Environmental Defenders Office

Submission on the draft Environmental Protection Regulations (Publication and Confidentiality) Regulations 2021 (WA)

7 September 2021

Environmental Defenders Office

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Department of Water and Environmental Regulation (WA)

Sent via email only: **publicationconfidentialityregulations@dwer.wa.gov.au**

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We thank the Department of Water and Environmental Regulation (**DWER**) for the opportunity to make a submission in relation to the draft Environmental Protection Regulations (Publication and Confidentiality) Regulations 2021 (WA) (**Draft Regulations**).

KEY RECOMMENDATIONS

While we recognise the importance of dealing with confidential information and trade secrets appropriately, good decision making should always be transparent and allow for accountability. As such, we recommend that the Draft Regulations are guided by a presumption of disclosure unless there are extenuating circumstances – such circumstances being limited and reviewable.

On this basis, we recommend several changes to the Draft Regulations to adhere more closely to this principle, and to ensure consistency with the *Freedom of Information Act 1992* (WA) (**Freedom of Information Act**). For ease of refence, the following recommendations are set out to align with the Draft Regulations and are not in order of significance:

***Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA) (Clearing Regulations)**

Recommendation 1: Regulation 8(2) be amended to include the period for which clearing is proposed to be undertaken.

Recommendation 2: The scope of regulation 8(3) be expanded to include (among other things) changes to the period and size of the area to be cleared.

Recommendation 3: Regulation 8(5) be amended to include whether the undertaking is in relation to an area or purpose permit.

Recommendation 4: The scope of regulations 8(7)-(8) be expanded to include (among other things) the particulars of the land to which the permit was granted.

Recommendation 5: Regulation 11 be amended to restrict the circumstances that the CEO must or may refrain from publishing relevant documentation (e.g.) if it is in the public interest. At a minimum, the CEO must publish (as defined in the Clearing Regulations) a public register of requests made under subregulation (1) and determinations under subregulation (3).

Recommendation 6: Regulation 12(2)(a) be amended to align with the Freedom of Information Act by (i) presuming the publication of personal information if it is in the public interest (and no contrary request has been made), and (ii) requiring the publication of a permit holder or permit applicant's name(s).

***Environmental Protection Regulations 1987* (WA) (EP Regulations)**

Recommendation 7: An amended regulation 2B(2) be reinstated to clarify when records and minutes are to be published, and an appropriate time period (e.g. 14 days) for publication.

Recommendation 8: Regulation 2B(4) be amended to (i) clarify that parts of minutes or records not subject to a determination under subregulation (3) must be published, and (ii) confirm the ongoing application of the *Freedom of Information Act*.

Recommendation 9: In relation to regulation 3B, we reiterate abovementioned Recommendation 5 and recommend the Authority's ability to refrain from publishing relevant documentation is restricted (e.g.) if it is in the public interest. At a minimum, the Authority must publish (as defined in the EP Regulations) a public register of requests made under subregulation (1) and determinations under subregulation (3).

Recommendation 10: In relation to regulation 3C(2)(a), we reiterate abovementioned Recommendation 6 and recommend closer alignment to the *Freedom of Information Act* by (i) presuming the publication of personal information if it is in the public interest (and no contrary request has been made), and (ii) requiring the publication of a proponent's name(s).

BACKGROUND

The *Environmental Protection Amendment Act 2020* (WA) (**EP Amendment Act**) received royal assent on 19 November 2020. When proclaimed into operation, the EP Amendment Act will incorporate a suite of amendments that will bring long-overdue updates to the *Environmental Protection Act 1986* (WA) (**EP Act**).

The EP Amendment Act makes several key changes to the operations of the EP Act. As such, the Draft Regulations purport to maintain the status quo and address several key lacunae. As outlined in more detail below, we are concerned that the Draft Regulations, in their current form, do not maintain the status quo. Instead, the current drafting encroaches upon public participation in protecting the environment and holding government agencies accountable. In doing so, the Draft Regulations threaten to undermine transparency and, by proxy, public confidence in the environmental planning process.

SUBMISSION

Clearing Regulations

Regulation 8(2)

Under section 51Q of the EP Act, the CEO is required to maintain a public record of particulars of (among other things) applications for clearing permits. Under the current regime, these particulars include the period for which a clearing permit is sought.[1]

The Draft Regulations have removed the requirement for this period to be recorded in relation to applications for clearing permits.[2] Whilst it is conceded that the size and location of the clearing is far more significant, the removal of this particular is still an encroachment upon the public's ability to understanding Departmental decision making and make informed submissions to DWER. In order to maintain the status quo, we recommend that the period for which a clearing permit is sought is kept in the records; consistent with the regime for clearing permits that have been granted.

[1] *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA) reg 8(1)(a)(vi).
[2] *Environmental Protection Regulations (Publication and Confidentiality) Regulations 2021* (WA) Pt 2, reg 8(2) (**Draft Regulations**).

Recommendation 1: Regulation 8(2) be amended to include the period for which clearing is proposed to be undertaken.

Regulation 8(3)

The EDO welcomes the new requirement for public records to contain particulars about applications for amendments of clearing permits.[3] That said, we would welcome further expansion of the particulars required in order to align with new regulations 8(2) and 8(4).

In order to facilitate full public participation in the process, and to ensure appropriate standards of transparency and accountability, we believe that it is particularly important to include information about the nature of the amendment (e.g.) changes to the period or size of the area to be cleared.

Recommendation 2: The scope of regulation 8(3) be expanded to include (among other things) changes to the period and size of the area to be cleared.

Regulation 8(5)

The current Clearing Regulations require the CEO to keep a record of '*whether the undertaking is in relation to an area permit or a purpose permit*'.[4] This requirement is not replicated in the Draft Regulations (in their current form). [5]

Given the significant differences between area and purpose permits, including their duration under EP Act section 51G, it is important that the CEO continues to record this information.

Recommendation 3: Regulation 8(5) be amended to include whether the undertaking is in relation to an area or purpose permit.

Regulations 8(7)-(8)

The EDO welcomes a public record of particulars of people who have surrendered their clearing permits or had their clearing permits revoked.[6]

In order to remove any potential confusion, we recommend that a description of the land to which the permit was granted is also included in the record. This is particularly relevant where persons have multiple clearing permits under their name.

Recommendation 4: The scope of regulations 8(7)-(8) be expanded to include (among other things) the particulars of the land to which the permit was granted.

Regulation 11

The EDO expresses concern over the potential abuse of regulation 11. In the past, we have observed instances of proponents relying upon confidentiality exceptions to limit public access to information. One notable example is *Re Cockburn Cement Limited and Department of Water and Environmental Regulation* [2017] WAICmr 24.[7] There, the Acting Information Commissioner found that several documents were exempt from disclosure under Schedule 1, clause 4(2) of the *Freedom of*

[3] Draft Regulations Pt 2, reg 8(3). See also *Environmental Protection Amendment Act 2020* (WA) ss 51Q, 51DA.
[4] See *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (WA) reg 8(1)(c)(ii).
[5] Draft Regulations reg 8(5).
[6] Draft Regulations regs 8(7)-(8).
[7] See also *Cockburn Cement Ltd v Minister for Environment* [2019] WASC 9.

Information Act. These documents included information about, *inter alia*, the content of emissions and operational specifications.

We understand from the explanatory note that the Draft Regulations were drafted to achieve closer alignment to the *Freedom of Information Act*. If that is the case, then there are some additional clauses that must be included to fully align with the Act. Schedule 1, clauses 4(1)-(3) of the *Freedom of Information Act*, the basis for regulation 11, has several key exceptions:

> *…*
>
> *(5) Matter is **not** exempt matter under subclause (1), (2) or (3) **merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant**.*
>
> *(6) Matter is **not** exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned **consents** to the disclosure of the matter to the applicant.*
>
> *(7) Matter is **not** exempt matter under subclause (3) if its disclosure would, on balance, **be in the public interest**.* (emphasis added)

If the purpose of the Draft Regulations is to align with the Act, then we recommend that the following carve-outs are also included to permit disclosure if:

1. the documentation disclosed merely reveals information about the business, professional, commercial or financial affairs of the person that submitted the documentation under subregulation (1);
2. consent is obtained from the person that submitted the documentation under subregulation (1); or
3. disclosure is, on balance, in the public interest.

Without some form of restriction in place, the EDO is concerned that regulation 11 will be relied upon to undermine transparency and limit access to information without public accountability.

As such, we would also recommend that any decision made by the CEO under regulation 11 is qualified with an objective, reasonability test. For example, regulation 11(3)(a) should read:

> *must refrain from publishing the relevant documentation if the CEO is **reasonably** satisfied that the relevant documentation contains particulars of …*

At a minimum, this regulation must be amended to require the CEO to create a record of decisions not to publish information. This register will maintain protection of confidentiality but will also facilitate public participation in the process through judicial review (where appropriate). Without such a register, the public will inevitably be required to apply for the supporting documentation through the *Freedom of Information Act* for every land clearing permit. Such a process would presumably lead to an avoidable increase in freedom of information requests. Further, the lack of transparency would undoubtedly undermine public confidence in the whole process.

Recommendation 5: Regulation 11 be amended to narrow the circumstances where the CEO must or may refrain from publishing relevant documentation (e.g.) if it is in the public interest. At a

minimum, the CEO must publish (as defined in the Clearing Regulations) a public register of requests made under subregulation (1) and determinations under subregulation (3).

Regulation 12

The EDO welcomes the restricted disclosure of information pertaining to (among other things) threatened species under new regulation 12. That said, it is unclear why this regulation also allows the CEO to refrain from publishing personal information. Quintessential of personal information is a person's name. Not publishing the name of a person with a land clearing permit clearly grates against the requirements under the EP Act. Whilst it might (in principle) be conceivable that a situation could arise which justifies the need to refrain from publishing personal information, this does not make such unfettered power defensible.

In line with Schedule 1, item 3 of the *Freedom of Information Act*, we recommend that disclosure of personal information be presumed if it is in the public interest (and no contrary request has been made). Further, in line with item 3(4), we recommend that the personal information of a permit holder or permit applicant always be published.

Recommendation 6: Regulation 12(2)(a) be amended to closer align with the *Freedom of Information Act* by (i) presuming the publication of personal information if it is in the public interest (and no contrary request has been made), and (ii) requiring the publication of a permit holder or permit applicant's name(s).

EP Regulations

Regulation 2B(2)

Given that the EP Amendment Act allows for decisions to be made by the Authority without a meeting, it is increasingly important that the public can readily access minutes and records of any meetings and decisions.[8]

To that end, the EDO is concerned about the deletion of current regulation 2B(2). Without regulation 2B(2), it is unclear when minutes and records have to be published in accordance with EP Amendment Act s 14(2). Contemporary standards for the publication of meeting minutes and decision records envisage short timeframes for publication (for example, unconfirmed minutes of local government Council meetings are required to be published within 14 days[9]. At an absolute minimum, the regulations should reinstate the previous time period: '*6 months from the day the minute or record (sic) was made*', although we note that such an extended period is not consistent with standards set on other legislation.[10]

Recommendation 7: An amended regulation 2B(2) be reinstated to clarify when records and minutes are to be published, and an appropriate time period (e.g. 14 days) for publication.

Regulation 2B(4)

Regulation 2B(4) prevents the publication of exempt matters (as determined by the Authority) under subregulation (3). The EDO is concerned that the proposed drafting is not reflective of the current

[8] *Environmental Protection Amendment Act 2020* (WA) Pt 2, s 14A.
[9] *Local Government (Administration) Regulations 1996* (WA) r 13.
[10] *Environmental Protection Regulations 1987* (WA) reg 2B(2).

status quo and may limit the disclosure of minutes and records. To understand this concern, it is important to compare the two provisions.

> **In force**: *No **part of a minute** that is the subject of a determination referred to in subregulation (3) is to be made available to a person under subregulation (2) **unless a decision has been made pursuant to an access application under the Freedom of Information Act 1992** that the person is to be given access to the minute or part of the minute.* (emphasis added)
>
> **Proposed**: *If a minute or record is the subject of a determination referred to in subregulation (3), the Authority must not publish the minute or record.*

First, the gravamen of our concern is the omission of the phrase 'part of a minute'. On our reading, the proposed regulation 2B(4) would *potentially* allow the entire minute or record to not be published if it is partly subject to a determination under subregulation (3). Of course, the preferred reading of proposed regulation 2B(4) is consistent with the existing practise; however, we are concerned that there is enough ambiguity here to allow for an entire record to not be published if only a minor part is subject to a determination under subregulation (3).

To prevent potential abuse of the new regulation, we recommend drafting to the following effect:

> *If a minute or record is the subject of a determination referred to in subregulation (3), the Authority must not publish the **part of the** minute or record **subject to the determination**.*

Second, the current drafting seemingly evinces an intention to no longer be bound by the *Freedom of Information Act* if the minute or record contains exempt material. This second point is arguably otiose as the *Freedom of Information Act* will undoubtedly continue to apply. That said, the EDO is concerned that the new regulation 2B(4) indicates that the Authority may begin opposing *Freedom of Information Act* requests because certain minutes or records are exempt matters (e.g.) under schedule 1, clause 6 of the *Freedom of Information Act*. If that is the case, we recommend adopting the drafting of the *Freedom of Information Act* by implementing a public interest test (see Recommendation 5).

In any case, for the sake of clarity, the drafting of the new 2B(4) should include a reference to the *Freedom of Information Act* – for example:

> *If a minute or record is the subject of a determination referred to in subregulation (3), the Authority must not publish the minute or record. **However, any minute or recording that is subject to a determination referred to in subregulation (3) is still subject to the Freedom of Information Act 1992 (WA)**.*

Recommendation 8: Regulation 2B(4) be amended to (i) clarify that parts of minutes or records not subject to a determination under subregulation (3) must be published, and (ii) confirm the ongoing application of the *Freedom of Information Act*.

Regulation 3B

We reiterate our abovementioned concerns in relation to the confidentiality exceptions under regulation 11 of the Clearing Regulations.

In addition to these concerns, we also raise an 'in principle' concern about the implications of new section 39 under the EP Amendment Act. Historically, the EP Act has allowed for proponents to request the Authority not to keep a public record of the whole (or any part) of their proposal by reason of the confidential nature of any matters contained in their proposal.[11] Whilst the previous regime is effectively replicated in regulation 3B, we are concerned about the potential of abuse. The new regime can be analogised to Henry VIII clauses; whereby the Executive can quickly amend regulations with limited oversight compared to primary legislation. In other words, the Executive can amend and table a new confidentiality regulation without having to go through close consideration and debate in the Legislative Assembly – compared to a legislative amendment.

Whilst redress for this particular concern is beyond the scope of these submissions, the EDO believes that this issue strengthens the argument for adopting our recommendations (in addition to any other public submissions). If there is limited public accountability for changes to the Draft Regulations in the future, it is important that all our recommendations are given due consideration now.

Recommendation 9: In relation to regulation 3B, we reiterate abovementioned Recommendation 5 and recommend the Authority's ability to refrain from publishing relevant documentation is restricted (e.g.) if it is in the public interest. At a minimum, the Authority must publish (as defined in the EP Regulations) a public register of requests made under subregulation (1) and determinations under subregulation (3).

Regulation 3C

Given the similarities between regulation 3C and abovementioned regulation 12 of the Clearing Regulations, we repeat our concerns in relation to the Authority's unfettered ability to refrain from publishing personal information.

Recommendation 10: In relation to regulation 3C(2)(a), we reiterate abovementioned Recommendation 6 and recommend closer alignment to the *Freedom of Information Act* by (i) presuming the publication of personal information if it is in the public interest (and no contrary request has been made), and (ii) requiring the publication of a proponent's name(s).

[11] See, eg, *Environmental Protection Act 1986* (WA) s 39(2).