



Factsheet - amendments to the Environmental Protection Regulations 1987 - clean fill and uncontaminated fill

1. Purpose

This fact sheet provides information on clean fill and uncontaminated fill in accordance with the amended *Environmental Protection Regulations 1987* (EP Regulations) and the revised [Landfill Waste Classification and Waste Definitions 1996 \(amended 2018\)](#) (Waste Definitions).

2. Background

The *Environmental Protection Amendment Regulations 2018* gazetted on 27 April 2018 are intended to address the consequences of the decisions of Justice Beech and the Court of Appeal in *Eclipse Resources Pty Ltd v the State of Western Australia [No. 4] [2016] WASC 62* and *Eclipse Resources Pty Ltd v The Minister for Environment [No 2] [2017] WASCA 90* (Eclipse case). The Eclipse case clarified the definition of waste and the application of the waste levy.

This decision had consequences beyond the Eclipse case, particularly for the use of fill by the development industry, including waste levy liability and licensing under the *Environmental Protection Act 1986* (EP Act).

The effect of this decision is that the use of clean fill and uncontaminated fill in circumstances where they would be considered waste and meet the category descriptions for landfill premises under the EP Act requires licensing and, in certain circumstances, payment of the waste levy.

3. Effect of the amendments

These amendments allow for the use of clean fill, or uncontaminated fill that meets environmental and health thresholds after testing, without the need for a landfill premises licence or payment of the waste levy¹.

The amendments are only relevant to material that is defined as waste under the EP Act and *Waste Avoidance and Resource Recovery Act 2007* (WARR Act) as interpreted by the Eclipse case, and for premises classified as a landfill category (63, 64, 65, 66 and 89) in the EP Regulations. Further information on considerations for determining whether material is waste is available in the factsheet [Assessing whether material is waste](#).

¹ Where applicable based on the defined levy region in the *Waste Avoidance and Resource Recovery Levy Regulations 2008*



4. Relevant factors

The WARR Act includes objects that preference reuse and recycling to divert waste from landfill consistent with the waste hierarchy.

The amendments to the EP Regulations and Waste Definitions support this by allowing for the use of clean fill, or uncontaminated fill that meets environmental and health thresholds after testing, without the need for a landfill premises licence or payment of the waste levy.

The [flow diagram](#) below sets out the steps that should be taken in determining whether the use of fill will trigger licensing or levy requirements.

Is the material waste?

These changes only apply to waste.

Sections 3(1) of the EP Act and the WARR Act define **waste** to include matter:

- (a) whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment; or
- (b) prescribed to be waste.

The term 'waste' in the EP Act and WARR Act also has its ordinary dictionary meaning –

- (a) anything left over or superfluous, as excess material, by-products etc., not of use for work in hand" (i.e. unwanted or excess material, viewed from the perspective of its source); and/or
- (b) any matter whether useful or useless which is gotten rid of into the environment.

Further information is provided in [Assessing whether material is waste](#).

Prescribed landfill premises category 63

The amendments only have practical effect for premises that accept inert (Class 1) waste for burial and would otherwise meet the description of a category 63 landfill premises in the Environmental Protection Regulations 1987. This is because this material may be used as fill for development and would be subject to licensing and the levy where relevant if it was not defined as a "clean fill premises".

Clean fill

The definition of clean fill is contained in section 2 of the Waste Definitions and essentially means raw excavated natural material such as clay, gravel, sand, soil or rock fines sourced from land that has not been used for any of the potentially contaminating land uses listed in Appendix B of the [Assessment and management of contaminated sites](#). A record of the originating site's historic activities should be retained by the proponent.

Uncontaminated fill

Uncontaminated fill includes inert waste type 1 (excluding asphalt and biosolids) and neutralised acid sulfate soils that meet the requirements set out in Table 6 of the Waste Definitions, as determined by relevant sampling and testing carried out in accordance with the requirements in Table 7 of the Waste Definitions.

The testing thresholds are intentionally conservative. Maximum concentration and leaching test thresholds allow for the use of uncontaminated fill at any location without increasing the risk to human health, the environment or any environmental value. This includes on the highly transmissive soils of the Swan Coastal Plain near Perth with its vital groundwater resources and wetlands. Available data on



ambient background levels in soils of the Swan Coastal Plain were taken into account when setting thresholds.

It is not necessary to test for every substance listed in Table 6. The testing and sampling regime (Table 7) in the Waste Definitions has been amended to allow for testing for substances based on land use history of the site of origin for uncontaminated fill Appendix B of the [Assessment and management of contaminated sites](#). This ensures that only likely contaminants are tested for, reducing the cost and complexity of the testing regime.

The sampling and testing requirements are based on achieving a 95% upper confidence limit (average) and the requirement to characterise each domain or stockpile separately. This ensures that only testing of relevant substances is undertaken, and that the results are practical in their application. Records to be maintained by the proponent should include the originating site/s historic activities, the tested contaminants and testing results.

It is the responsibility of the user to ensure that the material is environmentally suitable for the purpose for which it is being used, including whether its use could be pollution, or an unreasonable discharge under the EP Act or create a contaminated site within the meaning of the *Contaminated Sites Act 2003*.

Clean fill premises

Clean fill and uncontaminated fill may be accepted at a clean fill premises. Clean fill premises are defined in the EP Regulations and are premises that accept, and have only ever accepted, clean fill or uncontaminated fill for burial.

Where clean fill is accepted for burial at an area that is separate and distinct from a Class I inert landfill site it may qualify as a 'clean fill premises' even where the landfill site and clean fill premises are within one licence boundary.

Waste levy

The *Waste Avoidance and Resource Recovery Levy Regulations 2008* provide for a levy to be payable in respect of "waste disposed of to landfill" at "landfill premises" which are categories 63, 64 and 65 prescribed premises which require a licence under the EP Act whether or not such a licence is held.

Frequently-asked questions

Q1: My surplus (waste/excess) fill is not "clean fill" and exceeds some of the "uncontaminated fill" thresholds in Table 6. Can I get approval for risk-based reuse of this fill?

This is not possible currently as a case by case risk based approval requires amendments to the EP Act and WARR Act, as well as new regulations. It is the Department's intention to progress such amendments in consultation with stakeholders.

Q2: Testing of all the substances listed in Table 6 of the Waste Definitions would be prohibitively expensive. Do I have to test for all substances to meet the definition of uncontaminated fill?

The sampling regime (Table 7) in the Waste Definitions has been amended to allow for testing for substances based on land use history of the site of origin for uncontaminated fill. This ensures that only substances likely to be present are tested for, reducing the cost and complexity of the testing regime.



Q3: What if the clean fill contains concentrations of naturally occurring substances which exceed the concentration thresholds for uncontaminated fill?

Waste that meets the definition of clean fill does not require testing as outlined in Tables 6 and 7 of the Waste Definitions and nothing alters this. The EP Act places general obligations on users to ensure that the waste material is environmentally suitable for the purpose for which it is being used, including whether its use could result in pollution or an unreasonable discharge.

Q4: How do these amendments apply in regional areas outside Perth?

These amendments, including the testing regime, apply throughout Western Australia. The waste levy applies to waste generated in the Perth Metropolitan Region and disposed of to a category 63, 64 or 65 landfill premises anywhere in Western Australia, or disposed of to the Perth Metropolitan Region regardless of where it was generated.

Q5: I intend to store excess material taken from an urban development which was previously undisturbed bushland and stored temporarily offsite for later reuse in another development. Do these amendments apply to this situation?

They may. The key initial question is whether the material is waste (see [Assessing whether material is waste](#) for guidance). If you consider the material is waste, then you need to determine whether the reuse meets the definition of a category 63 landfill premises (more than 500 tonnes accepted for burial). From the context of the question, it appears that the material would meet the definition of clean fill. Refer to the [flow diagram](#) for further information.

Q6: My large site includes undeveloped native bushland, an area used as a market garden and a smaller fuel and chemical storage area. Contamination investigations have found pesticide contamination in the fuel and chemical storage area. How would these amendments apply to surplus (waste / excess) soil from my site?

If the undeveloped bushland area has not been used for any of the potentially contaminating land uses listed in Appendix B of the [Assessment and management of contaminated sites](#), waste / excess fill from this area is likely to meet the definition of clean fill and so would not require testing as outlined in Tables 6 and 7 of the Waste Definitions.

Market gardens are a potentially contaminating land use listed in Appendix B of the [Assessment and management of contaminated sites](#). If waste fill from the market garden area has been tested in accordance with Table 7 for potential contaminants based on the land use history and meets the relevant maximum concentration and leaching test thresholds in Table 6, it would meet the definition of uncontaminated fill. Clean fill and uncontaminated fill can be used at clean fill premises.

Waste pesticide-contaminated soil from the fuel and chemical storage area would not meet the definition of either clean fill or uncontaminated fill and should be disposed of at an appropriate waste treatment or disposal facility.

Q7: Why can't the thresholds for uncontaminated fill be based on the ecological investigation levels in the National Environmental Protection (Assessment of Site Contamination) Measure 1999?

The thresholds are intentionally conservative to protect sensitive areas and land uses. The blanket use of ecological investigation levels (EILs) set in the contaminated sites regime is not appropriate as these are not intended for decisions about waste reuse suitability. This is explicit in the National Environment Protection (Assessment of Site Contamination) Measure. It should be noted that the 2013 NEPM amendment significantly reduced the number of contaminants for which EILs were published (to eight) and therefore many of the parameters in Table 6 no longer have an EIL.



The Department is committed to reviewing the threshold values in the Waste Definitions by April 2019 based on ambient data received for the Swan Coastal Plain. You are encouraged to provide test results for samples representative of ambient background soils of the Swan Coastal Plain to the Department (Attention: Contaminated Sites Branch) by end December 2018 to inform this review.

Feedback and More Information

The Department is keen to receive feedback on this factsheet to ensure the content is clear and helpful. If you wish to provide feedback or for further information, please email DWER at info@dwer.wa.gov.au or phone 6364 7000.

Legislation

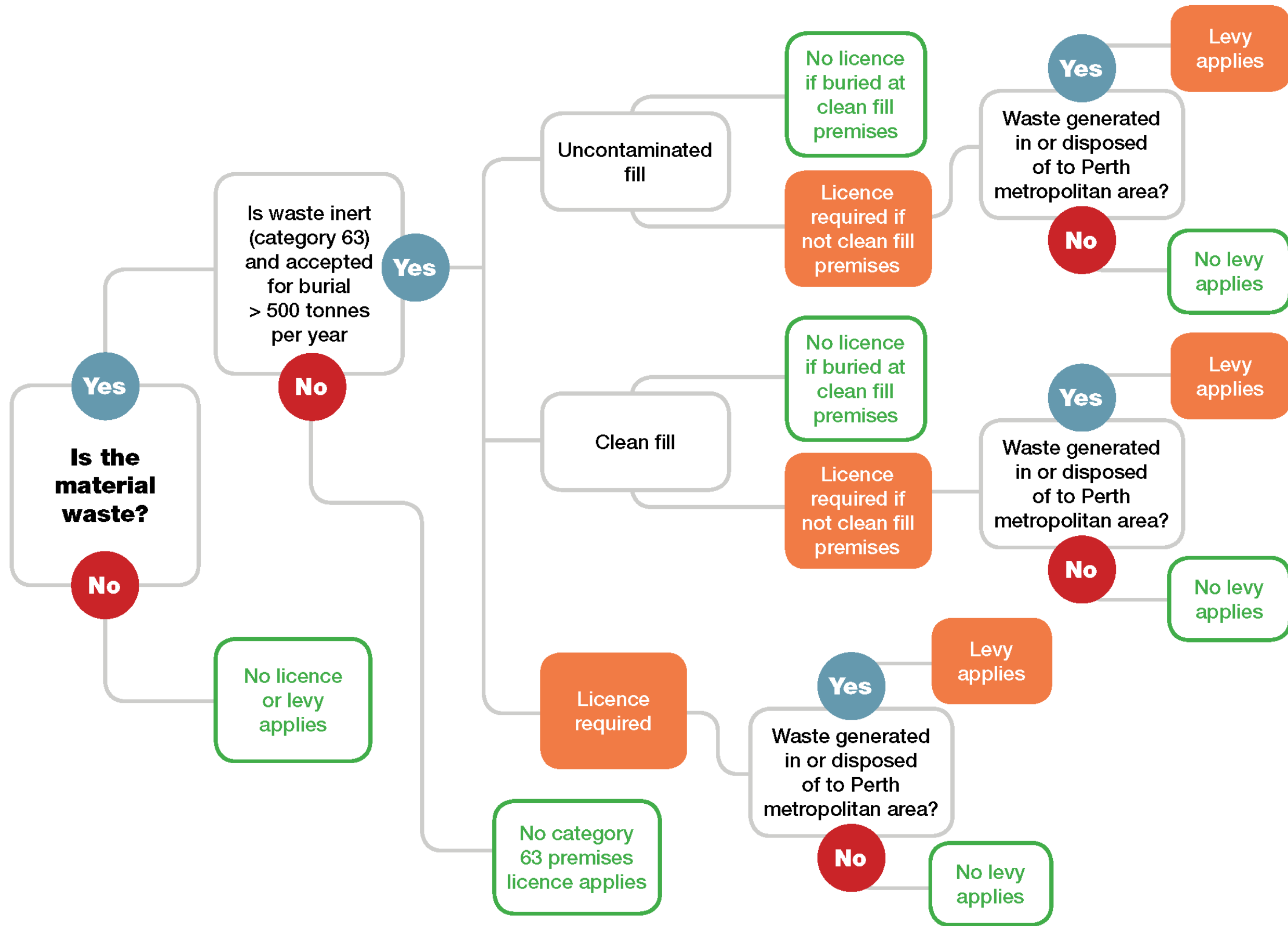
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