
Note regarding current legislative reform at April 2020

The Government has passed two phases of legislative reform to overhaul the *Environment Protection Act 1970*.

The first was the passing of the *Environment Protection Act 2017*. The 2017 Act establishes EPA as an independent statutory authority, and other governance arrangements.

Completing the legislative overhaul is the *Environment Protection Amendment Act 2018* (the Amendment Act) which contains the majority of the environment protection controls.

The Government intends for the *amended 2017 Act* to commence on 1 July 2020 (as a single Act). The 1970 Act will be repealed.

For the purposes of this draft practice note, all references to the Environment Protection Act 2017 refer to the act as it will appear at commencement.

General Practice Note

Potentially Contaminated Land

July 2020

PART 1: INTRODUCTION & BACKGROUND

This General Practice Note applies to both potentially contaminated and contaminated land. It is designed to provide guidance for planners and applicants about:

- How to identify potentially contaminated land
- Contaminated land and the planning system
- The requirements of proponents and permit applicants
- The appropriate level of assessment of contamination in different circumstances
- Appropriate conditions on planning permits
- Circumstances where the Environmental Audit Overlay (EAO) should be applied or removed.

What is potentially contaminated land?

Potentially contaminated land as defined in the Ministerial Direction, Potentially Contaminated Land (Ministerial Direction) and the General terms (clause 73.01) of the Victoria Planning Provisions (VPP):

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
- c) where known past or present activities or events on the land or offsite have the potential to have caused contamination.

The terms industry and mining are broad terms used to describe land use and activities. The VPP defines land use terms at clause 73.03 and displays them as a diagram to show how they relate to each other at Clause 73.04.

The terms specified in the potentially contaminated land definition apply to land uses regardless of whether they are the dominant land use or an ancillary land use. For example, the dominant use of land may be for crop raising but a small portion of the land may have been used in the past for a rural industry. This portion of land may have been significantly contaminated by the rural industry land use regardless of whether it was a separate land use or ancillary.

The effect of the storage definition ((b) above) is not intended to capture the storage of normal ancillary wastes, chemicals or fuel on, for example, a farm, a home or a school. It does not automatically define that land as potentially contaminated for the purpose of the direction. It is nevertheless true that, in some cases, the ancillary storage of these materials could result in contamination and planning authorities should be aware of this.

What is a sensitive use?

The Ministerial Direction and the EAO define a sensitive use as a:

'residential use, child care centre, kindergarten, pre-school centre, primary school, secondary school and children's playground, even if ancillary to another use.'

How is contaminated land considered in the planning system?

The planning system is the primary means for regulating land use and approving development and is an important mechanism for triggering the consideration of contaminated and potentially contaminated land. Development and a change to the use of land can increase the ways people can be exposed to contamination. The planning system seeks to identify and manage risks associated with contamination and make a site safe for its intended purpose. Development of land provides an opportunity to address contamination and mitigate any risks posed to human health, the environment and buildings and structures.

Changes in the use of land and buildings or works can increase the risk of exposure to contaminants. Types of change include:

- a change in land use from industrial to residential or another sensitive use such as a child care centre
- demolishing existing buildings or structures that result in the exposure of soil
- excavation of soil, constructing basements or swimming pools, or changes to building footprints

Planning scheme amendments

The *Planning and Environment Act 1987* requires a planning authority such as a municipal council when preparing a planning scheme or planning scheme amendment to *'take into account any significant effects which it considers the scheme or amendment might have on the environment or which it considers the environment might have on any use or development envisaged in the scheme or amendment'* (section 12).

A planning authority must consider planning schemes policies, including Clause 13.04 -1S of the *Planning Policy Framework* which contains State Planning Policy for potentially contaminated land. Clause 13.04 -1S aims to ensure that contaminated and potentially contaminated land is suitable for its intended future use and development, and that contaminated land is used safely.

The Ministerial Direction Number 1, Potentially Contaminated Land (the Ministerial Direction) requires planning authorities when preparing planning scheme amendments, to satisfy themselves that the environmental conditions of land proposed to be used for a sensitive use, agriculture or public open space are, or will be, suitable for that use and purpose.

Where land is determined to be potentially contaminated and the amendment would allow the land to be used for a sensitive use, agriculture or public open space (whether or not subject to the grant of a permit) the Ministerial Direction specifies that an environmental audit must be undertaken, and any recommendations of the audit are complied with before notice of the amendment is given.

The Ministerial Direction allows, under special circumstances the deferment of an audit by the application of the Environmental Audit Overlay (EAO) to the land.

An audit is not required if the planning authority is satisfied the land has not been used or known to have been used for industry or mining, and a preliminary risk screen assessment statement issued under the *Environment Protection Act 2017*, as amended, has concluded that an environmental audit is not required.

The Ministerial Direction requires a planning authority to satisfy itself that environmental conditions of potentially contaminated land are or will be suitable for sensitive uses to reduce the risk to human health and safety. Because the likelihood of exposure to children (such as ingestion of contaminated soil) is higher and the impact of contamination on children is greater, amendments which propose a residential use, child care centre, kindergarten, pre-school centre, primary school, secondary school, or children’s playground are included.

Planning permits and planning scheme requirements

The *Planning and Environment Act 1987* requires a responsible authority such as a municipal council, before deciding on a planning permit application, to consider ‘any significant effects which the responsible authority considers the use or development may have on the environment or which the responsible authority considers the environment may have on the use or development’ (section 60).

In addition, the VPP requires a responsible authority, before deciding on a permit application, approval of a plan or application to subdivision of land to consider ‘Any significant effects the environment, including the contamination of land may have on the use or development.’ (clause 65.01 and 65.02)

A responsible authority must consider relevant planning scheme policy including clause 13.04 -1S of the *Planning Policy Framework* which contains State Planning Policy for potentially contaminated land. Clause 13.04 -1S aims to ensure that contaminated and potentially contaminated land is suitable for its intended future use and development, and that contaminated land is used safely. Various strategies are outlined including:

- Provision of adequate information on the potential for contamination to have adverse effects on the future land use.
- Imposing permit conditions to ensure contamination is managed so that the site is suitable for a proposed use and development.
- Facilitating the remediation of contaminated land, particularly on sites with potential for development for a sensitive use.

The Environmental Audit Overlay (EAO) is a provision in the *Victoria Planning Provisions* and planning schemes which is designed to ensure the requirement for an environmental audit under the Ministerial Direction is met before the commencement of the sensitive use or any buildings and works associated with that use. The application of the overlay in effect defers the audit requirement in appropriate circumstances.

Requirements outside of the planning system

The management of potentially contaminated land is a shared responsibility, whereby multiple stakeholders are responsible for managing risk.

The *Environment Protection Act 2017* includes a series of duties relevant to the management of contaminated land. These duties apply when waste or pollution is present above background levels and creates a risk of harm.

	General environmental duty	Duty to manage contaminated land	Duty to notify of contaminated land
When	There is a risk of harm from pollution and waste	Contaminated land (regardless of whose activity caused it or when)	Land is contaminated above set thresholds
What	Risks are not minimised so far as is reasonably practicable	Risks of contamination are not minimised so far as is reasonably practicable	EPA is not notified as soon as practicable
Who	Person engaging in the activity	Person in management control of the contamination	Person in management or control of land

The *Environment Protection Act 2017* also introduces a series of remedial notices, including Site Management Orders (SMO). A SMO imposes requirements on the long-term management on a site where EPA reasonably believes long term management actions or conditions are necessary to mitigate contamination and enable the ongoing safe use of the site.

The *Environment Protection Act 2017*, as amended, places a duty on all owners and managers of land to manage the risks from contamination as far as reasonably practicable. This is called the Duty to Manage Contamination Land. It aligns closely to the new General Environmental Duty but focuses on legacy contamination.

Regardless of the planning provisions the requirements of the *Environment Protection Act 2017* apply in all circumstances, including the general environmental duty, the duty to manage contaminated land and the duty to notify of contaminated land.

Whilst most land in Victoria is affected by planning scheme controls, some land such as Commonwealth land is not covered by planning schemes. In some circumstances the planning scheme does not apply to specified Ministers or land. Current exemptions under section 16 of the *Planning and Environment Act 1987* exempt specified Ministers from the need to comply with planning scheme requirements.

A planning scheme may specify certain use and development that does not require a planning permit. For example, the development of a single dwelling on a lot in a General Residential Zone may not require a planning permit and only require a building permit.

Statutory and other assessment tools

The management and assessment of contaminated land can take various forms. EPA Victoria statutory instruments provide the highest level of assessment, whilst other instruments are available that are better suited for lower-risk scenarios.

A revised environmental assessment system was introduced under the *Environment Protection Act 2017*. Environmental audits and preliminary risk screen assessment are available each with a different purpose.

What are the different types of statutory and non-statutory environmental assessment?

Where land has been identified as being potentially contaminated, an assessment of the level of contamination may be necessary before a decision is made about the future use or development of that land. These can take a number of forms.

Desktop Study

A desktop study can be undertaken to determine if potentially contaminating land use, activities or events have occurred. Sources of information can be found in **Part 2** of this document. A desktop study is typically undertaken by a planning or responsible authority.

A desk top study may be undertaken by a suitably qualified environmental professional who may have access to additional sources including those established in:

- Section 3 – Basic Site Information in Schedule B2 of the National Environment Protection (Assessment of Site Contamination) Measure 1999 (As amended 2013).
- Section 3 of Australian Standard AS 4482.1-2005 - Guide to the investigation and sampling of sites with potentially contaminated land.

A desk top study can include the following checks:

- [Victoria Uneearthed](https://www.environment.vic.gov.au/sustainability/victoria-uneearthed) hosts a range of data sets including:
 - Historical business listings (Sands and McDougall directories)
 - Environment Audit Overlay (EAO)
 - EPA Priority Sites Register
 - Completed EPA environmental audits
 - Victorian Landfill Register(link: <https://www.environment.vic.gov.au/sustainability/victoria-uneearthed>);

- Land title information [Landdata website: https://www.landata.vic.gov.au/](https://www.landata.vic.gov.au/);
- Historic aerial images. The DELWP planning website <https://www.planning.vic.gov.au> provides access to VicPlan which includes historic planning zoning and aerial photos.
- Check with local Council
 - For any known contamination
 - Previous Uses
 - Previous planning and Building permits.

Preliminary Site Investigation (PSI)

The standard and process for preparing a Preliminary Site Investigation is established under the National Environment Protection (Assessment of Site Contamination) Measure 1999 (as amended 2013) (NEPM). NEPM outlines the sources of information that should be reviewed under Schedule B2—Guideline on Site Characterisation.

A PSI is primarily a desktop assessment and should be sufficient to identify potential sources of contamination based on the site history, determine potential contaminants of concern, identify areas of potential contamination, identify potential human and ecological receptors and identify potentially affected media (for example soil, groundwater, air). Sampling and testing of the land is not always necessary for a site assessment.

However, if the site history is incomplete and contaminating activities are suspected to have occurred, it may be necessary to undertake a limited preliminary sampling and analysis program to validate suspected contamination. If a thorough site assessment shows a history of non-contaminating activities and there is no other evidence or suspicion of contamination, further investigation is not required. Further advice may be sought from EPA as a referral authority.

Preliminary Risk Screen Assessment (PRSA)

The Environment Protection Act 2017 provides for the PRSA. The intent is for the PRSA to be applied at an early stage of assessing potentially contaminated sites as part of the planning process, to determine the potential for contamination that may affect the current and/or proposed use of a site. The PRSA is not intended to be a broad scale replacement of the Preliminary Site Investigation. The intent of the PRSA is to be a robust mechanism that can be used to assess where the risks of contamination appears low, and resulting in a PRSA which informs:

- The likelihood of the presence of contaminated land
- The need for an environmental audit
 - If an environmental audit is required, to recommend a scope for the environmental audit

Environmental audit

Defined under the *Environment Protection Act 2017*, an environmental audit is an assessment of the nature and extent of the risk of harm to human health and environment from a contaminated site and recommends measures to manage those risks. It aims to identify the environmental quality of a segment of the environment and any detriment to the beneficial uses of that segment. In the case of land, the beneficial uses are linked to land use.

A statutory environmental audit provides for an environmental auditor to undertake an independent assessment of the condition of a site and form an opinion about its suitability for the proposed use. To form such an opinion, the auditor must gather and review sufficient information including site history information and the results of sampling and analysis of soil and possibly groundwater, surface water and air. An environmental audit reflects the condition of the site at the date of issue of the Statement. If the site condition changes, an additional assessment may be required.

Table 1 -Outline of various assessment tools

	Desktop Study	Preliminary Site Investigation	Preliminary Risk Screen Assessment	Environmental audit
Purpose	Gather further evidence on the historical uses of the land	Gather further evidence on if the site is potentially contaminated where it is unclear	To determine whether an environmental audit is required	Determining the sites suitability for the proposed use and management/mitigation requirements
Recommendations prepared by	Responsible, planning authority, or suitably qualified professionals	Suitably Qualified Professional	Environmental Auditor	Environmental Auditor
Method	Desktop investigation of evidence of historical land uses	<ul style="list-style-type: none"> • Desktop investigation • May include limited field investigations and soil sampling • Should be conducted to the standard established under NEPM • Not regulated by EPA 	<ul style="list-style-type: none"> • Desktop investigation and field investigation • Review by an independent auditor appointment by EPA to confirm the reliability of the information • Conducted in accordance with NEPM and EPA standards and guidance • Regulated by EPA 	<ul style="list-style-type: none"> • Desktop investigation and field investigation • Third party review by an independent auditor appointment by EPA to confirm the reliability of the information • Conducted in accordance with NEPM and EPA standards and guidance • Regulated by EPA
Outcomes	List or timeline of the historical land uses at and near the site.	<p>Outcomes can vary, however can include:</p> <ul style="list-style-type: none"> ○ Opinion on the potential for a site to be contaminated ○ Recommendation on whether an environmental audit is required ○ Recommendations for further assessment 	<p>Preliminary Risk Screen Statement which informs:</p> <ul style="list-style-type: none"> ○ The likelihood of the presence of contaminated land ○ The need for an environmental audit ○ If an environmental audit is required, to recommend a scope for the environmental audit 	<ul style="list-style-type: none"> • Audit report that is made available to Council, EPA and published on EPA's website. • Statement of Environmental Audit providing an opinion on the site's suitability for use and any recommendations to control the use.
Distribution and transparency	No	No	<ul style="list-style-type: none"> • Audit report that is made available to Council, EPA and published on EPA's website. 	<ul style="list-style-type: none"> • Audit report that is made available to Council, EPA and published on EPA's website.

What does the Environmental Reference Standard (ERS) do?

An ERS is a reference standard and is not a mandatory compliance requirement. However, decision-makers will be required to take the ERS into account when making certain decisions. For example, when Environment Protection Authority Victoria (EPA) is assessing a development or operating licence application.

The *Environment Protection Act 2017* introduced an Environment Reference Standard (ERS).

The purpose of an ERS is to set out the environmental values that are sought to be achieved or maintained in Victoria. Environmental values are the uses, attributes and functions of the environment that Victorians value.

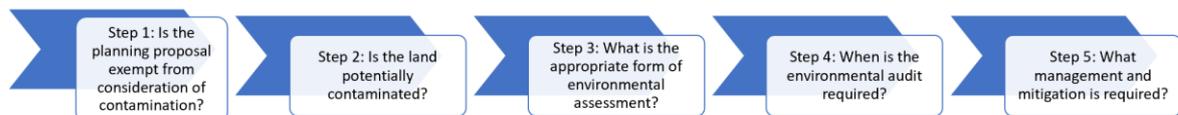
The ERS will provide a foundation for environmental monitoring and reporting. By providing a benchmark for comparing desired outcomes to the actual state of the environment, they enable an understanding of the current condition of the environment and a basis for assessing actual and potential risks to environmental values.

What about EPA guidance?

EPA Victoria publishes guidance material on a whole range of environmental issues. These may provide clear instructions on how best to comply with the environment protection frameworks or may be more risk based and flexible in their application.

The EPA Victoria website hosts the latest guidance information on how best to comply with the environment protection framework.

PART 2: PROCESS FOR MANAGING POTENTIALLY CONTAMINATED LAND



1. Is the proposal exempt from consideration of potential for contamination?

Note: This step is only relevant for planning permit applications. Strategic planning matters should progress to step 2.

On a site with and Environmental Audit Overlay, some works may be exempt from the need to consider potential contamination under the planning provisions, because even where the site was potentially contaminated, the works would not materially increase the risk of exposure to any contamination present, or are needed to address the contamination There include:

- The construction or carrying out of buildings and works which are not associated with a change in land use and do not include soil disturbance.
- Buildings and works that are required by the Environment Protection Authority or an environmental auditor appointed under the *Environment Protection Act 2017* to make the site safe.
- Works that an environmental auditor appointed under the *Environment Protection Act 2017* advises are reasonably required to undertake a preliminary risk screen assessment or environmental audit.

2. Is the land potentially contaminated?

Contamination of land is often a result of current or historical uses and activities that have taken place at a site, or adjacent to it.

2.1 What is the site history?

To determine if land is potentially contaminated land as defined in the VPP and the Ministerial Direction, one or more of the following steps may assist:

- Consider the existing and previous land uses by examining council records, including rates and planning information.
- Inspect the site. Observations should be made regarding evidence of contamination or historical activities that may give rise to contamination. For example, fuel tanks, industrial buildings or infrastructure.
- Identify whether an Environmental Audit Overlay (EAO) exists over the site. Note not all potentially contaminated sites will have an Environmental Audit Overlay.
- Review any Site Analysis presented with a permit application. clauses 54.01-1 (single dwellings) and 55.01-1 (two or more dwellings) of planning schemes require issues of site contamination to be identified.
- Consider any available information about the site:
 - The current and previous zoning, ownership or activities carried out on the site.
 - Council rate and property records are a useful record of this information. Council and State government websites may provide access to historic aerial photos and planning zoning including the State Library Victoria
 - Title searches on Landata.vic.gov.au
 - Any previous reports, investigations or site assessments.
 - Any potential contamination from surrounding land uses (for example, an adjacent service station or industrial drycleaners known to be causing off-site contamination).
 - State or Federal sites including: Mining Licences Near Me by Earth Resources Unexploded Ordnance (UXO) by Australian Government Department of Defence
- Victoria Unearthed is a tool that brings together existing information about potential land and groundwater contamination, historical business listings, and more held by the Environment Protection Authority. Victoria Unearthed is not a definitive source of information about current contamination but can be a useful starting point for finding out more about a piece of land or area. Information sources include;
 - Victorian Landfill Register
 - Environmental Audit Overlay
 - EPA environmental audits
 - Groundwater quality restricted use zones (GQRUZ)
 - Historical business listings - some information from Victoria's Sands & McDougall business directories from 1896, 1925 and 1974

Particular current or past land uses, activities or events on a site can act as an indicator for the collection of more information about the previous uses or activities. Zoning may suggest past land uses but is not a substitute for a review of the site history. In many cases the relevant information should be available from council or EPA records.

If further information is considered necessary, it can be requested from the proponent or applicant. For a permit application either before the application is lodged (pre-application stage) or under section 54 of the Act.

Where there is insufficient information to determine whether land is potentially contaminated, a desktop study or preliminary site investigation by a suitably qualified environmental professional may be requested. Where the applicant submits an assessment, the planning or responsible authority may require the applicant to contribute financially to an independent review of the information by a suitably qualified environmental professional.

3. What is the appropriate form of environmental assessment?

Past or present land uses, or activities might indicate potential contamination

An assessment of the current or previous land uses of a site is an important step in the identification of potentially contaminated land. **Table 3** lists the types of land uses and activities that may have potential for contaminating land.

Where a planning authority is assessing an amendment against the Ministerial Direction No. 1 the uses and activities listed as a high likelihood of contamination would fit the definition of potentially contaminated land. The list of uses and activities in Table 2 is not exhaustive. Other uses and

activities may present contamination risks and site contamination needs to be considered on a case-by-case basis.

Table 2 - Uses and their likelihood of contamination

Potentially Contaminated land or activity: The uses in the table below are associated with a high likelihood of contamination that can significantly affect human health. Includes land used or known to have been used for industry or mining:	
abattoir	glass manufacture
abrasive blasting	iron and steel works
airport	landfill sites/waste depots
asbestos production/disposal	lime works
asphalt manufacturing	materials recycling and transfer stations
automotive repair/engine works	metal coating
battery manufacturing/recycling	metal finishing and treatments
bitumen manufacturing	metal smelting/refining/finishing
boat building/maintenance	mining and extractive industries
breweries/distilleries	oil or gas production/refining
brickworks	pest control depots
chemical manufacturing/storage/blending/treatment / destruction facilities	printing shops
cement manufacture	pulp or paper works
ceramic works	railway yards
coke works	shooting or gun clubs
compost manufacturing	scrap metal recovery
concrete batching	service stations/fuel storage
council works depot	sewage treatment plant
defence works	ship building/breaking yards
drum re-conditioning facility	shipping facilities – bulk (rate <100 t/day)
dry cleaning	stock dipping sites
electrical/electrical components manufacture	tannery (and associated trades)
electricity generation/power station	textile operations
electroplating	timber preserving/treatment
explosives industry	tyre manufacturing
fertiliser manufacture or storage	underground storage tanks
fibreglass reinforced plastic manufacture	utility depots
firefighting or training (use of foams)	waste treatment/incineration/disposal
foundry	wool scouring
Uses and activities where contamination may occur: The uses and activities below have been associated with contamination from diffuse sources, adjacent land or site-specific land use practices. Typically, an assessment is required as to whether the land is potentially contaminated and its extent before it can be determined whether an environmental audit is required or not.	
Ancillary uses or activities	
In some cases, while the land use onsite may be benign, an ancillary land use or even a one-off activity or event has the potential to cause contamination. Examples include known or suspected:	
above ground storage of chemicals or fuels	mass animal burial on agricultural sites
imported fill that contains contaminated land	waste disposal such as illegal dumping
Regional contamination	
Some areas of Victoria have multiple, diffuse sources of contamination, leading to known regional scale contamination issues. Examples include:	
<ul style="list-style-type: none"> ▪ Historic small-scale gold mining spread over a region which has contaminated land ▪ Regional distribution of known contaminated fill. 	
Adjacent contaminating activity	
Sites may become contaminated from pollution migrating from an adjacent source, where the activity has potential to generate mobile contamination in vapour or groundwater. Land adjoining a site that is known to be contaminated or that has a high potential for contamination has a potential for contamination. This risk should be considered for sites adjacent to:	
automotive repair/engine works	electroplating
bitumen manufacturing	fuel storage depot

	chemical manufacturing/storage/blending	gasworks
	council works depot	service station
	defence works	tannery
	dry cleaning	underground storage tanks
	electrical/ electrical components manufacturer	
<p>Note: The list is not exhaustive of the uses which may present contamination risks and site contamination needs to be considered on a case-by-case basis. Where in doubt, a responsible or planning application may contact EPA for advice via phone, e-mail or referring the matter for non-statutory comments under Section 52 of the <i>Planning and Environment Act 1987</i>.</p>		
<p>Unlikely to be contaminated</p> <p>If appropriate assessment shows a history of non-contaminating activities and there is no other evidence or suspicion of contamination, further investigation is not required.</p>		
<p>Note: In some cases, there will be insufficient information available to determine if potentially contaminating activities have occurred in the past (for example there are significant gaps in historical information regarding the activities carried out on the land). Where a planning or responsible authority is wanting to gain additional information for the potential for a site to be contaminated, a desktop study or Preliminary Site Investigation by a suitably qualified environmental professional can be requested.</p>		

4. What level of assessment is required?

Where land has been identified as being potentially contaminated, an assessment of the level of contamination may be necessary before a decision is made about the future use or development of that land. The level of environmental assessment should be proportionate to the level of risk.

The level of environmental assessment necessary for a planning scheme amendment or planning permit application will depend on the statutory requirements and the potential for contamination. In some circumstances such as where an EAO has been applied to land an audit is usually mandatory.

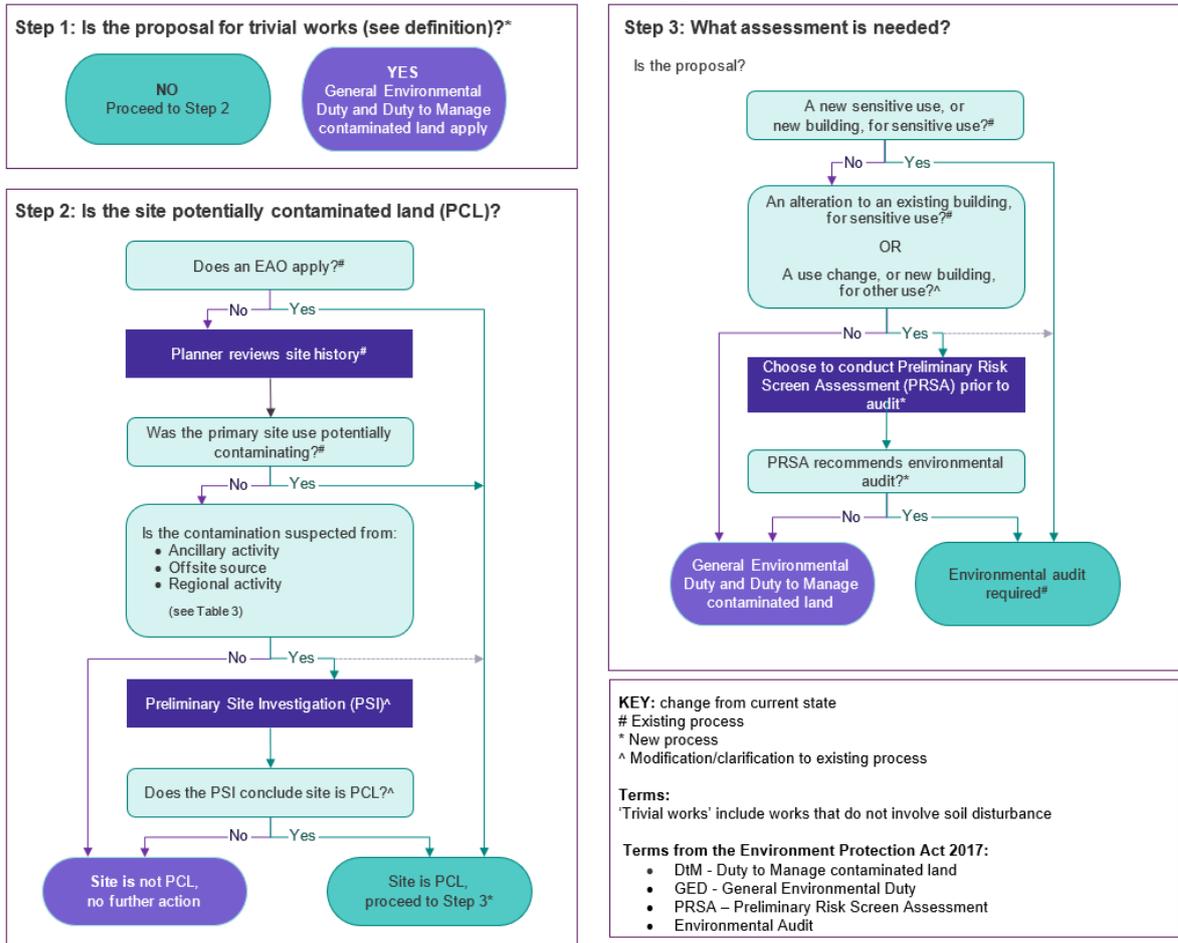
Councils should consider whether further information or advice from an expert should be sought to assist in determining what level of assessment is required. This enables planning decisions to be made with the knowledge of the condition of the site and the most satisfactory site management strategies.

The matrix in Table 3 indicates the recommended assessment level, based on proposed land use and current or historic land uses or activities carried out on the land and the statutory requirements.

Table 3 - Recommended assessment levels

	Categorisation of land		
	EAO applies	Potentially Contaminated land or activity	Uses and activities where contamination may occur
Planning Scheme Amendment			
Ministerial Direction 1 (MDN1) applies. i.e. the amendment will allow a sensitive use public open space or agriculture. The planning authority must satisfy itself whether or not the land is PCL	Presence of an EAO indicates that a previous amendment has already determined the land is PCL. Require an environmental audit	Requirements of MDN1 apply. i.e. requires an environmental audit	Desk top, PSI or Preliminary Risk Screen Assessment. If PCL Requirements of MDN1 apply. i.e. requires an environmental audit
MDN1 does not apply i.e. the amendment will not allow a sensitive use public open space or agriculture. i.e. retail, office, warehouse or industry uses	Presence of an EAO indicates that a previous amendment has already determined the land is PCL. Preliminary Site Investigation, PRSA or audit may be required to satisfy the PA that the intended use of the land is appropriate, and contamination can be managed	Desk top, Preliminary Site Investigation. The result may lead to the PA requiring a PRSA or audit to satisfy the PA that the intended use of the land is appropriate and contamination can be managed	Desk top, Preliminary Site Investigation. The result may lead to the PA requiring a PRSA or audit to satisfy the PA that the intended use of the land is appropriate and contamination can be managed
Planning permit			
Use of land sensitive use	EAO requires an environmental audit before agriculture use or sensitive use commences	Require an environmental audit	Preliminary Risk Screen Assessment
Use of land Non sensitive uses i.e. retail, office, warehouse or industry	EAO requirements do not apply	Preliminary Site Investigation, PRSA?	Preliminary Site Investigation
Development The construction or carrying out of buildings and works	EAO requires an environmental audit before The construction or carrying out of buildings and works in association with a sensitive use commences * exemptions apply	RA may require an environmental audit especially if the construction or carrying out of buildings and works in association with a sensitive use	Preliminary Site Investigation
The issue of a statement of compliance to subdivide land	EAO requires an environmental audit before The issue of a statement of compliance in specified circumstances	Preliminary Site Investigation	Preliminary Site Investigation

Figure 1 - Decision making framework



PLANNING APPROVALS AND CONTAMINATED LAND

When can a preliminary risk screen be used in a planning scheme amendment?

A preliminary risk screen assessment may be useful in strategic planning proposals involving the conversion of large agricultural properties to residential use. For large agricultural sites, often the land may become classified as potentially contaminated due to an ancillary activity affecting a small part of the site. In these cases, while an audit will be required as a new sensitive use will be established, it may be possible to limit the spatial scope of the audit by first conducting a preliminary risk screen assessment to determine the extent of the potential contamination. Should a PRSA be deemed appropriate, it should be required prior to amendment to inform the need for further assessment and planning controls. When is an environmental audit necessary for a planning scheme amendment?

For land that has been identified as potentially contaminated land and where a planning scheme amendment would have the effect of allowing that land to be used for a sensitive use, the Ministerial Direction requires a planning authority to satisfy itself that the land is suitable for the use by a Statement of Environmental Audit issued by an environmental auditor stating that the environmental conditions of the site are suitable for the sensitive use (with or without conditions on the use of the site).

The Ministerial Direction requires that this be done before notice of a planning scheme amendment is given. However, it may be appropriate to delay this requirement if testing of the land before a notice of the amendment is given is difficult or inappropriate. For instance, if the rezoning relates to a large strategic exercise or involves multiple sites in separate ownership. The Ministerial Direction provides for the requirement for an environmental audit to be included in the amendment. This can be done by applying the EAO.

For a proposal to redevelop potentially contaminated land for a use other than a sensitive use (for example, a retail premises or office use), a planning authority can require an environmental audit if it considers it appropriate. Consider the potential for contamination in **Table 2**.

When can a preliminary risk screen assessment (PRSA) be used for assessing a planning permit application?

For proposals with a medium to lower risk of potential contamination a preliminary risk screen can be sought. Some examples of planning permit applications where a preliminary risk screen can be used include:

- buildings or works associated with existing sensitive use
- change in use, subdivision or buildings and works associated with other non-sensitive uses.

Where a preliminary risk screen assessment is required, it must be conducted prior to the planning decision as it determines whether further assessment will be required to determine the suitability for the proposed use or development via an environmental audit.

When is an environmental audit necessary for a planning permit application?

For land that has been identified as potentially contaminated land and where a planning permit application may allow potentially contaminated land to be used for a use including a sensitive use, a Statement of Environmental Audit indicating that the site is suitable for the proposed use may be required. Where an EAO applies a Statement of Environmental Audit may be mandatory.

An environmental audit should be required unless the applicant can demonstrate to the satisfaction of the responsible authority that the site has never been used for a potentially contaminating activity, or that other strategies or programs are in place to effectively manage any contamination.

Public open space and agriculture are not sensitive uses but include an element of risk to the public. Careful consideration should be given to the likelihood of contamination and the need for an environmental audit.

If an environmental audit is required because an EAO is applied over the land, the Statement of Environmental Audit must be issued before the sensitive use or buildings and works associated with the sensitive use can commence. If an EAO has been applied, the planning authority has already made an assessment that the land is potentially contaminated and that it is unlikely to be suitable for a sensitive use without further assessment and remediation works or management.

There may be other circumstances where the land is known to be contaminated and it would be appropriate for the level of contamination to be fully assessed as part of the planning process.

Generally an environmental audit should be provided as early as possible in the planning process. This may not always be possible or reasonable and requiring an environmental audit as a condition of permit may be acceptable if the responsible authority is satisfied that the level of contamination will not prevent the use of the site.

The provision of a PSI or PRS assessment can assist the responsible authority in determining if an audit is required. A PRS assessment may conclude that an audit is not required.

An audit may be required prior to a planning decision where:

- There is uncertainty as to whether the site can practicably be made suitable for the proposed use,
- There will be no subsequent planning approval required for uses or developments which may be at risk from contamination, or
- There will be no practical mechanism available to mitigate or manage any contamination identified during subsequent stages of the planning or development process.

Environmental audit works

The EAO is not a permit trigger and does not prevent works or activities being undertaken that are associated with an environmental audit (such as soil sampling). There are exemptions for specified buildings and works contained in the EAO.

Remediation works

If a planning permit has not been issued for the development, works that are associated with a development that may be considered remediation works (such as excavation or basement construction) should not commence before the completion of an environmental audit.

Where a permit has been issued for a development and a requirement for an environmental audit is a condition of permit, the responsible authority should consider carefully wording the permit conditions to allow early building works that facilitate remediation of the site.

What if long term controls are needed to ensure safe ongoing site management?

A Statement of Environmental Audit usually contains one or more recommendations (or conditions if completed under the *Environment Protection Act 1970* that must be implemented for the site to be suitable for the proposed use. EPA can enforce these recommendations (or conditions) through the duty to manage contaminated Land. EPA may intervene further with stricter controls including the application of a site management order for the site to specifically highlight and control some or all recommendations. A site management order would also be highlighted on the land title. It is the responsibility of the land owner or manager to ensure all recommendations are considered when managing risks from contaminated land.

Under the provisions of the environmental audit overlay a recommendation to manage residual contamination in an environmental audit statement must be carried out to ensure the environmental conditions of the land are suitable for a specified sensitive use.

The planning or responsible authority must consider any recommendations in a Statement and:

- include provisions in a planning scheme amendment or conditions in a planning permit that reflect the requirements of the conditions of the Statement

- require the applicant to demonstrate that the conditions included in the Statement have been or will be met before the use commences
- liaise with other agencies of appropriate jurisdiction where the nature of the conditions means that they are more properly considered by that agency (for example, liaise with the EPA about conditions requiring ongoing management of groundwater).

A responsible authority may require a section 173 agreement under the *Planning and Environment Act 1987* where:

- the conditions on a Statement of Environmental Audit will be ongoing in nature and require maintenance or monitoring such as regular groundwater or waterway testing
- other parties, such as the EPA or a water authority are involved with conditions of an ongoing nature.

Other conditions, such as maintenance of a clay barrier are suitable to include as a planning permit condition.

Where conditions on a Statement of Environmental Audit can be most effectively implemented by another agency, the planning or responsible authority should liaise with that agency and reach agreement about responsibilities and actions. Most commonly this would involve EPA, but on occasions may involve other agencies such as water authorities (for example where conditions requiring ongoing monitoring and management of polluted groundwater are to be imposed).

Planning or responsible authority is responsible for:	Environment Protection Authority is responsible for:
<ul style="list-style-type: none"> • Implementing restrictions on permitted land uses • Recommendations that apply prior to commencement of use or development occupancy 	Implementing ongoing recommendations that apply ongoing post commencement of use or occupancy, either through a Site Management Order or under the Duty to Manage under the Environment Protection Act 2017

Requirements where an environmental audit is a condition of permit

Where an environmental audit is to be completed in response to a condition of a planning permit, it is necessary to carefully word planning permit conditions to not only require an environmental audit statement but to also address the implementation of any statement conditions.

An example of conditions that might be placed on a planning permit is provided below:

1. Prior to the commencement of the use or buildings and works associated with the use (or the certification or issue of a statement of compliance under the *Subdivision Act 1988*) the applicant must provide:
 - (a) An environmental audit statement issued under section 208 of the *Environment Protection Act 2017*. A Statement must state that the site is suitable for the use and development allowed by this permit.
2. Recommendations of the environmental audit statement must be complied with to the satisfaction of the responsible authority, prior to commencement of use of the site. Written confirmation of compliance must be provided by a suitably qualified environmental professional or other suitable person acceptable to the responsible authority. In addition, sign off must be in accordance with any requirements in the Statement conditions regarding verification of works.

In the absence of a site management order and where there are recommendations on a Statement of Environmental Audit that require significant ongoing maintenance and/or monitoring, the following condition might also be used:

3. The applicant may enter into a section 173 Agreement under the *Planning and Environment Act 1987*. The Agreement must be executed on title prior to the commencement of the use and prior to the issue of a Statement of Compliance under the *Subdivision Act 1987*. The applicant must meet all costs associated with drafting and execution of the Agreement, including those incurred by the responsible authority.

How are environmental audit conditions enforced?

Where a responsible authority becomes aware that an occupier is failing to comply with requirements set out in the planning scheme or planning permit, enforcement procedures under the *Planning and Environment Act 1987* are available. These may include planning infringement notices, enforcement orders or prosecution through the Magistrates Court.

Where the failure to comply with Statement conditions results in a site not being suitable for its current use, EPA may issue a Notice under the *Environment Protection Act 2017*. This also applies where the non-compliance results in pollution or a likelihood of pollution of another segment of the environment.

EPA is responsible for ongoing management under a site management order or other remedial notice issued under the *Environment Protection Act 2017*. Depending on the nature of the conditions, other agencies may also have a role in enforcement.

When should an Environmental Audit Overlay be applied?

The Ministerial Direction states that an audit must be done before the giving of notice of the amendment but allows some circumstances where the audit requirement can be deferred. It is only appropriate to defer the audit requirement if the planning authority determines that there is a reasonable expectation contamination can be remediated to allow a sensitive use and due to the specific constraints of the land or the nature of the amendment the requirement it would be unreasonable or impractical.

The Environmental Audit Overlay (EAO) is the mechanism provided in *the Victoria Planning Provisions* and planning schemes to defer the requirements of the Ministerial Direction for an environmental audit until the site is to be developed for a sensitive use. The EAO should not be applied where not specified by the Ministerial Direction. The EAO is not simply a means of identifying land that is or might be contaminated and should not be used for that purpose. Previous zoning is not sufficient reason in itself to justify application of an EAO.

By applying the overlay, the planning authority has made an assessment that the land is potentially contaminated land and is unlikely to be suitable for a sensitive use without more detailed assessment and remediation works or management. The steps set out in 'How is potentially contaminated land identified?' should be used to make this assessment.

Planning authorities should be careful in applying the overlay. Most buildings and works associated with a sensitive use will trigger the need to undertake an environmental audit without an EAO in place. Specifically, even minor buildings and works on the site will trigger assessment requirements which may appear disproportionate to the scale of the works, because there may be an immediate risk under the existing use scenario that needs to be addressed.

Where sensitive uses already exist on a site the planning authority, before applying an EAO, should satisfy itself that these sites are potentially contaminated (through site history records). If there is no evidence of potentially contaminated land it may not be appropriate to apply the EAO to these sites. If the land is confirmed to be potentially contaminated, consult with EPA. Where a sensitive use already exists on a site which the planning authority identifies being potentially contaminated land, EPA should be contacted for guidance, as there may be an existing site risk that needs to be addressed in the short term, rather than relying on the land use planning process in the longer term.

When should an Environmental Audit Overlay be removed?

The planning authority should remove the EAO if it determines that the land is not potentially contaminated land. The steps set out in 'How is potentially contaminated land identified?' will assist this decision.

It is not the intention of the MDN1 to unnecessarily burden land with the application of an EAO. The preference is to undertake an audit at the amendment stage. In some cases, an EAO may have been

applied very broadly, based on information available to the planning authority at the time. Planning authorities can undertake further work to identify and determine if land in an EAO is not potentially contaminated and can amend the planning scheme to remove the EAO from these properties.

In some circumstances where a Statement of Environmental Audit is issued, it may also be possible to remove the EAO. For example, where an audit statement determines the land is not contaminated or the requirements of the audit have been completed and the land has been remediated. The timely removal of an EAO will avoid costly and time-consuming requirements for all parties.

References

- Ministerial Direction No. 1 – Potentially Contaminated Land 2020.
- Victoria Planning Provisions, particularly clauses 13.04 -1S, 15.06, 45.03, 54.01, 55.01, 65 and 73.01. Planning schemes may have local policies and schedules that reference contaminated land.
- Environmental Auditing of Contaminated Land (EPA Publication 860, July 2002)).
- Environmental Auditor (Contaminated Land) Guidelines for Issue of Certificates and Statements of Environmental Audit (EPA Publication 759b, October 2002).
- National Environment Protection (Assessment of Site Contamination) Measure (National Environment Protection Council, 1999).
- *Environment Protection Act 2017*
- *Environment Protection Regulations 2020*
- Environment Reference Standard

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