



Some questions and answers regarding the *Contaminated Sites Act 2003 (WA) (Act)*

1. **Once remediated, is a site then removed from the contaminated sites register? Is there any ongoing record of that site having been on the register? Is any memorial also removed?**

(a) Classification

S13(1) provides that the CEO is to classify a site when required to do so under the Act (eg. where a report is received under s14). A classification can be appealed (s18) and the classification of a site may change over time (s13(2)). Schedule 1 indicates that a site or part of a site may be classified as either:

- report not substantiated;
- possibly contaminated – investigation required;
- not contaminated – unrestricted use;
- contaminated – restricted use;
- remediated for restricted use;
- contaminated – remediation required, or
- decontaminated.

(b) Databases

As soon as practicable after a site is classified, and not more than 10 days after doing so, the CEO is to ensure that the database and records are adjusted to reflect the classification (s17.). The CEO is to maintain a contaminated sites database which is accessible to the public, containing information on sites classified as contaminated-remediation required, contaminated restricted use or remediated for restricted use (s19(1)).

The CEO must also keep other records containing more detailed information, for example reports made on known or suspected contaminated sites, classification notices, memorials lodged under s58 and other information and documents that the CEO thinks appropriate (s20(1)). Members of the public can access a summary of these more detailed records where they make a request using prescribed Form 2, relating to a particular area of land, and pay a fee (s21).

(c) When is a site removed from the contaminated sites register and is there any ongoing record kept?

S20(3) provides that the CEO can retain records, “for such a period as is determined by the CEO”. Therefore, although a site is removed from the contaminated sites database an ongoing record may remain indefinitely on the CEO’s records. As discussed above, these records can be accessed by the public on request. The contaminated sites database only shows sites which are contaminated or have been remediated for restricted use. These sites can be re-classified as decontaminated; a record of this reclassification, and the documents supporting the re-classification, will remain on the database until removed by the CEO.

(d) When is a memorial lodged and removed?

The CEO is to ensure that a memorial is lodged on land:

- which is classified as contaminated – remediation required, contaminated – restricted use, remediated for restrictive use or possibly contaminated – investigation required (s58(1)(a)(i));
- where a Part 4 notice has been given (s58(1)(a)(ii)); or
- on which a charge in favour of the state, or a public authority nominated by the Minister, has been placed under certain provisions of the Act.

The CEO is to give notice to the Registrar that a memorial is to be withdrawn (nb: no time-frame is given):

- in respect of land referred to in s58(1)(a)(i), when the land is classified as decontaminated or not contaminated –unrestricted use (s58(3)(a));
- in respect of land referred to in s58(1)(a)(ii) where Part 4 notice is cancelled (s58(3)(b));

- in respect of land referred to in s58(1)(b) where, in the opinion of the CEO, the charge is recovered, paid or no longer required (s58(3)(c)); or
- where an appeal is made and a classification or notice in respect of land referred to in s58(1)(a) is set aside.

So, generally speaking a memorial is lodged on land when the site or part of the site is classified as having some level of contamination or where land is being investigated for contamination. The memorial will be removed when the site is remediated or if it is subsequently found that the site is not contaminated. Under s59 as soon as practicable after a memorial is lodged or withdrawn, a notice that the memorial has been lodged or withdrawn is to be given to:

- (a) each owner of the relevant land;
- (b) the Western Australian Planning Commission;
- (c) the CEO of the Health Department;
- (d) each local government which has located within its district all, or part, of the relevant land, and;
- (e) each responsible authority the scheme of which applies to all, or part, of the relevant land.

Key Points

- S20(3) allows the CEO to retain records “for such a period as is determined by the CEO”; therefore, even though a site is removed from the register, it may remain indefinitely on the CEO’s records.
- Generally, a memorial is lodged on land when the site or part of the site is classified as having some level of contamination or where land is being investigated for contamination. The memorial will be removed when the site is remediated or if it is subsequently found that the site is not contaminated.

2. **If there has been soil contamination, and also ground water contamination, does the continuing ground water contamination mean that the site would remain classified as contaminated if the soil contamination has been remediated?**

A site may be classified more than once (s13(2)). A contaminated site can be classified as contaminated-remediation required, contaminated-restricted use or remediated for restricted use. It is arguable that if a site, with soil and ground water contamination, was classified as contaminated-remediation required and only the soil contamination was remediated, it would be open to the CEO to re-classify the site as remediated-restricted use. However, if the severity of the ground water contamination meant that the site could not be used at all, then the original classification of contaminated-remediation required, would remain until the ground water contamination was remediated.

3. **What precisely is the role to be played by the auditors who are mentioned in the legislation? What powers/role do they have?**

- (a) What is the role of the auditors?

The role of the Auditors is to investigate and report. The role of Auditor arises in three circumstances:

- Where the CEO requires a mandatory audit to determine if a person has complied with a notice given under Part 4 (s44). The certificate of contamination audit may be taken into consideration for the purposes of the Act (s76).
- In order to get their site re-classified, a property owner, property occupier, person responsible for remediation or a person who has received a notice under Part 4 may request a certificate of contamination audit. A request is made using prescribed Form 3 (r.29). The CEO decides whether or not to conduct the audit (s62). Further, the written notice of classification may only be given by way of certificate of contamination audit where the audit was requested under s62 (s15(3)).
- The CEO can use whatever information the CEO considers to be relevant when classifying a site, presumably this would include a certificate of contamination audit (s13(4)).

- (b) What powers do they have?

Auditors do not have any decision making powers, they merely report to the CEO. S69 gives the CEO authority to accredit a person as an auditor.

4. **If the site has been remediated, who gives the sign-off for that site having been remediated? Is it the auditor? Or does the auditor give a report to the DEP and it is the DEP that gives the sign off? Will the DEP in fact give a sign-off? What time frames apply to all of this?**

- (a) Who decides when a site has been remediated?

S13(1) provides that the CEO is responsible for the classification of sites. When person believes that their site has been remediated they can request a certificate of contamination audit, the CEO can then rely on the audit to change the

classification of the site.

(b) What are the time frames?

The Act does not contain many set time frames; some time frames indicated are:

- a person must report a site they know to be contaminated within 21 days. A person must report a site they suspect to be contaminated as soon as practicable (s11(3));
- the CEO must then classify the site within 45 days, although there is provision for extension of that time for such further time as the CEO decides is necessary (s14);
- the CEO must give notice of the classification within 10 days (s15(1));
- the CEO must also update the databases within 10 days of classification (s17);
- a notice given under Part 4, such as an investigation notice, a clean up notice or a hazard abatement notice, must be complied with within the time specified on the notice (s43(1)).

Key Points

- The CEO is responsible for classifying the site. When a person believes that their site has been remediated they can request a contamination audit, which the CEO can rely on to change the classification of that site.
- The Act does not contain a time frame for the re-classification of a site once a contamination audit has been done.

5. **If I own a site or I lease a site and I have contaminated that site, am I in breach of the law for having contaminated the site? What are the penalties? If I am attending to the remediation of that site, am I also liable to the penalty for the contamination?**

(a) What is the penalty for failing to report a contaminated site under the Act?

S 11(4) lists the people who have a duty to report a contaminated site:

- (i) the owner or occupier of a site
- (ii) a person who knows or suspects that he or she has caused, or contributed to, the contamination;
- (iii) an auditor engaged to provide a report that is required for the purposes of this Act in respect of the site.

If a person, with a duty to report, knows that a site is contaminated they must report the site within 21 days (s11(3)(a).) If a person, with a duty to report, suspects a site is contaminated they must report the site as soon as practicable s11(3)(b). Failure to report a site brings a penalty of \$250,000.00 and a further daily penalty of \$50,000.00 which will apply for everyday that the offence continues past the deadline (see s11(3) & s87). Therefore, a person who has a duty to report a contaminated site will be liable to pay a penalty if they fail to report that site, unless the person has a defence. S11(5) provides that a person has a defence where:

- (i) the site had already been reported to the CEO;
- (ii) the contamination, or suspected contamination, was caused by a discharge of waste of which the CEO had already been notified under s72 of the EP Act; or
- (iii) The site was, or was to be reported under a programme approved by the CEO under section 12. (The CEO may approve a program for reporting sites where a company has a number of sites and it would be impossible to investigate and report all sites within 21 days).

(b) What is the penalty for failing to remediate a contaminated site under the Act?

The only sites which must be remediated are those which are classified as contaminated-remediation required (ie. a site classified as contaminated-restricted use need not be remediated s23.) S25 provides that a person is responsible for remediation to the extent that they caused or contributed to the contamination of a site. Where responsibility is in issue there is a committee that will decide who is responsible for remediation (s36(1).) A person who is bound by a Part 4 notice must ensure the requirements of the notice are met within the time set out or they are liable to a penalty of \$500,000 (s43(1)). Further, a daily penalty of \$100,000 will apply for everyday that the offence continues after the deadline (see s43(1) & s87).

(c) Is a person liable to a penalty for contaminating a site if the site is remediated?

“Contamination” is defined in s4 of the Act as “having a substance present in or on...land, water or site...[that]...has the potential to present, a risk of harm to human health, the environment or any environmental value.” However, the

Act does not make “contamination” itself an offence. A person has committed an offence under the Act where they fail to do what is required of them to enable the CEO to investigate or remediate a site or where a person fails to report a site when they have a duty to do so. A person has NOT committed an offence under the Act because they have contaminated a site.

However, if the contamination itself amounts to “pollution,” then they may have committed an offence under the *Environmental Protection Act 1986* (the “EPA”). “Pollution” is defined in s3A of the EPA as a direct or indirect alteration of the environment, to its detriment or degradation, to the detriment of any beneficial use or of a prescribed kind. It is an offence to cause pollution; s49:

- (2) A person who intentionally or with criminal negligence –
 - (a) causes pollution; or
 - (b) allows pollution to be caused,commits an offence.
- (3) A person who causes pollution or allows pollution to be caused commits an offence.

It is also an offence to discharge waste in circumstances in which it is likely to cause pollution; s50:

- (1) A person who intentionally or with criminal negligence –
 - (a) causes waste to be placed; or
 - (b) allows waste to be placed,in any position from which the waste –
 - (c) could reasonably be expected to gain access to any portion of the environment; and
 - (d) would in so gaining access be likely to result in pollution,commits an offence.
- (2) A person who causes or allows waste to be placed in any position from which the waste –
 - (a) could reasonably be expected to gain access to any portion of the environment; and
 - (b) would in so gaining access be likely to result in pollution,commits an offence.

The penalties applicable to these offences are described in schedules 1 & 2 of the EPA.

If a person reports a site and then does what is required by the CEO to remediate that site, then they will not have committed an offence under the provisions of the Act. However, if the contamination resulted from pollution which they caused or the discharge of waste occurred in circumstances likely to cause pollution, then that person will be liable to a penalty under s49(3) or s50 of the EPA.

Key Points

- A person who has caused pollution on a site may be in breach of the *Environmental Protection Act 1986* (“EPA”), but will not necessarily be in breach of the *Contaminated Sites Act 2003* merely because they have contaminated a site. Breach of the *Contaminated Sites Act* will occur if the person does not report and/or fails to remediate the contamination.
- There are penalties for failing to report a site as contaminated if you are an owner/occupier of the site, you caused the pollution or are an auditor and you know or suspect a site is contaminated (s11).
- If a person is deemed responsible for remediation of the site under the Act they are not excluded from liability under the EPA. However, a person responsible for remediation under the Act is not necessarily liable for penalty under the EPA.

For further information, please contact:



Graham Goerke

Partner

Tel: (08) 9426-6756

Email: ggoerke@jacmac.com.au

Jackson McDonald
1 December 2006