



# Environmental Defenders Office

## **Public Merits Review under Part VII of the *Environmental Protection Act 1986 (WA)***

*Disclaimer: This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice on a public interest environmental or planning law issue, please visit our [website](#).*

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Part VII of the [Environmental Protection Act 1986 \(WA\)](#) (**EP Act**) provides a public right to apply for merits review of particular decisions under the Act.

This factsheet sets out the opportunities for appeal, the key provisions and processes, and some observations and tips to assist the community in accessing justice through the public merits review system under the [EP Act](#).

### Merits Review

Merits review is a challenge to a decision on the basis of its merit (i.e. whether it was the correct and preferable decision). It differs from judicial review, which is undertaken through the court system and limited to legal errors in the decision (i.e. whether the correct procedures were undertaken in making the decision).

Public merits review provides an opportunity for the community to participate in decision-making and improve environmental administration by providing additional expertise as well as accountability for the regulatory process.

### Part VII of the EP Act

#### **Which decisions are available for public merits review?**

The rights of the public to apply for merits review under the [EP Act](#) is limited to particular decisions. The decisions available for public merits review are:

- a decision by the Environmental Protection Authority (**EPA**) to not assess a proposal, or the content and recommendations of a report by the EPA in relation to a proposal, under Part IV of the EP Act ([Part IV Appeals](#));

- the conditions on a licence or works approval granted or amended by the CEO (i.e. the Director General) of the Department of Water and Environmental Regulation (**DWER**), under Part V of the EP Act ([Part V Appeals](#)), and;
- the grant of or application of conditions to a clearing permit by the CEO of DWER under Part V of the EP Act ([Clearing Appeals](#)).

The appeals above are made to the Minister for Environment. The independent Office of the Appeals Convenor, established under Part VII of the [EP Act](#), will usually investigate these appeals and provide a report with recommendations to the Minister. The Minister then determines whether to uphold or dismiss the appeal, and their determination is final.

Visit: [The WA Office of the Appeals Convenor's pages on:](#)

- [Proposals considered by the EPA to read more about Part IV Appeals](#)
- [Works approvals and licences to read more about Part V Appeals](#)
- [Clearing of native vegetation to read more about Clearing Appeals](#)

### **Who can apply for merits review?**

For the decisions listed above, any person can make an application for merits review. There are broader appeal rights available to, for example, proponents.

As the appeal is against the content and substance of the decision, and not necessarily the legalities, there is often no need for formal legal representation that might be expected for court proceedings. EDO may provide legal assistance on a case-by-case basis within the terms of our internal policies.

### **What can be challenged in merits review?**

Appeals under Part VII deal with the substance of the decisions, and the Office of the Appeals Convenor will not deal with legal grounds (such as whether the decision-maker did not have the power to make the appealed decision).

#### Part IV Appeals

For merits review of a decision not to assess a proposal that has been referred to the EPA, the focus will be on whether there are likely to be significant impacts to warrant assessment.

The EPA's report on a proposal addresses what it has identified as the "key environmental factors" for the proposal, and its findings as to whether the proposal can be implemented consistently with its objectives for each of those factors. Merits review of the EPA's report and recommendations will focus on whether these findings are made on the basis of the best available evidence and are appropriate in the specific circumstances.

For appeals against EPA decisions under Part IV, grounds cannot extend to the commercial or economic aspects of the project. The EPA is limited to environmental considerations, with other considerations to be balanced as part of the final decision as to whether a proposal may be implemented (made by government). This does not prevent you from including such information in a Part IV appeal, however the grounds will not be determined on this basis.

Visit: [EPA WA's page on Statement of Environmental Principles, Factors, Objectives and Aims of EIA](#) to learn more about the EPA's report on a proposal

### Part V Appeals

These appeals are made against the CEO of DWER's decision to apply particular conditions to, or to amend, a licence or works approval. The merits review process cannot result in a decision to *grant* a licence or works approval being overturned, but appeals, if upheld, can result in changes to conditions or to an amendment not proceeding. The purpose of conditions is "prevention, control, abatement or mitigation of pollution or environmental harm". Merits review of this decision-making will focus on whether the conditions are appropriate and adequate for this purpose, with a particular emphasis on specific limits and levels of, for example, emissions from a licensed premises. Often these instruments include key conditions on monitoring and reporting which may also be a focus for merits review.

The licence or works approval itself will set out the conditions, with a "decision report" also provided comprising the original decision-maker's reasons, which should be addressed in the appeal.

### Clearing Appeals

Clearing Appeals may be made against the decision by the CEO of DWER to grant a clearing permit, or to apply conditions to, or amend, a clearing permit. As with licences and works approvals, the clearing permit will be accompanied by a "decision report", with the application documentation.

The decision report sets out the original decision-maker's reasons against each of the clearing principles from Schedule 5, with findings as to whether the proposed clearing is at variance with each principle.

Merits review of a decision to grant a clearing permit will focus on whether, and how, the decision-maker took into account the clearing principles and other relevant matters including applicable planning schemes and policies.

For merits review of conditions on a clearing permit, the focus will be on the purpose of those conditions being "preventing, controlling, abating or mitigating environmental harm or offsetting the loss of the cleared vegetation".

## Examples of merits review grounds

There are no standard grounds of merits review, however some common examples are provided below.

- Improving clarity or consistency in the decision (e.g. correcting clerical errors, adding a definition of an unclear term or phrase, translating a finding in an EPA report or DWER decision report into a condition).
- Provision of evidence (e.g. scientific reports, observations, data, articles).
- Application of the principles of ecologically sustainable development set out in section 4A of the EP Act.
- Application of the original decision-maker's published policies, guidance documents and previous decisions (e.g. the DWER guidance statement on setting conditions, the EPA's environmental factor guidelines and technical guidance for assessments, previous findings in EPA reports and advice, or conditions applied to proposals, licences or clearing permits).

## Merits Review Process

### Lodging an appeal

Lodging a merits review application must be done within the timeframe specified in Part VII, being:

- for Part IV Appeals, 14 days from the date the decision or report is published; and
- for Part V and Clearing Appeals, 21 days from the date the applicant or holder was notified of the decision.

There is no discretion to allow appeals that are lodged after this deadline. This makes it especially important to ensure an appeal is lodged in time – there are opportunities to provide further information or amend the lodged appeal to some extent after the lodgement deadline, so it is important to prioritise timely lodgement at this stage of your appeal.

Visit: [The WA Office of the Appeals Convenor's Lodge appeal page to submit an application online](#)

### Effect of lodging appeal

For appeals against EPA reports, the proposal cannot be implemented (including the government decision to approve implementation) while the appeal is pending.

For appeals against the grant of clearing permits, the clearing cannot be undertaken while the appeal is pending.

For other public merits reviews, the appealed decision will continue to have effect.

This means that a proponent can operate under the relevant licence or works approval, or the EPA's decision not to assess a proposal will stand unless and until it is overturned in the determination of the appeal.

### **Investigation of the appeal**

As above, appeals are generally investigated by the Office of the Appeals Convenor. The Appeals Convenor is required by the EP Act to act according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms and is not bound by rules of evidence – differing substantially from a formal judicial review proceeding in a court.

In investigating an appeal, the Appeals Convenor is empowered to conduct inquiries in whatever manner is considered appropriate, and may consult any person considered necessary for considering the appeal.

#### Response from decisionmaker

For every merits review, the original decision-maker (i.e. the EPA or the CEO of DWER) will provide a report responding to the appeal grounds. As this report is technically provided to the Minister (being the appeal decision-maker), there is no automatic right for an appellant to access it – you will need to request that it is provided in order to make comments on the original decision-maker's responses.

There is often a period of about a week stipulated by the Office of the Appeals Convenor in which you may provide these comments.

#### Hearing

While there is no formal hearing as a court or tribunal might conduct, the Office of the Appeals Convenor will consult the appellant and this is usually a private face to face meeting. You will have the opportunity to discuss your appeal grounds and any supporting evidence with the relevant staff.

### **Determination and remedies**

There is no requirement for appeals to be determined within a specific period – this timeframe varies from a few weeks to several months. The Office of the Appeals Convenor aims to have 80% of its reports submitted to the Minister within 60 days of receiving a final response to the appeal from the original decision-maker.

The Office of the Appeals Convenor will provide a report on the appeal to the Minister, containing their findings and recommendations as to the determination of the merits review. The Minister then, having regard to that report, will determine the appeal by either:

- Dismissing the appeal (affirming the original decision); or
- Upholding the appeal (overturning or varying the original decision).

While some grounds of appeal may be dismissed, others may be upheld or partially upheld. If a ground is upheld, the Minister has various powers available to “remedy” the identified errors in the decision. These remedies include:

- Requiring that the EPA assess a proposal more fully and/or more publicly and produce a fresh report;
- Changing the conditions that would have applied to the decision, including inserting or deleting conditions; and
- In the case of an appeal against the grant of a clearing permit, quashing the decision.

The Minister’s determination of the appeal will be published along with the report from the Appeals Convenor, on the Office of the Appeals Convenor’s [website](#).

**N.B. The Minister’s decision on the merits review is final and without further appeal.**

### EDO Tips for Public Merits Review

The availability of public merits review for EP Act decisions is an important means of providing access to justice for the community and on behalf of the environment. EDO has extensive experience in providing assistance in these appeals; below we provide some observations and tips for merits review under the EP Act.

1. While a merits review isn’t limited to the materials considered by the original decision-maker, applying the relevant policies and guidance for the decision (and showing how a proper application should yield a different decision) can bring your grounds into a common framework that has already been established.

However, if you think the policies and guidance aren’t correct or useful, highlight the flaws you have identified – and then offer a better basis for decision-making.

2. Similarly, referring to the fundamental purpose of the decision or the objectives and functions of the original decision-maker can be a standard against which the decision can be measured or critically evaluated. Some of these key provisions of the EP Act are:
  - the fundamental purpose of the Act, being to protect the environment of WA (s 4A);
  - the principles of ecologically sustainable development (s 4A);
  - the EPA’s objective to protect the environment and prevent, control and abate pollution and environmental harm (s 15);

- the purpose of conditions on licences and works approvals to be necessary or convenient for the prevention, control, abatement or mitigation of pollution or environmental harm (s 62); and
  - the clearing principles (Schedule 5).
3. Referring to previous decisions and published statements by the original decision-maker can be useful to highlight an inconsistency in approach – for example, if the EPA has recommended a particular level of protection in a strategic advice published on its website, that recommendation could be used to support an argument that the same level of protection should be afforded in a subsequent decision. You might also consider published statements from other government agencies (e.g. the Department of Biodiversity, Conservation and Attractions).
  4. More grounds don't necessarily lead to more chance of success in having your appeal upheld or partially upheld. By focusing on your areas of interest and expertise, you provide the appeals process with the best options for improving the decision in these areas.
  5. Ensure that any strong grounds you have identified are included in your initial appeal documentation, as the Appeals Convenor is unlikely to accept new grounds of review being introduced later in the process (although it may be possible to amend existing grounds or provide additional information in support of those grounds after the appeal is lodged).
  6. Clearly state what remedy you are seeking by, for example, providing a suggested condition to be added, or stipulate the type of surveys that should be required in a re-assessment. It's not just about finding something wrong with the decision, but providing a way for the decision to be improved through the appeals powers available.