Government of Western Australia
Department of Environment Regulation

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):					
DEPARTMENT OF LANDS					
Please indicate which best describes you / your organisation:					
Academic		Member of the public		Professional association	
Auditor		Industry		Real estate	
Community group		Legal practitioner		State agency	X
Developer		Local government		Other (specify)	
Environmental consultant		Planning consultant			

Contact person			
Position			
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.

1.1	***Do you support the proposed change?*** No, DoL does not support this change.
1.2	The reasons for this include: a) A consultancy is commissioned to undertake a scope of works on *behalf* of the site owner, occupier, project manager, developer etc. The consultant should recommend that a site be reported to DER if contamination is suspected/known but the obligation to report should remain with the owner/occupier of the site, the polluter and auditor (if involved). b) Contractual issues will arise if the consultancies are required to report to DER on suspected contaminated sites. It may also confuse the hierarchy of responsibility for reporting and place more onus on consultancies to be reporting sites. c) Given that consultancies will generally be the first party to be aware of any contamination issues on a particular site, this may result in many being found in breach of the Act if reporting is not undertaken within the required timeframe and by any other party that is required to report. Preparing a site investigation report will generally take a lot longer than the required timeframe for reporting a site under the Act (i.e. 21 days from first knowing or suspecting contamination).

(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	***Do you support the proposed way forward?*** No, DoL does not entirely support this action.
2.2	There is a need to differentiate between those sites which are suspected of contamination and those that are known to have contamination. There is a considerable gap that needs to be bridged between the classifications of PCIR and CRR. The comments received from stakeholders in the initial consultation paper were all valid and DoL agrees that introducing another classification may confuse the situation further and create additional costs to DER and to land owners. One suggestion put forward in the last consultation period, was to broaden the CRR classification to achieve what is being proposed by adding the new classification. DoL believes that this idea could be a potential way of achieving the desired outcome. Some additional thoughts on this proposed idea are listed below: a) "Contaminated – Remediation Required" could be renamed as "Contaminated – Action Required" or "Contaminated – Management Required". The *Action* or *Management* measures may range from further investigation, risk assessment to remediation and the details could be listed within the Notice of Classification. *Action* is the preferred name given that *Management* may be interpreted in a similar way to the restricted use classifications. b) The classification name is left as is but more information is provided in the Notice of Classification to detail the steps required through further investigation and risk assessment that may result in the site not requiring remediation (and therefore would be able to be reclassified).

(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	***Do you support the proposed way forward?*** Yes

(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	***Do you support the proposed changes?*** Yes

(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	***Do you support SAT review of the Contaminated Sites Committee's primary decisions (e.g. the committee decisions on responsibility for remediation), assuming that SAT is appropriately resourced to perform this task?*** Yes, particularly complex "responsibility for remediation" cases.
4.2.2	***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?*** No, the committee should remain the primary decision making authority given the speciality of the area and the interagency endorsement on the committee.