

STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS

TO: Mr Eric Lumsden
Member of the Western Australian Planning Commission (**WAPC**) and Director
General, Department of Planning (**DoP**)

SUBJECT: Petition No 136 - Kwinana Air Quality Buffer Zone Extension (Mandogalup) and
Petition No 150 - Kwinana Industry Air Buffer Zone Extension - Munster

**Questions of the Standing Committee on Environment and Public Affairs
(Committee)**

DATE: 17 October 2012

1. CONTEXT

- 1.1 These questions assume familiarity with Petitions 136 and 150, the submissions from the Principal Petitioners and stakeholder responses to correspondence from the Committee.
- 1.2 These documents can be accessed from the Committee's webpage: <http://www.parliament.wa.gov.au> by following the tabs, Legislative Council/Current Committees/Environment and Public Affairs Committee and clicking on the command "*Petitions: click here to view list of current petition*", which is highlighted in green on the Committee's webpage.

2. QUESTIONS: PETITION NO 136 - KWINANA AIR QUALITY BUFFER ZONE EXTENSION (MANDOGALUP)

When RDA Buffer Decision was made and came into effect

- 2.1 WAPC documents provided by DoP to the Committee state that WAPC's September 2010 decision to extend the Kwinana Air Quality Buffer to the north and east of Alcoa's Residue Drying/Disposal/Storage are in Kwinana (**RDA Buffer decision**) was "*reaffirmed*" in May 2011:
 - 2.1.1 when was the September 2010 decision affirmed?
 - 2.1.2 what were the factors that led to the RDA Buffer decision being reconsidered?
 - 2.1.3 when did the RDA Buffer decision come into effect for planning purposes?

Delay in advising affected landowners of RDA Buffer decision

Context for questions

2.2 WAPC's Decision Sheet dated 21 September 2010 records WAPC's decision that the WAPC:

4. *updates and releases a 'Review of the Kwinana Air Quality Buffer Position Paper (2008)' so that it reflects the new alignment.*

And WAPC's Decision Sheet dated 24 May 2011 records WAPC's decision to:

1. *Release the September 2010 WAPC report to stakeholders, in conjunction with planning advice;*
2. *Release the full Alcoa report to stakeholders, in conjunction with planning advice, with conditions on its use and circulation.*

2.3 Affected landowners were not advised of the RDA Buffer decision until October 2011, after tabling of Petition 136.

2.4 The Minister for Planning has advised the Committee that there were "*several reasons*" for failure to notify affected landowners of the RDA Buffer decision until October 2011, including:

- consultation with the State Solicitor's Office (SSO) and Alcoa on release of Alcoa's report;
- the time frame for review of the buffer decision was not settled until May 2011; and
- preparation of a Frequently Asked Questions document.¹

Questions

2.5 Why did WAPC decide to update and release a 'Review of the Kwinana Air Quality Buffer Position Paper (2008)' reflecting the new buffer alignment?

2.5.1 was this decision implemented?

2.5.2 if not:

1. why not? (In answering this question advise who made the decision not to release the report immediately on WAPC's decision that it be released and the statutory authority for that decision.)
2. explain why the WAPC made a decision that could not be implemented.

2.5.3 if so:

¹ Letter from Minister for Planning, 20 April 2012, p1.

1. when did that occur?
2. to which stakeholders was it released?
3. if the stakeholder to whom it was released did not include affected landowners, advise why they were not considered stakeholders.

(Having regard to State Planning Policy 4.1 – State Industrial Buffer Policy (**SPP 4.1**), which provides that an objective of that policy is to recognise the interests of existing landowners.)

4. explain any period of time elapsing between 21 September 2010 and the date the revised Position Paper was released.

2.6 Why did the WAPC decide in May 2011 to release the September 2010 WAPC report to stakeholders?

2.7 Why did WAPC make separate decisions in respect of release of the September 2010 WAPC report and Alcoa's report?

2.8 Was WAPC's May 2011 decision to release the September 2010 WAPC report to stakeholders implemented?

2.8.1 If not:

- why not? (In answering this question advise who made the decision not to release the report immediately on WAPC's decision that it be released and the statutory authority for that decision.)
- explain why the WAPC made a decision that could not be implemented.

2.8.2 If so:

- when did that occur?
- to which stakeholders was it released?
- have the petitioners been provided with a copy? And, if so, when did that occur? If not, why not?
- explain any period of time elapsing between May 2011 and the date the September 2010 WAPC report was released to the petitioners.

2.9 Is there any:

2.9.1 legislative requirement for publication of a decision by WAPC to make a buffer within a set period of time of that decision having been made? If so, identify that provision.

- 2.9.2 legislative or practical restriction on publication of interim buffer decisions when they are made? If so, identify that restriction.
- 2.10 To the extent that delay in releasing either of the revised Position Paper or the September 2010 WAPC report was based on discussion with SSO and Alcoa concerning release of Alcoa's report:
- 2.10.1 why wasn't the (1) revised Position Paper and (2) September 2010 WAPC report released independently of Alcoa's report?
- 2.10.2 which entity or entities raised issues with releasing Alcoa's report? Identify the issue/s raised by each entity.
- 2.10.3 in the event an issue was Alcoa's desire for confidentiality, what is the rationale for preservation of business confidentiality at the expense of providing landholders information on decisions affecting their land?
- 2.10.4 in the event an issue was copyright in the report:
- who owned the copyright?
 - could permission have been given to release the report and, if so, was permission sought and what was the response?
 - what is the rationale for a buffer-making process that results in the scientific studies considered by the WAPC in making decisions being withheld from affected landowners/the general public?
- In answering this question, advise whether the WAPC considered any other scientific studies in making the RDA Buffer decision and, if so, identify them.
- 2.11 To the extent delay in release of the revised Position Paper resulted from the review date for the RDA Buffer decision not being settled until May 2011, how did this prevent:
- 2.11.1 public notification of the RDA Buffer decision with a statement that a review date would be determined?
- 2.11.2 release of a revised 'Review of the Kwinana Air Quality Buffer Position Paper (2008)' reflecting the new buffer alignment and advice that a review date would be determined?
- 2.12 To the extent delay in release of a revised Position Paper or the September 2010 WAPC report was due to preparation of a Frequently Asked Questions document, why did it take so long to prepare that document?
- 2.13 In their petition, the petitioners seek copies of documents relating to the RDA Buffer decision.
- 2.13.1 have the petitioners now been provided with a copy of the September 2010 WAPC report?

2.13.2 if so, when did this occur?

2.13.3 if not, why not?

2.13.4 have the petitioners now been provided with a copy of Alcoa's report?

2.13.5 if so, when did this occur?

2.13.6 if not, why not?

Lack of consultation with affected landowners

Context

2.14 WAPC made the RDA Buffer decision following a recommendation from the Kwinana Air Quality Buffer Review Committee (**KBRC**). KBRC released a Position Paper for public consultation in 2008 that indicated an area under consideration for the RDA buffer. The buffer area the KBRC recommended to the WAPC is different from (more extensive than) that indicated in the Position Paper as being under consideration.

2.15 The 2008 Position Paper states that KBRC will undertake consultation with “*key stakeholders*” in determining and implementing the final Kwinana Air Quality Buffer area, including the area around the RDA.² The September 2010 WAPC report identifies input from:

- Alcoa;
- named property developers; and
- the Kwinana Industries Council,

but KBRC's final recommendation to the WAPC on the RDA buffer areas was not released for public comment.

2.16 WAPC did not consult with affected landowners in making either of its September 2010 or May 2011 decisions.

2.17 DoP advised the Committee that no public consultation occurred because the RDA Buffer decision was made on the basis of technical advice and was “*not potentially subject to change by way of public consultation*”.³

2.18 The September 2010 WAPC report records that DEC's recommendation to the KBRC was (in summary) that technical air quality standards was not the most important issue in determining

² Pp1 and 6.

³ Letter from Department of Planning, 4 January 2012, p1.

the buffer boundary but the long term strategic goals for the region.⁴ DEC considered dust an amenity issue.⁵ DoH saw lack of scientific certainty as requiring a precautionary buffer area from both a health and amenity perspective. The KBRC's recommendation for the RDA buffer area followed a conclusion that it would "*provide for the safety and amenity of land uses surrounding the Kwinana Industrial Area*".⁶

Questions

2.19 Why weren't the petitioners considered key stakeholders and afforded the same consultation opportunities as other stakeholders? (answer in respect of both the KBRC and WAPC processes)

2.20 Explain how lack of consultation with affected landowners on the final recommendation put to the WAPC, the RDA Buffer decision and WAPC's May 2011 decision is consistent with the following:

- WAPC's Annual Report 2010/11 identification of community groups and individual landowners as stakeholders, as well as developers (p17).
- SPP 4.1's statement that the final combination of management practices/off-site buffer areas "*often*" involve negotiation with adjacent landowners (4.4, p7), SPP 4.1's objective:

To recognise the interests of existing landowners within buffer areas who may be affected by residual emissions and risks, as well as the interests, needs and economic benefits of existing industry and infrastructure which may be affected by encroaching incompatible land uses,

⁴ The Western Australian Planning Commission, *Review of Kwinana Air-Quality Buff – Position Paper*, October 2008, p6. Commenting on the Alcoa report to the KBRC, and in the KBRC recommendation to the WAPC, departments observed that there is a high level of uncertainty with fugitive dust emission rates, background levels, frequency and magnitude of emission events. (Letter from Minister for Environment, 23 April 2012, p2. See also DoH and DEC's reports to the KAQ Buffer Review Committee, *Kwinana Industrial (including Air Quality) Buffer: Report to the Western Australian Planning Commission – September 2010*, October 2011, respectively pp39-40 and p33.) They also observed that there were no universally accepted standards for cumulative emissions against which readings can be measured. (Letter from DEC to the Buffer Review Committee, dated 8 June 2010, p3. Appendix 3 to the Western Australian Planning Commission, *Kwinana Industrial (Including Air Quality Buffer-Report to the Western Australian Planning Commission – September 2010*, October 2011, pp34 and 35.) DEC advised the KBRC that the EPA did not have a guideline or policy for definition of a dust buffer for amenity, health or environmental impacts due to a gap in scientific knowledge in respect of these matters. (The Western Australian Planning Commission, *Review of Kwinana Air-Quality Buff – Position Paper*, October 2008, p6.) DEC and DoH pointed out that the NEPM standards only measure health impact in terms of size, not chemical, and do not take into account the "*cumulative impacts of a very complex mix of atmospheric emissions*" at the boundary of a very large industrial estate. DEC also noted that there were no NEPM standards for PM2.5 particles. (*Kwinana Industrial (Including Air Quality Buffer- Report to the Western Australian Planning Commission – September 2010*, October 2011, p35.)

⁵ *The Kwinana Industrial (including Air Quality) Buffer: Report to the Western Australian Planning Commission – September 2010*, October 2011, p26.

⁶ *Kwinana Industrial (Including Air Quality Buffer- Report to the Western Australian Planning Commission – September 2010*, October 2011, p22.

and the statement in the September 2010 WAPC document that “*Section four outlines the interests of stakeholders in the area and their perspectives on development in the area*”;⁷ and

- WAPC’s Annual Report 2010/11 advice that the WAPC is working to improve planning processes through with the community can participate (p13).

2.21 How does the ability of the affected landowners in Mandogalup to provide meaningful input into the decision on the RDA Buffer differ from that of:

2.21.1 the developers who were consulted in the review process?

2.21.2 members of the public who may comment on technical reports supporting a development application?

2.22 Explain why the affected landowners’ views are irrelevant to a decision based on amenity of lands uses, particularly where the September 2010 WAPC report notes there are no technical standards for amenity.

2.23 What is WAPC’s response to the petitioners’ claim that:

A comprehensive interim report should have been issued between the vague 2008 consultation and the Sept 2010 decision. This report should have included data, maps, modeling (sic), real seasonal impact footprints, detailed closure strategy for Area F including agreed timeframe and detailed advisory comments from DEC & DOH”?

Industrial buffer-making process

2.24 The petitioners complain at lack of certainty in the uses that will/will not be permitted in the outer 0.5km of the RDA Buffer area. They query major planning decisions being taken without due regard to implementation.

2.24.1 what is WAPC’s response to this complaint?

2.24.2 have the uses that will and will not permitted in the RDA Buffer area been determined?

2.24.3 if so, have the petitioners been advised of those uses? When were they advised?

2.24.4 If not, why not?

2.25 The petitioners’ assert that the RDA Buffer has been developed without local community consultation and almost exclusively to meet industry needs. They consider Alcoa should be more stringently regulated to control dust and emissions. Where a buffer decision involves choosing between restricting land use and imposing stricter controls on industry:

⁷ The Kwinana Industrial (including Air Quality) Buffer: Report to the Western Australian Planning Commission – September 2010 , October 2011, p22.

- 2.25.1 what is the primary purpose in making an industrial buffer and whose are the primary interests protected?
- 2.25.2 to what extent is health risk management a factor? Does this take priority over maximising potential land uses in areas surrounding industrial sites?
- 2.25.3 what is DoP's response to the City of Cockburn's view that the Kwinana EPP addresses environmental issues with:
- A town planning buffer, on the other hand, is, or should be directed at avoiding use conflict.*⁸
- 2.25.4 would greater consultation with affected land owners lead to a better understanding of the purposes of an industrial buffer?
- 2.26 SSP 4.1 states "*While there are criteria for individual risk assessment, there are presently no criteria in Western Australia or Australia for societal risk*". SPP 4.1 makes a number of statements similar to: "*Societal risk criteria for industry, infrastructure and special uses will be established by the EPA ...*" (p7):
- 2.26.1 explain what is meant by "*individual risk*" and "*societal risk*"?
- 2.26.2 explain the statement in SPP 4.1 that there are criteria for individual risk assessment in light of the departmental advice in the September 2010 WAPC report that current standards do not permit definition of a dust buffer for amenity, health or environmental impacts due to a gap in scientific knowledge in respect of these matters (examples of that advice are provided at footnote 4)
- 2.26.3 from a practical perspective, in trying to implement it and manage stakeholder expectations, is SPP 4.1 too aspirational? does SPP 4.1 put too much emphasis on environmental criteria that have not been developed?
- 2.27 What uses are made of an industrial buffer?
- 2.27.1 in its Cockburn Cement inquiry, the Committee was advised that a buffer is a "*planning overlay*" not a statutory instrument. What is the significance of this?
- 2.27.2 what is meant by the DoP's advice, given during the Committee's Cockburn Cement inquiry, that the Kwinana Air Quality Buffer "*needs to be taken into account in any rezoning*"? Can planning buffers be disregarded? If not, why not?
- 2.28 Were formal planning instruments such as the Metropolitan Region Scheme, local planning schemes or strategies altered to reflect the September 2010 RDA Buffer decision?
- 2.28.1 if so, identify the instruments?

⁸ Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, *Inquiry into Cockburn Cement Ltd*, 20 October 2011, p153.

- 2.28.2 if not, why not?
- 2.28.3 if no formal planning instruments are altered, how is an industrial buffer given effect?
- 2.29 If buffers are made in the process of making or amending local planning schemes (via the process set out in SPP 4.1, page 3), do affected land owners have greater access (under the provisions of *Planning and Development Act 2005* relating to local planning schemes) to the following than when buffers are made directly by the WAPC:
- 2.29.1 consultation on the buffer proposal?
- 2.29.2 reasons for the decision to make a buffer?
- 2.29.3 avenue of appeal against the decision to make a buffer?
- 2.29.4 a statutory avenue to make a claim for compensation for any injurious affection arising from the making of a buffer?
- 2.29.5 if the answer to any of the above is yes, explain the rationale for the distinction.
- 2.29.6 if the answer to any of the above is no, explain how the two process for making a buffer equate in the listed matters.

The future

- 2.30 What is the current status of the RDA buffer?
- 2.30.1 is there any intent to reflect the RDA buffer in the statutory planning framework under the auspice of the WAPC?
- 2.30.2 if so, when will this occur?
- 2.30.3 if so, is this required by any legislation or is it purely an administrative decision?
- 2.30.4 if not, why not?
- 2.31 The Committee has been advised by various bodies that implementing the RDA Buffer is on hold pending the Wattelup developer study to be performed at a development site in the City of Cockburn as a result of the State Administrative Tribunal (SAT) decision in 2011:⁹
- 2.31.1 what is the relevance of this study to the RDA Buffer as it applies in Mandogalup?
- 2.31.2 is there any obligation on the developer to produce that study? Within a stipulated time frame?
- 2.31.3 has this study commenced?

⁹ *Wattelup Road Development Company Pty Ltd v Western Australian Planning Commission* [2011] WASAT 160.

- 2.32 What will occur with the RDA Buffer if the Wattleup developer does not pursue the relevant development application?
- 2.33 What power does WAPC, DoP or DEC have to compel individual developers or industry to undertake studies required to determine appropriate buffer areas in the Kwinana Industrial Area?
- 2.33.1 what power does WAPC, DoP or DEC have to compel the Wattleup developer to undertake the study recommended by SAT?
- 2.33.2 in WAPC or DoP's experience, have developers had problems in obtaining from industry the technical information necessary to provide reports on the impact of particulates, chemical emissions, odour, noise or light spillage at development sites?
- 2.34 Will there be public consultation when the RDA Buffer decision is reviewed?
- 2.34.1 can any assurances be provided that the petitioners will be consulted during this review?
- 2.35 The Town of Kwinana advises that its local planning scheme and district Structure Plan will be amended to reflect the RDA Buffer and these instruments will be subject to public consultation.
- 2.35.1 does this consultation process have potential to alter the WAPC RDA Buffer area as it will be reflected in those document?
- 2.35.2 if so, what is the practical effect of the local government planning documents showing a different area?
- 2.35.3 if not, why not?
- 2.36 Does the broad ambit of land uses captured by "*urban/urban deferred*" zonings and lack of distinction in those zonings between residential and non-residential use pose issues in depicting planning buffers in planning instruments with legal effect?
- 2.36.1 does this broad ambit pose issues for DoP in explaining to land owners the impact of a buffer decision?
- 2.36.2 would it be useful for buffer purposes to have categories that distinguish between sensitive and non-sensitive (1) urban or (2) residential usages?
- 2.36.3 if not, why not?
- 2.37 When will the review of the Kwinana Air Quality Buffer be finalised?
- 2.37.1 given that entities such as Alcoa and the Wattleup developer in the SAT case are focused on providing reports that ascertain their own emissions or the impact of cumulative emissions at a particular site, would there be merit in any of the WAPC, DoP or DEC undertaking a less piecemeal study to finalise that review?

2.38 What is the current status of the 2009 Draft State Industrial Buffer?

2.39 In the Cockburn Cement inquiry, the Kwinana Industry Council said that the Kwinana Air Quality Buffer:

*lacks the statutory strength it needs to effectively ward off applications to rezone rural or industrial zoned land to other zonings that allow residential development. This simply has to be fixed.*¹⁰

The KBRC also observed that once the WAPC finalised the buffer review:

*it will need to be implemented through the planning system. Consideration may be given to the drafting of a State Planning Policy or amendment to State Planning Policy 4.1 to reflect the buffer and restrict further residential uses in the area where required.*¹¹

2.39.1 what is DoP's response to these views?

2.39.2 is consideration being given to drafting a State Planning Policy to give effect to the buffers in and surrounding the Kwinana Industrial Area?

2.39.3 if not, why not?

2.39.4 what is the rationale for setting out the buffer-making process in a State Planning Policy, rather than the *Planning and Development Act 2005*, and for buffers to have no direct legal effect?

3. QUESTIONS: PETITION NO 150 - KWINANA INDUSTRY AIR BUFFER ZONE EXTENSION - MUNSTER

3.1 Has DoP had a chance to consider the latest odour studies of the Plant by:

- the Water Corporation's consultants, Air Assessments (November 2011); and
- PAE Holmes, consultants commissioned by the principal petitioner, Mrs Robyn O'Brien and another resident (also November 2011)?

3.1.2 If so, how will DoP reconcile the differences in scientific opinion on where the Odour Buffer should sit, particularly east of the plant?

3.1.3 If not, how does DoPreconcile differences in scientific opinion of this nature when determining buffers?

¹⁰ Mr Christopher Oughton, Director, Kwinana Industries Council, *Transcript of Evidence*, 11 April 2011, p3.

¹¹ *The Kwinana Industrial (including Air Quality) Buffer: Report to the Western Australian Planning Commission – September 2010*, October 2011, p23.

3.2 The Odour Buffer already has planning effect as it is reflected in the City of Cockburn's planning documents. However, please confirm the status of the Odour Buffer. For example, is it an interim buffer?

3.2.1 If the Odour Buffer is an interim buffer, when will a decision be made to finalise it?

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