



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):

Newmont

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 checked="" 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"/>		<input type="checkbox"/>

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

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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>We agree that there should be an obligation to report by <u>a suitably qualified professional</u> if the implications of not reporting the contaminated area will result in significant risk to human health, degradation in environmental values and/or incur a major financial liability on the part of the property owner. This means the decision should be risk based. Whilst this may involve subjective assessment, it does remove the likelihood of reporting of minor or trivial contamination by individuals who, whilst having the best of intentions, do not really have the experience to make a realistic assessment.</p> <p>The decision to incorporate the obligation to report into the Act would take any such decision out of the hands of Newmont.</p> <p>Currently, all recent Newmont contracts have a standard legal clause which requires that the contractor comply with all legal requirements in the performance of its duties under the conditions of the contract. Older contracts (pre about 2010), do not have this clause.</p>

	<p>If such a clause is included, the DER needs to carefully define the type of position which fits the 'suitably qualified professional' (by our definition) category, which normally would include a consultant, experienced in this sort of assessment work. This would considerably narrow down the field to only include those professionals capable of making such an assessment and whose declaration could be relied upon to be a true reflection of the actual status of the property concerned.</p>
1.2	<i>If your answer is no, why do you not support the proposed change?</i>
1.2	

(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>It is assumed that this question is interpreted that the 'contaminated – investigation required' category should be added <u>in addition to</u> the 'possibly contaminated' category.</p> <p>The addition of this category would be useful, provided it can be related back to a preliminary risk assessment of the contamination of the property. Reflecting back on what was stated in 1.1 above, the only really effective way of differentiating</p>

	<p>between contamination at properties requiring assessment is to have such properties risk rated using a suitable tool promoted by the DER. Simply changing the category name really doesn't help a lot because it implies expenditure is required (regardless of which categorical descriptor is used), to accurately define the extent and cost of rehabilitation required. Applying the risk assessment at even this early stage would allow the degree of urgency and likely scale of investigation to be estimated, thereby allowing the site to be prioritised. It appears that at present this ability to prioritise sites listed under the 'possibly contaminated' heading is limited.</p> <p>Using the outcome of a risk assessment, a consultant could make a subjective assessment of the contamination. The DER rightly uses risk assessment once site assessment has been conducted to assist in allocation of degree of rehabilitation required (options available), which then defines cost and therefore liability.</p> <p>However, the concept of conducting preliminary risk assessment on properties before site investigation can be conducted, allows the 'degree of urgency' to be allocated, if time response is critical towards containment or minimising risk of exposure to the public and/or environmental values.</p> <p>Initial response to this suggestion would be that applying such a risk allocation is not possible at this stage without site investigation. However, the desk top review would include historical review of operational conditions and observation of visual evidence at the site, without actually having to disturb the site. Understanding of soil types can be used to determine the attenuation potential and degree of transmissivity of the soil to assess in situ contaminant mobility potential. Understanding of site hydrological and hydrogeological conditions is also important in this assessment process, and would not be hard to obtain from site historical data available to a consultant.</p> <p>Whilst other methods may be being used to assist in prioritisation, this approach would add an additional tool.</p>
2.2	<i>If not, what modifications or alternative course of action do you propose?</i>
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	<i>Do you support the proposed way forward?</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.
3.1	The proposed change to the definition of ‘Owner’ and ‘Completion of Transaction’ is supported
3.2	<i>If not, what modifications or alternative course of action do you propose?</i>
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	<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	Agree on the following changes according to the order presented in the 3 bullet points above; <ul style="list-style-type: none">• 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.

	<p>Three months appears to be adequate time to complete circulation of information to all interested parties. However, as stated in the foregoing dialogue, there should be allowance for extension of this time in special cases. These 'special cases' need to be defined.</p> <ul style="list-style-type: none"> • 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). <p>Agree with the first up fine of \$125,000 but not the ongoing daily fine. Rather give the non compliant party a set time frame to supply any additional information required and the option to apply a second and larger fine if the additional or corrected information is not supplied in the that timeframe. The length of this time frame should be agreed with the DER. There may be a good reason why the additional information was not able to be supplied in the time allocated.</p> <ul style="list-style-type: none"> • The authority (or 'headpower') in the Act for the committee to publish its reasons for each decision on responsibility for remediation.
	<p><i>If not, what modifications or alternative course of action do you propose?</i></p>
<p>4.1</p>	

(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.

<p>4.2.1</p>	<p><i>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?</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>4.2.1</p>	<p>This change should be pending legal advice on implications.</p>

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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	