

11 April 2016

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Dear Mr Quinlan

Legal and Governance Review of Policies and processes of the Office of the Environmental Protection Authority (OEPA)

The Urban Development Institute of Australia (UDIA) WA is pleased to provide feedback to the review team responsible for *the Legal and Governance Review of Policies and Processes of the Environmental Protection Authority (EPA)*. The following feedback has been prepared in consultation with UDIA members, with special assistance from Lavan Legal.

- 1 We refer to your correspondence dated 8 February 2016 regarding the terms of reference for the above review and subsequent meeting to discuss the input from the perspective of the UDIA with a particular emphasis on implications for the land development industry.
- 2 Input has been requested from the UDIA in relation to the terms of reference including:
 - 2.1 The EPA's practices for development of policies and guidelines;
 - 2.2 The content, clarity and consistency of policies and guidelines;
 - 2.3 Processes to ensure policies and guidelines are given due consideration during assessments and in the EPA's reporting; and
 - 2.4 Any other matters related to the application of policies and guidelines which would affect the EPA's capacity to fulfil its statutory duties to undertake assessments.
- 3 Our comments in relation to the terms of reference are as set out below.

Scope/role of the EPA in relation to land development

- 4 The *Environmental Protection Act 1986* (WA) (**EP Act**) sets out its key principles and objects, in s 4A, namely to protect against threats of serious and irreversible environmental damage taking into account the precautionary principle,¹

¹ ss1 refers to a lack of scientific certainty not being a viable reason for postponing measures to prevent environmental degradation.

intergenerational equity, waste minimisation, conservation and that environmental factors should play a role in pricing and incentive mechanisms.²

- 5 Relevant to the UDIA, the EPA is the statutory body responsible for enforcing the EP Act's objectives in relation to land use planning, focusing on protection of the environment through the regulations of proposals in addition to preventing, controlling and abating pollution and environmental harm (s15). The powers of the EPA are defined as being those reasonably necessary to enable it to perform its functions (s 17(1)).
- 6 In particular the EPA has authority to decide whether planning schemes (which regulate land use planning outcomes) require a formal environmental impact assessment (Part IV of EP Act). The EPA also has this role for the subdivision and planning proposals referred to it. Strategic environmental assessments can also be made by the EPA when the circumstances warrant it. In each of these circumstances the EPA must give advice on matters that raise significant environmental issues including advice and guidance. The EPA only has an ongoing role in developments if the Minister for the Environment makes a statement of conditions, requiring such involvement.

Type of policies the EPA with take into account

- 7 Pursuant to s 26 of the EP Act the EPA can prepare policies itself.
- 8 It is observed at a general level however that the hierarchy and states of these policies is not well understood by the development industry.
- 9 That said, the WA government endorsed policies are split into two general types. Firstly, statutory Environmental Protection Policies (**EPPs**), and secondly, non-statutory State Environmental Policies (**SEPs**).
- 10 The SEPS are the policies that the EPA develops on behalf of the government, they are not statutory. The scope of an SEP includes establishing environmental values, environmental policy objectives, identifying a framework for implementation using existing statutory mechanisms etc, new funding, and defining environmental performance criteria to use for an environmental audit. The only one currently identified as relevant to the development industry, namely:
- 10.1 The State Environmental (Cockburn Sound) Policy 2015.
- 11 The EPPs are specific policies for set areas. They are ratified by Parliament and have the same force and effect as the EP Act. These can 'fill in' aspects missing in the EP Act or can be used where a strong policy position is required for the purposes of assisting regulators in assessment and providing certainty for proponents.
- 12 The EPA document '*State Environmental Policies: An Explanatory Document*' sets out that EPPs should be restricted to providing a clear statement of intent to use the enforcement powers of the Act, to address an environmental issue or to provide the

² ss4(1)-(2). Essentially that polluters should bear the costs of containment, avoidance and abatement, and that environmental factors should be included in the valuation of assets and services.

ability in certain areas to carry out activity that would otherwise be unclear under the Act. Current EPPs relevant to land development include:

- 12.1 *Environmental Protection Goldfields Residential Areas Sulphur Dioxide Policy and Regulation 2003 (WA);*
- 12.2 *Environmental Protection (Kwinana) (Atmospheric Wastes) Policy 1999 (WA);*
- 12.3 *Environmental Protection (Kwinana) (Atmospheric Wastes) Regulations 1992 (WA);*
- 12.4 *Environmental Protection (Western Swamp Tortoise Habitat) Policy 2011 (WA); and*
- 12.5 Environmental Protection (*Peel Inlet-Harvey Estuary*) Policy Approval Order 1992 (WA).

13 There have been other EPPs prepared historically that have now been suspended. These include the:

- 13.1 Environmental Protection South West Agriculture Zone Wetlands Policy 1998 (WA);
- 13.2 Environmental Protection Gnamptarra Mound Crown Land Policy 1992 (WA); and
- 13.3 Environmental Protection Swan Coastal Plain Lakes Policy 1992 (WA).

14 Other policy categories distinct from the ones listed above, are those that the EPA self-develop. Categories of EPA publications (not including EPP's or SPP's) related to development (broadly) including:

- 14.1 The Environmental Impact Assessment Administrative Procedures 2012;
- 14.2 Environmental Assessment Guidelines (**EAGs**) - These provide advice on procedures and environmental requirements that the EPA expects to be achieved in assessments. The ones broadly relevant to development are outlined below:
 - 14.2.1 EAG 1-Defining the Key Characteristics of a Proposal;
 - 14.2.2 EAG 2-Changes to Proposals after Assessment: Section 45C of the *Environmental Protection Act 1986 (WA)*;
 - 14.2.3 EAG 6-Timelines for Environmental Impact Assessment Proposals;
 - 14.2.4 EAG 8-Environmental Principles, Factors and Objectives;
 - 14.2.5 EAG 9-Application of a Significance Framework in the Environmental Impact Assessment Process;
 - 14.2.6 EAG 10-Scoping a Proposal;

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- 14.2.7 EAG 11-Recommend Environmental Conditions;
 - 14.2.8 EAG 13-Consideration of Environmental Impacts from Noise;
 - 14.2.9 EAG14-Preparation of an API: Category A Environmental Review Document;
 - 14.2.10 EAG 16-Referral of a Proposal under s 38 of the *Environmental Protection Act 1986* (WA); and
 - 14.2.11 EAG 17-Preparation of Management Plans under Part IV of the *Environmental Protection Act 1986* (WA).
 - 15 Guidance Statements (older versions of EAGs). These statements provided advice on procedures and environmental requirements the EPA expected to be achieved in assessments;
 - 15.1 GS 3-Seperation Distances between Industrial and Sensitive Land Uses;
 - 15.2 GS 6-Rehabilitation of Terrestrial Ecosystems;
 - 15.3 GS 7-Protection of the Western Swamp Tortoise Habitat, Upper Swan/Bullsbrook;
 - 15.4 GS 8-Environmental Assessment Guideline 13 Consideration of Environmental Impacts from Noise (interim guidance);
 - 15.5 GS 10-Level of Assessment for Proposals Affecting the Natural Areas within the System 6 Region and Swan Coastal Plain Portion of the System 1 Region;
 - 15.6 GS 28-Protection of the Lake Clifton Catchment;
 - 15.7 GS 33-Enviromental Guidance for Planning and Development;
 - 15.8 GS 41-Assessment of Aboriginal Heritage;
 - 15.9 GS 49-Assessment for Development Proposals in Shark Bay World Heritage Property;
 - 15.10 GS 51-Terrestrial Flora and Vegetation Surveys for Environmental Impact Assessment in Western Australia;
 - 15.11 GS 55-Implementing Best Practice in Proposals Submitted to the Environmental Impact Assessment Process; and
 - 15.12 GS 56-Terrestrial Fauna Surveys for Environmental Impact Assessment in Western Australia.
 - 16 Note: certain GS's that were applicable in the past have been superseded and replaced with guidelines or legislation linked to the Department of Environmental Regulation (**DER**) for example:
 - 16.1 The GS 17-A Site Remediation Hierarchy for Contaminated Soil, is superseded by the *Contaminated Sites Act 2003* (WA).
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- 16.2 GS 18- Prevention of Air Quality Impacts from Land Development Sites has been superseded by a DER guideline.
- 17 Strategic Advice as part of the EPA's own policy framework there are 'strategic advice' documents prepared pursuant to s16(e) of the EP Act, which are prepared directly for government on a particular project or issue. Those which are relevant to development include:
- 17.1 Perth and Peel @ 3.5 Million: Environmental Impacts, Risks and Remedies;
 - 17.2 Strategic Environmental Advice on the Dawesville in Binningup Area;
 - 17.3 Advice on Areas of Conservation Significance in the Preston Industrial Park;
 - 17.4 Keralup Formerly Amarillo Masterplan, Karnup;
 - 17.5 Fremantle Ports Outer Harbour Project;
 - 17.6 Dampier to Bunbury Natural Pipeline Corridor Widening – Kwinana to Bunbury Project;
 - 17.7 Environmental Values Associated with the Alignment of Roe Highway Stage 8 Appeals;
 - 17.8 Peel Inlet and Harvey Estuary System Management Strategy;
 - 17.9 Turquoise Coast Development: Jurien Bay; and
 - 17.10 Dampier to Bunbury Natural Gas Pipeline Land Corridor Expansion Project.
- 18 Environmental Protection Bulletins (EPBs) – these were formerly known as 'Position Statements'. They are short documents designed to be read by the broader public and outline the EPA's view on matters:³
- 18.1 EPB 1-Environmental Offsets: Biodiversity;
 - 18.2 EPB 2-Port Headland Dust and Noise;
 - 18.3 EPB 4-Strategic Advice-Dawesville to Binningup;
 - 18.4 EPB 6-The Natural Values of the Whicher Scarp;
 - 18.5 EPB 11-Consultation on Conditions Recommended by the EPA;
 - 18.6 EPB 12-Swan Bioplan-Peel Regionally Significant Natural Areas;
 - 18.7 EPB 13-Guidance for the Use of the Albany Regional Vegetation Survey in Environmental Impact Assessment;
 - 18.8 EPB 16-Minor or Preliminary Works or Investigation Work;
 - 18.9 EPB 17-Strategic and Derived Proposals;

³ Note: Bulletin number three, seven, nine and 15 have been withdrawn.

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- 18.10 EPB 18-Sea Level Rise;
 - 18.11 EPB 20-Protection of Naturally Vegetated Areas through Planning and Development;
 - 18.12 EPB 21-Guidance for Wind Farm Developments;
 - 18.13 EPB 23-Guidance on the EPA Landforms Factor; and
 - 18.14 EPB 24-Greenhouse Gas Emissions and Consideration of Projected Climate Change Impacts in the EIA Process.
 - 18.15 Note: there are three 'Position Statements' still in effect:
 - 18.15.1 PS 4-Environmental Protection of Wetlands;
 - 18.15.2 PS 3 - Terrestrial Biological Surveys As An Element Of Biodiversity Protection; and
 - 18.15.3 PS 2- Environmental Protection Of Native Vegetation In Western Australia.

UDIA comment

- 19 It is fair to say that the list of policy documentation (as evidenced above) is a somewhat complex and convoluted one, particularly when it comes to understanding which documents have priority in a land development context.
- 20 It is regularly the case that the policy documentation is either overlooked (and as much as it is hard to find) or considered to be outdated (due to the time without review). That being the case, it is generally the perception in the development industry that only a number of policies are strictly speaking 'relevant' from a land development perspective.
- 21 That said however, in circumstances that a proposal is, refused or conditions are such that an adverse outcome results, it is difficult from a proponents perspective to argue that a particular policy position has limited or no weight in the context of an appeal to the office of the appeals convenor. Equally, the UDIA is unaware of any challenge upheld in relation to the weight of such policy (irrespective of the *Roe 8 (Save Beelihar Wetlands (Inc) v Jacob* [2015] WASC 482) decision) in recent memory.
- 22 That being the case, it is UDIA's belief that a clearer strategic position with regard to the policy framework in promoting greater understanding of the transitional land use planning process, particular in regard to scheme amendments, would be of benefit to industry and thus supported in principle.

Planning Reform

- 23 As discussed with you, in July 2011, the West Australian Government and the Commonwealth Government agreed to undertake a Strategic Assessment of the Perth and Peel Regions under the *Environment Protection Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*).
- 24 The purpose of the Strategic Assessment was to address matters of national environmental significance (**MNES**) and state environment arising from future development of the Perth and Peel region (incorporated urban, industrial, rural-residential and infrastructure development). In addition to addressing the commonwealth requirements for a Strategic Assessment under part 10 of the EPBC Act, the Strategic Assessment also responds to the interim section 16 (e) advice prepared by the EPA under the Act (see at paragraph 17 above).
- 25 Relevantly, the Strategic Assessment has been progressed in the consideration of important planning framework documents, including:
- 25.1 Directions 2031 and Beyond – Metropolitan planning beyond the horizon; and
 - 25.2 Perth and Peel @ 3.5 million (including 4 sub-regional planning framework documents).
- 26 This is a significant development and will change the way in which environmental values (not only commonwealth environmental values) are assessed at a state level in WA.
- 27 On that basis, the UDIA has considerable interest in the Strategic Assessment process as it unfolds due to broad ranging implications for not only the identification of suitable land for development, but the processes and conditioning that development will be subject to in context of the broader land use planning process under the sub regionals frameworks.
- 28 As a consequence, the UDIA has made previous submissions and is in the process of preparing further comment in relation to the proposed Perth and Peel Green Growth Plan for 3.5 million consistent with its advocacy agenda and the interests of industry members. In particular, UDIA holds concerns in regard to the following:
- 28.1 Restrictive approach to land use planning in implementation of spatial boundaries ;
 - 28.2 Risk adverse approaches in avoidance of environmental values;
 - 28.3 Interpretation of evidence base which is inconsistent with current practical ‘on ground’ outcomes; and
 - 28.4 Lack of recognition for opportunities that exist for co-use of lands on which values exist and/or potential improved environmental outcomes as a result of transitional land management by industry.

29 Accordingly, your review of the policy framework relevant to decision making by EPA is timeous and its outcome in providing certainty to the development industry is welcomed.

30 I trust that the submission outlined above assists, please feel free to contact Craig Wallace or Tom Wilson at the UDIA should you have any queries in this regard.

Yours Sincerely

A handwritten signature in blue ink, appearing to be 'JC' or similar initials, followed by a horizontal stroke.

Justin Crooks
Environment Committee Chairman
UDIA WA