



Amended Decision in Respect of Appeal Against Requirements of Investigation Notice

Contaminated Sites Committee (CSC 14/2014)

Contaminated Sites Act 2003, Part 8, Division 2

Appellant: Bio-Organics Pty Ltd

Site: Lot 36 on Diagram 66394 as shown on certificate of title volume 1666 folio 695
Known as 36 Abernethy Road, Oakford.

Decision: Appeal Dismissed

Date: 18 March 2015

1.0 Summary

- 1.1 The Site is currently owned by Joseph and Naline Avila and occupied by Bio-Organics Pty Ltd ("Bio-Organics") which, until recently, operated composting and liquid waste operations on the Site.
- 1.2 The Site is classified *possibly contaminated – investigation required*.
- 1.3 The CEO of the Department of Environment Regulation ("DER") issued an investigation notice (IN), dated 2 October 2014, pursuant to section 49 of the *Contaminated Sites Act 2003* ("CS Act").
- 1.4 The notice advised that a person aggrieved by a requirement contained in the notice or by the CEO's decision to give the person the notice "may within 21 days of being given this notice or within 21 days of being bound by this notice, lodge with the Contaminated Sites Committee an appeal".
- 1.5 In a letter to the Committee dated 23 October 2014 Bio-Organics sought to appeal the requirements contained in the IN and the CEO's decision to serve the IN on Bio-Organics. Under section 79(3)(b) of the CS Act the lodging of this appeal had the effect of suspending the requirements of the notice, "subject to any written decision of the committee to the contrary", pending the determination of the appeal.
- 1.6 On 5 November 2014 the CEO wrote to the Committee asking that, pursuant to section 79(3)(b) the Committee consider making a decision that the provisions of the IN should continue to have effect pending the determination of the appeal ("Request").
- 1.7 On 13 November 2014, in accordance with section 80 of the CS Act, the Committee asked the CEO of DER to provide a report on the appeal (section 80 report).

- 1.8 The Committee invited comment from Bio-Organics on this Request. Bio-Organics responded in a letter dated 24 November 2014. This response was forwarded to DER and responsive submissions were received on 12 December 2014.
- 1.9 The Committee considered the CEO's Request and all submissions received from both parties regarding the Request at its meeting on 18 December 2014. The Committee decided to **reject** the CEO's Request to waive the normal suspension provisions associated with the Appeal under section 79(3)(b) of the Act, for the reasons set out below.
- 1.10 The CEO's section 80 report dated 24 December 2014 (received 6 January 2015) was forwarded to Bio-Organics for a response, which was received with additional supporting documents over 9 - 13 February 2015.
- 1.11 The Committee considered all documents and submissions provided by both the appellant and the CEO throughout the document exchange listed above.
- 1.12 The Committee decided that the appeal should be **dismissed** for the reasons set out below. Under section 82(2) of the Act this decision of the Committee is final and without appeal.

2.0 Appeal Grounds (Summary)

- 2.1 The IN *"would not result in any form of physical remediation. The result would be altered management practises. These management practises have already been implemented and therefore the process prescribed in the investigation notice is of no utility"*.
- 2.2 The IN *"refers to a "plume", however, there is no evidence of such a plume. ... the compost facility ... is fit for purpose and not leaking"*.
- 2.3 *"this test bore on neighbouring property is in fact UPSTREAM and potentially affected by large scale disposal of waste soil on that subject property"*.
- 2.4 *"a CS investigation is now underway on the direct upstream adjacent property ... the long term practise of high pressure washing out of commercial chicken sheds directly onto the ground... It is therefore prudent to suspend investigation as mandated by the notice ... until results are available from the neighbouring property"*.
- 2.5 *"The only downstream bore that presents an anolyte of significant increase downstream of the composting facility is a bore at the greatest distance from the Bio-Organics facility and the anolyte of concern is N. ... The level of N is within agricultural guidelines ... the farming practise that exist on that site do not fall within the remit of the CS Act. ... a monitoring bore (MB03A) ... consistently shows levels of N similar to or less than upstream background levels."*
- 2.6 *"I appointed a qualified consultant by the time required in correspondence by the CS branch."*
- 2.7 *"CS branch objected to the consultant on the basis of a potential conflict of interest (which we reject). Upon being notified by DER that they were unsatisfied with the consultant, I immediately appointed another qualified consultant. Obviously this was now after the deadline set by DER. DER then initiated the Investigation Notice stating that we were in breach. This is manifestly unfair."*

- 2.8 *“Further detailed testing is being completed MONTHLY in both upstream and downstream bores in a specific manner mandated by DER. This data is supplied monthly to DER. DER stipulate that in the reasons for the notice being given that Bio-Organics has not taken action to monitor the site. This is manifestly untrue.”*
- 2.9 *“The only analyte that is elevated downstream is N. ... there is no activity now to suspend ... there would no remediation to take place (N is within agricultural guidelines on farming land).”*
- 2.10 *“DER stipulates that P N are higher than a range of environmental guidelines (drinking water etc). ... these are simply not relevant to the property (being agricultural). Additionally the CS Act’s definition of contamination means that (with the exception of N in one bore) all levels fit within those tested upstream as background levels.”*
- 2.11 *“We object to the requirements of this notice because the notice is not simply requiring an expert to assess the site and implement a testing regime based on professional experience, expertise and site findings, but instead is mandating to the expert what and how to test. This is outside the requirements of the act.”*

3.0 Reasons for the Investigation Notice and the CEO’s section 80 report in response to the Appeal (summary)

- 3.1 The DER noted in the IN that the notice was issued for the reason that the Site is possibly contaminated and appropriate action has not, or is not being taken to investigate, monitor or assess the Site. Requirements were set out for groundwater monitoring on-site and off-site, and noted that following multiple requests, appropriate investigations have not been carried out. The requirements of the investigation notice are (in summary):
- 3.1.1 Engage an accredited contaminated sites Auditor to undertake an audit of the Site within 14 days.
 - 3.1.2 Sampling and Analysis Program (SAP) to be prepared by an Environmental Consultant, to be prepared in accordance with DER’s Contaminated Sites Management Series of guidelines (CSMS) and the National Environment Protection (Assessment of Site Contamination) Measure 1999 (NEPM). Provide the SAP to be submitted to the Auditor and the CEO for approval within 6 weeks.
 - 3.1.3 Engage an Environmental Consultant within 14 days to prepare a Community Consultation Plan (Plan), which should comply with CSMS and NEPM and submit draft to CEO and Auditor. Then implement the approved plan, which should include specific steps.
 - 3.1.4 Undertake Site investigations by implementing the SAP.
 - 3.1.5 Continual reporting to the CEO, including the Environmental Consultant preparing a Detailed Site Investigation (DSI) report, to be approved by the Auditor.
- 3.2 The CEO’s section 80 report in response to the appeal argued:
- 3.2.1 Bio-Organics, as the occupier of the Site, is ineligible to appeal the CEO’s decision to issue the IN; and

- 3.2.2 Recommended that all grounds of appeal be dismissed; also advised that the neighbouring property (see paragraph 2.4 above) had been investigated by DER and the result was *report not substantiated*.

4.0 Committee's decision

- 4.1 Bio-Organics sought to appeal against the CEO's decision to serve the IN on Bio-Organics. Under section 52(1) a person on whom an investigation notice is binding may appeal against a requirement of the notice. However section 52(3) specifically excludes an owner or occupier from lodging an appeal against the CEO's decision to give the person a notice unless section 54(1)(d) applies. In this case it does not, so Bio-Organics' purported appeal against the CEO's decision to serve the IN is invalid.
- 4.2 Bio-Organics' appeal against the requirements of the notice was received within the prescribed appeal period and fulfilled all other statutory requirements to be accepted as a valid appeal.
- 4.3 The CEO's Request regarding the effect of section 79(3)(b) of the CS Act
 - 4.3.1 The Committee considered the CEO's request for the Committee to decide that the requirements of the IN continue to have effect pending the resolution of the appeal.
 - 4.3.2 The Committee considered that such a decision, to reverse the default effect of a provision of the Act, may be justified where there was an imminent risk of harm to human health and the environment and a need to take prompt action. In this case, since the principal requirements of the notice related to the preparation, approval and implementation of an investigation plan and consultation plan, those circumstances did not appear to apply.
 - 4.3.3 The Committee also noted that, had there been a need for urgent action, an option available to the CEO would have been to issue a hazard abatement notice (against which there is no appeal). The CEO had not chosen to do so.
 - 4.3.4 The Committee having considered the matter, decided not to make the decision requested by the CEO, which meant that the requirements of the notice continued to be suspended pending the determination of the appeal.
- 4.4 For the purpose of considering the appeal, the Committee reviewed the investigations to date, and considers they have not adequately characterised the nature and extent of possible groundwater impacts of the activities undertaken on the site. This is evidenced by the Committee's separate affirmation of the classification of the site as *possibly contaminated – investigation required*.
- 4.5 Given this lack of information, it is not possible to know with certainty what remediation might be required, the relevant groundwater flow dynamics or the relative contributions of possible contaminant levels.
- 4.6 The possible risks to human health and the environment have also not been adequately investigated. Without identifying potential receptors and pathways it is not possible to determine the appropriate guidelines to employ.
- 4.7 The requirements for the sampling and analysis program refer to a "plume", but from the context it is clearly a reference to a "possible" plume, yet to be adequately

investigated. The lack of investigation is not grounds for claiming a plume does not exist.

4.8 The appellant has suggested other sources for the possible contamination, but without adequate investigation these assertions cannot be sustained, and the need for investigation of the possible contamination (including its likely source), remains.

4.9 The appellant's grounds of appeal did not directly address the terms of the IN, however the Committee's reasons in relation to each ground are as follows:

4.9.1 Ground 1 - It is not possible without further investigation to conclude that the required action would be to "do nothing". DER advises that it is premature to expect the IN to outline the remediation strategy required before the possible contamination has been identified. It is not clear that specific plans and investigations would be "of no utility", and further information is required.

4.9.2 Ground 2 - It is clear from the terms of the IN that because of a lack of information the existence of a plume is suspected but not confirmed. Without the required delineation investigation the presence or absence of a plume cannot be known with certainty.

4.9.3 Ground 3 - One aim of the investigation notice is to establish the direction of groundwater flow in the area. Strategen, the appellant's consultant, has reported the need for such work and DER agrees. This does not support an alteration or deletion of the requirements of the IN.

Bio-Organics questions whether activities on a neighbouring property might be a likely source for the possible groundwater contamination. Despite DER's explanations of why that is unlikely in relation to acid sulphate soil treatment, the possibility for some contribution remains, and the best way to determine whether the appellant's former operations were the source is by pursuing the investigation. The appellant has not provided a ground for changing the requirements of the IN.

4.9.4 Ground 4 - In relation to the neighbouring property, DER reported that investigations by DER and the Department of Health in 2013 found "insufficient grounds to indicate" possible contamination and concluded *report not substantiated*.

The appellant makes a number of unsubstantiated claims of "*an illegal liquid waste and chemical disposal operation*" but this matter has not been fully investigated to DER's satisfaction. The appellant states that DER has adopted an "*uneven approach*" but it appears that the difference is that the investigation of the neighbouring property is complete and that of this Site is still ongoing.

4.9.5 Ground 5 - Ground 5 relates to the present lack of information. This is not a reason for not conducting relevant investigations. The appellant's argument relates to "*downstream*" and "*upstream*" where more information needs to be collected to identify what these directions might be. Further risk analysis needs to be conducted to determine the appropriate guidelines to be applied.

4.9.6 Ground 6 - The appellant's argument in relation to appointing a qualified consultant in time is not a valid ground for removing the requirement in the

notice to appoint a qualified consultant. Without such a requirement it would be possible for the person subject to the requirement to subsequently cancel the appointment of the required consultant. The requirement is part of doing the job properly. This argument does not provide a ground for altering the requirement of the IN.

- 4.9.7 Ground 7** - Email evidence from DER indicates that DER was not “unsatisfied” with the initial consultant, but that the consultant was uncertain about taking the job because of a possible conflict as it was already employed on other work for the appellant. DER reports that, despite being granted an extension for compliance, the appellant did not advise DER of the appointment of the second consultant. Whether or not the circumstances preceding the issue of the IN were unfair on either party is irrelevant. This claim does not provide a ground for altering the requirement of the IN.
- 4.9.8 Ground 8** - The reasons for the IN do not state that no action has been taken, but that the appellant has twice, upon request, **failed** to provide information “*to demonstrate that action is being taken*”. In any event, the fact that some work is being undertaken is not, a ground for the alteration or removal of the requirement in the IN, especially since there appears to be uncertainty about the required monitoring.
- 4.9.9 Ground 9** - There is a lack of information and evidence that indicates which way is ‘downstream’, delineation of the alleged plume and adequate risk assessments to identify potentially at-risk receptors. The appellant’s claim that N is the only analyte elevated downstream lacks evidence.

Regarding the claim that there is no activity to suspend, DER observes that, the objective of the CS Act is not to suspend activities that have been licensed under the EP Act.

Section 8 Objective and principles of the Act

“The objective of the CS Act is to protect human health, the environment and environmental values by providing for the identification, recording, management and remediation of contaminated sites...”

The purpose of further investigations is to fully characterise the conditions at the Site and assess the risk to human health, the environment and environmental values.

The scope of the requirements may appropriately be wider than stopping current activities and the appellant has not shown that the only downstream receptor is agricultural.

- 4.9.10 Ground 10** - Since there is uncertainty over whether the possible contamination might reach and affect sensitive receptors other than agricultural (domestic and environmental) it is appropriate for the IN to apply guidelines appropriate to those sensitive receptors. The doubt over the adequacy of the “upstream” bore as an indicator of “background” levels is unresolved so it cannot be relied upon to amend or delete the requirements of the IN.

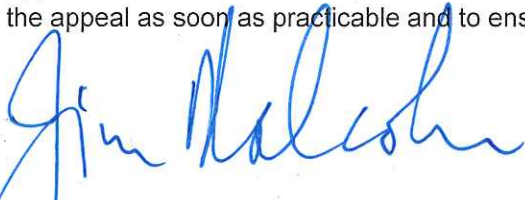
4.9.11 Ground 11 - The Act enables INs to be prescriptive and provides the CEO with the necessary power to set investigation requirements. The ground of appeal regarding prescriptiveness of the IN is not relevant.

5.0 Conclusion

The Committee dismisses all grounds of appeal.

The requirements of the IN are affirmed, with the provision that where a requirement contains the words "this notice being issued" or "the issue of this notice" the date referred to is to be the date of delivery of this amended decision.

Note: section 82(2) of the Act provides that the Committee's decision under that section is final and without appeal. Section 83 of the Act provides that the CEO of the Department is to give effect to the outcome of the appeal as soon as practicable and to ensure that the details are published in the prescribed manner.



Jim Malcolm
Chairman

and as agent for and on behalf of
the Contaminated Sites Committee

18 March 2015