



Environment Protection Authority

Review of contaminated land information on planning certificates in NSW



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Local councils are responsible for preparing planning certificates and ensuring they contain the information that is required by law. The EPA has reviewed the information about contamination found on a selected range of planning certificates and surveyed councils about their processes for preparing this information.

This report sets out the findings of that review and survey, and makes 13 recommendations for improving how contaminated land information is provided.

1. Introduction

Planning certificates, issued under the Environmental Planning and Assessment Act 1979 (EP&A Act), can provide useful information to prospective home buyers. They should include information on land or water contamination – whether the contamination is current, remediated or has never occurred on the site – allowing purchasers to make informed decisions.

In 2020 the NSW Environment Protection Authority (EPA) conducted a review of contaminated land information on planning certificates in NSW (**the review**), to better understand how NSW local councils present contaminated land information on their planning certificates. The review was undertaken with a view to making recommendations, if necessary, that would make such information clearer and more consistent.

The review focused on the provision of information as it relates to section 59(2) of the Contaminated Land Management Act 1997 (CLM Act), but it also looked at contaminated land information in general. The EPA regulates significantly contaminated land in NSW under the CLM Act.

The EPA has made 13 recommendations to help councils present information on contaminated land in planning certificates. They are set out in this document, which is intended for the advice of NSW local councils only.

1.1. Background

This review was conducted to address a recommendation, made by Professor Mark Taylor and Isabella Cosenza in their Review of the New South Wales Environment Protection Authority's Management of Contaminated Sites, about the range and consistency of information provided to purchasers of land that may be contaminated.

Recommendation 30 in Taylor and Cosenza's review was that:

The NSW Government should consider auditing local councils on a regular basis to ensure that they are appropriately making notations of contamination of land on certificates issued under s 149 of the *Environmental Planning and Assessment Act 1979* (NSW).

Taylor and Cosenza also noted the absence of a single cross-government platform for storing contaminated-site information, and made a series of recommendations aimed at consolidating and improving public access to information. The NSW Government accepted these recommendations and the EPA is leading the implementation of the responses.

Regular auditing of planning certificates is not feasible, due to cost. The EPA's review of contaminated land information on planning certificates was designed to gather enough information about the contents of planning certificates to allow it to recommend to councils a clear and consistent approach to presenting information about contaminated land.

1.1.1. Relevant legislation and guidelines

The main legislation and guidelines relevant to contaminated land information on planning certificates are:

- Environmental Planning and Assessment Act 1979 (EP&A Act)
Section 10.7 introduces planning certificates as an instrument to provide information on any land within a council area. As stated under section 10.7(2), the certificates must specify matters relating to the land that are prescribed either by the EP&A Act or arise in connection with another Act.
- Contaminated Land Management Act 1997 (CLM Act)
Section 59(2) prescribes matters to be included on an EP&A Act planning certificate that are

additional to those specified in section 10.7 of that Act (including by any regulations under that section). The matters which section 59(2) of the CLM Act require to be provided on a planning certificate relate to the key regulatory actions of the EPA; that is, whether the site is:

- declared to be significantly contaminated
- subject to a management order, a voluntary management proposal or an ongoing maintenance order
- the subject of a site audit statement
- Contaminated land planning guidelines¹
These guidelines, published by Department of Planning and Environment (DPE) and updated from time to time, describe the information that is required on planning certificates and additional information that DPE recommends be included.

Other instruments may require other contaminated land information to be placed on planning certificates.

1.1.2. Importance of contaminated land information on planning certificates

Under the current contaminated land management framework, planning certificates are the primary way land purchasers are advised about information held by a council regarding actual or potential contamination on the land they may be buying. This allows buyers to make informed decisions about the land they are purchasing (or looking to purchase).

In addition to the information regarding significantly contaminated land set out in section 59(2) of the CLM Act, under section 10.7(5) of the EP&A Act a council may include advice on other relevant matters affecting the land of which it may be aware. This allows information to be provided about:

- potentially contaminating activities that are known to have occurred on the land (as set out in DPE's *Contaminated Land Planning Guidelines*)
- the results of any site investigations held by the council
- any notifications of remediation
- if there is a long-term Environmental Management Plan for residual contamination on the land that must be complied with
- copies of any site audit statements held by the council.

Councils do not incur any liability for advice provided in good faith under section 10.7(2) or section 10.7(5) of the EP&A Act relating to contaminated land.

The EPA may also, under section 88E of the *Conveyancing Act 1919*, impose restrictions on the use of, or impose public positive covenants on, any land to which this section applies for the purpose of the ongoing management of the land and may release or vary any such restriction or covenant. This information can be obtained by purchasing land title certificates, but an evaluation of this information was outside the scope of this review.

¹ The current guidelines are the *Managing Land Contamination Planning Guidelines SEPP 55 – Remediation of Land* (1998). They can be found via www.epa.nsw.gov.au/your-environment/contaminated-land.

1.2. Review process

To better understand how contaminated land information is recorded and presented on planning certificates across NSW, the EPA engaged with 69 local councils through:

- a **survey** with questions on the councils' notation and contaminated land information processes
- a sample of sections **10.7(2) and 10.7(5) planning certificates** purchased from selected councils.

1.2.1. Survey sent to councils

All 128 NSW councils were asked to complete a survey developed by the EPA to ascertain the type of contaminated land information they record and/or include on their planning certificates. This survey contained a series of questions regarding:

- council's process for obtaining contaminated land information published by the EPA
- notations placed on sections 10.7(2) and 10.7(5) planning certificates with respect to section 59 of the CLM Act
- additional contaminated land policies a council may have in place.

Sixty-nine councils returned the survey form to the EPA. Information provided by councils, including copies of their policies and procedures, has been treated confidentially.

See Appendix 1 for a copy of the survey that the EPA sent to councils.

1.2.2. Planning certificates purchased

The EPA purchased 92 planning certificates from 52 councils to gain a better understanding of the information provided to members of the public, including potential buyers of contaminated land, in that local government area. Section 10.7(2) and (5) certificates were mostly purchased from councils for sites that:

- are currently regulated by the EPA
- were formerly regulated by the EPA
- had been notified to, and assessed by, the EPA to determine whether the contamination was significant enough to warrant regulation, but for which the EPA had determined that regulation under the CLM Act was not required.

Where sites contained multiple lots within a Deposited Plan, only one representative lot was selected for the purchase of the certificate.

The councils and planning certificates were chosen to provide a diverse sample across urban and regional NSW.

2. Findings and recommendations

2.1. Summary

The planning certificates and council survey responses were reviewed and, where relevant, compared with one another to give a better understanding of how information is presented.

Councils varied greatly in how they provided contaminated land information on planning certificates.

The EPA understands that some councils do not have dedicated contaminated land staff or policies, and funding and resourcing may affect the quality of information recorded and presented. The findings given below do not apply to all councils, and each council should reflect on its own processes and decide which recommendations are appropriate for it.

All recommendations below are advice only unless otherwise stated. They are aimed at improving the quality and consistency of contaminated land information on planning certificates.

The following findings and recommendations identify both general and specific issues highlighted by the review. Councils have not been identified by name and feedback has not been provided to individual councils.

2.2. Recommendations for councils

2.2.1. Information required under section 59(2) of the CLM Act

- a. **Finding:** The planning certificates reviewed had a wide variety of formats, ranging from a clear list of each of the items in section 59(2)(a)–(e) followed by a ‘yes’ or ‘no’ for each, to no mention at all of section 59 CLM Act matters. Some councils responded in the survey that they do not include the prescribed matters under section 59 of the CLM Act because they do not have a contaminated land policy in place to help guide them, or that council has not needed to include this because it has not had a significantly contaminated site.

Recommendation (a)

Items under section 59(2)(a)–(e) of the CLM Act are prescribed matters for the purposes of the EP&A Act and must be included on section 10.7(2) EP&A Act planning certificates. Councils should make every effort to complete this when producing planning certificates as it is a legislative requirement. When sites are not regulated by the EPA and section 59(2)(a)–(e) is not applicable, councils should still list each of the matters and clearly indicate that the item does not apply to the site.

- b. **Finding:** Many planning certificates showed inconsistencies with the prescribed matters in section 59(2) of the CLM Act as recorded on the EPA’s *Record of notices*. For example, some certificates stated that there was no management order attached to the site (item (2)(b)), even though there is one in place as listed on the EPA’s *Record of notices*. Only half of councils surveyed reported that they check the EPA’s *Record of notices* as part of their process when preparing a planning certificate. The *Record of notices* can be checked on the EPA’s website. Listing the matters in section 59(2) of the CLM Act on the planning certificate is a legal requirement and is vital to providing the land purchaser with the correct information.

Section 3 of this document, *Guidance for section 59 CLM Act matters on EP&A Act planning certificates*, provides examples of how to clearly and accurately present contaminated land information on a planning certificate.

Recommendation (b)

Councils should check the EPA's Record of notices register when creating planning certificates, to confirm the status of a site. Furthermore, if a council is unsure of a site's regulatory status (or if a Notice/Order does not match council records), then it should contact the EPA.

- c. **Finding:** Councils provide varying levels of guidance on how to search for contamination information. Some councils provide contextual information and links to relevant information sources, as in the example below.

Note: This information was sourced from the record under section 58 of the Contaminated Land Management Act 1997, < <http://www.environment.nsw.gov.au/prclmapp/searchregister.aspx> >. If the land does not appear on the record it may still be affected by contamination. For example:

Contamination may be present, but the site has not been regulated by the EPA under the Contaminated Land Management Act 1997.

The EPA may be regulating contamination at the site through a licence or notice under the Protection of the Environment Operations Act 1997.

Contamination at the site may be being managed under the *State Environmental Planning Policy No 55-Remediation of Land*.

Recommendation (c)

Councils should consider providing as much guidance as possible to help people search for any potential contamination information about a site. Where practicable, guidance similar to that provided above should be included as a minimum.

2.2.2. Information recommended by section 10.7(5) of the EP&A Act

- d. **Finding:** Most councils did not include any of this information on their planning certificates; a few did provide some of the information. The EPA understands that this information is not compulsory for inclusion on planning certificates and that it may not be available for every site. However, the EPA's view is that, where possible, it is useful to include such information on the planning certificate to provide relevant site information and transparency for potential buyers.

Recommendation (d)

Where available, councils should consider including site information relevant under section 10.7(5) of the EP&A Act, such as potentially contaminating activities, council site investigations, notifications of remediation and council-held audit statements.

- e. **Finding:** When surveyed, most councils did not say that they provided additional reports, site audit statements or information about potentially contaminating activities on a site. However, some said that this was available if asked for. To reduce time and increase information flow, the EPA considers that councils could provide copies upfront of documents pertaining to section 10.7(5) of the EP&A Act with the planning certificate. The EPA understands that for some sites with a lengthy regulated history, organising these attachments could be very time-consuming, and so councils should use their judgement as to when it is appropriate to offer a notation instead.

Recommendation (e)

Where practicable, councils should provide copies of reports, statements and further information about the site under section 10.7(5) of the EP&A Act with the planning certificate when it is issued. This will provide transparency and reduce the risk of a contaminated land notation being overlooked.

- f. **Finding:** The survey results suggest that for most sites with known potentially contaminating activities, these activities are not included as a section 10.7 (5) additional relevant matter on planning certificates. The certificates that best included this information cited specific previous activities and the potential for contamination. Some other certificates made generic statements, such as:

Council's records show that because of previous use the land may be contaminated. The services of a suitably qualified consultant should be sought to ascertain the degree of contamination, if any, on the land, and its likely effect on the land.

Recommendation (f)

When potentially contaminating activities are known to council, they should be included on the planning certificate.

- g. **Finding:** Some certificates noted only that site audit statements could be provided if requested. It was unclear if this was the type of standard text inserted on every planning certificate, or if there was a specific statement prepared for that site. To reduce confusion, it is recommended that the text clearly state whether a site audit statement for that specific site is available on request.

Recommendation (g)

Where practicable, councils should clearly state if there is a site audit statement available for a site.

- h. **Finding:** Where council policy on contaminated land restricts the use of land, many councils have adopted the following suggested text from the *Managing Land Contamination Planning Guidelines SEPP 55 – Remediation of Land (1998)*:

Council has adopted by resolution a policy on contaminated land which may restrict the development of the land. This policy is implemented when zoning or land use changes are proposed on lands which have previously been used for certain purposes. Consideration of council's adopted policy and the application of provisions under relevant State legislation is warranted.

The meaning of this may be unclear for the general reader without further context, so it is recommended that councils provide explanation, such as:

- why the policy has been adopted for the land in question
- a weblink to the contaminated land policy
- ways to contact the relevant council so that an officer can discuss the site.

Recommendation (h)

Where practicable, councils should provide adequate context when using the suggested Remediation of Land SEPP guideline text around contaminated land policy that restricts development.

2.2.3. Council policies and records

- i. **Finding:** Around a third of councils surveyed did not have a contaminated land policy in place. In some instances, this appears to be a legacy from council amalgamations. Therefore, where available and appropriate, councils could adopt a policy that had been developed by one of the pre-amalgamation councils. The EPA understands that developing policies can be costly and time-consuming: this may be a barrier for some councils, especially those that have very few contaminated sites in their area. At the very least, where a detailed policy is not possible or needed, guidelines should be developed to ensure that a minimum level of site investigation is carried out, and that the required contaminated land information is captured on the planning certificate. These guidelines should be consistent with the current version of DPE's contaminated land planning guidelines (as updated from time to time) and the Remediation of Land SEPP.

Recommendation (i)

Councils should consider developing a contaminated land policy or guidelines where practicable.

- j. **Finding:** Some councils reported having their own contaminated land registers from which they extract information for planning certificates. Such registers give good oversight of contaminated sites within the local government area, and information extraction can be automated to save time. But creating a register can also be costly and time-consuming, and may not be feasible for all councils. Even where a council has its own database of contaminated sites, the EPA still recommends that it check the EPA *Record of notices*, to ensure that it has the most up-to-date site status and does not overlook any Orders or Notices. Council may also wish to refer to the EPA's *List of notified sites* (see section 3.1.1). This list, updated monthly, contains all sites that have been brought to the EPA's attention as potentially contaminated and are being, or have been, assessed. That a site is on this list could be an additional piece of information to include on planning certificates.

Recommendation (j)

Where financially and logistically possible, councils should consider maintaining their own databases of contaminated land, for better oversight of contaminated sites within their local government areas.

2.2.4. Other information

- k. **Finding:** Some certificates did not include an explanation as to who the responsible authority is and where members of the public should go for more information or questions about the site. By including only relevant section 59(2) information, there is no way to make it clear to the general reader that the NSW EPA is the appropriate regulatory authority (ARA). We suggest that simple wording such as the following should be included for clarity:

This site is regulated by XXX [insert Council or the NSW EPA as relevant] and contaminated land enquiries should be directed to it on XXX [insert relevant contact details].

Recommendation (k)

Planning certificates should clarify the appropriate entity to direct enquiries to.

- I. **Finding:** A number of certificates incorrectly used either 'Environmental' or 'Agency' in the EPA's title, or referred to old titles including the 'Department of Environment and Heritage'. The EPA's full statutory name is the NSW Environment Protection Authority. It is a standalone statutory authority established by the Protection of the Environment Administration Act 1991.

Recommendation (l)

Planning certificates should correctly name the NSW Environment Protection Authority, to enable members of the public to identify it easily and ensure document integrity.

- m. **Finding:** Some planning certificates contained spelling and/or grammatical errors as well as what appeared to be editing errors, such as including the list of the items in section 59(2)(a)–(e) of the CLM Act, but without a 'yes' or 'no' after each item to indicate its relevance to the site.

Recommendation (m)

Councils should edit planning certificates before publication to make them easy to understand, help avoid misinterpretation and maintain document integrity.

3. Guidance for section 59 CLM Act matters on EP&A Act planning certificates

3.1. Investigating EPA records

The EPA makes available, free of charge, a public register of notices and orders, and a *List of notified sites*. These can be easily searched by local government area and/or suburb. Councils should check them, both as part of their initial evaluation of a site and before preparing a planning certificate, to ensure that planning certificates contain the latest contaminated land information regarding matters prescribed under section 59(2) of the CLM Act.

3.1.1. List of notified sites

The List of notified sites, which is updated monthly, contains all sites that have been notified to the EPA as being potentially contaminated. Each site includes a regulatory status such as 'contamination currently regulated under CLM Act', 'contamination formerly regulated under the CLM Act', or 'regulation under CLM Act not required'. The list also includes sites that are currently being assessed.

If this is relevant to a site under investigation or for which a planning certificate is being prepared, it may be worth contacting the EPA for further information and noting the following on the planning certificate:

This site appears on the EPA's *List of notified sites* for possible contamination. For more information visit the EPA's website or call 131 555.

3.1.2. Record of notices

The Record of notices is a searchable database maintained by the EPA on its website that contains key regulatory actions taken under the CLM Act, including:

- preliminary investigation orders
- notices of declared contaminated land
- approved voluntary management proposals
- management orders
- ongoing maintenance orders
- site audit statements.

The database specifies which of the notices and orders are current or have been repealed. Section 59(2)(a)–(d) of the CLM Act requires councils to note any prescribed matter that currently applies, and therefore there is no requirement to list former notices and orders. However, under section 59(2)(e) of the CLM Act, any site audit statement provided at any time to the local authority issuing the planning certificate (i.e. council) must be noted. Section 59(3) provides that if advice was provided under section 59(2) on a matter that no longer applies to the land, this must be specified on the planning certificate.

If, in searching either of these databases, council identifies any potential issue with the records of a site, please contact the EPA so we can investigate.

3.2. Notations for prescribed matters on section 10.7(2) EP&A Act planning certificates

Section 59(2) of the CLM Act states:

For the purposes of section 10.7 of the Environmental Planning and Assessment Act 1979, the following matters are prescribed in addition to any other matters, prescribed by the regulations under that section, to be specified in a certificate under that section:

- (a) that the land to which the certificate relates is significantly contaminated land—if the land (or part of the land) is significantly contaminated land at the date when the certificate is issued,*
- (b) that the land to which the certificate relates is subject to a management order—if it is subject to such an order at the date when the certificate is issued,*
- (c) that the land to which the certificate relates is the subject of an approved voluntary management proposal—if it is the subject of such an approved proposal at the date when the certificate is issued,*
- (d) that the land to which the certificate relates is subject to an ongoing maintenance order—if it is subject to such an order at the date when the certificate is issued,*
- (e) that the land to which the certificate relates is the subject of a site audit statement—if a copy of such a statement has been provided at any time to the local authority issuing the certificate.*

To avoid ambiguity, these matters (a)–(e) should ideally be listed on all planning certificates, whether the site includes contamination or not, and each item should be clearly labelled with a bolded ‘yes’ or a ‘no’ to indicate whether it applies to the site. The following format is recommended:

At the date at when this certificate is issued, under section 59 (2) of the Contaminated Land Management Act 1997:

- a. the land (or part of the land) to which the certificate relates is significantly contaminated land
[insert either ‘**YES**’ or ‘**NO**’]
- b. the land to which the certificate relates is subject to a management order
[insert either ‘**YES**’ or ‘**NO**’]
- c. the land to which the certificate relates is the subject of an approved voluntary management proposal
[insert either ‘**YES**’ or ‘**NO**’]
- d. the land to which the certificate relates is subject to an ongoing maintenance order
[insert either ‘**YES**’ or ‘**NO**’]
- e. the land to which the certificate relates is the subject of a site audit statement
[insert either ‘**YES**’ or ‘**NO**’].

In the case where none of the prescribed matters apply, planning certificates could simply note the following, although this is not as clear for people who are not familiar with the CLM Act and may lead to enquiries:

Prescribed matters arising under section 59(2) of the Contaminated Land Management Act 1997: Not applicable.

If a notice or order exists, a copy of the document could be attached to the planning certificate. If this is not feasible, include a link to the EPA's [Record of notices](#) and state that copies of the document(s) are available to view online.

4. Next steps

4.1. Assistance for councils

For regional councils, the EPA's *Council Regional Capacity Building (CRCB)* grants program provides funding to eligible groups of regional councils to employ a skilled contaminated land professional to help develop contaminated land resources such as policies and procedures, improve their technical capacity in contaminated land management, and provide a local source of advice.

Councils that do not have access to a CRCB Officer, and which are seeking more information on any of the recommendations or guidance in this document, should contact the EPA on 131 555.

Appendix 1: Survey



Survey

Contaminated land information on planning certificates

1. Which Council are you from?

Click or tap here to enter text.

2. Has Council got a contaminated land policy document in place?

No

Yes

If yes, please briefly describe what it covers. Please provide a URL link if the policy is available online or attach the document to your return email if it's internal and you have permission.

Click or tap here to enter text.

3. What notations does Council use to describe the matters with respect to significantly contaminated land set out in section 59 of the *Contaminated Land Management Act 1997*?

Click or tap here to enter text.

4. Does Council's process include checking the EPA's public 'list of notified sites' and 'record of notices' when preparing certificates?

No

Yes

If yes, is there a process for advising the EPA if there are differences between the EPA's and Council's records? (e.g. if Lot and DP have changed, or remediation has been completed)

- No
- Yes

If yes, please briefly specify the process

Click or tap here to enter text.

5. If Council records indicate additional information is available that could be provided under s 10.7(5), does the 10.7(2) certificate contain a notation that further information is available if the more detailed certificate is purchased?

- No
- Yes

If yes, please specify the standard notation used

Click or tap here to enter text.

6. With regard to additional information under s 10.7(5), does Council:

- Provide information on previously remediated sites?
Does this include copies of site investigations and notifications of remediation?

Click or tap here to enter text.

- Provide information on potentially contaminating activities, if known?
What wording is used to denote this?

Click or tap here to enter text.

- Provide copies of any site audit statements held by council?

Thank you for participating in this survey.