

# Guideline

## The duty to notify for contaminated land

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### 1. Purpose

This guideline provides guidance on meeting the duty to notify under the *Environmental Protection Act 1994* (the Act) with respect to events, changes in condition or activities on land that either is contaminated or is reasonably likely<sup>1</sup> to be contaminated by a hazardous contaminant. Depending on the circumstances, it may sometimes also be relevant to consider the general guidance on the duty to notify of environmental harm which is found in the EM467 guideline.

The duty to notify in relation to contamination of land can apply to both land that is already listed on the environmental management register (EMR) or contaminated land register (CLR) and to land that is or is reasonably likely to be contaminated and hence may warrant listing on the EMR.

The purpose of these duty to notify provisions is to enable a timely response to contamination hazards by the administering authority (the Department of Environment and Heritage Protection). Its response could be to:

- issue a show cause notice to the owner of the land if there are sufficient grounds to propose listing of land on the EMR or CLR, or
- require an environmental investigation to be conducted and an environmental report prepared, or
- require a site investigation report and/or a site management plan to be prepared and then certified by an approved auditor, or
- undertake another appropriate compliance action, for example by issuing a clean-up notice.

There may also be a duty to notify owners or occupiers of affected or potentially affected land, to enable them to respond to potential impacts; this is addressed in EM467.

### 2. Interpretation of contaminated land in the context of the duty to notify

In the context of sections 320A, 320DA and 320DB of the Act, **contaminated land** is interpreted to mean land, including associated soil, soil gases, surface waters or groundwater, that is:

- contaminated by a hazardous contaminant; or
- reasonably likely to be contaminated by a hazardous contaminant<sup>2</sup>.

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<sup>1,2</sup> Because someone who has a duty to notify in respect of contaminated land may not be certain that the land is contaminated, such a person should notify the administering authority if they think the land is likely to be contaminated

### 3. Responsibilities for the duty to notify with respect to contaminated land

In accordance with sections 320 to 320G of the Act, a duty to notify the administering authority exists for:

- an **owner or occupier** of contaminated land
- an **auditor** who has been commissioned to perform an auditor's function, in accordance with section 568(b) of the Act, i.e. with respect to the certification of a CLID
  - from the time that they have been engaged to perform an auditor's function,
  - until either they provide an auditor's certification or their engagement ceases and they have advised the administering authority accordingly
- a **local government** that has relevant statutory responsibilities with respect to land within a local government area.

The duties to notify applying to these different parties are distinct. There may be circumstances in which more than one party becomes aware of a relevant event, change in condition of the land or a notifiable activity and therefore needs to notify the administering authority.

A written notice is to be provided where a duty to notify arises. The notice must state:

- the notifiable activity that has been, or is being carried out; or
- the nature of the event or change in condition; and
- the circumstances in which the event or change happened.

In addition to the duties of the parties above, a person who has been employed or engaged to perform the regulatory function of a **suitably qualified person** may need to notify their employer or potentially the administering authority (in accordance with the general provision under section 320B). The role of an SQP is specified in sections 564 and 565 of the Act, i.e. to prepare one or other form of contaminated land investigation document (CLID).

Where an SQP or another employee has notified an owner or occupier, the owner or occupier would then have a duty under section 320D of the Act to notify:

- the administering authority within 24 hours
- any occupier or the registered owner of any affected land as soon as practicable.

### 4. Triggers for the duty to notify

#### ***For owners or occupiers, auditors and local governments***

In accordance with sections 320 to 320G of the Act, an owner or occupier, an auditor or a local government should notify the administering authority:

1. Within 24 hours of becoming aware for the first time of the **happening of an event** involving the spillage, leakage, exposure, combustion, mobilisation or other form of dispersal of a contaminant on the relevant land, where the event:
  - a) was not authorised by an instrument listed under section 320A(4) of the Act,
  - b) has not been previously notified by the responsible party (i.e. owner or occupier, auditor or local government), and
  - c) is causing or is reasonably likely to cause serious or material environmental harm

2. Within 24 hours of becoming aware for the first time of a **change in the condition** of land, relative to the previous condition (as either known or reasonably inferred) of the land, where the change in condition
  - a) is either known to be or reasonably known to be likely to relate to the nature or extent or impact of contamination, and
  - b) either is causing or is reasonably likely to cause or constitute serious or material environmental harm
3. Within 20 business days of becoming aware for the first time of a **notifiable activity** (as listed under Schedule 3 of the Act), where the activity:
  - a) is currently being carried out, or
  - b) was previously carried out.

The occurrence of a notifiable activity is considered to provide sufficient grounds to conclude that serious or material environmental harm is reasonably likely to occur.

In accordance with the applicable provisions, the above time periods apply unless the relevant person has a reasonable excuse for not complying within the time period.

***For a suitably qualified person***

Consistent with section 320B of the Act, a duty to notify may also exist for a suitably qualified person, i.e. as a person employed or engaged by an owner or occupier. This duty arises within 24 hours of the suitably qualified person becoming aware for the first time of the happening of an event involving the spillage, leakage, exposure or mobilisation or other form of dispersal of a contaminant on the relevant land, where the event:

- a) was not authorised by an instrument listed under section 320A(4) of the EP Act,
- b) having regard to available information, has caused or is reasonably likely to cause serious or material environmental harm, either on the relevant land or any other affected land.

The suitably qualified person needs to notify the person who has engaged or employed them, or if they cannot contact the latter, then the administering authority.

While there is not a specific obligation for a suitably qualified person to advise an auditor of a notifiable activity or a relevant event or change in condition of land, it would be appropriate and advisable for them to do so given the auditor's role in reviewing the CLID being prepared by the suitably qualified person and the auditor's statutory duty to notify.

***Where notification is needed – an overview***

An owner or occupier, auditor or local government should notify the administering authority where they become aware of:

- an event that is not authorised or a change in condition involving contaminants
  - that is causing or could involve serious or material environmental harm
  - on land that has previously been listed on the EMR on the basis of a notifiable activity
- a notifiable activity either has or is being conducted

***Where notification may not be needed***

The responsible party does not subsequently need to provide a further notification unless

- a new event or notifiable activity is observed or detected
- a further change in condition is detected, involving a credible risk of material or serious environmental harm that was not previously identified (e.g. associated with either additional contaminants or a more elevated level of the same contaminants).

Notification may not be warranted if a responsible party becomes aware of further information about a change in condition while a site investigation report is being prepared, and the administering authority is aware that the forthcoming report will address this information.

However, notification would be warranted if a change in condition either has occurred over a relatively short time or involves a relatively high level of risk of environmental harm.

If it has already been demonstrated through an auditor-certified CLID that land is not contaminated by a hazardous contaminant and is suitable for any use, the detection of a past notifiable activity on the land would not need to be notified.

## **5. Determining if serious or material environmental harm is likely**

To determine whether an event or change in condition is causing or reasonably likely to cause material or serious environmental harm, it may be appropriate to have regard to:

- a) relevant indicators of contamination signalling the extent and nature of harm already caused (see section 8 in this appendix)
- b) the nature and extent of the contaminants
- c) the sensitivity of the local receiving environment, in terms of pathways by which contaminants could cause impacts
- d) the possible effects of the harm over the long-term
- e) any exacerbating factors such as flooding or fire
- f) the criteria for material and serious environmental harm<sup>2</sup> under sections 16 and 17 of the Act.

## **6. Dealing with uncertainty**

The duty to notify arises when the responsible party “becomes aware” of relevant information. Since the risk from contamination need only be “reasonably likely” to cause serious or material environmental harm in order to warrant notification, it is not necessary for a responsible party to have a high measure of certainty before acting on their duty to notify.

At the same time, in order to be “reasonably certain” that sufficient grounds for a notification exist, a responsible party could be justified in seeking further information before notifying the administering authority. In particular, it could be appropriate for a person to seek information confirming that the potential harm is not trivial or negligible and is likely to be material or serious.

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<sup>2</sup> The financial threshold for which includes costs of losses or damages to property or costs of actions to prevent or minimise harm, to rehabilitate or restore the environment to its previous condition, but not associated costs of assessing harm

However, if an event or change in condition may need an urgent response, a notification should be provided promptly on the basis of available information, even if significant uncertainty is involved.

Where a responsible party is uncertain regarding their duty to notify they may:

- notify the administering authority on the basis of available information
- consult the administering authority as to whether notification is warranted.

## **7. Information sources for the duty to notify**

It is recognised that the different parties to whom the Act assigns a duty to notify have substantially different abilities in terms of both competencies and access to relevant information. The circumstances in which the different parties will typically become aware of matters that are required to be notified are:

1. By an **owner or occupier**
  - a) their observation or knowledge of a notifiable activity that has been carried out or is being carried out on the relevant land, or
  - b) their observation or knowledge of an actual event involving contaminants, or
  - c) their observation of a change in condition on the basis of physical indicators of contamination on the relevant land or any affected land that
    - i. would be apparent to any reasonable person, and
    - ii. are of a nature or extent to indicate that serious or material environmental harm has occurred or is reasonably likely to occur, or
  - d) information provided to them by a land contamination professional that explicitly identifies
    - i. the presence of a hazardous contaminant, or
    - ii. the occurrence or reasonably likely occurrence of serious or material environmental harm on the relevant land or any affected land
2. By an **auditor**
  - a) their observation of a notifiable activity that is being carried out on the relevant land, or
  - b) relevant information that they receive from a suitably qualified person who is preparing a CLID for certification by the auditor and submission to the administering authority, or
  - c) relevant information that they receive from a support expert engaged by the auditor to assist them in their evaluation of a CLID, or
  - d) their observation of relevant physical indicators of contamination, but
  - e) only where b), c) or d) provides evidence of
    - i. the presence of a hazardous contaminant, or
    - ii. the occurrence or reasonably likely occurrence of serious or material environmental harm on the relevant land or any other affected land

An auditor should inform their client and any suitably qualified person or support expert who supplied relevant information that they have acted on their duty to notify.

**3. By a local government**

- a) the observation by an employee of
  - i. any unauthorised notifiable activity that is being carried out on the relevant land, or
  - ii. an actual event involving contaminants , or
  - iii. a change in condition on the basis of relevant physical indicators of contamination on the relevant land or any affected land
- b) receipt of information from a person with relevant competencies that identifies
  - i. the presence of a hazardous contaminant, or
  - ii. the occurrence or reasonably likely occurrence of serious or material environmental harm on the relevant land or any affected land

**4. Also, in accordance with section 320B of the Act, a **suitably qualified person** is expected to notify their employer (if this is the owner or occupier) where practicable, and if not then the administering authority, in response to**

- a) their observation of
  - i. an actual event involving contaminants, or
  - ii. relevant physical indicators of an event on the relevant land or any affected land, but
- b) only where a) i or ii provides evidence of
  - i. the presence of a hazardous contaminant, or
  - ii. the occurrence or reasonably likely occurrence of serious or material environmental harm on the relevant land or any other affected land

**8. Examples of indicators of contamination**

An inspection of the relevant land and its surrounds may provide physical indicators of a change in condition resulting from contamination. Examples of indicators of contamination that may correspond to the occurrence or reasonably likely occurrence of material or serious environmental harm are:

- unusual occurrences of illness among people who have had exposure to a contaminated site, where the illness could plausibly relate to contamination
- the presence of chemicals on or in surface water or groundwater at the site (for example, abnormal colouration of the water, odours emanating from the water)
- visible signs of toxic responses to contaminants in flora and fauna (for example, unusual numbers of birds or fish dying on or near the site, dead vegetation within or adjacent to areas of otherwise normal growth)
- liquid or solid chemicals or chemical wastes found on or in the soil during site works, where these substances have not been applied for soil management
- the presence or the storage of bulk liquid dangerous goods on the site with potential for leakage or spillage
- the presence of illegal and/or uncontrolled landfills on site

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- the presence of asbestos as free fibres that may be released to the air environment and affect people either on-site or off-site
- evidence of off-site migration of contaminants into adjacent or nearby environments (for example, residential areas, creeks or wetlands)
- the accumulation of asphyxiating, toxic or flammable gas, or organic vapours, in enclosed spaces or in close proximity to buildings or structures.

Some of these indicators will be observable to a lay person. Others would depend on some level of technical expertise.

Note that this list is not exhaustive and there may be other indicators that are relevant.