



Government of **Western Australia**
Contaminated Sites Committee

Decision in Respect of Appeal Against Investigation Notice

Contaminated Sites Committee (CSC 01/2019)

Contaminated Sites Act 2003, Part 4, Division 4

APPELLANT: Joseph and Naline Avila
SITE: 941 (Lot 36) Abernethy Road, Oakford (**the Site**)
DATE: 16 December 2019

1. This decision of the Contaminated Sites Committee (**Committee**) relates to an appeal against an Investigation Notice (**IN**) given by the Chief Executive Officer (**CEO**) of the Department of Water and Environmental Regulation (**DWER**)¹ under s.52 of the *Contaminated Sites Act 2003 (Act)*, which was issued on 3 December 2018. The site is owned by Joseph and Naline Avila.
2. The reasons for the IN given by the CEO:
"This Notice is given to the Owners because the CEO of DWER is of the opinion that there are grounds to indicate possible contamination of the Site and that appropriate action to investigate, monitor or assess the Site is not being, or has not been, taken".

Appeal

3. An appeal was submitted to the Contaminated Sites Committee (**Committee**) on 21 December 2018 by the Appellant.

Time limitation

4. An appeal is to be brought, dealt with and determined in accordance with Part 8 of the Act. Pursuant to s.79(2), a notice of appeal is to be lodged within 21 days after the day on which the recipient is given the notice, which gives rise to the appeal, or such later time as may be specified in the notice. The notice, to which this appeal relates was dated 3 December 2018 and specified a period of 21 days from the date of the notice as the period during which an appeal may be lodged. The appeal was lodged in time on 21 December 2018 and was determined by the Committee to be valid.

¹ The Department of Water and Environmental Regulation (DWER) was established on 1 July 2017 following the amalgamation of the Department of Water, the Office of the Environmental Protection Agency and the Department of Environmental Regulation (DER). DER was separated from the former Department of Environment and Conservation (DEC) in June 2013. The use of the name 'DWER' is used in this document to refer to both DER and DEC. The CEO, herein refers to the CEO of DWER or its predecessors.

Grounds of appeal

5. The Appellant provided the following grounds of appeal:
 - i. Insufficient time for action or appeal.
 - ii. Incomplete documentation.
 - iii. Pending Notice of Amendment to IN.
 - iv. The IN is invalid in part and wholly. Full details shall be submitted within 90 days (UON) upon resolution of items 1--, including, but not limited to:
 - a. The site is not "high priority" therefore no investigation is required;
 - b. IN applies to a superseded Notice of Classification therefore invalid.

Committee's decision

6. The Committee has given consideration to all grounds of appeal and other matters raised in the correspondence and information that has been provided from the Appellant and the CEO.
7. *Insufficient time for action or appeal (i)*. The attempted differentiation between a preliminary appeal and a full and final appeal has no basis under the Act. It is either an appeal or it isn't. There is no scope under the Act to effectively put the Committee's processes on hold reserving appeal rights while the Appellant awaits the resolution of other matters. S.79 of the Act states that an appeal is to be lodged within 21 days after the Appellant is given the notice. Once an appeal is received, the Committee is obligated to deal with it in a timely manner. ***This ground of appeal is dismissed.***
8. *Incomplete documentation (ii)*. The Committee understands that this appeal ground relates to the 'document control' page of a draft Decision Document that was provided to the Appellant in May 2018 but was omitted from the version of the document provided to the Appellant in December 2018. The Appellant has not demonstrated that the missing page contained any relevant information that was not already in the Appellant's possession. There is insufficient evidence for the Committee to conclude that the documentation provided with the appealed IN was inadequate. ***This ground of appeal is dismissed.***
9. *Pending Notice of Amendment to IN (iii)*. DWER advised an intention to amend the IN, but on 11 February 2019, DWER advised the Appellant that the IN would not be amended while under appeal. The Committee considers that the existence of such an intention by DWER does not provide grounds for an appeal against the present IN. ***This ground of appeal is dismissed.***
10. *The IN is invalid (iv)*. This relates to the Appellant's perception that the CEO is required to issue an IN only in relation to a site that is 'high priority'. S.49(2) of the Act provides that an IN is to be given only if, in the opinion of the CEO, there are grounds to indicate the possible contamination of a site and that appropriate action to investigate, monitor or assess the site is not being, or has not been, taken. The Appellant has not provided evidence that establishes that the site does not meet the criteria listed in s.49(2) relating to the CEO's opinion. ***This ground of appeal should be dismissed.***
11. *The IN applies to a superseded Notice of Classification and is therefore invalid (iv)*. S.49 (2)(a) of the Act states that issuing an IN relates not to the classification of a site, which has a very specific meaning in the Act, but to there being 'grounds to indicate...the possible contamination of the site'. The Appellant has not provided evidence to question the CEO's opinion on this question. ***This ground of appeal should be dismissed.***

Conclusion

- 12. For the reasons stated above, the Committee has dismissed the appeal.

- 13. The requirements of the IN are affirmed, with the exception that where the IN requires some action to be taken within a specified number of days after “this notice being issued” or “the issue of this notice”, the action is to be taken within that same specified number of days after the date of delivery of this 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