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SUBMISSION ON THE PUBLIC CONSULTATION FOR THE PROPOSED AMENDMENTS TO THE *ENVIRONMENTAL PROTECTION ACT 1986*

To Strategic Policy,

The proposed amendments to the *Environmental Protection Act 1986* (EP Act), are a strong positive step towards improving the effectiveness of Western Australia's environmental protection legislation. The guiding principles and intent of the amendments, as outlined in the Department of Water and Environmental Regulation's (the Department) *Modernising the Environmental Protection Act discussion paper*, are all laudable.

Some of the reforms that are particularly welcome include:

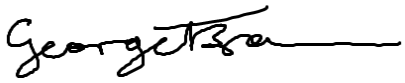
- the introduction of a referral mechanism for proposals to clear native vegetation;
- shifting from premises-based to activity-based regulation of industry licensing;
- simplifying the application and assessment processes for industry licensing by eliminating works approvals and adding clarity to other aspects of the process;
- the introduction of environmental protection covenants;
- adding a statutory mechanism for recouping costs from environmental monitoring programmes; and
- the inclusion of head powers for accreditation of certified environmental practitioners.

However, despite the positive aspects of these broad reforms, some of the wording in the draft exposure bill raises issues for the ways in which they are proposed to be implemented, along with several outstanding issues in the EP Act that have still not been addressed by the proposed amendments. These matters include:

- the substantial restructuring of Part V Division 3 has not been mirrored (where appropriate) for Part V Division 2, meaning that several of the issues that are resolved by the changes to Division 3 are still present in the equivalent sections in Division 2;
- the new provisions regarding referrals of proposed clearing lack any mechanisms for cost recovery or to allow the Department to decline to deal with an incomplete referral;
- no time limit for how long a determination that a clearing permit is not required would remain in effect; and
- no increases for the maximum fines that can be levied, to offset the impacts of inflation, and to further deter behaviour that would cause pollution or environmental harm.

The items listed above are addressed in greater detail below, along with the rationales for each comment or proposed change, in Appendix A.

Kind regards,



George Brown

Appendix A – Comments on the draft exposure bill for the proposed amendments to the EP Act

Section of draft EP Act	Comment / recommended change	Rationale for comment / change
s.11(2A)	*(2A) "At a meeting of the Authority the presence of an Authority member need not be by attendance in person but may be by that Authority member and each other Authority member at the meeting being simultaneously in contact by telephone or other means of instantaneous communication."* Suggested rewording: *(2A) "At a meeting of the Authority, an Authority member is deemed to be in attendance either where they are present in person or where they and all other Authority members at the meeting are simultaneously in contact by telephone or other means of instantaneous communication."*	Plain English wording.
11(4A)	*(4A) "At a meeting of the Authority the presence of a person under subsection (3) need not be by attendance in person but may be by that person and each Authority member at the meeting being simultaneously in contact by telephone or other means of instantaneous communication."* Suggested rewording: *(4A) "At a meeting of the Authority, a person acting in their capacity under subsection (3) is deemed to be in attendance where they are present either in person or they and each Authority member at the meeting are simultaneously in contact by telephone or other means of instantaneous communication."*	Plain English wording.
s.14A(5)	*"If at least ~~3~~ three Authority members…"*	Consistency; general convention is to use words rather than digits for small numbers.
s.41(2)	Suggested rewording: *"(2) …informed under section ~~39A(3)(b)~~ 39A(1)(b) that the Authority is not going to assess…"*	Section 39A(3) appears to have been integrated into section 39A(1). The reference in section 41(2) needs to be updated accordingly.
s.41(3)	Suggested rewording: *"(3) …given notice under section 39A~~(3)~~(1)(c) or (4) that…"*	Section numbering has not been updated to reflect proposed amendments to section 39A.
s.45	Numbering of the subsections appears to not follow the same numbering convention as other subsections inserted.	Consistent numbering conventions.

Section of draft EP Act	Comment / recommended change	Rationale for comment / change
s.45(5A)	There are two references to a "section 45AA".	There is no such section in the proposed amended Act. Unclear which section it was supposed to be referring to.
s.45(5A)	Reword subsection 45(5A).	Given that section 45(5A) is modelled on sections 51H(1) & (2) and 62(1) & (2), it would be advisable to have the wording roughly match these sections, such as by similarly linking the purpose of the conditions to the principles of the EP Act in section 4A.
s.45(5B)	Sub-sections "(h)" and "(e)" are mislabelled and should instead be written as "(e)" and "(f)" respectively.	Correct numbering needed.
s.45	Recommend redrafting this section to match the approach taken for sections 51I and 62A.	As noted in the discussion paper, the new section 45(5B) is modelled – in intent and function – on the existing sections 51I and 62A. As such, it would be better to match the approach taken with those sections (namely having a separate condition).
s.51DA(2)	<u>Suggested rewording:</u> *"(2) A person who proposes to do clearing to which this section applies must refer the proposed clearing* ***(referral)*** *to the CEO –* *(a) in the form and manner approved by the CEO; and* *(b) accompanied by the fee prescribed by or determined under the regulations."*	It is likely that in some scenarios, working out whether a clearing permit will be required will take considerable work on the part of the Department, especially given subsection (4) states that the CEO **must** take account of the known or likely environmental values in the area and the level of scientific knowledge available about the area. Note that not including such wording now would make it impossible to pursue cost recovery measures for this process without further legislative change to the Act itself (rather than just updating the Clearing Regulations like with other fee updates).

Section of draft EP Act	Comment / recommended change	Rationale for comment / change
s.51DA(6)	*"(6) Subject to the publication regulations, the CEO must publish in a prescribed manner —* *(a) the referral of proposed clearing under subsection (2); and* *(b) the notice given under subsection (5)."* Suggested rewording: *"(6) Where the CEO decides under subsection (3) that a clearing permit will not be required, the CEO must publish notice of this decision in the prescribed manner."*	Section 51DA(4) lists the specific matters that the CEO must take into consideration when determining if referrals of proposed clearing will require a clearing permit. Consideration of public submissions is not included in this list, nor is there any provision for inviting comments (as in the later proposed section 51E(4A)). This omission is presumed to be deliberate. Consequently, there is no benefit to requiring referrals to be published prior to a determination under section 51DA being made. This is particularly so where the determination was that a clearing permit is required, when the application itself is still required to be published for public comment. In addition, there are also some issues with the current draft section, which the proposed rewording aims to resolve. 1. Simplification – stating the notice must be published in the prescribed manner automatically means that the publication is subject to the "publication regulations" to be created under Schedule 2 item 36B. "Prescribed manner" covers all relevant regulations, including the proposed new 'publication regulations' (whatever form they may take). This also applies to other instances where this phrasing has been used. 2. Clarification – the phrase *"must publish in a prescribed manner…the notice given under subsection (5)"* risks being unclear, as on a practical level, the notice to the person who referred the proposed clearing would likely take a different form (a letter) to that prescribed for the public publication (listing on the website, and not necessarily posting a copy of the letter). The replacement language better provides for this distinction.
s.51DA(8)	Suggested rewording: *"(8) If a request is made under subsection (7) to treat it as such, the referral may be considered to be application for a clearing permit under section 51E where the referral meets, or is updated to meet, the requirements of sections 51E(1) and (2)."*	The wording as it is currently written is clunky and could be simplified considerably (suggested rewording provided). Note that given the proposed rewording for subsection (2), this would make the application fee a substitute for the referral fee. Given that at least part of the assessment would theoretically already be done due to consideration of the factors in subsection (4) (thus reducing the costs of the assessment itself), it makes sense to allow for this.

Section of draft EP Act	Comment / recommended change	Rationale for comment / change
Part V Division 2	General comment: Recommend similar restructuring of this section as that proposed to be made to Division 3 for licences.	Previously, Divisions 2 and 3 were drafted very similarly. The proposed restructuring of Part V Division 3 for licences severs this link, which was previously advantageous for both regulators and applicants to navigate the various statutory processes. Restructuring Division 2 to be (as appropriate) the same as the proposed Division 3 would be best. This would also allow the same improvements made to the processes for assessment of licence applications to be matched for assessments of clearing permit applications, including requirements to advertise and seek comments on amendment applications, etc. See the additional specific comments on section 51M (below) that are of further relevance to this.
s.51E(4)	*"(4) If, under subsection (3), the CEO declines to deal with the application, the CEO ~~does not have to~~ will not perform any function under subsection (4A) to (12) in relation to the application."*	The language in this provision is currently permissive, when it would be more appropriate to use an imperative.
s.51G	Suggested rewording: *"(1) Subject to this Act, a clearing permit continues in force –* *(a) if it is an area permit, for ~~2~~ two years; or* *(b) if it is a purpose permit, for ~~5~~ five years,* *from the date on which it is granted unless another period is specified in the permit.* *(2) Subject to this Act, where the CEO determines that a clearing permit is not required for proposed clearing referred under section 51DA, that determination remains valid for a period of two years."*	The addition of subsection (2) ensures that a determination for a given referral that a clearing permit is not required is not valid in perpetuity. This is to guard against there being other changes that – had they been known to the Department at the time of the initial referral – may have influenced the determination. Such changes may, for example, include authorisation of other nearby clearing or changes in the scientific knowledge available about the region/area. In subsection (1), changing from digits to words for the numbering is to be consistent with general stylistic convention.
s.51K(1)	Suggest adding text that gives the option of amending the permit by way of adding conditions of the same type as was referenced in the new section 51I(1)(ca). Should also allow for amendments that modify such conditions as well (such as by expanding the area that must be covered by a covenant or environmental undertaking).	This is to align the two sections and ensure that conditions requiring covenants or environmental undertakings can be added after the initial assessment and granting of the permit. It is possible that amending section 51K(1)(c) to include additional reference to the new section 51I(1)(ca) may be adequate to achieve this in relation to modification of an existing condition, but it would not be adequate to allow adding new conditions of this type.

Section of draft EP Act	Comment / recommended change	Rationale for comment / change
s.51L(2)	Recommend adding as a new subsection (2)(aa): *"(2)(aa) where the clearing permit includes a condition of the type specified in section 51I(2)(c) or 51I(2)(ca), if the CEO is satisfied that there has been a contravention of any of the provisions or conditions attached to such related environmental undertakings or environmental protection covenants;"*	With the current wording of subsection (2)(a), there is a risk that merely entering into a covenant would be adequate to comply with the conditions of the clearing permit. This loophole should be closed. Additionally, while contravention of the provisions of a covenant will be an offence under the new section 86O, it would be advantageous to have an additional option for responding to non-compliances aside from prosecution, such as being able to suspend or revoke an associated clearing permit, especially given the permanency of clearing.
s.51L	Suggest adding a new subsection: *"(3) A suspension of a clearing permit may be for a limited period determined by the CEO, or indefinitely until such time as the holder of that clearing permit is notified by the CEO that the suspension no longer applies."*	Recommend stating that suspensions can be for a limited or indefinite period of time. This is very similar to how the *Rights in Water and Irrigation Act 1914* deals with how suspensions of licences function (specifically Schedule 1 clause 25).
s.51M	In relation to the suggestion above (the general comments on Part V Division 2) about adding a requirement to advertise amendment applications, there may be benefit to limiting this requirement by adding a qualification that it is only required where, in the CEO's opinion, a proposed amendment would be materially significant relative to the originally granted permit.	This provides an explicit head power (and obligation) to publish (and seek comments on) amendment applications while maintaining discretionary flexibility to not need to submit comments on minor amendments (e.g. something like a 0.3hectare expansion to a 30-hectare area permit in a non-environmentally sensitive area). At minimum, this should apply to CEO-initiated amendments, except for where those amendments would be e.g. only administrative in nature or to ensure consistency with updates to approved policies. Alternately / additionally, see the comments below pertaining to section 51Q.

Section of draft EP Act	Comment / recommended change	Rationale for comment / change
s.51Q(1)	Suggested rewording: "…(i) referrals of proposed clearing received under section 51DA; ~~(i)~~(ii) applications for clearing permits; ~~(ii)~~(iii) clearing permits and undertakings mentioned in section 51E(9); (iv) applications for the amendment or surrender of an existing clearing permit received under section 51M(1); (v) amendments and surrenders of clearing permits granted under section 51M; ~~(iii)~~(vi) notifications received under section 51N(1) regarding the transfer of a clearing permit; ~~(iv)~~(vii) environmental protection covenants; and…"	This ensures that the appropriate records are kept for all applications, referrals, etc. received, including those added by the EP Act amendments. Note that subsection (v) will only be appropriate to add if the preceding point regarding adding an explicit head power to section 51M to grant or refuse to grant amendments and surrenders.
s.52(1)	*"**controlled works** means –* *(a) works at premises that is designed to enable a prescribed activity that is not authorised by a licence to be carried out at a premises; ~~and~~ or* *(b) work at premises that is designed to change the way of carrying out a prescribed activity that is authorised by a licence to be carried out at the premises if the change will…* *~~and~~ or* (c) *any other thing that is specified by the regulations as being controlled work for the purposes of this definition…"*	It makes more sense to use the word "or" instead of "and" in this context. Alternatively, use a phrasing construction that would be much the same as section 53(1) – i.e. 'a controlled work means any of the following: (a), (b), (c), etc.'.
Part V Division 3	As noted above, Division 2 should also be rewritten to align with the same structuring as proposed for Division 3.	Consistency of approach and implementation of similar general improvements as those made to Division 3.
s.53D(4)	*"(4) If, under subsection (3), the CEO declines to deal with the application, the CEO ~~does not have to~~ will not perform any function under section 53E, 54, 55, 59, or 60 in relation to the application."*	The language in this provision is currently permissive, when it would be more appropriate to use an imperative.

Section of draft EP Act	Comment / recommended change	Rationale for comment / change
s.53E	Similar to the suggestion above regarding clearing permit amendments and adding a requirement to advertise amendment applications (s.51M), there may be benefit to limiting this requirement by adding a qualification that it is only required where, in the CEO's opinion, a proposed amendment would be materially significant relative to the originally granted licence.	This provides an explicit head power (and obligation) to publish (and seek comments on) amendment applications while maintaining discretionary flexibility to not need to submit comments on minor amendments. At minimum, this should apply to CEO-initiated amendments, except for where those amendments would be e.g. only administrative in nature or to ensure consistency with updates to approved policies.
s.56	Suggest adding a new subsection: *"(3) A suspension of a licence may be for a limited period determined by the CEO, or indefinitely until such time as the holder of that licence is notified by the CEO that the suspension no longer applies."*	Recommend stating that suspensions can be for a limited or indefinite period of time. This is very similar to how the *Rights in Water and Irrigation Act 1914* deals with how suspensions of licences function (specifically Schedule 1 clause 25).
s.60(2)	Add in an explicit requirement to take into consideration whether the licence holder has been compliant with the conditions of their licence when determining whether an application to surrender should be granted.	If there are monitoring and/or other management requirements conditioned that the licence holder needs to comply with but they have not done so as yet, it may be appropriate to reject their surrender application on this basis. In at least some scenarios, this is more efficient and/or effective than granting the surrender but simultaneously issuing an environmental protection notice, covenant, or closure notice. While the section 60(2)(c) *"any other matter the CEO considers relevant"* provision does allow for this already, an explicit requirement to take this into account would be advantageous and support the 'responsible regulator' strategic objective. Note that an equivalent provision this is has already been added to Part V Division 2, in the new section 51NA(6)(b), which may provide a model approach for dealing with this.
s.61A(2)	Recommend adding the following additional subsections: *(a) "…give an environmental undertaking in relation to specified land other than land on which a prescribed activity is undertaken;* *(b) arrange for an environmental protection covenant to be given by a specified person other than the licence holder in relation to specified land other than land on which a prescribed activity is undertaken…"*	This would allow environmental offsets as a possible condition option on prescribed activity licences.

Section of draft EP Act	Comment / recommended change	Rationale for comment / change
Part VI	Removal of gendered language throughout is good, but there are several places where this has been missed, such as in Part VI (specifically sections 93 to 97, and section 99).	Consistency.
s.101A(1)	Suggested rewording: *"Subject to section 105, an applicant for –* *(a) a clearing permit who is aggrieved by the refusal of the CEO –* *(i) to grant the clearing permit under section 51E(5); or* *(ii) to grant the permit under section 51E(5) for all of the clearing applied for;* *or* *(b) the amendment of a clearing permit who is aggrieved by the refusal of the CEO to amend the clearing permit under s.51M; or* *(c) ~~(b)~~ a clearing permit who is aggrieved by the specification by the CEO of any condition in the permit under section 51E(5) or 51N(2),* *may within 21 days of being notified of that refusal or specification, as the case requires, lodge with the Minister an appeal in writing setting out the grounds of that appeal."*	This aligns with the introduction of a right to appeal amendment refusal decisions in the revised section 102. Note though that this is dependent on an explicit power to refuse clearing permit amendment applications being added to Part V Division 2 (so that that subsection can be referenced here).
s.101A(2)	Suggest rewriting section 101A(2) to align with the changes made to section 102(2), including adding an equivalent to the new section 102(2A).	Consistency of managing appeals across Part V Divisions 2 & 3.
s.110K	Suggested rewording: *"**environmental monitoring programme** means a monitoring programme established to monitor the impact on the environment of one or more ~~prescribed~~ activities, including pollution or environmental harm resulting from the activity or activities;"*	The current construction of the definition seems to only cover monitoring in relation to activities regulated under Part V. The new "s.45(5B)(h)" [sic] adds a provision allowing for implementation conditions to impose requirements pertaining to environmental monitoring programmes. While s.45(5B) does provide for implementation conditions to be implemented at the proponent's expense, it seems useful to not restrict the scope of s.110K unnecessarily. It may also allow for environmental monitoring unrelated to Part IV or Part V matters to still be covered under these provisions as well.

Section of draft EP Act	Comment / recommended change	Rationale for comment / change
110M(4)	It would seem appropriate to treat the payment of other fees, such as application fees and/or annual fees charged under Part V, in a similar manner to this. Suggest adding provisions in the relevant places reflecting this (either in the Act itself or in its supporting regulations).	Consistency in how fee payments are received and dealt with.
110N	Suggested rewording: *"(a) empowering the CEO to require a holder of a licence ~~licensee~~, or a person required under section 53A ~~the EP Act~~ to hold a licence…"*	The term "licensee" was deleted from the definitions in section 3, and the term "holder of a licence" is consistently used throughout the Act instead. The approach taken throughout the rest of the Act is also to refer to the specific section. Section 53A is assumed to be the relevant one for the purposes of section 110N.
Schedule 1	Recommend increasing the amounts for the penalties. Alternately, as a more future-proof fix, penalty amounts could be taken out of the Act and instead stated to be as prescribed under the regulations. Another option may be to state that the penalty values increase in line with inflation, as calculated by the Reserve Bank of Australia. Regardless of inflation though, the maximum penalties should still be increased, to bring into line with community expectations.	Based on inflation, the amounts would have depreciated in real terms significantly since they were last updated (by over 20% if last updated in 2010, and by almost 50% if last updated in 2003). Having these values prescribed under the regulations instead (similar to application/annual fees) would allow for them to be updated easier to account for inflation. This will enhance the effectiveness of the fines as a deterrent and as a mechanism for recouping the costs of damage to the environment from those prosecuted. It will also make it easier to increase fines separately to remain in line with community expectations.
Schedule 2, clause 36B	*"(b)(i) requirements as to when and how requests may be made for ~~that~~ information not to be recorded, kept, produced, made available for public inspection or published ~~may be made~~; and"*	Improved plain English.
Schedule 2, clause 36B	Formatting – inconsistent text size for the sub-clauses.	N/A.
Amendment Bill Part 3	Replace reference to the *Wildlife Conservation Act 1950* (WC Act) with the appropriate equivalent section under the *Biodiversity Conservation Act 2016* (BC Act).	The WC Act has been repealed and replaced by the BC Act.