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

Contact person			
Position			
Email		**Fax**	
Phone		**Mobile**	
Postal address		**State**	
Suburb / city		**Post code**	
Number of pages (including this cover sheet)		8	

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?*** 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.
1.1	**NO**
1.2	***If your answer is no, why do you not support the proposed change?***
1.2	Some points to oppose: 1) The key to achieving positive environmental outcomes (intent of the CS Act) is based upon mutual trust between a client and the environmental consultant. A duty to report for environmental consultants is likely to undermine the trust between these two parties and most certainly result in a reluctance to seek professional advice. This will likely have a flow on effect and impact not only in relation to identification and management of contaminated sites in WA but also possible financial implications for consulting firms. Further, if the consultants are legally bound to report a site based on the site information available to them, then this may result in clients withholding information from the consultant. It is noted that as part of the PSI process, a number of historical searches are only

	made available to the consultant after the relevant authorities have received authorisation from the site owner. Accordingly, current and/or former site owners/operators may now withhold this authorisation thereby limiting valuable information during the preliminary stages of the assessment and this could result in sites being deemed low risk/uncontaminated even though potential contamination sources are present. 2) Under the proposed changes, will project managers who do not report a contaminated site be subject to the same penalties under Section 7.0 (Penalty: $250,000 and a daily penalty of $50,000)? This may have profound impact on professional indemnity insurance for consultants, which is already very expensive. 3) The definition of contamination is broad and making an informed decision on whether to report a site can be subjective and wrought with ambiguity. For example, do we report a vacant site which has surface fragments of ACM which may exceed health criteria when there is minimal risk of exposure at present, but into the future, the site may be redeveloped and thus pose some level of risk? If project managers are subject to the penalties (point 2) for not reporting a site, this may lead to conservatism in the industry and result in a large number of sites being unnecessarily reported. 4) Currently, there is a duty to report within 21 days of becoming aware of contamination. Is there a hierarchy with respect to the consultants obligation to report? If the environmental consultant recommends to a client to report the site and the client fails to report within the 21 day period, would the environmental consultant also be in breach of the reporting requirements under the Act? It would be conceivable that if the client has failed to report the site within the 21 day period, then the consultant has a duty to report within a reasonable timeframe after the 21 days have lapsed. However, in a number of situations, consultants may only deal with a client for a brief period and over a single project. Accordingly, it could be deemed unprofessional and unethical for a consultant to harass the client regarding reporting requirements after completion of a project. 5) Environmental consultants often undertake pre-purchase due diligence assessments on behalf of a prospective buyer in order to reduce the “buyer beware” risks with respect to contamination. Typically, the environmental consultant is not in direct contact with the site owner and liaises only with the potential buyer. If contamination is identified, under the proposed change the environmental consultant will now have an obligation to report the site. Reporting of sites should ideally be done with the full knowledge of relevant stakeholders, in particular, the land owner and lessee (where applicable) that caused the contamination. Further, it would be a breach of confidentiality and client trust between the environmental consultant and the client (in this case, a prospective buyer) to discuss the results of such an assessment. Prospective buyers spend money upfront as part of due diligence not only to mitigate risks but also to negotiate sales prices. 6) With consideration of point (3), the proposed change could give rise to a situation whereby a client may legally challenge an environmental consultant for executing their obligation to report a site. With consideration to point (2) and potential penalties, there could be a more conservative approach adopted by consultants for sites when there is ambiguity. A landowner who does not agree that the site should be reported may seek legal advice/action which could have serious implications for environmental consultants. In view of the above, DP considers that a viable alternative would be that the consultant should be legally bound to inform the client of their (the client’s) obligations to report the under the CS Act and allow the client to seek legal advice on the matter.

(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?*** 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.
2.1	**Agreed**.
2.2	***If not, what modifications or alternative course of action do you propose?***
2.2	

(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?*** 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.
3.1	No comment as the requirements in the Act are relatively clear
3.2	***If not, what modifications or alternative course of action do you propose?***
3.2	

(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?*** 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	In many cases and depending on the complexity of the contamination issues, detailed/supplementary/delineation investigations can take up to six months to complete. Given that the committee itself can take up to six months to make a decision based on relatively detailed investigations that have been completed by the parties, a six month timeframe for the parties to submit the relevant information is considered reasonable
	If not, what modifications or alternative course of action do you propose?
4.1	

(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?*** 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.
4.2.1	DP generally supports the potential for the SAT to review the committees primary decisions as this will provide an intermediate review process prior to expensive proceedings in the Supreme Court. However, we also note that whilst the SAT panel will comprise lawyers, mediators and technical personnel, there are no technical personnel that have experience comparable to an auditor. The CS committee on the other hand, has two auditors on the panel (and is probably better placed to comprehend the technical and practical issues associated with contaminated sites). Therefore, it would be integral as well as prudent for the SAT to revert back to CS committee for technical issues
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?*** 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.
4.2.2	