



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):

Wesfarmers Chemicals, Energy and Fertilisers

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)	7		

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.

<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>No, persons with professional knowledge, such as consultants engaged directly by a company, or current or past employees, should not be legally required to report contamination.</p>
<p>1.2</p>	<p><i>If your answer is no, why do you not support the proposed change?</i></p> <p>The duty for environmental consultants to report is beneficial only in rare cases when an owner engages a consultant who provides advice and the owner knowingly doesn’t report their potentially contaminated site to the DER.</p> <p>For the majority of cases this new duty to report will expose environmental consultants (specifically contaminated sites project managers) to penalties of up to \$250,000 plus a daily penalty of \$50,000.</p> <p>This change will also require companies and consultants to re-draft confidentiality deeds, or the confidentiality provisions within existing contracts that govern the consultant's responsibilities.</p> <p>If the new duty to report is implemented vendors and purchasers will need to carefully consider the scope of any due diligence investigation carried out on a site and be mindful of the environmental consultant's mandatory duty to report to the DER.</p>

(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.

<p>2.1</p>	<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>
<p>2.1</p>	<p>Yes</p>
<p>2.2</p>	<p><i>If not, what modifications or alternative course of action do you propose?</i></p>
<p>2.2</p>	<p>Whilst a new classification “Contaminated – further investigation required” has its benefits, we acknowledge that this new classification could potentially slow down the classification process and add administration burden. The DER proposal to provide clearer guidance on notices for the actions required using a traffic light approach (for sites with a PCIR classification), is a welcomed improvement. Hopefully this change will assist DER in classifying sites more quickly and help DER and landowners to better prioritise the cleanup and investigation of higher risk sites.</p> <p>Additional information should be included in notices on the role of notified party. Currently notices give no indication to the party (owner/occupier/public authority/person who made report/person considered responsible for remediation and other interested persons) receiving the notification what their role in/contribution to the contamination, therefore, making it difficult to readily determine obligations under the Act.</p> <p>It should also be recognised by the DER that the proposed changes to enforceable timeframes on notices may not be achievable by companies with budgetary and scheduling pressures. Large companies with many contaminated sites must prioritise, which is typically done through a risk based approach.</p>

(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	Yes
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	Yes
	<i>If not, what modifications or alternative course of action do you propose?</i>
4.1	<p>The proposed three month timeframe is a welcomed improvement as it will prevent continual submissions to the committee and allow the committee to make a decision earlier. The extension of the offence for providing false and misleading written statements to the committee and publishing responsibility for remediation decisions on the website are also well received improvements.</p> <p>The 10 week time limit for parties to provide submissions should also include a provision to negotiate an extension if necessary in complex cases or where the letter from the committee has been lost in the mail. This should ensure parties don’t potentially miss the deadline or provide false or misleading information in the first round.</p> <p>A three month timeframe should also be enforced for parties to rebut and a one month timeframe for the Committee to make a final ruling. The process should also include only one opportunity for parties to rebut to the original submissions, to curtail the exchange of information.</p> <p>Provide adequate resources to the CSC. The current resource levels are resulting in delays in decisions. One option is to create a pool of suitably qualified professionals available to be called in to the CSC to facilitate timely decisions.</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>Yes.</p> <p>Currently, parties can only appeal CSC decisions (such as responsibility for remediation) to the Supreme Court on a question of law. The appeal is narrow and on applies to the legal principles of the law and does not involve the determining of the factual situation. A SAT review will allow a comparison merits review and involves analysis of the fact finding.</p> <p>Although the SAT review adds an additional step to the appeal process it will result in a more fair appeals process. CSC’s decisions will essentially be audited by an external independent body (SAT) and should result in less appeals to the Supreme Court. SAT also has additional powers over and above the CSC to conduct hearings, issue subpoenas and conduct mediations to come to a preferable decisions based on the merits of the situation. These techniques used by SAT will further highlight when parties are providing false or misleading information.</p>
<p>4.2.2</p>	<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>
<p>4.2.2</p>	<p>Yes.</p> <p>This will provide a fair process for parties to appeal the classifications and notices.</p> <p>Review of DER classification by the CSC works well, generally because additional information is given by the client and the classification can be appealed. DER should include a step to make contact with the client prior to classifying the site to ensure additional information isn’t available, this would result in less appeals to the CSC.</p>