Environmental Defenders Office

Submission on the draft Environmental Protection (Cost Recovery) Regulations 2021 (WA)

27 October 2021

Environmental Defenders Office

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Department of Water and Environmental Regulation (WA)

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We thank the Department of Water and Environmental Regulation (**DWER**) for the opportunity to make a submission in relation to the draft *Environmental Protection (Cost Recovery) Regulations 2021* (WA) (**Draft Regulations**).

KEY RECOMMENDATIONS

In principle, the EDO warmly welcomes the Draft Regulations. The Draft Regulations embody the 'polluter pays' principle – leading to consistent (yet flexible) cost recovery reflective of the time and effort required to provide EIA services to proponents. That said, we believe that the Draft Regulations provide an opportunity for further innovation and should go further with respect to cost recovery.

For ease of refence, the following recommendations are set out to align with the Draft Regulations and are not in order of significance:

Recommendation 1: Regulation 12(3) is amended to clarify whether the compliance priority rating is determined by reference to one, all or a discretionary choice of the criteria.

Recommendation 2: Regulation 10 and the definition of 'external costs' be amended to include costs associated with community consultation and/or Regulation 5 be amended to make explicit that costs of community consultation processes (other than publication) can be recovered.

Recommendation 3: Regulation 11(4) be amended to automatically apply a 'high', or at a minimum, 'medium' compliance priority rating unless specified otherwise, with the opportunity for a proponent to show cause why a lower rating should apply.

Recommendation 4: Regulation 13 be amended to require that any fee waiver, reduction or refund be 'reasonable' or in the 'public interest'. A new sub-regulation 13(2) should also be created that requires the CEO to publish any decisions to waive, reduce or refund and provide reasons for this decision.

Recommendation 5: Any policy that supports the implementation of the Draft Regulations be subject to public comment.

Recommendation 6: Regulation 14 be amended to allow the CEO (on a case by case basis) to impose interest on any payments that are postponed or extended.

Recommendation 7: Regulation 16 be amended to allow the CEO to recover enforcement costs associated with recovery of unpaid fees.

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BACKGROUND

The *Environmental Protection Amendment Act 2020* (WA) (**EP Amendment Act**) received royal assent on 19 November 2020. When proclaimed into operation, the EP Amendment Act will incorporate a suite of amendments that will bring a number of significant updates to the *Environmental Protection Act 1986* (WA) (**EP Act**).

The EP Amendment Act makes several key changes to the operations of the EP Act. New section 48AA creates a head power for making regulations in relation to fees or charges payable with respect to the referral, assessment and implementation of proposals under EP Amendment Act Part IV, Divisions 1 and 2. The Draft Regulations are pursuant to this regulation-making power. Importantly, such fees and charges are not punitive and are simply for defraying the costs incurred by DWER.

SUBMISSION

Regulation 12

Regulation 12(3) is ambiguous as to whether the compliance priority rating determination is based on one, several or all of the three identified criteria. This ambiguity may lead to the disputation of compliance priority rating determinations, and we recommend that the provision is clarified for the avoidance of doubt.

Recommendation 1: Regulation 12(3) is amended to clarify whether the compliance priority rating is determined by reference to one, all or a discretionary choice of the criteria.

Regulation 10

The Draft Regulations offer an opportunity for further innovation and development of the environmental impact assessment process. Public participation is at the heart of the environmental planning process; as such, public confidence and transparency in the process is integral.

Despite the formal opportunities for public consultation through Environmental Review Documents and the public submission process, there are still limited means for meaningful, public engagement with the environmental planning process. Feedback from EDO's clients and stakeholders indicate that the existing forms of consultation can be difficult to engage with for many groups due to several factors.

First, the referral documentation and reports are generally highly technical and difficult for lay members of the public to interpret. While this is less of an issue for professionalised environmental advocacy organisations, it can be very challenging for community stakeholders to understand and articulate their concerns with respect to proposals and respond to highly technical information.

Second, people located in rural, remote or regional areas frequently have more limited internet access than people living in urban centres. This is most acutely the case for people living in remote

Aboriginal communities. Consequently, these stakeholders may struggle to access referral documentation or otherwise engage with the environmental planning process.

Third, the above is exacerbated by the time limits on public consultation periods. For example, the public comments with respect to referred proposals is limited to seven days.

These resources-based challenges in engaging with the EIA process can often lead to distrust and frustration.

In our view, these issues can be resolved to a significant degree by increasing community consultation through the use of a range of measures including planning forums, citizen advisory committees, workshops, focus groups and surveys. Many such measures are already in use by the EPA and government in the context of EPA-initiated investigations and policy development.

Their use to foster increased community consultation in EIA is not only desirable from a governance and public trust perspective, but it also helps risk management and technical competence by incorporating a wider knowledge base of diverse perspectives. For community stakeholders, ideally the consultation would be in-person and simplify the key aspects of proposals.

Given how pivotal public participation is to the overall environmental planning process, we recommend that the Draft Regulations should be amended to ensure that the costs associated with EPA-directed consultation can be recovered from proponents. This could facilitate an expansion of the scope of community consultation in EIA.

Recommendation 2: Regulation 10 and the definition of 'external costs' be amended to include costs associated with community consultation and/or Regulation 5 be amended to make explicit that costs of community consultation processes (other than publication) can be recovered.

Regulation 11

Pursuant to regulations 11 and 12, a proponent of an approved proposal is liable to pay an annual compliance fee. This fee is calculated based on a proposal's compliance priority rating (as varied from time to time). As currently drafted, regulation 11(4) assumes a 'Low' compliance priority rating if there is no compliance priority rating for an approved proposal in effect immediately before the commencement of a financial year.

Having regard to the precautionary principle and the broad fee waiver/reduction powers under regulation 13, we submit that the baseline compliance priority rating should be higher. The environment is subject to multiple and increasing pressures, and some species and ecological communities are at a breaking point; as such, the baseline assumption that risks are low is not justifiable, and there should be a rebuttable assumption that any risk to the environment is high.[1]

Pursuant to regulation 12, the CEO is required to actively determine (from time to time) the compliance priority rating of proposals under Part IV of the EP Act. Ideally, this would prevent any

[1] Draft Regulations reg 12(3)(a).

proposal being approved without a compliance priority rating. As such, the CEO should not be allowed to abstain from making a determination in order to rely on the 'Low' compliance priority rating under regulation 11(4). To encourage decisions under regulation 12 and to protect the environment, it therefore follows that regulation 11(4) should be amended from a 'Low' to a 'High', or at a minimum, 'Medium' assumption. In any event, pursuant to regulation 13 any anomalies can be remedied by the CEO if a proponent can show cause that their proposal should have a lower compliance priority rating.

Recommendation 3: Regulation 11(4) be amended to automatically apply a 'high', or at a minimum, 'medium' compliance priority rating unless specified otherwise, with the opportunity for a proponent to show cause why a lower rating should apply.

Regulation 13

One of the key benefits of the model created by the Draft Regulations is its flexibility. Exemplary of such flexibility is regulation 13 which allows the CEO to refund, reduce or waive a fee paid under Part 2 of the Draft Regulations on a case by case basis.

While in principle the EDO welcomes such flexibility, we do express some concern that decisions under regulation 13 are unfettered and without clear guiding principles. By way of high-level comparison, section 6.12 of the *Local Government Act 1995* (WA) allows for local government concessions with respect to debts; however, this power is subject to conditions determined by local government.

Page 16 of the Discussion Paper estimates that costs 'will start from $175,000, with the average cost of an assessment about $436,000.' Given the significant amount of money (reflective of EPA costs) that could potentially be waived, we consider that regulation 13 should be subject to clear conditions and policies. At a minimum, a 'public interest' or 'reasonability' test should be applied to avoid potential abuse of this power. Similarly, any decisions made under regulation 13 should be published online, with reasons, to allow for public scrutiny.

Recommendation 4: Regulation 13 be amended to require that any fee waiver, reduction or refund be 'reasonable' or in the 'public interest'. A new sub-regulation 13(2) should also be created that requires the CEO to publish any decisions to waive, reduce or refund and provide reasons for this decision.

In making Recommendation 4, we acknowledge that DWER has commenced the process of creating a policy to support the implementation of the Draft Regulations.

To that end, we encourage that such a policy be published prior to the gazettal of the regulations to allow for public comment. Taking such an approach would provide some important context to some of the comments in the Discussion Paper. For example, clarifying why referral charge will always be automatically waived where a Decision-Making Authority refers a proposal because of a statutory obligation.

Recommendation 5: Any policy that supports the implementation of the Draft Regulations be subject to public comment.

Regulation 14

Like regulation 13, regulation 14 ensures that the Draft Regulations are not rigidly applied. While we acknowledge that circumstances may arise that require postponement of the day (or period) on which a fee is payable, we believe that the CEO should retain the power to recover interest on these fees.

Given that postponement may be granted on a case by case basis or enforcement/recovery rights not exercised, it might be argued that this power is unnecessary (e.g. the postponement can be denied). In our view, a postponement with interest is distinguishable from not granting a postponement as enforcement proceedings cannot be commenced under regulation 16 until a fee is payable. For example, if a company has genuine liquidity issues that will take a fortnight to resolve, the CEO might deem it desirable to postpone payment. In making such a decision, an amended regulation 14 would allow the CEO to still recover interest whilst also ensuring that the proponents compliance priority rating is not tarnished pursuant to regulation 12(3)(c) and the proponent does not have to be concerned about recovery proceedings being commenced.

Recommendation 6: Regulation 14 be amended to allow the CEO (on a case by case basis) to impose interest on any payments that are postponed or extended.

Regulation 16

Pursuant to regulation 16, the CEO may recover from the proponent any unpaid fee(s) (together with any interest payable) as a debt in a court of competent jurisdiction. For the sake of completeness, we consider that any costs associated with recovering or enforcement unpaid fees should also be covered by proponent on an indemnity basis. Such an approach will incentivise proponent compliance or, at a minimum, lead to more efficient and timelier dispute resolution.

Recommendation 7: Regulation 16 be amended to allow the CEO to recover enforcement costs associated with recovery of unpaid fees.