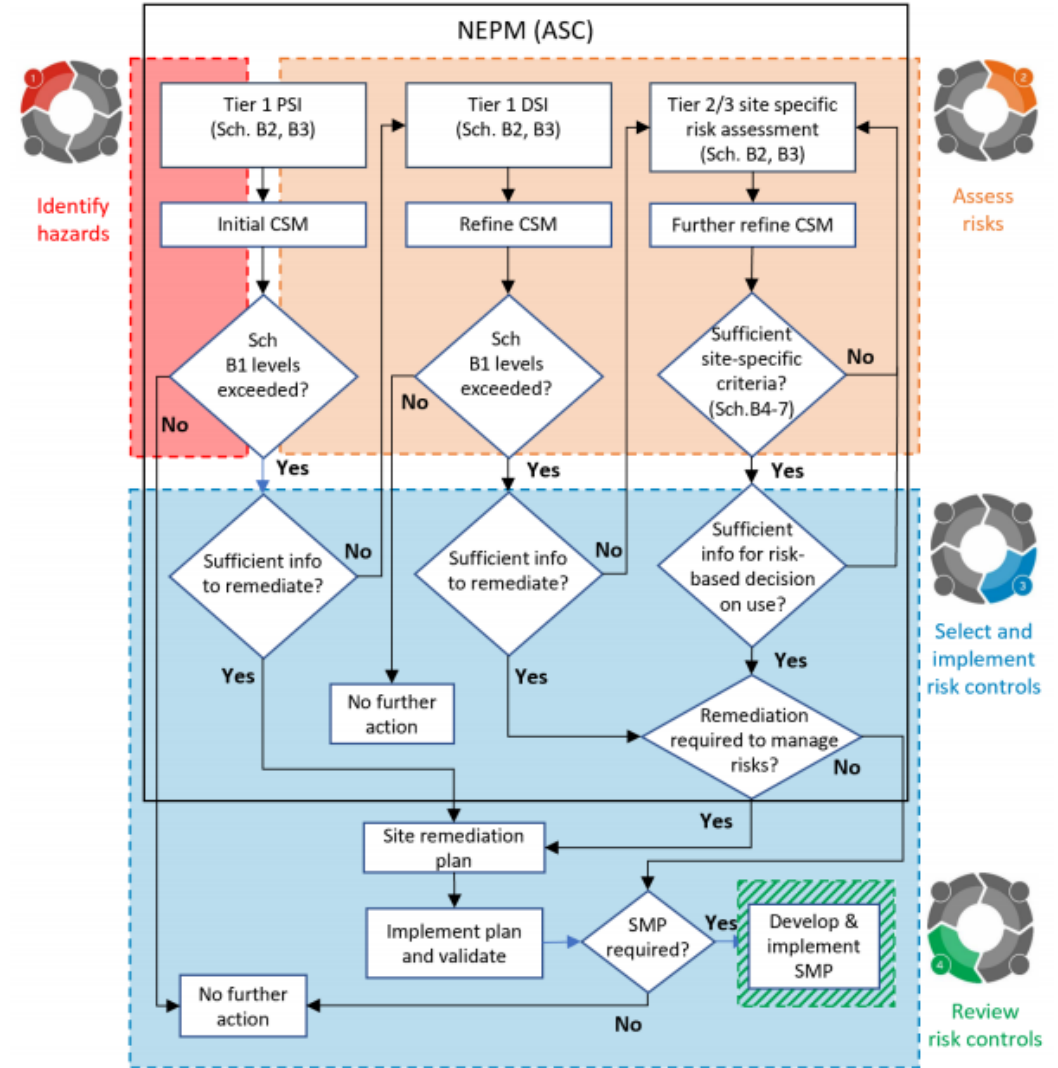


Figure 4 Conceptual relationship between the steps detailed in this guideline and the NEPM (ASC), using Schedule A—[Recommended general process for assessment of site contamination](#)



Duty to manage CL: NAPL

Non-aqueous phase liquids (NAPL)

Regulation 15 requires that:

A person in management or control of land where a non-aqueous phase liquid is present in soil or groundwater must, so far as reasonably practicable—

(a) clean up the non-aqueous phase liquid; and

(b) if the source of the non-aqueous phase liquid is located on the land, remove or control the source of the liquid.

- Mandatory obligation as part of your duty to manage under section 39, meaning that it must form part of your actions under that duty
- You cannot rely solely on natural attenuation of the NAPL as a risk control measure where it remains reasonably practicable to directly remove the NAPL, including its source

Contaminated Land

What happens to clean up notices?

- Environmental Action Notices
- Site Management Orders
 - New instrument for long-term management of a contaminated site
 - Registered on title, binds subsequent owners



Duty to notify contaminated land



Who is required to notify?

- All the following criteria must apply:
 1. You are a person in management or control of land
 2. The land or groundwater is contaminated within the meaning of section 35 of the Act
 3. The contamination meets the definition of ‘notifiable contamination’
 4. You have become aware, or reasonably should have become aware, that the land you manage or control is contaminated by notifiable contamination
- Very detailed guidance in [Notifiable contamination guideline - Duty to notify of contaminated Land](#) (Publication 2008 June 2021) – still in draft
- **Penalties:** individual \$21,808.80; company – approx. \$109,000

Duty to notify contaminated land



Are you in management or control?

Question of fact to be determined having regard to:

- any powers or control that a person can exercise over the land and/or any decision making authority a person has in respect of the land
- ownership of the land, occupation of the land, for example under a lease or licence agreement or other contracts relating to the land such as construction contract, or by reference to a legal right of way or entry granted in respect of the land
- legislation, such as under the Crown Land (Reserves) Act 1978

For further guidance [“Assessing and controlling risks of harm from contaminated land: a guide to meeting the duty to manage for those in management or control of land”](#) (publication 1977)



Duty to notify contaminated land

Is the land 'contaminated land' under section 35?

The Act defines *contaminated land* in section 35 as follows:

*Subject to subsection (2), **land** is contaminated if **waste**, a chemical substance or a prescribed substance is present on or under the surface of the **land**, and the **waste**, chemical substance or prescribed substance³—*

- (a) is present in a concentration above the **background level**; and*
- (b) creates a risk of **harm** to **human health** or the **environment**.⁴*

Source: EPA Publication 1940, February 2021

- [Contaminated land: Understanding section 35 of the Environment Protection Act 2017](#) (publication 1940) sets out EPA's understanding of the meaning of 'contaminated land'

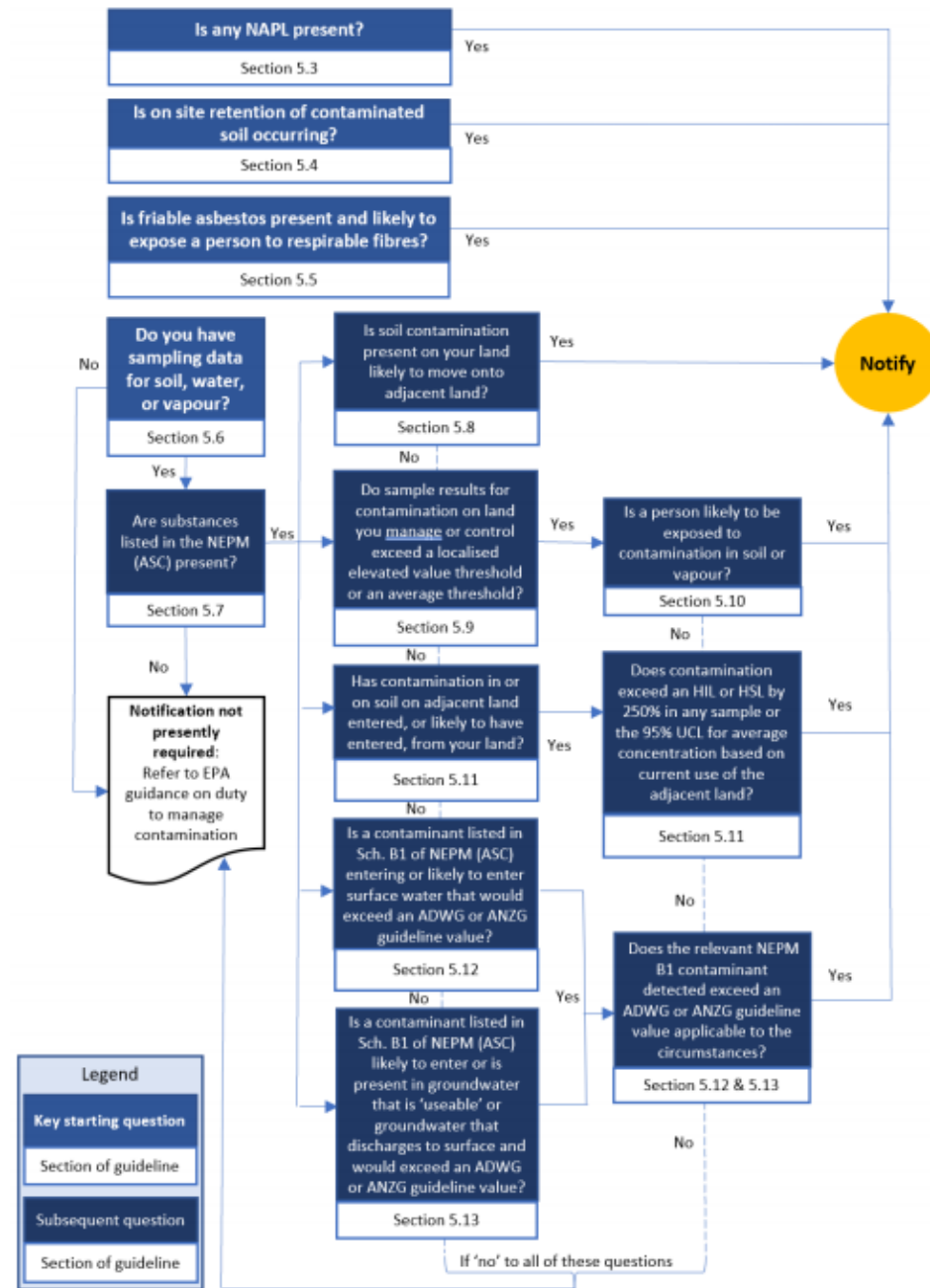


Figure 2: Summary of the key considerations, to work through sequentially, in identifying notifiable contamination set out in Part 2.1 of the Environment Protection Regulations 2021.

Duty to notify contaminated land



What is 'notifiable contamination'?

Subset of contaminated land - significant contamination

Contamination of land or groundwater is only notifiable when all three of the below apply:

1. specific substances are present
2. above specific concentrations, and in
3. specific circumstances.

Duty to notify contaminated land



What is 'notifiable contamination'?

1. The specific substances covered by the definition mean at least one of the following:
 - substances named in Section 6 of Schedule B1 of the National Environment Protection Measure (Assessment of Site Contamination) 1999 (NEPM (ASC))
 - friable asbestos in or on land
 - NAPL in soil or groundwater
 - soil sourced from contaminated land that is to be retained on site.

Duty to notify contaminated land



What is 'notifiable contamination'?

2. The specific concentrations above which notification is required are the values set out for the corresponding substances:
 - the Health Investigation Levels (HILs) and Health Screening Levels (HSLs) in the NEPM (ASC), in relation to substances in soil and vapour;
 - the Australian Drinking Water Guidelines (ADWG) or the Australian and New Zealand Guidelines for Fresh and Marine Water Quality (ANZG) in relation to the substances listed in Section 6 of Schedule B1 of the NEPM (ASC) as applicable to groundwater and surface water; or
 - respirable asbestos fibres in excess of 0.01 fibres per mL of air.

The applicable concentrations for HSLs and HILs are further specified for different circumstances.

Duty to notify contaminated land



What is 'notifiable contamination'?

3. The specific circumstances that make contamination notifiable are:
- where a person is exposed, or is likely to be exposed, to the contamination (including friable asbestos);
 - the contamination is migrating from the site onto adjacent land, into useable groundwater or into any surface water; or
 - in relation to waste soil sourced from contaminated land, where it is proposed to be retained on site.

Duty to notify contaminated land



Exemptions to ‘notifiable contamination’

Exemptions include:

- contamination of land in relation to which a certificate of environmental audit or a statement of environmental audit has been issued by an environmental auditor under the Environment Protection Act 1970, if—
 - no potentially contaminating activities have been carried out on the land after the certificate or statement was issued; and
 - there has been no material change in the condition of the land after the certificate or statement was issued; and
 - there are no adverse effects on land adjacent to the land
- contamination of land in relation to which a notice was served by the Authority under section 31A, 31B, or 62A of the Environment Protection Act 1970 for land or groundwater contamination, that was in force immediately before the repeal of that Act or had been revoked if there has been no material change in the condition of the land after the notice was served or revoked
- Refer Regulation 13 for more

Duty to notify contaminated land



When do I need to notify?

- **Person in management/control** must notify the EPA, as soon as practical after becomes aware or **ought to have become aware** of contamination
 - person's skills, knowledge and experience
 - whether the person could reasonably seek advice
 - any other circumstances of the contamination
- **What is 'as soon as practicable'**
 - EPA says - Where you have good understanding of site information, detailed reports, sampling etc. – this is when practical
 - Need to have concentration data to complete the online form

Duty to notify contaminated land



How do I need to notify?

- **Part A** – call EPA (1800 EPA VIC)
 - Basic information; can notify of multiple sites
- **Part B**
 - Online form – cannot be saved so need to have info to hand
 - Specific information about the type and levels of contamination
 - E.g. Need to have concentration data to complete the online form
 - Refer to ‘word template’ and guidance in [Notifiable contamination guideline - Duty to notify of contaminated Land](#) (Publication 2008 June 2021) – still in draft

Polluter pays principle



- Reasonable costs incurred by a person in management/control of contaminated land in complying with:
 - contaminated land duties
 - environmental action notices
 - site management orders
 - notification
- Recoverable from polluter
 - causing or contributing to the contamination
- **No need for EPA notice**



Audits



Preliminary Risk Screen

- Rapid, low cost (\$5k)
- Current trials with Council



Scaled Assessment Audit

- Scaled assessment of key risks

Statements must be given to future managers/controllers of land

Resources



- [Assessing and controlling contaminated land risks: a proposed guide to meeting the duty to manage for those in management or control of land](#) (publication 1977) – still in draft
- [Contaminated land policy](#) (publication 1915)
- [Contaminated land: Understanding section 35 of the Environment Protection Act 2017](#) (publication 1940)
- [Notifiable contamination guideline - Duty to notify of contaminated Land](#) (Publication 2008 June 2021) – still in draft



New duties: Pollution incidents



The new pollution incident duties will include obligations to both:

take action in response to harm caused by pollution; and

notify relevant authorities of pollution incidents (material harm)

Remember that the GED still applies

New duties: Pollution incidents



When do I need to notify the EPA?

- If you cause a ‘notifiable incident’
 - a pollution incident that causes, or threatens to cause ‘material harm’ to human health or the environment, that is:
 - there is an adverse effect on human health or the environment
 - there is an adverse effect on an area of high conservation value or of special significance
 - the cleanup or management of the pollution or cost of restoration would cost \$10,000 or more.
- Duty applies where you engaged in the activity that caused the incident
- The obligation to report applies even where the incident is contained to your site
- No need for actual harm; notify where harm is threatened by the event

New duties: Pollution incidents



How do I notify the EPA?

GET LEGAL ADVICE

Step 1

- Call EPA on 1300 372 842 (24 hours).
- You'll be asked for the following information: your contact information; your business name and address; the time, date and location of the notifiable incident; type of incident it was, such as a spill, leak, escape or fire; what caused the incident, or you suspect caused it; estimate of volumes released; what you think the impact may be on human health and the environment; how you're managing the incident. [Refer EPA website](#)

Step 2

- EPA will email you a notification form after you've reported the incident. Complete the form and return it to EPA within five business days. Your report of a notifiable incident isn't complete until you return the form to EPA.
- If an environment protection officer needs to attend your site, you may be asked to assist during the inspection.

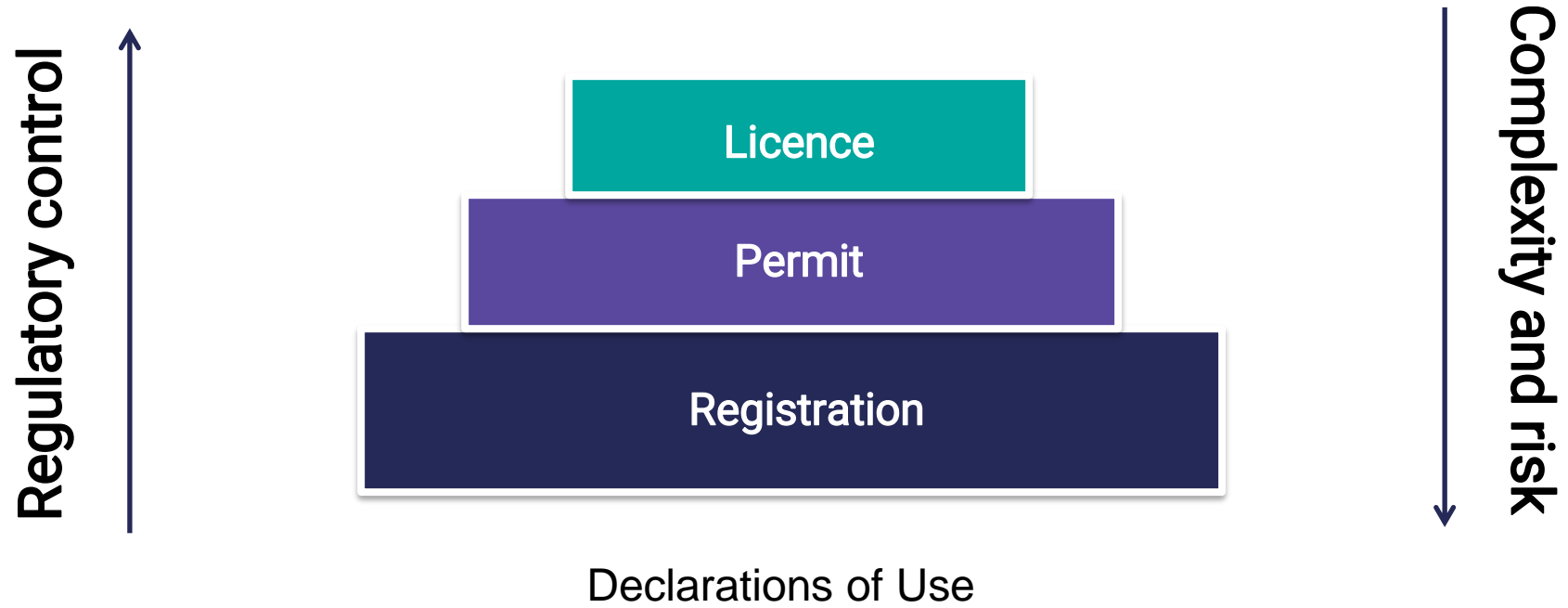
New duties: Pollution incidents



What clean up do I need to undertake?

- You must restore the impacted area to its original state, so far as is reasonably practicable
- At your cost
- Failure to comply – remedial notice (and criminal enforcement if you fail to comply with a notice)
- Refer to EPA's [Responding to harm caused by pollution](#) (publication 1991)

Permissions



Schedule 1—Prescribed permission activities and fees

<i>Column 1</i>	<i>Column 2</i>	<i>Column 3</i>	<i>Column 4</i>	<i>Column 5</i>
<i>Item</i>	<i>Activity type and summary description</i>	<i>Description of prescribed permission activity</i>	<i>Type of prescribed permission activity</i>	<i>Operating licence base fee in fee units (if applicable)</i>
31	A23 (Temporary storage—designated waste)	Temporary storage of 1000 litres or less of designated waste not generated at the site if the storage is for a period of no more than 60 days	<ul style="list-style-type: none"> • Prescribed registration activity 	

B: Primary industry and allied operations

32	B01a (Animal industries—waste solely to land)	Operating a piggery, cattle feedlot, sheep feedlot, goat feedlot, goat dairy or dairy freestall that— (a) has more than 5000 animals (of any combination of pigs, cattle, sheep or goats) concentrated for the purposes of agricultural production; and (b) discharges or deposits waste solely to land	<ul style="list-style-type: none"> • Prescribed development activity • Prescribed permit activity 	
33	B01b (Animal industries—waste not solely to land)	Operating a piggery, cattle feedlot, sheep feedlot, goat feedlot, goat dairy or dairy freestall that— (a) has more than 5000 animals (of any combination of pigs, cattle, sheep or goats) concentrated for the purposes of agricultural production; and (b) does not discharge or deposit waste solely to land	<ul style="list-style-type: none"> • Prescribed development activity • Prescribed operating activity 	140 fee units

Permissions



44

D07 (Milk processing)

Processing milk or manufacturing dairy products with a designed throughput of at least 200 tonnes per year of product(s)

- Prescribed development activity
- Prescribed operating activity

70 fee units

Permission Determination

Determination that no permission is required: section 48



Victoria Government Gazette

No. S 303 Friday 18 June 2021
By Authority of Victorian Government Printer

Environment Protection Act 2017

DETERMINATION OF THE AUTHORITY UNDER SECTION 48

Exemption from requirement to hold permission – discharges to land or surface water from prescribed activities

1. Citation

This Section 48 determination is 03 of 2021 and may be cited as EPA Determination – discharges to land or surface water from prescribed activities.

2. Summary

This determination is made by the Environment Protection Authority (Authority) under Section 48(a) and (b) of the **Environment Protection Act 2017** (the Act). It specifies the requirements that a person must meet to comply with Section 44 or 45 of the Act if the person does not hold a development licence or operating licence in relation to certain prescribed activities involving discharges to land or surface water.

A person who meets the requirements set out in this determination may engage in a prescribed activity set out in clause 4 without a development licence or operating licence issued under the Act in relation to that activity.

3. Definitions

In this determination, words or phrases have the same meaning as in the Act or the Environment Protection Regulations 2021 (the Regulations), unless otherwise specified, and – **water corporation** has the same meaning as in the **Water Act 1989**.

4. Application

(1) For the purposes of Section 48(a) and (b) of the Act, a person engaging, or proposing to engage, in one or more of the activities set out in the following items of the Table in Schedule 1 to the Regulations does not have to comply with the requirement to hold a development licence under Section 44(1) or an operating licence under Section 45(1) of the Act in relation to those activities, provided the person meets the requirements set out in clause 5 –

- (a) item 38 (D01 – Abattoirs);
- (b) item 41 (D04 – Seafood processing);
- (c) item 42 (D05 – Pet food processing);
- (d) item 43 (D06 – Food processing);
- (e) item 44 (D07 – Milk processing);
- (f) item 46 (D09 – Beverage manufacturing).

(2) For the purposes of Section 48(a) of the Act, a person who holds a permission or licence exemption issued by the Authority to engage in one or more of the activities set out in the following items of the Table in Schedule 1 to the Regulations, does not have to comply with the requirement to hold a development licence under Section 44(1) of the Act if, in relation to those activities, the person is only engaging, or

5. Requirements

For the purposes of clause 4, the specified requirements are that the person referred to in that clause ensures the activity discharges waste solely to land or surface water from –

- (a) an enclosed drain connected to a sewer;
- (b) a council stormwater drainage system and the discharge is stormwater only;
- (c) an emergency relief structure or other installation in the sewers of a water corporation.

6. Duration

This determination commences on 1 July 2021 and remains in effect until the revocation of the Regulations, unless earlier revoked by the Authority.

7. Notes

- (1) For the purpose of clause 5, the *Liquid Storage and Handling Guidelines*, published by the Authority in June 2018 (as amended from time to time) and available on its website (publication 1698) is relevant guidance.
- (2) The Authority may amend or repeal this determination by way of written notice published in the Government Gazette.
- (3) This determination does not satisfy, alter or remove any requirement under the Act, except to the extent the determination expressly states otherwise.
- (4) This determination and others can be found on the Authority's website: www.epa.vic.gov.au

- Don't need a development or operating licence in these circs

Transition: operating licences



If you had a licence under the old laws, it automatically transitioned to an operating licence under the *Environment Protection Act 2017* on 1 July 2021. Over the next 12 months EPA will work with operating licence holders across each industry to ensure you understand your new obligations.

Visit the **Operating licences webpage** to learn more about the transition timeline.

- [Source: EPA's "Operating licence transition process" \(publication 2019\)](#)
- Similarly: exemptions are automatically transitioned across



Transition: operating licences



- Transition timeline – 12 months
- Email from EPA at beginning of quarter of industry transition: EPA has indicated that this will be January 2022 for Dairy licences (check [here](#))
- Each licence holder will be emailed a Proposed Notice of Amendment (PNoA) – may contain new conditions – 10 BDs review
- If substantial change to licence conditions you can apply for an additional six months under section 472(3) of the Regulations
- Approximately 10 or more business days after you receive the PNoA, you'll receive a Final Notice of Amendment with your new operating licence
- No amalgamated licences - licence for each site
- [Operating licence transition process \(publication 2019\)](#)
- [EPA webpage](#)

EIPs transition to an A14 permit (Regulations, Schedule 1, item 22)



- EIP = 11(d) exemption under 1970 Act
- Transitions to an A14 permit (Regulations, Schedule 1, item 22)
- No action required for this transition to occur - automatic
- The permit (in the form of your existing EIP) will then expire on the same expiry date of the EIP or 30 June 2026 if there is no expiry date set in the EIP

		any time	
22	A14 (Reclaimed wastewater supply or use)	Supplying or using reclaimed wastewater, except if in accordance with a licence issued under the Act	• Prescribed permit activity

Compliance

- Compliance codes
- EPA position statements
- Better Environment Plans
- Regulations
- Emergency approvals
- Notices
 - Improvement Notices
 - Notice to investigate
 - Environmental Action Notices
 - Site Management Orders
- Environmentally hazardous substance orders



Implementation



- Understand and assess the risks of your activities and how you can:
 - **Eliminate** where reasonably practicable
 - **Minimise** as far as reasonably practicable
- Review/update environmental management systems/plans to ensure compliance with the new Act
- Understand transition of any site licences
- Get ready for any contaminated land notifications that need to be made
- Understand new waste management duties and how they will impact on your business
- Take your team on the journey

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