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):					
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	
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)			

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	**We do not support the proposed change.** The DER has given no indication, or examples as to why this change is being considered other than to expand the obligations of the reporting requirements.
1.2	***If your answer is no, why do you not support the proposed change?***
1.2	The proposed change is unnecessary, at present there are sufficient parties that are required to report a site without needing to add environmental consultants. At present a consultant can report a known or suspected contaminated site if they wish. The question that should be considered is whether there are any known sites (and what percentage) where a site has not been reported and subsequently found to present a significant unacceptable risk to human health or the environment, in which the owner or person responsible did not report the site. In this instance the DER would have the opportunity to prosecute the responsible party for not complying with their obligations. Has this been identified as a particular issue since the commencement of the Act, as we understand the number of prosecutions completed under the Act for this reason are limited, if any. There is no requirement for consultants in any other field of environmental consulting to report breaches of existing legislation, licences or works approvals, so there would

	need to be strong justification to impose the change solely in relation to the Act, justification which has not been provided. Obliging a consultant to report a site may put the client's interests at odds with those of the consultant leading to a less than beneficial outcome for the process overall. Due to the potential for prosecution, it is likely to mean that consultants will act conservatively as they are unlikely to accept liability on behalf of the landowner. Whilst the consultant may benefit from specific legal advice to confirm if the level of impact that is detected at the site constitutes "contamination" under the Act, this is additional cost which may or may not be accepted by the client and would not be absorbed by the consultant. We note from our submission to the previous discussion paper that the DER still has not progressed towards making it clear as to whether impact from a potential source located within a site that does not meet the criteria of contamination under the Act is required to be reported. It is this level of uncertainty that will result in sites with minor impact potentially being reported by a consultant. The inclusion of this requirement makes it almost impossible for a landowner or person who commissioned an investigation to obtain a second opinion as to whether a site should be reported under the Act. Noting that not all investigations and data interpretation is conducted to the same quality, a consultant could unreasonably believe a site needs to be reported when maybe it does not. This risk could mean that land owners delay or simply avoid investigation of their sites until a change of land use. This could then delay the investigation and identification of contamination that may be an issue on the basis that although there may have been a potentially contaminating activity, the simple presence of an activity should not constitute a suspicion of contamination. The proposed change in itself creates further uncertainty in only charging certain persons with certain knowledge and experience an obligation to report a site. Since environmental consultants are not licensed and qualifications can come in a variety of forms, as do job descriptions and titles, there would appear to be no clear way to clearly determine which persons would be responsible. We think it is potentially acceptable to make it a requirement for a consultant to report a site where migratory contamination is present that is confirmed to cross a site boundary and poses an immediate risk. There would need to be further clarification upon what level of contamination poses an immediate risk, but this would at least ensure that affected parties are informed in a timely manner. Even so, this would still trigger some of the previous issues identified in the consultant – client relationship. Adding this additional obligation to report a site will likely only increase the number of sites with minimal if any actual risk or contamination (as defined by the Act) and therefore stretching the Department's workloads even further. We note that there are still a vast number of outstanding reported sites yet to be classified. The focus should be resolving this backlog of classifications, reviewing the number of sites where an investigation was undertaken but the site not reported until sometime later

(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	**We support the proposed process improvements and no change to the classification system.**
2.2	***If not, what modifications or alternative course of action do you propose?***
2.2	We feel the inclusion of more detail on investigation requirements with site specific objectives and timelines for sites classified as "*Possibly contaminated – investigation required*" is required and will improve the process. The requirements should be considered with respect to the probable level of contamination and risk, particularly risk from migratory contamination. Time frames for completion of the investigations will assist in ensuring investigations progress. There may need to be some consideration of an avenue to request extended time frames in the event a site is being subject to a Contaminated Sites Committee decision, and or due to the financial capability of a landowner or responsible party to complete the investigations required.

(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	**We support the proposed change.**
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	**We support the proposed change, although suggest reconsideration of the actual time frame for the provision of information**.
	If not, what modifications or alternative course of action do you propose?
4.1	<u>Time frames</u> We support the proposal to include a time frame for the provision of information, although we feel further consideration of the time frame is required. We are of the opinion time frames should be stipulated for the provision of all final information to ensure the process and determination of liability can be resolved as soon as possible. Whilst not being involved, we have witnessed a recent decision whereby further information was provided to the CSC at the last minute providing another claim as to the innocence of one of the alleged parties responsible for the site. After numerous years of the process there had been sufficient time to obtain and provide all necessary information, the provision of an additional report at the last minute was simply seeking a delay and ultimately results in further costs by all parties needing to respond to the additional report. Unfortunately not all sites are the same, some sites may enter the process with significant body of site data whilst other may not. The three months proposed may therefore not be enough to obtain sufficient information. We think it would be fair to require an outline of the parties claims to be provided within three months of the request being filed with the committee and supporting information provided within six months of the request being filed. The provision of the outline case at three months would give the parties the opportunity to determine if additional site data is required and agree on a revised time frame to acquire this data if appropriate, subject to committee approval. <u>Offence of false or misleading</u> We support this proposed change. Although we do not have a specific comment information on whether this is actually an issue, an increased penalty for providing knowingly false or misleading information can only help to ensure the appropriate level of scrutiny is given to information provided to the committee. <u>Publish decisions</u> We support the proposed change.

(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	We support this proposed change.
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	We support this proposed change.