



## **Decision in Respect of Appeal Against Classification**

**Contaminated Sites Committee (CSC 04/2018)**

***Contaminated Sites Act 2003, Part 8, Division 2***

**APPELLANT:** Bio-Organics Pty Ltd (**Bio-Organics**)  
**SITE:** 941 (Lot 36) Abernethy Road, Oakford (**the Site**)  
**DATE:** 28 October 2019

### **DECISION**

1. This is an appeal against a notice of classification given by the Chief Executive Officer (**CEO**) of the Department of Water and Environmental Regulation (**DWER**)<sup>1</sup> under s15 of the *Contaminated Sites Act 2003 (Act)* on 26 February 2018. That notice of classification classified the Site as *possibly contaminated – investigation required (PCIR)*. The site is owned by Joseph and Nalina Avila and is occupied by Bio-Organics. Ben Avila is the Applicant for the Appeal.
2. The Reasons for Classification given by the CEO found:

*“As there are grounds to indicate possible contamination of the site, further groundwater monitoring is required and soil has not been investigated, further works are required to determine the contamination status of the site and the site has been classified PCIR”.*

### **Background**

3. The site comprised of natural bushland until 1985 when it was cleared for agricultural and pastoral land use.
4. The site is roughly rectangular and is bound by Abernethy Road to north, rural land to the east and a vineyard and rural land to the south. Lot 35 (not part of the site) adjoins the western boundary of the site and primarily comprises rural land with an equipment/maintenance yard located in the south eastern portion and a residential building in the northern portion of the Lot.
5. The site can be sub-divided into two distinct sections, namely the northern section and the southern section. The northern section of the site covers an area of approximately 12 ha and comprises rural land that is currently being utilised as a pasture.

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<sup>1</sup> 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.

6. The south-eastern portion of the site operated as a compost manufacturing facility between 2002 and June 2014, when DWER revoked the operating licence for the site and issued a closure notice under the *Environmental Protection Act 1996*. Compost manufacturing is a land use that has the potential to cause contamination under DWER's 2014 '*Assessment and Management of Contaminated Sites*'<sup>2</sup> Contaminated Sites Guidelines.
7. A contamination assessment was carried out in 2013, following a report of an unauthorised discharge from the site. Groundwater monitoring undertaken at the site did not meet the guidelines published within the *National Environment Protection Measure 1999* (NEPM).
8. An Investigation Notice was issued by DWER under s49 of the Act in October 2014 requiring that an investigation is conducted to determine the nature and extent of potential contamination at the site and off-site.
9. In July 2015, a Preliminary Site Investigation and Sampling Analysis and Quality Plan and a Community Consultation Plan was submitted to DWER. The groundwater monitoring required under the Investigation Notice was completed in 2016 and a Detailed Site Investigation (DSI) Report and Mandatory Auditor's Report (MAR) was submitted to DWER in March 2017.
10. Community consultation found that groundwater in the area was generally used for irrigation and livestock watering and drinking water was sourced from scheme or rainwater, except for one resident who occasionally supplemented groundwater for drinking.
11. The groundwater investigation found that nutrients, metals, total dissolved solids, calcium and magnesium carbonate were at elevated concentrations in the groundwater beneath the site and exceeded guideline levels. The DSI concluded that further groundwater monitoring was required, near the stormwater basin, on an annual basis for two years.
12. As the quality of the soil had not been investigated, DWER was unable to determine the suitability of the site as a whole or for any other land use.
13. The MAR recommended that further groundwater monitoring was required near the stormwater basin on annual basis for two years.
14. An independent review by an accredited auditor in Victoria concluded that the groundwater investigation provided a reasonable basis for assessing impacts to the east of the site, but insufficient on-site investigation had been carried out near the southern boundary of the site.
15. In August 2017, groundwater monitoring was carried out at an adjacent site to the south-west at which compost from the site had been stockpiled. The monitoring found perfluoroalkyl and polyfluoroalkyl substances (PFAS) in the groundwater beneath the adjacent site and the report considered that the annual monitoring needed to include PFAS.
16. DWER believes that further groundwater monitoring is required and the soil has not been investigated, as a result the site has been classified PCIR. When the results of further groundwater monitoring and soil investigation are submitted to DWER, they will be reviewed and the site may be reclassified.

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<sup>2</sup> '*Assessment and management of contaminated sites*', Contaminated Sites Guidelines, Department of Environmental Regulation, December 2014.

17. All investigations, monitoring and assessment is required to be carried out in accordance with the DWER Contaminated Sites Guidelines, the NEPM and the PFAS National Environmental Management Plan.

### **Appeal**

18. An appeal application form was submitted under s18 of the Act to the Contaminated Sites Committee (**Committee**) on 16 April 2018 by the Appellant.

### **Time limitation**

19. An appeal against a site classification made under s13 of the Act is to be effected in accordance with s18 of the Act. An appeal is to be brought, dealt with and determined in accordance with Part 8 of the Act. By s79(2), a notice of appeal is to be lodged within 21 days after the day on which the appellant is given the notice or certificate which gives rise to the appeal, or such later time as may be specified in the notice. The notice, subject of this appeal was dated 26 February 2018 and specified a period of 45 days from the date of service of the notice as the period during which an appeal may be lodged. The appeal was lodged on 16 April 2018 and was determined to be valid by the Committee.

### **Grounds of appeal**

20. The Appellant raised several grounds of appeal (*in italics*) as outlined in the application of 16 April 2018, then supplementary grounds on 5 October 2018.
21. *The Appeal is only partially complete and preliminary in nature.* Pursuant to the Act, there are no provisions for a preliminary appeal. The Committee has proceeded to determine the appeal.
22. *The Notice does not include evidence to support the decision or classification.* The CEO's Notice of Classification does 'provide brief reasons for the classification of the site' pursuant to section 15 (5)(d). This ground of appeal is dismissed.
23. *The Notice does not provide any evidence to define a contaminant source, pathway or receptor which is required to classify the site as possibly contaminated.* It is not expected at the stage a site is classified as PCIR that details such as source, pathway or receptor will be defined, merely that they will be 'possible'. This ground of appeal is dismissed.
24. *The Notice does not provide any evidence to support allegations of 'new' possible sources of contaminants such as PFAS.* This claim does not amount to grounds to question the classification. This ground of appeal is dismissed.
25. *The Notice contains statements of error.* This claim is too vague and does not provide evidence as to why the classification is incorrect. This ground of appeal is dismissed.
26. *DWER has not shown procedural fairness as to the cause and impact of nutrients in the environment.* No evidence has been provided by the Appellant to demonstrate a lack of procedural fairness. This ground of appeal is dismissed.

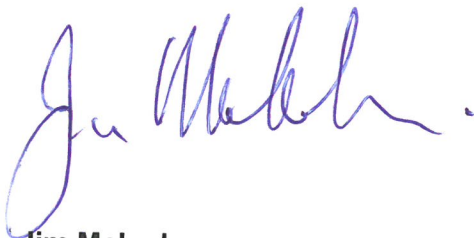
27. *DWER has not addressed concerns that the CWTR were falsified in 2014 and has been relied upon in the Notice.* Not relevant to the appropriateness of the classification. This ground of appeal is dismissed.
28. *DWER relied upon an 'Independent Review Report' recommending entirely new investigations, which mandates more bore and water sampling that was completed in the previous investigations.* The report is not supported by the facts and not suitable to use to classify the site. The appellant has not provided grounds to question the classification. This ground of appeal is dismissed.
29. *A peer review cannot be completed until all of the documents given to SENVERSA are provided to the Appellant and the Committee.* The Appellant has received all relevant documentation from the CEO of DWER in relation to the appeal. This ground of appeal is dismissed.
30. *The Notice is reliant upon a site that is currently under appeal (Lot 6, King Road). The appeal for this site is not 'reliant' on the Lot 6 King Road Appeal.* The Committee is not prevented from determining the matter. This ground of appeal is dismissed.
31. *The CS statutory process has been inappropriately interfered with by the Minister for Environment reacting to pressure from a local action group and specific media which are hostile towards DWER and anti any outcome which exonerates the applicants.* The Appellant does not provide evidence as to why the classification is incorrect. This ground of appeal is dismissed.
32. *Incomplete documentation.* Both DWER and Appellant have received all relevant documentation in relation to the appeal. This ground of appeal is dismissed.
33. *Documentation on procedural issues.* The appellant does not provide evidence as to why the classification is incorrect. This ground of appeal is dismissed.
34. *Pending responses from DWER.* The appellant does not provide evidence as to why the classification is incorrect. This ground of appeal is dismissed.
35. *Appeal against Lot 6 pending.* The appeal for this site is not 'reliant' on the Lot 6 King Road Appeal (which has now been determined). The Committee is not prevented from determining the matter. This ground of appeal is dismissed.
36. *Inconsistencies in expert opinions.* Differences between experts are a normal part of the decision making process. It is the role of the Committee to evaluate each item of evidence, be it an expert report or observation of an interested party and form an opinion. This ground of appeal is dismissed.
37. *New DWER contradictions in Appeal Report.* The appellant does not provide evidence as to why the classification is incorrect. This ground of appeal is dismissed.
38. *Staff Misconduct.* This allegation is irrelevant to the correctness or otherwise of the classification. This ground of appeal is dismissed.

39. *Sequential or consecutive appeals and actions.* The appeal for this site is not 'reliant' on the Lot 6 King Road Appeal (which has now been determined). The Committee is not prevented from determining the matter. This ground of appeal is dismissed.
40. *Mediation* (request for a face-to-face meeting with the Committee). The Committee considers all matters based on the papers and does not normally meet with parties or hold hearings. This ground of appeal is dismissed.
41. 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.

### **Conclusion**

42. For the reasons stated above, the appeal is dismissed.
43. The site remains classified under the *Contaminated Sites Act 2003* as *possibly contaminated – investigation required*.

**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