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2 February 2018

Project Manager
Proposed regulatory amendments to categories 63-66, 89
Department of Water Environmental Regulation
Locked Bag 33
Cloisters Square WA 6850

Dear Sir/Madam

Submission on Consultation Paper – Amendments proposed following the decision on *Eclipse Resources Pty Ltd v The State of Western Australia [No.4] (2016) WASC 62*

The Department of Water and Environmental Regulation (DWER) released a consultation paper in November 2017 on proposed amendments to the *Environmental Protection Regulations 1987* following the decision on *Eclipse Resources Pty Ltd v The State of Western Australia [No.4] (2016) WASC 62* (Eclipse Ruling). Main Roads Western Australia (Main Roads) has a particular interest in the proposed amendments in relation to the use of clean fill and uncontaminated fill in road construction activities.

Main Roads generally supports the principles of the consultation paper – that is that premises accepting clean fill and uncontaminated fill are not considered landfill facilities. This will be beneficial to Main Roads business and divert inert material from landfill. The reuse of clean fill and uncontaminated fill on Main Roads projects is currently being restricted due to uncertainty from the Eclipse Ruling. The volume of recycling of fill material reported in Main Roads operations has dropped by 93% since 2015. Clarity and an appropriate way forward is vital to continue and increase Main Roads' and industry's use of such materials.

However Main Roads considers that the current consultation paper does not propose an appropriate way forward for the reuse of uncontaminated fill. The definition and assessment criteria for uncontaminated fill is overly conservative and restrictive. The sampling and testing regime, combined with low permissible concentrations of contaminants, may have the unintended consequence of making it too expensive and time consuming to test recycled fill. Also, the proposed end use for the material should be taken into consideration when determining whether or not fill is considered "uncontaminated".

The definition of 'uncontaminated fill' in Table 1 of Appendix B of the consultation paper is considered to be restrictive as:

- The number of samples and parameters required to be tested is considered excessive
- The maximum concentrations allowable for each parameter are much lower than that that is commonly considered a risk to human health or the environment
- The definition does not consider the end use of the material



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The sampling regime recommended in the consultation paper for uncontaminated fill may have the unintended consequence of making a potentially uncontaminated fill source uneconomic. Each soil sample is expected to cost in the order of \$500 and a sample is required for every 25m³ of fill. This means that a 1000m³ source of recycled fill will require \$20,000 worth of sampling. At these sorts of costs is unlikely that recycled fill will even be tested if there is a risk that it will fail to meet the definition of uncontaminated. Sampling frequency should be conducted on a risk based approach, with a low frequency screening assessment as the first stage.

The maximum concentrations permissible in uncontaminated fill in Table 1 of Appendix B are generally an order of magnitude lower than the thresholds for further action in a contaminated soil investigation, as defined in DWER's Contaminated Sites Management Series and the National Environmental Protection Measure (NEPM) *Guideline on Investigation Levels for Soils and Groundwater* Ecological Investigation Level (EIL) and/or the Health Investigation Level (HIL). This is an extremely conservative approach and it will severely limit the reuse of material that poses little to no threat to human health or the environment. Main Roads suggests that DWER should consider increasing the maximum allowable concentrations to be in line with the NEPM EIL and/or the HIL.

The definition of uncontaminated fill does not consider the end use of the material. The proposed definition requires all fill, regardless of its final use, to meet the same criteria. This is inconsistent with the assessment process for contaminated sites under the NEPM, where the end land use is taken into consideration when determining whether further investigation into contamination is required. It is suggested that the end land use of the premises receiving the uncontaminated fill determine the maximum allowable concentrations for uncontaminated fill.

In summary, Main Roads supports the principle behind the consultation paper, but believes the definition and assessment criteria for uncontaminated fill are not an appropriate way forward, as they are overly conservative and will result in lost opportunities for recycling and reusing fill material that has little to no risk to human health or the environment.

If you have any queries regarding Main Roads submission please contact John Braid on ph 9323 6183 or john.braid@mainroads.wa.gov.au.

Yours sincerely

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