



EPA REVISED PROCEDURES SUITE

COMMENT SUMMARY

The Environmental Protection Authority (EPA) is seeking feedback on its revised environmental impact assessment (EIA) procedures suite to implement the changes made by the *Environmental Protection Amendment Act 2020 (EP Amendment Act)*. We note that this consultation process relates to practical and operational issues associated with the revisions to the EPA's procedures suite, **not** the provisions of the EP Amendment Act. The EPA is accepting comments on the revised procedures suite until **Monday 31 May 2021**.

This comment summary sets out the EDO's summary responses to the EPA's 10 key questions from consultation, and more detailed comments on certain key issues.

The Revised Procedures Suite

The EPA procedures suite consists of the draft *Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2021 (Administrative Procedures)*, revisions of the *Environmental Impact Assessment (Part IV Divisions 1 and 2) Procedures Manual (Procedures Manual)* and the *Statement of Environmental Principles, Factors, Objectives and Aims of EIA (Statement of Principles)*, and a collection of instructions relating to various aspects of the process.

The detail of the proposed changes is set out in the Procedures Manual, and EDO's focus has been on this document, and the Statement of Principles.

The EPA's Key Questions

The EPA has published 10 key questions that is seeking feedback on:

1. *Do you believe the amendments achieve the EPA's objective to have efficient processes and maintain strong environmental protection?*
2. *Are there additional amendments you believe would ensure efficient processes and maintain strong environmental protection?*
3. *Do you believe any amendments undermine the EPA's objective to have efficient processes and maintain strong environmental protection?*
4. *Do you agree the EPA's key principles for EIA will ensure efficient processes and maintain strong environmental protection?*
5. *Do you support the principle of proportionality of information – information needs are dependent on the nature and risk of potentially significant impacts?*
6. *Do you support the EPA's preference for outcomes-based conditions?*
7. *Do you believe the proposed definition and aims of EIA are helpful to provide guidance?*
8. *Do you believe proponents should have the primary role for defining and adaptively managing their proposals to meet EPA objectives and specific environmental outcomes?*
9. *Should the EPA include its expectations about the timing of proposal amendments post approval?*

T +61 8 9420 7271

E perth@edo.org.au

W edo.org.au

18/2 Delhi St, West Perth WA 6005

ABN: 72 002 880 864

10. *Are there any areas where you think further guidance would be helpful, taking into account the EPA's need to provide procedures and guidance for all proposals, which then needs to be considered on a proposal-by-proposal basis?*

EDO Comments on the Key Questions

EDO's brief comments in relation to the EPA's key questions are set out below.

Do you believe the amendments achieve the EPA's objective to have efficient processes and maintain strong environmental protection?

The proposed amendments to the procedures include a mix of efficiency measures and transparency measures. Improved transparency is likely to lead to improved decision-making and may therefore serve the aim of strong environmental protection. Robust assessment of cumulative impacts may also assist strong environmental protection.

Are there additional amendments you believe would ensure efficient processes and maintain strong environmental protection?

The transparency measures in the revised procedures could be further strengthened by making the release of information routine in all relevant processes (except where confidentiality requirements prevent it), Making transparency routine will result in better (and therefore more efficient) decision-making and improved environmental protection.

Do you believe any amendments undermine the EPA's objective to have efficient processes and maintain strong environmental protection?

The process for considering other decision-making processes requires careful management as if administered badly, it may compromise strong environmental protection and needs a high level of assurance that other processes can meet the objectives of the Act and the EPA.

Do you agree the EPA's key principles for EIA will ensure efficient processes and maintain strong environmental protection?

Combining process efficiency and strong environmental protection into a single principle is problematic, as these are really two separate principles. Combining them creates the impression that the aim is to balance the two against each other, which does not sit well with the purpose and objects of the Act (which prioritises environmental protection). It would be preferable if they were separated into distinct principles.

Do you support the principle of proportionality of information – information needs are dependent on the nature and risk of potentially significant impacts?

In general, the quantity and complexity of the information required to be made available should be proportionate to the nature and risk of the impacts. It should be noted, however, that transparency and the public provision of information is always desirable, even where a change is considered routine and where anticipated impacts are minor.

Do you support the EPA's preference for outcomes-based conditions?

Outcomes-based conditions have the potential to improve enforceability of conditions and are supported for this reason, noting that objectives-based management plans may sometimes be necessary.

Do you believe the proposed definition and aims of EIA are helpful to provide guidance?

The inclusion of the aims of EIA is useful for setting expectations of proponents and to emphasise the importance of public participation in the process.

Do you believe proponents should have the primary role for defining and adaptively managing their proposals to meet EPA objectives and specific environmental outcomes?

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. Centralising the proponent's role in defining proposals does not address this issue, and while we understand the aim is to reduce subsequent amendments, it is not clear how this approach will achieve this.

Should the EPA include its expectations about the timing of proposal amendments post approval?

It is desirable for post-approval amendments by the proponent to be infrequent (particularly s45C amendments, which have relatively limited public participation and assessment), and it is appropriate to state this expectation.

Are there any areas where you think further guidance would be helpful, taking into account the EPA's need to provide procedures and guidance for all proposals, which then needs to be considered on a proposal-by-proposal basis?

Further guidance is desirable on how cumulative impacts would be considered with respect to the specific environmental factors identified in the EPA's Environmental Factor Guidelines, e.g. how will cumulative impacts be considered in the context of the EPA's factor guidelines in Greenhouse Gas Emissions or Flora and Vegetation?

Further guidance is also desirable on how the EPA will consider whether other decision-making processes are able to meet the objectives and principles of the EP Act, and its own objectives. For example, more detailed guidance is desirable on how the EPA will apply these considerations to planning decisions, to clearing permit and licensing decisions made by the CEO of DWER, and decisions made under mining and petroleum legislation.

Key Points for Consideration

REQUESTS 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.¹

EDO's view is that the revised procedures suite should preferably specify the parameters of these compliance periods (i.e. a maximum number of days) to prevent ongoing delays with the EIA of proposals.

CHANGES TO REFERRED PROPOSALS AND CHANGES TO PROPOSALS DURING ASSESSMENT

The Procedures Manual states 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;²
- *will usually* refuse the amendment, if its view is that the amendment would be a significant amendment if the referred proposal was already approved;³
- *may* publish its decision in relation to amendments of referred proposals on its website.⁴

The Procedures Manual also 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;⁵
- *will usually* refuse the amendment if its view is that the amendment would be a significant amendment if the proposal was already approved;⁶
- *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.⁷

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.

Further guidance is also desirable on the circumstances in which the EPA would not refuse the amendment if it forms the view that the amendment would be a significant amendment if the proposal was already approved.

¹ Procedures Manual p 17.

² Procedures Manual p 14.

³ Ibid.

⁴ Ibid.

⁵ Procedures Manual p 14.

⁶ Ibid.

⁷ Ibid p 48.

CONSIDERATION OF CUMULATIVE IMPACTS

The Statement of Principles 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”.⁸

The formal recognition of the assessment of cumulative impacts, and the definition of cumulative impacts, 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”.⁹

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”.

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 harm¹⁰.

Given this, the procedures suite should require the EPA to *ensure* 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.

⁸ *Statement of Environmental Principles, Factors, Objectives and Aims of EIA* p 9.

⁹ Procedures Manual p 17.

¹⁰ *Environmental Protection Act 1986 (WA)*, s15

CHANGES TO APPROVED PROPOSALS AND CONDITIONS WITHOUT INQUIRY OR ASSESSMENT

The proposed changes to the procedure for considering amendments to approved proposals and conditions without inquiry and assessment (under s45C) introduce new measures for improved transparency of this process, notably the release of information on the proposed amendment for public information, and the publication of reasons for decision.

Specifically, the Procedures Manual provides that where the EPA, as a delegate of the Minister, receives requests for amendments to approved proposals and conditions without assessment or inquiry, it:

- *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.

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 justification for not releasing the information or publishing reasons for decision, this should be explained.

PREFERENCE FOR OUTCOMES-BASED CONDITIONS

The Procedures Manual states that the EPA will prefer outcome-based conditions where practicable.¹¹ These are conditions that contain a measurable environmental outcome that must be met without prescribing how that outcome is to be achieved.

It also states that the EPA will still consider recommending objectives-based management plan conditions when outcome-based conditions are "not practical",¹² and such conditions are appropriate in some cases, such as for new industries.¹³

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.

¹¹ Procedures Manual p 52.

¹² Ibid p 54.

¹³ Ibid.