



Department of
Environment and Conservation

Contaminated Sites Management Series

DISCLOSURE STATEMENTS

November 2006

Notice

This guideline applies to persons defined in the *Contaminated Sites Act 2003 (CS Act)* as “owners” in relation to freehold or Crown land who wish to submit disclosure statements to the Contaminated Sites Committee (**Committee**) in order to obtain certificates of exemption from responsibility to remediate contaminated sites. It is a guidance document only, to assist in the process of submitting disclosure statements to the Committee.

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Preface

This *Disclosure Statements* guideline has been prepared by the Land and Water Quality Branch of the Department of Environment and Conservation (**DEC**). The aim of the guideline is to assist persons defined in the *Contaminated Sites Act 2003 (CS Act)* as “owners” in relation to freehold or Crown land to prepare and submit disclosure statements to the Contaminated Sites Committee (**Committee**) for the purpose of obtaining certificates of exemption from responsibility to remediate contaminated sites. The guideline forms part of a comprehensive statutory and policy framework for the identification, assessment and management of contaminated sites in Western Australia.

The Contaminated Site Management Series contains the following guidelines:

Technical

- Assessment Levels for Soil, Sediment and Water
- Bioremediation of Hydrocarbon-Contaminated Soils in Western Australia
- Community Consultation
- Development of Sampling and Analysis Programs
- Potentially Contaminating Activities, Industries and Land uses
- Reporting on Site Assessments
- Use of Monitored Natural Attenuation for Groundwater Remediation
- The use of Risk Assessment in Contaminated Site Assessment and Management: Guidance on the Overall Approach

Administrative

- Reporting of Known or Suspected Contaminated Sites
- Certificate of Contamination Audit Scheme
- Disclosure Statements
- Contaminated Site Auditors: Guidelines for Accreditation, Conduct and Reporting.
- Site Classification Scheme
- Landuse Planning Process

Copies of these guidelines are available from DEC’s library located at The Atrium, 168 St Georges Terrace, Perth, WA 6000, or from DEC’s website at www.dec.wa.gov.au. Copies of the *Contaminated Sites Act 2003* and the *Contaminated Sites Regulations 2006* are available from the State Law Publisher.

We welcome your feedback

A publication feedback form can be found at the back of this guideline.

Questions and/or feedback regarding this document can be forwarded to:

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1. May I submit a disclosure statement?

1 Introduction

1.1 Background

The *Contaminated Sites Act 2003 (CS Act)* provides a regulatory framework for the identification, recording, classification, management and remediation of contaminated sites.

A site that is known or suspected of being contaminated must be reported to the Department of Environment and Conservation (**DEC**) by the owner or occupier of the site, the person that caused or contributed to the contamination, or an auditor engaged to report on the site under the *Act*.¹ When a site is reported, the Chief Executive Officer (**CEO**) of the DEC is required to review the report and classify the site based on the risk the site poses to human health, the environment or any environmental value. The CS Act provides for seven categories of site classification.²

The CS Act stipulates a hierarchy of responsibility for the remediation of contaminated sites. The hierarchy includes the polluter being responsible in the first instance. Where the polluter cannot be found or made to pay, responsibility reverts to the current owner of the site with the State taking responsibility to remediate sites (known as an “*orphan sites*”) where the people responsible for remediating these sites cannot be identified, found or made to assume such responsibility.

1.2 Disclosure statements

The CS Act contains provisions setting out the procedure for persons to apply to the Contaminated Sites Committee (**Committee**) for certificates exempting them from the responsibility to remediate contaminated sites. Such a person must be an “*owner*” of land, as defined by section 5 of the CS Act, who believes that they did not cause, contribute to, or fail to prevent contamination, and who at the time of purchasing land did not know that it was contaminated.³

Disclosure statements are the means by which owners present information to the Committee for the purpose of obtaining certificates of exemption from responsibility to remediate sites.

Exemption certificates specify the extent to which a person is not responsible for remediating a site. The Committee will not give an exemption certificate unless it is satisfied that the site is “*contaminated*” pursuant to definition of that word at section 4 of the CS Act⁴ and that the site has been adequately investigated to determine the extent of the contamination.

This guideline explains what a disclosure statement is, what information it should contain and who is eligible to submit one to the Committee.

¹ Pursuant to s11(1) of the CS Act, any other person may make such report to the CEO.

² For a description of the classifications, see s13 and Schedule 1 of the CS Act or refer to the DEC Guideline ‘Site Classification Scheme’.

³ See s65(1) of the Act.

⁴ See s65(1)(a) and s4(1) of the CS Act. Pursuant to s4(1), “*contaminated*” in relation to land, water or a site, means having a substance present in or on that land, water or site at above background concentrations that presents, or has the potential to present, a risk of harm to human health, the environment or any environmental value.

2 Disclosure statements and the contaminated sites hierarchy of responsibility

A hierarchy of responsibility for remediating contaminated sites is provided at Part 3, Division 1 of the CS Act (“**hierarchy**”). The hierarchy establishes a statutory method for determining who is responsible to remediate sites. The circumstances of each case must be taken into account when determining responsibility under the hierarchy.⁵

A general outline concerning the order of responsibility for remediating sites under the hierarchy is provided below. Numerous qualifications concerning the responsibility for remediating sites are provided in the CS Act.⁶ The qualifications are not referred to in this outline.⁷

Note: It is important to note that the hierarchy only applies to sites classified as “*contaminated - remediation required*”.⁸

2.1 Hierarchy of responsibility – general outline

In general terms, the hierarchy of responsibility for remediating contaminated sites under the CS Act is as follows:

- any person who caused or contributed to the contamination of a site (section 25);
- any person who is a landowner or occupier of land wishing to change the use of that land (section 26);
- any person who knew or suspected or had reasonable grounds to know or suspect that the site was contaminated at the time of becoming the owner of the site (section 27(1));
- any person who became the owner of the site either before or after the CS Act commenced (or was the owner of the site when the contamination occurred and continues to own the site) (section 27(2));
- any person responsible for remediating a site under sections 27(1) or 27(2) from which contamination from that site (the “*source site*”) has migrated to another site (the “*affected site*”) (section 27(2a));
- in certain circumstances, each director of a body corporate in liquidation that the Committee determines is responsible for remediation (section 28); or
- the State of Western Australia where, for example, pursuant to sections 29, 30 and 32 of the CS Act;
 - a State agency contaminates a site;
 - no other person is responsible to remediate the site;⁹
 - the responsible person cannot be identified or found, or be made to assume responsibility for remediation;
 - the person responsible for the contamination is insolvent; or
 - responsibility for remediation of a site is transferred to the State.

⁵ In that regard, the provisions of Part 3, Division 1 of the CS Act must be carefully considered. Determining who is responsible to remediate a site is subject to the various qualifications provided in that Division.

⁶ For example, see s25, s27(1)(c) and (d), and s27(2)(d) and (e) of the CS Act.

⁷ In addition the outline does not describe each and every person subject to the hierarchy.

⁸ See s23 of the CS Act.

⁹ In accordance with s24 of the CS Act.

2.2 Effect of exemption certificates

The effect of exemption certificates on owners and persons included in the hierarchy is varied. For example, a certificate may only exempt a landowner from the responsibility to remediate a part of, or one type, of contamination on the site. In other cases, an exemption certificate may completely exempt an owner from the responsibility to remediate a site. In these cases, as a general rule, the entire responsibility for remediating the site will shift to the next person in the hierarchy.¹⁰

¹⁰ One result of the Committee giving of an exemption certificate to an owner, is that the responsibility for remediating the site may shift to the State – see s29 of the CS Act.

3 What is a disclosure statement?

A disclosure statement is a document submitted by an “*owner*” of land, as defined by section 5 of the CS Act (**owner/s**), to the Contaminated Sites Committee containing information to enable the Committee to determine whether or not to give the owner a certificate exempting that person from the responsibility to remediate a contaminated site. A disclosure statement is to provide the Committee with enough information to enable it to make a decision to give, or to refuse to give an exemption certificate.¹¹

Three important points need to be made about disclosure statements:

- They are voluntary. There is no legal obligation for any person to submit a disclosure statement.
- They provide the basis for obtaining exemptions from the responsibility to remediate sites but only to the extent of the amount and quality of the information provided to the Committee.¹² Owners will not be exempted from the responsibility to remediate contamination that is not disclosed by them to the Committee.
- Owners should ensure that the information they provide to the Committee about matters such as the type, nature and extent of contamination is sufficient to enable it to make a decision. In every case, the Committee will need to be satisfied that contamination investigations carried out on the site were compliant with the requirements outlined in the guidelines contained within the DEC Contaminated Sites Management Series to enable the Committee to make its decision.

<p>Note: Exemption certificates relate specifically to the responsibility to remediate sites and not to other matters (e.g. carrying out investigation works).</p>

¹¹ See s64(3) and s54(4). If the information in a disclosure statement is insufficient for the Committee to make its decision, then it will inform the maker of the disclosure statement accordingly and request such further information it requires.

¹² The basis upon which the Committee grants exemption certificates is outlined in **Section 8** of this document.

4 Who can submit a disclosure statement?

Any person who is an “owner” of land as defined in section 5 of the CS Act, may submit a disclosure statement to the Committee.

In relation to freehold land, such person/s may be:

- the holder of the freehold land; and
- a mortgagee in possession.¹³

In relation to Crown land, such person/s include, for example:

- a “*management body*”¹⁴ that has the care, control and management of the land;
- person/s responsible for the administration of the land while it reserved, set apart, vested or dedicated for specified purposes;
- the Minister for the Environment in relation to “*orphan sites*” that have been compulsorily acquired¹⁵; and
- the Minister for Lands, for all other Crown Land.

If you are such an “owner”, it is recommended that before preparing and submitting your disclosure statement, you take into account that the Committee must be satisfied that all of the following circumstances apply before it can give an exemption certificate.¹⁶

- the (subject) land is contaminated.¹⁷
- the contamination was not caused, or contributed to, by you;
- you did not fail to prevent the contamination of the land, as far as was reasonably within your control to prevent that contamination; and
- the land was contaminated at the time you became the owner of the land and, at that time, you did not know, or suspect, and could not reasonably have known or suspected, that the land was contaminated.

If the land you own is a “*source site*”, on which contamination originated and from which it has migrated to affect other sites, the disclosure statement may also cover all related “*affected sites*”.¹⁸

¹³ See s5(1)(a) of the CS Act.

¹⁴ “Management body” is defined in s3 of the *Land Administration Act 1997* and includes person/s the Minister of Lands appoints to administer land reserved by the Crown.

¹⁵ See s5(b)(i)(b)(iii) of the CS Act.

¹⁶ See s65 (1) of the CS Act.

¹⁷ See s65(1)(a) and s4(1) of the CS Act. For the definition of “contaminated” in s4(1) of the CS Act see footnote 6 of this Guideline.

In relation to ascertaining whether or not a site is “*contaminated*” useful indicators of contamination are as follows:

- chemicals or wastes found on the ground surface, or in the soil, during any excavation works (for example, abnormal colouring or staining of the soil);
- odours emanating from the soil;
- the presence of chemicals in either the groundwater or surface water of the site (for example, chemicals floating on the water, discolouration of the water, or odorous water);
- evidence of off-site migration of contaminants into adjacent or nearby areas (for example migration to creeks, rivers or wetlands);
- visible signs of potential harm from contaminants to plants or animals (for example dead vegetation adjacent to areas of otherwise normal growth, unusual numbers of bird or fish deaths on or near the site);
- know or suspected spillages of chemicals at the site;
- evidence of historical equipment (for example pipes) or facilities (for example trenches) used for transferring chemicals on or off the site;
- a history of illegal landfilling on the site;
- evidence that underground storage tanks and associated fuel storage/supply equipment is damaged; or
- symptoms of illness or health impairment to people who have been exposed to a substance on the site.

A list of the types of activities and land uses that have an increased potential to cause contamination can be found in the DEC document “*Potentially Contaminating Activities, Industries and Landuses (2004)*”. Guidance on identifying known and suspected contaminated sites is provided in “*Reporting of Known or Suspected Contaminated Sites*” (DEC, 2006).

¹⁸ See s66(5) of the CS Act.

5 When can I submit a disclosure statement?

Disclosure statements can be submitted to the Committee:

- within **two years** after the date of commencement of the CS Act (1 December 2006);
- within 12 months after notification is given to the Committee of the intention to submit a disclosure statement provided that such notification is given within the initial two year period, after the date of commencement of the CS Act (i.e. Notification must be given before 1 December 2008); or
- at any time before the completion of an approved program for the reporting of known or suspected sites under section 12 of the CS Act.¹⁹

Any owner who fails to lodge a disclosure statement within the applicable periods described above will be ineligible to obtain a certificate exempting that person from the responsibility to remediate the subject site.

The disclosure statement must be in the prescribed form (see Schedule 1, Form 5 of the *Contaminated Sites Regulations 2006*). It must contain and have attached to it, all of the relevant information.

The address for lodgement of disclosure statements is:

Contaminated Sites Committee
Suite 2, Level 13
Allendale Square
Perth WA 6000

¹⁹ See s64(1) and s64(2) of the CS Act.

6 What information should a disclosure statement contain?

The disclosure statement form is found at Form 5 (**the form**), Schedule 1 of the *Contaminated Sites Regulations 2006* and can be obtained from the DEC website www.dec.wa.gov.au. The details to be provided on or with the form include as follows:

1. Owner details – including name, address, telephone number.
2. Land details– including street address, lot number, certificate of title details (including a certified copy of the certificate/s of title for the land) and the name of the local government authority. If the land is a source site with the disclosure statement covering related affected sites, land details must also be provided for the affected sites.
3. Site history details for all land included in the disclosure statement , including:
 - all current and previous activities and/or land uses (if known);
 - contaminants of concern; and
 - if and when the site has been reported to the DEC as a known or suspected contaminated site under Section 11 or 12 of the CS Act (refer to Section 7.1).
4. Copies of reports on contamination investigations undertaken on all the land²⁰ included in the disclosure statement by a suitably qualified and experienced environmental professional. It is the owner's responsibility to obtain such reports. Further technical guidance on the requirements for such reports is provided in the DEC Contaminated Sites Management Series.
6. Details of the contamination for which an exemption certificate is sought, including the type and extent of the contamination and reasons why an exemption certificate should be given.

After including the details in or with the form, the relevant declaration indicated on the form must be made.²¹

An exemption from responsibility to remediate a site is based on the information included in or with a disclosure statement. An owner will not be exempted (or will only be partially exempted) from the responsibility to remediate a site if the owner includes inadequate details of the contamination.²²

²⁰ Owners are to attach copies of the reports to the form, unless copies have been provided previously.

²¹ It is an offence under s94 of the CS Act to make a statement, provide or cause to provide false or misleading information in a disclosure statement either knowingly or with reckless disregard as to whether the information is false or misleading. It is also an offence to fail to disclose or cause a failure to disclose, all information known to be materially relevant to the disclosure statement.

²² See s64(3) of the CS Act, further information may be requested by the Committee if a disclosure statement does not contain enough information for the Committee to make a decision on whether an exemption certificate can be given.

7 What happens after the Committee receives a disclosure statement?

If the Committee considers that a disclosure statement contains insufficient information to enable it to decide whether or not to give an exemption certificate it will notify the owner and request such further information as the Committee requires.²³

Pursuant to section 64(4) of the CS Act, within 45 days after the Committee's receipt of the disclosure statement (or further information described in the paragraph above) the Committee will:

- issue an exemption certificate, specifying the extent to which a person who made a disclosure statement is not responsible for remediation of the land in respect of which the statement was made;
- refuse to give an exemption certificate; or
- decline to deal with the disclosure statement.²⁴

In considering a disclosure statement, the Committee will seek advice from DEC regarding the contamination of the site.

7.1 Other responsibilities of owners under the Contaminated Sites Act

A person making a disclosure statement is not absolved from complying with other requirements imposed by the CS Act. For example, pursuant to section 11 of the CS Act an owner or occupier is required to report a site that is known or suspected of being contaminated to the CEO of the DEC. It is an offence not to report a site within 21 days after the person first knew that the site was contaminated, or as soon as is reasonably practicable if a site is suspected of being contaminated.²⁵

²³ See s64(3) of the CS Act.

²⁴ See s64(4) of the CS Act. Pursuant to s64(4)(c), if necessary, the Committee is able to seek further information from the maker of the disclosure statement.

²⁵ Certain persons specified in s11 of the CS Act (e.g. owners or occupiers) are required to report a site known or suspected to be contaminated to the CEO in the prescribed form (see Schedule 1, Form 1 of the CS Regulations).

8 Exemption certificates

Pursuant to section 65(1) of the CS Act, the Committee will give an exemption certificate in respect of all, or part, of the land described in the disclosure statement to the owner making the disclosure statement if, and to the extent that, the Committee is of the opinion that **ALL OF** the following circumstances exist:

- the land is contaminated;
- the contamination was not caused, or contributed to, by an action of the owner;
- the owner did not fail to prevent the contamination of the land, as far as a site was reasonably within the owner's control to prevent that contamination; and
- the land was contaminated at the time the owner became the owner of the land and, at that time, the owner did not know, or suspect, and could not reasonably have known or suspected, that the land was contaminated.

An exemption certificate must specify the extent to which a person who made a disclosure statement is not responsible under sub-sections 27(2) or (2a) of the CS Act (see paragraph 2.1 of this guideline).

An exemption certificate may be transferred by the holder of a certificate to a subsequent owner, with the approval of the Committee.²⁶

If the Committee determines that the disclosure statement (and any attachment to it) contains false or misleading information²⁷ then it may cancel or amend the exemption certificate.²⁸

Any submitter of a disclosure statement who is aggrieved by a decision of the Committee refusing to give an exemption certificate under section 64(4), or the extent to which the person is not responsible for remediation under an exemption certificate (section 65(2)), or cancellation or amendment of an exemption certificate (section 66) may appeal to the Supreme Court on questions of law only. Appeals to the Supreme Court must be made within 21 days after the written notice or certificate was given, unless the time for making an appeal is extended by the Supreme Court.²⁹

²⁶ See s65(5) of the CS Act.

²⁷ Such false or misleading information may result from a failure to disclose relevant information in the disclosure statement – see s66(1)(d) of the CS Act.

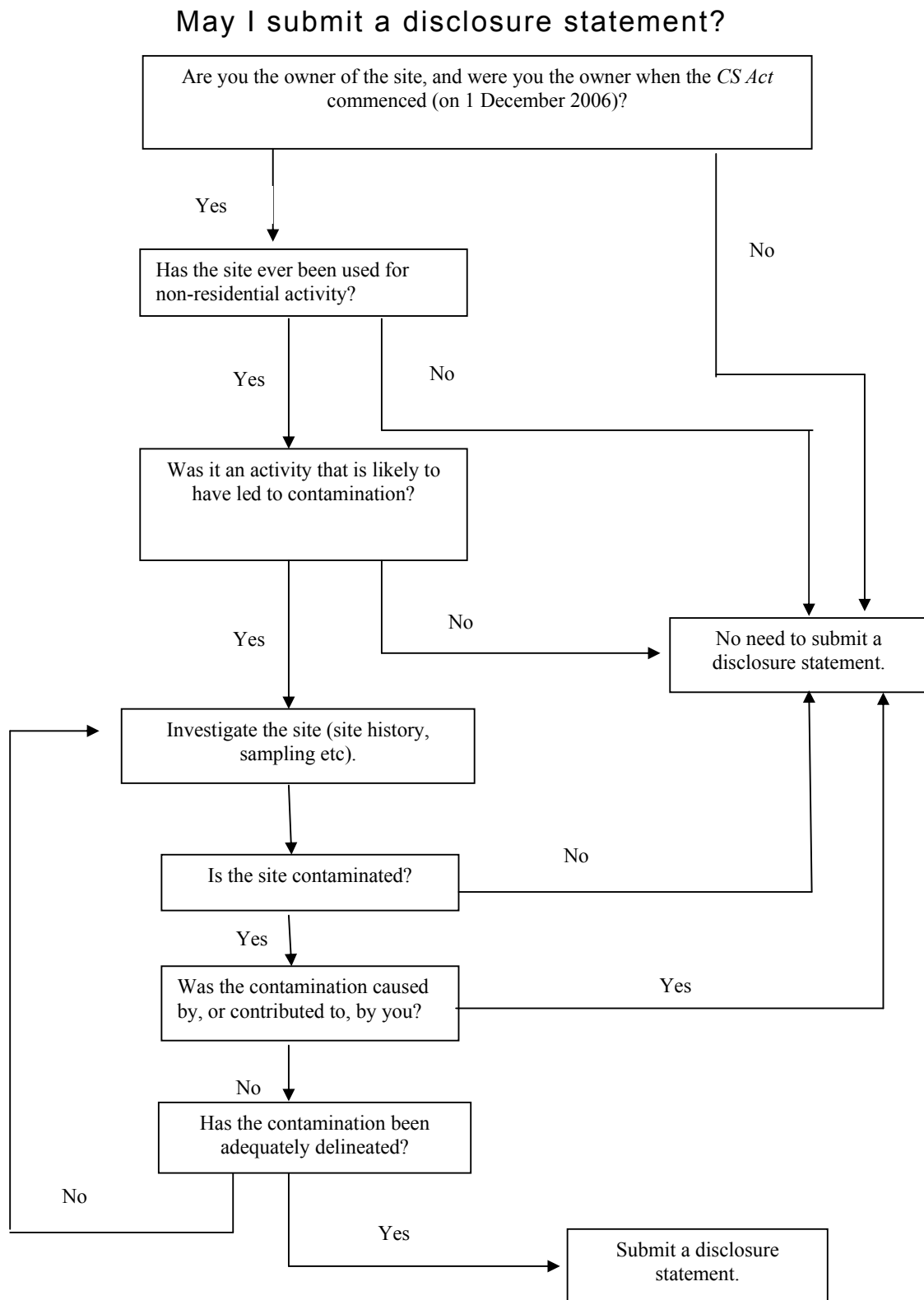
²⁸ See s66 of the CS Act.

²⁹ See s67 and s77 of the CS Act.

9 Glossary

Term	Definition
Contaminant	A substance present at levels above background concentrations that presents or has the potential to present a risk of harm to human health, the environment or any environmental value.
Contaminated	In relation to land, water or a site, means having a substance present in or on that land, water or site at above background concentrations that presents, or has the potential to present, a risk of harm to human health, the environment or any environmental value (section 4 of <i>Contaminated Sites Act 2003</i>).
Contamination Investigation	Study of a site to determine possible and actual contaminants. May involve a desktop review of the site and may also include the collection of soil, groundwater or sediment samples. Also referred to as a <i>site investigation</i> .
DEC	Department of Environment and Conservation
Detailed Site Investigation	An investigation, which confirms and delineates potential or actual contamination through a comprehensive sampling and analysis program.
Investigation	Study of a site to determine possible and actual contaminants. May involve a desktop review of the site and may also include the collection and analysis of soil, groundwater or sediment samples.
Orphan site	Means a site where contamination has occurred and investigation and/or remediation is required but where no party can be identified or located, or be held responsible.
Preliminary Site Investigation	An investigation consisting of a desktop study and a site inspection, which may also include limited sampling.
Remediation	Action taken to eliminate, limit, correct, counteract, mitigate or remove any contaminant or its negative effects on the environment or human health.
Site	An area of land that includes – <ul style="list-style-type: none"> a. Underground water under that land; and b. Surface water on that land.

Figure 1



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