Project Manager
Proposed regulatory amendments to categories 63-66, 89
Dept. of Water & Environmental Regulation (DWER)
Locked Bag 33
Cloisters Sq.
Perth WA 6850

Issued via email to wastereform@dwer.wa.gov.au

1st February 2018

Our Ref: Consultation Paper: Amendments proposed following the decision on Eclipse Resources v The State of Western Australia [No.4] (2016) WASC 62.

DWER Ref: Amendments to Schedule 1 of the Environmental Protection Regulations 1987. Version Nov 2017.

Introduction:

The Instant Waste Management (IWM) group of companies is an industry leader in the recycling of Construction & Demolition Waste (C&D waste) & manages many other commercial or industrial waste types. Its wider group structure, has licenced capacity (annual tonnage), to manage well over half of all the Waste Authority reported C&D waste within metropolitan Western Australia.

As a privately owned family business with over twenty years of experience in the waste sector. IWM is in a unique position to provide advice on circular supply chain management. Social and economic arguments for a reduced level of regulation on the use of Class I waste material, as a viable alternative to our states' finite quarried basic raw materials. Particularly, when considering the five million tonnes per annual shortage of "fill" supply, against the ongoing demand needed each year by the civil earthworks & land development sectors.

IWM has been heavily engaged in actively lobbying and policy advocacy for over five years. With state executive representation & C&D waste working group membership in the Waste Management Association of Australia. It was a founding member of the lobbying group, of privately owned companies that formed up the WA Waste Industry Alliance & was approached to form WA's new industry only association.

Background:

In the context of this consultation paper & other guidance testing regimes released by DWER on the waste classification of many types of recycled materials. We have, in the past been asked to work with the state government's working group, to develop the publicly released consultation paper in 2014. Called the "*End of Waste*" guidelines. These have since been retracted &/or are still under a "long-term review", since early 2016. With no set date for their reintroduction given by the DWER.

This was, in our opinion, a direct result of the pending court decision between Eclipse Resources & the WA state government. As the "End of Waste" guidelines had a similar mechanism, to that of the New South Wales "Exemption Scheme for recycled materials"; for materials that no longer wished to be defined as a "waste" under the EP Regulations… but instead referred to as a "product" under the broader terms of Consumer Protection Law. (Therefore, not liable for landfill levy exposure, which ended up in excess of $10M listed in the courts' findings).

Since the court ruling, (in favour of the Western Australian State Government in the aforementioned Eclipse legal matter). The use of recycled materials have incurred unwanted "commercial risk", when used in any land development & construction recycling activities. As the legal definition of the term "Waste", now includes recycled fill and clean virgin fill material, that is moved from one place to another, as it becomes surplus to requirements.

This has had unwanted ramifications on the recycling, civil and earthwork sector… A land developer, can potentially incur landfill levy for the use of "Clean Fill" virgin basic raw material or the use of more environmentally friendly products, like that of reprocessed inert class one construction waste into viable recycled materials like "Un-contaminated Fill", when conducting cut & fill civil works prior to the construction of roads and houses etc.

Instant Waste Management
PO Box 419 Morley BC, WA 6943
Telephone: +61 8 9379 2111
Facsimile: +61 8 9379 2444
Email: info@instantwaste.com.au
www.instantwaste.com.au

Additionally, the legal risk of having the land development listed as “Contaminated Land” on the actual Title Deed. Whenever recycled materials (uncontaminated fill) or clean fill, “has ever been used on that plot of land”. Has led to a decline in the use of recycled materials and in some cases increased stockpiles of viable recycled materials, which have been manufactured via well regarded, quality assurance process, for safe structural & environmental use. (Based on the land developers’ geotechnical engineers specification & their environmental consultants’ assessment against National Environmental Protection Measurements when appropriate).

This demand for recycled fill material is primarily driven by its low cost & the documented shortage in supply of virgin raw materials (Green Growth Plan recommendations) & more importantly the economic & social benefits of using recycled materials, in preference to a finite virgin sand. In such well recognised programmes as the EnviroDevelopment’ s leaf accreditation scheme for using recycled “materials” & also recycling “waste” to above industry best practice levels.

The commercial risk of using imported materials was temporarily addressed on Clean Fill, by a formal letter from the Director General of the DER (Jason Banks) to the Western Australian CEO of the Urban Development Industry Association, after the Eclipse case. This letter clarified that the intent of the landfill levy wasn’t to incur a levy revenue on the movement of “clean fill” materials from land development A, to land development B. Only to incur levy on those licenced landfill sites that buried waste under their relevant licenced landfill categories.

No such document was ever provided from the DER to the recycling sector or its industry associations regarding recycled fill sand or other recycled materials. This, when partnered with a lack of purchasing & the retraction of specifications of other recycled materials types by state government’s procurement agencies, (eg. Main Roads WA). Has led to a position where C&D waste recycling market development has stagnated due to interference from government regulators & unforeseen case law legislation.

Recommendations:

We believe that the DWER’s intent of the proposed amendments to Schedule 1 of the EP Regulations 1987, is driven by a desire to regulate the clean fill & un-contaminated fill market. To drive market uptake by other government agencies & the wider market.

However…. the high cost implication of the suggested testing regime has “no sound economic modelling”. The >$500 estimated cost per test per sample and a simple cut and paste review of the required testing regime sampling frequency from the Victorian EP, (one test every 25m3 or one test every 250m3), if the Upper Confidence Limits of >95% of all testing results, pass the proposed levels detailed in pages 9 – 12 Table 1: (*Maximum concentrations of chemical substances & limits of relevant physical attributes for uncontaminated fill*).

The unwanted market effect of these testing costs, is a uneconomically sustainable cash flow increase on recycled material manufacturing costs and an increase in the recycled materials ex-yard price of up to $20+GST per tonne! On a viable recycled material, sold across Perth for as little as $2+GST per tonne from licenced DWER sites. (A cheaper price, than that of its virgin basic raw material competitor). Even subsidy of the proposed high level of testing will not support the typical cash flow model of this low margin product during manufacturing.

The use of the maximum concentration mg/kg dry weight levels and leaching testing to similar levels, as if the testing was conducted on a Contaminated site. Is inferring a very risk adverse approach to an inert material, which is listed as a class one waste type at point of generation and category of waste acceptance. The desire to protect the water table from perceived contaminates is a valid point but the drinking water levels implied in table 1 (referenced above) for heavy metals etc. is so high that potentially rain water passing through natural ground would most likely fail the test results, does seen very excessive. We would recommend an approach similar to that of New South Wales regarding the use of recycled materials and the determining of the status of fill as “end of waste” & a manufactured product.

On that note, please see that attached legal reviews from two difference legal practices. That also highlight that even if the testing results are past & documents produced to prove that the material is classed as “Uncontaminated fill” it would in fact still be a waste by-product and by case law, subject to the landfill levy. Particularly if the site also accepted recycled materials like road base or compost for landscaping.

Yours Faithfully

Jake Hickey

Jake Hickey
State Resource Development Manager
Website: www.instantwaste.com.au

Instant Waste Management
PO Box 419 Morley BC, WA 6943
Telephone: +61 8 9379 2111
Facsimile: +61 8 9379 2444
Email: info@instantwaste.com.au
www.instantwaste.com.au

SQUIRE PATTON BOGGS

Amendments to the Environmental Protection Regulations

The Department for Water and Environmental Regulation (DWER) has released a consultation paper outlining its long-anticipated proposals to address the application of the "landfill levy", 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 release of the consultation paper provides an opportunity for government 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. Comments are invited until 2 February 2018.

The *Eclipse* decision clarified the application of the waste levy in Western Australia. It 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 Regulations) and licensing requirements under the Environmental Protection Act 1986 (EP Act).

Proposed Amendments

DWER has identified the need for amendments, which are intended to remove premises that only accept uncontaminated waste and "clean fill" from the scope of the levy and licensing regime. This will be achieved by:

- Amending categories 63-66 of Schedule 1, Environmental Protection Regulations 1987 (EP Regulations) to exclude "clean fill premises"
- Including a new definition of "uncontaminated fill" and amending the definition of "clean fill" in the DWER's Landfill Waste Classifications and Waste Definitions document to replace the concept of waste that has "no harmful effects on the environment" with a prescriptive definition, specifying the types of uncontaminated materials that are clean fill

These amendments, examined in further detail below, intend to provide a level of certainty and clarity to industry stakeholders on the relationship between licence requirements, the waste levy and use of fill.

Amendment to Category 63 to 66, and 89 of the EP Regulations

DWER proposes to amend the category descriptions such that those sites that 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 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, are also proposed to be amended for consistency.

Amendment of Waste Definitions

DWER proposes to amend the Waste Definitions to include a definition for the term "uncontaminated fill" and amend the definition of "clean fill".

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" 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 sulphate soil
- Does not contain any other type of waste
- Has not, since it was excavated or removed from the earth, been used or subject to processing of any kind

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

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

Further Action

The release of the consultation paper provides an opportunity for government 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. Comments are invited until 2 February 2018.

To discuss the amendments of the implications of the *Eclipse* decision for your business, please speak to your usual Squire Patton Boggs contact or one of the lawyers listed below.

Contacts

Margie Tannock
Partner, Perth
T +61 8 9429 7456
E margie.tannock@squirepb.com

Charlotte Osborne
Senior Associate, Perth
T +61 8 9429 7592
E charlotte.osborne@squirepb.com

LSV Borrello
Lawyers

Comments and notes regarding the *Consultation Paper : Amendments proposed following the decision on Eclipse Resources Pty Ltd v The State of Western Australia [No.4] (2016) WASC 62*, dated November 2017 (***Consultation Paper***), produced by the Western Australian Department of Water and Environmental Regulation (***DWER***).*

1. The Consultation Paper proposes amendments to the *Environmental Protection Regulations 1987* (***EP Regs***) and the *Landfill Classification and Waste Definitions 1996* (***Waste Definitions***) (***Proposed Amendments***).

2. Under the statutory framework for the landfill levy, the levy is only imposed in relation to premises that are either licensed under the *Environmental Protection Act 1986* (***EP Act***) or are required to be licensed under the EP Act. This arises because if premises are not either licensed, or required to be licensed, under the EP Act, then there is no applicable mechanism under the *Waste Avoidance and Resource Recovery Levy Regulations 2008* (***WARRL Regs***) by which to calculate or assess the amount of the levy that is payable.

3. The Proposed Amendments to the EP Regs seek to exclude certain premises – to be called **clean fill premises** – from the need for licensing under the EP Act if they only receive certain types of waste, the effect of which will be that the disposal of those types of waste at those type premises will not attract the levy.

4. The Proposed Amendments refer to 2 types of waste – **uncontaminated fill** and **clean fill** – to be defined in the Waste Definitions.

5. **Clean fill** is to be defined as "*raw excavated natural material such as clay, gravel, sand, or rock fines*" that also satisfies 4 other criteria, which include that the area from which the material was excavated or removed was not contaminated with manufactured chemicals or with process residues as a result of industrial, commercial, mining or agricultural activities, and that the material has not been

* This document is produced by LSV Borrello Lawyers. It is intended to provide general information in summary form on the topic, current at the time of first publication. The contents do not constitute legal advice and should not be relied upon as such. For further information or advice on these matters, please contact **Julius Skinner**, whose details appear at the end of this document.

used or subject to processing of any kind since being excavated or removed from the earth. In essence, this is referring only to "virgin" material.

6. **Uncontaminated fill** is to be defined as "*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 sets out various maximum concentrations of chemical substances and limits of physical attributes that must be met.

   Table 2 provides that the sampling requirements are "*Method 3.1 or Method 3.2 in the Australian Standard 1141 Methods for sampling and testing aggregates*" and "*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*".

   Table 2 also provides that the testing requirements are that the laboratory is currently accredited by the National Association of Testing Authorities, Australia (NATA).

7. Of note, the Proposed Amendments do not exclude either clean fill or uncontaminated fill from being "waste". In accordance with findings of the Supreme Court and the Court of Appeal in the ***Eclipse Resources Pty Ltd*** decisions, these types of material will still be "waste" where they are superfluous, leftover or unwanted in the hands of the person or entity excavating, removing or producing them.

8. As a result, the Proposed Amendments do not generally exclude the landfill levy from applying to these types of material, only in connection with clean fill premises.

9. This also means that where specifications for works etc exclude the use of "waste" materials for the works, the uncertainty regarding the use of uncontaminated fill, and even clean fill, which arises from the ***Eclipse Resources Pty Ltd*** decisions will remain.

10. The Proposed Amendments provide that premises will only be clean fill premises if they are "*premises on which <u>all</u> of the waste that <u>is</u>, <u>or has ever been</u>, <u>accepted for burial</u>*" is either uncontaminated fill or clean fill (my emphasis). Several points can be made about this.

11. First, the exclusion from the levy will only apply to uncontaminated fill or clean fill at premises where these are the <u>only</u> types of waste that are received. Unless one of the other existing exemptions is applicable, the levy will continue to apply to uncontaminated fill and clean fill at any premises where other types of waste are also received (if the premises are licensed or required to be licensed under the EP Act) – because both uncontaminated fill and clean fill are still considered to be "waste".

12. Second, the criteria is whether any other type of waste is accepted for burial at the premises, not (for example) whether any other type of waste is either "received at" the premises or "disposed of to landfill" at the premises. There may not appear to be much difference between these various terms, but both the Court of Appeal and the Supreme Court in the ***Eclipse Resources Pty Ltd*** decisions found that there are differences. In short, "accepted for burial" requires more than simply being "received at", but is broader than "disposed of to landfill" (ie. material can be "accepted for burial" even though it is not ultimately "disposed of to landfill").

13. The Court of Appeal ([2017] WASCA 90) dealt with the proper meaning of the phrase "accepted for burial" at paragraphs [188]-[194], agreeing with and adopting the findings of the Supreme Court in the original decision ([2016] WASC 62). In summary, the Court of Appeal found that the determination is to be made at the time of receipt of the material at the premises, and that the phrase refers to material that is taken or received for the direct or immediate purpose of being put in the ground and covered with earth. This applies whether or not there may be a more remote or future objective, to be fulfilled after the premises have ceased to be used for landfill (such as a future use of the land), but is also used in contrast to phrases that appear in the definitions of other categories of licensed premises under the EP Regs, such as "discharged onto land or into waters" (C19, C20, C22), "stored, reprocessed, treated or irrigated" (C61) or "stored pending processing" (C67A).

14. Third, and most important, the exclusion from the levy will only apply if uncontaminated fill or clean fill is the only type of waste that is, or has ever been accepted for burial at the premises. This raises serious practical difficulties and limitations for the exclusion of the levy.

15. Presumably the owner/occupier of premises will be required to satisfy the DWER that the requirements to be clean fill premises are satisfied.

16. For "virgin" sites at which there has never been any burial of materials, this may not pose any difficulties – although, to take an extreme position, the criteria is not whether material has *in fact been buried* at the premises, but whether material other than uncontaminated fill or clean fill has ever been accepted for burial at the premises.

17. However, for any site at which there has ever been some burial of materials in the past (including any site any at which any filling or change of levels has ever taken place), it will be necessary to satisfy the DWER that all of that material is either uncontaminated fill or clean fill.

18. Note that this aspect of the definition of clean fill premises is not limited to premises that were previously licensed under the EP Act to accept other types of waste, or at which other forms of waste have been received in the past in quantities that would have required licensing under the EP Act. Rather, if any waste has ever been accepted for burial at the premises, it appears to be necessary to demonstrate that all of that waste is either uncontaminated fill or clean fill. This means that premises will be excluded from being clean fill premises even if the amount of waste other than uncontaminated waste or clean fill that has

in the past been accepted for burial is less than the threshold amount that would have required licensing under the EP Act.

19. Going back to the criteria to be satisfied for **clean fill** in the Waste Definitions (referred to above), it is clear that it will often be impossible to demonstrate that those criteria are satisfied in relation to historical filling, for which little or no source information may be available.

20. As to **uncontaminated fill**, assuming for the moment that it is *possible* to sample and test historical fill in the manner set out in Table 2 in order to determine whether the requirements of Table 1 are met, there is a question as to how *practicable* this might be for fill that is already in the ground.

21. Of even more difficulty, is the relevant time at which the requirements of Table 1 must be met for the purposes of the definition of clean fill premises. It appears likely from the language of the definition and having regard to the purpose of the definition, that the relevant time is at the time the material is accepted for burial. But, how is this able to be demonstrated by sampling and testing that takes place some time (perhaps years) after the material was accepted for burial, in circumstances where some of the substances or attributes included in Table 1 change over time? This aspect, at least, requires further review – and consideration should be given to clarifying that, at least in relation to historical material, the relevant time is at the time of the sampling/testing that is carried out.

22. Another unusual and perhaps unsatisfactory outcome of the Proposed Amendments is that same material – clean fill and uncontaminated fill – when used for the same purpose as fill for land, will either attract the levy or not attract the levy depending only on the historical use of the premises at which it is used.

23. The effect of this is a significant discrimination against existing fill sites. As noted above, it may well be impracticable, if not impossible, to satisfy the criteria for a clean fill site in respect of an existing fill site, meaning that existing fill sites are likely to either be abandoned or will only be able to be filled with material other than uncontaminated fill or clean fill (because the availability of new sites where uncontaminated fill or clean fill can be used without attracting the levy will ensure that it will be uneconomic to use either uncontaminated fill or clean fill at a site where the use of that material will attract the levy).

24. A further practical difficulty or risk arises from the fact that the definition of clean fill premises is applied as an exclusion or exception to the definition of various categories of licensed premises in the EP Regs. It is up to the owner/occupier of premises to determine whether the premises require licensing under the EP Act, by reference to the definitions in the EP Regs – but the Proposed Amendments do not involve the licensing of clean fill premises, which would require a positive determination by the DWER as to whether the criteria in the definition are satisfied. Nor do the Proposed Amendments provide for an application to be made to the DWER for a determination as to whether or not premises are clean fill premises, which would also require a positive determination by the DWER as to whether the criteria in the definition are satisfied. Rather, the Proposed Amendments provide that premises do not require licensing if the criteria in the

definition of clean fill premises are satisfied, placing the onus on the owner/occupier to determine whether the criteria in the definition are met, in order to determine whether or not it is necessary to apply for one of the categories of licences.

25. This risk arises in circumstances where the consequences of "getting it wrong" are significant – both in terms of the landfill levy unexpectedly being applicable to the material accepted for burial, and also a breach of the EP Act requirement for licensing of the premises.

For further information or advice on these and other matters relating to the application of the landfill levy, the decisions of the Court of Appeal or the Supreme Court in the ***Eclipse Resources Pty Ltd*** matters, or the contents and proposals contained in the Consultation Paper, please contact **Julius Skinner**, Principal, at our Perth office.

A: Level 14, 225 St Georges Terrace, Perth WA 6000
T: 9404 9100
E: j.skinner@lsvb.com.au