



Decision in Respect of Appeal Against Classification

Contaminated Sites Committee (CSC 04/2020)

Contaminated Sites Act 2003, Part 8, Division 2

APPELLANT: Mr Jeffrey Skates
SITE: Parcel 31504 = Eastern portion of Lot 407 on Plan 59114 with certificate of title reference number 2730/828 (known as 20A Greenock Av, Como) (**Appeal Site or Affected Site**)
DATE: 29 April 2021

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 7 April 2020. That notice of classification advised that the CEO had classified the Appeal Site as *remediated for restricted use*. The Affected Site is owned by Mr Jeffrey Skates.
2. The Reasons for Classification given by the CEO found:

“The site was reported because a contamination assessment found hydrocarbon (diesel and petrol) present in soil and groundwater at the adjacent service station that extended beyond the property boundary to this site as a dissolved phase groundwater plume”

Background

3. The site, 393 Canning Highway (Lot 223 on Plan 3352) (**Source Site**) was originally classified on 17 January 2007 as *contaminated – remediation required*.
4. It is not in dispute that contamination from this site, which is used as a service station, had migrated and affected other sites within the area, including Parcel 31504, eastern portion of Lot 407 on Plan 59114 – 20a Greenock Av, Como (ie, the **Appeal Site**).
5. The source site and affected sites were both classified as *contaminated – remediation required* on 7 October 2009.
6. Following the submission of a Mandatory Auditor’s Report (MAR), both the source site and affected sites were re-classified.
7. The appeal site was classified as ***remediated for restricted use*** on 7 April 2020. The site classification was based on information submitted to DWER in March 2020 relating to

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.

the source site. Multiple groundwater investigations were conducted on the source site and the affected sites. Results of historical groundwater monitoring indicated hydrocarbons and heavy metals (diesel and petrol) exceeded 2006 Department of Health (DoH) Guidelines (Coode Street Road Reserve, 247 Coode Street, 249 Coode Street). LNAPL was identified on the surface of the groundwater beneath the source site and extending to the road reserve.

8. Groundwater investigations in 2019 identified that concentrations of hydrocarbons were present in the groundwater at concentrations exceeding assessment levels for the non-potable use of groundwater as published in the 2014 DWER Contaminated Sites Guidelines. These criteria are relevant due to the potential for groundwater beneath the affected site to be used for irrigation purposes. LNAPL was not recorded in monitoring wells during the recent investigations. Groundwater samples have been analysed for monitored natural attenuation (MNA) to assess plume stability with the results indicating that the hydrocarbon plume is generally stable and has been delineated in the direction of the groundwater flow. Vapour results were below the residential and commercial/industrial health screening levels published in the relevant National Environmental Protection Measure (NEPM).
9. Remedial options were presented in a Remediation Action Plan (RAP) (2019), with groundwater remediation by MNA providing the most appropriate method for managing the dissolved phase hydrocarbon plume. Tier 1, 2 and 3 risk assessments were completed for the site during the investigation period. (Tier 1 criteria are generic screening values while Tier 2 assessments consider site-specific circumstances, which may result in modification of the generic Tier 1 criteria. The MAR advises that a Tier 3 risk assessment was undertaken where *"Site specific target levels were derived for TPH, and BTEX for onsite commercial and off-site residential uses."*)
10. The Site Management Plan (SMP) (2019) outlined the requirements for ongoing groundwater monitoring to assess plume stability. The Tier 1 risk assessment indicated that the contamination did not pose an unacceptable risk to human health or the environment provided that the SMP and relevant restrictions were implemented.
11. An accredited Contaminated Sites Auditor reviewed the investigations and risk assessment for the site. DWER accepted the Auditor's recommendations that the substances present on the site did not pose an unacceptable risk to human health or the environment and that the site is suitable for ongoing residential/road reserve use subject to certain restrictions. DoH recommended that if groundwater is to be abstracted there should be analytical testing to determine if the groundwater is suitable for use.
12. DWER classified the affected site as '*remediated for restricted use*' due to the site being subjected to an SMP and relevant restrictions.
13. A memorial was placed on the certificate of title, which triggers the need for further investigations and risk assessments should the site be proposed for a more sensitive land use.
14. Actions that must be undertaken include:
 - i. an SMP (2019) for ongoing groundwater monitoring purposes; and
 - ii. all future reports on investigation, assessment, monitoring or remediation of the site are to be accompanied by an MAR.

15. Restrictions at the site include:

- i. groundwater abstraction from the superficial aquifer, other than for analytical testing or remediation, is not permitted at the site due to the nature of the groundwater contamination; and
- ii. the SMP must be implemented due to the presence of the dissolved-phase hydrocarbon plume.

Appeal against site classification

16. On 28 April 2020, the Appellant enquired about the possibility of lodging an appeal to the Contaminated Sites Committee (**Committee**) against the *remediated for restricted use* site classification. A written appeal application was subsequently provided to the Committee on 22 May 2020, including grounds of appeal.

Time limitation

17. 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 9 April 2020 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 Committee determined that the appeal application was valid.

Grounds of appeal

18. The Appellant provided grounds of appeal against the *remediated for restricted use* site classification. In summary, these grounds were:

1. There is a lack of evidence of contamination remaining.
2. Early reports indicate that levels of BTEX elements (i.e. certain Volatile Aromatic Hydrocarbons) on the property are significantly lower than at the nearest measuring point (monitoring well MW13) hence MW13 records cannot be assumed relevant to the levels on the property.
3. A review of reports on past analyses show an assumed groundwater flow path that would tend to move contamination away from the appellant's land.
4. No memorial had been placed on the existing title.

19. The Committee requested the CEO of DWER to provide an Appeal Report under s 80 of the Act on 24 July 2020; the report was received by the Committee on 21 August 2020.

DWER's response to the Appeal

20. DWER's Appeal Report, dated 21 August 2020, submitted that all the appeal grounds should be dismissed.

21. A summary of the points included:

- The land comprising of the eastern portion of Lot 407 on Plan 59114 on certificate of title 2730/828 (the Appeal Site) was formerly part of Lot 10 on Diagram 24586, known as 249 Coode Street, Como.
- Information relating to the contamination status of the site was submitted to DWER following a contamination assessment of a nearby service station located at 393 Canning Highway, Como (Lot 223 on Plan 3352). This service station has been identified as a 'source site' where the contamination has originated and migrated to affect other sites.

- First Classification – Affected site comprising of Parcel 26331 (Coode Street road reserve, adjacent to the service station at 393 Canning Highway, Como) was classified as *contaminated – remediation required* on 7 October 2009 based on information submitted to the Department by August 2009. This was based on a series of groundwater investigations completed between 2003 and 2008 (for petrol and diesel) and for metals in groundwater beneath 247 and the former 249 Coode Street and the Coode Street road reserve. Concentrations of metals exceeded the levels in the Contaminated Sites Reporting Guidelines for Chemicals in Groundwater (DoH 2006), which specified the relevant assessment levels for the use of groundwater for non-potable domestic purpose use such as garden irrigation at the time of classification.
- Second Classification – the affected site comprising of: 247 Coode St, Como; Coode Street road reserve; 249 Coode Street, Como; 249a Coode Street, Como and eastern portion of Lot 407 was reclassified as *remediated for restricted use* on 7 April 2020 following submission of a Mandatory Auditor’s Report (MAR) and supporting documentation in March 2020.
- The MAR reviewed the groundwater data and risk assessments for the affected site. The Auditor concluded that the substances present on the site did not pose an unacceptable risk to human health, the environment or any environmental value and the site was suitable for ongoing residential use subject to a Site Management plan (SMP) (dated 2019).
- DWER interpreted the appeal against the *remediated for restricted use* classification as the Appellant seeking a *decontaminated* classification for the appeal site.

22. DWER provided specific responses to each of the Appeal Grounds, as follows:

- DWER’s response to appeal **ground 1** – The MAR considered the 2019 groundwater data collected from monitoring wells MW13, MW4a, MW6 and MW6a to provide an assessment of groundwater conditions. The Auditor concluded that the dissolved phase hydrocarbon plume extends west to MW13 and DWER considered that groundwater monitoring well MW13, located adjacent to the appeal site’s northern boundary is indicative of groundwater quality beneath at least the **northern portion** of the appeal site. Groundwater collected from monitoring well MW13 in 2019 detected BTEX elements (xylenes and ethylbenzene) at concentrations exceeding the Australian Drinking Water Guidelines (ADWG) and the Non-Potable Use Guidelines (NPUG) (e.g. use for garden irrigation). DWER consulted DoH which advised that *“groundwater underlying the site is likely to be impacted by the petroleum hydrocarbon plume at levels exceeding ADWG and NPUG criteria.. the groundwater underlying the source and affected site is being remediated and managed using **Monitored Natural Attenuation (MNA)** approach under the Site Management Plan (SMP), the classification should remain as **remediated for restricted use**”*. DWER agreed with DoH and advised that the appeal site should remain as **remediated for restricted use** and accordingly submitted that this ground of appeal be dismissed.
- DWER’s response to appeal **ground 2** – No dedicated groundwater monitoring wells have been installed on the appeal site during the course of the investigations. The MAR and the Department consider that the groundwater monitoring well MW13, located adjacent to the appeal site’s northern boundary, is indicative of groundwater quality beneath at least the northern portion of the appeal site. Concentrations of petroleum hydrocarbons detected in monitoring well MW13 in 2019 exceed the screening levels for domestic non-potable uses in groundwater. DWER submitted that this ground of appeal be dismissed.
- DWER’s response to appeal **ground 3** – The MAR concluded that the groundwater flow is west/north west towards the Swan River which is supported by groundwater

elevation data and groundwater contour maps. DWER agreed with the MAR in relation to the groundwater flow. The groundwater contamination (dissolved-phase hydrocarbon) plume is migrating in a generally north-westerly direction, based on ongoing detections in monitoring wells – MW1, MW5, MW13 and MW16. It is highly likely that groundwater contamination extends beneath at least the northern portion of the appeal site. DWER submitted that this ground of appeal be dismissed.

- DWER's response to appeal **ground 4** - In accordance with s58(1) of the CS Act, the lodgement of memorials with the Registrar of Titles is an administrative consequence of site classifications. At the time of the 2009 classification, Lot 10 on Diagram 24586 was in the process of subdivision, to create Lots 407 on Plan 59114. A review of the Department's records indicates that memorials were lodged on 247 Coode Street Como, Lot 409 and Lot 410 on Plan 59114 on 26 November 2009. Due to an administrative error, a memorial was not lodged on Lot 407, known as 20a Greenock Av, Como. The Department regrets the oversight, it is the information regarding the nature and extent of contamination that informs a site classification decision rather the presence of otherwise of a memorial. DWER submitted that this ground of appeal be dismissed.
- Finally, DWER noted that future work for the site includes the implementation of an SMP to assess ongoing temporal groundwater trends on a bi-annual basis for an initial period of three years in all available monitoring wells. The objective of the SMP is to achieve a classification of *decontaminated* for the affected sites under the CS Act and to facilitate the cessation of groundwater monitoring once the end point has been reached.

23. The CEO's Appeal Report dated 21 August 2020 was forwarded to the Appellant on 9 September 2020, with a response due by 19 October 2020.
24. The Appellant confirmed on 10 September 2020 that DWER's information had been received.
25. No further response or submission was provided to the Committee by the response due date of 19 October 2019.

Committee's decision

26. The Committee has considered all of the grounds of appeal and the other matters raised in the correspondence and information that has been provided by the Appellant and the CEO of DWER.
27. The Committee has considered all of the technical reports listed in the document register. Reports that were provided are listed below;
 - Gull Service Station Como - July 2008 Groundwater Monitoring (ERM, 8 August 2008).
 - Mandatory Auditors Report, 393 Canning Highway Como (Senversa, March 2020).
 - Site Management Plan, Puma Como Service Station, 393 Canning Highway Como (WSP, July 2019).
 - Gull Como, Annual Groundwater Monitoring Report (May 2005 to February 2006) (ERM, May 2006).
28. The Committee notes that there are other reports available in relation to this site that the Appellant has considered, however these reports have not been provided to the Committee.

29. Appeal **ground 1** - The Committee agrees with DWER's view that the groundwater monitoring well MW13, located adjacent to the appeal site's northern boundary is indicative of groundwater quality beneath at least the northern portion of the appeal site. As presented within the MAR, groundwater collected from monitoring well MW13 in 2019 (WSP 2019b) detected xylenes and ethylbenzene at concentrations exceeding the Non-Potable Use of Groundwater criteria, which are relevant assessment levels for the use of groundwater for non-potable domestic purposes (such as garden irrigation). ***This ground of appeal has not been made out.***
30. Appeal **ground 2** - The evidence before the Committee indicates that the MW13 monitoring well, immediately adjacent (to the north) of the Appellant's property boundary reported concentrations of petroleum hydrocarbons above screening levels for domestic non-potable uses of groundwater. There are no purpose-built groundwater monitoring wells at this property. The quality of data obtained from the domestic groundwater bores sampled by ERM (the Appellant's expert adviser) between 2003 and 2007 is unknown and cannot be relied upon for comparing results with purpose-built groundwater monitoring bores. ***This ground of appeal has not been made out.***
31. Appeal **ground 3** - Based upon the substance of the evidence provided; the Committee concurs that the groundwater is generally flowing in a west/north-westerly direction. However, the Appellant does not provide a clear explanation or any evidence to support the claim that the impacted groundwater from the 'source' site would bypass to the north of the Appellant's land, yet impact groundwater within MW13, which is immediately north of his land. ***This ground of appeal is not made out.***
32. Appeal **ground 4** - Under s.58(1) of the CS Act, the lodging of a memorial is an mandatory administrative requirement that occurs when a site is classified as *remediated for restricted use*. A memorial on the title lets other individuals know that there is restriction on the use of the land. The Committee agrees with DWER that it is the information regarding the nature and extent of contamination that informs a classification decision, rather than the presence or otherwise of a memorial. ***This ground of appeal is not made out.***

Conclusion

33. For the reasons stated above, none of the grounds of Appeal has been made out and consequently the appeal should be dismissed and the classification under appeal affirmed.

34. The site, therefore, remains classified under the *Contaminated Sites Act 2003* as **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.

A handwritten signature in black ink that reads "Jim Malcolm". The signature is written in a cursive style with a large, looping initial "J".

Jim Malcolm
Chairman

as agent for and on behalf of
the Contaminated Sites Committee

Anna Ciffolilli (**Member**)
Peter McNab (**Member**)
Warren Dodge (**Member**)