Maddocks

IS A SITE AUDIT STATEMENT WORTH THE 'PAPER' IT IS WRITTEN ON?

About the author

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Patrick Ibbotson has specialised in development and environmental issues since 1988 and has worked extensively with infrastructure and redevelopment projects, disposal and management of former industrial sites, remediation and compliance issues, dispute resolution, land access, local government issues and planning law, climate change and environmental law.

He works with Commonwealth, State and local government agencies and corporations as well as Australian and international private sector corporations. His experience acting for both the public and private sector brings his clients an understanding of the multiple perspectives that are often necessary to efficiently resolve and manage infrastructure, development and environmental issues.

Patrick has been acknowledged as a leading lawyer in a number of directories, including:

- The Australian Financial Review's Best Lawyers in the categories of Government Practice from 2018, Planning and Environment Law from 2009 – 2018 and Water Law from 2012 – 2018.
- Doyle's Guide 2016, recommended as a leading Planning & Environment Lawyer.
- Chambers Asia-Pacific 2007 – 2015, 2017 – ranked in the area of environment and acknowledged by peers as a distinguished practitioner in the area of Environment.

Patrick is also the Chairman of Maddocks.

Introduction

This paper (and its deliberately contentious title) have emerged from my thinking about the roles that site audits and site audit statements have come to play in transactions involving land or companies with potentially contaminated land holdings. In many transactions site audit statements have become de facto certificates that a condition precedent or condition subsequent has been satisfied (or not). For example, when a potentially contaminated site is sold, completion may be conditional on the issue of a site audit statement or price adjustments may be made around the cost of remediation works necessary to obtain a site audit statement.[1]

Of course, such conditions need careful drafting. The condition in the contracts needs to be along the lines of: a site audit statement that the land is suitable for the [relevant category of use] without the need for implementation of an environmental management plan… etc[2].

In these transactions multiple parties are 'relying' on a site audit statement:

- the vendor to allow the property out of their control in circumstances where they may be liable in the future for remediation or costs if there is a problem;
- the purchaser for making the investment decision;
- the purchaser's financier for advancing funds secured against the property;
- the directors and decision makers within the vendor and purchaser.

However, are these people getting what they think they are getting? Are they entitled to rely on the site audit statement? What does a site audit statement that confirms the land is suitable for use actually tell them?

The concept of 'reliance' can usefully be thought about across three connotations:

- is the document factually, technically and legally accurate, ie the statements made are reliable;
- can I use the document as a defence from claims; and
- can I sue the author if I suffer loss due to relying on the document? Does the author owe duties to me?

Accordingly, the test of whether a site audit statement is worth the 'paper' it is written on may be answered by asking if the site audit statement can be relied on in one of these senses.

[1] See for example: *Orica IC Assets Ltd v Port Kembla Copper Pty Ltd* [2008] NSWSC 72
[2] refer to 'Section A1' site audit statement

Summary

For those too busy to read further here is a brief summary of this paper:

- The site audit scheme operates primarily for the protection of planning and consent authorities. In doing this it provides some protection to developers involved in the planning process.
- In particular, the site audit scheme enables planning and consent authorities to have a higher degree of certainty that the assessments of contamination and other technical reports have been prepared in accordance with the applicable EPA guidance documents[3]. This in turn is likely to assist in establishing the good faith defence available under schedule 6 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).
- A site audit statement that certifies that land is suitable for a category of use is not a certification that the land is not contaminated or possibly even significantly contaminated[4]. The site audit statement is limited to the date of its issue and the contaminants of concern the subject of the reports and assessments that have been audited. The applicable guidance documents and standards will, if complied with, include processes to properly identify contaminants of concern so that there is a high degree of confidence that the relevant contaminants have been identified and considered. What happens if there are changes in understanding of the contaminants, the standards or the risk mechanisms after the site audit statement is issued? In that circumstance a site that was the subject of the site audit statement may be found to be significantly contaminated even though there is a site audit statement saying that the land is suitable for a category of use. This is despite the site auditor having acted properly and without negligence.
- The existence of the site audit statement does not act as a fetter on the powers of the EPA to serve management orders or to recover costs from the persons responsible for the contamination. It would be a relevant consideration when exercising those powers[5].
- It is unclear who may 'rely' on a site audit statement:
  - the person who commissioned it and to whom it is addressed can rely on it;
  - planning and consent authorities are clearly within contemplation of the scheme as relying on the site audit statement if it is a 'statutory site audit' carried out within the ambit of that authority's functions?[6] Are they within the contemplation of the site auditor if the site audit is not a statutory site audit? Can a site audit statement that was not a statutory site audit later be used to satisfy a statutory function?
  - purchasers of land or businesses (and their financiers) who are not addressees or otherwise in a sufficiently legally proximate relationship with the site auditor may not be

[3] Although *Commonwealth of Australia v Randwick City Council* [2001] NSWLEC 79 at 77 and 78 suggests that a consent authority will still need to form a view that the land would be suitable for its intended use if there are competing expert views it may not be appropriate to rely on a site audit statement.
[4] In the context of the equivalent Victorian scheme the Supreme Court of Victoria in *Premier Building and Consulting Pty Ltd v Spotless Group Limited & Ors* [2007] VSC 377 (5 October 2007) observed at 126 'The scheme of the Environment Protection Act, at least since 1989, [138] was that the actual work of certifying that a parcel of land was free of contamination was done, not so much by the EPA itself, but by appointed environmental auditors.' However, the court later observes that in fact the site audit statement 'certifies that the segment of the environment, the subject of audit, 'is not or is not potentially detrimental to any beneficial use of that segment' [at 126]
[5] See the precautionary approach that was taken in *Commonwealth of Australia v Randwick City Council* [2001] NSWLEC 79
[6] s47CLM Act

able to rely on the site audit statement. However, a failure to obtain one might be used against them to assert that they had assumed risk[7];

- it is unclear having regard to the above points how long a site audit statement remains current and for how long the site auditor remains liable for it;

- in a claim between parties to a transaction for misleading conduct (either under the common law or statute) or negligence, except where the defendant is a public authority relying on schedule 6 of the EP&A Act, the fact that the conduct was informed by and consistent with a site audit statement is likely to be relevant but is not necessarily determinative of liability – it is not necessarily a defence.

– Site audit statements are subject to conditions and limitations that are both express and implicit. The implicit limitations arise from the nature and purpose of the site audit scheme. Express limitations arise from conditions specified in the site audit statement. While there are controls on the conditions that may be imposed on site audit statements, there are some interesting issues that may arise:

- What is the effect of limitations and disclaimers included in a site audit report? Is the site audit report (including limitations and disclaimers) incorporated into the site audit statement by reference?

- What is the impact of a site audit statement that is subject to an EMP being implemented?

– Where site audit statements are used as a condition in a contract, the wording of the condition and the content of the site audit statement need to align. Attention to detail on this point is critical.

[7] See for example how the arguments were put in *Premier Building and Consulting Pty Ltd v Spotless Group Limited & Ors* [2007] VSC 377 (5 October 2007)

Case study

In 2003, Form Co owned a site on which it has manufactured widgets for over 50 years. The site was located in an area that was rapidly being developed for residential purposes. Form Co determined that it should sell the site.

Form Co was concerned to ensure that when it sells it would not be left with a tailing liability from contamination. Form Co engaged EEE Pty Ltd (**EEE**) to investigate the site.

EEE carried out an investigation. The investigation was properly carried out in compliance with all of the applicable standards at the time. EEE's investigation report was delivered in mid-2005.

The EEE report was in three phases. Phase 1 was a historical review and a review of current operations. It identified a number of sources of potential contamination and a range of contaminants of concern. These were lead, zinc and a range of other metals, PAHs and a range of solvents. A detailed site investigation was recommended.

The Phase 2 report set out the results of the detailed site investigation. Sampling was carried out across the site. Likely sources (based on Phase 1 review) were targeted more intensely. Soil and groundwater were sampled. Everything was done in accordance with the EPA guidance documents and the current best practice.

The Phase 2 report identified a range of contamination issues across the site.

The Phase 3 report contained a risk assessment to endeavour to refine and delineate acceptance criteria for remediation.

Diedre Gummins was retained by Form Co as site auditor. She audited the EEE work and reports and issued a letter confirming that in her opinion the reports had been prepared in accordance with all applicable requirements.

EEE then prepared a remediation action plan (**RAP**). The RAP provided for: limited parts of the site to be excavated and backfilled, treatment and reuse of some soils and disposal of others and some ground water extraction and treatment. Backfilled material was to be carefully and correctly validated. The site auditor signed off on the RAP and issued a site audit statement that the site could be made suitable for residential uses if remediated in accordance with the RAP.

Form Co decided to press on with the sale but on the basis that completion be conditional on completion of the remediation works.

Land Co reached agreement with Form Co to acquire the site. The agreement provided that completion of the sale would be subject to the satisfaction of the following conditions:

- Form Co must remediate in accordance with the RAP;
- buildings must be demolished;
- the site must be cleared and compacted;
- a site audit statement must be issued; and
- the site audit statement must certify that the land is suitable for residential use without any condition requiring ongoing monitoring or remediation works.

The conditional contract was signed in late 2007.

Form Co retained Remediation Co to complete the remediation works in the RAP. EEE was retained as an adviser by Form Co. Diedre Gummins remained the site auditor.

The remediation was completed and in late 2009 a site audit statement was issued to Form Co that confirmed that the land was suitable for residential use without any condition requiring ongoing monitoring or remediation works.

The sale to Land Co was completed in January 2010.

Land Co worked with the local council to have the land rezoned from industrial to residential. The site audit statement was produced to the council and the Department of Planning for this purpose.

Land Co then made a development application in January 2012. The site audit statement was produced as part of the application. The development application was approved in early 2014.

Land Co achieved pre-sales and finance was committed. The financier sighted the site audit statement as part of the finance approval process.

Construction commenced in early 2015.

A neighbouring site was owned by Smith & Co. The site was rezoned along with the Land Co site. Smith & Co decided to sell their property in early 2015. They commissioned a site assessment. The site assessment identified minimal impacts from the Smith & Co uses but found high levels of PFOS/PFOA compounds. These appeared to increase as they approached the boundary with the Land Co site.

Smith & Co obtained samples of soils from the Land Co site in 2015 and found that there were very elevated levels of PFOS/PFOA compounds. It appeared that soils on the Land Co site were a source of the PFOS/PFOA contamination.

Smith & Co contacted Land Co. Together they approached the EPA.

Land Co identified a solution that involved removing and containing the contaminated soils the cost is a number of millions. In the meantime work was delayed. The delay and the additional remediation costs are causing significant financial stress on Land Co. Their financier has been informed and is beginning to seek answers on expected completion.

Smith & Co has identified that the cost of remediating its site will be more than $4M. They have obtained advice on their rights against Land Co and Form Co.

Diedre Gummins has retired.

EEE has become part of a large multinational consulting firm.

What a mess!

Land Co gets legal advice. It is told that:

- the EEE assessments were properly carried out;
- at the time that EEE and Diedre Gummins completed their work PFOS/PFOA was not a generally recognised contamination issue; and
- the contract under which Land Co purchased the site did not require the site audit statement to be issued to Land Co or addressed to Land Co.

The CEO of Land Co says ‘but we relied on a site audit statement to tell us that the site was not contaminated’.

Form Co gets legal advice. It is told that if the contamination was caused during its use and occupation of the site then Form Co could be a person responsible for that contamination under

the *Contaminated Land Management Act 1997* (**CLM Act**) and be served with management orders by the EPA.

The Chairman of Form Co complains to her partner ‘but we relied on a site audit statement to confirm that we had dealt with the contamination’.

What is a site audit?

The concept of a site audit was introduced in the CLM Act. The basic concept was to provide a quality control process for the assessment of contaminated sites: land owners and developers would be able to retain their own consultants and advisers but their work would be reviewed by an accredited expert known as a site auditor. The site auditor would provide a statement called a site audit statement that confirms that the consultant's work has been adequately carried out and hence the conclusions were valid.

So the CLM Act introduced the concept of a site audit, site auditor and a site audit statement as follows (CLM Act as made, s 47):

> **site audit** means an independent review:
>
> (a) that relates to investigation, or remediation, carried out (whether under this Act or otherwise) in respect of the actual or possible contamination of land, and
>
> (b) that is conducted for the purpose of determining any one or more of the following matters:
>
> (i) the nature and extent of any contamination of the land,
>
> (ii) the nature and extent of the investigation or remediation,
>
> (iii) what investigation or remediation remains necessary before the land is suitable for any specified use or range of uses.
>
> **site audit statement** means a written statement by a site auditor of the findings of a site audit.
>
> **site auditor** means a person for the time being accredited under this Part as a site auditor.

To enable the system to work it was necessary to accredit people as site auditors and this in turn led to the creation of the Site Auditor Scheme under which site auditors are accredited to perform their role. The scheme is underpinned by guidelines: today the *Contaminated Land Management Guidelines for the NSW Site Auditor Scheme* (3rd edition) (**Site Auditor Guidelines**).

In 2018 the underlying rationale and the current definitions remain similar.

The Site Auditor Guidelines observe (page v):

> To improve access to competent technical advice and increase certainty in the assessment and remediation of contaminated sites, the NSW Government introduced the NSW Site Auditor Scheme in 1998.
>
> Under the scheme, the management of contaminated sites involves both contaminated site consultants and accredited site auditors. Contaminated site consultants, typically engaged by the site owner or developer, conduct site assessments, undertake any necessary remediation and validate the work. Accredited site auditors independently review these consultant activities to ensure the work complies with current regulations and guidelines and meets the standard appropriate for the proposed land use. It is highly desirable that a site auditor is engaged as early in the assessment and remediation process as possible, as early communication between parties to the project improves the efficiency of the audit, usually reflected in timeliness and cost savings.

The current definitions of a site audit and site auditor are:

> **site audit** means a review:
>
> (a) that relates to management (whether under this Act or otherwise) of the actual or possible contamination of land, and
>
> (b) that is conducted for the purpose of determining any one or more of the following matters:
>
> (i) the nature and extent of any contamination of the land,
>
> (ii) the nature and extent of any management of actual or possible contamination of the land,
>
> (iii) whether the land is suitable for any specified use or range of uses,
>
> (iv) what management remains necessary before the land is suitable for any specified use or range of uses,
>
> (v) the suitability and appropriateness of a plan of management, long-term management plan or a voluntary management proposal.
>
> **site auditor** means a person for the time being accredited under Part 4

There are two types of site audits. First a voluntary site audit and secondly a statutory site audit.

A voluntary site audit is any audit that is not a statutory site audit. A statutory site audit is defined as follows: (CLM Act s 47)

> In this Part, a reference to a ***statutory site audit*** is a reference to a site audit carried out in order to secure compliance with one or more of the following:
>
> (a) a requirement under this Act,
>
> (b) an approved voluntary management proposal,
>
> (c) a requirement imposed by *State Environmental Planning Policy No 55—Remediation of Land* or by any other environmental planning instrument made under the *Environmental Planning and Assessment Act 1979* or by any development consent or approval given under that Act,
>
> (d) any other requirement imposed by or under an Act,
>
> unless it is carried out only in order to secure compliance with a legal obligation arising from an agreement or arising in such other circumstances as the regulations may prescribe.

A statutory site audit:

- may only be carried out by a person accredited as a site auditor under the site auditor scheme (CLM Act s 48); and
- must be notified to the EPA (CLM Act s 53C)[8].

[8] (Note that there are other requirements to notify the EPA including if required by EPA direction (s 53A and also s 53B(5)) the provision of annual returns (s 53D), if there are

What is a site audit statement?

A site audit statement is defined in the CLM Act as follows:

> **site audit statement** means a site audit statement prepared by a site auditor in accordance with Part 4.

Section 53B of the CLM Act provides:

> 53B **Site audit reports and site audit statements**
>
> (1) A site auditor must make a site audit report in writing whenever he or she carries out a site audit and furnish that report to the person who commissioned the site audit.
>
> (2) The site audit report must contain a critical review of the information collected in relation to the site audit and must clearly set out the reasons for the findings proposed to be contained in the relevant site audit statement.
>
> (3) After completing the site audit report, the site auditor must make a site audit statement in a form approved by the EPA and must:
>
> (a) furnish that statement to the person who commissioned the site audit, and
>
> (b) if the site audit is a statutory site audit, at the same time furnish a copy of the statement to the EPA and the local authority for the area in which any land the subject of the site audit is situated.
>
> (4) The site audit statement must contain the site auditor's findings in relation to the site audit and must be consistent with the reasons set out in the site auditor's site audit report.
>
> (5) A site auditor must promptly furnish the EPA with any further information, in support of or otherwise relating to a site audit report or a site audit statement, or concerning any site audit carried out by the site auditor, as the EPA may, by notice in writing to the site auditor, require.
>
> (6) A site audit is to be carried out, and a site audit report and site audit statement are to be prepared and furnished, by a site auditor:
>
> (a) in compliance with the provisions of this Act and the regulations, and
>
> (b) in accordance with the guidelines, and
>
> (c) having regard to the provisions of any environmental planning instruments applying to the site.

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significant health or environmental problems posed by the site (Site Auditor Guidelines 3.8.1); if the site has been or should have been notified under s 60 of the CLM Act or is regulated under that Act (Site Auditor Guidelines 3.8.2); if there are hazardous ground gasses (Site Auditor Guidelines 3.8.3); and if there is a premature cessation of the audit (Site Auditor Guidelines 3.8.4). The conditions of the site auditor's accreditation could also impose obligations on the site auditor to notify the EPA or other authorities.)

A site audit statement is a written document provided in an approved form and containing the site auditor's findings in relation to the site audit and must be consistent with the reasons set out in the site auditor's site audit report

The approved form as at October 2018 is annexed.

What is the purpose of a site audit statement?

A site audit statement can be issued for four broad purposes (approved form p6):

- First, to attest to the suitability of land for a use 'where site investigation and/or remediation has been completed and a conclusion can be drawn on the suitability of land uses'.
- Second, to confirm that certain testing plans, assessments and investigations are adequate to characterise the contamination or to specify a management plan.
- Third, to confirm whether the terms of a management proposal or order have been complied with.
- Fourth, to confirm whether the site can be made suitable for a specified land use (or uses) if the site is remediated or managed in accordance with the implementation of a specified plan.

These purposes are specified in the form on the following page.

Purpose of site audit

☐ A1 To determine land use suitability

Intended uses of the land:

OR

☐ A2 To determine land use suitability subject to compliance with either an active or passive environmental management plan

Intended uses of the land:_____

OR

(Tick all that apply)

☐ B1 To determine the nature and extent of contamination

☐ B2 To determine the appropriateness of:

- ☐ an investigation plan
- ☐ a remediation plan
- ☐ a management plan

☐ B3 To determine the appropriateness of a site testing plan to determine if groundwater is safe and suitable for its intended use as required by the Temporary Water Restrictions Order for the Botany Sands Groundwater Resource 2017

☐ B4 To determine the compliance with an approved:

- ☐ voluntary management proposal or
- ☐ management order under the *Contaminated Land Management Act 1997*

☐ B5 To determine if the land can be made suitable for a particular use (or uses) if the site is remediated or managed in accordance with a specified plan.

Intended uses of the land:_____

_____

But … what is the purpose really: who can rely on a site audit statement?

Assessments of land contamination are common in a range of contexts. They include:

- when assessing what work may be required in order to redevelop land;
- when land is bought or sold;
- in commercial transactions where land is a material element;
- when considering liability;
- when considering the rezoning of land.

Often parties to commercial transactions will retain a consultant to assess:

- the nature and extent of contamination;
- the prospects of remediation;
- whether remediation has been completed.

It is not unusual to see parties insisting on the input of a site auditor and for sales transactions to be conditional upon the issue of a site audit statement.

In remediation projects, the finalisation of the clean-up works (as opposed to the monitoring and response works) is often evidenced by a site audit statement as part of the completion test.

At one level these uses of site audits and site audit statements makes sense. For example, a purchaser of land who wants to know that remediation has been finalised prior to completion of the sale will also be concerned to be comforted that the verification of works has been completed in accordance with the applicable EPA guidance and requirements: that the assessments, validation, monitoring have all been compliant.

So too the purchaser who acquires land subject to disclosures set out in a site assessment report will want to know that the assessment report has been carried out in accordance with the applicable EPA guidance and requirements and that the site is capable of remediation (or does not need remediation).

In these contexts, the issue of a site audit statement is intended by the parties to provide comfort that the contamination issues have been assessed and considered in accordance with the EPA's guidance and requirements – that the information is reliable in that sense.

However, the site audit provisions of the CLM Act and the site auditor scheme were not established with such purposes front of mind.

A useful starting point is the current Site Auditor Guidelines (page v):

> Planning consent authorities need information about a site's known or suspected history of potentially contaminating activities to be able to decide whether the land is suitable for an alternative use, such as residential or commercial development. They must be sure that any risks posed by any chemicals in the environment are acceptable and the land is suitable for its proposed use. In some cases the land and its immediate environment may have to be remediated or managed to make it suitable.
>
> The assessment and remediation of contaminated sites, usually conducted by contaminated site consultants, is technically difficult because of the complex behaviour of chemicals in the environment and their effects on ecosystems and human health. Obtaining dependable information for making reliable decisions can

> be difficult. It is therefore important that consent authorities and developers have access to advice from appropriately qualified and experienced people in making their land-use planning and development decisions.

These opening paragraphs to the guidelines point to the more limited priorities of the site auditor scheme: the assurance provided to planning/consent authorities and developers.

Clause 2 of Schedule 6 of the EP&A Act provides:

> (1) A planning authority does not incur any liability in respect of anything done or omitted to be done in good faith by the authority in duly exercising any planning function of the authority to which this clause applies in so far as it relates to contaminated land (including the likelihood of land being contaminated land) or to the nature or extent of contamination of land.
>
> (2) This clause applies to the following planning functions:
>
> (a) the preparation or making of an environmental planning instrument, including a planning proposal for the proposed environmental planning instrument,
>
> (b) the preparation or making of a development control plan,
>
> (c) the processing and determination of a development application and any application under Part 3A or Division 5.2,
>
> (d) the modification of a development consent,
>
> (d1) the processing and determination of an application for a complying development certificate,
>
> (e) the furnishing of advice in a certificate under section 10.7
>
> (f) anything incidental or ancillary to the carrying out of any function listed in paragraphs (a)–(e).
>
> (3) Without limiting any other circumstance in which a planning authority may have acted in good faith, a planning authority is (unless the contrary is proved) taken to have acted in good faith if the thing was done or omitted to be done substantially in accordance with the contaminated land planning guidelines in force at the time the thing was done or omitted to be done.
>
> (4) This clause applies to and in respect of:
>
> (a) a councillor, and
>
> (b) an employee of a planning authority, and
>
> (c) a Public Service employee, and
>
> (d) a person acting under the direction of a planning authority,
>
> in the same way as it applies to a planning authority.

This provision was previously contained in s 145B.

The planning guidelines referred to are currently *Managing Land Contamination: Planning Guidelines*, 1998 (**1998 Planning Guidelines**). There is currently a draft guideline to replace these titled 'Contaminated Land Planning Guidelines' (**Draft 2018 Guidelines**).

1998 Planning Guidelines

The EPA refers to the 1998 Planning Guidelines as follows: (https://www.epa.nsw.gov.au/your-environment/contaminated-land/managing-contaminated-land/role-of-planning-authorities)

> [the guideline] aims to establish 'best practice' for managing land contamination through the planning and development control process. The guidelines provide advice to planning authorities on the early identification of contaminated sites, consideration of contamination in rezoning and development applications, recording and use of information, and ways to prevent contamination and reduce the environmental impact of remediation activities.

The 1998 Planning Guidelines themselves say (page 1):

> The purpose of these Guidelines is to establish 'best practice' for managing land contamination through the planning and development control process. The Guidelines explain what needs to be done to show that planning functions have been carried out in good faith. Obviously they cannot provide a definitive answer in all cases, so planning authorities will also need to exercise their judgement.

The 1998 Planning Guidelines identify a number of decisions that may be made by planning authorities including:

- decisions to rezone land;
- decisions to grant development consent;
- decisions on making planning instruments and DCPs;
- controlling remediation works;
- making determinations under Part 5 of the EP&A Act; and
- issuing certificates under s 149 of the EP&A Act.

Part 3.6.1 is titled 'when is a site audit necessary?'

> As a general principle, a site audit is only necessary when the planning authority:
>
> - believes on reasonable grounds that the information provided by the proponent is incorrect or incomplete;
> - wishes to verify the information provided by the proponent adheres to appropriate standards, procedures and guidelines;
> - does not have the internal resources to conduct its own technical review.
>
> Any appropriately qualified contaminated land consultant may provide an independent review of another consultant's work[9]. In some circumstances, these 'site audits' must be performed by a site auditor accredited by the EPA under the CLM Act. Section 47(2) of the CLM Act specifies when the involvement of a site auditor accredited by the EPA is mandatory.
>
> Normally, it is unnecessary to have more than one site audit for the same stage of the site investigation process.
>
> SEPP 55 does not require a mandatory site audit at any stage of the planning process for remediation work, although the CLM Act allows the SEPP to require a site audit.

[9] Maddocks note: but this has now changed under the current Site Auditor Guidelines and EPA policy which requires that reports provide to the EPA be by a certified consultant.

> If a planning authority considers that it needs a site audit in order to make its planning decision, the cost should be borne by the proponent and not the planning authority.

In Chapter 4 of the 1998 Planning Guidelines, Figure 3 sets out a flow chart of the decision process for a development application. A site audit statement is indicated when there is uncertainty as to whether land 'has been... proven suitable for proposed uses without the need for further testing or treatment'. Site Audit Statements are similarly indicated in rezoning processes (Figure 2) and assessment of remediation work (Figure 4).

While a site audit statement is not mandated by the 1998 Planning Guidelines the reality is that many councils will not consider themselves to have capacity to fully understand either the assessment or implications of contamination. Even those that do may well take the view that the best course is to require site audit statements to ensure that they can be satisfied that consultant's reports have been prepared in accordance with the necessary guidelines and requirements. That is certainly a safer course.

Indeed, as many developments are now certified it is common for development consents to specify that a site audit statement must be provided prior to commencement of construction.

In respect of planning certificates, s 59(2) of the CLM Act provides for site audit statements received by councils to be included under s 149(5) (now s 10.7(5)).

> For the purposes of section 149 of the *Environmental Planning and Assessment Act 1979*, the following matters are prescribed in addition to any other matters, prescribed by the regulations under that section, to be specified in a certificate under that section:
>
> (a) that the land to which the certificate relates is significantly contaminated land—if the land (or part of the land) is significantly contaminated land at the date when the certificate is issued,
>
> (b) that the land to which the certificate relates is subject to a management order—if it is subject to such an order at the date when the certificate is issued,
>
> (c) that the land to which the certificate relates is the subject of an approved voluntary management proposal—if it is the subject of such an approved proposal at the date when the certificate is issued,
>
> (d) that the land to which the certificate relates is subject to an ongoing maintenance order—if it is subject to such an order at the date when the certificate is issued,
>
> (e) that the land to which the certificate relates is the subject of a site audit statement—if a copy of such a statement has been provided at any time to the local authority issuing the certificate.
>
> Note.
>
> Section 53B requires site auditors to furnish local authorities with copies of site audit statements relating to site audits for the purposes of statutory requirements.
>
> (3) If a local authority, under section 149 (5) of the *Environmental Planning and Assessment Act 1979*, includes advice in a certificate in relation to a matter set out in subsection (2) (a)–(e) that no longer applies to the land, the authority is to make this clear on the certificate.

The result is that under the statutory scheme, site audit statements are clearly intended to be relied on by:

- planning authorities; and

– a land owner or developer making applications, such as development applications, and assessing suitability of sites for development. Normally the land owner or developer would retain the site auditor.

Draft 2018 Guidelines

The Draft 2018 Guidelines describe the role of site auditors and site audit statements as follows (p6):

> Accredited site auditors are highly qualified and experienced contaminated land consultants who are accredited by the EPA under the CLM Act.
>
> Accredited site auditors can be engaged to independently review the work of contaminated land consultants, principally to ensure work has been undertaken in accordance with current regulations and guidelines, and provide a state audit statement. The involvement of an accredited site auditor in overseeing and signing off the work of a contaminated land consultant can provide greater certainty to planning authorities and communities.
>
> The EPA Guidelines for the NSW Site Auditor Scheme includes information about the NSW site auditor scheme and the appointment, role and responsibilities of site auditors. The role of an accredited site auditor is further discussed in Section 3.

In Part 3 the Draft 2018 Guidelines say:

> The assessment of site contamination, remediation and validation and the preparation of related reports is typically undertaken or approved by a certified contaminated land consultant.
>
> In some circumstances, a planning authority may decide to engage another certified contaminated land consultant, or an accredited site auditor, to independently review the work of a contaminated land consultant.
>
> The Remediation of Land SEPP does not specify the circumstances when an independent review by a certified contaminated land consultant or a site audit is required, but generally, these are only necessary when:
>
> - the planning authority believes on reasonable grounds that the information provided by an applicant is incorrect or incomplete
> - the contamination and/or remediation issues are complex and the planning authority does not have the internal resources to conduct its own technical review
> - the planning authority requires additional certainty that a site can be made suitable for a particular use or uses if remediated in accordance with a remediation plan.
>
> In most cases, provided there is reasonable evidence that work has been undertaken in accordance with relevant EPA guidelines, a planning authority should be able to rely on the findings of investigation and assessments undertaken or approved by a certified contaminated land consultant.

While the EPA appears optimistic that the need for a site auditor and site audit statements will be the exception (and in the broad sweep this is probably correct), the reality is that, for industrial and utility sites in particular, councils will often be best served to require that site audit statements are provided so that there is independent evidence that the various reports provided in support of a development application or rezoning proposal comply with the various EPA guidelines and requirements.

The Draft 1998 Guidelines introduce the concept of a 'certified contaminated land consultant', for example as follows:

> A certified contaminated land consultant (in the context of the investigation, assessment, remediation and validation of contaminated land) is a contaminated land consultant, whose qualifications and experience have been confirmed through a recognised certification scheme to have the necessary competencies to carry out work relating to contaminated land to an appropriate standard.
>
> Certification schemes that are recognised by the EPA as providing a suitable level of accreditation for contaminated land consultants are listed on the EPA's website.
>
> A certified contaminated land consultant, typically engaged by the site owner or applicant, conducts site investigations and assessments, undertakes any necessary remediation and validates the remediation work when it is completed.
>
> A certified contaminated land consultant may be engaged by a planning authority at any time to review the work undertaken by another certified contaminated land consultant.

An example of the role of the certified contaminated land consultant is that the guidelines say that site assessments and various other documents should be prepared by a certified contaminated land consultant. For example (p15):

> Has the detailed site investigation been undertaken or approved by a certified contaminated land consultant in accordance with relevant EPA guidelines made or approved under section 105 the CLM Act, including the ASC NEPM?
>
> Is the sampling program that has been undertaken by the certified contaminated land consultant adequate to identify all contaminants of potential concern and the extent of any contamination on the site?
>
> Have appropriate thresholds and criteria been used for the assessment in accordance with the ASC NEPM?

The effect of the Draft 2018 Guidelines will be that in order to comply with the guidelines planning authorities will need to ensure that reports they rely on in making decisions are prepared by a certified contaminated land consultant.

The concept of a certified contaminated land consultant emerges from the NSW EPA policy *Contaminated Land Certification Policy* (version 2 November 2017). That policy sets out the policy rationale as follows:

> There is a need for industry engaging contaminated land consultants and regulators reviewing contaminated land consultant's work to have confidence in the competency levels of these consultants. The NSW Environment Protection Authority (**EPA**) requires all reports submitted to it to comply with the requirements of the *Contaminated Land Management Act 1997* (**CLM Act**) to be prepared, or reviewed and approved, by a certified contaminated land consultant.
>
> Contaminated land consultant certification based on competency and national standards should lead to improvements in the minimum standard of contaminated land work carried out by practitioners and increased confidence in the profession.

The policy requirement is:

> The EPA requires all reports submitted to the EPA to comply with the requirements of the *Contaminated Land Management Act 1997* (**CLM Act**) to be prepared, or reviewed and approved, by a certified consultant.

Under the policy two schemes are certified. The EPA recognises both the CEnvP(SC) and CPSS CSAM certifications.

The Certified Environmental Practitioners Scheme – Site Contamination CEnvP (SC)

The Environment Institute of Australia and New Zealand Inc. (EIANZ), a not-for-profit professional association for environmental practitioners from across Australia and New Zealand, developed the Certified Environmental Practitioners Scheme (CEnvP) Contaminated Land specialisation in October 2014. Site Contamination Practitioners Australia (SCPA), a not-for-profit organisation supported by the Cooperative Research Centre for Contamination Assessment and Remediation of the Environment (CRC CARE), launched its certification scheme in November 2014. The boards of each scheme came to an agreement to transition the two schemes into a new single 'Site Contamination' specialist certification operating under CEnvP. All current members of each scheme will be transitioned to the new scheme which from 1 January 2018 will be referred to as CEnvP Site Contamination (CEnvP (SC)).

Certified Professional Soil Scientist Contaminated Site Assessment and Management

Soil Science Australia (SSA) has also developed a Certified Professional Soil Scientist Contaminated Site Assessment and Management (CPSS CSAM) certification. SSA provides accreditation for suitably qualified members as Certified Professional Soil Scientists. The CPSS CSAM is available to experienced soil scientists as a specialised competency. The CPSS CSAM scheme was launched in 2016.

The Certified Professional Soil Scientist Scheme and the Certified Environmental Practitioners Scheme are not professional standards schemes under the *Professional Standards Act 1994* (NSW).

Qualifications in a site audit statement

Site audit statements can be issued subject to qualifications referred to as conditions. The Site Auditor Guidelines at 3.4.5 require that: 'Site audit statements must be issued with either no conditions or as few conditions as practicable, since conditions qualify the auditor's conclusions, and therefore detract from the definitive nature of the statement'.

Often a site audit statement may conclude that land can be made suitable if works are carried out or if confirmed by any further assessment. The Site Auditor Guidelines make a number of observations about these types of conditions:

- Where the site audit statement states a site can be made suitable for a use(s) if remediated in accordance with a specified plan, any conditions specified by the auditor on the site audit statement should be limited to minor modifications or additions to the specified plan.
- Where the site audit statement states that future assessment or remediation of the site is required – for example, if development is proposed on an area where contaminated soils were contained – it must also state whether the assessment or remediation should be audited by an accredited site auditor.
- Where the site audit is being done as part of the planning approval process under the EP&A Act, the method for ensuring compliance with any condition should be discussed by the auditor with the consent authority. The consent authority should be asked their view on the method for ensuring compliance and given reasonable opportunity to respond.
- Where the site audit statement states a site can be made suitable for a particular use(s) if remediated or managed in accordance with a specified plan the plan must be attached to the site audit statement and included in the site audit report.
- Where the site audit statement states a site is suitable for a particular uses(s) if managed in accordance with a specified plan, the plan must be attached to the site audit statement and included in the site audit report.

As noted earlier in this paper, a site audit statement may be issued for a number of purposes. These include certification that the land is suitable for a specified use. Such a certification is pointless if it is subject to a condition that entails further assessment to verify the conclusion.

To address this, the approved form of site audit statement provides for two types of certification:

- Section A1 'The site is suitable for the following uses'. This section does not include space for conditions.
- Section A2 'Subject to compliance with the attached environmental management plan[10] (EMP), the site is suitable for the following uses':

The requirements for conditions under section A2 are discussed in section 3.4.6 of the site auditor guidelines:

> Implementation of an EMP must not be included by a site auditor as a condition on a site audit statement nor accepted by the auditor as a means of managing contamination of a site unless the following conditions have been met.
>
> a) The EMP has been reviewed by the auditor.
>
> b) The EMP can reasonably be made to be legally enforceable, for example because compliance with it is a requirement of a notice under the CLM Act or of development consent conditions issued by the relevant consent

10 Refer to Part IV for an explanation of an environmental management plan

> authority. The relevant authority (the EPA or the local authority in these cases, respectively) should be asked their view on the legality of the draft EMP. How implementation of an EMP can reasonably be made to be legally enforceable should take into account exempt and complying development which may occur at the site.
>
> c) There will be appropriate public notification of any restrictions applying to the land to ensure that potential purchasers or other interested individuals are aware of the restrictions, for example appropriate notations on a planning certificate issued under s.149(2) of the *Environmental Planning and Assessment Act* or a covenant registered on the title to land under s.88B of the *Conveyancing Act 1919*.
>
> d) There is no off-site migration of contamination from the site which is the subject of the site audit, or where there is off-site migration or its potential, that contamination within the site is managed or monitored so it does not present an unacceptable risk to either the on-site or off-site environments.

Again, a condition that in effect requires that an EMP be implemented to monitor contamination to ensure that the site conditions are as anticipated, is not really a certification that the site is suitable for use. What will happen if the monitoring concludes that the site conditions have not been verified? Certainly, a party to a commercial transaction should never rely on a site audit statement so qualified unless the transaction documents clearly specify the consequences and responses in an acceptable manner.

The site audit statement is also required to be accompanied by a site audit report. The site audit report is required to be specifically referenced in the site audit statement by reference number and date.

Part 3.3 of the Site Auditor Guidelines specifies minimum content of a site audit report:

> The site auditor must, as far as practicable, ensure that the report is a self-contained document which requires little or no direct reference by the reader to other material or documents to support the audit findings or the conclusions contained in the site audit statement.

However, the Site Auditor Guidelines do not specify what limitations may or may not be contained within a site audit report. It possible to see both bespoke and standard limitations in site audit reports including:

- that the report has been prepared for the person who retained the site auditor and the report cannot be relied on by any other person;
- seeking to limit the liability of the author;
- limiting the scope to the instructions provided;
- limiting responsibility to those matters of which the author had notice.

Given that the site audit statement must be accompanied by a site audit report and incorporates the site audit report by reference, these types of conditions and limitations need to be considered carefully by people using and relying on the work of the site auditor. There is potential for conditions in the site audit report to effectively act as conditions on the site audit statement or to limit the ability to rely on the site audit statement.

Can a site audit statement be amended?

A site audit statement should be final and therefore should not be amended. However, if a mistake is identified then the Site Auditor Guidelines require:

> should errors be found after the site audit statement has been signed, the site auditor must send a corrected version of the statement to the person who commissioned the site audit and any other person the auditor provided the statement to.

If circumstances change then it may be necessary to revisit a site audit statement. The Site Auditor Guidelines provide:

> After a site audit statement has been issued, the site auditor may become aware of new information about contamination at the site that may materially affect the validity or appropriateness of the conclusions in the site audit statement or report. Such circumstances may arise, for instance, where formerly unknown and unrecorded site history information becomes available after the statement is issued. Where the audit is statutory, the auditor must promptly notify the client, the EPA, the local authority and any other person the auditor provided the statement to.
>
> Where an auditor is commissioned to do so, they must issue an amended site audit report and/or statement (as appropriate) to take account of this new information and issue the amended version to the client and any other person the auditor provided the report and/or statement to (with a different number from the original). If it was a statutory site audit, the auditor must also send the amended site audit statement to the EPA and the local authority.
>
> The auditor must not issue an amended site audit report and/or statement for a statutory audit without first providing to the EPA written justification for issuing an amended document and receiving the EPA's written approval to do so.

How do you find out about site audit statements?

Site audit statements can be located if:

- they are on the EPA register https://apps.epa.nsw.gov.au/prclmapp/searchregister.aspx
- they have been notified to a council and therefore can be disclosed under s 10.7(5) of the EP&A Act (previously s 149(5)).

As a purchaser of land or a business it is necessary to conduct these searches and to make inquiries with the vendor.

Site audit statements are not registered on title.

What happens if there is a change in standards or law?

A site audit statement is issued at a point in time having regard to the laws guidelines and requirements in place at that point in time. If the standards change:

- there is no mechanism for updating the site audit statement (unless it falls within the 'new information' provisions of the Site Auditor Guidelines);
- there is no protection for people who have relied on the site audit statement.

A current example of this is the concern around PFOS/PFOA. See the example in part 3 of this paper.

- The vendor in that scenario relied on the site audit statement to allow the site out of their control. They were responsible in ensuring the site was cleaned up before it was sold for redevelopment.
- The developer/original purchaser relied on the site audit statement to invest and to make decisions to redevelop the site.
- The council relied on the site audit statement to permit redevelopment.
- The builder relied on the site audit statement to ensure their people were not exposed to contamination and that safety precautions were taken.
- Yet in 2018 it turns out that in fact there is a risk presented from the PFOS/PFOA.

PFOS/PFOA is a topical issue at the moment but what happens over time when standards tighten on known contaminants such as lead or solvents or new contaminants are identified such as nano-particles or fuel additives.

So … who can rely on a site audit statement?

The concept of 'reliance' can usefully be thought about across three connotations:

- is the document factually, technically and legally accurate, ie the statements made are reliable;
- can I use the document as a defence from claims; and
- can I sue the author if I suffer loss due to relying on the document? Does the author owe duties to me?

Anyone relying on a site audit statement needs to be careful:

- There are inherent, express and implied limitations.
- Where the site audit statement is a condition of an agreement: does the statement strictly comply with the agreement?
- Further, for some classes of people the ability to rely on a site audit statement is clear but for others it is debateable.

In terms of reliance in the sense of the statements made being reliable, the example given in this paper relating to new and emerging contaminants or if standards or laws change, suggests caution is required. The site audit statement is fixed in time, our knowledge is not and the law is not.

In terms of reliance in the sense of a site audit statement providing a defence, this is open to authorities making planning decisions (as described in this paper). However, caution is again required if contaminants have emerged or the site audit report or statement is inappropriately qualified. For people other than planning authorities, the site audit statement does not provide a statutory defence.

In terms of the ability to sue a site auditor, it is not immediately apparent that a site auditor owes a duty of care beyond the person who commissioned that site audit statement (or possibly a planning authority for a statutory site audit). In this regard, it is necessary to consider the traditional common law concepts of duty of care and causation.

In *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* [1997] HD (1997) 142 ALR 700 Brennan CJ said:

> The uniform course of authority shows that mere foreseeability of the possibility that a statement made or advice given by A to B might be communicated to a class of which C is a member and that C might enter into some transaction as the result thereof and suffer financial loss in that transaction is not sufficient to impose on A a duty of care owed to C in the making of the statement or the giving of the advice. In some situations, a plaintiff who has suffered pure economic loss by entering into a transaction in reliance on a statement made or advice given by a defendant may be entitled to recover without proving that the plaintiff sought the information and advice[13]. But, in every case, it is necessary for the plaintiff to allege and prove that the defendant knew or ought reasonably to have known that the information or advice would be communicated to the plaintiff, either individually or as a member of an identified class, that the information or advice would be so communicated for a purpose that would be very likely to lead the plaintiff to enter into a transaction of the kind that the plaintiff does enter into and that it would be very likely that the plaintiff would enter into such a transaction in reliance on the information or advice and thereby risk the incurring of economic loss if the statement should be untrue or the advice should be unsound. If any of these elements be wanting, the plaintiff fails to establish that the defendant owed the plaintiff a duty to use reasonable care in making the statement or giving the advice.

Since that case the *Civil Liability Act 2002* (NSW) has been enacted. Relevantly section 5B (duty of care) and 5D (causation) provide:

5B **General principles**

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm

5D **General principles**

(1) A determination that negligence caused particular harm comprises the following elements:

(a) that the negligence was a necessary condition of the occurrence of the harm (factual causation), and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

The following table summarises my current thinking:

Class of person	Does the Site Auditor owe a duty of care?	Comments
Local council making strategic planning decisions or acting as consent authority	Yes at least in respect of a statutory site audit	The statutory scheme is such that a site auditor ought to have these people in their contemplation as relying on the SAS For a non-statutory site audit the facts and circumstances of the case will need to be considered but the likelihood is that these entities will be entitled to rely on it
State Government agency making strategic planning decisions or acting as consent authority	Yes at least in respect of a statutory site audit	
Planning Panels (Whatever the PAC, IHAPs, JRPPs etc are called this month)	Yes at least in respect of a statutory site audit	
Developer of land making decisions about redevelopment or making a development application	Probably	Yes, if they retained the site auditor
Principal under remediation contract	Probably	If they retained the site auditor or otherwise have a reliance regime in place with the site auditor
Purchaser of land from the person who retained the site auditor	Uncertain/no	The scheme does not specifically contemplate this except possibly in respect of circumstances where the site audit statement has been provided to councils. There is no comprehensive register. If these people were named addressees of the site audit statement or the auditor was specifically informed then a different result may follow. There may be a difference between site audits statements that are for a statutory purpose and those that are not. If purchasers can rely on a SAS, how long can this reliance go on for?
Subsequent purchasers of land	Uncertain/no	
Purchaser of the company that was a person responsible for the contamination	Uncertain/no	
Financier of purchaser of land or company	Uncertain/no	