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4 February 2020

Director General
Department of Water and Environmental Regulation
Locked Bag 10
Joondalup DC WA 6919

email: EPActqueries@dwer.wa.gov.au

Dear Mike,

Water Corporation submission – Modernising the *Environmental Protection Act 1986*

The Water Corporation [the Corporation] welcomes the opportunity to provide comment and suggestions on the "Modernising the Environmental Protection Act" discussion paper [the Discussion Paper] and the associated Exposure Draft Bill [the Bill].

The Corporation is the principal supplier of water, wastewater and drainage services in Western Australia to hundreds of thousands of homes, businesses and farms, as well as providing bulk water to farms for irrigation, and treated wastewater for public open space. Our services, projects and activities span over 2.6 million square kilometres. We have over 3,000 employees and manage an asset base of over $37 billion in water supply, wastewater, drainage infrastructure and bulk water for irrigation across the State. As a result of these operations the *Environmental Protection Act 1986* [the Act] and managing its requirements effectively are central to our ability to safely and securely deliver the services that the community expects.

In 2019 the Corporation refreshed its corporate vision, which is now built on the three key pillars Safety for All, Lowest Total Cost and Lowest Environmental Impact. In all our operations we seek to optimise the outcomes to meet all of these objectives, consistent with the Government's priorities. The actions ensuing from this vision will allow the achievement of the objectives we have set internally, which in turn will be critical in ensuring that the environment is protected, and where possible enhanced, as a result of our operations.

In responding to the discussion paper we have structured our submission in accordance with the structure of the discussion paper for ease of review. Our comments are as follows:

1.1 Background:
The Corporation notes the Background comments and supports this process of review of the Act.

1.2 Policy Drivers
The Corporation notes the policy drivers for this review of the Act and supports the objectives of the review as they are described.

1.3, 1.4 and 1.5 Reform of the Legislation and Development of the Amendments
The Corporation has been involved in several consultative processes with the Department of Water and Environmental Regulation [DWER] and its predecessor agencies in relation to reviewing aspects of the Act. We agree the reasoning for the review is sound.

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2.1 New Areas of Environmental Reform

Bi-Lateral agreements

The bilateral agreements key function is to reduce duplication of environmental assessment and approval processes between the Commonwealth and the State, and the Corporation is supportive of amendments that reduce regulator duplication. As this review proceeds, more detail will be required to understand how the amendments will facilitate the implementation of the bilateral agreement application and assessment processes.

Referral and assessment fees are required under the *Environmental Protection and Biodiversity Conservation Act 1999* [EPBC Act]. Support is provided for the State (under the Act) to also charge fees for processing referrals, undertaking assessments and approving management plans prepared as conditions of approval. Any fees should be stipulated in Regulations that prescribe or provide for the determination of fees payable to the State or a State entity in respect to the requirements to satisfy bilateral matters. It is likely that the bilateral agreements will lead to the Environmental Protection Authority [EPA] undertaking more assessments. Therefore the fees should allow for additional resources to ensure the effectiveness of Environmental Impact Assessment is not compromised.

The proposed amendments will enable the EPA to require proponents to do anything necessary to give effect to a bilateral agreement. It is also noted that the amendments will allow the imposition of fees to be charged for work to ensure bilateral agreements are implemented under Part IV processes in the Act, and under Part V for clearing permits.

- S124D states the Regulations may provide a procedure for applying for a matter to be dealt with under the bilateral agreement. Presumably the Regulations be amended to accommodate this and we look forward to further detail being provided;
- Where an action is to be assessed under a bilateral, referral and assessment fees will not be payable to the Commonwealth. If the Commonwealth becomes involved in the assessment will cost recovery mechanisms apply? (E.g. if the State asks the Commonwealth for advice or to become involved?) S124F (2) implies matters to be dealt with using bilateral agreement procedures may incur greater or additional fees than non-bilateral matters.

The Assessment bilateral allows the Commonwealth to 'accredit' particular State assessment processes and State approval processes. This should, in our view, be beneficial as it aims to remove duplication of assessment and approvals as a separate Commonwealth referral, assessment or approval will not be required for proposed actions that fall under an accredited process.

The Commonwealth and Western Australia have signed a bilateral agreement under the EPBC Act that accredits the native clearing permit assessment processes under Part V Division 2 of the Act. Accreditation under the Agreement allows DWER to assess the impacts of clearing on relevant matters of national environmental significance while undertaking an EP Act clearing permit assessment. The Approval bilateral was released in draft form for public comment but has never been finalised. As such, separate decisions are required to be made (and separate approvals issued) by the State and the Commonwealth, even when a bilateral assessment is undertaken. An approved bilateral agreement would allow the State to approve projects under the EPBC Act and the Corporation supports efforts to progress this Agreement.

The EP Act currently does not provide for the assessment of non-native vegetation by DWER under Western Australia's Bilateral Assessment (e.g. impacts to pine plantations used as Black Cockatoo feeding habitat). As such a separate referral to the Commonwealth and a Clearing Permit application to DWER will need to be submitted for their respective approvals and it is suggested this be considered in this review process.

Implementation of the bilateral should improve collaboration between State and Commonwealth agencies and lead to better data sharing, and these outcomes are supported by the Corporation.

Modernising advertising and publishing requirements

The Corporation supports these proposed amendments.

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Environmental Protection Covenants

The Corporation supports the proposed amendments.

Environmental Monitoring Programs

The Corporation (which is already involved in several similar industry monitoring programs under Part IV of the Act, or voluntarily) supports this amendment, as long as the processes supporting the final legislation clearly allow for entities to only be involved in monitoring programs specifically related to their operations. Further the cost structures involved should be transparent, relate only to the monitoring required, and are fair and reasonable. We look forward to being involved in the future consultation for the development of the Regulations or policies guiding these monitoring programs.

Certified Environmental Practitioners

The Corporation supports this proposed amendment.

2.2 Improvements to Administrative Efficiency

The Corporation supports the proposed amendments to assist in efficient management of processes under the Act.

2.3 Part 1 – Preliminary

The Corporation has no specific comment on this, given the issues are raised in other parts of the Discussion Paper or the Bill.

2.4 Environmental Protection Authority

The Corporation supports these amendments.

2.5 Part III – Environmental Protection Policies [EPPs]

The Corporation understands the complexity of dealing with EPPs in the Act and notes that no amendments are planned at this time. In our view there is still a place for properly constructed and effective EPPs in Western Australia and we look forward to the proposed (separate) review of Part III of the Act.

2.6 Part IV – Environmental Impact Assessment

This is a critical feature of the Act for the Corporation given the number of active and future assessments (and hence Ministerial statements) under Part IV of the Act that we currently operate under, or anticipate operating under in the future. In that light our comments here relate to Section 2.6 of the Discussion Paper collectively, rather than by section heading.

The Corporation notes that no fundamental changes to the Act appear to be proposed here – in our experience that seems appropriate, but as suggested in the Discussion Paper there are many potential improvements to processes that could be undertaken. The Corporation supports the administrative changes that will need to be developed to support the implementation of the bilateral Commonwealth/State Agreement. We support the proposal for uniform language to be used and the requirements to 'publish'.

Within the proposed changes to EIA processes in Part IV we have the following comments:

- We support the EPA being able to declare a referral to be withdrawn if no response received from proponent in a specified period;
- Currently significant proposals can be referred to the EPA by a third party without sufficient information about the proposal. Changes to the Act to allow the proponent to amend a proposal after referral to better define the

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- proposal prior to a decision being made about Level of Assessment (LoA) are supported in addition to the proponent being able to withdraw the proposal if it notifies the EPA that it does not wish to proceed with the proposal;
- S39AB (1) states that if a nominated person ceases to have responsibility for a proposal, that person is to give the Authority written notice advising the name of the person to whom or which responsibility for the proposal will pass or has passed. This will not always be practical, for example, if that person departs the relevant organisation; or becomes deceased; or is in some way unable to give the Authority written notice and these circumstances need to be catered for;
- S39AB (2) and (3) implies that the Authority has the power to nominate a person of their choosing as the person responsible for the proposal, [even if another person has been provided as the person responsible] by a written notice to the Authority. More detail is required regarding how the Authority determines who the responsible person is and if this proposal is intended only for third party referrals?;
- The Corporation supports the proposed clarification that the Minister may direct the EPA to assess or re-assess a proposal after the EPA has decided not to assess and the Minister, having determined an appeal, has upheld the EPA decision. Providing the Minister with this power will provide the capacity to direct the EPA to assess or re-assess based on new information, or failure to consider something in the initial decision;
- Amendment of Section 39A to give the EPA discretion to determine which Decision Making Authorities (DMAs) it will notify of its decision to approve a project is supported. The Corporation supports the proposed change to allow the Minister and DMAs to have regard to outcomes of an appeal under Section 45 of the Act;
- The Corporation supports the intention to improve the definition of strategic assessments, which will ensure alignment with EPBC Act;
- The revocation of implementation agreements, if not substantially commenced by the date specified is supported, as there is no current provision to withdraw or suspend approval if the proponent decides not to proceed with a proposal. In our view proponents should be advised of this proposed action perhaps 28 days in advance to be given the opportunity to seek an extension of time in accord with other provisions of Part IV;
- Section 47A (6) discusses revoking approved proposals once the specified period ends. This is supported, but does there need to be any additional wording to allow a proponent to apply to the Authority in writing to extend the specified period?;
- The Corporation supports the proposed addition of a power to specify the types of implementation conditions that may be imposed - e.g. a power to enter into covenants and impose offsets, including monetary contributions to a fund. As proponents can request changes to Conditions after the Implementation Statement has been issued, but the Minister cannot currently make changes to conditions (other than minor administrative changes), unless the EPA has undertaken an inquiry, this expansion of the scope of minor changes is therefore supported to allow the Minister to change conditions without an EPA inquiry (particularly if the changes have no significant detrimental effect). The Corporation also supports the proposed ability to impose Conditions allowing for the staged implementation of a proposal which would enable different Conditions to apply to different stages of the proposal;
- The proposed change to Section 46 so that only relevant DMAs are consulted is supported;
- The proposed Section 45C amendment to include the Minister being able to require information when a proponent makes a request to change the proposal is supported;
- The Corporation supports streamlining the process for amending a proposal during assessment under Section 43A, and the consequent provision to clarify the process for referral and assessment of a significant amendment;
- The Corporation supports the Minister's power to stop a proposal from 24 hrs to 28 days if there is a non-compliance with implementation of a proposal, so long as the proponent has adequate rights to challenge the suspension;
- The Corporation supports the extension of 28 days for a Level of Assessment decision if not enough information has been provided. This should ensure consistency for referral of proposals;
- Cost recovery does not currently apply in Part IV of the Act. The Corporation supports the head power to allow a fee to be charged to align with the EPBC Act. However the EPA will then need to ensure sufficient resources are available to assess proposals within agreed and reasonable timeframes. It is noted that this is in line with the Government's 'User pays' policy, however there is a need for this to be fair and reasonable and represent the cost of the services provided. Regulations will need to be developed to ensure equity in implementation of this cost recovery model, and the Corporation welcomes consultation on these matters with other stakeholders.

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2.7 Part V- Environmental Regulation

The Corporation understands it is the entity responsible for the largest number of licences under Part V of the Act, and hence has a significant interest and investment in the requirements of Part V of the Act, both for licensing and other regulatory activities. We have addressed our comments in accord with the sub headings in the Discussion Paper.

Clarifying constraints on CEO decision making

The Corporation supports these proposed amendments to clarify process.

Clearing of Native Vegetation

The Corporation supports the thrust of the proposed changes to enable a focus on environmental outcomes, rather than regulatory process, and specifically the proposed changes to the manner in which ESAs are prescribed and made known.

However the Corporation seeks clarification regarding the intention of the proposed amendment to clause 1 of Schedule 6.

Without an accompanying definition it is unclear as to what is the correct reading and interpretation of the new term "prescribed enactment", replacing the term "written law".

Our strict reading of "prescribed enactment" is that only those pieces of legislation listed in the new Schedule 6, or if applicable the Regulations, will be exempt from obtaining a clearing permit. If this reading is correct, the Corporation seeks the inclusion of its broad powers permitting clearing to be added to the list of legislation in Schedule 6, specifically sections 121(1) and 121(4) (b), 130(2) (d), 136(2), 139(2), 141(1) and 163(1) of the Water Services Act 2012. We look forward to the opportunity to discuss this with you further through this review process.

The Corporation supports the changes to allow for satellite imagery to be used in administering these laws relating to native vegetation clearing.

Licences

The Corporation notes the intention to substantially replace Part V Division 3 of the Act and in the process modify and simplify many administrative provisions – generally the proposals in the Bill in this regard are supported.

In respect to the significant changes proposed in the Discussion Paper the Corporation generally supports the move to prescribing activities rather than premises, although the ensuing Regulations will still require some powers to allow for an activity to have "ended" and another activity to have commenced (the definition of sewage used currently in regulation is a case in point and we will comment on that in the "Other Issues" section at the end of this submission). Potentially the most significant impact for the Corporation will be on the reuse of treated wastewater for irrigation of public spaces, largely in co-operation with local government, and the Corporation is currently engaging with DWER on how these activities will be managed in the future. The schemes are important contributions to the (largely) regional communities the irrigation schemes serve and the final resolution of the regulation of them will require the Corporation (and DWER to the extent possible) to manage outcomes effectively for the environment and the communities. This proposal could adversely affect some third party proponents, such as smaller local governments, and the Corporation in the many places where irrigation of public open space is the only, or the preferred, method of disposing of treated wastewater. The Corporation looks forward to the current consultation process continuing while this legislation amendment process is underway.

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The proposed capacity for voluntary Part V licences where an activity does not meet the required threshold is supported, as for smaller operators in particular the requirements of the Act can be quite challenging to navigate. The issue of a licence does offer a form of useful guidance. However with respect to the proposed involuntary requirement for licensing, we believe there should be further clarity with respect to the definition of regulatory categories and relevant thresholds. Proponent need to clearly know when a Licence is required (e.g. will a third party reuse scheme with multiple irrigation areas, each less than 100kL/day meet the regulation threshold considering risk assessment of individual areas, or will it be possible for the irrigation activities of a local government to be regulated collectively?). The review and update of the subordinate environmental regulations will be very important, and the Corporation looks forward to detailed consultation on these issues.

The proposed combining of works approvals and licences into one instrument is supported as an administrative efficiency and legal clarification by removing the current works approval to licence transition. However in the subordinate and administrative processes that will support this legislative initiative the mechanisms for dealing with licence conditions that only relate to design or construction (as opposed to operation) need to be clear so that they can be reconciled and deleted efficiently. Similarly, the requirement for DWER to have regard to planning instruments in deciding whether to grant or refuse an application is supported, as is the proposed change to how wetlands are defined in the Act.

The Corporation also supports the introduction of a defence for clearing to prevent danger to human health, where the clearing takes place in an environmentally sensitive area. In some cases, excavation in the vicinity of Corporation assets may result in nearby trees becoming unstable, which in turn may result in clearing being required at short notice to ensure on-site safety.

With respect to the proposals to ensure persons other than the licensee are required to comply with the relevant licence conditions, while a contractor or employee may commit an offence by failing to comply with the Conditions of the Corporation's licence, the Corporation as licensee will nonetheless still be taken to have contravened the Conditions of a licence. The Discussion Paper (pages 19/20) notes that the level of oversight and responsibility will weigh into the consideration of the alleged offence committed by the entity, but the Act is silent. It is also the case that enforcing some licence Conditions (for example technology choice) will be outside the power of any one person and the drafting of this amendment will need to be considered carefully. The policy on enforcement of offences will need to be reviewed to ensure these factors are taken into account.

The Bill introduces a new terminology "Controlled Work" (Section 52, Page 140) and Controlled Work licence (Section 53A, Page 142) which are broadly defined as follows.

- Controlled work: work at a premises which is designed to enable a prescribed activity that is not currently licenced to be carried out at the premises or;
- work at a premises that is designed to change the way of carrying out a licenced prescribed activity which may cause emission or result in alteration or;
- any other thing that is specified by the regulations as being controlled work for the purposes of this definition (Section 52, Page 140). In the Section 53, Part V of the Bill, the purpose of licence is provided as:
- The licence may be granted to authorise or carry out a controlled work, prescribed activity or deal with an activity that would be a prescribed activity if it reached the threshold for that activity (Section 53, Page 141).

In Section 53 A and B, the Licence for Controlled Work or Prescribed Activity are detailed further, however, the difference of these two licences is not clear. In our view some further clarification of the boundaries between these Licence categories would be beneficial in this review process.

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2.8 Part VI - Enforcement

The proposed amendments to Part VI of the Act appear to be in line with contemporary enforcement practice and are generally supported. The requirements for compensation for significant damage to a property during forced entry need to be clear in policy or administrative instructions, particularly in cases where no alleged offence is actually discovered.

2.9 Part VI A – Legal Proceedings and Penalties

The proposed amendments to Part VI A are generally supported.

2.10 Part VII – Appeals

The Corporation supports the proposed changes to Part VII of the Act dealing with appeals against decisions made under the Act.

2.11 Part VIII – General

The Corporation supports the proposed clarification to Part VIII of the Act to confirm who can initiate prosecutions under all sections of the Act.

2.12 Schedules 1, 5 and 6

The Corporation makes no comment on the proposed increase in penalties available under the Act, but supports the proposal in Schedule 5 to align the definition of "threatened ecological communities" with that existing in the Commonwealth's EPBC Act. We have commented on the proposed changes to Schedule 6 earlier in this submission.

3. Further Issues for consideration

The Corporation raises the following issues for further consideration in this legislative review process, and will be pleased to discuss them further with DWER as is necessary:

1. The regulation of sewage and treated sewage under the Act is creating some complexity for the Corporation as we increasingly move from treatment and disposal operations to higher order treatment systems, and broader reuse options for treated wastewater [the groundwater replenishment scheme [GWR] resourced from the Beenyup Wastewater Treatment Plant is one significant example of this continuing move to higher order wastewater management].
   The current EP Act Licence for the GWR scheme [recycled water recharged into the Leederville and Yarragadee aquifers] deemed the recycled water as an emission and subject to conditions. The treated wastewater used in the GWR has met all drinking water standards at the point of compliance, but the water is still deemed "sewage" under the Act at the point of injection into the aquifer. This treated water is regarded as recycled water at the compliance point, under the *Health Act 2016,* and is conveyed appropriately through pipelines.

   Though the recycled water is treated to drinking water quality, it is regarded as sewage for the purposes of the Act. This has now created an issue for GWR Stage 2 when considering the conveyance pipeline as commissioning differs according to its definition as "drinking water' versus "wastewater". There continues to be ambiguity, and some inconsistency between the EP Act and the Health Act, in respect to how treated wastewater is regarded, and this will become even more important in the future as the Corporation plays its part in the State's water recovery and reuse objectives. Meeting these objectives is designed in large part to

ease the pressure on declining natural sources such as Perth's groundwater, and in the Corporation's view a solution to this definition of treated wastewater which meets higher order standards than sewage is required.

We recognise that this issue is not a matter for the Act itself, but as the EP Act Regulations (and in particular the definitions of prescribed activities and premises are updated) we will be seeking consultation on this issue and a resolution that allows reuse of treated wastewater to be encouraged and facilitated in the future while protecting the environment and human health.

A separate, but for the Corporation related issue, is the reuse of materials such as bio-solids that make a significant contribution to the State's waste minimisation and reduction goals, as well as improving agricultural soils. A recent discussion paper from DWER related to the need for a circular economy, and essentially the "end of waste", which is a significant issue for the Corporation. While that discussion paper related to another legislative process the Environmental Protection Act is a critical component of encouraging waste recovery, reuse and recycling and the Corporation believes that changes to the Act and its subsidiary legislation that allow for flexibility in the reuse of waste, while protecting the environment, should be considered in this legislative process. This should ensure a degree of consistency when the waste legislation is formally considered, and the Corporation will be pleased to discuss this issue more extensively with DWER as is necessary;

2. Because many of the proposed changes to the Act will also require subsidiary Regulations to be amended, it would be useful if draft updated Regulations could be available alongside the Bill in its next iteration. If this is not possible a statement detailing the proposed areas, in DWER's opinion, of the subordinate Regulations that will need alteration would be valuable;

3. there is a typographical error in the proposed definition of "environmental undertaking" on page 9 of the Bill [sub clause (e)]–"protection";

4. the definition of "proposal" on page 13 of the Bill is very broad and could in our view be qualified by some reference to impact, or potential impact, on the environment;

5. the description used in Section 51 DA (4) on page 115 to define clearing that does not require a permit because it is insignificant in nature could be seen as ambiguous. We assume that DWER will develop a policy or guideline to guide the CEO's decisions in this regard once the power is enacted, and the Corporation will be pleased to participate in the consultation on this issue;

6. the Act already provides for strategic proposals to be assessed under Part IV of the Act, but the Corporation sees some value in the Act also including a mechanism for developing strategic proposals, or State wide policies, dealing with complex issues such as emerging contaminants (e.g. PFAS). We recognise the Act, and various subsidiary Regulations, already have some mechanisms for developing and implementing State wide policy, but these emerging contaminant issues in particular are presenting complexities that may require an approach that builds on national guidelines and the like. The Corporation would appreciate the opportunity to advance this discussion with DWER through this process.
7. DWER and the Water Corporation have had some initial discussions in regard to the concept of nutrient trading as an additional mechanism for use in ensuring protection of high priority environmental values and catchments, while allowing resources to be directed efficiently. The addition of a head power to allow this type of environmental initiative would be welcome as it would allow stakeholder discussions to proceed around the regulatory design of such a scheme.
The Corporation will welcome the opportunity to discuss with DWER the potential for an amendment to the Act to allow for nutrient trading to become available as another environmental management tool.

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The Corporation appreciates the opportunity to comment on these proposed legislative amendments to the Act, and will be pleased to engage further on our comments with DWER as proves to be necessary. In the first instance Digby Short, our Manager Environment, will be the officer managing this process and he can be contacted by telephone on 08 9420 2038, or by e mail at digby.short@watercorporation.com.au.

Yours sincerely,

Pat Donovan
Chief Executive Officer