



Review of the *Contaminated Sites Act 2003*

Discussion paper

SUBMISSION COVER SHEET

Complete and email this form with your submission by

**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.

This submission is written on behalf of (individual or organisation name):

Ports WA

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	Ports WA Environment Working Group		
Email		Fax	
Phone		Mobile	
Postal address		State	
Suburb / city		Post code	
Number of pages (including this cover sheet)	8		

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>The proposed change is not supported.</p>
<p>1.2</p>	<p><i>If your answer is no, why do you not support the proposed change?</i></p>
<p>1.2</p>	<p>The responsibility to report a site rests correctly and appropriately with the owner, occupier, contaminator or auditor. An environmental consultant is engaged by the owner/occupier and is a servant of that party i.e. is not to act outside the terms of that contract.</p> <p>Environmental consultants have a professional duty to advise their clients when there is a duty to report. In Ports WA experience, advice to report a site is consistently received either verbally or stated in technical reports. An obligation to report under the Act therefore already exists where environmental consultants are engaged by owners, occupiers or contaminators and potential contamination is identified. DER could consider as an alternative amending the CSMS guideline “Reporting of Site Assessments” so that consultants have a clear responsibility to advise clients when a site should be reported.</p>

The nature of the legal and professional relationship between consultants and clients will be significantly impacted by the proposed change. The proposed change is not dissimilar to proposing a law to require lawyers and/or doctors to report possible crimes to relevant authorities when a client comes seeking counsel.

Ports WA are concerned that the proposed change would result in a significant increase to the cost of engaging contaminated sites consultants, therefore discouraging their engagement, the identification of contamination and the establishment of smaller / sole trader consultancies in the industry who cannot afford the insurances.

Consultant professional indemnity insurances will certainly increase in response to new legal liability. For example, a site may be reported, having financial consequences for a 3rd party or stakeholder. The technical qualitative risk based justification for reporting the site may be challenged and legal proceedings against the consultant commenced after further investigation establishes the basis for reporting the site was unsound.

Risk based guidance on when to report a site, with case study examples has not been developed to provide consultants (let alone occupiers and owners), with sufficient clarity when to report. Over-reporting of sites, given the risk averse nature of consultancies would likely ensue, leading to further litigation, cost and unnecessary burden to industry and the DER. Costs will inevitably be passed on to clients however the benefits of the proposed change have not been considered.

An informal survey of contaminated sites professionals including consultants and auditors was undertaken by Ports WA members to gauge the prevalence of under-reporting by their clients. Ports WA found that clients (including ports) who contract consultancy services were invariably seeking to understand and comply with their obligations under the Act. No basis or evidence to support the need for the proposed change has been presented or seems to be supported by the WA Ports' survey.

Consideration will also need to be given to the potential conflict in the commercial terms and conditions (T&C) by which consultants are engaged with respect to information confidentiality between the consultant and the owner/occupier to avoid consultants notifying without the knowledge of the owner/occupier. Any consultant notification should include a statement which clearly demonstrates that the consultant has also advised the owner/occupier of the regulatory notification prior to notification.

Guidance on the need to notify, with case study examples is required to prevent an increase in over-reporting that would result in unnecessary administrative and financial burden to industry, and the DER.

(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	<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>
2.1	<p>Ports WA are supportive of this proposal. In either case, the risks are not established and need to be. We therefore suggest to simply the classification system to reflect risk. PC-IR should be simply stated as “<i>investigation required</i>”.</p> <p>Similarly we suggest <i>remediated - restricted use</i> and <i>contaminated - restricted use</i> are replaced with a single classification of “<i>restricted use</i>”. In both cases the risks have been determined. Ports WA understand the only difference is that sites classified <i>remediated - restricted use</i> required remediation whereas <i>contaminated - restricted use</i> did not.</p> <p>One is not “worse” than other however the <i>contaminated - restricted use</i> is perceived as a much less desirable classification and has unnecessary consequences for procurement and development of remediated sites.</p>
2.2	<p><i>If not, what modifications or alternative course of action do you propose?</i></p>
2.2	

(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.

<p>3.1</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>3.1</p>	<p>Ports WA are supportive of this proposal.</p>
<p>3.2</p>	<p><i>If not, what modifications or alternative course of action do you propose?</i></p>
<p>3.2</p>	

(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	<p><i>Do you support the proposed changes?</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>
4.1	<p>A timeframe of three months is supported on the condition that the provision to negotiate an extension in complex cases is included. This is particularly relevant when additional information may be required on remote sites which present access issues and lack local resources.</p> <p>Extension of the offence for providing false or misleading information is supported.</p> <p>Providing head power in the Act for the committee to publish its reasons for decisions is supported. In addition, in the interest of equity and transparency, Ports WA suggests the reasons for ALL decisions are published, i.e. this is not a discretionary decision made by the Committee.</p>
	<p><i>If not, what modifications or alternative course of action do you propose?</i></p>
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	<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>
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<p>4.2.1</p>	<p>Ports WA are supportive of this proposal. The opportunity to incorporate a merits review of Committees decisions at SAT is supported if SAT is able to constitute a tribunal that includes members with suitable contaminated sites technical experience.</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>Ports WA do not support this proposal. The Committee’s primary function is to make decisions for the purposes of the Act. Assuming the Committee is appropriately resourced, the review of classifications of notices issued by the DER should remain a Committee function.</p> <p>The Committee has specific contaminated sites knowledge and experience to undertake its merit review function considering legal, factual and technical aspects. Accordingly the committee consists of at least one Auditor and one legal practitioner.</p> <p>Given the wide range of matters brought before the Development and Resources stream of SAT, it is unlikely the tribunal would always be constituted by members with technical knowledge and experience superior to the Committee.</p>