Purpose

The purpose of this Fact Sheet is to:

(a) set out the matters relevant to determining whether material is "waste" within the meaning of the Environmental Protection Act 1986 (EP Act) and the Waste Avoidance Resource Recovery Act 2007 (WARR Act) and their associated regulations; and

(b) thereby provide information to industry on how the Department proposes to assess whether material is waste when exercising its powers and performing its functions under this legislation.

DWER considers that it is the responsibility of the person in possession of material to determine whether it is waste or not.

If you are unsure of whether the material you hold is waste or whether certain provisions in the legislation apply to you, DWER recommends that you seek your own legal advice.

Background

DWER administers Part V Division 3 of the EP Act, including the licensing of prescribed premises. A number of prescribed premises categories in the Environmental Protection Regulations 1987 (EP Regulations) are defined by reference to activities involving waste occurring on the premises. There are also a number of offence provisions in the EP Act which make it an offence to do certain things with waste.

DWER also administers the WARR Act and the Waste Avoidance and Resource Recovery Levy Regulations 2008 (WARR Levy Regulations). These regulations provide for a levy to be payable in respect of "waste disposed of to landfill" at certain categories of prescribed premises as defined in the EP Regulations (categories 63, 64 and 65).

The assessment of whether certain material is waste is therefore important to the application of these Acts and regulations.

The decisions of Justice Beech and the Court of Appeal in Eclipse Resources Pty Ltd v the State of Western Australia [No. 4] [2016] WASC 62 and Eclipse Resources Pty Ltd v The Minister for Environment [No 2] [2017] WASCA 90; (Eclipse case) provide guidance on the matters relevant to determining whether material is waste.

Ultimately, whether or not material is waste in a particular case will depend on all the facts and circumstances of that case.

Definition of waste

Waste is defined section 3(1) of the EP Act and section 3(1) of the WARR Act to include matter:
(a) whether liquid, solid, gaseous or radioactive and whether useful or useless, which is
discharged to the environment; or

(b) prescribed to be waste.

This inclusive definition is not exhaustive, meaning that the term ‘waste’ in the EP Act and
WARR Act also has its ordinary dictionary meaning.

In the Eclipse case, the Courts confirmed that, "waste", at least, includes:

(a) “anything left over or superfluous, as excess material, by-products etc., not of use for
work in hand” (i.e. unwanted or excess material, viewed from the perspective of its source);
and/or

(b) any matter whether useful or useless which is gotten rid of into the environment.

Relevant factors in assessing whether material is waste

There are a number of relevant factors that should be considered in an assessment of
whether material is waste, as set out below.

Whether certain material is waste must be assessed at a particular point in time. Material
may cease to be waste, because, for example, it has been reprocessed into a new product
or recycled. However, the new product or recycled material may become waste again if it
becomes excess to the requirements of its owner.

Point of view of the source/producer

For the purposes of the licensing and waste levy regimes, whether material that is received
at premises is waste or not must be assessed from the perspective of the person who is the
source/producer of the material and not the receiver of the material.

Accordingly, the fact that the receiver of the material considers it useful (e.g. to fill their land)
and economically valuable (e.g. as a substitute for purchased fill material) does not mean
that the material is not waste.

If material is unwanted or excess to requirements, viewed from the perspective of its
source/producer, the material is waste.

The source/producer of material that is excavated at one site and taken to another will be the
owner of the material at its source. This will often be (but will not necessarily always be) the
owner of the land from which the material is excavated.

Nature of the material

There is no requirement that material must be environmentally harmful in order to be waste.
The nature/composition of material is not determinative of whether it is waste. However, the
nature of material may be relevant in the broad sense that it may explain why the material is
not wanted by its source/producer.

If material is contaminated with a substance that would prevent it (practically or legally) from
being used for its ordinary purpose, this may be relevant to the assessment of whether or
not it is wanted by its source/producer.
**Concept of being ‘unwanted’**

Even if material is left over from, or a by-product of, a particular project and not wanted by its source/producer for that project, it may still be wanted by them for use for some other project (on the same site or a different site) or for sale to a third party.

Material wanted by its producer/source for use in some other project or for sale to another person is not considered to be waste.

For example, if the owner of a building demolished the building and did not want the bricks resulting from the demolition, the bricks would be considered waste. However, if the owner wanted the bricks to build a wall on another site that he/she owned or wanted them to sell to a third party for use by the third party, the bricks would not be considered waste.

**Payments relating to the materials**

Whether or not a third party pays for material or is paid to receive material from its producer/source, is a relevant consideration in assessing whether the material is waste.

If the producer of material pays a third party to receive it and dispose of it for them, this indicates that the producer does not want the material and it is waste. However, if material is sold by a producer to a third party, this will generally indicate that the material is a valuable commodity wanted by the producer for sale.

**Substantially transformed**

Material that is waste at a certain point in time may stop being waste if it is re-used in certain ways, sufficiently processed or is recycled.

It is recognised in categories 13, 39, 44, 61, 61A, 62 and 67A in Schedule 1 of the EP Regulations, in section 5(1) of the WARR Act and in regulation 5(1)(b) of the WARR Levy Regulations that waste may be transformed into something else through re-use, processing (including treatment), recycling or use in energy recovery.

However, the decisions of the courts in the Eclipse case confirmed that the use of waste as fill to be buried does not qualify as the "re-use" of waste within the meaning of the WARR Levy Regulations or WARR Act. Waste that is buried and used as fill is considered "waste disposed of to landfill" within the meaning of the Levy Regulations.

When assessing whether material is waste, or still waste, at any particular point in time it may be relevant to consider whether and how it has been transformed into a product or good and the extent of the transformation or conversion. A mere intent to convert waste into a product or good is not sufficient.

The fact that material has been subject to some degree of processing does not necessarily mean that it has become a product or ceased to be waste. For example, the courts have found that merely sorting waste to exclude some contaminants does not mean that the material is no longer waste.

Consideration of whether material that is waste at a particular point in time has been substantially or materially transformed and converted into a product or good so that it is no longer waste at a different point in time will depend on a number of factors, such as:

- the type of processes the waste has been subjected to;
• the degree or extent of the transformation of the material; whether the essential nature, form and/or utility of the material has been substantially or materially changed;

• whether any relevant specifications or standards (including environmental specifications and standards) have been met; and

• whether there is an economic demand for the material in its altered state.

Examples

Two examples are provided below to illustrate how these factors are used by DWER to assess whether material is waste.

Scenario 1

At Premises A mixed construction and demolition materials are accepted onto the premises from third parties and directed to a sorting area. The third parties bringing the materials to Premises A do not want them and either pay the owner/occupier of Premises A to take them or give them to the owner/occupier for free.

Large pieces of plastic, timber, metal and plant material are removed from the materials by an excavator. The residual 'sorted' materials are buried on Premises A to raise the level of the land and fill a void.

In this scenario, the incoming materials are unwanted by their sources. They are not processed to substantially or materially transform them into something new. Essentially the same materials that were accepted at the premises are deposited and buried to level the land. The materials buried are considered to be waste by DWER.

Scenario 2

At Premises B, mixed construction and demolition materials are accepted from third parties onto the premises. The third parties bringing the materials to Premises B do not want them and either pay the owner/occupier of Premises B to take them or give them to the owner/occupier for free.

• The materials are processed in a number of different ways including (but not necessarily limited to) the following:

• An excavator breaks up large materials and removes reinforced steel. The materials are also passed through a jaw crusher;

• The materials then pass through vibratory screens, air blowers and under belt magnets that remove plastics, metals and other undesirable materials;

• After initial screening the materials pass through a hand picking station where any residual contaminants are removed;

• Finally, the materials are passed through an impact crusher and two screens which separate the materials into different size fractions;

• The processed materials are tested for asbestos content and against relevant Main Roads material specifications;
• Subject to meeting asbestos and Main Roads specifications, the materials are sold as recycled fill sand, road base and drainage aggregate to third parties.

In this scenario, the incoming materials are regarded as waste by DWER at the time of their receipt at Premises B. However, the materials are substantially and materially transformed through processing into new products that are different to the materials accepted at the gate. There is also a market for these products. When purchased and used by consumers these products would not be classified as waste by DWER.

Any contaminant materials screened out during the processing of the construction and demolition materials received at Premises B that are not wanted by the owner/occupier of Premises B to make recycled fill sand, road base and drainage aggregate would remain waste in DWER's view.

Feedback and More Information

The Department is keen to receive feedback on this factsheet to ensure the content is clear and helpful.

If you wish to provide feedback or for further information, please email DWER at info@dwer.wa.gov.au or phone 6364 7000.

Legislation

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Factsheet - amendments to the Environmental Protection Regulations 1987 - clean fill and uncontaminated fill

1. Purpose

This factsheet provides information on clean fill and uncontaminated fill in accordance with the amended Environmental Protection Regulations 1987 (EP Regulations) and the revised Landfill Waste Classification and Waste Definitions 1996 (amended 2018) (Waste Definitions).

2. Background

The Environmental Protection Amendment Regulations 2018 gazetted on 27 April 2018 are intended to address the consequences of the decisions of Justice Beech and the Court of Appeal in Eclipse Resources Pty Ltd v the State of Western Australia [No. 4] [2016] WASC 62 and Eclipse Resources Pty Ltd v The Minister for Environment [No 2] [2017] WASCA 90 (Eclipse case). The Eclipse case clarified the definition of waste and the application of the waste levy.

This decision had consequences beyond the Eclipse case, particularly for the use of fill by the development industry, including waste levy liability and licensing under the Environmental Protection Act 1986 (EP Act).

The effect of this decision is that the use of clean fill and uncontaminated fill in circumstances where they would be considered waste and meet the category descriptions for landfill premises under the EP Act requires licensing and, in certain circumstances, payment of the waste levy.

3. Effect of the amendments

These amendments allow for the use of clean fill, or uncontaminated fill that meets environmental and health thresholds after testing, without the need for a landfill premises licence or payment of the waste levy.

The amendments are only relevant to material that is defined as waste under the EP Act and Waste Avoidance and Resource Recovery Act 2007 (WARR Act) as interpreted by the Eclipse case, and for premises classified as a landfill category (63, 64, 65, 66 and 89) in the EP Regulations. Further information on considerations for determining whether material is waste is available in the factsheet Assessing whether material is waste.

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1 Where applicable based on the defined levy region in the Waste Avoidance and Resource Recovery Levy Regulations 2008

Use of clean fill and uncontaminated fill 2018
4. Relevant factors

The WARR Act includes objects that preference reuse and recycling to divert waste from landfill consistent with the waste hierarchy.

The amendments to the EP Regulations and Waste Definitions support this by allowing for the use of clean fill, or uncontaminated fill that meets environmental and health thresholds after testing, without the need for a landfill premises licence or payment of the waste levy.

The flow diagram below sets out the steps that should be taken in determining whether the use of fill will trigger licensing or levy requirements.

Is the material waste?
These changes only apply to waste.

Sections 3(1) of the EP Act and the WARR Act define waste to include matter:

(a) whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment; or
(b) prescribed to be waste.

The term ‘waste’ in the EP Act and WARR Act also has its ordinary dictionary meaning –

(a) anything left over or superfluous, as excess material, by-products etc., not of use for work in hand” (i.e. unwanted or excess material, viewed from the perspective of its source); and/or
(b) any matter whether useful or useless which is gotten rid of into the environment.

Further information is provided in Assessing whether material is waste.

Prescribed landfill premises category 63
The amendments only have practical effect for premises that accept inert (Class 1) waste for burial and would otherwise meet the description of a category 63 landfill premises in the Environmental Protection Regulations 1987. This is because this material may be used as fill for development and would be subject to licensing and the levy where relevant if it was not defined as a “clean fill premises”.

Clean fill
The definition of clean fill is contained in section 2 of the Waste Definitions and essentially means raw excavated natural material such as clay, gravel, sand, soil or rock fines sourced from land that has not been used for any of the potentially contaminating land uses listed in Appendix B of the Assessment and management of contaminated sites. A record of the originating site’s historic activities should be retained by the proponent.

Uncontaminated fill
Uncontaminated fill includes inert waste type 1 (excluding asphalt and biosolids) and neutralised acid sulfate soils that meet the requirements set out in Table 6 of the Waste Definitions, as determined by relevant sampling and testing carried out in accordance with the requirements in Table 7 of the Waste Definitions.

The testing thresholds are intentionally conservative. Maximum concentration and leaching test thresholds allow for the use of uncontaminated fill at any location without increasing the risk to human health, the environment or any environmental value. This includes on the highly transmissive soils of the Swan Coastal Plain near Perth with its vital groundwater resources and wetlands. Available data on
ambient background levels in soils of the Swan Coastal Plain were taken into account when setting thresholds.

It is not necessary to test for every substance listed in Table 6. The testing and sampling regime (Table 7) in the Waste Definitions has been amended to allow for testing for substances based on land use history of the site of origin for uncontaminated fill Appendix B of the Assessment and management of contaminated sites. This ensures that only likely contaminants are tested for, reducing the cost and complexity of the testing regime.

The sampling and testing requirements are based on achieving a 95% upper confidence limit (average) and the requirement to characterise each domain or stockpile separately. This ensures that only testing of relevant substances is undertaken, and that the results are practical in their application. Records to be maintained by the proponent should include the originating site/s historic activities, the tested contaminants and testing results.

It is the responsibility of the user to ensure that the material is environmentally suitable for the purpose for which it is being used, including whether its use could be pollution, or an unreasonable discharge under the EP Act or create a contaminated site within the meaning of the Contaminated Sites Act 2003.

**Clean fill premises**

Clean fill and uncontaminated fill may be accepted at a clean fill premises. Clean fill premises are defined in the EP Regulations and are premises that accept, and have only ever accepted, clean fill or uncontaminated fill for burial.

Where clean fill is accepted for burial at an area that is separate and distinct from a Class I inert landfill site it may qualify as a 'clean fill premises' even where the landfill site and clean fill premises are within one licence boundary.

**Waste levy**

The Waste Avoidance and Resource Recovery Levy Regulations 2008 provide for a levy to be payable in respect of "waste disposed of to landfill" at “landfill premises” which are categories 63, 64 and 65 prescribed premises which require a licence under the EP Act whether or not such a licence is held.

**Frequently-asked questions**

**Q1:** My surplus (waste/excess) fill is not “clean fill” and exceeds some of the “uncontaminated fill” thresholds in Table 6. Can I get approval for risk-based reuse of this fill?

This is not possible currently as a case by case risk-based approval requires amendments to the EP Act and WARR Act, as well as new regulations. It is the Department’s intention to progress such amendments in consultation with stakeholders.

**Q2:** Testing of all the substances listed in Table 6 of the Waste Definitions would be prohibitively expensive. Do I have to test for all substances to meet the definition of uncontaminated fill?

The sampling regime (Table 7) in the Waste Definitions has been amended to allow for testing for substances based on land use history of the site of origin for uncontaminated fill. This ensures that only substances likely to be present are tested for, reducing the cost and complexity of the testing regime.
Q3: What if the clean fill contains concentrations of naturally occurring substances which exceed the concentration thresholds for uncontaminated fill?
Waste that meets the definition of clean fill does not require testing as outlined in Tables 6 and 7 of the Waste Definitions and nothing alters this. The EP Act places general obligations on users to ensure that the waste material is environmentally suitable for the purpose for which it is being used, including whether its use could result in pollution or an unreasonable discharge.

Q4: How do these amendments apply in regional areas outside Perth?
These amendments, including the testing regime, apply throughout Western Australia. The waste levy applies to waste generated in the Perth Metropolitan Region and disposed of to a category 63, 64 or 65 landfill premises anywhere in Western Australia, or disposed of to the Perth Metropolitan Region regardless of where it was generated.

Q5: I intend to store excess material taken from an urban development which was previously undisturbed bushland and stored temporarily offsite for later reuse in another development. Do these amendments apply to this situation?
They may. The key initial question is whether the material is waste (see Assessing whether material is waste for guidance). If you consider the material is waste, then you need to determine whether the reuse meets the definition of a category 63 landfill premises (more than 500 tonnes accepted for burial). From the context of the question, it appears that the material would meet the definition of clean fill. Refer to the flow diagram for further information.

Q6: My large site includes undeveloped native bushland, an area used as a market garden and a smaller fuel and chemical storage area. Contamination investigations have found pesticide contamination in the fuel and chemical storage area. How would these amendments apply to surplus (waste/excess) soil from my site?
If the undeveloped bushland area has not been used for any of the potentially contaminating land uses listed in Appendix B of the Assessment and management of contaminated sites, waste/excess fill from this area is likely to meet the definition of clean fill and so would not require testing as outlined in Tables 6 and 7 of the Waste Definitions.

Market gardens are a potentially contaminating land use listed in Appendix B of the Assessment and management of contaminated sites. If waste fill from the market garden area has been tested in accordance with Table 7 for potential contaminants based on the land use history and meets the relevant maximum concentration and leaching test thresholds in Table 6, it would meet the definition of uncontaminated fill. Clean fill and uncontaminated fill can be used at clean fill premises.

Waste pesticide-contaminated soil from the fuel and chemical storage area would not meet the definition of either clean fill or uncontaminated fill and should be disposed of at an appropriate waste treatment or disposal facility.

Q7: Why can’t the thresholds for uncontaminated fill be based on the ecological investigation levels in the National Environmental Protection (Assessment of Site Contamination) Measure 1999?
The thresholds are intentionally conservative to protect sensitive areas and land uses. The blanket use of ecological investigation levels (EILs) set in the contaminated sites regime is not appropriate as these are not intended for decisions about waste reuse suitability. This is explicit in the National Environment Protection (Assessment of Site Contamination) Measure. It should be noted that the 2013 NEPM amendment significantly reduced the number of contaminants for which EILs were published (to eight) and therefore many of the parameters in Table 6 no longer have an EIL.
The Department is committed to reviewing the threshold values in the Waste Definitions by April 2019 based on ambient data received for the Swan Coastal Plain. You are encouraged to provide test results for samples representative of ambient background soils of the Swan Coastal Plain to the Department (Attention: Contaminated Sites Branch) by end December 2018 to inform this review.

Feedback and More Information
The Department is keen to receive feedback on this factsheet to ensure the content is clear and helpful. If you wish to provide feedback or for further information, please email DWER at info@dwer.wa.gov.au or phone 6364 7000.

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Flow Diagram - Inert Waste (Category 63) proposed to be used for fill

Is the material waste?

Yes

Uncontaminated fill

No licence if buried at clean fill premises

No levy applies

Yes

Clean fill

No licence or levy applies

No

Licence required

Waste generated in or disposed of to Perth metropolitan area?

Yes

Levy applies

No

No

No

No

No

No

No

No

No

No

No

No

No

No