



National
Environmental Law
Association
Limited
ACN 008 657 761

Western Australian Division

GPO Box U1942
Perth WA 6845

Telephone: 0438910902

Email: president@nelawa.org.au

30 July 2021

Better Regulatory Practice Branch
Department of Water and Environmental Regulation

By email: betterregulatorypractice@dwer.wa.gov.au

To whom it may concern,

Department of Water and Environmental Regulation Draft *Guideline: Native Vegetation Referral* - Comments

Set out below are the comments made on behalf of the West Australian division of the National Environmental Law Association (**NELA(WA)**), and endorsed by the national NELA board, regarding the Department of Water and Environmental Regulation's (**DWER**) draft *Guideline: Native Vegetation Referral (Guideline)*. This Guideline implements various provisions relating to clearing of native vegetation provided in the *Environmental Protection Amendment Act 2020 (WA) (EP Amendment Act)*

About NELA

NELA is a peak body for environmental lawyers in Australia. We are Australia's only national, multi-disciplinary, member-based association focused on environmental law and sustainability. NELA serves the needs of practitioners in law, planning, natural resources and environmental science and management. NELA obtains and exchanges information on issues relevant to environmental law and policy.

One of NELA's objectives is to provide a forum for and otherwise assist in the discussion, consideration and advancement of environmental law among the legal profession and the wider community.

Background

Amendments to the *Environmental Protection Act 1986 (WA) (EP Act)* made by the EP Amendment Act change the way that native vegetation is regulated in WA. In particular, s 51DA introduces a new process whereby proposed clearing activity can be referred to the relevant department (either DWER or the Department of Mines, Industry Regulation and Safety (**DMIRS**)) for a decision as to whether a clearing permit is required.

DWER has published the draft Guideline to support this process and to inform stakeholders about the how the relevant department will implement the changes and consider key criteria in the legislation.

Consideration of factors when assessing referrals

S 51DA(4) of the EP Amendment Act provides that the CEO of the relevant department will consider the following considerations when deciding whether a clearing permit is required:

1. Whether the area proposed to be cleared is small relative to:
 - a. the total remaining vegetation within the region in which the area is situated
 - b. the ecological community of which the vegetation proposed to be cleared forms part of
2. Whether there are any known or likely significant environmental values within the area
3. Whether the state of relevant scientific knowledge about vegetation within the region in which the area is situated is adequate
4. Whether the issues that would arise as a result of the proposed clearing are likely to require conditions to manage or mitigate effects on the environment.

The Guideline provides further guidance about how the relevant department will consider these factors in making a decision under s 51DA.

Consideration 1: Size of the area

When considering whether the proponent should be granted a clearing permit, the relevant department must consider the size of the proposed area to be cleared. When considering this factor, the Guideline sets out at Table 1 what considerations the relevant department should consider and what threshold levels of vegetation would apply.

Table 1 shows thresholds for remaining vegetation in both the regions and the surrounding areas for the proposed clearing that must be considered. The threshold percentage for remaining vegetation differs depending on the area in which the proposed clearing activity is located.

NELA (WA) proposes that the Guideline be amended to increase the percentages in Table 1 so that a clearing permit is more likely to be required than not. For example, as it currently stands, Table 1 provides that where more than 1 ha is proposed to be cleared in the urban Perth, Peel and Greater Bunbury regions, clearing permit is required when the remaining vegetation in the region is **less than 10%**. We submit that the threshold numbers should be increased, so as to support proactive ecologically sustainable development. In our view, setting the threshold as low as 10% (or 30% in other circumstances) is inconsistent with objectives to maintain and preserve as much native vegetation as possible.

Consideration 2: Environmental values

The Guideline provides that, when the relevant department is considering known or likely environmental values in the area, it must consider potential impacts on significant environmental values within the area, including:

- Biological values (e.g. flora and fauna)
- Conservation values (e.g. impact to ecological linkages and conservation areas)
- Land and water resource values (e.g. wetlands and watercourses)

The Guideline provides that: “*clearing activities that have the potential to impact significant environmental values and/or require mitigation, and/or offsetting conditions are likely to require a permit*” (emphasis added).

NELA (WA) submits that the Guideline should be amended to require the relevant department to require a clearing permit where clearing activities have the potential to impact significant environmental values.

Table 2 outlines factors that the relevant department must consider in determining the need for a permit based on known or likely significant environmental values within the area. In terms of fauna, Table 2 provides that the relevant department must consider:

- Whether the proposed clearing area provides habitat for any threatened, priority, or specially protected fauna; and
- Whether the proposed clearing area provides significant habitat for fauna.

NELA (WA) submits that the Guideline should be amended to require relevant department to consider all areas that provide habitat for fauna, as opposed to merely *significant areas*. This will ensure that the relevant department assesses all potentially affected fauna when considering whether a permit is required.

Consideration 3: Scientific knowledge

In considering the state of scientific knowledge, the Guideline requires the relevant department to assess the relevant scientific knowledge of the vegetation in the region and specifically whether the level of scientific knowledge is adequate. Further, it provides that where the data or information “*is not adequate, and additional information is required to support the department’s decision, a permit is likely to be required*” (emphasis added).

NELA (WA) considers that the Guideline should be amended to require a clearing permit in circumstances where scientific knowledge is inadequate, to ensure that any relevant gaps in scientific literature are addressed. We also submit that the Guideline should go further and require that certain conditions be imposed on clearing permits where such scientific knowledge of vegetation is missing, to ensure these gaps are being addressed. For example, conditions attached to permits could require the proponent to carry out research or investigations.

Consideration 4: Conditions

The Guideline requires applicants to avoid and mitigate environmental impacts to the area as much as practicable before planning their clearing activity. To this end, the Guideline provides that “*clearing activities that are likely to require conditions to minimise, mitigate, or offset effects on the environment will likely require a permit*” (emphasis added).

NELA (WA) submits that the Guideline should be amended to provide that clearing activities which are likely to require such conditions should always require a clearing permit. Otherwise, it may result

in conditions not being imposed on clearing activities where they are required to minimise, mitigate, or offset environmental impacts.

Referral of mining-related clearing to DMIRS

DMIRS has delegated statutory authority under s 20 of the EP Act to receive, assess and determine applications for clearing permits that relate to ‘mineral and petroleum activities’. However, NELA(WA) considers that the transferral of referred clearing permit applications that relate to ‘mineral or petroleum activities’ to DMIRS may result in the inconsistent and mollified application of the considerations outlined in the new s 51DA(4) of the EP Act to these applications.

While s 51DA and the Guideline provide that DMIRS must consider the same criteria as DWER in deciding whether a clearing permit is required, DWER’s Guideline outlines the assessment information that they highly recommend, but do not necessarily require, to be submitted with permit applications. It may be the case that transferred referrals to DMIRS may not provide all or most of the assessment information that DWER recommends, but may still be dealt with or approved without it on the basis of the transferral.

There may also be inconsistencies in the conditions imposed on clearing permits by DMIRS and DWER. While s 51DA and the Guideline provide that DMIRS must consider the same criteria as DWER in deciding whether a clearing permit is required which may ensure some consistency between departmental assessments, the departments have materially different purposes. DWER’s stated purpose is to manage and regulate Western Australia’s environment and water resources, whereas DMIRS’ stated purpose is to promote ‘a future for the Western Australian community, industry and resources sector’.¹ NELA (WA) considers that these purposes will be at odds and may distinctly influence each department’s assessment of referrals and applications, leading to inconsistent and in some cases conflicting approvals and conditions on clearing permits.

Further, NELA (WA) considers the referral of clearing permit applications to DMIRS by default will hinder the consolidation and simplification of environmental regulation and approvals processes, defeating the purpose of the recent amendments to the EP Act.

NELA (WA) therefore submits that the Guideline should be amended to remove the requirement to refer applications related to ‘mineral or petroleum’ activities to DMIRS. Alternatively, NELA (WA) proposes that the Guideline be amended to further guidance to the departments in order to reduce the risk of inconsistent application of the clearing principles and other considerations outlined in the EP Act.

Lack of transparency and public participation

The Guideline provides that there is no statutory requirement for referrals to be advertised for public comment. NELA (WA) submits that, while it is not required in the legislation, the Guideline should be amended to provide that referrals should be published and subject to public comment.

¹ Department of Mines, Industry Regulation and Safety, ‘About the department’, *Department of Mines, Industry Regulation and Safety* (Web Page, 22 June 2021) <<https://www.dmirns.wa.gov.au/content/about-department>>.

While the Guideline provides that the relevant department will publish the referral on its website after it has made a decision, NELA (WA) submits that this is not sufficient, and that referrals should be published earlier in the process to enable public participation in the process.

Section 3.6 of the Guideline provides that in circumstances that the relevant department considers that a clearing activity does not require a permit or if the activity qualifies for an exemption, it will inform the referrer that a permit is not required. NELA(WA) supports this inclusion as it suggests that a clear process will be provided to landowners and developers to determine whether or not an exemption applies to their proposed clearing.

NELA(WA) notes that in circumstances that section 3.6 of the Guideline is not implemented, there will be no process for ensuring that clearing is subject to an exemption, noting that DWER's current clearing permit assessment process, in accordance with DWER's A guide to the assessment of applications to clear native vegetation (December 2014) and clearing permit decision reports, does not identify whether proposed clearing qualifies for an exemption.

Further, while the Guideline provides that the referral outcome (i.e. the department's decision as to whether a clearing permit is required) will be published on the relevant department's website after a decision has been made, it does not specify whether this notice will include information as to why a clearing permit is required or not. In particular, it does not clarify whether the notice will contain information as to whether a clearing exemption applies (and, if so, which one) or the considerations listed above are met/result in a clearing permit being required.

NELA (WA) recommends that the Guideline be amended to provide additional guidance and certainty in relation to the application of exemptions to proposed clearing. In particular, we recommend that the following requirements be incorporated in the Guideline:

- 1.1 that the relevant department will publish whether an exemption applies or does not apply to the proposed clearing in the notice of its decision;
- 1.2 that in circumstances where an exemption does apply, the relevant department identifies which exemption or exemptions apply to the proposed clearing in the notice of its decision;
- 1.3 that in circumstances where an exemption does not apply, the relevant department provides reasons for this decision in the notice.

NELA (WA) considers that providing increased clarity and transparency relating to whether or not clearing exemptions apply in the Guideline (if not the EP Act itself) will be extremely beneficial in that it will provide certainty to landowners and developers in respect of whether or not an exemption applies, and as a consequence, it will likely ensure that unlawful clearing and enforcement actions are significantly reduced.

Timeframe for decisions on referrals

Further to s 51DA(8) of the EP Amendment Act, section 3.7 of the Guideline provides that, in circumstances where a referrer has not received a decision notice within 21 days, the referrer may request in writing that the referral be treated as a clearing permit application or wait until the relevant department notifies the referrer of its decision.

NELA (WA) does not support this section of the Guideline and considers that the referrer must be provided with certainty and transparency insofar as the timeframe for the relevant department to

decide whether or not a referral requires a clearing permit. This section essentially allows for the relevant department to opt-out of the legislated timeframe and “stop-the clock” indefinitely, and accordingly goes against the legislative intention to create a streamlined, efficient, flexible and transparent process.

Accordingly, NELA (WA) submits that the Guideline be amended to provide that, in circumstances where the relevant department requires further time for making a decision, the referrer must be notified by a department representative, provided with reasons for the delay, and provided with a new timeframe for the decision.

Issues not addressed

NELA (WA) notes that the Guideline does not address the following key issues:

- The relocation or rescue of species of value prior to clearing – to this end, we note the [*Guidelines for the Translocation of Threatened Plants in Australia*](#)
- The environmental value of native vegetation for the mitigation of greenhouse gas emissions
- Consultation with relevant scientific institutions, for example the WA Botanic Gardens
- Consideration of the WA Natural Resource Management regional plans or strategies
- Consideration of other relevant biodiversity policies and strategies

We submit that the Guideline should be amended to address these issues.

Please contact us if you have any questions in relation to the above submissions.

Yours sincerely

Western Australian Division of the National Environmental Law Association