



Explanatory note: Draft Environmental Protection Regulations Amendment (Publication and Confidentiality) Regulations 2021

Background

A key objective of introducing the proposed [Environmental Protection \(Publication and Confidentiality\) Regulations](#) (Draft Regulations) is to improve and streamline the materials the State can publish and hold in confidence. This will provide greater transparency on the matters that can be held confidential and those matters that the public can expect to be published.

The Draft Regulations are a component of the broader regulatory reform of the *Environmental Protection Act 1986* (EP Act). Those amendments to the EP Act are being made through the *Environmental Protection Amendment Act 2020* (EP Amendment Act).

The Draft Regulations are intended to continue current Environmental Protection Authority (EPA) and Department of Water and Environmental Regulation (the department) practices in relation to protecting confidential information that has been received in connection proposals submitted under Part IV of the EP Act (Proposals) and clearing permits under Part V Division 2 of the EP Act (Clearing Permits).

Consultation on the Draft Regulations will open be for a two-week comment period from Tuesday 24 August 2021 to 5pm on Tuesday 7 September 2021.

Purpose of Draft Regulations

With respect to Proposals, currently under section 39 of the EP Act the EPA is required to keep a public record of each proposal referred to it, but Proponents may request the EPA not to keep a public record of the whole (or any part) of a proposal by reason of the confidential nature of any matters contained in that whole or part. The new section 39 of the EP Act requires the EPA to keep a public record of each referred proposal. There is no capacity in the new section 39 of the EP Act for a proponent to request the EPA to keep information confidential.

Currently, regarding Clearing Permits, permit applicants or holders simply request that the CEO of the department (CEO) keep specified material confidential. The new section 51DA(7)(a) and 51E(4B) of the EP Act requires the CEO to publish the application and any accompanying information. Similarly, pursuant to new section 51M(12) the CEO must publish notice of any amendment, revocation or suspension of a Clearing Permit, and pursuant to new sections 51MA(6) and 51MA(10), the



CEO must publish applications and notices in connection with the surrender of Clearing Permits.

These requirements for information and material to be published mean that the current practices in relation to refraining from publishing documents in connection with Clearing Permits will not continue to be permissible.

The Draft Regulations are therefore required to enable the EPA and the CEO to continue to protect confidential information that it receives from Proponents and Clearing Permit holders and applicants.

Overview of Draft Regulations

The Draft Regulations establish the process to guide the CEO and the EPA in its decision-making in relation to publishing documentation and refraining from publishing documentation.

The Draft Regulations have been drafted in a way that will achieve closer alignment with the objectives and rationale for maintaining confidentiality in the *Freedom of Information Act 1992*.

An overview of the Draft Regulations is set out below:

Part 1 - Preliminary

Part 1 of the Draft Regulations deals with commencement of the Draft Regulations.

Part 2 - Environmental Protection (Clearing of Native Vegetation) Regulations 2004 amended

Part 2 of the Draft Regulations will amend the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (Clearing Regulations).

Part 2 of the Draft Regulations sets out the process for protection of confidential information that the CEO has received in connection with clearing permits.

Regulation 8 of the Clearing Regulations is to be amended. New regulation 8 will set out the particulars in respect of which the CEO must keep a public record, when dealing with:

- applications for clearing permits
- applications for amendment of clearing permits
- clearing permits that are in force
- undertakings under section 51E(9) of the EP Act
- notifications under section 51N(1) of the EP Act
- surrender of clearing permits
- revocation or suspension of clearing permits.



Regulation 8A of the Clearing Regulations is to be added, which will require the CEO to keep public records of information given to the CEO in response to a written notice given by the CEO under section 51E(1A), 51KA(2) or 51MA(3) of the EP Act.

A new Part 3 will be inserted into the Clearing Regulations to establish the process for a person to request the CEO to keep confidential the whole or part of documentation which the person has provided, because of the confidential nature of that documentation.

If an applicant makes the request by email, the CEO is required to acknowledge receipt of the request.

On receipt of a request, the CEO will consider whether the documentation the subject of the request contains trade secrets of a person or confidential information that is not a trade secret but that has a commercial value to a person which could be destroyed or diminished if the documentation was published. If the CEO is satisfied that this threshold has been met, the CEO must refrain from publishing the documentation.

The CEO may also refrain from publishing the documentation if the above threshold is not met, but is nevertheless satisfied that it is desirable to refrain from publishing the documentation because of the confidential nature of that documentation.

The CEO may also (without a request being made) keep certain information confidential including:

- personal information
- bank account details
- precise location of threatened, endangered, vulnerable or priority species, or their breeding areas
- precise location of native species and their breeding habitat if the CEO considers that publication would threaten the survival of the population.

Part 3 - Environmental Protection Regulations 1987 amended

Part 3 of the Draft Regulations will amend *Environmental Protection Regulations 1987* (EP Regulations).

Part 3 of the Draft Regulations deals with publication of EPA minutes and sets out the process for protection of information that the EPA has received in connection with a Part IV EP Act Proposal (Proposal).

Regulation 2B of the EP Regulations is to be amended. The drafting for new regulation 2B has been simplified and modernised and no substantive changes are proposed. The regulation will continue to protect from publication such material that the EPA has determined is exempt.

A new Part 2A will be inserted into the EP Regulations to establish the process for a person to request the EPA to keep confidential the whole or part of documentation



which the person has provided, because of the confidential nature of that documentation.

If a request is made by email, the EPA is required to acknowledge receipt of the request.

On receipt of a request, the EPA will consider whether the documentation the subject of the request contains trade secrets of a person or confidential information that is not a trade secret, but that has a commercial value to a person which could be destroyed or diminished if the documentation was published. If the EPA is satisfied that this threshold has been met, the EPA must refrain from publishing the documentation.

The EPA may also refrain from publishing the documentation if the above threshold is not met, but is nevertheless satisfied that it is desirable to refrain from publishing the documentation because of the confidential nature of that documentation.

The EPA may also (without a request being made) keep certain information confidential including:

- personal information
- bank account details
- precise location of threatened, endangered, vulnerable or priority species, or their breeding areas
- precise location of native species and their breeding habitat if the CEO considers that publication would threaten the survival of the population.