

2 February 2018

Project Manager
Proposed Regulatory Amendments to Categories 63-66, 68
Department of Water and Environmental Regulation
Locked Bag 33
CLOISTERS SQUARE WA 6850

Via email: wastereform@dwer.wa.gov.au

To whom it may concern,

Consultation Paper: Amendments proposed following the decision on Eclipse Resources Pty Ltd v The State of Western Australia [No.4] (2016) WASC 62

Thank you for the opportunity to provide feedback regarding the proposed amendments to the Environment Protection Regulations as set out by the above Consultation Paper.

The Urban Development Institute of Australia (UDIA) WA is the peak body representing the property development industry in Western Australia. UDIA is a membership organisation with members drawn from the residential, commercial and industrial property development sectors. UDIA members include both private and public sector organisations. Our industry represents approximately 12.3% of Western Australia's Gross State Product, contributing \$30.45 billion annually to the Western Australian economy and \$251.7 billion nationally. As well as helping to create sustainable and liveable communities, the industry employs a total of 228,500 Western Australians and over 2 million Australians across the country.

It is essential that waste management legislation remains contemporary and supportive of best practice to enable the delivery of the best possible environmental, social and economic outcomes. For this reason UDIA welcomes the proposed amendments to the Environmental Protection Act Regulations and acknowledges the Department's efforts in seeking to ensure that clean fill can be used for development purposes without the requirement for a licence, or generating a waste levy liability.

Given this, the proposed amendment to exclude premises that only accept 'uncontaminated fill' or 'clean fill' from the licensing regime and waste levy requirements is strongly supported by the Institute. Nevertheless, the Institute remains concerned that the proposed amendments do not explicitly exclude either 'clean fill' or 'uncontaminated fill' from the definition of 'waste'.

In accordance with the findings of the Supreme Court and the Court of Appeal in the Eclipse Resources Pty Ltd decisions, material will still be 'waste' if it is leftover, superfluous, or unwanted. As such, the Institute is concerned that any leftover material will still attract the waste levy. The proposed regulations should make it clear that both 'clean fill' and 'uncontaminated fill' do not attract the waste levy, even if the material is leftover, superfluous, or unwanted.

Similarly, the restricted definition of clean fill premises, which is defined as "*premises on which all of the waste that is, or has ever been, accepted for burial is uncontaminated fill or clean fill*" indicates

that the levy will apply to any material that is received by premises which currently accept, or have previously accepted any waste material. UDIA recommends that the proposed Regulations are amended so that the criteria for determining whether or not material attracts the waste levy, is determined by the nature and composition of the material itself and not the existing use or any previous use of a site receiving material.

UDIA understands the importance of ensuring that fill material is uncontaminated and fit for purpose, however the Institute is concerned that the proposed testing requirements for fill material will significantly add to the cost of material other than 'raw, excavated natural material'. Furthermore, as the proposed Regulations define 'clean fill' as material that *"has not, since it was excavated or removed from the earth, been used or subject to processing of any kind"*, the Institute is concerned that raw excavated natural material that has simply been sorted, washed, or crushed will not be categorised as clean fill and therefore its use will require testing. The Institute therefore recommends that the definition of 'clean fill' modifies the reference to *'processing of any kind'*.

The list of chemical substances identified by Table 1 is considerable, therefore the cost of undertaking testing for the full range of substances listed is likely to be significant. The generic and wide ranging substance testing requirements fails to give any due regard to site characteristics such as historical uses. An analysis of these could be used to indicate with reasonable accuracy whether the presence of the substances exceeding the quantities prescribed is likely or not. The Institute has similar reservations about the footnote accompanying Table 1 which states that *"Australian Drinking Water Guidelines. The relevant compounds to be tested should be informed by the source of the fill material"* which is also a large subgroup of compounds. To improve efficiencies and avoid unnecessary cost, the Institute strongly recommends that a more reasonable approach is taken to the testing of fill material with appropriate consideration given to the likelihood of the presence of substances exceeding the prescribed quantities.

UDIA also notes Table 1 does not provide any values for herbicides, referring simply to "other pesticides" with reference given to ADWG which may be confusing. Confirmation that the Australian Drinking Water Guidelines definition of pesticides includes herbicides should be made here.

The Institute is also concerned about the lack of clarity regarding the ASLP testing methodology. This should be incorporated into Table 2, together with confirmation on pH ranges to be used (i.e. pH 5, pH 7). Reference should also be given to the current WA DER Landfill Waste Classification and Waste Definitions 1996 (amended December 2009).

The Institute appreciates the Department's efforts in engaging with the development industry on this important issue. Should the Department require any assistance or further information regarding this matter, the UDIA would be delighted to assist. Please do hesitate to contact Chris Green, Director of Policy and Research at cgreen@udiawa.com.au or 9215 3400.

Yours sincerely



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