



Government of Western Australia
Contaminated Sites Committee

Decision in Respect of Appeal Against Classification

Contaminated Sites Committee (CSC 01/2018)

Contaminated Sites Act 2003, Part 8, Division 2

APPELLANT: Greenland Resources Pty Ltd (**Greenland**)
SITE: Lot 6, 123 King Road, Oakford (**the Site**)
DATE: 29 July 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**)¹ under s15 of the *Contaminated Sites Act 2003 (Act)* on 21 November 2017. That notice of classification classified the Site as *possibly contaminated – investigation required (PCIR)*. The Appellant is the registered proprietor of the site. The shares in the Appellant are owned by Joseph and Naline Avila, and the Appellant is represented in this appeal by Benjamin and Daniel Avila.
2. The Reasons for Classification given by the CEO included that a groundwater investigation in August 2017 found:
“Nutrients (nitrate and total nitrogen), perfluoroalkyl and polyfluoroalkyl substances (**PFAS**) and metals (copper and zinc) were present in groundwater at concentrations exceeding criteria for the protection of freshwater aquatic ecosystems, long-term agricultural irrigation and/or drinking water, as published in the guidelines 'Health-based Guidance Values for PFAS for Use in Site Investigations in Australia' (Australian Department of Health, April 2017) and 'Assessment and management of contaminated sites' (DER, 2014). These criteria are relevant because a conservation category wetland is present to the east; a subsurface drain beneath the eastern site boundary discharges into an agricultural drain to the north (and then other downstream surface water bodies); the site is within a rural area; and the site is located partly within a Priority 2 Public Drinking Water Source Area.”

Background

3. The Site is a 21.3036 hectare rural site and has been used as a vineyard producing wine grapes for approximately 15 years. The vineyard consists of approximately 30,000 grapevines.

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.

4. The Appellant claims the management of the Site, including watering, pest and disease management, nutrition, pruning and expected yields has been in accordance with a management plan prepared by AHA Viticulture consultants (2008).
5. Prior to the vineyard development, the Appellant raised cattle on the Site.
6. Compost and mulch were produced and applied to the Site as an integral component to the vineyard establishment and ongoing management as a soil improver and source of plant nutrition. The Appellant claims that, in accordance with a vineyard management plan and manufacturer recommendations, pest and disease control is managed by foliar spray.

Appeal

7. An appeal application form was submitted under section 18 of the Act to the Contaminated Sites Committee (**Committee**) on 12 January 2018 by the Appellant.

Time limitation

8. 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 an 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 30 November 2017 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 in time on 12 January 2018 and was determined to be valid by the Committee.

Grounds of appeal

9. The Appellant listed several grounds of appeal in information attached to the appeal application of 12 January 2018. On 21 May 2018 the CEO provided a report under s80 (a) and (b) of the Act responding to the grounds of appeal and on 20 July 2018 the Appellant provided a response to the appeal report. On 10 August 2018 the Appellant provided supplementary information. On 26 September 2018 the CEO provided a response to the Appellant's response and supplementary information. On 31 October 2018 the Appellant provided a response to the CEO's further submission.
10. The Committee has given consideration to all grounds of appeal and other matters raised in the above correspondence from the Appellant and the CEO.

Exemption for correct application of fertiliser

11. Pursuant to the definition of "contaminated" in section 3 of the Act, regulation 5 (2) (f) provides that land, water or a site is not contaminated where a substance is present as a direct result of the correct application of a fertiliser. Regulation 5 (4) further clarifies the term "correct application" to include application "in accordance with ... any relevant recommendation of the manufacturer or distributor of the fertiliser...". The Appellant has claimed that this exemption applies to the "alleged contaminants" which were "applied to the land as part of normal and proper viticultural use of fertiliser".
12. It is not clear that compost is a "fertiliser" in the ordinary meaning of the word, but if it may be, the question remains whether compost is a fertiliser the use of which is within the meaning of the regulation, as noted at paragraph 11 above.
13. This requirement is clearly intended to apply to artificial fertilisers, the chemical composition of which is known and the recommendations for the use of which are informed by field trials.
14. The Appellant claims that the compost was used in accordance with a management plan prepared by AVA Viticulture consultants.
15. This ground of appeal is dismissed.

PFAS

16. The Appellant questions why DWER chose to investigate PFAS as contaminants of possible concern. Since PFAS have been found at above health-based guidance levels, DWER's reasons for testing for them are irrelevant. The Appellant also questions how the levels identified relate to background levels. This identified need for further information supports the classification of PCIR.
17. The Appellant further questions the use of guideline values applied for assessing PFAS impacts to aquatic ecosystems. However, supportive evidence has not been provided by the Appellant to conclude aquatic ecosystems cannot be impacted by Site-derived groundwater contamination, and therefore the use of aquatic ecosystem guideline criteria is deemed appropriate pending further investigation (see below).
18. The Appellant's grounds of appeal related to PFAS are dismissed.

Conservation category wetland and the appropriate water quality guidelines

19. The Appellant claims "there are no aquatic ecosystems within even remote distances from the site that are endangered. A palusplain wetland is not an aquatic ecosystem" and that the application of a standard for the protection of freshwater aquatic ecosystems is inappropriate.
20. The CEO has responded that "there is a conservation category wetland located immediately east of the site and down-gradient, as shown in multiple reports including the Douglas Partners Detailed Site Investigation" and notes that Clarke identified "potential environmental impacts on surface water quality and wetland ecosystems" as 'the key risk' requiring further investigation.
21. To the extent that the Appellant has valid grounds for questioning the classification of the wetland, this supports the need for further investigation and the appropriateness of the classification of the site as PCIR.
22. The Appellant's grounds of appeal related to the appropriateness of the water quality guidelines used are dismissed.

Drinking water quality guidelines

23. As noted above, the reasons for classification suggest the water quality guidelines referred to are appropriate because the Site is within a rural area and the Site is located partly within a Priority 2 Public Drinking Water Source Area.
24. The Appellant questions why the CEO has referred to drinking water quality guidelines when "...there is no realistic prospect that the vineyard groundwater subject to this notice would be used for drinking water. Golder's analysis demonstrates that it is well outside that guideline for many (natural) reasons; including pH, Total Organic Carbon, Total [sic], salinity, etc."
25. DWER's guideline (DER 2014) provides the following advice for when the Australian Drinking Water Guidelines (ADWG) should be applied to the investigation of contaminated sites:
"Drinking water should be considered a relevant environmental value and the ADWG used to assess concentrations of substances in groundwater or surface water if:
 - *a public drinking water source area is a potential receptor;*
 - *scheme water is not available (in this situation it is reasonable to assume that groundwater or surface water may be used for potable purposes); and/or*
 - *there is a reasonable expectation that the groundwater or surface water could be used as a drinking water resource, even where it is not currently being used for that purpose.*

Factors to consider with regard to whether the use of water as a drinking water resource is feasible include background water quality, yield or flow, hydrogeology or hydrology, the

potential for saline intrusion into aquifers and/or impact on groundwater-dependent ecosystems. Saline groundwater is desalinated for potable use in many Mid-West and Goldfields towns.”

26. The CEO has responded that part of the Site is “... partially located within a Public Drinking Water Source Area, and ... scheme water is not available.” The CEO concluded that drinking water criteria are relevant.
27. The Committee has concluded that the use of drinking water quality guidelines is appropriate.
28. This ground of appeal is dismissed.

Uncertainty over background levels, direction of groundwater flow and soil sampling

29. The Appellant questions Golder’s ‘background levels’ and the differing views about the direction of groundwater flow, and claims that DWER has not sampled soil at the site. Rather than throwing doubt on the classification, these questions show the need for further information and support the classification of PCIR.
30. The Appellant’s grounds of appeal related to these uncertainties are dismissed.

Grounds relating to possible sources of the contamination

31. The Appellant raises a number of grounds of appeal questioning how the contamination may have occurred and its possible sources. An appeal against classification does not and cannot encompass issues associated with causation. The classification of the Site relates to the state of the Site itself. In this case, the CEO’s reasons for classification related significantly to the results of a groundwater investigation and the substances identified. How those substances came to be present is not pertinent to the correctness or otherwise of the classification.
32. Grounds to which this consideration applies include:
 - a. The possible production or presence of compost leachate and its composition relative to groundwater;
 - b. The correctness of the Controlled Waste Tracking System records;
 - c. The presence or removal of stockpiles;
 - d. The interpretation of aerial and other photographs.
33. These grounds of appeal are dismissed.

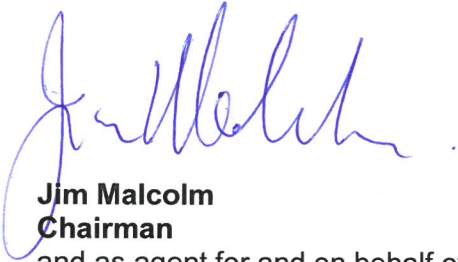
Other grounds of appeal

34. The Appellant has raised several other matters that the Committee has decided are irrelevant to the question whether or not the CEO’s classification of the Site is correct. These matters include:
 - a. Whether or not the making of compost should be considered a ‘potentially contaminating land use’;
 - b. Allegations of falsification of records and abuse of process;
 - c. Authorship of the CEO’s appeal report;
 - d. The Closure Notice and the Supreme Court findings;
 - e. The Prevention Notice and the Environmental Protection Notice; and
 - f. The findings of the Parliamentary Standing Committee.

Conclusion

35. The appellant has raised a number of questions that could, following further investigation or the provision of supporting documentation, lead to the classification being changed. In view of the present lack of information over these matters the PCIR classification is presently appropriate.
36. For the reasons stated above, the appeal is dismissed.
37. 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