

**DIRECTION NO.1**

**POTENTIALLY CONTAMINATED LAND**

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**Purpose**

1. The purpose of this Direction is to ensure that potentially contaminated land is suitable for a use which is proposed to be allowed under an amendment to a planning scheme and which could be significantly adversely affected by any contamination.

**Application**

2. This Direction applies to potentially contaminated land.

**Definitions**

3. In this Direction:
  - “potentially contaminated land” means land used or known to have been used for:
    - a) industry,
    - b) mining, or
    - c) the storage of chemicals, gas, wastes or liquid fuel (if not ancillary to another use of the land).
  - “sensitive use” means a residential use, a child care centre, a pre-school centre or a primary school.

**Requirement to be met**

4. In preparing an amendment which would have the effect of allowing (whether or not subject to the grant of a permit) potentially contaminated land to be used for a sensitive use, agriculture or public open space, a planning authority must satisfy itself that the environmental conditions of that land are or will be suitable for that use.

**How a planning authority must satisfy itself - sensitive uses**

5. In satisfying itself in relation to an amendment allowing a sensitive use, a planning authority must comply with either sub-clause (1) or (2):

- (1) Before it gives a copy or notice of the amendment under Section 17, 18 or 19 of the Act, a planning authority must ensure that:
  - a) A certificate of environmental audit has been issued for the land in accordance with Part IXD of the Environment Protection Act 1970, or
  - b) If the amendment allows a sensitive use only in accordance with plans included or referred to in the amendment an environmental auditor appointed under the Environment Protection Act 1970 has made a statement in accordance with Part IXD of that Act that the environmental conditions are suitable for the sensitive use in accordance with those plans.
- (2) A planning authority must include in the amendment a requirement to the effect that before a sensitive use commences or before the construction or carrying out of buildings or works in association with a sensitive use commences:
  - a) A certificate of environmental audit must be issued for the land in accordance with Part IXD of the Environment Protection Act 1970, or
  - b) An environmental auditor appointed under the Environment Protection Act 1970 must make a statement in accordance with Part IXD of that Act that the environmental conditions of that land are suitable for the sensitive use.

### **Exemption by Minister**

6. The Minister or Executive Director, Planning, Heritage and Building Division may grant an exemption from the need to comply with this Direction in relation to a particular amendment. The Minister or Executive Director must consult the Environment Protection Authority before deciding to grant an exemption. An exemption may be granted subject to conditions.”

### **HON JOHN THWAITES MINISTER FOR PLANNING**

Date : 27 September 2001

<b>Amendments to this Direction</b>	
Introduced	9 October 1989
Amended	14 May 1992
Amended	27 September 2001

Planning and Environment Act 1987

Section 12 (2) (a)

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## **EXPLANATORY STATEMENT**

### **Introduction**

Despite our relatively short history, we have witnessed many changes in industrial activity, industrial practices and techniques and in the locations preferred for these activities. In the same period, our environmental and occupational health standards have significantly improved.

It is therefore not surprising to learn that many sites are contaminated as a result of industrial activities and practices which by today's standards would be unacceptable. Some of these sites may have been severely contaminated at a time when records of industrial activity were poorly kept or not kept at all. As industrial activity changes and locational requirements change, industrial sites become available for other uses and rezonings are proposed.

In many cases, this will not pose any significant problems and the provisions of the Planning and Environment Act 1987 allow for appropriate consideration of relevant environment conditions.

### **What is potentially contaminated land ?**

In this Direction, potentially contaminated land is considered to be land used or known to have been used for:

- a) industry;
- b) mining, or
- c) the storage of chemicals, gas, wastes or liquid fuel (if not ancillary to another use of the land).

The effect of the storage definition ((c) above) is to ensure that the storage of normal ancillary wastes, chemicals or fuel on, for example, a farm, a home or a school 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 matters could result in contamination and planning authorities should be aware of this.

Some information about contaminated farm land can be made available from the Department of Food and Agriculture if the relevant owner of the land agrees and if a fee is paid.

If potentially contaminated land is proposed to be rezoned to allow:

- a) Residential use
- b) Public open space
- c) Agriculture
- d) A child care centre, pre-school centre or a primary school,

it is important that planning authorities deliberately satisfy themselves that the environmental conditions of the land are suitable for those uses.

### **What does the Direction do?**

The Direction therefore requires a planning authority to satisfy itself that environmental conditions of potentially contaminated land are or will be suitable for any of the above uses proposed to be allowed under the amendment.

Because the likelihood of ingestion of contaminated soil by young children is higher, the critical rezonings are those amendments to planning schemes which propose residential use, or a child care centre, pre-school or a primary school. In the Direction, these uses are defined as “sensitive” uses.

Under the Environment Protection Act 1970, a certificate of environmental audit may be granted by auditors appointed under that Act to certify that land is suitable for any ‘beneficial use’, as defined in that Act.

### **How must a planning authority satisfy itself?**

The Direction uses this certificate of audit system and requires a planning authority to satisfy itself in one of two ways if an amendment proposes to allow a sensitive use.

#### **Option 1**

Before a notice or copy of the amendment is given :

- A certificate of environmental audit must be issued for the land; or
- An environmental auditor appointed under the Environment Protection Act 1970 has made a statement in accordance with Part IXD of the Act that the environmental conditions of the land are suitable for the proposed sensitive use, if redevelopment plans have been prepared and are referred to in the amendment.

In the latter case the auditor’s statement provides a planning authority with assurance that residual levels of contamination do not prejudice the proposed use. A statement therefore differs from a certificate of environmental audit because the latter provides unqualified assurance that no beneficial use is restricted. Guidelines on the issue of certificates and auditor’s statements have been prepared by the EPA and have been sent to all planning authorities.

#### **Option 2**

If testing of land before a notice or copy of the amendment is given is difficult or inappropriate, a planning authority may alternatively require a certificate or an

auditor's statement at a later date. Under this option, the requirement for a certificate or statement to be issued before a sensitive use commences or buildings or works associated with a sensitive use commences must be included in the amendment.

### **What about open space and agriculture?**

The Direction does not require the issue of a certificate or statement in relation to amendments which allow potentially contaminated land to be used for other purposes. Planning authorities are encouraged to satisfy themselves that the environmental conditions of land are appropriate for its intended use in accordance with the general duties of planning authorities under Section 12 of the Act.

Special care should be taken with amendments which propose open space or agriculture. In relation to open space, planning authorities are encouraged to contact the Environment Protection Authority to discuss appropriate approaches to the development of open space designed to overcome potential problems. For example, the way open space is developed may be critical to avoid potential problems associated with a proposed wetland or an adventure play ground.

In relation to agriculture, planning authorities are encouraged to contact the Department of Natural Resources and Environment on the suitability of the land for its intended agricultural use.

### **What if the amendment affects a large part of the municipality? Can an exemption be sought from the need to comply with the Direction?**

It is recognised that a planning authority's task of complying with this Direction will be significantly harder in relation to amendments affecting all (or large parts) of the municipality. The Direction is not designed to discourage proper reviews of a whole scheme (or large parts of it). Planning authorities undertaking such exercises are encouraged to identify all the potentially contaminated land in the planning area, and to concentrate on satisfying itself about environmental conditions if the uses referred to in Clause 4 of the Direction could be allowed under the relevant amendment.

The nature of the task may make it reasonable to seek an exemption from the Direction and Clause 6 of the Direction enables a request for exemption to be made to the Minister. A ground for exemption may be that the potentially contaminated land is already used for the uses referred to in Clause 4. An exemption may also be appropriate if the form of (for example) prior industry use of the land was particularly benign and extremely unlikely to result in any contamination. Before a request is made, a planning authority should discuss the matter with the Environment Protection Authority.

**More information?**

Advice about the appropriate form of amendments should be sought from the relevant regional office of the Department of Infrastructure.

On issues relating to agriculture, advice should be sought from the relevant local office of the Department of Natural Resources and Environment.

Advice on a particular situation should be sought from the EPA on (03) 9695 2722.