

2 February 2018

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Proposed Regulatory Amendments to Categories 63-66, 89  
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## **Re Consultation Paper: Amendments Proposed Following the Decision on *Eclipse Resources Pty Ltd v The State of Western Australia (No.4) (2016) WASC 62***

Senversa Pty Ltd is an Australian-owned professional consulting firm specialising in contaminated sites and waste, with more than 70 employees across Australia.

The Department of Water and Environmental Regulation (DWER) recently released the Consultation Paper: Amendments proposed following the decision on *Eclipse Resources Pty Ltd v The State of Western Australia (No.4) (2016) WASC 62*, which proposes amendments to:

- the description of category 63, 64, 65 and 66, and 89 of Schedule 1 of the *Environmental Protection Regulations 1987 (EP Regulations)*, and
- the *Landfill Waste Classification and Waste Definitions 1996 (as amended December 2009)* (Waste Definitions).

The proposed amendments to the EP Regulations, specifically with regard to waste definitions, are very relevant to the projects we work on and the clients we work with. In this regard we have reviewed the proposed amendments and provide the following comments.

- The approach taken in defining 'uncontaminated fill' with regard to corresponding maximum concentrations ('thresholds'), is not considered to sufficiently maximise re-use of surplus fill as a potential resource through safely diverting low-level contaminated fill from landfills to developments. Specifically, Senversa consider that there is an opportunity for total maximum concentrations (mg/kg) to be land use dependant, as is the case for Tier 1 screening risk assessment of contaminated sites under national and state guidelines.<sup>1</sup> Furthermore, the use of maximum 'thresholds' does not take into account ambient/background concentrations which may be naturally higher than these 'thresholds'.

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<sup>1</sup> National Environmental Protection Council (NEPC) *National Environmental Protection Measure (Assessment of Site Contamination)* 1999 (as amended 2013) and Department of Environment Regulation (DER) *Assessment and Management of Contaminated Sites in Western Australia* (2014).



- Alternatively, and preferably, Senversa considers that the definition of 'uncontaminated fill' should mean to not be 'contaminated'<sup>2</sup> in the context of the receiving site and as defined in the *Contaminated Sites Act 2003* (CS Act). Using the definition of 'contaminated' as provided in the CS Act will mean that there is an opportunity for the waste reuse risk assessments to be tailored to individual site(s)/uses and will also mean that emerging contaminants and evolving toxicological research (and general validity of published assessment criteria) can be more readily incorporated.
- By harmonising definitions of 'uncontaminated fill' with 'contaminated' between the respective EP Regulations and CS Act, inconsistencies can be avoided which may result in actions such as a site receiving 'uncontaminated fill' only to be found to be 'contaminated' by the fill due to circumstances not contemplated by the amendments to the EP Regulations (for example due to the presence of a non-listed contaminant such as dioxins etc)
- In the specific context of contaminated site assessment work, we have worked on a number of projects that have generated significant volumes of low-level contaminated material, with examples including Midland Railway Workshops and Elizabeth Quay. These State Government projects generated significant volumes of soil which, under the proposed amendments, would continue to require disposal at a landfill when a safe alternative off-site beneficial use may exist.

We consider that there are three key challenges that need to be considered as part of the proposed ideas above.

- (1) What happens if the proposed risk-based assessment is not valid or robust (or completed at all).
- (2) Circumstances where the corresponding material is ultimately taken to a different site or sites from which the initial assessment was based.
- (3) Changes to the site may unknowingly invalidate the risk-based assessment.

The incorporation of independent review requirements by a suitably qualified person(s) such as a DWER Contaminated Sites Auditor into future guidelines may largely mitigate these three scenarios. With regards to the third scenario it is noted that there are existing provisions under the *Planning and Development Act 2005* to ensure that the suitability of the land for subdivision, amalgamation or development are considered.<sup>3</sup>

We trust that you find the above comments useful and that they will facilitate further discussion around how to best meet the underlying principles and objectives of various relevant legislation including *Environmental Protection Act 1986*, *Waste Avoidance and Resource Recovery Levy Act 2007* and the CS Act.

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<sup>2</sup> "in relation to land, water or a site, means having a substance present in or on that land, water or site at above background concentrations that presents, or has the potential to present, a risk of harm to human health, the environment or any environmental value."

<sup>3</sup> Under Section 58 (6a) of the CS Act the Western Australian Planning Commission is not to approve under Section 135 of the *Planning and Development Act 2005* the subdivision of that land, or the amalgamation of that land with any other land without "seeking, and taking into account, the advice of the CEO as to the suitability of the land for the subdivision, amalgamation or development".



Should you have any queries please don't hesitate to contact the undersigned on 08 6324 0200.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'JL'.

**Justin Lumsden**  
Principal

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**Jeremy Hogben**  
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**Vanessa Bryant**  
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