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):					
WALGA					
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	Yes	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?*** 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	Yes, only if 'environmental consultant' is clearly defined and Local Government employees, such as in-house environmental managers, are specifically excluded from that definition. WALGA makes this submission on the following basis: • If employees of Local Governments are not excluded from the definition of "environmental consultants", some employees of Local Governments, such as environmental managers, will be burdened with the personal responsibility of reporting known or suspected contamination; • It would be inappropriate and undesirable for such a burden to be placed on the employee of a Local Government, even if that employee meets the definition of environmental consultant, particularly as it: ○ Could impose on the employee a burden which is more appropriately imposed on the employer;

	○ Has the potential to create a conflict of interest between the in-house environmental consultant and the Local Government; ○ May discourage full investigations into potential contamination by the in; and ○ May discourage other employees of Local Governments without the requisite expertise from providing full information to the in-house environmental consultant.
1.2	***If your answer is no, why do you not support the proposed change?***
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	***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	No. The Association supports the proposal to introduce a new classification scheme.
2.2	***If not, what modifications or alternative course of action do you propose?***
2.2	The Association is supportive of changing the site classification scheme to include the classification of "contaminated – investigation required"; if Local Government's unique operating environment is recognised by DER. Local Government has a unique operating environment because they run on annual budget cycles. Due to this, meaning that funds are generally not readily available for contaminated sites investigation/clean-up.

	The Association also supports a change to the contaminated sites information that is publically available. Each council should have full access to DER's contaminated sites data within the Local Government boundaries. Full access to data will enable Local Governments to make better informed decisions, including in relation to development applications on contaminated, or potentially contaminated, land, and also ensure that information is not lost during institutional changes, such as council amalgamations. An alternative to changing the site classification scheme may be to introduce a system similar to what exists in New South Wales (http://www.epa.nsw.gov.au/clm/aboutclmrecord.htm). Introducing an online list of all sites reported and each site's status would mean that interested parties could easily identify if a site has been reported pursuant to the duty to report.

(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	Yes, as long as the new definition of "owner" and "completing of transaction" are consistent with the definitions of these in other Acts.
3.2	***If not, what modifications or alternative course of action do you propose?***
3.2	

(4) 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	The Association would prefer powers to be transferred to the State Administrative Tribunal. However, if DER decides to continue with the Contaminated Sites Committee as the decision making authority, then a three month timeframe is supported.

	The Association generally supports the proposal to introduce a three month time limit for the provision of information to the Contaminated Sites Committee. However, this time limit should be capable of extension in certain circumstances, including when: • Agreement is reached with the Contaminated Sites Committee as to when relevant information is to be provided; • A Local Government's resources prevent it from being able to provide all available information within the 3 month time limit; • The subject site's history is particularly complex, for example, where a number of occupiers used similar contaminants or there is a long history of industrial uses; • Pertinent documents are held by third parties; and • There are reasons outside of the Local Government's reasonable control, such that all relevant information could not be provided within the 3 month time limit. . In support of the above submission, the Association notes that, whilst the timely remediation of sites is to be encouraged, it has to be balanced against the risk that a significant financial liability may be imposed on the basis of incomplete information.
	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	Yes, The Association supports the SAT review of the Contaminated Sites Committees' primary decisions. The SAT is independent of the DER and has significant experience in reviewing the

	merits of decisions based on technical evidence. It also has a more transparent process than the Contaminated Sites Committee, conducting relatively informal hearings in a public forum where witnesses are examined. The SAT is therefore well placed to undertake merits review of decisions of the Contaminated Sites Committee, subject to employing non-judicial members with expertise in contamination. Other benefits of a right to appeal to the SAT include: • Unlike the Contaminated Sites Committee, the SAT publishes reasons for its decisions and its decisions have precedent value. This improves the consistency of decisions and enhances the public's understanding of, and confidence in, the decision-making process; and • The SAT has significant experience in mediations and has a strong track record of assisting parties to resolve disputes. Whilst the Contaminated Sites Committee encourages the DER and persons responsible for contamination to discuss matters between themselves, the Contaminated Sites Committee does not assist in these discussions. The Association submits that transferring the Contaminated Site Committee's appeal jurisdiction to SAT will not disadvantage appellants who are unable to engage legal representation. The Association has observed that it is not necessary to engage a lawyer in the SAT process; appellants are able to represent themselves.
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	Yes, The Association supports the SAT review process being proposed for decisions, classifications and notices made by the DER. The observations made in response to item 4.2.1 above are equally applicable to the SAT's review of decisions of the DER. In addition, the Association notes that the SAT regularly reviews notices issued by Local Governments which may require substantial works to be undertaken. Examples of such notices include (but are not limited to) notices issued under the e *Local Government Act 1995* (such as notices issued under section 3.25 of that Act) and the *Planning and Development Act 2005* (such as notices issued under sections 215 and 255 of that Act, relating to illegal development). This, in the Associations view, further supports the submission that the SAT has significant experience in reviewing notices of a similar nature to that issued by the Contaminated Sites Act.

(5) Additional Comments

	Association has additional comments on the review of the *Contaminated Sites Act* that were not covered in the discussion paper. These comments are around data sharing, state government assistance and future clarity and are detailed below.
5.1	**Data sharing** - All contaminated sites data should be freely available to the general public. If this is not possible, then full and free access should be available to decision making authorities, such as Local Government.
5.2	**State Government Assistance** - Many of the contaminated sites that Local Governments are responsible for (such as landfills) were contaminated while either under State Government control or while the best management practices/legal obligations at the time were adhered to. The State Government should recognise the history of these sites and provide financial assistance for site remediation to local governments.
5.3	**Future clarity** – Several options could be introduced that would provide clarity for future operations. These include stakeholder communication templates, voluntary management plans, review of guidelines, investigation commencement timeframes and additional reporting requirements for consultants.