

# **The EIA assessment process in WA**

## **A Summary**

**Garry Middle**



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# The EIA assessment process in WA - A Summary

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## Forward

In early 2022 I released a third edition of a book which gave a detailed description of environmental impact (EIA) process and practice – “An Introduction to Environmental Impact Assessment: A focus on practice in Western Australia”. The book contained a few chapters that focused specifically on the EIA process in WA.

I also use this book as the key reference for an online course I offer on EIA.

Several participants of that course asked that I produce a separate document that provides a more concise description of the WA EIA process for quick reference. This is that document.

A full description of the process can be found in my book which can be purchased from my website - <http://www.garrymiddle.net/eia-in-wa-book-purchase>

You are welcome to share this document but please reference myself as the author.

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# 1. Introduction

This document is an attempt to provide a basic and minimalist summary of the environmental impacts assessment (EIA) process in WA. A full description of the process can be found in my book (Middle 2022) which can be purchased from my website - <http://www.garrymiddle.net/eia-in-wa-book-purchase>

The relevant sections of the *Environmental Protection Act 1986* (EP Act) are noted in green, along with a description of the relevant process. Key terms are underlined.

The main part of this document is the basic summary, which is 18 pages! And so, I wrote an Appendix which is a 'bare bones' totally minimalist summary, which is still 18 pages.

## 2. General matters

### 2.1 What can be assessed

The legal basis for EIA in WA is contained in Part IV of the EPA Act (Part IV). As well, the *Environmental Impact Assessment Administrative Procedures 2021* (Government of Western Australia 2021) set out the procedures for dealing with referrals and in the assessment of proposals – called the Admin Procedures.

Three types of projects can be assessed under Part IV:

- Proposals;
- Strategic proposals; and
- Planning schemes

Proposals are projects that, once approved, works on the ground can commence and environmental impacts would then occur, for example, a mine or road. This includes significant amendments to approved proposals.

A strategic proposal is a plan or program that contains a number of possible future proposals – for example a regional transport plan that proposes a number of new roads within that region. Environmental impacts only occur once specific proposals within that plan are implemented.

Planning schemes primarily involve Zoning or Reserving land for future uses including proposals, notably subdivision of land and subsequent development, where the environmental impacts occur – i.e. Zoning or Reserving of land has no direct and immediate environmental impacts.

These three types are not always separate – i.e. whilst some proposals are 'stand-alone' without being part of a strategic framework or require specific zoning (e.g. mines) others do have a strategic or planning context. I will try to make sense of all this within the requirements of Part IV.

The EPA will likely assess proposals and schemes that could have significant environmental impacts or a significant environmental effect.

### 2.2 Meaning of the 'environment' including the context for 'social'

The EP Act defines the environment as –

*... **environment**, subject to subsection (2), means living things, their physical, biological and social surroundings, and interactions between all of these;*

S2 refers to 'social surroundings' and defines it as follows:

*In the case of humans, the reference to social surroundings in the definition of environment in subsection (1) is a reference to aesthetic, cultural, economic and other social surroundings to the extent to which they directly affect or are affected by physical or biological surroundings.*

Social surroundings has a narrow meaning - there must be a link between an element of the environment and a social issue.

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## 2.3 Objectives of environmental protection in WA

The EPA usually makes reference to the Objects of the EP Act (s4A) which are to “protect the environment of the State”, having regard to 5 key Principles:

- The precautionary principle,
- The principle of intergenerational equity,
- The principle of the conservation of biological diversity and ecological integrity,
- Principles relating to improved valuation, pricing and incentive mechanisms, and
- The principle of waste minimization.

## 2.4 Factors

S44(2) of the EP Act refers to the 'assessment report' of the EPA where:

*The assessment report must set out —*

*(a) what the Authority considers to be the key environmental factors identified in the course of the assessment; ...*

The EPA recognises 14 environmental factors organised under five themes and has set specific objectives for each factor. These 14 factors and their objectives are shown in Figure 1 below, which is taken from that policy statement.

**Figure 1: EPA Factors and Objectives**

Theme	Factor	Objective
Sea	Benthic communities and habitats	To protect benthic communities and habitats so that biological diversity and ecological integrity are maintained.
	Coastal processes	To maintain the geophysical processes that shape coastal morphology so that the environmental values of the coast are protected.
	Marine environmental quality	To maintain the quality of water, sediment and biota so that environmental values are protected.
	Marine fauna	To protect marine fauna so that biological diversity and ecological integrity are maintained.
Land	Flora and vegetation	To protect flora and vegetation so that biological diversity and ecological integrity are maintained.
	Landforms	To maintain the variety and integrity of distinctive physical landforms so that environmental values are protected.
	Subterranean fauna	To protect subterranean fauna so that biological diversity and ecological integrity are maintained.
	Terrestrial environmental quality	To maintain the quality of land and soils so that environmental values are protected.
	Terrestrial fauna	To protect terrestrial fauna so that biological diversity and ecological integrity are maintained.
Water	Inland waters	To maintain the hydrological regimes and quality of groundwater and surface water so that environmental values are protected.
Air	Air quality	To maintain air quality and minimise emissions so that environmental values are protected.
	Greenhouse gas emissions	To reduce net greenhouse gas emissions in order to minimise the risk of environmental harm associated with climate change.
People	Social surroundings	To protect social surroundings from significant harm.
	Human health	To protect human health from significant harm.

## 2.5 The key agencies

The EPA decides whether a proposal should be subject to formal EIA or not, carries out assessments and controls the EIA process. The EPA is not the decision maker in EIA but provides advice to Minister for the Environment in the form of a publicly available report as to whether a proposal is acceptable or not and, if so, what Environmental Conditions should apply.

The Minister for Environment makes the final decision on the acceptability of proposals subject to EIA and sets Environmental Conditions for the implementation of a proposal if it is to be approved. The Minister also determines most appeals throughout the EIA process.

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The Appeals Convenor investigates and provides advice to the Minister for Environment in respect to a range of appeals, including those in the EIA process. This advice is not binding on the Minister. The Minister determines most of the appeals made under the EP Act.

## 2.6 What is ‘significant’?

The EPA Statement of Environmental Principles, Factors, Objectives and aims of EIA (EPA 2021) lists the following twelve (12) matters that the EPA can consider when considering significant effect, although it is not constrained to these matters:

1. the object and principles of the Act
2. values, sensitivity and quality of the environment which is likely to be impacted
3. all stages and components of the proposal (such as any infrastructure required for the proposal to be practicably implemented, or a proposal life cycle)
4. extent (intensity, duration, magnitude, and geographic footprint) of the likely impacts
5. resilience of the environment to cope with the impacts or change (including considering pressures such as climate change)
6. consequence of the application of the mitigation hierarchy to the proposal
7. consequence of the likely impacts (or change), including off-site impacts (such as impacts on a wetland from chemicals discharged into upstream river systems) and indirect impacts (such as reduced fish harvest due to decreased water quality)
8. likely environmental outcomes, and whether these are consistent with the EPA environmental factor objectives
9. cumulative effects, taking into account cumulative environmental impacts - the successive, incremental and interactive impacts on the environment of a proposal with one or more past, present and reasonably foreseeable future activities
10. holistic impacts – connections and interactions between impacts, and the overall impact of the proposal on the environment as a whole
11. level of confidence in the prediction of residual impacts and the success of proposed mitigation  
Further guidance on the mitigation hierarchy is in the following section
12. public interest about the likely effect of the proposal or scheme, if implemented, on the environment, and relevant public information.

## 2.7 Key steps of WA EIA

The process for EIA in WA contains ten key steps:

1. Referral,
2. Decision to assess/not assess,
3. If assessment, then level of assessment is determined,
4. Formal scoping,
5. Preparation and then release of the environmental review document (ERD),
6. Assessment,
7. Release of the EPA report,
8. Final decision including conditions setting for approved proposals,
9. Follow up, and
10. Post approval changes.



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## 3. Referral process

### 3.1 Stand-alone proposals

These are proposals that have not been covered by an assessed scheme or in an assessed strategic proposal.

S38 requires that certain stand-alone proposals should be referred to the EPA either by

- the proponent (s38(1)) if it is a significant proposal,
- the Minister if there appears to be public concerns about the likely effect of any proposal (38(2)),
- a decision-making authority (DMA) any significant proposal or a proposal of a prescribed class (S38(4)).

There is also a provision for third party referrals: i.e. a member of the public can make a referral to the EPA of a proposal that could have significant environmental impacts (s38(1)).

As well, the EPA can call in a significant proposal (s38A.).

S43(1) and 43.(3AA) allows the Minister to direct the EPA to assess a proposal or assess one more fully, at any time – before, during or after assessment and approval.

### 3.2 Proposals under an assessed strategic proposal

Where a strategic proposal has been assessed and a proposal under that strategic proposal is referred to the EPA, the proponent can ask that that proposal be considered a derived proposal – in effect, that the proposal has already been assessed - s38E.(2).

The EPA can agree to that request, which means it will not require further assessment. This can only be done if (s39E.(4)):

- The assessed strategic proposal identified that specific proposal; and
- That EPA assessment noted that that specific proposal could be implemented subject to conditions.

However, if

- environmental issues raised by the specific proposal were not adequately covered in the assessed strategic proposal,
- significant new relevant information has emerged, or
- the specific proposal has greater negative impacts than as assessed,

then the EPA can still assess that proposal (s39E.(5)). In these cases, the EPA must give written notice of its decision to the proponent (s39E.(8)).

### 3.3 Proposals under assessed schemes

Once a scheme has been referred to the EPA is it considered to be an assessed scheme even if the EPA does not formally assess that scheme.

Proposals under assessed schemes can be referred to the EPA only by the proponent (s38.(2)). However, the responsible authority of that assessed scheme (the WA Planning Commission or a Local Government) can also refer a proposal under an assessed scheme if it

- raises environmental issues not assessed by the EPA when the relevant scheme or amendment was referred to the EPA, or
- does not comply with the environmental conditions of the assessed scheme (s48I (3)).

This section also allows the responsible authority to refuse that proposal without referral to the EPA.

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The EPA can call in a proposal under an assessed scheme if it did not have adequate information about that proposal at the times the scheme was assessed (s38A.(4)), and the Minister retains the ability to refer a proposal under an assessed scheme to the EPA.

### 3.4 Requirements of referrals and EPA requests for further information, including time frames

As part of the referral, the proponent is required to submit sufficient information to enable the EPA to decide on the significance of impacts.

The EPA may request further information from any person relating to the proposal before it makes a decision on whether an assessment is required or not (s38F).

The EPA must make a decision on whether to assess or not assess a proposal within 28 'active' days of referral (s39G(1)); however s38F(3) allows the EPA to wait longer (the 28 day clock can stop and become 'inactive') where insufficient information has been provided to the EPA at the time of referral. The 28-day clock continues once the EPA has sufficient information

Where the EPA request further information it has to be as a written notice called a requisition, and the requisition has to specify a compliance period which is the time period within which that additional information has to be provided (s38F(2)). These requests can be to any person or agency and not just the proponent. The 28 day 'clock' stops for compliance period (s38F.(3)).

If additional information is not received by the end of compliance period, the EPA can declare proposal withdrawn (s.38F.(4)). This also applies to requests to declare a proposal a derived proposal.

### 3.5 Changes to proposals before EPA decision to assess/not assess

The proponent can request that the EPA accept a change to proposal prior to the EPA decision to assess/not assess, but the EPA is not required to accept that change to proposal (s38C).

The proponent can decide to proceed with the proposal as referred or withdraw the proposal and resubmit a fresh proposal for consideration (s.38D).

This section also allows the proponent to withdraw proposals that have been referred to the EPA by a third party.

### 3.6 Validity of referrals

Whilst not specified in the EP Act, the EPA could consider that a referral is not valid. There are two tests of validity:

- Process, and
- Information test.

The validity test considerations are:

- Whether the referrer can refer that proposal, and
- Whether the proposal has previously been referred and does it meet the four criteria in 38B (it has been withdrawn, deemed to have been withdrawn, terminated or the statement has been withdrawn).

The information test consideration includes whether the EPA has sufficient information to consider whether the referral is valid. The EPA can also request more information to help it make that decision. This can apply if that further information is not forthcoming or continues to be insufficient: i.e. it implies that if insufficient information is provided, the EPA can declare a the referral as a non-valid referral.

If the EPA determines that the referral is invalid, it will notify the referrer of this and state the reasons why it is not a valid referral.

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## 4. To assess or not assess

Under s38, the EPA decides, based on information in the referral documentation, and any additional information it receives, if the environmental impacts of a proposal are likely to be so significant as to require EIA – what the EPA calls formal assessment.

Once the EPA has all the information to enable it to make a decision to assess or not assess, it releases that information for a seven-day public review period. During this time, any member of the public can make a submission as to whether the proposal should be assessed, and if so, at what level of assessment.

The decision to assess or not assess is normally delegated to the Chair of the EPA.

S38G.(7) allows the EPA to give non-binding advice for any proposals that are not to be assessed. This advice sets out how the EPA expects that the environmental impacts should be managed.

The EPA is required to advertise all of its decisions in relation to assess or not assess and of assessed the level of assessment. The referral information is also made publicly available.

An appeal right exists at this stage: most decisions to not assess are appealable but a decision to assess is not appealable.

The not assessed decisions that are not appealable are those where the EPA determines that the proposal can be dealt with under Part V Division 2 – i.e. proposals where the only significant environmental issue is clearing of native vegetation (s100(1)(a)).

S38G.(4) allows the EPA to not assess a significant proposal where the EPA:

*In making its decision under subsection (1) the Authority may take into account other statutory decision-making processes that can mitigate the potential impacts of the proposal on the environment.*

This means that the EPA could decide to not assess a proposal it would have normally assessed if another approval process has a statutory decision making process and relevant policies that allows it to adequately deal with those impacts.

## 5. Where assessment is required

### 5.1 Levels of assessment

The level of assessment set on a proposal undergoing EIA depends on its complexity and significance - the more complex the environmental issues and likely impacts associated with a proposal the 'higher' the level of assessment. Public interest is also a consideration – high levels of public interest could lead to a higher level of assessment. The higher the level of assessment, the more time is needed for the community to consider the project and for the EPA to assess it.

The 2021 Procedures Manual notes that the EPA 'usually' sets level of assessment as one of the following 5 levels:

- Assessment based on referral information only, including any additional information obtained during the referral period – no public review;
- Assessment based on referral information and specified additional information required after the decision to assess has been made. Any additional information will be required by a separate notice under s. 40 (2) (a) – no public review;
- Assessment based on referral Information (with or without additional information), i.e. either of the two above but with a public review of that documentation;
- Environmental review – No Public Review. This is where a more detailed environmental review document is required as the level of information being sought is more complex than any of the above three;
- Public Environmental Review. This is where a more detailed environmental review document is required as the level of information being sought is more complex than any of the first three above, and a public review of that document is required.

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## 5.2 The EPA determines the overall assessment process

[S40](#) allows the EPA to determine the form, content, timing and procedure of any environmental review (i.e. the assessment), which involves:

- The level of assessment, including the length of any public review period;
- Formal scoping;
- Preparation and then release of the proponent's environmental review document;
- Requiring the proponent to respond to submissions;
- The EPA assessment; and
- Release of its assessment report.

## 5.3 Initial nomination of decision making authorities (DMAs) and proponent nomination

The EPA decides who the DMAs are at this stage of the process and notifies each ([s.38G\(1\)](#)). There is a difference between a DMA nominated at this stage and a 'key DMA' which are determined at a later stage of the process (see section 9.1). The EPA can add DMAs (by request or by the EPA's own initiation) any time up to when the EPA report on the proposal is given to the Minister.

The EPA is to nominate in writing who the proponent is when it decides to assess a proposal, unless it's a public authority ([s.38H](#)).

## 5.4 Assessment of significant amendments

[S40AA](#) applies where the EPA assesses a significant amendment to an approved proposal. In assessing a significant amendment to an approved proposal the EPA needs to consider both the approved proposal and the amendment ([s.40AA.\(2\)](#)), which means the existing conditions can be inquired into as well ([s.40AA.\(3\)](#)). During the assessment, the existing conditions will still apply - [s.40AA.\(4\)](#). A statement issued after the assessment of the amendment can either only apply to that amendment or to the whole proposal [s.40AA.\(6\)](#).

## 5.5 Termination of assessments

The EPA can terminate an assessment when a proponent informs it in writing that it no longer wishes to proceed with the proposal (not that it doesn't want to proceed with the assessment) -[s.40A.\(1\)\(aa\)](#).

## 5.6 Other decision-making authorities are constrained if a proposal is referred to the EPA

In general, when a proposal is referred to the EPA, any DMA is constrained from approving that proposal until:

- In a case where the EPA has decided to not assess a proposal, when any appeals against that decision have been dismissed or at the end of the 14 day appeal period if no appeals have been lodged; or
- In a case where the EPA was decided to assess a proposal, or where the Minister directs the EPA to assess a proposal, a final approval for that proposal has been given by the Minister and any appeals finalised.

Notwithstanding this [s41\(4\)](#) allows a DMA to approve minor or preliminary work subject to the approval of the EPA and provided those works are insignificant.

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## 6. Scoping - ERDs

Where the level of assessment requires an ERD, the EPA will issue the terms of reference for the preparation of the proponent's environmental review document (ERD) – this is called an Environmental Scoping Document (ESD). The ERD includes the initial list of key environmental factors associated with the proposal as well as the scope of work required to be carried out to address these factors. The EPA prepares all ESDs.

## 7. Release of the environmental review document (ERD)

Once the proponent completes a draft of the ERD, it is sent to the EPA for consideration. The EPA has to approve the release of the ERD. The key considerations here are:

- Has it met the terms of reference?
- Is it technically sound? and
- Is it readable?

Once the EPA is happy with the ERD, it is released for public review for a specified period of time. Free copies are provided to key organisations (community and government) as well as at public libraries, and is made available for download from a website free of charge. Hard copies can be obtained free of cost or purchased for from the proponent for a low cost.

All submissions on the ERD are sent direct to the EPA not the proponent. The EPA may require additional works be carried out at this stage, which could include consideration of additional factors.

At the end of the public review period, officers from the DWER supporting the EPA summarise the key issues raised in the submissions and sends this summary to the proponent. The proponent is offered the chance to respond to the issues raised in the submissions as summarised in the summary document. Most proponents choose to reply to the issues raised in the summary of submissions. The EPA can also require the proponent to respond to any specific submission (S40(6)(b)).

## 8. EPA Assessment

### 8.1 Matter that can be considered

Following the public review period, the EPA may consider information from one or more of the following sources in assessing the proposal:

- (a) Referral,
- (b) Environmental Scoping Document,
- (c) The ERD,
- (d) Issues raised in public submissions or meetings,
- (e) Reports from any public inquiry,
- (f) Advice from relevant government agencies,
- (g) The proponent's commitments, proposed management measures and response to issues,
- (h) Additional information including peer reviews provided by the proponent,
- (i) Expert advice commissioned by the EPA,
- (j) Relevant environmental policies, standards and criteria,
- (k) The EPA's own investigations and expertise, and
- (l) Any other information considered relevant by the EPA.

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The EPA assessment involves determining which of the factors discussed during the process requires detailed examination and assessment: i.e. which factors are potentially 'fatal flaws' or which require substantial management.

## 8.2 Amendments of proposals during assessments

s.43A requires that the proponent refer in writing a request to change the proposal during assessment, and the EPA can accept or reject that request - s43A.(2). If it accepts that request, a re-referral is not required, but the EPA could revisit any earlier parts of the assessment process, which could include re-issuing ESDs and a new public review period.

If the EPA rejects that request, the proponent may choose to withdraw the proposal and then carry out a fresh referral and start the process over again.

## 8.3 The EPA report

The assessment ultimately leads to an EPA report. Under s44, the EPA must prepare a report on:

- (a) The environmental factors relevant to that proposal,
- (b) Whether the proposal should be implemented or not, and
- (c) If the proposal should be implemented, the conditions and procedures, if any, to which any that proposal should be subject.

The EPA report sets out clearly the proposal as assessed by the EPA, which is later captured in the Ministerial Statement.

S44(2AA) allows the EPA to take into account "... other statutory decision-making processes that can mitigate the potential impacts of the proposal on the environment" when deciding on what are the key environmental factors to be included in its assessment report. This means that the EPA can take into account the policies, plans etc. of another decision making process. The EPA could choose to allow that decision making process to deal with a particular impact through its processes and not the environmental approval process. In these cases, the EPA would not recommend that a condition be set to manage any impact, but leave it to that other decision maker to manage any impacts.

The report is made public, but it is written as advice to the Minister. The report can be appealed, and there is a two-week period from the release of the report for any appeals to be received by the Appeals Convenor.

The whole of the EPA report is appealable.

## 8.4 'Other Advice' in EPA's assessment reports

From time to time, the EPA will give 'other advice' on related issues, which is allowed for by S44(2a). This advice is not binding, although is appealable.

## 8.5 Change of proponent

The proponent can, at any time, write and notify of a change of proponent, and the EPA can decide to accept that change but is not required to do so (s.381.(2)). The EPA can also change proponent even if the current nominated proponent has not requested a change in proponent (s.381 (3)).

If the change is to occur after the publishing of a Statement, these powers rest with the Minister (s.381 (4)).

## 9. The final decision-making process

Once the EPA has been released, the role of the EPA has largely concluded, although it will be consulted on any appeals against its report. The final decision making process is a Ministerial process, and the Minister for Environment is required to begin a consultation process with other DMAs.

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## 9.1 Key DMAs

A decision-making authority (DMA) is one who makes a decision that would cause the proposal to proceed or not, or parts of it. A key DMA is one that makes a 'major' decision rather than a minor one. Only a key DMA will be consulted by the Minister in finalising the environmental conditions for a proposal. Any agency that makes a minor decision will not be consulted. [S45 \(2\)](#) gives the Minister power to determine which ministers/agencies are key DMA's and need to be consulted.

## 9.2 The final decision making consultation process

Any approval and conditions is controlled by [s45](#), and the Minister is required to consult and get (if possible) agreement with DMAs using the EPA's report as starting point. [S45A\(1\)](#) sets out what matters can be included in Conditions.

The Conditions will be for the life of a project, although [S46](#) allows for changes to conditions. The Minister issues the final approval in the form of a statement that includes a detailed description of the proposal and the conditions to apply.

[S45](#) makes reference to implementation issues, which are:

- Should the proposal be approved; and
- If approved, what conditions should apply to the proposal.

[s45\(2\)](#) sets out dispute resolution processes where the Minister cannot get agreement with another DMA. If that disagreement is with another Minister, then the Governor (i.e. the Cabinet) decides ([s.45.\(5\)](#)). The Governor's decision is final – no appeals.

If the other DMA is not a Minister, then the Minister must establish an appeals committee to report to the Minister ([s.45. \(6\)](#)). These appeals are treated as if it were an appeal on a Minister's decision, therefore the decision of the appeals committee is final ([s.45. \(7\)](#)).

Whether the decision is to approve or that it may not be implemented, the Minister is required to notify all DMAs, the EPA, the proponent and whoever referred the proposal ([s.45. \(8\) and \(13\)](#)).

Implementation issues cannot be agreed to during the appeal period, and if an appeal against the EPA report is lodged, until those appeals are determined, and any reassessment required as an outcome of an appeal has been completed ([s.45. \(10\)](#)).

If the assessed proposal is a significant amendment and the decision is that it cannot be implemented, the approved proposal is unaffected and can continue to be implemented ([s.45. \(14\)](#)).

In determining any appeal, the Minister can only take into account environmental matters. However, the Minister is not so constrained in determining the final approval.

## 9.3 Content of conditions

[S45A.\(1\)](#) specifies that conditions can be set to cover the following:

- Carrying out environmental protection, abatement or restoration measures on land not part of the proposal as an offset;
- Contribute money to a third party to carry out environmental protection, abatement or restoration measures on land not part of the proposal; and
- Arrange for an environmental protection covenant or other environmental undertakings to be applied by a person who is not the proponent on land not part of the proposal. (

[S45\(9\)](#) is a catch-all in that notwithstanding the types of conditions listed in [45A.\(1\)](#), the EPA can recommend any other type of condition. This section also allows for a proposal to be implemented in stages, and conditions can be set that apply only to specific stages ([s.45A.\(3\)](#)).

This section also allows a condition to be set which requires the collection of fees ([s.45A \(4\)](#)).

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## 9.4 Some standard conditions

The EPA requires a number of standard conditions to apply to all approvals, which are usually the initial conditions in the final statement. They relate to:

- Time Limit for Proposal Implementation – in general, the proponent has to substantially commence the proposal within five years otherwise the approval lapses;
- Compliance reporting – which involves the establishment of a reporting protocol (usually annually) on compliance with the remaining conditions, during construction, operations and closure; and
- Public availability of data – requiring public reporting of compliance reporting and the results of any environmental monitoring required in other conditions.

Compliance reporting, as well as any monitoring, is to be done at the proponent's expense.

## 10. Appeals

[S107](#) deals with appeals for both Part IV (EIA) and Part V.

There are three appeal opportunities throughout the EIA process:

- The EPA decision to not assess a proposal – third party appeals allowed,
- The EPA report and recommendations – third party appeals allowed, and
- The final conditions - only the proponent can appeal these.

In the first two cases, the Appeals Convenor investigates the appeals and reports to the Minister with recommendations. The Minister determines all these the appeals.

In the third case, the appeal is against the Minister's decision, and the Minister is required to establish an appeals committee. The decision of the committee is binding on the Minister.

For appeals on an EPA decision to not assess, the Minister can either:

- Dismiss the appeal,
- Uphold the appeal and require the EPA to assess the proposal, or
- Refer it back to the EPA for it to reconsider that decision to not assess.

For appeals against an EPA report, the Minister can:

- Dismiss the appeals;
- Uphold in part or in full and change the EPA recommendation and any associated condition or procedure; or
- Refer it back to the EPA requiring a full or partial re-assessment related to the matters raised in the appeal.

## 11. Control of implementation of proposals – follow-up

### 11.1 Role of agencies and the Minister

In general, environmental conditions are audited and monitored by DWER (the CEO) for the Minister, and this includes ensuring compliance ([s.48. \(1\) and \(2\)](#)).

In some cases, the implementation of the proposal could also be subject to requirements of another DMA because of a condition, or that another public authority has relevant expertise or functions relevant to a condition. In these cases [s48.\(3\)](#) requires that the proponent is to comply with those requirements of the other DMA or public authority. Also, the DMA or public authority can monitor the compliance ([s48.\(4\)](#)), exercise the powers with respect to non-compliance, and report any non-compliance to the Minister ([s48.\(5\)](#)).



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The Minister can order the implementation of the proposal to stop, and not to resume for a specified period not more than 28 days (s48.(7)(a)). This written notice will also include the steps the proponent needs to take to comply with the conditions and prevent, control, or abate pollution (s48.(7)(b)), or can require other agencies or persons to take steps to require compliance with conditions or prevent, control, or abate pollution (s48.(7)(c)).

If the Minister requires other agencies to take action - (s48.(7)(c)) – the Minister can recover the cost from the proponent (s48.(8)).

The Minister could also determine that the conditions should be changed under s46(c) and s48.(7)(d).

## 11.2 Duties of proponents after Statement finalised

S47.(1) makes it an offence for a proponent to not implement the proposal in accordance with the conditions. However, non-compliance with the condition that sets the date for substantially commencing a proposal is not an offence under the Act (s.47.(2)) – see s47A.

The wording in this section sets out in more details what the CEO can request of the proponent to assessing compliance (s.47.(3)). If the proponent does not comply with the CEO's request 'without a reasonable excuse' the proponent commits an offence (s.47.(4)).

If the implementation decision is that the proposal not be implemented but the proponent proceeds to implement the proposal, the proponent commits an offence (s.47.(5)).

## 12. Changes post approval

### 12.1 Changes to Proposals and Conditions – minor and significant

Sometimes, as part of the implementation of the proposal, the proponent finds it necessary to modify the proposal as assessed by the EPA, or wants to amend the environmental conditions. In most cases, these changes will not lead to any significant changes to the environmental impacts of the proposal and are handled administratively. However, some changes could lead to increased environmental impacts.

S45C combines changes to conditions and proposals into a single process. The proponent is required to seek approval from the Minister for any changes to conditions, changes to a proposal, or both, after the initial approval has been given. That request must be in writing. The Minister can seek additional information from the proponent in support of that request (s45C.(2)), and that request must be in writing.

There are five pathways here:

- The changes are minor and can be approved by the Minister;
- The changes are significant and are refused by the Minister and no further action is taken by the Minister;
- The changes are significant but should be considered as a significant amendment (s38 referral);
- Two options for changes to conditions considered significant and are refused by the Minister - see below.

If the Minister determines that the requested changes are minor, then the Minister can make those changes without referral to the EPA, but the Minister is required to publicly advertise that those changes have been made (s45C.(6)).

The Minister may also make minor changes to correct the description of the proposal (s.45C.(4)) or conditions (s45C.(5)) which either brings it/them into a standardised form or format, or correct errors or omissions without a formal request being made of the Minister by the proponent.

If the Minister determines that the proposed changes are significant then the Minister is prevented from making those changes (s.45C.(3)). In these cases, the Minister must set out the reasons for that decision (s45C.(7)). The proponent has the option of referring those proposed changes to the EPA as a significant amendment of an approved proposal (s.45C.(7)).

If the Minister determines that proposed changes to conditions are significant and decides to refuse that request, the Minister has two options. The Minister can either (s45C.(8)):

- 
- Determine that, in consultation with the relevant DMAs, the requested change is a significant amendment and should be referred to the EPA by the relevant DMA as a significant amendment; or
  - Request the EPA to inquire into this proposed change under s46(1).

Any changes deemed to be a significant amendment to the proposal will be dealt with as a s38 referral and subsequent assessment. If the Minister takes the s46(1) route, then the Minister must specify the length of time the EPA has to report to the Minister. Other than this, the EPA would carry out that inquiry consistent with how it would assess a significant proposal. These EPA reports are not subject to appeal, although the proponent may appeal any amendment to conditions made as a result of the EPA report (s100.(3)).

## 12.2 Splitting or combining proposals and splitting or combining statement

S45D allows the Minister to either split a proposal into separate proposals and have separate statements, or allow more than one proposal and their statements to be combined. It can also be a request under s45C(1). Such a request must meet the minor change test of s45C.

Statements issued under this section supersede the previous statement(s) (s45D.(2) and (3)).

## 12.3 Duration and withdrawal of statements – s47A.

S47A deals with circumstances where a statement can be withdrawn. S47A.(1) requires that a statement continues to have effect unless it has been withdrawn or is taken to have been withdrawn. It applies in circumstances where:

- The CEO determines that a proposal has not substantially commenced within the timeframe specified in a condition (s47A.(2));
- The proponent writes to the Minister and argues that the proposal has been implemented, conditions complied with or no longer have to be complied with (s47A3(a));
- The proponent writes to the Minister and argues that impacts can be mitigated through Part V licencing or other regulatory process (s47A.(3(b))).

Where the above applies, the Minister may withdraw the Statement (s47A.(4)) and this decision needs to be made public (s47A.(6)). The Minister is required to notify all DMAs, the EPA, the proponent and whoever referred the proposal of this decision (s47A.(5)).

If a statement is time limited and that time period expires, the statement is taken to be withdrawn (s47A.(7)). Statements withdrawn or taken to have been withdrawn have no further effect (s47A.(8)).

## 13. Assessment of planning schemes

NOTES:

1. The term 'schemes' is used to refer to whole schemes and amendments to a planning scheme;
2. The *Planning and Development Amendment Act 2020* made changes to both the EP Act and the *Planning and Development Act 2005* (PD Act), but at the time of writing have yet to come into effect. The discussion below will cover both the existing situation and the process once these changes come into effect.

### 13.1 Assessment of Planning Schemes process - overview

The key aspects of this process are:

- As at the time of writing, all scheme amendments need to be referred to the EPA but the 2020 changes to the EP and PD Acts will mean that scheme amendments that do not have any environmental implications do not need to be referred to the EPA (basic schemes);

- 
- The Responsible Authority (RA) is defined as being either the WAPC or the relevant local government under the PD Act;
  - The Responsible Minister (RM) is defined and is the Minister for Planning for assessments under the PD Act;
  - The decision of EPA to not assess a scheme is not appealable;
  - If a scheme is assessed there is only one level of assessment;
  - The EPA issues instructions setting out the terms of reference for the writing of the environmental review document;
  - The environmental review document is advertised along with the Scheme documents;
  - Both Minister for Environment and Planning must agree on any appeals and the final conditions; and
  - The approved scheme must contain the environmental conditions.

## 13.2 Definitions and the introduction of planning ‘codes’

The term ‘planning instrument’ has been added to [s3 \(1\)](#) of the EP Act and includes:

- (a) a scheme or a strategy, policy or plan made or adopted under a scheme; or
- (b) a State planning policy approved under the Planning and Development Act 2005 section 29 and published in the Gazette;
- (c) planning code means a planning code prepared under the Planning and Development Act 2005 Part 3A; or
- (c) a local planning strategy made under the Planning and Development Act 2005.

The *Planning and Development Amendment Act 2020* introduced a new planning mechanism called a Code, the first and only one to date is the R Codes.

It is intended that Codes will be ‘read into a scheme’ which means they will become part of a local planning scheme. Codes can be assessed by the EPA.

## 13.3 Referral of schemes and codes

The requirements for referral of schemes to the EPA is not covered by the EP Act but by the relevant scheme Act, mostly the PD Act.

[s48AAA](#) of the PD Act allow the EPA to draft Regulations, to be approved by the Governor, prescribing classes of planning scheme and amendments that do not need to be referred to the EPA. The section refers to “schemes that are not required to be assessed” by the EPA, which, in effect, this means not requiring referral.

[S \(1\)](#) of the EP Act has also been amended to define an assessed scheme to include those schemes covered by the above Regulations – i.e. all schemes whether referred to the EPA or not will be deemed to be assessed schemes.

[S48AAB](#) of the PD Act allows the EPA to draft Regulations, to be approved by the Governor, prescribing classes of planning Codes and amendments that do not need to be referred to the EPA.

The existing EP Act requires the EPA to make a decision on whether to assess or not assess a scheme within 28 days, with no provisions to ‘stop the clock’ should the EPA not have enough information to make this decision. The changes to the Act will have a new provision that allows the 28 day clock to stop for referred schemes if the EPA requires more information. This section defines the 28 day clock as the information period.

[S48BA.\(3\)](#) would allow the EPA to requisition any person or agency to provide it with additional information within a specific compliance period. The compliance period or the time taken to provide that information is not included in the 28 day information period.

Interestingly, the Act is silent on what the EPA is do if after the expiry of the compliance period the additional information has not been received.

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## 13.4 Decision to assess or not assess a referred scheme

The EPA has four choices for referred schemes:

- Not assess not advice given;
- Not assess, advice given;
- Assess, Environmental review required; or
- Scheme is environmentally unacceptable. (S48A.(1)(c))

If the EPA determines that a scheme is environmentally unacceptable the Minister can either:

- Require the EPA to assess the scheme (48A.(2)(a)); or
- With the agreement of the RM and any other relevant DMA agree with the EPA (48A.(2)(b)).

If the Minister cannot get agreement on this matter, then the matter is referred to the Governor (in effect the Cabinet) for a final decision (not appealable) (48.J).

The decision of the EPA to not assess a scheme is not appealable, however the Minister can direct the EPA to assess a scheme that the EPA had decided to not assess (S48E.(1)).

## 13.5 Assessment procedure

Where a scheme is being assessed, a similar process as for the assessment of proposals is applied, with some differences.

If an ERD is required the EPA issues 'instructions' for its preparation (equivalent to an ESD for proposals) – S48C. (1) (a). The EPA has 60 days from the date of referral to issue the instructions ((48A.(1)(b)).

Depending on the relevant scheme Act, the EPA can determine the timing and procedure (including length of the review period) (48C.(3)), or where the PD Act provides for a public review of the scheme, the environmental review document is to be incorporated into the scheme documents and is to be advertised at the same time that the proposed scheme is advertised (48C.(6)). In these latter cases, the public review period is determined by the statutory requirements for the advertising of proposed schemes under that PD Act.

The ERD needs to be made available to the public the same way that an environmental review document is required for proposals, and is the responsibility of the RA.

Submissions on the environmental review document go to the RA not the EPA – requirement of the relevant scheme Act - and the RA must then send these and its response to the environmental issues raised in the submissions to the EPA.

S48D(1) sets a time limit on when the EPA is to report to the Minister – 60 days after the end of the public review period or 30 days after receiving the RA's response to submissions, whichever is the longer (48D.(1)). Interestingly, S48D(2) allows the Minister to require the EPA to report to him/her at any time, including a shorter period of time, but the Minister must first consult with the EPA and also get agreement from the RM. The EPA report is subject to the same appeal rights as its report on proposals. In addition, the Minister can direct the EPA to re-assess or more fully assess a scheme provided the Responsible Minister also agrees.

The changes to the Act will allow the EPA to find a scheme environmentally unacceptable after its assessment, which is not currently the case. S48D.(1)(d) will be modified to include "the Authority's recommendations as to whether or not that scheme may be implemented..."

## 13.6 The decision-making process – agreeing on the Conditions

The Minister is only required to get agreement on the environmental conditions with the RM – usually Planning – but would normally consult with the RA (48F.(1)). Whilst there are no appeals allowed against the agreed conditions, the RA can request the RM to initiate a review of the conditions prior to them being finalised (48.G(1)). If the RM agrees with this request, that Minister and the Minister for Environment need to agree on any changes (48.G(2)).

If the two Minister cannot reach agreement on the Conditions, then the Governor (i.e. Cabinet) will decide.

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## 13.7 Implementation of the conditions

The RA is responsible for ensuring subsequent proposals comply with the environmental conditions and are required to monitor (or cause to be monitored) the implementation of the assessed scheme's conditions (48H).

The term 'implementation issue' will be used when the changes to the EP Act are made and will refer to the question as to whether or not the scheme can be implemented and, if so, what conditions and procedures are to apply.

## 13.8 Proposals under assessed schemes

Proposals under assessed schemes cannot not be assessed by or referred to the EPA, unless certain circumstances apply. These are described in Section 3.3 above.

## 13.9 Removal of relevant decision making authority - 48A, 48F and 48G.

S48A will be changed to remove the need for the EPA to inform 'any relevant decision making authority' of its decision to assess a scheme. Only the RA need be informed (48A.(1)). Similarly, if the EPA finds a scheme to be environmentally unacceptable and the Minister agrees, the Minister no longer needs to notify any relevant DMAs (48A.(2)).

## 14. Assessment of strategic proposals

### 14.1 The process

S37B(2) of the EP Act defines a strategic proposal as one:

... the extent to which it identifies —

- a) a future proposal that will be a significant proposal; or
- b) future proposals likely, if implemented in combination with each other, to have a significant effect on the environment.

Unlike significant proposals where any person is able to make a referral to the EPA, only the proponent of a strategic proposal can refer it to the EPA (S38.(7)) – i.e. there is no requirement to refer a significant proposal to the EPA, and there are no third party referral rights either.

Once a strategic proposal is referred to the EPA, the EPA can choose to not assess it, not assess it and provide non-binding advice, or formally assess it. If the EPA decides to assess a strategic proposal, the proponent is not constrained in its implementation – i.e. they can proceed to finalise the strategic proposal but cannot implement the proposals that make up the strategic proposal.

The assessment process for strategic proposals is the same as for other proposal assessments as described above.

### 14.2 Final approval and condition setting of assessed strategic proposals

Conditions set as part of a strategic proposal set constraints on the implementation of proposal that form part of that strategic proposal, and can include:

- Identifying any derived proposal that is environmentally unacceptable;
- If options are included, which option(s) are preferred from an environmental perspective;
- Specify the limits on acceptable impacts of individual derived proposals;
- Set limits on acceptable cumulative environmental impacts for all derived proposals;
- Set out a long-term strategic approach to offsetting; and

- 
- Specify the nature of EMPs required for each derived proposal.

The full implementation of an assessed program may take many years, during which time EPA policy on key factors/issues may change. As noted above, [38E.\(5\)](#) allows the EPA to assess a derived proposal that complies with the conditions set at the times of the strategic assessment where an EPA policy changes, and the derived proposal is inconsistent with that change in policy.

### 14.3 Proposals under assessed strategic proposals

As noted in Section 3.2 above, proposals that are part of a strategic assessment can be considered as derived and not subject to further assessment by the EPA.

The assessment process for proposals not considered to be derived is the same as for other proposal assessments, but would be limited to those new issues and/or information.

## 15. The use of Section 16(e) as SEA

The EPA can use [s16\(e\)](#) of the EP Act to give non-binding advice on a range of matters, especially certain plans and schemes. [S16 \(e\)](#) allows the EPA to

*... advise the Minister on environmental matters generally and on any matter which he may refer to it for advice ...*

The EPA does this as a publicly available report. This allows the EPA to give either overall policy advice on a particular matter, or early advice to another decision-making authority on what are the key environmental issues.

## 16. References

EPA (2021). Statement of Environmental Principles, Factors, Objectives and aims of EIA. Perth, Western Australia, Environmental Protection Authority.

Government of Western Australia (2021). The Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2021. Government Gazette, WA, Government Printer: 475–4819.

Middle, G. (2022). [An Introduction to Environmental Impact Assessment: A focus on practice in Western Australia](#). Perth, Western Australia, VisionEnvironment.

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## Appendix – the bare bones

### Three types of projects can be assessed under Part IV:

- Proposals - projects;
- Strategic proposals – plans etc. made up of projects; and
- Planning schemes – for zoning and reservation of land.

The EPA will likely assess proposals and schemes that could have significant environmental impacts or a significant environmental effect.

The EPA Statement of Environmental Principles, Factors, Objectives and aims of EIA (EPA 2021) lists twelve (12) matters that the EPA can consider when considering significant effect, although it is not constrained to these matters.

The EPA recognises 14 environmental factors as the broad assessment framework which are organised under five themes and has set specific objectives for each factor.

The EPA decides whether a proposal should be subject to formal EIA or not, carries out assessments and controls the EIA process.

The Minister for Environment makes the final decision on the acceptability of proposals subject to EIA and sets Environmental Conditions for the implementation of a proposal if it is to be approved. The Minister determines most of the appeals made under the EP Act.

The Appeals Convenor investigates and provides advice to the Minister for Environment in respect to a range of appeals, including those in the EIA process. This advice is not binding on the Minister.

The process for EIA in WA contains ten key steps:

1. Referral,
2. Decision to assess/not assess,
3. If assessment, then level of assessment is determined,
4. Formal scoping,
5. Preparation and then release of the environmental review document (ERD),
6. Assessment,
7. Release of the EPA report,
8. Final decision including conditions setting for approved proposals,
9. Follow up, and
10. Post approval changes.

### Referrals

**S38** requires that certain stand-alone proposals should be referred to the EPA either by

- the proponent (**s38(1)**) if it is a significant proposal,
- the Minister if there appears to be public concerns about the likely effect of any proposal (**38(2)**),
- a decision-making authority (DMA) any significant proposal or a proposal of a prescribed class (**S38(4)**).

There is also a provision for third party referrals: i.e. a member of the public can make a referral to the EPA of a proposal that could have significant environmental impacts (**s38(1)**).

As well, the EPA can call in a significant proposal (**s38A.**).

**S43(1) and 43.(3AA)** allows the Minister to direct the EPA to assess a proposal or assess one more fully, at any time – before, during or after assessment and approval.

### Proposals under an assessed strategic proposal

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Where a strategic proposal has been assessed and a proposal under that strategic proposal is referred to the EPA, the proponent can ask that that proposal be considered a derived proposal – in effect, that the proposal has already been assessed - s38E.(2).

The EPA can agree to that request, which means it will not require further assessment. This can only be done if (s39E.(4)):

- The assessed strategic proposal identified that specific proposal; and
- That EPA assessment noted that that specific proposal could be implemented subject to conditions.

However, if

- environmental issues raised by the specific proposal were not adequately covered in the assessed strategic proposal,
- significant new relevant information has emerged, or
- the specific proposal has greater negative impacts than as assessed,

then the EPA can still assess that proposal (s39E.(5)). In these cases, the EPA must give written notice of its decision to the proponent (s39E.(8)).

#### Proposals under assessed schemes

Once a scheme has been referred to the EPA is it considered to be an assessed scheme even if the EPA does not formally assess that scheme.

Proposals under assessed schemes can be referred to the EPA only by the proponent (s38.(2)). However, the responsible authority of that assessed scheme (the WA Planning Commission or a Local Government) can also refer a proposal under an assessed scheme if it

- raises environmental issues not assessed by the EPA when the relevant scheme or amendment was referred to the EPA, or
- does not comply with the environmental conditions of the assessed scheme (s48I (3)).

This section also allows the responsible authority to refuse that proposal without referral to the EPA.

The EPA can call in a proposal under an assessed scheme if it did not have adequate information about that proposal at the times the scheme was assessed (s38A.(4)), and the Minister retains the ability to refer a proposal under an assessed scheme to the EPA.

#### Requirements of referrals and EPA requests for further information, including time frames

The EPA may request further information from any person relating to the proposal before it makes a decision on whether an assessment is required or not (s38F).

The EPA must make a decision on whether to assess or not assess a proposal within 28 'active' days of referral (s39G(1)): however s38F(3) allows the EPA to wait longer (the 28 day clock can stop and become 'inactive') where insufficient information has been provided to the EPA at the time of referral. The 28-day clock continues once the EPA has sufficient information

Where the EPA request further information it has to be as a written notice called a requisition, and the requisition has to specify a compliance period which is the time period within which that additional information has to be provided (s38F(2)). These requests can be to any person or agency and not just the proponent. The 28 day 'clock' stops for compliance period (s38F.(3)).

If additional information is not received by the end of compliance period, the EPA can declare proposal withdrawn (s.38F.(4)). This also applies to requests to declare a proposal a derived proposal.

#### Changes to proposals before EPA decision to assess/not assess

The proponent can request that the EPA accept a change to proposal prior to the EPA decision to assess/not assess, but the EPA is not required to accept that change to proposal (s38C).

The proponent can decide to proceed with the proposal as referred or withdraw the proposal and resubmit a fresh proposal for consideration (s.38D).

This section also allows the proponent to withdraw proposals that have been referred to the EPA by a third party.



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### Validity of referrals

The EPA could consider that a referral is not valid. There are two tests of validity:

- Process, and
- Information test.

The validity test considerations are:

- Whether the referrer can refer that proposal, and
- Whether the proposal has previously been referred.

The EPA can also request more information to help it make that decision.

### To assess or not assess

Under s38, the EPA decides if the environmental impacts of a proposal are likely to be so significant as to require EIA – what the EPA calls formal assessment.

Once the EPA has all the information to enable it to make a decision to assess or not assess, it releases that information for a seven-day public review period.

The decision to assess or not assess is normally delegated to the Chair of the EPA.

S38G.(7) allows the EPA to give non-binding advice for any proposals that are not to be assessed.

The EPA is required to advertise all of its decisions in relation to assess or not assess and of assessed the level of assessment. The referral information is also made publicly available.

An appeal right exists at this stage: most decisions to not assess are appealable but a decision to assess is not appealable.

The not assessed decisions that are not appealable are those where the EPA determines that the proposal can be dealt with under Part V Division 2 – i.e. proposals where the only significant environmental issue is clearing of native vegetation (s100(1)(a)).

S38G.(4) allows the EPA to not assess a significant proposal where the EPA believes that if another approval process has a statutory decision making process and relevant policies that allows it to adequately deal with those impacts

### Levels of assessment

The level of assessment set on a proposal undergoing EIA depends on its complexity and significance - the more complex the environmental issues and likely impacts associated with a proposal and the higher the level of public interest the 'higher' the level of assessment.

The 2021 Procedures Manual notes that the EPA 'usually' sets level of assessment as one of 5 levels

- Assessment based on referral information only, including any additional information obtained during the referral period – no public review;
- Assessment based on referral information and specified additional information required after the decision to assess has been made. Any additional information will be required by a separate notice under s. 40 (2) (a) – no public review;
- Assessment based on referral information (with or without additional information), i.e. either of the two above but with a public review of that documentation;
- Environmental review – No Public Review. This is where a more detailed environmental review document is required as the level of information being sought is more complex than any of the above three;
- Public Environmental Review. This is where a more detailed environmental review document is required as the level of information being sought is more complex than any of the first three above, and a public review of that document is required.

### The EPA determines the overall assessment process

S40 allows the EPA to determine the form, content, timing and procedure of any environmental review (i.e. the assessment).

### Initial nomination of decision making authorities (DMAs) and proponent nomination

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The EPA decides who the DMAs are at this stage of the process and notifies each (s.38G(1)). There is a difference between a DMA nominated at this stage and a 'key DMA' which are determined at a later stage of the process.

The EPA is to nominate in writing who the proponent is when it decides to assess a proposal, unless it's a public authority (s.38H).

#### Assessment of significant amendments

S40AA applies where the EPA assesses a significant amendment to an approved proposal. In assessing a significant amendment to an approved proposal the EPA needs to consider both the approved proposal and the amendment (s.40AA.(2)), which means the existing conditions can be inquired into as well (s.40AA.(3)). During the assessment, the existing conditions will still apply - s.40AA.(4). A statement issued after the assessment of the amendment can either only apply to that amendment or to the whole proposal s.40AA.(6).

#### Termination of assessments

The EPA can terminate an assessment when a proponent informs it in writing that it no longer wishes to proceed with the proposal (not that it doesn't want to proceed with the assessment) -s.40A.(1)(aa).

#### Other decision-making authorities are constrained if a proposal is referred to the EPA

In general, when a proposal is referred to the EPA, any DMA is constrained from approving that proposal until the assessment process is completed including any appeals.

Notwithstanding this s41(4) allows a DMA to approve minor or preliminary work subject to the approval of the EPA and provided those works are insignificant.

#### Scoping - ERDs

Where the level of assessment requires an ERD, the EPA will issue the terms of reference for the preparation of the proponent's environmental review document (ERD) – this is called an Environmental Scoping Document (ESD). The ERD includes the initial list of key environmental factors associated with the proposal as well as the scope of work required to be carried out to address these factors. The EPA prepares all ESDs.

#### Release of the environmental review document (ERD)

Once the proponent completes a draft of the ERD, it is sent to the EPA for consideration. The EPA has to approve the release of the ERD.

Once the EPA is happy with the ERD, it is released for public review for a specified period of time. Free copies are provided to key organisations (community and government) as well as at public libraries.

All submissions on the ERD are sent direct to the EPA not the proponent.

The EPA may require additional works be carried out at this stage, which could include consideration of additional factors.

At the end of the public review period, officers from the DWER supporting the EPA summarise the key issues raised in the submissions and sends this summary to the proponent. The proponent is offered the chance to respond to the issues raised in the submissions as summarised in the summary document.

The EPA can also require the proponent to respond to any specific submission (S40(6)(b)).

#### Matter that can be considered in an EPA assessment

Following the public review period, the EPA may consider information from a range of sources including the ERD and any extra information it has sought during the assessment.

The EPA assessment involves determining which of the factors discussed during the process requires detailed examination and assessment: i.e. which factors are potentially 'fatal flaws' or which require substantial management.

#### Amendments of proposals during assessments

s.43A requires that the proponent refer in writing a request to change the proposal during assessment, and the EPA can accept or reject that request - s43A.(2). If it accepts that request, a re-referral is not required, but the EPA could revisit any earlier parts of the assessment process, which could include re-issuing ESDs and a new public review period.

If the EPA rejects that request, the proponent may choose to withdraw the proposal and then carry out a fresh referral and start the process over again.

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## The EPA report

The assessment ultimately leads to an EPA report. Under s44, the EPA must prepare a report on:

- (d) The environmental factors relevant to that proposal,
- (e) Whether the proposal should be implemented or not, and
- (f) If the proposal should be implemented, the conditions and procedures, if any, to which any that proposal should be subject.

S44(2AA) allows the EPA to take into account "... other statutory decision-making processes that can mitigate the potential impacts of the proposal on the environment" when deciding on what are the key environmental factors to be included in its assessment report. This means that the EPA can take into account the policies, plans etc. of another decision making process for a particular impact and not recommend that a condition be set to manage any impact.

The report is made public, but it is written as advice to the Minister. The report can be appealed, and there is a two-week period from the release of the report for any appeals to be received by the Appeals Convenor.

### 'Other Advice' in EPA's assessment reports

From time to time, the EPA will give 'other advice' on related issues, which is allowed for by S44(2a). This advice is not binding, although is appealable.

### Change of proponent

The proponent can, at any time, write and notify of a change of proponent, and the EPA can decide to accept that change but is not required to do so (s.381.(2)). The EPA can also change proponent even if the current nominated proponent has not requested a change in proponent (s.381 (3)).

If the change is to occur after the publishing of a Statement, these powers rest with the Minister (s.381 (4)).

### The final decision-making process

Once the EPA has been released, the role of the EPA has largely concluded. The final decision-making process is a Ministerial process, and the Minister for Environment is required to begin a consultation process with other DMAs.

### Key DMAs

A key DMA is one that makes a 'major' decision rather than a minor one. Only a key DMA will be consulted by the Minister in finalising the environmental conditions for a proposal. S45 (2) gives the Minister power to determine which ministers/agencies are key DMA's and need to be consulted.

### The final decision-making consultation process

Any approval and conditions are controlled by s45, and the Minister is required to consult and get (if possible) agreement with DMAs using the EPA's report as starting point.

The Minister issues the final approval in the form of a statement that includes a detailed description of the proposal and the conditions to apply.

S45 makes reference to implementation issues, which are:

- Should the proposal be approved; and
- If approved, what conditions should apply to the proposal.

s45(2) sets out dispute resolution processes where the Minister cannot get agreement with another DMA. If that disagreement is with another Minister, then the Governor (i.e. the Cabinet) decides (s.45.(5)). The Governor's decision is final – no appeals.

If the other DMA is not a Minister, then the Minister must establish an appeals committee to report to the Minister (s.45. (6)). These appeals are treated as if it were an appeal on a Minister's decision, therefore the decision of the appeals committee is final (s.45. (7)).

Whether the decision is to approve or that it may not be implemented, the Minister is required to notify all DMAs, the EPA, the proponent and whoever referred the proposal (s.45. (8) and (13)).

Implementation issues cannot be agreed to during the appeal period, and if an appeal against the EPA report is lodged, until those appeals are determined, and any reassessment required as an outcome of an appeal has been completed (s.45. (10)).

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If the assessed proposal is a significant amendment and the decision is that it cannot be implemented, the approved proposal is unaffected and can continue to be **implemented (s.45. (14))**.

In determining any appeal, the Minister can only take into account environmental matters. However, the Minister is not so constrained in determining the final approval.

#### Content of conditions

**S45A.(1)** specifies that conditions can be set to cover the following:

- Carrying out environmental protection, abatement or restoration measures on land not part of the proposal as an offset;
- Contribute money to a third party to carry out environmental protection, abatement or restoration measures on land not part of the proposal; and
- Arrange for an environmental protection covenant or other environmental undertakings to be applied by a person who is not the proponent on land not part of the proposal. (

**S45(9)** is a catch-all in that notwithstanding the types of conditions listed in **45A.(1)**, the EPA can recommend any other type of condition. This section also allows for a proposal to be implemented in stages, and conditions can be set that apply only to specific stages (**s.45A.(3)**).

This section also allows a condition to be set which requires the collection of fees (**s.45A (4)**).

#### Some standard conditions

The EPA requires a number of standard conditions to apply to all approvals, which are usually the initial conditions in the final statement. They relate to:

- Time Limit for Proposal Implementation;
- Compliance reporting; and
- Public availability of data.

Compliance reporting, as well as any monitoring, is to be done at the proponent's expense.

#### Appeals

**S107** deals with appeals for both Part IV (EIA) and Part V.

There are three appeal opportunities throughout the EIA process:

- The EPA decision to not assess a proposal – third party appeals allowed,
- The EPA report and recommendations – third party appeals allowed, and
- The final conditions - only the proponent can appeal these.

In the first two cases, the Appeals Convenor investigates the appeals and reports to the Minister with recommendations. The Minister determines all these the appeals.

In the third case, the appeal is against the Minister's decision, and the Minister is required to establish an appeals committee. The decision of the committee is binding on the Minister.

For appeals on an EPA decision to not assess, the Minister can either:

- Dismiss the appeal,
- Uphold the appeal and require the EPA to assess the proposal, or
- Refer it back to the EPA for it to reconsider that decision to not assess.

For appeals against an EPA report, the Minister can:

- Dismiss the appeals;
- Uphold in part or in full and change the EPA recommendation and any associated condition or procedure; or
- Refer it back to the EPA requiring a full or partial re-assessment related to the matters raised in the appeal.

#### Control of implementation of proposals – follow-up - Role of agencies and the Minister

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In general, environmental conditions are audited and monitored by DWER (the CEO) for the Minister, and this includes ensuring compliance (s.48. (1) and (2)).

In some cases, the implementation of the proposal could also be subject to requirements of another DMA because of a condition, or that another public authority has relevant expertise or functions relevant to a condition. In these cases s48.(3) requires that the proponent is to comply with those requirements of the other DMA or public authority. Also, the DMA or public authority can monitor the compliance (s48.(4)), exercise the powers with respect to non-compliance, and report any non-compliance to the Minister (s48.(5)).

The Minister can order the implementation of the proposal to stop, and not to resume for a specified period not more than 28 days (s48.(7)(a)). This written notice will also include the steps the proponent needs to take to comply with the conditions and prevent, control, or abate pollution (s48.(7)(b)), or can require other agencies or persons to take steps to require compliance with conditions or prevent, control, or abate pollution (s48.(7)(c)).

If the Minister requires other agencies to take action - (s48.(7)(c)) – the Minister can recover the cost from the proponent (s48.(8)).

The Minister could also determine that the conditions should be changed under s46(c) and s48.(7)(d).

#### Duties of proponents after Statement finalised

S47.(1) makes it an offence for a proponent to not implement the proposal in accordance with the conditions. However, non-compliance with the condition that sets the date for substantially commencing a proposal is not an offence under the Act (s.47.(2)) – see s47A.

The wording in this section sets out in more details what the CEO can request of the proponent to assessing compliance (s.47.(3)). If the proponent does not comply with the CEO's request 'without a reasonable excuse' the proponent commits an offence (s.47.(4)).

If the implementation decision is that the proposal not be implemented but the proponent proceeds to implement the proposal, the proponent commits an offence (s.47.(5)).

#### Changes to Proposals and Conditions – minor and significant

S45C combines changes to conditions and proposals into a single process. The proponent is required to seek approval from the Minister for any changes to conditions, changes to a proposal, or both, after the initial approval has been given. That request must be in writing. The Minister can seek additional information from the proponent in support of that request (s45C.(2)), and that request must be in writing.

If the Minister determines that the requested changes are minor, then the Minister can make those changes without referral to the EPA, but the Minister is required to publicly advertise that those changes have been made (s45C.(6)).

The Minister may also make minor changes to correct the description of the proposal (s.45C.(4)) or conditions (s45C.(5)) which either brings it/them into a standardised form or format, or correct errors or omissions without a formal request being made of the Minister by the proponent.

If the Minister determines that the proposed changes are significant then the Minister is prevented from making those changes (s.45C.(3)). In these cases, the Minister must set out the reasons for that decision (s45C.(7)). The proponent has the option of referring those proposed changes to the EPA as a significant amendment of an approved proposal (s.45C.(7)).

If the Minister determines that proposed changes to conditions are significant and decides to refuse that request, the Minister has two options. The Minister can either (s45C.(8)):

- Determine that, in consultation with the relevant DMAs, the requested change is a significant amendment and should be referred to the EPA by the relevant DMA as a significant amendment; or
- Request the EPA to inquire into this proposed change under s46(1).

Any changes deemed to be a significant amendment to the proposal will be dealt with as a s38 referral and subsequent assessment. If the Minister takes the s46(1) route, then the Minister must specify the length of time the EPA has to report to the Minister. Other than this, the EPA would carry out that inquiry consistent with how it would assess a significant proposal. These EPA reports are not subject to appeal, although the proponent may appeal any amendment to conditions made as a result of the EPA report (s100.(3)).

#### Splitting or combining proposals and splitting or combining statement

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**S45D** allows the Minister to either split a proposal into separate proposals and have separate statements, or allow more than one proposal and their statements to be combined. It can also be a request under **s45C(1)**. Such a request must meet the minor change test of **s45C**.

Statements issued under this section supersede the previous statement(s) (**s45D.(2) and (3)**).

#### Duration and withdrawal of statements – s47A.

**S47A** deals with circumstances where a statement can be withdrawn. **S47A.(1)** requires that a statement continues to have effect unless it has been withdrawn or is taken to have been withdrawn. It applies in circumstances where:

- The CEO determines that a proposal has not substantially commenced within the timeframe specified in a condition (**s47A.(2)**);
- The proponent writes to the Minister and argues that the proposal has been implemented, conditions complied with or no longer have to be complied with (**s47A3(a)**);
- The proponent writes to the Minister and argues that impacts can be mitigated through Part V licencing or other regulatory process (**s47A.(3(b))**).

Where the above applies, the Minister may withdraw the Statement (**s47A.(4)**) and this decision needs to be made public (**s47A.(6)**). The Minister is required to notify all DMAs, the EPA, the proponent and whoever referred the proposal of this decision (**s47A.(5)**).

If a statement is time limited and that time period expires, the statement is taken to be withdrawn (**s47A.(7)**). Statements withdrawn or taken to have been withdrawn have no further effect (**s47A.(8)**).

#### **Assessment of planning schemes**

##### Assessment of Planning Schemes process - overview

The key aspects of this process are:

- As at the time of writing, all scheme amendments need to be referred to the EPA but the 2020 changes to the EP and PD Acts will mean that scheme amendments that do not have any environmental implications do not need to be referred to the EPA (basic schemes);
- The Responsible Authority (RA) is defined as being either the WAPC or the relevant local government under the PD Act;
- The Responsible Minister (RM) is defined and is the Minister for Planning for assessments under the PD Act;
- The decision of EPA to not assess a scheme is not appealable;
- If a scheme is assessed there is only one level of assessment;
- The EPA issues instructions setting out the terms of reference for the writing of the environmental review document;
- The environmental review document is advertised along with the Scheme documents;
- Both Minister for Environment and Planning must agree on any appeals and the final conditions; and
- The approved scheme must contain the environmental conditions.

##### Definitions and the introduction of planning 'codes'

The *Planning and Development Amendment Act 2020* introduced a new planning mechanism called a Code, the first and only one to date is the R Codes.

It is intended that Codes will be 'read into a scheme' which means they will become part of a local planning scheme. Codes can be assessed by the EPA.

##### Referral of schemes and codes

The requirements for referral of schemes to the EPA is not covered by the EP Act but by the relevant scheme Act, mostly the PD Act.

**s48AAA** of the PD Act allow the EPA to draft Regulations, to be approved by the Governor, prescribing classes of planning scheme and amendments that do not need to be referred to the EPA. The section refers to "schemes that are not required to be assessed" by the EPA, which, in effect, this means not requiring referral.

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S (1) of the EP Act has also been amended to define an assessed scheme to include those schemes covered by the above Regulations – i.e. all schemes whether referred to the EPA or not will be deemed to be assessed schemes.

S48AAB of the PD Act allows the EPA to draft Regulations, to be approved by the Governor, prescribing classes of planning Codes and amendments that do not need to be referred to the EPA.

The changes to the Act will have a new provision that allows the 28 day clock to stop for referred schemes if the EPA requires more information. This section defines the 28 day clock as the information period.

S48BA.(3) would allow the EPA to requisition any person or agency to provide it with additional information within a specific compliance period. The compliance period or the time taken to provide that information is not included in the 28 day information period.

#### Decision to assess or not assess a referred scheme

The EPA has four choices for referred schemes:

- Not assess not advice given;
- Not assess, advice given;
- Assess, Environmental review required; or
- Scheme is environmentally unacceptable. (S48A.(1)(c))

If the EPA determines that a scheme is environmentally unacceptable the Minister can either:

- Require the EPA to assess the scheme (48A.(2)(a)); or
- With the agreement of the RM and any other relevant DMA agree with the EPA (48A.(2)(b)).

If the Minister cannot get agreement on this matter, then the matter is referred to the Governor (in effect the Cabinet) for a final decision (not appealable) (48.J).

The decision of the EPA to not assess a scheme is not appealable, however the Minister can direct the EPA to assess a scheme that the EPA had decided to not assess (S48E.(1)).

#### Assessment procedure

Where a scheme is being assessed, a similar process as for the assessment of proposals is applied, with some differences.

If an ERD is required the EPA issues 'instructions' for its preparation (equivalent to an ESD for proposals) – S48C. (1) (a). The EPA has 60 days from the date of referral to issue the instructions ((48A.(1)(b)).

Depending on the relevant scheme Act, the EPA can determine the timing and procedure (including length of the review period) (48C.(3)), or where the PD Act provides for a public review of the scheme, the environmental review document is to be incorporated into the scheme documents and is to be advertised at the same time that the proposed scheme is advertised (48C.(6)).

The ERD needs to be made available to the public the same way that an environmental review document is required for proposals, and is the responsibility of the RA.

Submissions on the environmental review document go to the RA not the EPA – requirement of the relevant scheme Act - and the RA must then send these and its response to the environmental issues raised in the submissions to the EPA.

S48D(1) sets a time limit on when the EPA is to report to the Minister – 60 days after the end of the public review period or 30 days after receiving the RA's response to submissions, whichever is the longer (48D.(1)). Interestingly, S48D(2) allows the Minister to require the EPA to report to him/her at any time, including a shorter period of time, but the Minister must first consult with the EPA and also get agreement from the RM. The EPA report is subject to the same appeal rights as its report on proposals. In addition, the Minister can direct the EPA to re-assess or more fully assess a scheme provided the Responsible Minister also agrees.

The changes to the Act will allow the EPA to find a scheme environmentally unacceptable after its assessment, which is not currently the case. S48D.(1)(d) will be modified to include "the Authority's recommendations as to whether or not that scheme may be implemented..."

#### The decision-making process – agreeing on the Conditions

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The Minister is only required to get agreement on the environmental conditions with the RM – usually Planning – but would normally consult with the RA (48F.(1)). Whilst there are no appeals allowed against the agreed conditions, the RA can request the RM to initiate a review of the conditions prior to them being finalised (48.G(1)). If the RM agrees with this request, that Minister and the Minister for Environment need to agree on any changes (48.G(2)).

If the two Minister cannot reach agreement on the Conditions, then the Governor (i.e. Cabinet) will decide.

#### Implementation of the conditions

The RA is responsible for ensuring subsequent proposals comply with the environmental conditions and are required to monitor (or cause to be monitored) the implementation of the assessed scheme's conditions (48H).

#### Removal of relevant decision making authority - 48A, 48F and 48G.

S48A will be changed to remove the need for the EPA to inform 'any relevant decision making authority' of its decision to assess a scheme. Only the RA need be informed (48A.(1)). Similarly, if the EPA finds a scheme to be environmentally unacceptable and the Minister agrees, the Minister no longer needs to notify any relevant DMAs (48A.(2)).

#### **Assessment of strategic proposals**

##### The process

S37B(2) of the EP Act defines a strategic proposal.

Only the proponent of a strategic proposal can refer it to the EPA (S38.(7)).

Once a strategic proposal is referred to the EPA, the EPA can choose to not assess it, not assess it and provide non-binding advice, or formally assess it. If the EPA decides to assess a strategic proposal, the proponent is not constrained in its implementation – i.e. they can proceed to finalise the strategic proposal but cannot implement the proposals that make up the strategic proposal.

The assessment process for strategic proposals is the same as for other proposal assessments as described above.

##### Final approval and condition setting of assessed strategic proposals

Conditions set as part of a strategic proposal set constraints on the implementation of proposal that form part of that strategic proposal.

As noted above, 38E.(5) allows the EPA to assess a derived proposal that complies with the conditions set at the times of the strategic assessment where an EPA policy changes, and the derived proposal is inconsistent with that change in policy.

##### The use of Section 16(e) as SEA

The EPA can use s16(e) of the EP Act to give non-binding advice on a range of matters, especially certain plans and schemes.

The EPA does this as a publicly available report. This allows the EPA to give either overall policy advice on a particular matter, or early advice to another decision-making authority on what are the key environmental issues.

END

