5 April 2018

Director, Housing Approvals and Policy
Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

Dear Director Housing Approvals and Policy,

Re: Submission on the Draft NSW Contaminated Land Planning Guidelines

I am providing this submission to the DPE in response to the publication of the Draft NSW Contaminated Land Planning Guidelines.

Statutory Auditors work within the site audit scheme, regulated by the Contaminated Land Management Act 1997 (the CLM Act) administered by the NSW EPA. The scheme was implemented in 1998, to improve access to competent technical advice and increase certainty in the assessment and remediation of contaminated sites. The scheme was implemented following a number of significantly negative impacts on human health and the environment from inappropriate land development, resulting from poor environmental assessment and management. EPA accredited site auditors independently review a contaminated land consultant's work to ensure that it complies with current regulations and guidelines and meets an appropriate standard for the proposed land use. Site auditors must conduct site audits in accordance with the requirements set out in the CLM Act.

Since its inception, the NSW EPA Auditing scheme, over thousands of development projects, has provided the people of NSW with a high degree of confidence and assurance that their health and the environment are properly protected. We believe that the changes proposed in the draft Land SEPP, May result in an increased risk of harm from contamination to human health and the environment to the detriment of the people of NSW. This is because the proposed wording, in effect, replaces the CLM Act audit function with review by “certified contaminated land consultants”.

The following provides some of our reasoning as to why the draft Land SEPP should not proceed in its current form:

1. A review of the draft guidelines indicates a major deviation in the way that a planning authority is advised to seek an independent review, by advising a planning authority to seek either an independent review from a certified consultant or a site auditor. This is a significant change from the current planning guidelines which clearly advise a planning authority to use a site audit where they require an independent review of information.

   **Section 3: independent reviews and site audits**—appears to wrongly give the impression that a review by a certified consultant and one undertaken by a site auditor are interchangeable and provide the same outcome for a planning authority. We note that:
• In conducting an independent review, an auditor must undertake this as a site audit, with associated legal obligations (CLM Act) under the scheme administered by the NSW EPA. A site audit ensures work has been undertaken in accordance with current regulations and guidelines. Site auditors’ performance is reviewed and monitored by the EPA to ensure they meet the required standards. Accreditation as a site auditor is subject to satisfactory review of an auditor’s work by the EPA (amongst other obligations). The product of this is a Site Audit Statement, which is in effect a statutory certificate of site suitability.

• In contrast certified consultants, in conducting a “review”, do not have any obligations to follow guidelines made or approved under the CLM Act or work within a controlled administrative framework. Any review provided by a certified consultant will be reliant solely on their ethical position, their personal opinion of what should be included in the review and any caveats place in the review. Yearly certification is subject only to submission of a continuing professional development log and we are not aware of any requirement for ongoing review of technical performance by a statutory authority.

A review by a certified consultant provides less certainty regarding the information the planning authority is basing its decision upon, downgrading environmental certainty and ultimately placing the health and environment of the people of NSW at risk.

2. The draft guideline uses various terminology that is inconsistent, for instance:

• Section 1 – role of the applicant: This requires that the applicant ensures “an appropriately qualified and experienced environmental consultant undertakes the investigation, assessment, remediation and validation process.” Later in section 1 the guideline states that certified contaminated land consultants “have the necessary competencies to carry out work related to contaminated land to an appropriate standard”.

• Section 3 independent reviews and site audits: Assessment of site contamination, remediation and validation and the preparation of related reports is “…typically undertaken or approved by a certified contaminated land consultant”. We note that this statement specifically excludes the use of the site audit scheme.

• Section 1: Advice on the role of principle certifying authorities – Requires planning authorities ensure DA conditions “…require a certified contaminated land consultant, not a PCA, to review or approve contamination reports.” We note that this statement specifically excludes the use of the site audit scheme.

We have been led to believe through recent presentations by the DPE that the statement “review and approve” is intended to relate to the author (or reviewer under a company quality management system) and is not intended to cover the process of “independent review”. This is not clear in the current guidelines. We suggest that the term “review or approve” be changed (or clearly defined) to “reports prepared or co-signed by a certified consultant”.

Appendix 7 of the draft guidelines should include definitions of the following in the context of the points above: “appropriately qualified”, an “appropriate standard”, the role “review and approve”.

3. We note that if an independent review is requested by a planning authority to determine site suitability (as listed in the draft guidelines) or to determine the appropriateness of a plan of management (i.e. remediation action plan), this is defined as a site audit (under the CLM Act). If the review is statutory (i.e. required by a DA condition or a SEPP), it is unlawful for that review to be conducted by anyone other than an accredited site auditor. This must be clearly communicated to planning authorities through the planning guidelines.

4. The draft guidelines in advising planning authorities to either seek out an independent review by either a certified consultant or a site auditor restricts site audit practice. The CLM Act states that any “review” undertaken by a site auditor must be a site audit (and meet the requirements and obligations set out in the CLM Act). However, as discussed earlier, a review by a certified consultant is not constrained by any requirements or obligations under current legislation. This is a significant issue that must be addressed.
5. The proposed changes (summarised in Figure 3 of the draft guidelines) advise a planning authority in determining:

- a development application for Category 1 remediation, a planning authority may seek an independent review by either “…a certified practitioner or an accredited site auditor”.
- category 2 remediation works, a planning authority is not advised to seek any independent review.

This is a concerning change to the level of advice provided to planning authorities. All remediation sites should be awarded the same level of environmental protection and certainty irrespective of the category of remediation.

In summary, we believe that the draft guidelines propose a significant change (and increased risk to the NSW public and environment) by advising planning authorities to seek reviews by a certified professional as an alternative to a site audit. The draft guidelines fail to clearly identify the difference (and level of certainty) between a review conducted by a site auditor under the CLM Act (site audit) and one undertaken by a certified consultant (with no obligations to follow guidelines or statutory obligations under current NSW legislation), outside the current audit system. This failure of the draft guidelines has the potential to reduce site auditor involvement in the planning process, jeopardising decades long proven auditing processes, substituting it with reviews of an undefined nature, structure or statutory rigour produced by professionals with little to no direct accountability.

This would ultimately place the human health and the environmental of NSW at risk.

- Certified professionals should be considered qualified for writing a report for the purposes of consideration by others (whether EPA/council or an auditor). They should NOT be considered competent to provide 3rd party sign off as to the adequacy of another certified professional’s report. We currently have an established and regulated scheme (site audit scheme) in NSW to undertake this.
- The people and environment of NSW are entitled to the same level of environmental protection irrelevant of the size or extent of a remediation program. The apparent circumventing of independent review for category 2 remediation effectively removes a level of environmental protection and certainty for the people of NSW.

Given the significant issues identified in the draft guidelines, I request that a final draft guideline and draft SEPP55 is exhibited for consultation.

Yours sincerely,
on behalf of Senversa Pty Ltd,

Jason Clay
Senior Principal