



# Consultation Paper:

Amendments proposed following the decision on *Eclipse Resources Pty Ltd v The State of Western Australia [No.4]* (2016) WASC 62

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## Purpose

Following Justice Beech's decision in *Eclipse Resources Pty Ltd v The State of Western Australia [No 4]* (2016) WASC 62, handed down on 9 March 2016 in the Supreme Court of Western Australia, the Department of Water and Environmental Regulation (DWER) proposes amendments to:

- the description of category 63, 64, 65 and 66, and 89 of Schedule 1 of the *Environmental Protection Regulations 1987* (EP Regulations), and
- the *Landfill Waste Classification and Waste Definitions 1996 (as amended December 2009)*<sup>1</sup>(Waste Definitions).

The release of this paper provides an opportunity for government and stakeholders to work together to ensure that these amendments deliver their intended outcomes, and to identify and resolve any unintended consequences of these amendments prior to them taking effect.

## Consultation

DWER welcomes stakeholder comments on the proposed amendments.

Written submissions are encouraged from industry stakeholders and interested community members. To ensure that your submission is as effective as possible, please:

- support your response with evidence and your reasons; and
- where unintended consequences are identified, please suggest alternatives that you believe will resolve the issue.

Please note that by making a written submission you are consenting to your submission being treated as a public document. Your name will be published; however your contact address will be withheld for privacy. If you do not consent to your submission being treated as a public document, you should either mark it as confidential, or specifically identify the parts that you consider confidential, and include an explanation.

DWER may request that a non-confidential summary of the material is also given. It is important to note that, even if your submission is treated as confidential by the Department, it may still be disclosed in accordance with the requirements of the *Freedom of Information Act 1992*, or any other applicable written law.

The Department reserves the right before publishing a submission to delete any content that could be regarded as racially vilifying, derogatory or defamatory to an individual or an organisation.

Written submissions must be received by 5pm (WST) on 2 February 2018.

Submissions may be lodged by email (preferred) to [wastereform@dwer.wa.gov.au](mailto:wastereform@dwer.wa.gov.au) or hard copies can be mailed to:

Project Manager  
Proposed regulatory amendments to categories 63-66, 89  
Department of Water Environmental Regulation  
Locked Bag 33  
CLOISTERS SQUARE WA 6850

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<sup>1</sup> Please refer to <https://www.der.wa.gov.au/images/documents/our-services/approvals-and-licences/landfillwasteclassificationandwastedefinitions1996.pdf> for a copy of the Waste Definitions.

## Introduction

The decision of Justice Beech in *Eclipse Resources Pty Ltd v The State of Western Australia [No 4]* (2016) WASC 62 handed down on 9 March 2016 clarified the application of the waste levy in Western Australia. The decision has also had unintended consequences in relation to the use of clean fill for development in certain circumstances and liability for the waste levy under the *Waste Avoidance and Resource Recovery Levy Act 2007* (WARR Levy Act) and licensing requirements under the *Environmental Protection Act 1986* (EP Act). Accordingly, DWER has reviewed Schedule 1 of the EP Regulations to ensure that the use of clean fill for development can continue without the requirement for a licence or liability for the waste levy. In addition, amendments are proposed to allow for the use of uncontaminated fill that meets environmental and health standards after testing without the need for a licence or payment of the waste levy.

Amendments are proposed to the description of category 63, 64, 65 and 66 prescribed premises in Part 1, Schedule 1 of the EP Regulations regarding the definition of 'waste' that is 'accepted for burial' by a third party.

The proposed amendments provide that premises that have only ever accepted 'uncontaminated fill' or 'clean fill' (as defined in the Waste Definitions) for burial are not category 63 to 66 prescribed premises, and as a result are not subject to the licensing regime under Part V Division 3 of the EP Act or liable to pay the waste levy (for categories 63 to 65) under the *Waste Avoidance and Resource Recovery Levy Act 2007* (WARR Levy Act) and *Waste Avoidance and Resource Recovery Levy Regulations 2008* (WARR Levy Regulations).

Amendments are also proposed to the Waste Definitions to include a definition for 'uncontaminated fill' and a revised definition for 'clean fill'. 'Uncontaminated fill' will include inert type 1 waste (excluding asphalt and biosolids) meeting specified thresholds for chemical substances and relevant physical attributes, as determined by sampling and testing requirements.

The revised definition of 'clean fill' in the Waste Definitions is proposed to be limited to raw excavated natural material that meets specified requirements including that it has been excavated from non-contaminated areas, does not contain any acid sulfate soil, does not contain any other type of waste and has not been re-excavated or removed from the earth or subject to processing of any kind.

The definition of 'clean fill' will be consistent with Justice Beech's determination in the *Eclipse* decision that 'clean fill' excludes material containing building rubble such as broken concrete or bricks.

The use of 'clean fill' and 'uncontaminated fill' as defined in the amended Waste Definitions document by occupiers of premises will not pose any risk of harm to human health or the environment.

Through this consultation paper, DWER is seeking advice and input from industry stakeholders and interested community members as to whether these proposed amendments would result in any unintended consequences.

## Legislative Context

The EP Act, EP Regulations, WARR Levy Act and WARR Levy Regulations provide the legislative and regulatory context for Justice Beech's findings and decision in the *Eclipse* case relating to the waste levy.

Part V Division 3 of the EP Act regulates emissions and discharges caused by occupiers of prescribed premises defined in Schedule 1 of the EP Regulations.

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Schedule 1 of the EP Regulations defines category 63, 64, 65 and 66 as landfill premises at which waste, as determined by the waste type in the Waste Definitions for the relevant landfill<sup>2</sup>, is accepted for burial.

For category 63 and 64 prescribed premises the amount of waste accepted for burial must meet a minimum threshold<sup>3</sup>.

Category 63, 64, 65 and 66 prescribed premises are required to be licensed under Part V Division 3 of the EP Act.

The WARR Levy Act imposes a liability to pay the waste levy in respect of waste received at 'disposal premises'. The WARR Levy Regulations prescribe the levy payable in respect of waste received and disposed of at landfill premises. Landfill premises are defined as premises specified in category 63, 64 or 65 of Schedule 1 of the EP Regulations in respect of which a licence is held or that would, if the occupier of the premises held a licence in respect of the premises as required under the EP Act, be a licensed landfill.

Copies of the EP Act, EP Regulations, WARR Levy Act and WARR Levy Regulations are available at [www.slp.wa.gov.au/legislation/statutes.nsf/main\\_mrtitle\\_1400\\_homepage.html](http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_1400_homepage.html).

## Proposed Amendments

DWER has identified the need for amendments such that the requirement for an EP Act licence, and consequently payment of the waste levy, do not apply to sites using fill that does not pose a risk of harm to the environment or human health.

The amendments set out below are intended to provide a level of certainty and clarity to industry stakeholders on the relationship between licence requirements, the waste levy and use of fill.

### Amendments to category 63 to 66, and 89 of the EP Regulations

DWER proposes to amend the category descriptions such that those sites which have only ever accepted 'uncontaminated fill' or 'clean fill' are not required to be licensed as category 63 to 66 prescribed premises, and consequently are not liable for the waste levy under regulation 12(1) of the WARR Levy Regulations for categories 63, 64 or 65. The draft regulation amendments are at Appendix A of this paper.

The proposed category 63 to 66 amendments do not apply to those premises that have previously accepted or currently accept waste other than 'uncontaminated' or 'clean fill'. This excludes those sites that may pose a significant risk of harm to human health and the environment and prevents occupiers from avoiding potential levy liability.

Although not subject to the licensing regime under Part V Division 3 of the EP Act or the waste levy regime, category 89 putrescible landfill premises under Part 2, Schedule 1 of the EP Regulations, which may be registered by the occupier of those premises<sup>4</sup>, are also proposed to be amended for consistency (see Appendix A).

### Amendment of Waste Definitions

Alongside the proposal to amend category 63 to 66, and 89 of the EP Regulations, DWER proposes to amend the Waste Definitions to include a definition for the term 'uncontaminated fill' and amend the definition of 'clean fill'. The definitions for 'uncontaminated fill' and 'clean fill' as proposed for

<sup>2</sup> Category 63 prescribed premises are a 'class I inert landfill site', category 64 prescribed premises are a 'class II or III putrescible landfill site' category 65 prescribed premises are a 'class IV secure landfill site' and category 66 prescribed premises are a 'class V intractable landfill site'.

<sup>3</sup> The 'production or design capacity' threshold amounts per year for category 63 premises are 500 tonnes or more a year and for category 64 premises are 20 tonnes or more a year.

<sup>4</sup> See regulation 5A of the EP Regulations.

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inclusion in the Waste Definitions document are contained in Appendix B of this paper.

The term 'uncontaminated fill' consists of inert type 1 waste, excluding asphalt and biosolids, which meets specified maximum concentrations (thresholds) of chemical substances and limits of relevant physical attributes (set out in Table 6 of the Waste Definitions), as determined by specified sampling and testing requirements (set out in Table 7 of the Waste Definitions).

The existing definition of 'clean fill'<sup>5</sup> in the Waste Definitions is revised to be limited to raw excavated natural material that meets the following requirements:

- has been excavated or removed from the earth in areas that are not contaminated with manufactured chemicals, or with process residues, as a result of industrial, commercial, mining or agricultural activities;
- does not contain any acid sulfate soil;
- does not contain any other type of waste; and
- has not since it was excavated or removed from the earth, been used or subject to processing of any kind.

The definition of 'waste'<sup>6</sup> in the Waste Definitions is also removed so as to ensure consistency with the definition of waste under section 3(1) of the EP Act and section 3(1) of the WARR Act.

## Next steps

This paper is available for public comment until 2 February 2018. Following public consultation and discussions with key stakeholders, DWER will publish a Consultation Summary Report with regulatory amendments proposed to take effect by early 2018.

## References

### Policy Documents

*Landfill Waste Classification and Waste Definitions 1996*

### Legislation

*Environmental Protection Act 1986*

*Environmental Protection Regulations 1987*

*Waste Avoidance and Resource Recovery Act 2007*

*Waste Avoidance and Resource Recovery Levy Act 2007*

*Waste Avoidance and Resource Recovery Regulations 2008*

*Waste Avoidance and Resource Recovery Levy Regulations 2008*

Copies of the above legislation are available at

[www.slp.wa.gov.au/legislation/statutes.nsf/main\\_mrtitle\\_1400\\_homepage.html](http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_1400_homepage.html)

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<sup>5</sup> See 'Definition' heading on page 4 of the Waste Definitions for the definition of clean fill.

<sup>6</sup> See 'Definition' section, page 5 of the Waste Definitions for the definition of waste.

## Appendix A – Environmental Protection (Amendment) Regulations 2017

Western Australia

### Environmental Protection Amendment Regulations 2017

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Environmental Protection Act 1986

## **Environmental Protection Amendment Regulations 2017**

Made by the Governor in Executive Council.

**1. Citation**

These regulations are the *Environmental Protection Amendment Regulations 2017*.

**2. Commencement**

These regulations come into operation as follows —

- (a) regulations 1 and 2 — on the day on which these regulations are published in the *Gazette*;
- (b) the rest of the regulations — on the day after that day.

**3. Regulations amended**

These regulations amend the *Environmental Protection Regulations 1987*.

**4. Regulation 2AA amended**

- (1) In regulation 2AA insert in alphabetical order:

***clean fill premises*** means premises on which all of the waste that is, or has ever been, accepted for burial is ***uncontaminated fill*** or ***clean fill***, as determined by reference to the *Landfill Waste Classification and Waste Definitions 1996*;

***Landfill Waste Classification and Waste Definitions 1996*** means the document of that name

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published by the Chief Executive Officer as amended from time to time.

- (2) In regulation 2AA in the definition of *head office* delete “Australia.” and insert:

Australia;

Note: The heading to amended regulation 2AA is to read:

**Terms used**

**5. Schedule 1 amended**

- (1) In Schedule 1 delete items 63 to 66 and insert:

63	Class I inert landfill site: premises (other than clean fill premises) on which waste of a type permitted for disposal for this category of prescribed premises, in accordance with the <i>Landfill Waste Classification and Waste Definitions 1996</i> , is accepted for burial.	500 tonnes or more per year
64	Class II or III putrescible landfill site: premises (other than clean fill premises) on which waste of a type permitted for disposal for this category of prescribed premises, in accordance with the <i>Landfill Waste Classification and Waste Definitions 1996</i> , is accepted for burial.	20 tonnes or more per year
65	Class IV secure landfill site: premises (other than clean fill premises) on which waste of a type permitted for disposal for this category of prescribed premises, in accordance with the <i>Landfill Waste Classification and Waste Definitions 1996</i> , is accepted for burial.	Not applicable

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66 Class V intractable landfill site: premises (other than clean fill premises) on which waste of a type permitted for disposal for this category of prescribed premises, in accordance with the *Landfill Waste Classification and Waste Definitions 1996*, is accepted for burial. Not applicable

(2) In Schedule 1 delete item 89 and insert:

89 Putrescible landfill site: premises (other than clean fill premises) on which waste of a type permitted for disposal for this category of prescribed premises, in accordance with the *Landfill Waste Classification and Waste Definitions 1996*, is accepted for burial. More than 20 but less than 5 000 tonnes per year

Clerk of the Executive Council.

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## Appendix B – Amendments to the Waste Definitions

**clean fill** means raw excavated natural material such as clay, gravel, sand, soil or rock fines that:

- (a) has been excavated or removed from the earth in areas that are not contaminated with manufactured chemicals, or with process residues, as a result of industrial, commercial, mining or agricultural activities;
- (b) does not contain any acid sulfate soil;
- (c) does not contain any other type of waste; and
- (d) has not, since it was excavated or removed from the earth, been used or subject to processing of any kind.

**uncontaminated fill** means inert waste type 1 (excluding asphalt and biosolids) that meets the requirements set out in Table 1, as determined by sampling and testing carried out in accordance with the requirements set out in Table 2.

**Table 1 Maximum concentrations (thresholds) of chemical substances and limits of relevant physical attributes for uncontaminated fill**

Parameter	Maximum Concentration* mg/kg, dry weight	Leaching test* ASLP, µg/L
Metals & metalloids		
Aluminium	-	55
Antimony	20	3
Arsenic	20	10
Barium	200	-
Beryllium	2	-
Cadmium	1	0.2
Chromium III	30	10
Chromium VI	1	1
Cobalt	15	1
Copper	50	1
Lead	110	3
Manganese	500	500
Mercury (inorganic)	0.5	0.05
Molybdenum	40	35
Nickel	10	10
Selenium	1	5
Silver	20	0.05
Thallium	1	0.8
Tin (inorganic)	50	-

Parameter	Maximum Concentration* mg/kg, dry weight	Leaching test* ASLP, µg/L
Uranium	25	0.5
Vanadium	25	-
Zinc	50	10
Other Inorganics		
Asbestos	0.001%**	-
Sulfate	2,500	-
Cyanides	50 complexed 10 free	5 as CN
Ammonia as N	-	400
Fluoride	400	120
Total nitrogen		2000
Total phosphorus	-	200
<b>Organic Compounds</b>		
Benzene	0.5	1
Toluene	10	180
Ethyl benzene	2	5
Xylene (total)	2	600 sum
Total recoverable hydrocarbons (C <sub>6</sub> -C <sub>10</sub> )	45	-
Total recoverable hydrocarbons (>C <sub>10</sub> -C <sub>16</sub> )	25	-
Total recoverable hydrocarbons (>C <sub>16</sub> -C <sub>34</sub> )	300	-
Total recoverable hydrocarbons (>C <sub>34</sub> -C <sub>40</sub> )	2800	-
Naphthalene	3	15
Benzo[a]pyrene	1	0.01
Carcinogenic polycyclic aromatic hydrocarbons (PAHs) as BaP TEQ (8 species)	3	-
Total PAHs*** (16 species)	300	-
Phenol	1	320
Cresols		2 (sum)

Parameter	Maximum Concentration* mg/kg, dry weight	Leaching test* ASLP, µg/L
PCBs	1	-
<b>PFAS</b>	To be based on Meeting of Environment Ministers	
PFOS + PFHxS		
PFOA		
<b>Pesticides</b>		
Aldrin plus dieldrin	1	0.001
DDT+DDD+DDE	3	0.006 DDT 0.03 DDE
Other pesticides	Leaching test	< ADWG <sup>+</sup>
<b>Physical attributes</b>		
pH (pH units)	6 to 9	6.5 – 8.5

\* Both total concentration and leaching analyses are required to assess the quality of the fill material unless no value is included in Table 1 (indicated by '-')

\*\* The asbestos content (in any form) must not exceed 0.001% asbestos weight for weight (w/w), (Guidelines for managing asbestos at construction and demolition waste recycling facilities, Department of Water and Environmental Regulation (2012)).

+ Australian Drinking Water Guidelines. The relevant compounds to be tested should be informed by the source of the fill material.

\*\*\* Carcinogenic PAHs (as B(a)P TEQ): is based on the eight carcinogenic polycyclic aromatic hydrocarbons (PAHs) listed below and their potency relative to benzo(a)pyrene. The B(a)P toxicity equivalence quotient (TEQ) is calculated by multiplying the concentration of each carcinogenic PAH in the sample by its B(a)P Total Equivalent Factor (TEF), given below, and summing these products.

PAH species	TEF	PAH species	TEF
Benzo(a)anthracene	0.1	Benzo(g,h,i)perylene	0.01
Benzo(a)pyrene	1	Chrysene	0.01
Benzo(b+j)fluoranthene	0.1	Dibenz(a,h)anthracene	1
Benzo(k)fluoranthene	0.1	Indeno(1,2,3-c,d)pyrene	0.1

**Table 2 The minimum sampling and testing standards for uncontaminated fill**

Activity	Minimum requirements
Sampling	Method 3.1 or Method 3.2 in the Australian Standard 1141 Methods for sampling and testing aggregates
	Number of samples according to the National Environment Protection (Assessment of Site Contamination) Measure 1999 (ASC NEPM), Volume 3, Schedule 2, Section 7.5.2
Testing	Laboratory is currently accredited by the National Association of Testing Authorities, Australia (NATA)