



Submission to the Legal and Governance Review of Policies and Processes of the
Environmental Protection Authority (EPA) of Western Australia

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1. INTRODUCTION – ABOUT NELA

The National Environmental Law Association (**NELA**) is Australia’s leading environmental law organisation with a membership base of professionals in environment and resources law and related disciplines.

NELA’s vision is that ecological sustainability is a guiding principle in regulating energy and resources, utilities, pollution control, protecting biodiversity and cultural values, and land use planning and infrastructure.

We seek to protect the environment by shaping the law through information sharing, analysis and debate.

2. ABOUT THIS SUBMISSION

NELA welcomes the opportunity to provide a submission to the Legal and Governance Review of Policies and Processes of the Environmental Protection Authority (**EPA**) (**Review**).

We note that the Terms of Reference for the Review require the reviewers to consider and report on:

1. the EPA’s practices for development of policies and guidelines;
2. the content, clarity and consistency of policies and guidelines;
3. processes to ensure policies and guidelines are given due consideration during assessment and in the EPA’s reporting; and
4. any other matters related to the application of policies and guidelines which could affect the EPA’s capacity to fulfil its statutory duties to undertake assessment (including potential amendments to the *Environmental Protection Act 1986* (WA) (**EP Act**)).

In summary

1. NELA believes that the EPA generally engages in good regulatory practices and that, on the whole, the EPA's policies and guidelines are sound.
2. NELA cautions against the EPA undertaking significant changes as a reaction to the decision in *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482 (**Roe 8**). The Roe 8 decision turned on its facts¹, and simply reinforced the need for the EPA to take into account its own policies. NELA recommends only minor changes to the EPA's policies and procedures to ensure the validity of its assessment of approvals, whilst remaining independent and efficient.

1. The EPA's practices for development of policies and guidelines

Policies and guidelines to be finalised in a timely fashion

Some EPA policies and guidelines remain in draft form for longer than is reasonable. This creates uncertainty for proponents and other key stakeholders. An example of this is *Draft Guidance Statement 54a Sampling Methods and Survey Considerations for Subterranean Fauna in Western Australia* (referenced in *EAG 12 for the Consideration of subterranean fauna in environmental impact assessment in Western Australia*). This draft guidance statement was released on 27 July 2007 for "stakeholder and public review, use and comment for 12 months", yet it remains in 'draft' as at February 2016.

It is NELA's view that prompt finalisation of policies and guidelines ensures that comments arising from drafts are relevant at the time that they are reviewed, and improves certainty for proponent, affected stakeholders and ongoing assessments.

NELA **recommends** that the EPA finalises its policies and guidelines in a reasonable time frame, no longer than 12 months.

¹ The primary reasons for the approval in Roe 8 being overturned do not appear to be a change in law, but rather that the EPA lawyers conceded that the EPA had failed to take any account of the relevant policies ([190]), that the actual assessment in the EPA report appeared contrary to the policies, and that the only reference to the policies was in meeting minutes, in a meeting conducted three years prior to the EPA's decision on the outcome of the assessment, where only two out of the five EPA members who made the decision were present at that meeting, and the minutes merely referenced the policy, rather than provided any evidence of the consideration of the policy ([96], and 192 - 201]). The Chief Justice also note that the policy in question was very important to the outcome of the assessment ([210]), which was another reason for the approval being invalidated.

2. The content, clarity and consistency of policies and guidelines

2.1 Content of policies – should be objectives-focussed and not de facto compliance instruments

The EPA is an independent expert statutory body and has significant discretion to exercise its functions (within the constraints of the EP Act). This wide discretion needs to be balanced with the need to provide proponents and the public with some guidance and certainty about EPA objectives and procedures so they can properly engage in the assessment process. It is helpful for the EPA to strike this balance by setting clear objectives in policies, and clear assessment processes. The balance can be undermined when the EPA makes policies and guidance that are too detailed or makes a presumption.

Detailed policies would likely result in the EPA and others taking a line by line compliance approach to them, which is resource intensive, inconsistent with the EPA's discretion, inconsistent with the fact that policies only need to be taken into account (not followed) and inconsistent with the EPA's role of seeking to achieve holistic objectives. It could also provide fertile ground for administrative law challenges (because it might be easier to demonstrate that a policy has not been taken into account or is inconsistent with the Act), and would lead to impractical and protracted assessment processes. Those processes would also risk becoming a "tick the box" exercise and not focussed on objectives or the holistic approach that the Roe 8 decision said is required of the EPA.

NELA recommends that the EPA policies should provide a framework against which decision-makers can exercise discretion on a case-by-case basis. The policies should not be so specific that they steer the EPA into an issue by issue consideration, given that Roe 8 found that the EPA must look at the totality of impacts.

2.2 EPA policies should clearly be focused on environmental objectives

NELA recommends that the EPA's policies should clearly be focussed on environmental objectives and not social or economic utility.² However, since the Minister is entitled to take social or economic utility into account, the EPA should not reject assessment documentation simply because it includes those issues.

2.3 EPA policies should not leave discretion to the CEO

² *Save Beelihar Wetlands (Inc) v Jacob* [2015] WASC 482, [194].

EPA policies which suggest the CEO of the Office of the Environmental Protection Authority (**OEPA**) has discretion could leave the approval exposed to challenge because Roe 8 found that the CEO's discretion is often quite limited (eg, the CEO's discretion for approving management plans under the conditions considered in Roe was limited).

2.4 EAG 9 – Application of a significance framework in the environmental impact assessment process

2.4.1 The EPA should not defer its responsibility to other government departments.

EAG 9 states that the EPA takes a holistic approach to assessing environmental acceptability. Yet the use of a 'significance framework' to make decisions in the environmental impact assessment process indicates that the EPA confines itself (and the proponent) to limited 'key' environmental factors determined as significant, rather than considering the proposal holistically.

EAG 9 further limits the EPA's review, by providing that the EPA may not assess factors if it believes that an alternative regulatory process can ensure that the environmental objectives for relevant factors can be met, and the likely environmental effects of the factor are 'not so significant' as to warrant formal assessment of the factor.

The EPA's decision not to assess factors is problematic as a matter of law. The EPA functions as an independent and specialised body with the authority to make decisions relating to the environment. Declining to assess certain factors at all, on the basis of regulatory efficiency rather than environmental significance, may be inconsistent with the EPA's functions under s 16 of the EP Act. This creates legal risk for proponents, as it may involve appeals and legal challenges to any approval.

The decision not to assess factors also creates uncertainty and delay. Other agencies will be making their assessments later in the approvals process, and their assessments will not necessarily be consistent with the EPA's assessment that the issue is '*not so significant*' as to warrant formal assessment, as these agencies have their own policies and procedures to determine significance.

NELA recommends that the EPA review all environmental factors in assessing the significance of impacts of a proposed development, to provide proponents and stakeholders with a thorough and holistic implementation decision. NELA recommends that the EPA

receive advice from other government decision-makers, or bring them on board as co-decision-makers, consistent with its powers under s 17 of the EP Act. This coordination should take into account, on a case by case basis, whether the environmental factor being protected is better dealt with in a primary or secondary approval. Ultimately, however, the EPA must act as a coordinator and be responsible for making the final assessment in its entirety.

2.4.2 Inconsistency with offsets

When avoidance or mitigation of inherent impacts does not meet the EPA's environmental objectives, EAG 9 refers to offsets as a condition to compensate for any significant unavoidable residual impact.³ The offset guidelines state that the offsets are intended to be of last resort after all other steps have been taken to mitigate the impacts.⁴ In practice, however, the mitigation hierarchy is rarely followed and the ability for agencies to impose offset conditions practically results in agencies requesting offset conditions.

NELA recommends that the EPA strictly observe the mitigation hierarchy and that offsets only be considered where all reasonable efforts to avoid or mitigate impacts have been exhausted. Moreover, the offset can achieve no net loss of the environmental values being protected.

2.5 EAG 1 – Defining the key characteristics of a proposal

According to EAG1, the Key Proposals Characteristics in Schedule 1 of the Ministerial Statement are intended to outline the extent of authorisation the proponent has to implement the proposal.⁵ However, it is clear that the content of Schedule 1 is not an implementation condition of itself, and is not the complete description of the proposal.⁶ The proposal is defined by the approval documentation submitted for the assessment, and will always be the responsibility of the Proponent, not the EPA.⁷ The EPA's labelling of the proposal description as a 'Key Proposal Characteristics Table' results in a common

³ Application of a significance framework in the EIA process, Environmental Assessment Guideline No.9, 14.

⁴ WA Environmental Offsets Guidelines, August 2014, 7.

⁵ Defining the Key Characteristics of a Proposal, Environmental Assessment Guideline No.1, May 2012, 7.

⁶ See, generally, *Re Minister for the Environment Ex Parte Elwood & Anor* [2007] WASCA 137.

⁷ *Re Minister for the Environment Ex Parte Elwood & Anor* [2007] WASCA 137, [98].

misconception, leading proponents to misinterpret the table as a compliance table, and the complete definition of the proposal.

NELA recommends that the EPA make it clearer to proponents that the proposal is defined by the approvals documentation, and that the Key Proposal Characteristics Table is intended as a summary only. All other relevant EPA policies (including post assessment guidelines about compliance reporting) should also be revised to ensure it is consistent with this message, and hence not a compliance issue.

This would provide clarity for proponents and the EPA on what should be assessed and reported on for compliance purposes and what constitutes a change to an approval.

2.6 Other issues with offsets policy and guidelines

There are also various problems with the EPA's current approach to offsets⁸ which could lead to administrative law challenges as seen in *Bulga Milbrodale Progress Association (2013)* 194 LGERA 347 (**Bulga**) case, and therefore more uncertainty for environmental assessment. The issue of the validity of offsets were not decided on in Roe 8 case because they weren't raised, but the Chief Justice did say "*there is a cogent argument to the effect that unless there is a real or appreciable risk of the environmental degradation of that other land, the mere act of acquisition and maintenance of that land does not mitigate or "offset" the environmental degradation of other land in any material way.*" He went on to say "*it would have been necessary to consider the lawfulness of this aspect of the policy as there is, on its face, a strong argument to the effect that this aspect of the policy is unlawful*". This suggests that an offsets policy premise that promotes a wide use of averted-loss offsets may be challenged in future.

NELA **recommends** an urgent review of the current offsets policy to ensure that the EPA's approach to offsets is lawful.

3. Processes to ensure policies and guidelines are given due consideration during assessment and in the EPA's reporting

3.1 Proponents should assist EPA in complying with policies

⁸ WA Environmental Offsets Guidelines, August 2014, and WA Environmental Offsets Policy, September 2011.

The EPA must take into account its own relevant policies and guidelines.⁹

Proponents should be encouraged to assist the EPA in this process, by providing documentation that demonstrates that relevant policies have been appropriately considered as part of the approvals process. This would expedite the EPA's assessment process by reducing the EPA's workload, as well as minimise legal risk.

However, this exercise should be undertaken at a holistic level and should not become a line-by-line compliance approach to avoid administrative law challenges.

4. Any other matters related to the application of policies and guidelines which could affect the EPA's capacity to fulfil its statutory duties to undertake assessment (including potential amendments to the *Environmental Protection Act 1986 (WA)*)

4.1 Internal policies and guidelines

The Roe 8 decision highlighted the importance of the EPA having procedures in place to ensure that its policies and guidelines have been taken into account.

The EPA may benefit from a legal risk assessment of its internal policies and guidelines, to ensure that they offer adequate guidance to its personnel.

4.2 Administrative procedures

The EPA has significant procedural discretion under the EP Act, and its current mechanism for utilising these, the *Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2010 (Administrative Procedures)*, are very long and prescriptive.

Many of the procedural aspects that are currently in the administrative procedures would be more appropriately incorporated into the EP Act. Examples of procedural discretions which could be incorporated into the EP Act are:

- **The significance test** - the EPA has a discretion under the EP Act about whether a proposal is likely to have a '*significant effect on the environment*'.¹⁰

⁹ See generally, *Save Beelihar Wetlands (Inc) v Jacob* [2015] WASC 482.

¹⁰ EP Act, s 38.

Clause 7 of the Administrative Procedures lists a non-exhaustive list of matters that the EPA may have regard to in exercising this discretion that is not contained anywhere in the EP Act.

- **Levels of assessments** - s 40 of the EP Act enables the EPA to assess a referred proposal and determine if it is necessary for public review to occur, including the content of clause 10 of the Administrative Procedures, which outlines the EPA's levels of assessment and criteria for each of these categories, would bring the EP Act into line with other environmental legislation in Australia which specifies the assessment levels and criteria within the legislation (for example, the *Environment Protection and Biodiversity Act 1999* (Cth)).
- **Time stipulations** – for example, the EPA provides a seven-day period for public comment before making a decision on whether or not to assess a proposal (Clauses 8.1, 10.1.2, 10.1.4, 10.2.2), which are not currently stated in the EP Act.

This would reduce the EPA's discretion as to procedure and provide two main benefits. Firstly, transparency would be increased. There would be less scope for 'behind the scene' negotiations over procedural matters, which could help to improve public confidence. Secondly, it would limit the number of procedural decisions and enable the EPA to focus its time and resources on environmental outcomes.

FURTHER INFORMATION

For any inquiries about matters raised in the submission please contact Michelle Brooks, NELA WA President c/o- secretariat@nela.org.au