

<b>JURISDICTION</b>		CONTAMINATED SITES COMMITTEE (APPEAL AGAINST SITE CLASSIFICATION)
<b>ACT</b>	:	CONTAMINATED SITES ACT 2003 (WA)
<b>CITATION</b>	:	[2024] CSCWA 02
<b>MEMBERS</b>	:	W DODGE, CHAIRPERSON C BARTON, MEMBER H BROOKES, MEMBER V BRYANT, MEMBER P MCNAB, MEMBER
<b>DETERMINED ON THE PAPERS</b>	:	18 September 2024
<b>FILE NO/S</b>	:	CSC 3/2023
<b>APPLICANT</b>	:	WATER CORPORATION
<b>OTHER PARTIES</b>	:	DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION

**Catchwords:**

Appeal against site classification – Notice of Classification – Halls Head – Prescribed Premises – Waste Water Treatment Plant – Water Resources Recovery Facility - Classification as “possibly contaminated – investigation required” – Whether sufficient or any evidence of contamination - Appeal dismissed

**Legislation:**

*Contaminated Sites Act 2003 (WA), s 4(1), s 11, s 18, s 80(a), s 96(1), Schedule 1*

*Contaminated Sites Regulations 2006 (WA)*

*Environmental Protection Act 1986 (WA), Part V Division 3*

*Environmental Protection Regulations 1987 (WA), Schedule 1*

**Result:**

The appeal is dismissed. The site classification of *possibly contaminated – investigation required* is affirmed.

**Representation:**

Applicant	:	Water Corporation
Other parties	:	N/A
<b>Case(s) referred to in decision</b>	:	<i>Greenland Resources Pty Ltd v Contaminated Sites Committee [No 2] [2024] WASC 162</i>  <i>Empire Securities Pty Ltd and Western Australian Planning Commission [2005] WASAT 98</i>

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 REASONS FOR DECISION OF THE COMMITTEE:
**Introduction**

1. This decision is the determination of an appeal against a Contaminated Site Classification pursuant to s 18 of the *Contaminated Sites Act 2003* (WA) (CS Act).
2. Relevantly, s 18 of the CS Act provides as follows:

**18. Appeals against classification**

...

(2) *A person who is –**(a) an owner; ...*

...

*of a site classified as –**(c) possibly contaminated – investigation required; ...**may appeal against the classification, or the inclusion in the site of land of which the person is an [owner].*

...

(4) *An appeal is to be brought, dealt with and determined in accordance with Part 8 [of the CS Act which governs appeals].*

3. On 12 May 2023, a delegate of the Chief Executive Officer (CEO) of the Department of Water and Environmental Regulation (DWER) issued a notice of classification (notice) for

lot 10 Peelwood Parade, Halls Head (described as Lot 10 on diagram 79777, as shown on Certificate of Title Volume 2086 Folio 140) (site). The CEO classified the site as:

*possibly contaminated – investigation required.*<sup>1</sup>

4. Prior to the CEO’s decision, being the decision under appeal, the site had never been classified under the CS Act.
5. The notice was issued by DWER in response to a report of a known or suspected contaminated site dated 31 May 2007 (“Form 1 report”).<sup>2</sup>
6. The Water Corporation is the owner of the site.
7. On 20 June 2023,<sup>3</sup> Water Corporation (Applicant) applied to the Contaminated Sites Committee (Committee) for a review of the CEO’s decision by way of an appeal.<sup>4</sup> The Applicant seeks to have the classification altered to *report not substantiated*.
8. In the notice, the CEO concluded as follows:
 

“[T]here are grounds to indicate possible contamination of the site, and [as] a risk assessment to determine the risk to human health, the environment and environmental [values] has not been fully carried out, the site is classified ‘possibly contaminated – investigation required’.”
9. At this point it is important to note that the site is operated as a “prescribed premises”.<sup>5</sup> The premises’ name, as referred to on the Licence, is the Halls Head (Mandurah No 2) Water Resource Recovery Facility.
10. The term “contaminated” is defined in s 4 of the CS Act as follows:

(1) *In this Act –*

***contaminated***, 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>1</sup> Schedule 1 of the CS Act lists the possible classification of sites.

<sup>2</sup> See reg 6 and Form 1 of the *Contaminated Sites Regulations 2006* (WA). The following sentence has been redacted.

<sup>3</sup> Pursuant to s 79(2) of the CS Act an appeal must be lodged within 21 days after the day on which the appellant is given the notice of classification or at such later time as maybe specified in the notice. Here, the notice specified 45 days in which to lodge an appeal.

<sup>4</sup> In *Greenland Resources Pty Ltd v Contaminated Sites Committee [No 2]* [2024] WASC 162 the Supreme Court of Western Australia decided, confirming the Committee’s practice, that appeals against site classification are not *de novo* appeals but are appeals responsive to the grounds raised by the applicant.

<sup>5</sup> Part V Division 3 of the *Environmental Protection Act 1986* (WA) (EP Act) and see Category 54 (“[s]ewage facility”), under Schedule 1 of the *Environmental Protection Regulations 1987* (WA). The Applicant is the licensee under licence L5997/1992/11 issued by DWER (Licence) and operates the site as a Wastewater Treatment Plant (WWTP).

...

11. Schedule 1 of the CS Act specifies the following criterion for the classification *possibly contaminated – investigation required*:

“There are grounds to indicate possible contamination of the site.”

#### ***Procedural History***

12. On 29 June 2023, the Committee requested from the CEO a report on the appeal pursuant to s 80(a) of the CS Act. This report (DWER’s report) was received by the Committee on 21 August 2023.
13. On 30 August 2023, the Committee provided DWER’s report to the Applicant for a response.
14. On 4 October 2023, the Applicant provided a response to the information received from DWER and the Applicant’s response included additional information not initially provided upon lodgement of the appeal. This information included various inspection reports of the infrastructure located on site.
15. These reports and related matters are discussed further below, as necessary.

#### ***Supplementary Information***

16. On 28 March 2024, the Committee requested the Applicant provide additional information that related to an unspecified formal investigation, that was referred to within the Form 1 report. This investigation, completed at the site, highlighted elevated nutrients downstream of the WWTP.
17. On 9 April 2024, the Applicant provided a response to the Committee’s request for information dated 28 March 2024 as follows:

“Whilst no formal documentation can be found on what the formal investigation involved for the Halls Head WWTP, it is reasonable [to assume that] it involved reviewing the 2005/06 Annual Report [ie, a Licence condition requirement, reporting to DWER] which contains data from 1 July 2005 to 30 June 2006.”

#### ***Disposition of the Appeal***

18. In making its decision the Committee has considered all documentation provided by both the Applicant and the CEO and has given due regard to the following guidelines:<sup>6</sup>

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<sup>6</sup> See CS Act, s 13(4) and see *Greenland Resources Pty Ltd v Contaminated Sites Committee [No 2]* [2024] WASC 162, at para [153]. The notice refers to these guidelines.

- Department of Environmental Regulation, *Identification, reporting and classification of contaminated sites in Western Australia*, June 2017 (2017 Guidelines) which, broadly speaking, deal with the mechanics of the process of site classification; and
  - DWER, *Assessment and management of contaminated sites*, November 2021 (2021 Guidelines) which provides guidance on the assessment and management of contaminated sites in Western Australia within the legislative framework of the CS Act and the revised national site assessment framework provided in the National Environment Protection (Assessment of Site Contamination) Measure 1999.<sup>7</sup>
19. For the reasons set out below, the Committee has concluded that none of the grounds have been made out and the classification of the site by the CEO as *possibly contaminated – investigation required* should be affirmed.
20. In short, this is because there is sufficient material to indicate that contamination may potentially exist at the site and the Applicant has not provided sufficient material to displace this assessment. Therefore, the CEO’s classification of the site as *possibly contaminated – investigation required*, as detailed in the notice, remains appropriate.
21. We now turn to discuss, in detail, each of the grounds of appeal.

### **Grounds of Appeal**

22. The Applicant is objecting to the site classification of *possibly contaminated – investigation required* on three grounds.

#### **Ground 1 (limited soil investigations)**

23. The first ground of appeal is responsive to the following justification found in the notice:
- “No soil investigations have been undertaken at the wastewater treatment plant (WWTP) and the condition of [the] soil is unknown. As this site is an operational waste treatment facility, the investigations carried out were limited due to the presence of infrastructure at the site.”
24. The Applicant submits that the site is a licensed premises that has operated, in effect, in accordance with the applicable regulatory obligations. The Applicant says that there have been no site-related incidents involving uncontrolled discharges of waste on the site, and that there is no evidence to suggest that spills and leaks have occurred on or in the ground in and around the site.
25. The Applicant contends that its position is supported by a “robust CSM [conceptual site model], which focussed on material data gaps in the site understanding” that has been

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<sup>7</sup> A national inter-governmental environmental standard referred to as the ASC NEPM.

prepared by the Applicant's external environmental consultant Senversa Pty Ltd (Senversa 2022)<sup>8</sup>, and which indicates no plausible source-pathway-receptor (SPR) linkages have been identified in relation to soil contamination.

26. The applicant submits that the SPR linkages have been discounted and acknowledged by DWER in the notice of classification.
27. The applicant further submits that the implemented investigations were not impeded by site infrastructure and were targeted to assess the SPR linkages. Where investigations were not conducted, this was due to there being no reasonable suspicion of contamination and that DWER's requirement for further investigation upon site decommissioning is not material to the site classification in the context of ongoing use.
28. In response to DWER's report, the Applicant provided a further submission to support its position that there was no secondary evidence of contamination, that leaks have been appropriately addressed and asset condition assessments support its view that "there is no reasonable suspicion that soil contamination has been caused".

#### **DWER's position**

29. DWER acknowledged that the site is appropriately licensed but DWER nevertheless observed that a prescribed premises regulated under Part V Division 3 of the EP Act may also be classified under the CS Act.
30. DWER submits that there is evidence to support a claim that the site has been subject to site related incidents, and these include:
  - the Form 1 report submitted to DWER in 2007, whereby it was reported that the site was suspected to be contaminated by nutrients and the source, referenced within the reporting document, was treated wastewater being present in both soil and groundwater;
  - a reported pollution incident on 4 March 2014 when raw sewage was discharged to or into the soil due to a pipe leak, with the incident being reported by the Applicant to DWER and an incident report being completed which was documented in GHD 2020<sup>9</sup>; and
  - a waste discharge of an estimated 238 kilolitres of untreated wastewater from the influent station to the overflow sump due to a "PLC [Programable Logic Controller] failure" which was reported to DWER on 28 June 2010 under s 72 of the EP Act.

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<sup>8</sup> Senversa (2022) *2021/2022 Environmental Site Assessment Mandurah No 2 (Halls Head) Wastewater Treatment Plant, Halls Head, WA 6210*, 11 October 2022.

<sup>9</sup> GHD (2020) *Water Corporation Mandurah No 2 (Halls Head) Wastewater Treatment Plant Baseline Assessment, July 2020, Rev 1*, 21 July 2020.

31. DWER also submits that it has reviewed the results documented within a 2022 Environmental Site Assessment report, prepared for the Applicant by an external environmental consultant (Senversa 2022).
32. Having analysed the Senversa 2022 report, DWER submits that:

“The distribution of TN [total nitrogen] and NO<sub>x</sub>-N [nitrogen oxides as nitrogen] concentrations in groundwater along the western boundary suggests there may be leakage or seepage occurring from site containment infrastructure other than the infiltration ponds. DWER considered these results as a secondary line of evidence, providing grounds to indicate possible contamination of soil beneath site containment infrastructure (other [than] the infiltration ponds).”
33. Thus, DWER considers (in accordance with the 2017 Guidelines<sup>10</sup>) that these results from the Senversa 2022 report constitute a secondary line of evidence and therefore DWER concluded that the results provide grounds to indicate possible contamination of the soil beneath the site containment infrastructure, other than the infiltration ponds.
34. The DWER report acknowledges that previous environmental investigations did not identify any unacceptable off-site risks to human health or the marine environment, but DWER re-emphasised its previous point that the concentrations of TN and NO<sub>x</sub>-N in groundwater are grounds to indicate possible contamination of the site.
35. The DWER report concedes that further investigation of soil beneath infrastructure is impracticable at this point in time. However, DWER observes that there are secondary lines of evidence indicating possible soil contamination beneath site containment infrastructure.
36. DWER has submitted that this ground of appeal should be dismissed and that the current classification of *possibly contaminated – investigation required* be affirmed.

### **Committee’s Consideration**

37. The Committee acknowledges that the site is a prescribed premises, is subject to a Licence, issued under the EPA Act, and also acknowledges the statutory obligations imposed on the Applicant, as the licensee.<sup>11</sup>
38. The Committee acknowledges the Applicant’s submission that it has operated in accordance with its regulatory obligations under the EP Act. However, the Committee notes that while premises may be regulated under one specific piece of legislation this

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<sup>10</sup> See para 7.2.2 (“Threshold to classify a reported site as *possibly contaminated – investigation required*”).

<sup>11</sup> The site, as a prescribed premises, is, in effect, principally regulated under the EP Act.

does not preclude the possibility of other issues or investigations being conducted in accordance with other regulatory obligations.<sup>12</sup>

39. The Committee notes that the 2017 Guidelines lists, “Sewage/wastewater treatment plant” within the list of potentially contaminating industries, activities and land uses. The Committee acknowledges that a site is not, of course, necessarily to be regarded contaminated solely because an activity listed in the Guidelines has occurred on the site.
40. Under section 7.2.2 of the 2017 Guidelines the threshold to classify a reported site as *possibly contaminated – investigation required* is indicated. The 2017 Guidelines state, in part, that “[i]f secondary indicators of contamination are present, then the site is likely to be classified as *possibly contaminated – investigation required*”.
41. The Committee has had regard to the above statement found in the 2017 Guidelines when forming its view on this issue.
42. Supplementary information provided by Water Corporation on 8 April 2024 (which is considered in detail below) in the Form 1 report lodged with DWER in 2007. That is, suspected site contamination occurred at the site and the suspected source of that contamination was treated wastewater, with resultant contamination of soil and groundwater.
43. The supplementary information referred to includes tabulated analytical results from an annual monitoring report to DWER.<sup>13</sup> Concentrations of nutrients in groundwater directly downgradient of potential sources on-site (Halls Head Obs Bore 7/88 SP) indicate elevated concentrations of ammonia (NH<sub>3</sub>) and nitrate (NO<sub>3</sub>) plus nitrite (NO<sub>2</sub>).
44. The Senversa 2022 Report indicates that concentrations of these various nutrients exceed the criteria adopted for protection of marine water quality in one or more locations downgradient of infrastructure on-site (bores 7/88, 03S/20, 04S/20 and 05S/20) during the monitoring period 2020-2021.
45. In the Committee’s view there is the potential that soil contamination can give rise to groundwater contamination and the Committee has proceeded on this basis in addressing this aspect of the appeal.
46. The Committee observes that the results of monitoring in 2020-2021 (as presented within Senversa 2022) were not discussed in the report itself with reference to the criteria for

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<sup>12</sup> Eg, the CS Act and its subsidiary legislation, and DWER guidelines.

<sup>13</sup> Halls Head Wastewater Treatment Plant Annual Monitoring Report 2005/06.



non-potable groundwater uses on-site. The 2021 Guidelines make references to appropriate Tier 1 criteria.<sup>14</sup>

47. In the Committee's view, consideration should have been given to additional criteria that include all potential beneficial uses for example the irrigation of garden beds or similar. This is discussed further, below.
48. A soil and groundwater assessment has not been undertaken on or immediately adjacent to all potential source areas including the emergency overflow basin and infiltration ponds.
49. In short, investigations to date have not been sufficient to discount the presence of possible contamination at the site and there is prima facie evidence of possible contamination on the site.
50. Further, the Committee does not accept the Applicant's claim that there has been "no site-related incidents involving uncontrolled direct discharges of waste to ground". This is because there is information before the Committee which indicates otherwise. This information includes an environmental consultant's report (GHD, 2020]) which noted that:

"[DWER information] confirmed the sewage trunk main entering the site had leaked less than 10 kL on 5 March 2014. The spill was reported to have been contained on-site and thoroughly cleaned with biodegradable disinfectant. Section 72 [of the EP Act] notification was not sent to DWER as the leak was <10 kL."
51. The Committee accepts the information provided by the Applicant that DWER Industry Regulation branch acknowledged the clean-up measures undertaken and confirmed that the incident could be closed off. However, this does not necessarily confirm that contamination has not occurred or residual contamination is not present.
52. In relation to secondary lines of evidence of possible contamination,<sup>15</sup> the Committee notes that the CSM, as presented in various reports, does not identify any plausible SPR linkages.
53. However, the Committee having considered the various assessment reports noted above does not agree with the Applicant's submission, as it is unsupported by the underlying investigation data and fails to consider all relevant beneficial uses.

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<sup>14</sup> ASC NEPM, Schedule B1, refers to Tier 1 risk assessment as follows: "A Tier 1 assessment is a risk-based analysis comparing site data with generic investigation and screening levels for various land uses to determine the need for further assessment or development of an appropriate management strategy."

<sup>15</sup> See section 7.2.2 of the 2017 Guidelines, discussed above.

54. Further, analytical results, taken from various monitoring wells, reported groundwater concentrations of contaminants above relevant Tier 1 Screening Levels.
55. In relation to possible infrastructure leaks,<sup>16</sup> the Committee notes that the Applicant has provided documentation that provides assessments of particular infrastructure including surrounding areas following a spill event. However, in the Committee's view the assessments completed to date are not comprehensive enough to discount the possibility of leaking infrastructure across the site or further spills.
56. Not all potential sources of contamination have been adequately investigated. The Committee acknowledges that the Applicant has provided information to support its position that some infrastructure elements have been maintained and were thus unlikely to have leaked. However, the Committee agrees with DWER that there has been insufficient follow up to discount contamination coming from infrastructure on site.
57. In relation to the potential for on-site or off-site risk, the Applicant has not adequately assessed all potential on-site sources of contamination to groundwater. Assessments completed to date primarily focus on the potential risk to the adjacent aquatic environment in the context of marine water ecosystems and recreational water quality.
58. The Committee also considers that the nominated "background" levels relied upon by the Applicant are not appropriate to dismiss potential impacts from on-site sources of contamination. This is because, for example, per- and polyfluoroalkyl substances (PFAS) concentrations used in the Applicant's consultant's modelling compared a PFAS concentration against a "background concentration"; however, the "background" sample was collected on-site, and the monitoring well used for modelling impacts to the marine environment was not the monitoring well that reported the highest concentrations of PFAS on-site. Accordingly, the modelling conclusions put forward are unlikely to be an accurate assessment of risk.
59. The Committee is also of the view that discounting non-potable use of groundwater on-site as the Applicant has done is not considered to be appropriate. Groundwater uses on-site or immediately off-site, or both, for, say, irrigation of garden beds, or similar, is a common consideration when assessing site contamination. However, this potential risk has not been adequately assessed. GHD (2020) notes there are two licenced abstraction bores are present on the site (GWL 65570 and GWL 169941) confirming that non-potable use is an applicable current use.

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<sup>16</sup> See para 27 above.

60. The Committee concludes that there is sufficient evidence, in the material provided by both parties, to support a decision that affirms the CEO's current classification of the site as *possibly contaminated – investigation required*.
61. This ground of appeal should be dismissed.

**Ground 2 (Adequate site investigations and risk assessments completed)**

**Applicant's submissions**

62. The second ground of appeal is responsive to the following justification found in the notice:

“As there are grounds to indicate possible contamination of the site, and a risk assessment to determine the risk to human health, the environment and environmental assessment has not been fully carried out, the site is classified [*possibly contaminated – investigation required*].”

63. The Applicant submits that the current evidence does not indicate any grounds for possible contamination at the site. The Applicant's position is that the site investigation and associated risk assessments were conducted “to the extent necessary to address plausible SPR linkages identified for further assessment by the data gaps evaluation”.<sup>17</sup>

**DWER's position**

64. DWER submits that the data showing the distribution of nutrients in groundwater along the western boundary of the site (see *Senversa 2022*, referred to above) is a secondary line of evidence indicating possible contamination through leakage and or seepage from the site containment infrastructure (other than the infiltration ponds).
65. DWER submits that this ground of appeal be dismissed and that the current site classification be affirmed.

**Committee's Consideration**

66. The Committee disagrees with the Applicant's submission that existing lines of evidence do not suggest grounds for possible contamination of the site.
67. As the Committee has discussed above in its response to Ground 1, information provided to the Committee supports a finding contrary to the Applicant's position. This is due to the indications of the contaminants being present at the site, arising from the data taken from the various monitoring wells, which report results of concentrations above Tier 1 Screening Levels for relevant beneficial uses of groundwater.

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<sup>17</sup> Data gaps are those elements of a contaminated site assessment which have yet to be undertaken to determine the nature and extent of contamination at a site.

68. The Committee concludes that the Applicant and DWER have provided sufficient evidence to support a decision by the Committee that affirms the CEO's current classification of the site as *possibly contaminated – investigation required*.
69. This ground of appeal should be dismissed.

**Ground 3 (Action required by Applicant to complete further works)**

**Applicant's submissions**

70. The third ground of appeal is responsive to the following paragraph found in the notice under the heading "Action Required":

"The [Applicant] should prioritise a local domestic abstraction bore survey and sampling program to determine local groundwater use and assess the public health exposure and risk."

**Committee's Consideration**

71. DWER has conceded that this paragraph was not determinative of the classification and was only included following consultation with Department of Health.
72. In DWER's report to the Committee it said:
- "As this ground of appeal is not relevant to the reasons for classification of the site as *possibly contaminated – investigation required*, DWER recommends that this ground be dismissed. In the event the Committee affirms the *possibly contaminated – investigation required* classification, DWER will update the records to remove the action related to local domestic abstraction bores."
73. In light of these observations, it is unnecessary for the Committee to consider the Applicant's submissions in relation to this ground of appeal.
74. In any event, the reference to prioritising local domestic bores and sampling is the nature of an "advice note" directed to the owner of the land.
75. In administrative law, generally speaking, such advice notes are not capable of review by administrative tribunals. Thus, the State Administrative Tribunal of Western Australia has noted that "a decision to give such 'advice' is not a 'reviewable decision' for the purposes of the Tribunal Act".<sup>18</sup>
76. This ground of appeal should therefore be dismissed.

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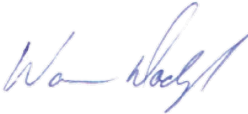
<sup>18</sup> *Empire Securities Pty Ltd and Western Australian Planning Commission* [2005] WASAT 98, at [78], (Senior Member David Parry, as he then was).

**Conclusion**

77. For the reasons stated above, none of the grounds of appeal have been made out and the Committee therefore dismisses the appeal and affirms the CEO's decision under appeal.

I certify that the preceding paragraphs comprise the reasons for decision of the Contaminated Sites Committee.

W DODGE, CHAIRPERSON



18 September 2024