



Review of the *Contaminated Sites Act 2003*

Discussion paper

SUBMISSION COVER SHEET

Complete and email this form with your submission by

Monday 24 February 2014.

**To assist us in collating stakeholder responses, please submit in Word format.
PLEASE DO NOT SEND PDF DOCUMENTS**

Submissions will be published on the DER webpage, however, personal contact details will not be made public.

Email to: consitesreview@der.wa.gov.au

This submission is written on behalf of (individual or organisation name):

Association of Mining and Exploration Companies (AMEC)

Please indicate which best describes you / your organisation:

Academic	<input type="checkbox"/>	Member of the public	<input type="checkbox"/>	Professional association	<input type="checkbox"/>
Auditor	<input type="checkbox"/>	Industry	<input type="checkbox"/>	Real estate	<input type="checkbox"/>
Community group	<input type="checkbox"/>	Legal practitioner	<input type="checkbox"/>	State agency	<input type="checkbox"/>
Developer	<input type="checkbox"/>	Local government	<input type="checkbox"/>	Other (specify)	<input type="checkbox"/>
Environmental consultant	<input type="checkbox"/>	Planning consultant	<input type="checkbox"/>	Industry Association	<input checked="" type="checkbox"/>

Contact person			
Position	AMEC		
Email		Fax	
Phone		Mobile	
Postal address		State	
Suburb / city		Post code	
Number of pages (including this cover sheet)			

Review of the
Contaminated Sites Act 2003
Discussion paper

Response template

To get the most out of your feedback, **please provide examples and relevant data to support your view (e.g. how the issue affects you, information regarding costs incurred and how frequently the issue arises)**. Comments are most helpful if they:

- contain a clear rationale;
- provide evidence to support your view;
- describe any alternatives we should consider; and
- where possible provide data which could inform a costs and benefits analysis of the issue such as how often the issue arises and what direct and/or indirect costs or savings would be incurred if the change was made.

What will happen to the information I provide?

After the comment period has closed (24 February 2014), we will review and consider all stakeholder feedback and produce a detailed report for consideration by the Minister for the Environment. The review report will be tabled by the Minister in Parliament. All submissions received will be published on the DER website (personal contact details will not be made public).

Thank you

We would like to thank you for your time in contributing to this review process. This stakeholder consultation will provide valuable information for us to consider and incorporate into improving the operation of the CS Act and Regulations and the way we do our business.

(1) Duty to report

Under s.11(4) of the Act, the following persons have a duty to report a site:

- an owner or occupier of the site
- a person who knows, or suspects, that he or she has caused, or contributed to, the contamination
- an auditor engaged to provide a report that is required for the purposes of this Act in respect of the site.

If any other person becomes aware of a known or suspected contamination, they **may** report it, but are **not** obliged to do so.

In the Consultation paper we asked: Should a person with the professional knowledge or ability to identify contamination have a duty to report it?

Proposed way forward – include an ‘environmental consultant’ in the persons with a duty to report under s.11

The intent here is that the reporting obligation would apply to environmental consultants engaged for investigation or remediation purposes [an appropriate definition of ‘environmental consultant’ would need to be included in the Act]. It is suggested that for an environmental consultancy, the onus would be on the project manager to ensure that known/suspected contamination is reported to DER in the appropriate timeframe. It is not intended that a reporting obligation would apply to other professionals such as a field technician sampling wells, a laboratory technician conducting laboratory analyses or to someone conducting a survey at the site.

<p>1.1</p>	<p><i>Do you support the proposed change?</i></p> <p>Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.</p>
<p>1.1</p>	<p>AMEC considers that this is not a satisfactory solution. The rationale is as follows:</p> <ul style="list-style-type: none"> • The law states that if owners, occupiers and polluters have a duty to report a suspected or known contaminated site and if they don’t report, they commit an offence under the CS Act. This is sufficiently detailed to define requisite reporting requirements.
<p>1.2</p>	<p><i>If your answer is no, why do you not support the proposed change?</i></p> <ul style="list-style-type: none"> • There are very few ‘environmental consultants’ and even ‘contaminated sites’ consultants who are sufficiently skilled, trained, and educated to properly determine whether a ‘site’ should be reported as suspected or known contamination. There is a great deal of technical knowledge and experience required to accurately determine if a site is contaminated. Even if a site is reported by an ‘environmental consultant’ as suspected contamination, the law requires that the reported site be assessed by the DER and issued a classification. The ramifications to industry would be a lack of trust in the environmental consultancy arena, a ‘closing of ranks’ to reporting, and further malaise to an already misunderstood legislative instrument. • If the DER pursues this policy, AMEC suggests that only those who have demonstrated expertise and education in the field of contaminated sites be allowed to report. This should be identified through regulations and a system in place that licences ‘contaminated sites’ practitioners based on education (geologist/hydrogeologist/geotechnical

	<p>engineer/geochemist), a agreed number of years of experience (minimum of 10 yrs), passing a scientific, technical and legislatively comprehensive examination, and have the licence be renewed annually. Professional development credits throughout the year will need to be obtained to maintain the licence. The implementation of this policy will require a significant level of upfront and ongoing resources.</p>
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(2) Site classification scheme

In the Consultation paper we asked: In circumstances where contamination has been identified but requires further investigation to determine whether clean-up is necessary for the current or proposed land use, would a new classification, *contaminated—investigation required* be helpful? Would such a classification prompt more timely investigations at a site?

Proposed way forward — process improvements — no change to classification system

We have initiated substantial improvements to our internal procedures to provide clearer guidance on what a site classification of *possibly contaminated— investigation required* means. A summary of the planned improvements is provided in the Discussion paper.

2.1	<p><i>Do you support the proposed way forward?</i></p> <p>Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.</p>
2.1	<p>AMEC supports the change, however we suggest some further elaboration</p>
2.2	<p><i>If not, what modifications or alternative course of action do you propose?</i></p>
2.2	<ul style="list-style-type: none"> • From a transparency perspective and the availability of ‘publicly available’ information AMEC agrees with the review statements. This provides prospective purchasers and new tenement holders in the case of mining with better understanding than the standard ‘buyer beware’ approach to what the status of their property/tenement is and as such, allows for more transparency and capacity in identifying acceptable risk/costs. However, as identified in the review document, there should be clarity in defining the meaning of this classification and instruction in issuing it. • However AMEC would prefer to see discrete milestones/timelines placed on those sites that have the classification ‘possibly contaminated, further investigation required’ that will support owner/occupiers/leases in understanding their risk. Specific items could include the provision of a strategy that highlights how the potentially contaminated site will be investigated /addressed (that same strategy can then be placed in the mine closure plan), or require that a determination as to whether the site is contaminated or not be made within two years.

(3) Mandatory disclosure

Under s.68 of the Act, landowners must provide written disclosure to any new or potential owners if selling or transferring land that is classified *contaminated—restricted use*, *contaminated—remediation required* or *remediated for restricted use* or land that is subject to a regulatory notice.

In the Consultation paper we asked: Are the mandatory disclosure requirements clear? Have you encountered difficulties in knowing when to make a disclosure?

Proposed way forward—minor changes to the Act

The definition of ‘owner’ is provided in s.5 (1) of the Act. For the purposes of s.68, we propose to clarify the meaning of ‘owner’ and ‘completion of a transaction’ as described in the Discussion paper.

3.1	<p><i>Do you support the proposed way forward?</i></p> <p>Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.</p>
3.1	<ul style="list-style-type: none"> • AMEC is comfortable with the proposed changes in relation to mandatory disclosure requirements or clarification on ‘completion of a transaction’. However, there is a gap in the reporting process. The completion of the transaction does not satisfactorily identify or address mining tenements or cadastres on mining tenements or how disclosure for mining fits in with any legislative requirements under the Mining Act 1978.
3.2	<p><i>If not, what modifications or alternative course of action do you propose?</i></p>
3.2	<p>However, AMEC prefers the term ‘entity’ to describe the owner, mortgagee or leaseholder as opposed to ‘person’. We recommend the use of ‘entity’ which should be clearly defined as a person, corporation, etc. We would further like to see clarify in the meaning of ‘owner’ in relation to leases of tenements.</p>

(4) The Contaminated Sites Committee

(4.1) Improved timeframes for decisions on responsibility for remediation

It was originally anticipated that most committee decisions on responsibility for remediation would be made within six months of a request being filed with the committee (reg. 27). However, these decisions are taking much longer in practice. In many cases this is because relevant information is submitted after material has been circulated by the committee, resulting in multiple rounds of consultation prior to the committee making its final decision.

In the Consultation paper we asked: Should there be a time limit and requirement for all relevant documents to be sent to the committee to decide on the responsibility for remediation? What time limit (e.g. three months) would be fair to all parties? Can you suggest other ways to expedite the decision making process?

Way forward – possible changes to the Act

The possible changes to the Act to improve the timeliness of committee decision-making could include:

- a timeframe of three months in the Act to complete the circulation of all information submitted to the committee. For example, a three-month timeframe would mean that parties would have about 10 weeks from the call for submissions to provide all relevant information for circulation to the other parties. The process would need to be clearly articulated in supporting guidelines to avoid claims that the process lacked procedural fairness if exchange of information was curtailed.
- extending the offence of providing ‘false or misleading information’ (s. 94) to include making a written submission to the committee in connection with a decision on responsibility for remediation (penalty \$125,000, and a daily penalty of \$25,000).
- the authority (or ‘headpower’) in the Act for the committee to publish its reasons for each decision on responsibility for remediation. (Reference to published decisions may help parties to identify the types of documentation which will be required by the committee and may also help parties to come to an agreement on responsibility without applying to the committee for a formal decision).

Please also consider the next section on the role of the committee and whether you would support the possible transfer of some committee functions to the State Administrative Tribunal before finalising your response to Q.4.1.

4.1	<i>Do you support the proposed changes?</i> Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.
4.1	<ul style="list-style-type: none"> • AMEC supports the changes which would improve the timeliness of contaminated sites decisions on responsibility for remediation and its supporting caveats.
	<i>If not, what modifications or alternative course of action do you propose?</i>
4.1	Not applicable

(4.2) Role of the Contaminated Sites Committee and the State Administrative Tribunal

When the Act was being drafted, the State Administrative Tribunal (SAT) did not exist so Parliament did not address the question of whether or not all or part of the role of the committee should be performed by SAT. Further information on this issue is provided in the Discussion paper.

4.2.1	<i>Do you support SAT review of the Contaminated Sites Committee’s primary decisions (e.g. the committee decisions on responsibility for remediation),</i>
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	<p><i>assuming that SAT is appropriately resourced to perform this task?</i></p> <p>Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.</p>
4.2.1	<p>AMEC supports changes to the CS Act that would allow for appeals on decisions made by the Contaminated Sites Committee be addressed through SAT. There are two paths that can generate an appeal – on legal grounds or technical grounds.. At this time if a Contaminated Sites Committee decision is appealed, these appeals are on a point of law only and are made to the Supreme Court. I.e., the Supreme Court can only make a judgement on a point of law. As the appeal is only on the question of law, there is limited ground for the appeal to promote technical merits, which are critical in contaminated sites evaluations. Whereas with the SAT, an appeal can be made on technical merits. A lawyer is not always necessary in the SAT and there are ample expert witnesses, aside of the DER, who are more than capable to appeal decisions from a technical perspective considering that the CS Act is quite a simplistic legislative instrument.</p>
4.2.2	<p><i>Do you support SAT becoming the review decision-maker in place of the Contaminated Sites Committee for appeals against classification and notices served under the Act, assuming that SAT is appropriately resourced to perform this task?</i></p> <p>Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.</p>
4.2.2	<p>AMEC considers that people who are aggrieved by the Contaminated Sites Committee’s original decisions should have a right to seek a merits review of the decisions, and this review should be conducted by the SAT. The SAT should also exercise the Contaminated Sites Committee’s existing merits review function.</p> <p>AMEC supports amending the CS Act to empower the State Administrative Tribunal to review the decisions of the Contaminated Sites Committee which are made pursuant to the committee’s original jurisdiction under the Act; and, transfer the Contaminated Sites Committee’s existing merits review jurisdiction under the Act to the State Administrative Tribunal.</p>