

07/2011



Government of Western Australia
Contaminated Sites Committee

DECISION IN RESPECT OF APPEAL AGAINST CLASSIFICATION

Contaminated Sites Act 2003, Part 8, Division 2

Appellant: Elkin Pty Ltd
Site: 52 Mandurah Terrace, Mandurah
Lot 1.1 on Diagram 60437 as shown on Certificate of Title Volume 1973 Folio 887
Decision: Appeal (Partially) Upheld
NEW CLASSIFICATION: *remediated for restricted use*
Date: 31 July 2013

1.0 SUMMARY

- 1.1 The Site is a former petrol station (now used for commercial purposes) which was operated for approximately 35 years until decommissioned and partially remediated by BP in 1996. It was classified *possibly contaminated – investigation required* by the Department of Environment and Conservation (DEC). The Notice of Classification was given in accordance with section 15 of the *Contaminated Sites Act 2003 (Act)* on 31 March 2011 (received by the Appellant on 15 April 2011). DEC's reasons for classification were set out in the 'Notice of Classification'.
- 1.2 The reason for classification was the previous use of the site as a petrol station and the presence of hydrocarbons on the Site and in a plume moving off-site (affecting the road reserve and parkland adjacent to the Peel Inlet) including groundwater contamination which was identified in 1995. Remediation was undertaken in 1996 to remove most impacted soils, however some remained on the north-west portion and southern/south-eastern boundaries of the site. Groundwater monitoring was undertaken by BP until June 2006.
- 1.3 On 5 May 2011 the Contaminated Sites Committee (Committee) received from the Appellant an appeal against the classification. The Appellant is the owner of the site. The appeal was lodged in accordance with sections 18 and 79 of the Act.
- 1.4 The Appellant and DEC undertook negotiations; however an agreement could not be reached between the parties.
- 1.5 By letter dated 17 August 2012, the Appellant filed Supplementary Grounds of Appeal.
- 1.6 The Appellant provided technical reports and other evidence to be considered by the Committee, including a BP Site Assessment and Remedial Action Plan for Former BP "Flying Spanner" Service Station dated February 1995; BP Environmental Site Closure Report for BP "Flying Spanner" dated May 1996; BP "Flying Spanner" Environmental Site Assessment dated 12 January 2012.
- 1.7 On 12 October 2012, in accordance with section 80 of the Act, the Committee forwarded a copy of the appeal and supporting information to the CEO of DEC for its report.

- 1.8 The CEO's s80 Report dated 18 January 2013 was forwarded to the Appellant on 11 February 2013 for a response. The CEO concluded that the classification for the site could be changed to *remediated for restricted use*.
- 1.9 The Appellant responded by letter dated 11 April 2013, arguing the classification should be *not contaminated – unrestricted use*.
- 1.10 The classification and management of contaminated sites has been taken over by the newly formed Department of Environment Regulation (DER) from 1 July 2013, which replaced DEC. Please note that hereafter both DEC and DER will be referred to as the Department for simplicity.
- 1.11 The Committee considered the appeal and supporting documents, and the CEO's report on 31 July 2013. The Committee decided that the appeal should be **partially upheld** for the reasons set out below. Under section 82(2) of the Act this decision of the Committee is final and without appeal.

REASONS FOR DECISION

2.0 Appeal Grounds (Summary)

Preliminary Grounds of Appeal

- 1) *The decision to classify the site was beyond the power reasonably open to the Delegated Officer*
- 2) *The available information does not support the categorisation of the Site as a "source site"*
- 3) *The Delegated Officer failed to seek comment from the current owner prior to classifying the Site*
- 4) *The available information does not support the classification **possibly contaminated – investigation required***
- 5) *There is a material error in the Notice – however it is likely this will be rectified*

Supplementary Grounds of Appeal

- ~~6) *The classification **possibly contaminated – investigation required** is erroneous*~~
- 7) *The Site should be re-classified as **not contaminated – unrestricted use***

3.0 COMMITTEE'S FINDINGS

The Committee concluded that Ground 1 was not supported by the evidence. After remediation in 1996 some contaminated soil remained on-site and there was a plume of contaminated groundwater beneath the site. The evidence does not indicate that either of these observations of contamination no longer applies. The Committee concluded that the Delegated Officer had the power to classify the site.

The Committee considered Ground 2 was not a valid ground of appeal. Whether or not the CEO chooses to describe a site as a source site is irrelevant to the classification of the site.

The Committee considered Ground 3 was not a valid ground of appeal. Section 13(5)(b) of the Act provides that the CEO "may seek comments from ... any person which or who has, in the opinion of the CEO, a direct interest in the classification of the site". The wording clearly makes this optional and not a requirement.

The Committee concluded that Grounds 4, 5 and 6 should be upheld to the extent that the classification *possibly contaminated – investigation required* was not supported by the evidence. The evidence is clear that the site was contaminated, extensive remediation was undertaken, and some contamination remained in soils and groundwater. The evidence has not demonstrated that this contamination has been removed and its ongoing presence requires some constraints on the use of the site (notably excavation of the contaminated soil and extraction of the contaminated groundwater).

The Committee concluded that Ground 7 was not supported by the evidence. As noted above, following remediation some contamination in soils and groundwater remained at the site. Subsequent investigations have not confirmed that either of these forms of contamination have been removed and their presence necessitates some constraints on use of the site.

Where, following classification as *possibly contaminated – investigation required* a site has been investigated and found to be not contaminated, a classification of *not contaminated – unrestricted use* may be appropriate. That does not apply in this case.

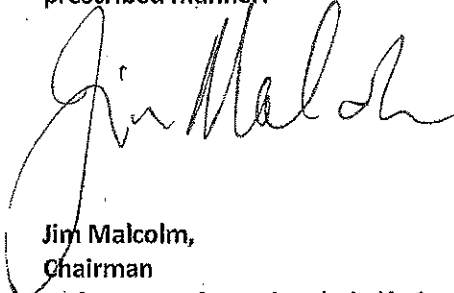
Where a site has been remediated so that no restrictions on use of the site are required the appropriate classification would be *decontaminated*. That does not apply in this case.

Where a site has been remediated so that some restrictions on use of the site are required the site could be classified as *contaminated – restricted use* or *remediated for restricted use*. In this case the Committee concluded that the site should be classified *remediated for restricted use*.

4.0 CONCLUSION

The Committee upholds some grounds of appeal and substitutes the classification of the site to *remediated for restricted use*.

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**