



Submission to the Department of
Environment Regulation's Draft
Guidance Statements: Regulatory
Assessment Framework,
Environmental Risk Assessment
Framework and Regulatory Controls
March 2016

About CCI

CCI is the peak organisation representing business in Western Australia. With a membership of about 9000 businesses across all sectors of the economy, CCI aims to build a competitive and productive business environment in Western Australia by promoting free enterprise through advocacy and essential services that make it easier to do business. CCI's vision is for Western Australia to be a world-leading place to live and do business.

The Roe 8 Supreme Court decision and the DER's guidance statements

In December 2015 the Supreme Court ruled in *Save Beelihar Wetlands (Inc) –v- Jacob [2015] WASC 482* that the subject matter, scope and purpose of the Environmental Protection Act 1986 (WA) (EP Act) mean that the Environmental Protection Authority (EPA) is bound to take into account its own published policy positions when making its decisions. The EPA's failure to either consider or document consideration of some of its policies resulted in the Supreme Court ruling that the Minister's subsequent decision based on the EPA's advice to approve the Roe Highway Extension (Roe 8) was invalid.

The Western Australian Government is currently appealing the Supreme Court decision, however, it raises the prospect that public authorities are legally required to demonstrate that they have complied with their own published policies and guidelines.

CCI supports the intention of the Department of Environment Regulation's (DER) regulatory reform program to provide certainty for industry and the community and to apply a higher level of standardisation in its decision making. However, the Supreme Court's decision raises the prospect that the publication of detailed and prescriptive policies and guidelines may open up more avenues for the appeal of sound decisions made by regulators.

The Supreme Court's Roe 8 ruling means there is a trade-off between the greater level of certainty provided by publishing policies and guidelines and public authorities' flexibility to amend procedures and requirements where this is warranted. The DER should review its guidance statements that were drafted prior to the Supreme Court's decision, paying special attention to ensure that the wording used to describe actions that are required to be taken by the DER or applicants allows scope where warranted for processes or requirements to be amended if expedient in particular circumstances; and that sound decisions of the DER are not vulnerable to appeal on a technicality.

In addition, the DER should review its internal procedures to ensure that it adequately documents its consideration of its published policies and guidelines.

Regulatory Assessment Framework

The Regulatory Assessment Framework provides guidance on the assessment of applications for, and amendments and renewals of, works approvals and licences under Part V of the EP Act.

Public advertisement of applications for works approvals

Point 1(e) of the Draft Guidance Statement outlines that, in addition to DER's public advertisement of applications for works approvals and licences, DER will also refer applications to interested parties or persons which are considered to be directly affected by the proposal and other interested parties.

However, the Draft Guidance Statement does not indicate that applicants will be consulted on or notified of submissions by interested parties. For procedural fairness and a streamlined administrative process, it would be advisable for the DER to notify the applicant of submissions received and to allow the applicant to respond. This would result in a more streamlined administrative process over a situation in which the applicant is only able to respond after the DER has developed a draft works approval or licence. It would also enable a process of direct stakeholder engagement by the applicant in which issues identified by other stakeholders can be addressed through negotiation prior to the finalisation of the regulatory instrument and in doing so reduce the prevalence of appeals.

Renewal, Amendment, Transfer or Surrender of existing works approval or licence

The diagram in Figure 1 indicates that applications for renewal, amendment, transfer or surrender of an existing works approval or licence will not require public advertisement. This is different from the DER's current practice of advertising applications for licence renewals.

Ceasing the practice of advertising licence renewal applications would incrementally streamline the process for renewing licences and would conform with the requirements of the EP Act which only requires that applications for new works approvals and licences be advertised. This is appropriate, as public consultation is most relevant in relation to new works approvals or licences.

Decline to deal

CCI understands that the intent of the section on declining to deal with an application is that where an application is incomplete, the DER will attempt to include the information itself where this is publicly available and otherwise provide the applicant with 14 days to provide the information necessary to complete the application, before declining to deal with an application.

However, the drafting of the point 3(b) could be interpreted to mean that an application would be declined where the information in the application has not been made publicly available elsewhere. This point should be redrafted to clarify the DER's intent, for example, by merging points 3(a) and 3(c) to read "the Application Form is incomplete and the information is not otherwise publicly available".

The drafting of point 3(c) could also be misinterpreted and could be clarified by amending it to read "following DER's written request, the applicant has not provided within 14 days the information required to undertake the assessment".

Applicant amendments

For significant amendments proposed by an applicant (point 9(a)(iii)), there is some ambiguity within the Guidance Statement on whether the entire works approval or licence will be reassessed in accordance with point 1 of the Guidance Statement, or whether only sections relevant to the proposed amendments will be assessed.

A streamlined works approval and licence amendment process would only consider sections of the licence relevant to the proposed amendments, as there may be sections of the licence or works approval which do not relate to the proposed amendments and can therefore do not need to be reassessed.

Environmental Risk Assessment Framework

The Draft Guidance Statement outlines the process and method DER will undertake when assessing the risks posed by an application for a new or amended works approval or licence. It is imperative that DER's staff adequately receive training in using the framework to enable them to make consistent and fair decisions.

The Draft Guidance Statement text outlines the various considerations to be made at each stage in the process outlined in the diagram at Appendix 1, frequently referring to subsequent appendices. To improve the clarity of the process a number of improvements could be made to enable greater clarity of the alignment between the Guidance Statement text and the Risk Assessment Process Diagram in Appendix 1.

- Using common terminology in the Guidance Statement text and the labels in the diagram in Appendix 1. For example, the term 'treat risks' is used in the Guidance Statement text but is not used in the diagram.
- Including cross-referencing between the diagram in Appendix 1 and subsequent appendices relevant for each stage in the assessment. For example, it would be useful to reference Appendix 2 — Risk Assessment Matrix and Appendix 5 — Health and Ecosystem Criteria, in the "Identification of Emissions" box.
- Applying strict sequential ordering to the statements in the guideline text with the process outlined in the Risk Assessment Process Diagram. For example, the treatment of risks (point 5) is related to the determination of regulatory controls (point 7) and would logically follow rather than precede documentation of DER's risk assessment (point 6).

Australian/New Zealand Standards

The Draft Guidance Statement (point 1) states that DER will assess the risk of prescribed premises under Part V of the EP Act in accordance with the Risk Assessment Process consistent with the AS/NZS ISO 31000:2009, and as set out in Appendix 1.

The reference to ISO 31000:2009 implies, in one interpretation, that applicants should be familiar with the Standard. The purchase and gaining familiarisation with the Standard would be a material cost for applicants and the Guidance Statement should be able to stand alone and provide sufficient information for applicants to navigate the DER's risk assessment process.

On another interpretation, the reference to ISO 31000:2009 is simply highlighting that the DER considers its proposed Risk Assessment Process is consistent with the Standard. If this is the case, the reference to the Standard can be removed since the background section of the Guidance Statement outlines that the assessment framework has been developed in accordance with the Standard.

In the context of the Supreme Court's December 2015 ruling in relation to the Roe 8 Highway Extension, the referencing of external policies takes on increased significance as the DER may be required to demonstrate its consideration of these policies and guidelines.

Monitoring

The Guidance Statement (point 8) outlines that DER will consider monitoring and review as part of the regulatory risk management process. Notwithstanding that the term 'regulatory risk management process' is not otherwise used in the Guidance Statement, the wording of the section suggests a low bar will be applied for the imposition of monitoring.

The imposition of monitoring requirements can have significant costs for holders of works approvals and licences and as such it should only be imposed where reasonably required. The Draft Guidance Statement should be amended to state that "monitoring and review will be undertaken where *it is required* for the purposes of...".

Further, the Draft Guidance Statement (point 9) states that "DER will undertake monitoring and review" at certain stages. This presupposes the need for monitoring and review, and it would be more appropriate for the Guidance Statement to state that "DER will consider the need for monitoring and review" in those circumstances.

Risk Assessment Matrix and Criteria

The Risk Assessment Matrix (Appendix 2/page 5) outlines that even where the consequence of an event is insignificant it may be rated as a moderate risk if the event is likely or almost certain to occur. A rating of moderate would mean that DER would generally apply primary controls under the Risk Treatment Matrix (Appendix 3). Applying controls where the consequence of an event is insignificant is not justifiable. Where the consequence of an event is insignificant, it is only appropriate for the risk to be rated as low.

The Risk Assessment Matrix and Criteria contain a number of different definitions of risk, likelihood and consequence. These include:

- risk determined on the evaluation of consequence and likelihood (page 5);
- likelihood being a function of the risk/opportunity occurring (page 6);
- likelihood as the probability of an event occurring (page 6);
- consequence as a function of a risk occurring (page 6); and
- likelihood as the probability or likelihood of a consequence occurring (page 6).

The different definitions and use of terminology has the potential to create confusion. Using a consistent and accepted definition of risk, such as risk being a function of the consequence and likelihood of an event, would enhance the ability of applicants and other interested parties to interpret the Risk Assessment Matrix and Criteria.

Risk Treatment Matrix

The treatments described in the Risk Treatment Matrix (Appendix 3) are definitive and do not provide flexibility for the DER to use its judgement when determining whether to apply regulatory controls. For example, the Matrix states that risks rated as moderate “will be subject to regulatory controls” and risks rated as high “will be subject to multiple regulatory controls”. Rewording the statements in the Risk Treatment Matrix to be non-definitive such as stating that risks “may be subject to regulatory controls” would increase the flexibility of the DER to use its discretion when determining when to impose conditions and how many to impose.

The treatments described in the Risk Treatment Matrix for risks rated high is that regulatory controls will include “primary and secondary controls” and this will include “both outcome-based and management based conditions”. These statements presuppose the outcome of an assessment against the Guidance Statement on Regulatory Controls, and are definitive, limiting the flexibility of the DER to use its discretion.

In the context of the Supreme Court’s December 2015 ruling in relation to the Roe 8 Highway Extension, there is a heightened need for public authorities to demonstrate their consideration of their published policies and guidelines. As a consequence, definitive statements should be used with caution as they may either constrain the ability of the DER to use its discretion or make the DER’s decisions vulnerable to appeal.

Regulatory Controls

The Guidance Statement on Regulatory Controls may provide useful guidance to applicants and regulatory officers on the types of regulatory controls that may be applied to mitigate potential risks. However, as noted in the Draft Guidance Statement, the Regulatory Control Matrix provided is not exhaustive.

To assist in the interpretation of the Guidance Statement on Regulatory Controls, the DER should ensure that terminology is consistent between the documents and other guidance statements, particularly the Guidance Statement: Regulatory Assessment Framework and Guidance Statement: Environmental Risk Assessment Framework

The Draft Guidance Statement: Regulatory Controls introduces some new terminology not used in the other guidance statements, including ‘emission risk’ and ‘inherent risk’. A reading of the Draft Guidance Statement and the Regulatory Control Matrix (Appendix 1) indicates that both these terms are variations on the terms ‘risks’ used elsewhere.

The suite of additional controls available to the DER in the Regulatory Control Matrix include “Infrastructure Requirements”. These are identified as a primary control. However, DER may not have the expertise to be able to stipulate an engineering solution resulting in impractical design and excessive costs when there may be other ways to achieve the same environmental outcome. DER should reconsider the specification of infrastructure requirements as a primary control.