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State Environmental Planning Policy - Remediation of Land

Executive Summary

The Property Council of Australia (**PCA**) NSW Division welcomes the opportunity to comment on the proposed Remediation of Land State Environmental Planning Policy (**Remediation of Land SEPP**).

For twenty years, remediation of land in NSW has been governed by the *State Environmental Planning Policy No. 55 – Remediation of Land (SEPP 55)* and the associated Contaminated Land Planning Guidelines (**Contaminated Land Guidelines**) which were introduced in 1998 as a framework for the management of contaminated land in NSW. This policy is now due to be repealed and replaced by the updated Remediation of Land SEPP.

Whilst SEPP 55 is a highly practical instrument to manage potential conflicts between the provisions of the NSW planning legislation and the need for remediation, the PCA supports the Government's ongoing review of all State Environmental Planning Policies to ensure that they remain effective and relevant, especially in light of advancements in remediation techniques and changing land uses over time.

We understand that the Remediation of Land SEPP aims to deliver the following improvements:

- the reduction of risks associated with remediation projects;
- encourage proponents to better consider and plan remediation works;
- provide better community protection from unnecessary risks, disturbance and inconvenience; and
- ensure the consistent regulation of contaminated land and facilitate enforcement of long-term environmental management plans.

We also acknowledge and accredit the Government's efforts in undertaking crucial developments in updating the SEPP, particularly in relation to:

- the clear description of remediation works that will require development consent; and
- introduction of certification and operational requirements for remediation works that can be undertaken without development consent.

PCA further understands that provisions will be added to in the new SEPP to:

- require all remediation work that is to be carried out without development consent, to be reviewed and certified by a certified contaminated land consultant;
- categorise remediation work based on the scale, risk and complexity of the work; and
- require environmental management plans relating to post-remediation management of sites or ongoing operation, maintenance and management of on-site remediation measures (such as a containment cell) to be provided to council.

The Managing Land Contamination: Planning Guidelines will also be updated to reflect the proposed Remediation of Land SEPP and current best practice. Overall, the clarity to be provided by the majority of these changes is supported by the PCA and the property development industry in NSW.

However, in reviewing the Explanation of Intended Effects (**EIE**) for the Remediation of Land SEPP we encourage the NSW Government to reconsider particular aspects in regard to:

- transitional arrangements for development applications made prior to the commencement of the Remediation of Land SEPP;
- the expanded list of remediation works classified in Category 1;
- increased requirements for Category 2 remediation work; and
- significant cost and time delays associated with the additional certification requirements which are likely to extend time taken for the assessment and determination of development applications by Councils and the Department of Planning and Environment.

Key Recommendations

We have provided the following key recommendations to ensure that the proposed reforms to the Remediation of Land SEPP will not have a detrimental effect on the property industry:

- **provide clear transitional arrangements for developments that apply for development consent or provide notification of proposed remediation works within six – twelve months following the commencement of the Remediation of Land SEPP.**
- **provide information sessions for developers state-wide about the changes to be introduced through the new Remediation of Land SEPP – these information sessions should be provided at least three months before the reforms commence.**
- **notify and provide assistance to the proponents of remediation works that are newly classified in the expanded Category 1;**
- **thresholds should be provided for the new types of Category 1 remediation works so that the onerous development consent requirements do not apply to very small remediation projects;**
- **provide a broader range of certification options for Category 2 works, particularly those in remote and regional areas with limited access to suitably qualified consultants;**
- **a clear direction should be provided to all local councils across NSW that the new SEPP and associated guidelines are to be the only policy applied to remediation works and councils are not permitted to impose additional requirements over and above the requirements of the Remediation of Land SEPP and Guidelines;**

- **councils should be directed to rely on the conclusions reached by the certified contaminated land consultant instead of obtaining separate and independent site audit reports to be obtained at the expense of the developer. Alternatively, if a Council is permitted to obtain a peer review of a post remediation completion report, then clear guidance must be included in the guidelines specifying the limited matters that may be considered by the peer reviewer;**
- **the NSW Government should implement a program to enable additional contaminated land consultants to become certified to address the current shortfall in the industry.**

About us

The Property Council of Australia is a leading advocate for both the state and national interests of the Australian property industry. With over 2,200 active firms and 55,000 active individuals we provide a progressive and in touch perspective to support and assist the development of public policy impacting the property industry.

Our focus includes:

- housing affordability;
- leading sustainability;
- growth and infrastructure; and
- better planning.

The property industry is an integral part of state economic growth; the industry contributes \$54 billion in gross state product, \$20.3 billion in wages and \$17 billion in State taxes and Local Government fees, rates and charges.

In this regard, any changes to the statutory requirements for the remediation of land in NSW have the potential to have significant implications for the property industry. We therefore look forward to ongoing consultation with the NSW Government with respect to the Remediation of Land SEPP to ensure that the new SEPP results in positive reforms for the NSW property industry.

1 Transitional Arrangements

SEPP 55 has been in force for 20 years and, together with the Contaminated Land Guidelines, has defined the statutory process for the remediation of land in NSW.

The introduction of the new Remediation of Land SEPP will see the repeal and replacement of the previous policy and guideline and in some cases this will result in a significant shift in remediation requirements for developers and planners state wide. In particular, with the changes to the types of developments listed in Category 1 and Category 2, this will mean the inclusion of many remediation works that have not previously been covered by SEPP 55.

Current development applications already in the system and those where notice of proposed Category 2 remediation work has been previously provided to the relevant council have been given protection and will continue to be regulated by SEPP 55 as it was immediately before the commencement of the Remediation of Land SEPP.

However, this protection has not been extended to development applications that may be lodged shortly after the commencement of the Remediation of Land SEPP. In particular, this will mean that developments currently in the planning stage may find themselves unexpectedly subject to the Remediation of Land SEPP requirements

if their remediation works are included in the expanded list of Category 1 developments. In addition, proponents of Category 2 remediation works are likely to experience delays in commissioning environmental consultants to undertake assessment and certification of remediation works due to the limited number of certified environmental consultants in the market. Such reforms may result in substantial and unexpected time delays and costs for property developers and may cause some projects to be uneconomical.

The Remediation of Land SEPP should therefore provide transitional arrangements for development applications lodged within six months of the commencement of the new SEPP to enable these developments to proceed under the repealed SEPP 55 provisions. The same should also apply to notice provided with respect to proposed Category 2 remediation works during the six month period immediately following the commencement of the Remediation of Land SEPP. This additional time period will also enable State and local government to implement any necessary changes arising from the new Remediation of Land SEPP, particularly in relation to expanded certifier accreditation.

Recommendations:

Provide transitional arrangements for developments that apply for development consent or provide notification of proposed remediation works within six months following the commencement of the Remediation of Land SEPP.

Provide information sessions for developers state-wide about the changes to be introduced through the new Remediation of Land SEPP – these information sessions should be provided at least three months before the reforms commence.

Provide transitional provisions that ensure that the Remediation of Land SEPP does not apply to approvals granted or sought pursuant to SEPP 55.

2 Expanded Category 1 Definition

Under SEPP 55 some remediation works were previously exempt from the requirement to obtain development consent as they did not fall into Category 1 remediation works as specified in SEPP 55. However, under the new Remediation of Land SEPP the nature of Category 1 works has been broadened to include 16 additional types of remediation works, which will now require development consent. We understand that the new remediation works to be incorporated in Category 1 include works that are typically complex requiring specialist expertise or works which present a significant risk of impact on adjacent land such as on-site treatment of contaminated groundwater, remediation of hazardous ground gas and remediation of groundwater by either active bioremediation, in-situ or ex-situ thermal processes or chemical oxidation or reduction.

Further categories have also been included where there is a long-term environmental management requirement, post-remediation monitoring or an on-site containment cell.

Whilst we acknowledge that certain developments (being Category 1 remediation works) require development consent due to the heightened risk to humans and the environment, the proposed change to the Remediation of Land SEPP will have significant implications for the property development industry as it will result in:

- unexpected changes to the assessment pathway for the new types of remediation works that will be incorporated into Category 1 under the Remediation of Land SEPP;
- delays in obtaining approval for and commencing development due to the new consent requirements for the additional types of remediation works included in Category 1 – these delays could be up to 12 months as a result of the additional environmental assessment reporting, management plans, site audits and Council assessment and determination;

- additional costs associated with the above delays as well as further costs for assessment process for these remediation works (these costs could potentially be significant); and
- insufficient resourcing within certain councils and the Department of Planning and Environment, specifically with respect to contamination expertise, to respond to the influx of new development applications.

Recommendation:

A detailed explanation should be given for each of the new types of Category 1 remediation works to allow developers to identify whether their proposed development will trigger the development consent requirements under the Remediation of Lands SEPP.

Thresholds should be provided for the new types of Category 1 remediation works so that the onerous development consent requirements do not apply to very small remediation projects.

The Department should reconsider the significant expansion of Category 1 remediation works with a view to having a more pragmatic approach for works which fall within the scope of this category.

3 Changes to Category 2 Works

Category 2 remediation works will face some significant changes under the Remediation of Land SEPP, particularly regarding the following issues:

- the notification of works must contain a remediation plan prepared by a certified contaminated land consultant and will be required to demonstrate that the contaminated land consultant has reviewed all relevant data relating to the site and is satisfied that it is sufficient to support the remediation methods;
- remediation work must be undertaken consistent with the remediation plan and certification must be provided to this effect; and
- post completion of remediation work notifications must make note of ongoing environmental management requirements.

These additional requirements to be imposed on Category 2 remediation works will increase the financial burden on developers due to the added costs involved in engaging consultants to prepare reports, monitor progress of remediation works and provide certification.

In respect of Category 2 remediation works, the EIE indicates that a validation report from a certified contamination land consultant must be provided with the notice of completion of remediation works certifying that the remediation has been carried out in accordance with the remediation plan. This requirement has a number of significant implications for developers:

- it does not provide an ability for changes to the nature of the remediation works that may be undertaken even if the changes will have a beneficial environmental outcome;
- it requires the same certified contaminated land consultant to be used throughout the entire remediation project and does not provide an alternative pathway in the unavoidable circumstances where the consultant may not be available during the whole period e.g. unavailable due to illness, certifier ceases to operate for financial reasons etc; and

- will create a significant power imbalance between the developer and the certified contaminated land consultant, as the consultant may impose excessive fees or may change the scope of the remediation works to be undertaken before they will agree to provide post completion validation and certification.

Furthermore, obtaining specialised certification increases the costs of remediation works and the associated costs will disproportionately impact smaller developments and developments in remote and rural areas where access to certifiers may be limited.

Recommendations:

Provide a broader range of certification options for Category 2 works, particularly those in remote and regional areas with limited access to suitably qualified consultants.

4 Local Council policies

A number of local councils around NSW have prepared standalone policies in relation to contaminated land that apply in addition to the requirements of SEPP 55. These policies are currently given standing under SEPP 55, because works which do not satisfy a relevant council policy are deemed Category 1 remediation work requiring development consent

The EIE indicates that the Remediation of Land SEPP will be the only policy which determines the categorisation of remediation works to ensure consistent framework across the State.

Recommendations:

Upon the introduction of the Remediation of Land SEPP, a clear direction should be provided to all local councils across NSW that the new SEPP and associated guidelines are to be the only policy applied to remediation works and councils are not permitted to impose additional requirements over and above the requirements under the Remediation of Land SEPP.

5 Certification and independent review of consultants work

The PCA supports the increased reliance on certified contaminated land consultants to ensure compliance with the Remediation of Land SEPP requirements. These consultants have a high level of expertise and are best placed to assess the potential risks associated with contamination and to devise an appropriate strategy to address these risks.

However, in the past councils have used their discretion to require site audits to be undertaken in order to validate completed remediation works as council do not always have the internal technical expertise to assess post remediation reports prepared on behalf of a developer.

The Remediation of Land SEPP should expressly require the relevant council to accept the documentation prepared by the certified contaminated land consultant instead of the council engaging a separate and independent site auditor or certified environmental consultant to undertake a peer review. The purpose of using a certified contaminated land consultant is to ensure that a high level of expertise and independence is applied to all certification work, hence there should be no need for a second assessment to be undertaken.

Alternatively, if the Remediation of Land SEPP will continue to permit a Council to obtain an independent peer review of post remediation reports that are prepared by a certified contaminated land consultant, then clear restrictions must be given to the peer review (through the guidelines) about the extent of the matters to be considered by the peer reviewer.

Recommendation

Councils should be directed to rely on the conclusions reached by the certified contaminated land consultant instead of obtaining separate and independent site audit reports to be obtained at the expense of the developer. Alternatively, if a Council is permitted to obtain a peer review of a post remediation completion report, then clear guidance must be included in the Guidelines specifying the limited matters that may be considered by the peer reviewer.

The NSW Government should also implement a program to enable additional contaminated land consultants to become certified to address the current shortfall in the industry.

Council's should not have a role in approving a report prepared by a certified land management consultant and most importantly an auditor. In this regard Council may provide comments which the certified contaminated land consultant or auditor may consider and it is left to the discretion of the certified contaminated land consultant or auditor as to whether these comments will be included in any final report.

Conclusion

The PCA is a strong supporter of the NSW Government's initiatives surrounding planning and environment, and we are actively committed to promoting growth and prosperity in the property industry through our advocacy and assistance.

We look forward to ongoing consultation with the NSW Government in relation to the proposed reforms to be introduced through the Remediation of Land SEPP and Guidelines. We would welcome the opportunity to discuss our recommendations with you.

Yours sincerely

Jane Fitzgerald
NSW Executive Director