



# Environmental Defenders Office

## **EPA'S REVISED ENVIRONMENTAL IMPACT ASSESSMENT PROCEDURES SUITE**

### **EDO COMMENTS**

#### **BACKGROUND**

The Environmental Protection Authority (**EPA**) has revised its environmental impact assessment (**EIA**) procedures suite to implement the changes made by the *Environmental Protection Amendment Act 2020* (**EP Amendment Act 2020**).

The comments of the Environmental Defenders Office (**EDO**) on the amended procedures suite are outlined below. These comments principally focus on substantive changes made in the following key documents:

- *Environmental Impact Assessment (Part IV Divisions 1 and 2) Procedures Manual* (**Procedures Manual**); and
- *Statement of Environmental Principles, Factors, Objectives and Aims of EIA*.

#### **EXECUTIVE SUMMARY**

EDO's comments on the EPA's revised procedures suite are summarized below:

- While the EPA's key principles are broadly supported, it is inappropriate to combine process efficiency and environmental protection into a single principle, as they are distinct concepts, and the Act gives priority to the latter;
- The requirement for proponents to provide more detailed proposal descriptions is supported, however we recommend that the procedural and guidance material expressly require proponents to identify whether a proposal is part of a larger project, and to identify related proposals, in order to allow better control of the proponent practice of splitting projects into multiple proposals;
- It is recommended that the EPA set timeframes when it requests further information on a proposal, and publishes these timeframes, to afford stakeholders better visibility of the progress of a proposal through the assessment process;
- The introduction of greater transparency to the process for deciding on changes to proposals, particularly publication of notices of proponent applications, and reasons for decisions, is strongly supported. However, the basis for the level of discretion reflected in the current draft procedures is unclear. It is recommended that the discretion is narrowed (so that notice of the application and reasons for decision are *always* published, or if the EPA considers there are strong policy reasons why this would not be done in certain circumstances, the reasons, and the circumstances, should be set out in the procedures suite);
- Formal incorporation of the consideration of cumulative impacts, and the definition of cumulative impacts, is supported. We recommend that the EPA provides additional, more

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specific guidance, as to how cumulative impacts will be considered with respect to the EPA's environmental factor guidelines;

- The procedures suit should require the EPA to satisfy itself that another decision-making process can satisfy the objective of the EP Act, and the EPA's objectives for environmental factors, before declining to assess a proposal on the basis that another process is capable of meeting its requirements;
- The EPA should also provide additional guidance on how specific decision-making processes are considered to meet its requirements where it forms this view; and
- The focus on outcomes-based conditions is supported, noting that objectives-based conditions requiring management-plans will continue to be used where necessary.

### **EPA'S KEY PRINCIPLES**

By way of preliminary comment, EDO generally supports the key principles the EPA has applied in designing the procedural amendments, with one key exception.

We do not consider that it is appropriate to combine 'efficient processes' and 'main strong environmental protection' in a single principle. The two are conceptually quite separate and are not necessarily complementary.

While we acknowledge that ensuring process efficiency is an important principle, combining it with environmental protection in a single principle gives the impression that the aim is to offset the two objectives against one another.

To do so would be, in EDO's view, inconsistent with the EPA's objectives under s15 of the *Environmental Protection Act 1986 (WA)* (**EP Act**) to use its best endeavours to protect the environment and to prevent, control and abate pollution and environmental harm. This, and the objects of the EP Act, clearly prioritise protection of the environment.

We therefore recommend that, if the cited principles are to continue to be used as guidance for the EPA in revision of its procedures, they are amended so that the objectives of efficiency and environmental protection are treated as separate principles, and that strong environmental protection is set as a core baseline consideration, consistent with the EP Act.

### **PROPONENT DEFINITION OF CONTENT OF PROPOSALS**

The EPA's revised procedures suite seeks to provide the proponent with the primary role/responsibility of defining the content of a proposal, in order to phase out the key proposal characteristics descriptions in schedule 1 of Ministerial Statements.

In particular, the Procedures Manual requires referrals to contain more detailed information about proposals, including information on the proposal type, proposal content and, to the extent reasonably practicable, a description of any feasible alternatives to the proposal. This includes a requirement for the proponent to provide a stand-alone Proposal content document which includes a general proposal description and table of proposal elements which have the potential to have a significant effect on the environment, in accordance with the *Instructions: How to identify the content of a proposal*).

The current Procedures Manual only requires referrals to define the key characteristics of a proposal.

### ***EDO Comments***

In general, the introduction of a more detailed proposal description that forms part of the Ministerial Statement issued pursuant to s45 is supported, as it may serve to reduce ambiguity as to the scope of a proposal, although we are unsure if it will achieve the stated aim of reducing the frequency of subsequent amendments.

One persistent issue with EIA is the practice of proponents segmenting proposals into smaller units, in part to reduce the perceived impacts of a proposal. While we recognise that there can be legitimate reasons for this approach, the practice can interfere with the EPA's capacity to clearly identify the impacts of proposals, and may in some cases lead to the approval of proposals prior to the assessment of a related proposal which has more substantial impacts and whose approval is less likely.

Significant investment as a result of the early approval of proposals which form a relatively minor part of a larger project can then create political pressure to approve the larger components of the project, even where they may be environmentally unacceptable. A recent example is the Northwest Shelf-Pluto Interconnector pipeline, which was assessed and approved despite the fact that it forms part of the larger Burrup Hub project, of which more significant components (the Northwest Shelf extension and the Scarborough Nearshore) were still under assessment as separate proposals. If the latter two components were not approved, the environmental impacts associated with the interconnector pipeline would be unnecessary.

It is not clear if the amended procedure, as currently envisaged, will address this problem. In our view, the Procedures Manual, and the *Instructions - How to Identify a Proposal*, should require the general proposal description to expressly note whether the proposal forms part of a larger project or is connected to other current or future proposals. Such an amendment would support clarity in identifying the proposal and assist the EPA to identify cumulative impacts for the purposes of assessment. Furthermore, the EPA's guidance documentation would expressly discourage proponents from proceeding to assess minor components of their projects as separate proposals ahead of more significant (and environmentally contentious proponents) unless there are clearly articulated reasons to do otherwise.

### **REQUEST FOR FURTHER INFORMATION**

The Procedures Manual provides that, where the EPA considers that it requires further information in relation to a proposal, it must issue a requisition specifying a compliance period within which the information must be provided.<sup>1</sup>

### ***EDO Comments***

While the EDO supports amendments to enable the EPA to issue requisitions which specify time periods relating to requests for further information, we submit that the revised procedures suite

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<sup>1</sup> Procedures Manual p 17.

should specify the parameters of these compliance periods (i.e. a maximum number of days) to prevent ongoing delays with the EIA of proposals.

### **CONSIDERATION OF CUMULATIVE IMPACTS**

The Procedures Manual refers to holistic and cumulative assessment and impacts and states that the *Statement of Environmental Principles, Factors, Objectives and Aims of EIA* provides guidance on cumulative and holistic environmental impacts.

We note that the *Statement of Environmental Principles, Factors, Objectives and Aims of EIA* defines cumulative impacts as meaning “the cumulative effect of the impacts of the proposal on the environment, meaning the successive, incremental and combined impacts of the proposal with one or more other activities on the environment, arising from past, present and reasonably foreseeable future activities”.<sup>2</sup>

#### ***EDO Comments***

EDO supports the amendments to the revised procedures suite to clarify that the EPA must assess cumulative impacts during EIA and to the broad definition of cumulative impacts.

The formal recognition of the assessment of cumulative impacts, and the definition, are important inclusions that offer the prospect of improved assessments and environmental protection.

To ensure transparency and consistency in decision-making, further guidance should be provided about how the EPA will consider cumulative impacts in EIA and in the context of each of its environmental factor guidelines. For example, with respect to Greenhouse Gas Emissions, it is desirable for there to be further guidance on how the EPA would consider the emissions of the State as a whole, global emissions and historical emissions when considering the cumulative impacts of GHGe in EIA.

### **DEFERRAL TO OTHER DECISION-MAKING PROCESSES**

The Procedures Manual provides that, where the EPA takes into account other statutory decision-making processes, it must “consider the capacity of the decision-making process to achieve the object and principles of the EP Act, and may consider whether the EPA’s objectives for environmental factors are likely to be met through other decision-making processes”.<sup>3</sup>

Further, it provides that, where the EPA considers that the proposal can be dealt with under another statutory decision-making process, “it *may* liaise with relevant decision-making authorities before making the decision”.

In relation to recommended conditions, the Procedures Manual states that “the EPA may recommend that the mitigation of the impact is regulated through another decision-making process”.<sup>4</sup>

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<sup>2</sup> *Statement of Environmental Principles, Factors, Objectives and Aims of EIA* p 9.

<sup>3</sup> Procedures Manual p 17.

<sup>4</sup> *Ibid* p 51.

## **EDO Comments**

EDO notes that these amendments if administered poorly may result in the EPA deferring responsibility for the assessment and management of environmental issues to regulatory bodies that do not have objectives to protect the WA environment, for example, the Department of Mines, Industry Regulation and Safety whose objective is to promote development. This could compromise the EPA's objective to use its best endeavours to protect the environment and to prevent, control and abate pollution and environmental harm<sup>5</sup>.

Given this, the procedures suite should require the EPA to satisfy itself that the other decision-making process *will* apply and achieve the objects and principles of the EP Act and the EPA's objectives for environmental factors. This would require the EPA to satisfy itself in advance whether specific decision-making processes are capable of meeting its and the Act's requirements before considering a decision that defers to the process.

Further guidance should then be published setting out how the EPA considers that the relevant processes are able to meet its requirements.

## **CHANGES TO REFERRED PROPOSALS AND TO PROPOSALS DURING ASSESSMENTS**

The Procedures Manual provides that, where a proponent requests to amend a referred proposal before the EPA has made a decision whether to assess the proposal, the EPA:

- *may* release the proposal as requested to be amended for public comment before making a decision;<sup>6</sup>
- *will usually* refuse the amendment, if its view is that the amendment would be a significant amendment if the referred proposal was already approved;<sup>7</sup>
- *may* publish its decision in relation to amendments of referred proposals on its website.<sup>8</sup>

The Procedures Manual further provides that, in relation to amendments to proposals during assessment (i.e. after the EPA has made a decision to assess the proposal), the EPA:

- *may* release information on the proposed amendment for public information or review, usually where there is potential for significant impact;<sup>9</sup>
- *will usually* refuse the amendment if its view is that the amendment would be a significant amendment if the proposal was already approved;<sup>10</sup>
- *may* publish its decision relating to changes/amendments to proposals during assessment; and
- *will usually* publish a summary of reasons for its decisions on its website.<sup>11</sup>

In addition, the Procedures Manual further states that, in deciding whether public consultation or review in relation to a proposed amendment is necessary, the EPA may consider the following:

- The nature of the proposed amendment

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<sup>5</sup> *Environmental Protection Act 1986 (WA)*, s15

<sup>6</sup> *Ibid* p 14.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid* p 14.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid* p 48.

- The stage of the assessment process, such as whether information has been released for public review
- the currency, relevance and reliability of the information that exists, including any submissions
- the degree to which the proponent has consulted about the proposal and proposed amendment
- the level of public interest in the proposal.

### ***EDO Comments***

In EDO's view, in the interests of transparency, the release of information regarding proposed amendments, and the publication of summaries of reasons for decision, should be a requirement rather than discretionary, and any reason for departing from this principle should be explained.

Preferably, the revised procedures suite should provide that the EPA:

- *will* release information on the proposed amendment for public information or review in all circumstances;
- *will* refuse the amendment if its view is that the amendment would be a significant amendment if the proposal was already approved;
- *will* publish its decision relating to changes/amendments to proposals during assessment; and
- *will* publish a summary of reasons for its decisions on its website.

If these changes are not made, the revised procedures suite should clarify relevant factors that the EPA must consider in making these decisions, to ensure consistency in decision-making and strengthen trust in the process. Further guidance is also desirable on the circumstances in which the EPA will not refuse the amendment if it forms the view that the amendment would be a significant amendment if the proposal was already approved.

### **ASSESSING SIGNIFICANT AMENDMENTS TO APPROVED PROPOSALS**

The Procedures Manual refers to the provision in the EP Amendment Act that states that the EPA's assessment of a significant amendment of an approved proposal *may* also include an inquiry into and report on the implementation conditions relating to the approved proposal.

### ***EDO Comments***

EDO submits that the revised procedures suite should provide further guidance and limits on when the EPA can assess significant amendments without an inquiry or public consultation.

### **CHANGES TO APPROVED PROPOSALS AND CONDITIONS ASSESSMENT OR INQUIRY**

The Procedures Manual refers to the changes in the EP Amendment Act and provides that, on the assumption that the Minister's powers under s45C will continue to be delegated to the EPA Chair, the delegate, in relation to amendments to approved proposals and conditions without assessment or inquiry:

- *may* release information on the proposed amendment for public information or review, usually where there is a potential for a significant impact;
- *will* refuse the proposed amendment if it considers that it is a significant amendment;

- will publish its decision, the updated consolidated proposal document, and any updated conditions to the Ministerial statement on the EPA’s website; and
- will usually publish a summary of reasons for its decision on the EPA website.

**EDO Comments**

Currently, the s45C process is not public and typically the first public notice of a s45C change occurs when the change is published after the decision has been made. Therefore, the proposed changes represent a substantial improvement in transparency over the status quo.

However, while EDO welcomes the prospect of improved transparency in 45C decisions, it is not clear why a discretion is retained as to whether to release information and to publish reasons for decision. In EDO’s view, the revised procedures suite should provide that the EPA:

- will release information on the proposed amendment for public information or review in all circumstances;
- will publish a summary of reasons for its decision on the EPA website.

If there is a policy or procedural justification for not releasing the information or publishing reasons for decision, this should be explained.

Given the desirability of greater transparency in this process, if the Minister elects to retain her s45C powers and does not renew the delegation to the EPA Chair is not renewed, we recommend that the EPA provide advice to the Minister that she institute a transparency regime along the same lines.

**OUTCOMES-BASED CONDITIONS**

The Procedures Manual states that the EPA will prefer outcome-based conditions where practicable.<sup>12</sup> These are conditions that contain a measurable environmental outcome that must be met without prescribing how that outcome is to be achieved. In particular, an outcome-based condition may be expressed as:

- an impact that must be avoided.
- a level of impact that must not be exceeded.
- a level of protection that must be achieved.

The Procedures Manual and that these conditions *may* be accompanied by a condition which requires that proponents monitor, review and report against the environmental outcomes, adopt adaptive management approaches, to ensure that the environmental outcome is achieved. It also states that the *Instructions: Environmental outcomes and outcomes-based conditions* will provide guidance on these conditions and specification of environmental outcomes.

Despite this, it states that the EPA will still consider recommending objectives-based management plan conditions when outcome-based conditions are “not practical”,<sup>13</sup> and such conditions are appropriate in some cases, such as for new industries.<sup>14</sup>

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<sup>12</sup> Ibid p 52.

<sup>13</sup> Ibid p 54.

<sup>14</sup> Ibid.

Where the EPA recommends an outcome-based or objectives-based management plan condition, the Procedures Manual states that it will usually also recommend a condition to either implement a management plan provided during an assessment that the EPA considers is acceptable or prepare and implement a management plan.

***EDO Comments***

EDO supports the EPA's preference for outcomes-based conditions and the move away from conditions which require proponents to prepare objectives-based management plans. In our view, this will improve condition-drafting to ensure that conditions are enforceable and ensure the protection of the environment. We recommend that these conditions should always be accompanied by conditions that require the proponent to monitor, review and report against the environmental outcomes to ensure they are achieved (i.e. not "may" be accompanied by such conditions).