



Position Paper on a Sector Interpretation of “Significance”

By the NICOLA Significance Working Group

Champion: Dr. Heidi Snyman

**Members: Heidi Snyman, Marcus van Zutphen, Tina Costas, Simone Labuschagne,
Claudia du Plessis**

Reviewed by: Hayley Thomas

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1.0 INTRODUCTION

The Network for Industrially Contaminated Land in Africa (NICOLA) established a working group to develop a sector understanding of “significant” contamination as stipulated in the South African legislation. Although the use of the word “significant” (or “significantly”) is commonly used in law without defining the term, it has caused some confusion in the sector as it is not clear when notification is required.

The National Environmental Management: Waste Act, 2008 (Act 59 of 2008) (NEMWA) makes provision for the management of contaminated land in Part 8 of NEMWA which was promulgated on 2 May 2014 when the regulations GN R.331 of 2014, National Norms and Standards for the Remediation of Contaminated Land and Soil Quality, were gazetted.

One of the objects of NEMWA as stated in Section 2(a), is to “protect health, well-being and the environment by providing reasonable measures for... (viii) remediating land where contamination presents, or may present, a *significant risk of harm* to human health or the environment”.

Section 36 (5) of NEMWA stipulates that “an owner of land that is *significantly* contaminated, or a person who undertakes an activity that caused the land to be *significantly* contaminated, must notify the Minister and MEC ...”. It is understood that the latest iteration of the NEMLA Bill (19 June 2018, which is under consideration by the National Council of Provinces) contemplates amendment to Section 36 (5) as follows: “an owner of the land that is [~~significantly~~] likely to be contaminated, or a person who undertakes an activity that caused the land to be significantly contaminated, must notify the Minister and MEC ...”.

Notification can lead to the Department of Environmental Affairs (DEA) issuing a Remediation Order or an Order to monitor and manage the investigation site which is then added to a Contaminated Land Register. In cases where sites that do not pose risk (and unlikely to pose a risk in the foreseeable future) are listed on the contaminated land register, there is the potential of land devaluation.

At the time of preparing this position paper, NEMWA requires the DEA to include all investigation areas in the Contaminated Land Register. The NEMLA Bill (19 June 2018) also makes provision for the amendment of Section 41, subsections 1, 2 and 3 by replacing the word “investigation” with

“contaminated land”. Once this is passed, it is anticipated that only contaminated land areas will be included in the Contaminated Land Register. This was confirmed by the DEA in a meeting held between the DEA and NICOLA on 5 Dec 2018. Furthermore, the Department recently published the Contaminated Land Register on the SAWIC webpage aligned with the intent of the amendments detailed in the NEMLA Bill (19 June 2018).

It is important to guide the sector on when to notify the Minister and MEC in accordance with NEMWA Section 36(5). According to this Section, notification is required when [significant] contamination is discovered. NICOLA recommends through this paper, that significance be linked to a common understanding of “harm”. Using the object of the Act as stated in Section 2 and the guidance of NEMWA Section 38(1) for the different types of investigation areas, an investigation area is either:

- a) contaminated, presents a [significant] risk [of harm] to health or the environment, and must be remediated urgently;
- b) contaminated, presents a [significant] risk [of harm] to health or the environment, and must be remediated within a specified period;
- c) contaminated and does not present an immediate risk [of harm] but that measures are required to address the monitoring and management of that risk; or
- d) not contaminated [does not pose risk even if land use changes].

2.0 OBJECTIVE

The objective of this paper is to provide clarity and a harmonized approach for the determination of “significance” and hence when to notify under the applicable legislation. A further objective is to clarify the implementation of Part 8 with respect to short- and long-term management of sites included on the contaminated land register.

3.0 DEFINING SIGNIFICANT CONTAMINATION

The Act states (Part 8, Section 37 (3)) that: land may be regarded as being *contaminated* at any particular time if (there is) risk [of harm] to health or the environment even if the risk could eventuate only in certain circumstances and those circumstances do not exist at the time that the site assessment is undertaken, but those circumstances are reasonably foreseeable.

As the aim of the contaminated land register is to NICOLA’s understanding to protect and inform relevant stakeholders of the risks associated with contaminated sites; the following approach is therefore recommended:

It is proposed that ‘*significant contamination*’ be interpreted to represent contamination that presents a ‘*significant risk of harm*’. Therefore, in identifying whether there is ‘*significant contamination*’, it is implied that harm is suspected, or has already occurred (proven risk), or may reasonably be expected to occur (probable / possible risk), which requires action to mitigate. For the purpose of this discussion, the following description of “harm” is proposed:

- 1) Harm to human health: includes health impacts at reasonable levels of concern (derivation of health impacts must be based on defensible assumptions and where site specific data is not available (Tier 1), such assumption must be suitably conservative; where health impacts at reasonable levels of concern exist, risk assessments should be based on site specific information (Tier 2)).

- 2) Harm to the “environment” as defined in the National Environmental Management Act, NEMA Act 107 of 1998¹ includes (but is not limited to) any statistically significant² and quantifiable and adverse change to ecological systems, specie populations, crop yields, terrestrial and aquatic life, property value and areas of historic, architectural, traditional, artistic or archaeological interest.
- 3) Harm to a water resource includes inputs that have or may reasonably be expected to directly or indirectly alter the physical, chemical or biological properties of a water resource so as to make it quantifiably less fit for any beneficial purpose for which it may reasonably be expected to be used.

4.0 INTERPRETATION OF PART 8

Based on the above description of “harm”, and the classification as provided in NEMWA Section 38 (1), NICOLA propose to clarify the implementation of Section 41 as follows for:

An investigation area, which is either:

- (a) *[significantly] contaminated, presents an [immediate proven / probable] risk [of harm] to health or the environment, and must be remediated urgently:*

For these sites, harm has occurred, been caused or is eminent and hence notification is required. The site will be added to the Contaminated Land Register, and the DEA may declare it a remediation site. Under these circumstances, the DEA shall issue a Remediation Order for urgent remediation as is necessary to neutralise the risk of harm.

Engagement is required with respect to the process once the objectives of remediation measures are reached.

- (b) *[significantly] contaminated, presents a [proven / probable/ possible] risk [of harm] to health or the environment, and must be remediated within a specified period:*

For these sites, harm has occurred, been caused or will likely realise in the foreseeable future, hence notification is required. The site will be added to the contaminated land register, and the DEA may declare it a remediation site. Under these circumstances, the DEA shall issue a Remediation Order for remediation within a specific period as is necessary to neutralise the risk of harm.

Engagement is required with respect to the process to be followed once the objectives of remediation measures are reached.

- (c) *contaminated and does not present an immediate [and / or a material] risk [and / or presents a low probability of risk] [of harm] but measures are required to address the monitoring and management of that risk;*

¹ “environment” means the surroundings within which humans exist and that are made up of— (i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and, (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being

² Statistically significant means the likelihood that a relationship between two or more variables is caused by something other than chance.

Within the current legal framework, notification will be required and an Order to 'manage and monitor'³ the risk will likely be issued by the DEA.

Engagement is required with respect to alternatives to such sites being recorded on the contaminated land register. It is proposed that alternative institutional control⁴ mechanisms be contemplated to ensure adequate long-term management of such sites.

(d) *not contaminated [shown to be within established baseline and/or risk-based limits]*.

For these sites, it is proposed that notification will not be required if the Site Assessment (SA) was initiated by the land owner. In cases where the Minister or MEC identified the investigation area in terms of section 36(1) of NEMWA and the SA concludes that the site is not contaminated, the Department closes the file/case. It is understood that no order will be issued by the Department and that the site will not be recorded on the contaminated land register.

5.0 DOCUMENT REVISION

This document is Rev 0 of 0 Revisions and was approved by NICOLA on 26 April 2019. Review comments and suggestions are welcomed. Please submit these to NICOLA Admin (admin@nicola-org.com) with the following Reference: Position Paper Significance.

³ This does imply that the registered sites are managed and monitored, however monitoring is not by default taking samples and analysis. The purpose is to determine whether there are changes that will lead to a re-assessment of the risks associated with the present contamination. This could be triggered by changes in land use, receptors, pathways ect.

⁴ Institutional controls are non-engineered instruments such as administrative and legal controls that help minimize the potential for human exposure to contamination and/or protect the integrity of the remedy