



Our Ref: 27.1.1

26 November 2004

Dr Judy Edwards MLA
MINISTER FOR THE ENVIRONMENT
Level 29 Allendale Square
77 St Georges Terrace
Perth, WA 6000

Dear Minister

Re: Revised Draft Environmental Protection (Swan Coastal Plain Wetlands) Policy 2004

The Urban Development Institute of Australia (UDIA) is the peak industry body representing the urban development industry in Western Australia.

It is in this capacity that we thank the Minister for the Environment for the opportunity to comment on the Revised Draft Environmental Protection (Swan Coastal Plain Wetlands) Policy 2004.

However we would like to express our disappointment that the serious issues and concerns raised in our previous submission on the draft policy did not result in the Environmental Protection Agency making significant changes to the document, despite the concerns being shared by many other submissions and members of the public, as has been evidenced in the significant publicity regarding the policy.

UDIA strongly believes that the issues outlined below require further examination and consideration by the Department of Environment (Environmental Protection Authority).

In particular, we make the following comments:

- The combination of the onus on landowners which is created by automatic registration, and the existence of known errors and inaccuracies in the data base creates an inequitable outcome for affected landowners.

We would support the regulations being amended to provide for an unpopulated register at gazettal, with case by case registration in accordance with an agreed transparent process emerges very strongly from this consideration.

- We request that before this EPP is finalised and gazetted, the proposed environmental significance criteria are subjected to more public and extended review, including expert peer review by a panel from government, community and industry.
- UDIA requests that the policy include provision for landowners to appeal to the Minister for Environment and Heritage.



- We remain concerned regarding the general requirement for consultation in clause 10. The requirement to take ‘reasonable steps’ to consult with affected persons has been the subject of much litigation in the environment and town planning fields throughout Australia, and some direction should be provided to avoid unnecessary uncertainty or conflict.
- While the matter of exemptions may arguably be covered in some cases by regulation 8(2)(a), we request that regulation 8(2)(b) be amended to include clause 9 of Schedule 6. This would mean that an alteration of a wetland by an activity referred to in regulation 8(1) would not be a prescribed alteration if the clearing was done in accordance with a subdivision approval.
- UDIA remains concerned that, while the policy in effect amounts to a restriction of land use or defacto acquisition, it does not provide for compensation of affected land owners.

Additional information on each of these issues is provided below.

Inequitable Outcome for Affected Landowners

UDIA has concerns that this policy is overly onerous and is not equitable for affected landowners.

The policy is onerous in that we presently understand that the wetland register will be fully populated at gazettal of the EPP and submissions and information must be provided to the EPA in order for the register to be amended or a wetland deleted from the register.

Notwithstanding our agreement that wetlands with acknowledged and verified conservation values need to be protected by the EPP, this approach potentially assumes the character of being “guilty until proven innocent” insofar as wetlands which appear to have attributes which require or cause the wetland to be registered, in the event that appearances do not survive detailed assessment of the site against the criteria there is no ready way, other than the formal process, to have the register corrected.

In contrast, the previous draft EPP published in 1999 incorporated the concept of a wetland register which would be “empty” on day one, but would be populated as verified factual information was put forward and assessed and agreed, on a case by case basis.

UDIA considers that the 1999 approach has more quality control and data verification opportunity built into the basic process for registration and therefore is preferable.

It is also more equitable to landowners in that there is no onus to prove through the statutory process that a registered wetland should not be on the register. Registration would only happen on a case by case basis, and analysis and effort by landowners and government would only need to be carried out to the appropriate level of scientific detail at the stage when planning for reservation or development arrives. This amounts to an “as required only” draw on the human and financial resources of private landowners, government and the private sector.



The draft policy creates issues and costs to landowners who have draft EPP wetlands on their land in so far as the onus is placed on them to correct inaccuracies and errors which are carried forward by the mapping into the gazetted EPP.

It is noted that, notwithstanding DoE's considerable efforts to verify the wetland maps database which has informed the draft EPP mapping, that there remain inaccuracies and errors in the mapping which will be time consuming, costly and inconvenient to remedy after the policy is gazetted, as the gazetted data will be the authoritative reference.

The combination of the onus on landowners which is created by automatic registration, and the existence of known errors and inaccuracies in the data base creates an inequitable outcome for affected landowners. The value of an unpopulated register at gazettal, with case by case registration in accordance with an agreed transparent process emerges very strongly from this consideration.

Registration Criteria

The proposition that technical criteria which have previously been used to evaluate conservation values of wetlands will now be changed will create significant issues and problems for community and industry.

Previously, in addition to protection afforded through the original EPP, and through recognition in the statutory planning system that RAMSAR, CAMBA, JAMBA wetlands required particular protection, Bulletin 686 was used to identify conservation values.

Notwithstanding the acknowledged shortcomings of the processes set out in Bulletin 686, there was a level of understanding in government and industry on how it should be applied and the outputs of the process, in industry members experience, were generally sound and rational.

We are concerned that there is now a new set of criteria proposed, and that these criteria are very broad and potentially will include (on day one when the EPP is gazetted and has legal force) wetlands which whilst having some acknowledge values, are not so significant as to create the need to restrict uses as set out in the EPP, and invoke the very serious offence of environmental harm.

We submit that before this EPP is finalised and gazetted, the proposed environmental significance criteria are subjected to more public and extended review, including expert peer review by a panel from government, community and industry.

Right of Appeal

UDIA is concerned that no right of appeal is included in the policy. While administrative law remedies may, depending on the circumstances, be available they are not the equivalent of a right of appeal and are much more limited in scope than usual appeals under the Environmental Protection Act. Further, pursuing an administrative law remedy in the Supreme Court would be an expensive, complex and time consuming process for most land owners.

UDIA suggests that the policy include provision for landowners to appeal to the Minister for Environment and Heritage.



Consultation

We remain concerned regarding the general requirement for consultation in clause 10. The requirement to take 'reasonable steps' to consult with affected persons has been the subject of much litigation in the environment and town planning fields throughout Australia, and some direction should be provided to avoid unnecessary uncertainty or conflict.

Exemptions

UDIA remains concerned that the draft policy is not clear regarding exemptions for developments approved under the statutory planning system, particularly for sites that were not defined as incorporating an EPP wetland at the time of approval but could incorporate an EPP wetland under the proposed broad definitions contained in the draft policy.

UDIA believes that it is important that the policy does not unnecessarily constrain the completion of approved subdivisions. We recommend that the policy is reviewed to ensure clarity in this area.

In addition, while the matter of exemptions may arguably be covered in some cases by regulation 8(2)(a), we suggest that regulation 8(2)(b) be amended to include clause 9 of Schedule 6. This would mean that an alteration of a wetland by an activity referred to in regulation 8(1) would not be a prescribed alteration if the clearing was done in accordance with a subdivision approval.

Compensation

UDIA is further concerned that, while the policy in effect amounts to a restriction of land use or defacto acquisition, it does not provide for compensation of affected land owners.

UDIA strongly believes that if sites are to be protected for the benefit of all Western Australians, the cost of conservation should be equally borne by all and should not place and unfair or inequitable burden on individual landowners. UDIA recognises that while the compensation issue may not be directly within the power of the EPA to resolve, there should be a whole of government approach to resolving the issue before the EPP becomes law.

Thank you for the opportunity to provide comment on the revised policy. We look forward to your response.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Marion Fulker', is positioned below the text 'Yours sincerely'.

MARION FULKER
Executive Director

