**Environment Alert**

# Contaminated 'Land' – integration of planning and environmental regulation

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On 3 April 2020 the Victorian Government commenced public consultation for the draft amended statutory instruments forming part of the Victorian Planning Policy Framework that will harmonise controls in anticipation of 1 July 2020 when the reformed environmental protection legislation is scheduled to commence.

The draft amended statutory instruments appear to be a rollover with necessary amendments rather than a bold reform resolving long-standing gaps identified by successive Victorian Government reviews – this is a missed opportunity.

Engage Victoria provides the draft amended statutory instruments, the timeline for consultation and release of final instruments, useful explanatory information and the online mechanism for making submissions.

Click here to submit feedback on the proposed updates to the Victorian land use planning system.

**Submissions on the proposed changes have been extended from Tuesday, 5 May 2020 to Tuesday, 2 June 2020.**

The core draft amended statutory instruments (**Draft Amended Statutory Instruments**) include:

- Clause 13.04-1S (Contaminated and potentially contaminated land) (**Amended cl 13.04-1S**)
- Clause 45.03 (Environmental Audit Overlay) (**Amended EAO**)
- Clause 65.01 (Approval of an application or plan) (**Amended cl 65.01**)
- Clause 65.02 (Approval of an application to subdivide land) (**Amended cl 65.02**)
- Clause 73.01 (General terms) (**Amended cl 73.01**)
- Minister's Direction No.1 'Potentially Contaminated Land' (**Amended Minister's Direction**)
- General Practice Note 30 – 'Potentially Contaminated Land' (**Amended Practice Note**)

Several miscellaneous amendments to the Victorian Planning Provisions are also proposed including:

- removing reference to state environment protection policies and waste management policies and inserting reference to the *Environment Reference Standards* and *Environment Protection Regulations 2020 (Vic)* (neither instrument released);
- substituting reference to the new types of permissions under the *Environment Protection Act 2017 (Vic)* (e.g. operating licence, development licence, environmental action notice, site management order);
- substituting references to the new compliance codes, position statements; and
- acknowledgment of the importance of Ministerial Direction No.19 'Ministerial Direction on the preparation and content of amendments that may significantly impact the environment, amenity and human health and Ministerial Requirement for information for authorisation or preparation of amendments that may significantly impact the environment, amenity and human health' (**Minister's Direction No.19**).

The particulars of the miscellaneous amendments have not been released for consultation and are being prepared together with the subordinate legislation under the *Environment Protection Act 2017 (Vic)*, which was previously released for public comment in October 2019.

**Purpose of the Draft Amended Statutory Instruments**

The Draft Amended Statutory Instruments are necessary to harmonise the Victorian Planning Policy Framework with the reformed environment protection legislation scheduled to commence from 1 July 2020.

Please refer to the Russell Kennedy Alert's for more information on the reform to environment protection legislation.

> *Russell Kennedy Alert – 'Reform to Victoria's Environment Legislation'*
>
> *Russell Kennedy Alert – 'Reform of Victoria's Subordinate Environment Legislation'*

Explanatory information published by Engage Victoria under '*FAQs - Why are land use planning amendment being amended?*' identifies that the Draft Amended Statutory Instruments implement recommendations 10.3 and 14.2 of the 'Independent Inquiry into the Environment Protection Authority' (March 2016) (**Independent Inquiry**).

> "Recommendation 10.3
> Develop, as a priority, strengthened land use planning mechanisms that establish and maintain buffers to separate conflicting land uses, avoid encroachment problems, help manage health, safety and amenity impacts, and ensure integration with EPA regulatory requirements.
>
> Recommendation 14.2
> Integrate and strengthen planning and environmental regulation of legacy contamination, through a reform process led by the Department of Environment, Land, Water and Planning to provide a more consistent, risk-based approach to risk screening, assessment and remediation requirements and ongoing compliance mechanisms."

In our opinion, the Draft Amended Statutory Instruments also substantively address recommendations 10.4 and 14.1, which must also be considered to understand why the amendments are proposed and how they are intended to operate.

> "Recommendation 10.4
> Together, the EPA and the Department of Environment, Land, Water and Planning simplify and better integrate EPA regulatory standards and obligations that are to be applied through the planning system, including through the creation of mandatory, measurable and enforceable planning controls that land use planners can more readily understand and apply.
>
> Recommendation 14.1
> The Department of Environment, Land, Water and Planning develop a comprehensive state-wide database of sites that pose a high risk to the community because of their past use, which should link to other relevant government data sources including information held by the EPA."

The Independent Inquiry in framing these recommendations acknowledged the considerable body of work previously undertaken, which included, but was not limited to:

- Report titled 'Managing Contaminated Sites' (Victorian Auditor General's Office, 2011)
- Report titled 'Potentially Contaminated Land' (Advisory Committee, 2012) (**Advisory Committee Report**)
- Report titled 'Managing Landfill' (Victorian Auditor General's Office, 2014)

The Independent Inquiry also acknowledge remarks of the Victorian Civil and Administrative Tribunal and Planning Panels Victoria.

This body of work, the Independent Inquiry and the reformed environment protection legislation must be considered as a whole to fully understand the Draft Amended Statutory Instruments forming part of the Victoria Planning Policy Framework. This also informs what has been retained, what has been inserted, what has been removed and what has been omitted.

The Andrews Government's response (2017)[1] supported each of these recommendations.

The Independent Inquiry recorded:

- in relation to Recommendation 10.4:
  "Effective environmental regulation relies on land use planners being able to understand and consistently apply standards in their day-to-day decision making. Inconsistencies in language and lack of clarity in guidance documents can make this difficult.

  We heard of these difficulties from many local governments – and especially, that they did not have the resources or capabilities to apply EPA requirements. This is a significant issue for the EPA and for the planning system more generally.

  However, we do not consider that it is feasible or appropriate to expand the EPA's role in permit level statutory planning. Nor do we consider it practical for local governments to commission additional 'peer review' advice to help them interpret technical assessments and make decisions."[2]

- in relation to Recommendation 14.2"
  "Land use planning is a key tool for managing risk, in particular, for ensuring people do not live on contaminated sites and contaminated sites are safely redeveloped (with appropriate remediation).
  …
  Legacy risks remind us that the EPA needs to be mindful of the past, present and future, and must calibrate its regulatory responses accordingly."[3]

The Inquiry also cited relevant submissions made by local government including:

- in relation to Recommendation 10.4:
  "Strengthening the various legislative provisions by putting in place clear definitions, clear enforcement responsibilities and more effective requirements for the management and completion of referrals between statutory authorities. (Kingston City Council submission, p. 2.)"[4]

- in relation to Recommendations 14.1, 14.2 and 14.3:
  "Council currently responds to reports of dumped asbestos containing materials on a regular basis at significant investigation, clean up, transport and disposal cost. Council would welcome work by the EPA to identify and remove barriers to the correct disposal of asbestos, as well as any initiatives to encourage businesses, tradespersons and residents to take materials to appropriate facilities for disposal. (Brimbank City Council submission, p. 6)"[5]

[1] 'Andrews Labour Government Response to the Independent Inquiry into the Environment Protection Authority' (Victorian Government, 2017)
[2] Independent Inquiry, pg 194
[3] Independent Inquiry, pg 251
[4] Independent Inquiry, pg 194
[5] Independent Inquiry, pg 259

Important issues identified by the Independent Inquiry in relation to these recommendations include:

- identifying potentially contaminated land → prioritising regulation by risk assessment → proportionate remedial and management response (risk to human health);
- enforcement of conditions attached to statements of environmental audit and recording these conditions on land titles;
- systematic identification of potentially contaminated land;
- regional or area based application of planning controls identifying potentially contaminated land;
- identification and remediation of groundwater contamination; and
- integration of asbestos regulation across all levels of government in the context of land contamination, including buildings and structures.

**Preliminary matters - Definitions**

Before examining the detail of the Draft Amended Statutory Instruments it is important to understand the statutory definition of specific terms.

'Land' is defined in the *Planning and Environment Act 1987 (Vic)* and the *Environment Protection Act 2017 (Vic)* each with different language that is non-exhaustive and with an important distinction.

The definition of 'land' under the *Environment Protection Act 2017 (Vic)* expressly includes groundwater.

The Victorian Planning Provisions being a subordinate instrument will apply the definition from the *Planning and Environment Act 1987 (Vic)*.

Unless these statutory definitions of 'land' are reconciled there will be an irreconcilable difficulty applying environmental assessment and audit decisions under the *Environment Protection Act 2017 (Vic)* with the provisions of the Victorian Planning Provisions and the *Planning and Environment Act 1987 (Vic*) in certain circumstances. This does not currently exist as the definition of 'land' under the Environment Protection Act 1970 (Vic) does not include groundwater.

This uncertainty was recently dealt with by the Deputy President Dwyer in *Almia Pty Ltd v Port Phillip CC* (Red Dot) [2020] VCAT 163 concerning strata titles some floors above ground level. Deputy President Dwyer determined the matter on the definition of 'land' in the planning framework as the case required the interpretation and application of the Victorian Planning Provisions.

The Environment Protection Authority resisted this approach on the basis that completing an environmental audit of a strata title 11 storeys above ground level with no access to the source of the contamination, namely soil and groundwater presenting a vapour or gas risk was futile.

From a scientific perspective the difficulty in auditing an airspace within a building that will be regularly exchanged multiple times a day and is isolated from the source of contamination by physical barriers and distance, is problematic with the outcomes of the environmental audit and reliance on those outcomes into the future being significantly uncertain.

In reality this scenario is far removed from the problem originally addressed when in 1989 the Cain (Jnr) Government introduced the 'Minister's Direction - Rezoning of Industrial Land – Environmental Condition' after the discovery of lead contaminated soil and resumed residential properties in Suspension Street, Ardeer.

A further important aspect to note is that both definitions of 'land' include buildings and other structures permanently affixed to the land. This will be important in relation to application of contamination criteria especially in relation to asbestos.
Uncertainty remains as to whether subsurface infrastructure such as sewers, drains and utility pipelines are 'structures' forming part of 'land' with asbestos again being prevalent.

**Draft Amended Statutory Instruments**

*Amended cl 73.01*

Amended cl 73.01 inserts into the Victorian Planning Provisions for the first time a definition of 'potentially contaminated land'.

While this term is currently defined in the Minister's Direction No.1 – 'Potentially Contaminated Land' (2001) the definition has been changed to significantly broaden its ambit.

The proposed definition is:

> "Potentially contaminated land means land:
> a) used or known to have been used for industry or mining;
> b) used or known to have been used for the storage of chemicals, gas, wastes or liquid fuel above or below ground with the potential to cause contamination; or
>
> where known past or present activities or events on the land or offsite have the potential to have caused contamination."

The proposed definition:

- maintains its adoption of land uses including industry and mining;
- significantly broadens the 'storage of chemicals, gas, wastes or liquid fuel' to remove the previous exclusion where this is ancillary to another use; and
- increases the ambit by inserting activities or events with the potential to cause contamination either on the land or on other land.

This third limb currently forms part of the definition applied in the General Practice Note 30 'Potentially Contaminated Land', which is broader than the current Minister's Direction.

This third limb currently forms part of the definition applied in the General Practice Note 30 'Potentially Contaminated Land', which is broader than the current Minister's Direction.

Inclusion of land contaminated by an offsite source is an important consideration where the contaminant is mobile such as groundwater or subsurface gas.

This underscores the importance of reconciling the divergent definitions of 'land' in the *Planning and Environment Act 1987 (Vic)* and the *Environment Protection Act 2017 (Vic)*.

The removal of the current exclusion of storage of chemicals, gas, waste or liquid fuel where ancillary to another use will substantially broaden the land included in the definition. For example dwellings in a rural area, restaurants/cafes and other residential, rural or commercial land uses that rely on liquefied petroleum gas supply by bottles or back up diesel generators for power. The Amended Practice Note seeks to temper this change, although the Amended Guidance Note is not a subordinate instrument and provides guidance only whereas Amended cl 73.01 will be subordinate instrument that must be applied.

The broadening of the definition is balanced by introducing the preliminary risk screen assessment, which is intended to drop out low risk sites from a full environmental audit. Further, the ability to limit the scope of an environmental audit now provides greater flexibility to provide a proportionate response.
Nevertheless the likely outcome will be a greater application of the Environmental Audit Overlay with a lower level of assessment. The impact of increased development costs for preliminary risk screen assessments needs to be considered in the context of growth strategies and development contributions.

Amended cl 73.01 improves certainty in the construction of the Victorian Planning Provisions and various Local Planning Policy across Victoria.

Reconciliation of the definitions of 'land' in the planning and environment protection legislation will further increase certainty.

Amended cl 73.01 does not adopt all definitions from the Amended Minister's Direction. This omission is a missed opportunity, which will perpetuate uncertainly, particularly in relation to 'sensitive use' as a defined term used in both Amended EAO and Amended cl 13.04-1S.

Other defined terms omitted include 'preliminary risk screen assessment', 'environmental audit' and 'environmental auditor'. A definition of 'site management order' should also be inserted to clause 73.01.

The rationale for adopting a single defined term and omitting the balance is not discussed on the supporting material and is not otherwise obvious in relation to legislative interpretation or the procedure for future amendment.

*Amended cl 13.04-1S*

This clause of the Victorian Planning Provisions is the policy on contaminated land and potential contaminated land.

Amended cl 13.04-1S broadens the objective to expressly include known 'contaminated' land in addition to 'potentially contaminated' land to bring the objective into line with the clause heading.

The drafting of requirements has been simplified by adopting the defined general term 'potentially contaminated land'.

The requirement for remediation has been broadened beyond a future residential use to now address all future 'sensitive use'. Note the definition of 'sensitive use' has also been broadened in the Amended Minister's Direction.

Additional requirements have been inserted both to confirm the site is suitable for a proposed use and development. New requirements:

- assessment of the environmental condition of the 'site'; and
- necessary conditions for management of contamination.

Adoption of the term 'site' in these requirements signals a consistency with the national assessment framework for contaminated sites, which includes all segments of the environment comprising a site, including groundwater.

The *National Environment Protection (Assessment of Site Contamination) Measure 1999, as amended 2013*, remains a policy guideline for the clause.

This national assessment framework is adopted by the *Environment Protection Act 2017 (Vic)*.

This divergence in terminology ('site' as compared with 'land') is a matter that requires resolution together with the definition of 'land' as discussed earlier.
Policy guidelines have also been amended to remove the State Environment Protection Policy (Prevention and Management of Contamination of Land) (**Current Land Policy**) and insert the *Environment Protection Regulations 2020 (Vic)* and the *Environment Reference Standards* which have not yet been finalised.

The Current Land Policy provides an exhaustive definition of 'land' that does not include groundwater.

Amended cl 13.04-1S now has a far greater application having regard to the defined terms adopted.

*Amended cl 65.01 and Amended cl 65.02*

These clauses of the Victorian Planning Provisions identify what matters are required to be considered by the responsible authority when determining or approving a planning permit application, a plan or a plan of subdivision.

The proposed changes insert considerations, as appropriate, of any significant effects the environment, including contamination of land, may have on the use or development.

The proposed amendment is consistent with s 60(1)(e) of the *Planning and Environment Act 1987 (Vic)* with express inclusion of contamination of land as a component of the environment.

In our opinion, this change increases certainty.

*Amended EAO*

The Environmental Audit Overlay has been consistently criticised as a blunt tool which applies a sledge hammer (environmental audit) to all scenarios, when often a more subtle tool (preliminary site investigation or detailed site investigation) would suffice.

The Amended EAO adopts the new preliminary risk screen assessment introduced by the *Environment Protection Act 2017 (Vic)* from 1 July 2020 allowing a tiered site assessment process with the intention that low risk sites will drop out and a full environmental audit will only be required for contaminated sites or sites with a high risk of contamination. The flexibility to vary the scope of an environmental audit will also allow a more focused and proportionate assessment response.

The environmental auditor's opinion expressed in a preliminary risk screen assessment statement and supported by a preliminary risk screen assessment report if determining that an environmental audit is not required will drop out by an exemption incorporated into Amended EAO.

Guidelines yet to be published by the Environment Protection Authority on this form of assessment will be important and should form a 'Policy guideline' for clause 45.03.

These are important changes that will improve the assessment and development of contaminated land and potentially contaminated land in Victoria.

Additional exemptions are inserted including buildings and works which do not change the land use and do not disturb soil.

Again this is a proportionate and pragmatic response to remarks from a series of decisions of the Victorian Civil and Administrative Tribunal, constituted by Senior Member Martin and Senior Member Byard (as he was then) and most recently endorsed by Deputy President Dwyer.

On the face of it this appears to be a sensible exclusion, although it needs to be reconciled with the risk of vapour and gas intrusion. There are examples in Victoria where environmental audits (s 53X of the *Environment Protection Act 1970 (Vic)*) have been completed for strata titles some floors above the ground (i.e. segment of the environment audited is an airspace within a building). While this process has been criticised by some professionals it has nevertheless occurred without the Environment Protection Authority's intervention and has recently been endorsed by the Victorian Civil and Administrative Tribunal in *Almia Pty Ltd v Port Phillip CC* (Red Dot) [2020] VCAT 163 for planning purposes.

The purpose of the Amended EAO has been broadened to:

- apply to 'sensitive uses' changed to also include kindergartens, secondary schools and children's playgrounds including where ancillary to other uses;
- apply to agriculture; and
- apply to public open space.

The existing Victorian Planning Policy Framework leaves the requirement for an environmental assessment for agriculture or public open space as a matter for the satisfaction of the responsible authority or planning authority as the case may be.

This change to a mandatory requirement will increase development costs, but importantly will resolve the transfer of contaminated land to local government through subdivision by the transfer of public open space with significant ongoing management obligations and costs. This is a common occurrence often omitted from development contribution calculations and exacerbated by relocation of contaminated soil and waste to land designated for public open space.

Application of the Amended EAO to agriculture appears to be sensible with proportionality to be achieved by selective application of the Amended EAO. This is likely to be relevant in the context of current practices applying waste to land, such as stabilised biosolids, recycled water and other food or agriculture based wastes such as abattoir effluent.

Application to agriculture should also be carefully considered in the context of compost for broad-acre land application with the continuing discussions between the Environment Protection Authority and industry on how the new 'declaration of use' mechanism is to be applied.

The Amended EAO differentiates between the application of the requirement for an environmental audit for different land uses by alternative triggers.

| **Sensitive use** | **Agriculture** | **Public Open Space** |
|---|---|---|
| - commencement of use<br>- buildings and works<br>- subdivision | - commencement of use<br>- buildings and works | - buildings and works |

The Amended EAO inserts new requirements that recommendations from an environmental audit statement and environmental audit report be:

- carried out ensuring the land is suitable for a specific sensitive use;
- completed prior to the issue of a statement of compliance for subdivision of land allowing a sensitive use; and
- inserted as a condition in a planning permit for use or development (including subdivision).

Drafting of this requirement should be refined to:

- confirm the exclusion of its application from agriculture and public open space, which appears contrary to the requirement for an environmental audit for these land uses;
- avoid confusion given subdivision is a form of development;
- clarify any planning permit condition is to give effect to planning aspects of a recommendation rather than a verbatim duplication of a recommendation which will relate to environmental aspect regulated under the *Environment Protection Act 2017 (Vic)*; and
- provide for reconciliation by future amendment to an environment audit recommendation as currently occurs by amendment to conditions attached to a statement of environmental audit.

Future modifications to recommendations of an environmental audit need to be considered in terms of expiry of planning permits and enforceability beyond expiry.

Currently, some conditions attached to statements of environmental audit apply for a limited duration or to contaminant thresholds such as a groundwater monitoring program. Statements of environmental audit are periodically amended in some instances to address these changes.

The mechanism to allow reconciliation of environmental controls and planning controls requires consideration noting this is an issue the subject of considerable judicial commentary albeit in relation to planning permissions and licences.

This new requirement to impose permit conditions to give effect to environmental audit recommendations seeks to address an important deficiency identified by the Independent Inquiry that being compliance, and where necessary enforcement, of ongoing conditions (or now recommendation) from the environmental audit process.[6]

The debate between the Environment Protection Authority and local councils regarding responsibility for compliance and where necessary enforcement of conditions attached to a statement of environment has persisted since statements of environmental audit were introduced in 1990s. The matter was considered in the Advisory Committee Report with a concluding recommendation that an agreement pursuant to s 173 of the *Planning and Environment Act 1987 (Vic)* be used for ongoing and longer terms obligations and a broader review be undertaken to apply a more simple and effective instrument to be registered on title.[7]

Regardless this requirement of the Amended EAO will be frustrated and remain unfulfilled where there is no requirement for a planning permit (section 1 use) and obviously no decision of the responsible authority allowing a condition to be imposed. This gap remains unresolved.

This gap, albeit in a different context, was also identified by the Advisory Committee in 2012 with the option of inserting a permit trigger into the Environmental Audit Overlay.[8] Any permit trigger should provide for the Environment Protection Authority to be a recommending referral authority.

The drafters have adopted the current approach presumably to avoid the consequential shift for an environmental audit from mandatory to discretionary.

While this is a sound approach the gap remains unresolved. Decisions and remarks of the Victorian Civil and Administrative Tribunal are also missed with the value of quasi-judicial review lost in the absence of a reviewable decision. This valuable contribution, such as that of Deputy President Dwyer's[9] and Senior Member Martin's[10] focuses the attention of the drafters in preparing legislation.

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[6] Independent Inquiry, pg 256
[7] Advisory Committee Report, pgs 48-52
[8] Advisory Committee, pg 28
[9] *Almia Pt Ltd v Port Phillip CC* (Red Dot) [2020] VCAT 163 at [43-45]
[10] *Architype Australia Pty Ltd v Yarra CC* (Red Dot) [2010] VCAT 497

The other option to resolve this gap and the responsibility for compliance and enforcement of environmental audit recommendations is to utilise a new instrument to be introduced by the *Environment Protection Act 2017 (Vic)* – site management orders.

Site management orders will be registered on title and deal with ongoing requirements for managing contaminated land.

In our opinion, this is the preferred approach.

Relevant considerations include:

- improved consistency of compliance and enforcement with a single entity responsible for administration (Environment Protection Authority) rather than varying approaches across Victoria's 79 municipalities;
- authoritative decisions by a singular expert authority, which is responsible for the administration of the balance of the environmental audit program, including auditor conduct and appointment;
- all guidance issued for the environmental audit process is issued by the Environment Protection Authority with limited, if any, consultation with local government;
- the Environment Protection Authority convenes regular meetings with appointed auditors discussing practice matters, with local councils excluded;
- local councils are generally not resourced or skilled to administer compliance and enforcement of environmental audit recommendations;
- local councils are more likely to encounter a conflict of interest as an adjoining or nearby land owner where compliance with an environmental audit has not been achieved (e.g. offsite migration of contamination – the Environment Protection Authority has a limited land holding, if any, in Victoria);
- failure to enforce a s173 agreement exposes the municipal council to civil liability in negligence; and
- the second reading of the Environment Protection Amendment Bill 2018 specifically identifies site management orders as the new tool for securing ongoing management requirements of contaminated land and landfills.

The Second Reading speech states:

> "**Site Management Orders**
>
> The 1970 Act does not provide the EPA with a robust way to ensure that risks of harm from sites with long-term management requirements, like closed landfills and contaminated sites, are effectively managed.
>
> The Bill therefore introduces Site Management Orders, which will be an essential tool in ensuring these long-term risks are appropriately managed for the protection of the surrounding community and environment.
>
> This new regulatory control will attach clear management conditions to the land title to ensure high levels of transparency, and will allow more effective regulation of the risks associated with these types of sites." [11]

Application of site management orders for compliance of environmental audit recommendations is consistent with the approach articulated by the Advisory Committee in 2012 and the Independent Inquiry in 2016.

This is a missed opportunity that should be addressed.

[11] Second Reading, 20 June 2018, pg 2085

*Amended Minister's Direction*

The Amended Minister's Direction lays down the modified definitions of 'sensitive use' and 'potentially contaminated land' discussed earlier. These changes alone broaden the application of the Amended Minister's Direction and the collective Draft Amended Statutory Instruments.

Other definitions are also adopted from the *Environment Protection Act 2017 (Vic)* including 'environmental audit', 'environmental auditor' and 'preliminary risk screen assessment'. 'Site management order' should also be inserted where environmental audit recommendations are to be applied by this new instrument.

The significant change introduced to the Minister's Direction is the new restriction on deferring the requirement for an environmental audit through the scheme amendment process by application of the Environmental Audit Overlay to now only allow this where the planning authority determines that:

- there is a reasonable expectation contamination can be remediated to allow a sensitive use; and
- it is unreasonable or impracticable to complete the environmental audit prior to the amendment having regard to the specific constraints of the land or the nature of the amendment.

This change will compel further assessment in preparation prior to the amendment process, which should increase certainty for the planning authority, submitters and interested stakeholders.

This addresses commentary from Planning Panels Victoria on various amendments dealing with contaminated land.

The Explanatory Statement is removed from the Amended Minister's Direction. It is unclear if this will be re-inserted.

It is noteworthy that the current Explanatory Statement is the repository for the encouragement for planning authorities to satisfy itself that the land is suitable via an environmental audit for any rezoning allowing agriculture of public open space.

*Amended Practice Note*

The Amended Practice Note is doubled in length with additional content addressing the reformed environmental audit process and new mechanisms including preliminary risk screen assessments.

The expanded guidance is useful particularly in relation to the new tiered form of assessment under the Amended EAO.

While the Amended Practice Note is a guidance document only its simplification of content has in some instances resulted in incomplete information that is misleading. For example the stated purpose of an environmental audit omits important elements of the statutory provisions of the *Environment Protection Act 2017 (Vic)*.

The statutory purpose of an environmental audit is to:

- assess the nature and extent of the risk of harm to human health or the environment from contaminated land, waste, pollution or any activity; and
- recommend measures to manage the risk of harm to human health or the environment from contaminated land, waste, pollution or any activity; and
- make recommendations to manage the contaminated land, waste, pollution or activity.[12]

Table 1 should be amended to accurately record the purpose of an environmental audit and a preliminary risk screen assessment.

The statutory purpose of a preliminary risk screen assessment is accurately recorded in the body of text, but is then truncated in Table 1 to be incomplete. The statutory purpose is to:

- assess the likelihood of the presence of contaminated land; and
- determine if an environmental audit is required; and
- recommend the scope for an environmental audit, where an environmental audit is required.[13]

In relation compliance, and where necessary enforcement, of recommendations of an environmental audit the Amended Practice Note provides expanded guidance, albeit ambiguous, expanded guidance. Responsibility for compliance, and where necessary enforcement, is divided on the basis that:

- restrictions on land use (local government responsible);
- application prior to commencement of use or development (local government responsible); and
- ongoing post commencement of use or development (Environment Protection Authority responsible).

While this division is a significant assumption of responsibility by the Environment Protection Authority the division is arbitrary with no origin in legislation.

The Amended Practice Note recognises the function and intended application of site management orders for this purpose by the Environment Protection Authority, but then lays out planning permit conditions for circumstances where the Environment Protection Authority fails to apply a site management order and plays no role in compliance under the permit conditions. This should be amended to require the Environment Protection Authority to be a party to any s 173 agreement together with the local council and the land owner.

In our opinion, the preferred approach is for all environmental audit recommendations to be applied by site management orders.

The Amended Practice Note's commentary on the exclusion of ancillary chemical, gas, waste or fuel is unhelpful creating uncertainty. This is discussed above.

The substantive risk based approach of the existing General Practice Note continues to apply leading to proportionate outcomes.

An opportunity exists for the Amended Practice Note to provide clarification that commencement of remedial works necessary to complete an environmental audit (e.g. excavation and removal of contaminated soil) is exempt from planning permission. In the absence of the exemption the environmental audit process is frustrated and cannot be completed until planning permission is obtained. This run counter to encouraging remediation of contaminated land.

Clarification should be provided on the operation of clause 62.05 and the definition of 'works' in the *Planning and Environment Act 1987 (Vic)*, which provides an exemption to remove any change to the natural condition of land (i.e. that is contamination). A direct, express exclusion would provide greater certainty.

[12] Environment Protection Act 2017, s 208(2)
[13] Environment Protection Act 2017, s 204(2)

**Other matters**

The Draft Amended Statutory Instruments remain silent on how contaminants within a building or structure are to be considered and dealt with noting that buildings and structures form part of 'land'. Asbestos in a deteriorated state (i.e. friable) is an obvious example although other examples will also exist including explosives and radioactive wastes impregnated into structural elements. Asbestos management was an issue identified by the Independent Inquiry in relation to the contaminated land.[14]

Remediation of groundwater was also identified by the Independent Inquiry as an unresolved issue requiring attention.[15] It is unclear if groundwater constitutes part of 'land' under the non-exhaustive definition of the *Planning and Environment Act 1987 (Vic)*.

Currently, groundwater is not part of 'land' as defined by the *Environment Protection Act 1970 (Vic)*, however the environmental audit is expressed to be of a segment/s of the environment and so groundwater has consistently been considered where present to form part of the audit site, which from the late 1990s lead to the evolution of 'clean up to the extent practicable' determinations (**CUTEP**) and groundwater quality restricted use zones (**GQRUZ**).

As identified earlier the definition of 'land' under the *Environment Protection Act 2017 (Vic)* anticipated to commence from 1 July 2020 expressly includes groundwater.

The reform to the environment protection legislation may also resolve some of the procedural difficulties of the existing CUTEP and GQRUZ processes where non-polluter developers are being compelled to provide gratuitous advice to other land owners within the GQRUZ in relation to the risk to existing use of that land and future constraints on development.

In our opinion, this is beyond power and a function that the Environment Protection Authority must fulfil under the legislative provisions as the entity determining CUTEP. This tension continues where EPA has delegated the determination of CUTEP to the environmental auditor.

The Draft Amended Statutory Instruments are silent on the remediation of groundwater contamination, which again is a missed opportunity, particularly in circumstances where the risk of vapour intrusion from contaminated groundwater becomes more prevalent with development of basements increasing.

[14] Independent Inquiry, pgs 258-260
[15] Independent Inquiry, pgs 257-258

## Conclusion

This alert provides an overview and discussion of the major changes introduced by the Draft Amended Statutory Instruments.

We recommend that local government, water corporations, waste and resource recovery entities and property developers commit resources to examine and evaluate the Draft Amended Statutory Instruments and make submissions addressing relevant interests before **Tuesday, 2 June 2020**.

If you would like further information or assistance please contact:


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