



Factsheet

30. Contaminated Sites

The Contaminated Sites Act 2003 (Act) provides a regulatory scheme for dealing with sites that are known or suspected to be contaminated. Among other things, the scheme involves reporting, investigating and remediating such sites. One feature of the scheme is that an accurate database of WA's contaminated sites is kept by the Chief Executive Officer (CEO) of the Department of Environment and Conservation (the DEC). Information for the database is obtained (primarily) from persons who now have a statutory duty to report known, or suspected, contaminated sites to the DEC. Additionally, any member of the public who is concerned that a site is, or may be, contaminated may voluntarily lodge a report.

Certain contaminants are dealt with under different legislation. For example: for radioactive materials - see the *Radiation Safety Act 1975*; for biologically pathogenic material - see the *Environmental Protection Act 1986* and the *Health Act 1911*; and for unexploded ordnance - see the *Explosives and Dangerous Goods Act 1961*. Fact Sheet 29: Industrial Chemicals may also be of assistance.



How do sites become contaminated?

Environmental contamination may be caused by poor or inadequate use and disposal of chemicals used in industrial and agricultural activities. Some contamination results from point sources such as accidental spillage of chemicals on manufacturing sites. Other contamination can be caused by the leaching of contaminants from inappropriate landfills and the spreading, or diffusion via groundwater, of pesticides and fertilisers applied to land. Contaminants can disperse into a surprisingly large area.

Some sites may have been contaminated long ago by gas works, oil refineries, steel works, mineral processing sites, railway yards, market gardens or sheep dips. Some causes of contaminated sites in suburban areas are petrol stations, automotive repair and spray-painting businesses.



What is a contaminated site?

A site, defined for these purposes as an area of land, including the groundwater in, and the surface water on, such land. A site is contaminated when a substance is present in or on it (in concentrations higher than background levels) that presents, or has the potential to present a risk to human health, the environment or to any environmental value.

Provisions in the Act distinguish between a 'source site' and an 'affected site'. The 'source site' is the site from which the contaminating substance originates; the substance then migrates to an 'affected site'. In some cases, of course, the source site and the affected site will be one and the same.

Important disclaimer:

This Fact Sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this Fact Sheet.

What kinds of exemptions are available?

Provisions in the Regulations may exclude certain sites from the operation of the Act. The exemptions currently include:

- Surface water affected by eutrophication.
- Water or land affected by salinisation.
- Substances present in land or water as a direct result of the correct application of a fertiliser herbicide or pesticide to land.
- Substances present in part of a building or contained in a building (so, for example, depending on the circumstances, asbestos used in roofing or cladding, or chlorine storage in a shed for use in a swimming pool may be excluded from the operation of the Act).

Another way in which sites are excluded from the operation of the Act is by the Minister for the Environment (Minister) declaring by “Order” (with the Governor’s approval) that particular areas, acts or sites are excluded from the operation of the Act. Before doing so, the Minister must consult with the Minister for Health and may seek comments from any person who in the Minister’s opinion has a direct interest in the matter. The Minister is to publish notice of the Order in the Gazette. The Minister may impose conditions to which the Order is subject. Contravening an Order condition is an offence that may incur penalties up to a maximum of \$250,000 and \$50,000 per day. The maximum penalties for bodies corporate are 5 times these amounts.

Within 2 years of the Act commencing (i.e. by 01 December 2008), any landowner may seek a certificate from the Contaminated Sites Committee (Committee) exempting that person from the requirements of the Act (exemption certificate). Certain criteria must be established to the Committee’s satisfaction before it gives an exemption certificate. The criteria includes that the current owner/s did not cause, or fail to prevent the contamination and did not know of the contamination at the time of purchase. The prescribed form for seeking an exemption certificate is known as “disclosure statement” and is found at Schedule 1, Form 5 of the Regulations.

Who administers the contaminated sites legislation?

The Act is administered by the Minister, the DEC (predominantly via DEC’s Land and Water Quality Branch) and the Committee. Human health issues are dealt with by the Department of Health.

Who reports known or suspected contamination?

Pursuant to the Act, the DEC receives reports of known or suspected sites from persons who have:

- a duty under the Act to do so (mandatory reporting) or;
- no such duty but nevertheless wish to make such report (non-mandatory reporting).

Mandatory Reporting

Any person in the following categories must (in the prescribed form) report known or suspected contamination to the DEC:

1. an owner or occupier of a site;
2. a person who knows or suspects they have caused or contributed to contamination; and
3. any auditor engaged to provide a report that is required under the Act.

Any person described in sub-paragraphs 1 to 3, who knows that the site is contaminated, must make a report to the DEC within 21 days of becoming aware that the site is contaminated or such later date as the DEC approves in writing

before that 21 day period expires. Any person described in sub-paragraphs 1 to 3, who suspects that a site is contaminated, must make a report to the DEC as soon as it is reasonably practicable to do so.

Failure to make a mandatory report of a site to the DEC within the time limits specified in the Act is an offence and may attract a maximum penalty of \$250,000 and a daily penalty of \$50,000. In addition, submitting false or misleading information in a mandatory report is an offence and may attract a maximum penalty of \$125,000 and a daily penalty of \$25,000. For both categories the maximum penalty for companies is \$1.25 million.

The Act provides a 6 month grace period (until 1 June 2007) from prosecuting persons who fail to make a mandatory report as required by the Act.

Any person, who, within the above grace period, receives approval from the DEC of a “programme” for reporting sites to it, may not be subject to the statutory time limits for making mandatory reports.

An owner wishing to sell land that the DEC has classified under the Act as:

- Contaminated – Remediation Required;
- Contaminated – Restricted Use; or
- Remediated for Restricted Use

must, within 14 days before the completion of the transaction, give written disclosure to prospective new owners, mortgagees and lessees of the classification and provide a copy of that disclosure to the DEC. Failure to comply with any of these obligations is an offence which may attract penalties up to a maximum of \$125,000 and \$25,000 per day. The maximum penalties for bodies corporate are 5 times these amounts.

Non-Mandatory Reporting

Any person (including any member of the public) may (in the prescribed form) report a known or suspected contaminated site to the DEC, but will not face penalties for not doing so. The Act prohibits persons from reporting sites maliciously or without reasonable grounds. Any person who acts in such manner is guilty of an offence and is liable to a maximum penalty of \$250,000; companies acting in such a manner can be fined up to \$1.25 million.

Anyone considering whether to report a site should note that a site is not suspected of being contaminated simply because it has, or has had, a particular industry located on it, so evidence of contamination is required, for example:

- abnormal colouring or staining of the soil;
- odours emanating from the soil;
- evidence of off-site migration of chemicals, staining, odours or contaminants into adjacent creeks, rivers or wetlands;
- historical, illegal or uncontrolled landfills on-site; or
- inappropriate waste disposal on site (such as via soak well or on-site burial).



Classification of contaminated sites

After receiving a report that a site is known or suspected to be contaminated, the DEC must classify the site under the categories described in the first column of the schedule below headed “Classification”. Classifications must correspond to the criterion for each category described in the second column of the schedule under the heading “Criterion”:

Classification	Criterion
<i>Report not substantiated</i>	A report under section 11 or 12 provides no ground to indicate possible contamination of the site
<i>Possibly contaminated – Investigation required</i>	There are grounds to indicate possible contamination of the site
<i>Not contaminated – unrestricted use</i>	After investigation, the site is found not to be contaminated
<i>Contaminated – restricted use</i>	The site is contaminated, but suitable for restricted use
<i>Contaminated – remediation required</i>	The site is contaminated and remediation is required
<i>Remediated for restricted use</i>	The site is contaminated, but has been remediated so that it is suitable for restricted use
<i>Decontaminated</i>	The site has been remediated and is suitable for all uses

The Act provides that specified persons (e.g. owners, occupiers and in some cases persons responsible for remediation) may appeal to the Committee to challenge certain classification decisions made by the DEC (e.g. decisions to classify sites as contaminated - remediation required, contaminated –restricted use, or remediated for restricted use). The Act also provides that report makers (e.g. members of the public) may appeal to the Committee. However, such appeals are restricted to sites categorised as Report Not Substantiated.

The DEC must lodge and the Registrar of Titles must register a memorial on the title of any land that has been classified as:

- contamination –remediation required;
- contaminated –restricted use;
- remediated for restricted use; or
- possibly contaminated –investigation required.



Recording contaminated sites

One of the main purposes of the Act is for the DEC to keep an accurate and up to date “contaminated sites database” (database) in relation to sites that are classified under the following categories:

- contamination –remediation required;
- contaminated –restricted use; and
- remediated for restricted use; or

The database contains information regarding each site classified under those 3 categories. The information includes descriptions of the site’s location, the extent of the site and the nature and extent of known contamination on the site. Information on the database is accessible to the public free of charge.

Further information, on sites classified in the other 4 categories, is accessible to members of the public if a request (in the prescribed manner) is made to the DEC for a “summary of records” along with payment of the prescribed fee. The information that the DEC makes available to the request maker will depend on the type of request made. Such information may include for example, a summary or copy of an investigation, clean-up or hazard abatement notice (regulatory notice), management plans, or sampling and analysis programmes.

Responsibility for contamination

The Act only requires those persons responsible for sites classified as contaminated – remediation required to remediate sites. Remediation may involve restoration of the site, restrictions on access to the site or the removal of contaminants.

It is worth noting that a person responsible for remediating a site may also be responsible at common law to a person adversely affected by the contamination. In that regard, legal advice from a lawyer in private practice should be obtained.

Who determines responsibility for remediating a site?

Decisions regarding the responsibility for remediation and the extent of remediation are made by:

- the DEC;
- the Committee; and
- the Supreme Court of Western Australia (on appeal on points of law only).

Regarding the DEC, such decisions are reflected in regulatory notices given to persons who in the DEC's opinion are or (in some circumstances) may be responsible for remediating sites. Those persons must comply with the requirements of regulatory notices.

Regarding the Committee, such decisions are made on the request of "interested persons", or on its own initiative. For the purposes of the Act, an interested person includes:

- (a) An owner or occupier of land that comprises all, or part, of the site.
- (b) A past owner or occupier of a site who, it is suspected, caused or contributed to the contamination
- (c) A present or past adjoining owner of a site suspected of causing or contributing to the contamination
- (d) A person approved by the DEC in writing as having a particular interest in the site.

The Committee must notify a person who is the subject of a decision:

- before the decision is made; and
- after the decision is made.

Regarding the Supreme Court, a person given notice of the Committee's decision may appeal to the Supreme Court within 21 days after the notice is given but only on questions of law.

Hierarchy

A hierarchy of persons responsible for remediating contaminated sites is provided at Part 3, Division 1 of the Act (hierarchy). The hierarchy establishes a statutory method for determining who is responsible to remediate sites and applies only to sites classified as contaminated - remediation required.

Deciding who is responsible for remediation under the hierarchy may involve considering a number of relatively complex provisions in the Act. Information about specific aspects concerning those provisions is beyond the scope of this Fact Sheet.

Some noteworthy aspects when considering responsibility for remediation under the hierarchy are as follows:

1. *When the contamination occurred*

A person who causes or contributes to the contamination of a site after the Act comes into force will be responsible for remediation regardless of whether the contaminating activity is done with or without lawful authority.

A person who has caused or contributes to the contamination of a site prior to the commencement of the Act is responsible for remediation of that site to the extent that the contaminating activity was done without lawful authority.

2. *Liquidation*

If the corporation responsible for remediating a site is insolvent, the Committee may find that persons who were company directors at the time of the contamination are responsible for the remediation.

3. *Change of the Use of a Site*

An owner or occupier of a site who, after the Act commences, has changed or plans to change the use to which a site is put must remediate any contamination on the site to the extent required by the change of the site's use. For example, the owner of a site zoned and being used for industrial purposes may be responsible for remediating contamination on that site if it is rezoned and intended to be used for residential purposes.

4. *The Current Owner of a Site*

In some circumstances, a site owner who has not caused contamination on the site may become responsible for its remediation. In addition, a site owner who is responsible for remediating his or her source site may also be responsible to remediate another person's affected site if the contaminating substance has migrated from the source site to the affected site.

5. *The State*

Sites that the State will assume responsibility to remediate include sites that:

- are not within the scope of the hierarchy;
- come within the hierarchy's scope but the persons responsible for remediating the sites cannot be identified or found, or cannot be made to assume liability for the remediation; or
- are contaminated by public authorities, other than local authorities.

In addition, in certain circumstances, the State will be responsible for remediating a site that is the subject of "certificate of contamination audit" if the certificate contains incorrect information about the contamination or the classification of the site.



Appeals from the Contaminated Sites Committee

A person dissatisfied with the Committee's decision concerning responsibility for remediation may make an appeal to the Supreme Court but only on questions of law. Appeals must be made within 21 days of notice of the decision or certificate being given.



When are contaminated sites cleaned up?

Persons responsible for remediation may be served with regulatory notices requiring them to take the appropriate steps. For example:

- An 'investigation notice' may require the person bound by the notice to take measures to locate and measure contamination/possible contamination on the site.
- A 'clean up notice' may require the person bound by the notice to follow a comprehensive management plan in order to remediate the site.
- A 'hazard abatement notice' requires the person bound by the notice to take prompt action to remediate contamination that poses an immediate and serious health or environmental risk.

Persons bound by decisions of the DEC regarding investigation or clean up notices may appeal to the Committee. Appeals to the Committee may be made in relation to decisions:

1. to impose notice requirements;
2. to give notice; or
3. that a person is bound by a notice.

There are limited rights of appeal in relation to sub-paragraphs 2 and 3. For example, a person who the Committee decides is responsible for remediation under section 36 of the Act cannot appeal the DEC's decision to give that person a clean up or investigation notice (although that person may appeal against the Committee's original decision under section 40).

Regarding sub-paragraphs 1 and 2, appeals must be lodged with the Committee within 21 days after the appellant is given notice or a certificate of the DEC's decision. Regarding sub-paragraph 3, appeals must be lodged with the Committee within 21 days after the notice becomes binding on the person or such later time specified in that notice or certificate. A site's classification continues to have effect but the notice is suspended pending the determination of an appeal.



Protection for persons assisting the DEC

The Act protects persons who have (or will) assist the DEC to carry out his functions by for example, reporting contaminated sites, assisting investigations and identifying persons responsible for contamination. The identity of persons assisting the DEC is confidential, but if they choose to reveal their identity or if, say, the landowner “works it out”, then the Act will intervene. It is an offence to threaten or intimidate such persons. Serious penalties apply for persons found guilty of committing such offences.

How Can You Become Involved?

- Monitor industries, agricultural sites and other land uses in your area.
- Report suspected contaminated sites to the Department of Environment and Conservation (see its Reporting of Known or Suspected Contaminated Sites guidelines).
- Become familiar with the indicators and symptoms of contamination (see the Department of Environment and Conservation's guidelines on Potentially Contaminating Activities, Industries and Land uses).
- Refer a development proposal likely to have significant environmental effects, including contamination, to the EPA (see Fact Sheet 5: Environmental impact assessment in WA).

Contacts and further information

For further information, including guidelines about community involvement, reporting and management of contaminated sites, visit the Department of Environment and Conservation's contaminated sites page.

Department of Environment and Conservation

Tel: (08) 6364 6520

<http://www.dec.wa.gov.au/>

Department of Health

Tel: (08) 9222 4222

<http://www.health.wa.gov.au/home/>

Environmental Protection Authority

Tel: (08) 6364 6500

<http://www.epa.wa.gov.au/>

For copies of the legislation considered in this fact sheet visit:

State Law Publisher

Tel: (08) 9321 7688

<http://www.slp.wa.gov.au/index.html>

The Environmental Defender's Office WA (Inc)

The Environmental Defender's Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- . to provide community groups and individuals with legal advice and representation to help protect the environment;
- . to promote law reform that improves environmental protection; and
- . to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Western Australian Government and the Federal Attorney-General's Department. However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over \$2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

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