CITY OF Armadale

Our Ref: CD/4309/20
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23/01/2020

Strategy Policy
Environmental Protection Act 1986 amendments
Department of Water Environmental Regulation
Locked Bag 10
**JOONDALUP DC WA 6919**

Dear Sir/Madam,

**RE: Submission on the Proposed Amendments to the Environmental Protection Act**

The City of Armadale (the City) has reviewed the proposed amendments to the Environmental Protection (EP) Act 1986, including the discussion paper and Exposure draft Bill.

In general the City agrees with the need to modernise the EP Act to improve regulatory efficiency and effectiveness. The City supports the majority of the proposed amendments, with specific comments provided against the following amendments in Table 1 attached. Other comments on the further issues for consideration outlined in the discussion paper are provided in Table 2.

If you have any questions in relation to this matter, do not hesitate to contact me on 08 9394 5194 or lrogers@armadale.wa.gov.au.

Yours sincerely

**Kevin Ketterer**
Executive Director Technical Services

*Attachment 1: City of Armadale Comments on proposed Amendments to the EP Act*

***Table 1 – City of Armadale Comments on proposed Amendments to the EP Act***

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| **Bilateral Agreement** | |
| *Improved ability to fully implement bilateral agreement.*<br><br>*Allows for cost recovery associated with bilateral agreements.* | **Supported**, provided environmental standards of both State and Commonwealth Law are maintained such that approved actions do not have unacceptable or unsustainable impacts on Matters of National Environmental Significance or State listed environmental values. |
| **Provide a head of power for certified environmental practitioners** | |
| *Recognition of an accreditation and certification scheme* | **Supported in principle**, providing there is an opportunity for consultation on the development of the certification criteria and the proposed accreditation scheme. |
| **Part II -EPA** | |
| *Allows for the EPA Chairman and members to be appointed either full-time or part-time* | **Not supported**, the complexity and responsibility associated with being EPA Chair should be supported by a dedicated full time position. Members being appointed part-time is supported. |
| **Part III – Environmental Protection Policies** | |
| *No changes proposed at this time. It is proposed that before considering such amendments, there be a review of the effectiveness of this Part, including opportunities for improved practices and recommendations for change.* | A review of effectiveness of existing policies is **supported**, however there is urgent need for environmental policies to provide clarity regarding the Governments position on environmental matters to inform decision making, with for example the protection of wetlands on the Swan Coastal Plain. However the current scope of EPP's is insufficient to achieve this objective. |
| **Part IV – Environmental Impact Assessment** | |
| *The Bill provides that the EPA may take into account the role of other statutory decision-making authorities in regulating the environmental impacts of that proposal.* | **Not supported**, this appears to formalise the approach already taken by the EPA in deferring consideration of environmental matters to a later stage of the planning process. In the City's experience, a non-assessment decision by the EPA is often held up as evidence environmental matters have been addressed. This can also result in unacceptable environmental outcomes because the holistic approach of assessing environmental factors as a whole, and cumulative impacts, can be lost.<br><br>Should this amendment be introduced the City strongly suggests the EPA provide clearer advice on how matters raised in the assessment should be dealt with at later stages, what the expectation for mitigation/management may be, and which agency is responsible for oversight of these matters. |

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| **Implementation decisions for proposals** | |
| *Once an EPA report is received by the Minister, the Minister must consider any appeals made, and then consult with other relevant decision making authorities on whether the proposal should be implemented, and what conditions should be applied.* | **Supported,** provided relevant decision making authorities are appropriate and consistent in regard to similar applications, alternatively the onus could be put on the decision making authorities to make the determination on whether they are relevant or not. This will ensure that no decision making authorities are inadvertently not consulted when they should have been. |
| **Schemes** | |
| *Allows for an extension to the assessment period where the EPA has sought additional information* | **Supported in Part** - The City is generally supportive of timeframes being extended to give a proponent the opportunity to provide additional information if it will assist in their application. The City is however concerned that in some circumstances this could result in a stale mate or delayed assessment.<br><br>For example if the proponent is unable to modify their proposal (due to other constraints i.e. planning constraints), or provide further information, or would simply prefer the application to be assessed based on the information already provided the assessment process could be stalled indefinitely.<br><br>Therefore, it is requested that any changes to the assessment period associated with a request by the for additional information allow for the proponent, particularly Local Governments, to have the option to take the opportunity to provide additional information, or choose to decline to provide additional information and have the application assessed based on information already provided. This would allow for the proponent to weigh up any potential risks of not providing additional information, and make this decision in discussion with EPA officers. |
| **Cost recovery** | |
| *Allows for cost recovery for environmental impact assessment under Part IV of the EP Act* | **Not supported for Local Government**. The City of Armadale would object to fees or charges being imposed for the assessment of referred Schemes or Amendments under s48A for reasons set out as follows:<br>• Local Governments are required by legislation to provide Planning Schemes to govern land use and development and this is a service to the Western Australian community;<br>• Local Governments have limited ability to pass on costs to their constituent community through increases in local Rates taxes and charges; |

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| | • Local Governments are compelled by regulation to review Planning Schemes, prepare a new Scheme or Amendments to an existing Scheme every 5 years which mandates the costs of studies and reports for s48A assessments;<br>• The changes in Amendments or new Schemes are often mandated by State Government changes to Planning Policies/Frameworks or to provide a community benefit;<br>• The User Pays Principle is only appropriate in certain specific circumstances and applying it to the assessment of Local Government Planning Schemes or Amendments under s48A is not appropriate;<br><br>The Regulations and cost modelling referred to in the discussion paper should be cognisant of the above considerations and specifically exclude the cost of State Government Departments assessment of Planning Schemes and Amendments under s48A being passed on to Local Governments.<br><br>The Regulations should acknowledge that Local Government Planning Schemes provide important statutory assessment and approval processes, including for protection of the natural environment for wide public benefit and these are funded directly by Local Governments. |
| **Clearing of Native Vegetation** | |
| *ESAs to be prescribed in the regulations so that required changes can be made separate to section 51B, more efficient process, therefore they will remain more up to date.* | **Supported**, as the ESA's inform regulatory decision making it's important to ensure that ESA mapping is accurate, widely accessible to the public, and is updated on a regular basis in response to new data. Relevant parties should also be informed when ESA mapping is updated. |
| *New criteria (with regard to size of the area, known environmental values, scientific knowledge and whether conditions would be required to manage impacts) to determine whether a proponent needs to apply for a clearing permit.* | **Supported**, provided that decision making agencies have the opportunity to review the criteria proposed to be used to determine if a proponent needs to apply for a clearing permit prior to this process being implemented. Furthermore the criteria should be prescribed in the regulations rather than the Act so that updates can be made more efficiently and easily as required.<br><br>In addition the City has further comments on the clearing assessment process below:<br><br>1. The City of Armadale prides itself on best environmental practice and for this reason is careful to ensure that Native Vegetation Clearing Permit applications are submitted for clearing of all native vegetation that is not exempt under the Schedule 6, or the Regulations. |

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| | It should be noted however that this has resulted in NVCP applications being submitted for very minor clearing that has already been thoroughly assessed by the City's Environmental Department and identified as having minimal impact. For example the removal and translocation of three grass trees, or the removal of a single tree that is considered a risk as assessed by QTRA accredited, but does not meet the requirements to be exempt because of questions over the meaning of "imminent danger" (on advice for DWER). Putting in applications of this nature is a drain on the resources of both the City and DWER.<br><br>It is our understanding that many LG's choose not to submit an application for this sort of clearing, however under the current legislation this option would mean the City is liable for illegal clearing.<br><br>To address the above it is suggested that:<br>• Exemptions be made available to LGs with Environment Teams who can assess minor clearing internally.<br>• Clarity around the wording and intent of exemptions is required as a priority.<br><br>2. The removal of *Typha orientalis* for conservation and/or management purposes has become an unnecessarily challenging and time consuming issue. Therefore it is also requested that a special exemption is included for Local Governments for the removal of *Typha orientalis* for conservation and/or asset management purposes.<br><br>This could be similar to, or an extension of the existing exemption for DBCA under Schedule 6 Clause 3 – which can currently be used by the DBCA to clear *T. orientalis* on DBCA managed land, as part of their role as the managers of lands – in accordance with a management plan, necessary operation or compatible operation (particularly if this management plan was developed prior to *T. orientalis* being reclassified as native to WA).<br><br>This exemption includes volunteers and contractors working on DBCA managed land. This schedule also allows for past custom and practice (i.e. pre-existing removal programs) if the clearing occurs on DBCA managed land.<br><br>For instance, if *T. orientalis* has historically been removed from a site because it is having a negative impact on the biodiversity of the site and/or the flow of water, this practice would be |

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| | considered a necessary operation and would be exempt under Schedule 6 Clause 3 of the EP Act.<br><br>The current requirement is that if an LGA wishes to clear *T. orientalis* in natural environments on land not managed by DBCA, and if a prior approved management plan is not in place, a Clearing Permit will be required.<br><br>An LGA can apply for a strategic Clearing Permit using a fast track approach to cover the annual maintenance of *T. orientalis* within designated waterways/wetlands within the LGA boundaries. The difficulty with this is that DWER still expect the LGA to identify every waterway/wetland within an LGA boundary that they wish this strategic clearing permit to be applied to which requires significant effort. Rather, it should be accepted that LGs with experienced Environment Teams have the knowledge and discretion to determine when *T. orientalis*, should or should not be cleared, and therefore should be provided an exemption to carry out the clearing of *T. orientalis* for conservation and/or asset management purposes, at their discretion.<br><br>3. There should be greater certainty in respect to the expectations of DWER around the clearing of intact vegetation communities in highly cleared landscapes (such as the Swan Coastal Plain and the Wheatbelt).<br><br>Most of the vegetation communities in these regions are under-represented (below 30% of pre-European extent) and should be retained where possible. There currently is a lack of legislative support for the protection of these communities and there should ideally be a provision within the EP Act, or perhaps incorporated in the proposed 'Native Vegetation policy' that states that under-represented vegetation communities in these areas should be retained.<br><br>This would set a clear guide as to what is and is not acceptable at the planning stage, to temper expectations prior to later design and development stages. There should also be provision to retrospectively reclaim intact vegetation where land is already zoned for development, whereby landowners can be compensated by the State for the loss of developable land. |

***Table 2 – City of Armadale Comments on Further Issues for Consideration***

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| **3.1 New Ideas** | |
| *Include new provisions under the EP Act to ban certain products or product classes.* | **No comment** |
| *Resources provided for third party and community participation in environmental impact assessment and environmental regulation.* | **Supported** |
| *DWER administers funds in some areas as a result of approvals under the EP Act but there are no specific head powers or hypothecation of the funds specifically provided for under the EP Act.* | **No comment** |
| **3.2 Delegations** | |
| *Clearly control any delegation of decision-making to non-environmental agencies or officers, to ensue these powers are exercised to protect the environment* | **Supported** |
| **3.3 Role of the Environmental Protection Authority** | |
| *Require EP Act to prepare and publish its policies on environmental impact assessment and environmental protection in a manner consistent with the objects and principles of the Act, and ensure that these published policies are mandatory considerations.* | **Supported** |
| *Part 2 should include eligibility criteria for the appointment of EPA Board members as a schedule to the Act, which is developed following public and professional consultation.* | **Strongly supported** |
| *Remove duplication issues between the EP Act and the Heritage Act 2018. The EPA is not the best entity to assess heritage or culture.* | **Supported** |
| **Environmental Protection Policies** | |
| *Section 33 of the EP Act be amended to require public input into the EPA's advice to the Minister on the revocation of any existing environmental protection policy.* | **Supported** |
| *Parliamentary approval should also be required to validate the Minister's decision as in the case for any new environmental protection policy.* | **No comment** |

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| *Revise Part III to facilitate the broader adoption of environmental protection policies.* | **Supported** |
| **Assessment** | |
| *The EP Act be amended so that the EPA's criteria for determining significance are contained in the body of the Act rather than in the separate administrative procedures.* | **Not supported.** Criteria for significance should be readily adaptive as new information becomes available. |
| *Section 38A of the EP Act be amended to make it mandatory for the EPA to explicitly consider and report on the cumulative impacts of every proposal it receives.* | **Supported** |
| *Section 44(3) be amended to clarify that the government may not request or direct the EPA to alter the content of any of its reports prior to publication.* | **Supported** |
| *A review of section 48A of the EP Act be undertaken, together with an amendment of the regulations requiring the EPA to seek public comment on the content of its assessment of planning schemes.* | **Supported** |
| *The current separation applied to planning schemes in the EP Act should be removed, and these should be subject to Part IV in the same way as other significant proposals.* | **Supported** |
| *A confidential peer review process be introduced as a requirement of the EP Act to assess environmental review documents prepared by proponents, similar to the process used for academic publications, with costs recovered.* | **Strongly supported** |
| *Broader powers for strategic assessments to allow cumulative impacts to be more fully considered and regionally important environmental values protected.* | **Supported** |
| **Decision-making** | |
| *The EP Act be amended to require decisions made under Parts III, IV and V give effect to the objects and principles as contained in section 4A.* | **Supported.** The Act should be amended to improve the weight of consideration afforded to the objects and principle of the Act. Furthermore, the Act should require that approval applications and referrals must address the objects and principles of the Act in documents submitted. |
| *Include statutory criteria for decision-makers to have regard to when making decisions under the EP Act.* | **Supported** |
| *Require all decision-makers under the Act to provide written reasons where requested.* | **Supported** |
| *Add statutory criteria for recommendations by the EPA as to whether a proposal may be implemented.* | **Supported** |

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| *Section 46 of the EP Act be amended to allow the Minister to revoke an environmental approval if new evidence about the potential for significant environmental harm becomes available.* | **Strongly supported** |
| *The power to amend works approvals, licences, land clearing permits or implementation agreements or decisions should be limited to administrative changes. Any substantive changes to such approvals should be subject to robust environmental assessment conditions.* | **Not supported**, occasional minor changes should be allowed provided that the intent remains the same and the change will not result in negative environmental impacts. |
| *Section 44 of the EP Act be amended to require that, wherever possible, the EPA impose clear and objectively verifiable conditions so that compliance can be assessed and monitored using measurable outcomes.* | **Supported** |
| *Clarify how the time limit for implementation of a proposal works.* | **Supported** |
| *Additional post approval administrative powers that could enable multiple Ministerial Statements to be rolled into one, or conversely to split a proposal into two or more Ministerial Statements.* | **Supported** |
| *Clarification in respect to derived proposals, including that they are subject to a Ministerial Statement.* | **Supported** |
| *Clarify revised proposal provisions, including constraints to decision-making and implementation.* | **No comment** |
| *Where the EPA relies on other regulators to achieve its environmental objectives, it must verify and substantiate the level of environmental protection achieved through such third parties. It also must not have the effect of diminishing community and third party participation through reductions in transparency, consultation or appeal rights.* | **Supported** |
| *DWER and EPA to not make decisions or allow activities that are inconsistent with Recovery Plans under the Biodiversity Conservation Act or EPBC Act, or which would result in increasing threat to a listed species or habitat, or increase a threatening process.* | **Strongly agree**. How would this be implemented, and how would this sit within Planning Legislation? i.e. where a proposal was approved prior to development of Recovery Plans or Threatened species listings. |
| **Offsets** | |
| *The EPA's policies and guidelines be amended to regulate and minimise the use of offsets and make explicit the circumstances under which they can be applied.* | **Supported** - if this measure strengthens the argument that proposals that require clearing of TECs and significant habitat are environmentally unacceptable and therefore should not be approved.<br><br>However, if significant environmental values continue to be impacted then offsets remain necessary. In this case, the focus of offsets should be shifted to offsetting the environmental values that are approved to be removed in the local area. This may mean providing resources for revegetation and/or very high standards of management and mechanisms for protection of local |

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| | bushland areas (some of which may already be protected but are degraded, or have minimal resources allocated for management under the care of WAPC or LGs), rather than buying up land for conservation further afield. |
| **Clearing of Native Vegetation** | |
| *The clearing provisions should be moved to a standalone part of the Act to ensure that the specific protection of native vegetation and biodiversity conservation is the focus of regulation (rather than pollution and environmental harm).* | **Supported** |
| *Alternatively, a purpose-specific native vegetation Act could be developed to regulate the clearing of native vegetation and to provide for arrangements relating to carbon farming.* | **No comment** – support or not for this initiative will depend strongly on the detail of any such proposal |
| *Reform of the clearing provisions in Part V and in supporting regulations is necessary to avert continued degradation of native vegetation across the State, particularly in highly cleared areas such as the Wheatbelt and the Perth and Bunbury metropolitan areas.* | **Strongly supported** |
| *Areas of reform should include exemptions, principles and definitions applying to clearing* | **Supported**, particularly the definition of significance. Currently it is too easy for a proponent to argue that a proposal will not have any significant impacts on an environmental value. However for values such as TECS, Threatened Flora, CCWs etc any negative impact should be considered significant no matter how minor, as these values are already, by the definition of being Threatened, significant. |
| **Industry regulation** | |
| *Include a power to license mobile plant and equipment.* | **No comment** |
| **Compliance and enforcement** | |
| *The amended EP Act should require financial assurances to be imposed on all approvals under the EP Act. This is necessary to protect against environmental impacts and to address financial risks to the Government.* | **Supported** |
| *Modernise enforcement options including review of the offences and defences, consideration should be given to introducing civil penalties and civil remedies and the option of third-party enforcement.* | **Supported** |
| *The funding arrangements for the EPA be reviewed to ensure that the auditing and compliance is able to be carried out effectively.* | **Supported.** Including minor infringements and compliance. If these offences can't be effectively investigated and/or audited then there is no point in them being listed? |

| **Appeals** | |
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| *The current structure of Part VII is currently not optimal in terms of clarity and logic, which is in large part due to the initial drafting of this Part and also due to numerous sets of Part VII amendments made from 1994 to 2010. It is recommended that it be restructured to streamline and modernise the format, reduce duplication, and clarify intent.* | **Supported** |
| *Third party appeals should be allowed against decisions to not assess proposals; decisions not to assess schemes, decisions on whether to implement proposals (not only conditions), and decisions on works approvals and licences (not only conditions.* | **Supported** |
| **Additional comments** | |
| *Clearing permit applications should be publicly available.* | **Supported** |
| *Provision for remedial activities and prosecution for polluting activities undertaken on environmentally valuable sites with absent land owners.* | **Supported**<br>For example large scale pollution (rubbish dumping) occurring on privately owned land within the Anstey Keane Dampland Bush Forever Site continues to occur because the land owners are absent and refuse to remove rubbish and undertake remedial action such as installing fencing a) because they didn't dump it there and b) because the land is locked up in acquisition negotiations with the State. |