



Guidance Statement on Regulatory Assessment Framework, Environmental Risk Assessment Framework and Regulatory Control

Department of Environment Regulation

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About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia funded by its member companies.

The Western Australian resources sector is diverse and complex, covering exploration, processing, downstream value adding and refining of over 50 different types of mineral and energy resources.

In 2014-15, the value of Western Australia's mineral and petroleum production was \$99.5 billion. Iron ore accounted for approximately \$54 billion of production value to be the state's most valuable commodity. Petroleum products (including LNG, crude oil and condensate) followed at \$24 billion, with gold third at \$9 billion.¹

Notwithstanding the recent decline in the price of several export commodities, the estimated value of royalty receipts the state received from the resources sector still composed over 16 per cent of estimated total state revenue in 2015-16, or around \$4.4 billion.²

As at September 2015, there was approximately \$171 billion in resources sector projects committed or under construction in Western Australia and a further \$110 billion in proposed or possible projects.³

Recommendations

Guidance Statement on Regulatory Assessment Framework

CME recommends:

- The objective of the Guidance Statement on Regulatory Assessment Framework is expanded to include applications for native vegetation clearing, with clarification included around assessment of clearing principles.
- Point 1(d) is updated to ensure that clearing principles will not be assessed for the same project multiple times by different agencies.
- The Department of Environment Regulation (DER) assessment process should not duplicate, overlap or contradict other environmental approvals. As such, point (e) and (f) of the Guidance Statement on Regulatory Assessment Framework should be deleted.
- The sections for "*Declining to Deal*" and "*Decision to Refuse*" are updated to ensure all decisions to decline or refuse environmental applications are reviewed by management.
- The section for "*Declining to Deal*" point (c) is updated to state "*following DER's written request, the applicant has not provided the required information to undertake the assessment within 21 days.*"
- The section for "*Decision to Refuse*" point (b) is updated to state "*DER's draft decision to refuse has been provided to the applicant with 21 days (unless an extended timeframe has been agreed between the proponent and DER) for the applicant to propose further mitigations to address the risk.*"

¹ Department of Mines and Petroleum (DMP), 2015, *Mineral and Petroleum Industry 2014-15 Review*, www.dmp.wa.gov.au/1525.aspx, p. 1

² Government of Western Australia, 2015, *2015-16 Budget, Budget Paper No. 2 Volume 2*, www.ourstatebudget.wa.gov.au/Budget-Papers, pp. 541 & 593

³ DMP, 2015, *loc. cit.*

Guidance Statement on Regulatory Assessment Framework, Environmental Risk Assessment Framework and Regulatory Control

- The DER's process for assessing the fitness and competency of the applicant is consistent with the Application Form for works approvals and licences.
- The "*Decision to Grant*" section is updated to state "*in deciding to grant an application, DER will impose additional controls where DER's risk assessment determines that the risk rating is Moderate and/or above, having taken into consideration applicant proposed controls*" to ensure consistency in DER's guidance.
- The DER's draft decision and draft instrument is provided to the applicant in all instances.
- The Applicant Amendments section is updated to state "*In some circumstances, certain applicants submit multiple amendments. Where there are multiple applicant amendments within a concurrent timeframe, DER will consult with the applicant and aggregate the amendments and assess them as a single application where practicable.*"
- The Guidance Statement on Regulatory Assessment Framework is updated to ensure applicants are adequately consulted throughout the assessment of applications.

Guidance Statement on Environmental Risk Assessment Framework

CME recommends:

- The Guidance Statement on Environmental Risk Assessment Framework should be updated to ensure the risk of projects within or within proximity to Specified Ecosystems and the distance to Sensitive Receptors are appropriately considered.
- DER Licencing Officers are trained and supported on the implementation of the new environmental risk assessment process and ongoing monitoring undertaken to ensure a consistent approach to assessments occurs.
- The Guidance Statement on Environmental Risk Assessment Framework is updated to allow the applicant to submit baseline data to inform the risk assessment.
- The Monitoring and Review section is updated to state "*DER may undertake monitoring and review at the following stages*" to prevent unnecessary changes to works approvals and licenses.
- The definition of "*insignificant*" should be changed to remove "*no detectable impacts*" and better describe what DER considers as an "*insignificant*" consequence to Public Health.
- Appendix 2 is updated to state "*Deviation from criteria may be appropriate to allow for higher or lower level of controls based on the risk to, and the environmental value of the receiving environment. DER will consult applicants where deviation from criteria results in a higher level of controls.*"
- The risk assessment template in Appendix 4 should be updated to include columns for 'Related Criteria/Standards/Guidelines' and 'Current Controls'.
- DER's risk assessment process does not duplicate the assessment process conducted by Department of Mines and Petroleum (DMP) for Major Environment Events (MEEs).
- DER justifies the use and proposed application of more stringent Health and Ecosystem Criteria for the environmental risk assessment.

Guidance Statement on Regulatory Controls

CME recommends:

- Point 3(a) of the Guidance Statement on Regulatory Controls is updated to remove the identification of inherent risks.
- Appendix 3 of the Guidance Statement on Environmental Risk Assessment Framework is updated to combine high and extreme risk ratings to be "*Acceptable subject to primary and secondary controls*".
- Table 1 *Risks for Prescribe Premises* is removed from the Guidance Statement on Regulatory Controls and included in the Guidance Statement on Environmental Risk Assessment Framework.
- Table 2 *Risk and Controls* is updated to clearly outline how risk ratings will be treated when determining controls.
- Table 2 *Risk and Controls* is updated to acknowledge the limitations to altering the siting of or specifying infrastructure requirements for licences and licence amendments.
- Guidance Statement on Regulatory Controls is updated to clearly identify the interaction with the Guidance Statement on Setting Conditions and DER's Conditions Library.

Context

CME welcomes the opportunity to review and provide comment on the Department of Environment Regulation (DER) draft Guidance Statement on Regulatory Assessment Framework, Environmental Risk Assessment Framework and Regulatory Controls.

The Guidance Statement on Regulatory Assessment Framework has been developed to provide guidance on DER's assessment of applications for works approvals and licences issued under Division 3, Part V of the *Environmental Protection Act 1986* (EP Act).

The Guidance Statement on Environment Risk Assessment Framework shows how DER will apply a risk-based approach to its regulatory functions to ensure there is not an unacceptable risk of harm to public health or the environment.

The Guidance Statement on Regulatory Controls outlines how DER will apply regulatory controls which are proportionate to the level of risk the activity poses to public health and the environment.

Together, these documents underpin the DER's risk-based approach to regulation. CME support the Guidance Statements, however, recommends the consideration of several matters outlined below.

Guidance Statement on Regulatory Assessment Framework

Objective

The objective of the Guidance Statement on Regulatory Assessment Framework is to guide DER's assessment of applications for works approvals and licences. However, Figure 1 includes the "*clearing of native vegetation with works approvals application*" which does not appear to be covered by the existing objective.

CME is aware DER intends to streamline the assessment of works approvals and native vegetation clearing permits. To progress towards this and remove any ambiguity on the coverage of the Guidance Statement on Regulatory Assessment Framework, **CME recommends the objective of the Guidance Statement on Regulatory Assessment Framework is expanded to include applications for native vegetation clearing, with clarification included around assessment of clearing principles.**

In expanding the objective, **CME recommends point 1(d) is updated to ensure that clearing principles will not be assessed for the same project multiple times by different agencies.**

For example, if there is a Part IV approval with appropriate clearing conditions, a Mining Proposal and/or Works Approval should not need to assess the proposed works against the clearing principles. Similarly, where there is no Part IV approval, clearing should only be assessed under the Mining Proposal or Works Approval process, not both.

Referring Applications to Interested Parties

The Guidance Statement on Regulatory Assessment Framework introduces a new referral process for works approval and licence applications. This new process outlines DER's requirements to refer applications to interested parties or persons which are considered to be directly affected by the proposal and other interested parties.

CME is concerned the Guidance Statement on Regulatory Assessment Framework doesn't include an explanation as to the criteria on what triggers referral, the associated timeframes with this and explicitly, whether the referral will trigger stop-the-clock.

CME is also concerned the new referral process will duplicate or overlap with other environmental approvals which would be a step back in streamlining and improving the

efficiency of the approvals framework in Western Australia. For example, point (e)(iii) states DER will refer applications to “*the Environmental Protection Authority, where applications may require referral, or which have been assessed, under Part IV of the EP Act.*” If the project proposal has already been assessed under Part IV of the EP Act, it is unclear why the application would need to be referred back to EPA.

The proposed referrals process also doesn’t appear to consider existing State Agreement Act projects and how the risk assessment process will be managed and issues resolved if in conflict.

The Department of Mines and Petroleum (DMP) is progressing in the area of reducing regulatory overlap and duplication with the inclusion of a section on “*Environmental Legislative Framework*” in the draft Mining Proposal Guidelines⁴. For each approval or statutory requirement listed in the Mining Proposal, DMP’s assessment will focus on those factors which are not directly regulated by another agency or covered by another regulatory requirement.

Whilst DMP’s assessment will focus on those environmental factors not already covered by other approvals or legislation, applicants are still required to identify all risks through the risk assessment process. In most circumstances, DMP will consider it acceptable to include the requirements of the relevant approvals as appropriate risk treatment measure (e.g. Ministerial conditions, etc.).

DMP’s process also prevents unnecessary referrals of applications to other government departments which may cause delays in the assessment process. A similar approach should be adopted by DER and, if done so, the referrals process outlined in the Guidance Statement on Regulatory Assessment Framework is not required.

CME recommends the DER’s assessment process should not duplicate, overlap or contradict other environmental approvals. As such, point (e) and (f) of the Guidance Statement on Regulatory Assessment Framework should be deleted.

Declining to Deal and Decision to Refuse

The Guidance Statement on Regulatory Assessment Framework includes guidance on how DER will “*Decline to Deal*” and “*Decision to Refuse*” applications for works approvals and licences.

When declining to deal, DER will provide a written request for the applicant to provide the required information to undertake the assessment.

For the decision to refuse, DER’s draft decision will be provided to the applicant with an opportunity for the applicant to propose further mitigations to address the risk.

However, it is unclear whether requests from DER will be sent from the licencing officer or reviewed by a manager and given the implications these matters it warrants review by a manager to prevent DER incorrectly declining or refusing applicants.

CME recommends the sections for “*Declining to Deal*” and “*Decision to Refuse*” are updated to ensure all decisions to decline or refuse environmental applications are reviewed by a manager.

The timeframe for applicants responding to DER in the event of declining to deal is 14 days. This timeframe may be too short and 21 days would be more appropriate to allow the proponent an adequate opportunity to address the DER’s request for further information.

In circumstances where DER’s draft decision refuses an application, the applicant is provided 21 days to propose further mitigations to address the risk. This timeframe may be too short in some circumstances and the Guidance Statement on Regulatory Assessment

⁴ DMP, Draft Guidelines for Mining Proposals in Western Australia, September 2015

Framework should be updated to allow for time periods to be agreed between the proponent and DER in these circumstances.

CME recommends the section for “Declining to Deal” point (c) is updated to state “following DER’s written request, the applicant has not provided the required information to undertake the assessment within 21 days.”

CME recommends the section for “Decision to Refuse” point (b) is updated to state “DER’s draft decision to refuse has been provided to the applicant with 21 days (unless an extended timeframe has been agreed between the proponent and DER) for the applicant to propose further mitigations to address the risk.”

Transfer

The Guidance Statement on Regulatory Assessment Framework states “Where an application for the transfer of a works approval or licence has been made, DER will undertake an assessment of the fitness and competency of the applicant”. It is unclear how the DER will determine if an application is fit and competent.

The DER has recently released an updated Application Form for works approvals and licences. Section 5 on “Fit and competent operator” has been updated to only apply to applicants who have held or been part of a small proprietary company and previously held a licence or works approval. The DER’s process for assessing the fitness and competency of an operator should be consistent and align with the Application Form.

CME recommends DER’s process for assessing the fitness and competency of the applicant is consistent with the Application Form for works approvals and licences.

Decision to Grant

The Guidance Statement on Regulatory Assessment Framework states “in deciding to grant an application, DER will impose additional controls where DER’s risk assessment determines that the risk rating is above Moderate having taken into consideration applicant proposed controls”.

The risk rating of “above Moderate” is inconsistent with the terminology used in the Guidance Statement on Environmental Risk Assessment Framework.

CME recommends the “Decision to Grant” section is updated to state “in deciding to grant an application, DER will impose additional controls where DER’s risk assessment determines that the risk rating is Moderate and/or above, having taken into consideration applicant proposed controls” to ensure consistency in DER’s guidance.

In deciding to grant an application, the DER will provide the draft decision and draft instrument to the applicant where DER has determined “significant additional controls” are required.

It is Industry’s preference for applicants to receive the draft decision and instrument in all instances as this provides an opportunity for the applicant to respond and prevent unnecessary future amendments to works approvals and licenses. For example, minor changes to conditions or units which could be easily amended if identified in the draft format, rather than requiring a formal works approval or licence amendment.

CME recommends the DER’s draft decision and draft instrument is provided to the applicant in all instances.

Applicant Amendments

In some circumstances, where applicants submit multiple amendments within a concurrent timeframe, DER will aggregate the amendments and assess them as a single application.

While this may be an efficiency measure for DER, applicants may have amendments which are time dependent and the aggregation may delay issuing the final instrument.

The aggregation of amendments should be in consultation with the proponent to ensure an efficient outcome for both the applicant and DER.

CME recommends the Applicant Amendments section is updated to state “*In some circumstances, certain applicants submit multiple amendments. Where there are multiple applicant amendments within a concurrent timeframe, DER will consult with the applicant and aggregate the amendments and assess them as a single application where practicable.”*

Other Issues

While the Guidance Statement on Regulatory Assessment Framework provides overarching guidance on DER’s assessment of applications, it is unclear how and when applicants will be consulted through this process. Ongoing consultation throughout the assessment with applicants is essential to ensure the most effective, efficient and practicable control types are applied.

CME recommends the Guidance Statement on Regulatory Assessment Framework is updated to ensure applicants are consulted throughout the assessment of applications.

Guidance Statement on Environmental Risk Assessment Framework

Link to Guidance Statements on Separation Distances and Environmental Siting

DER recently released draft Guidance Statements on Separation Distances and Environmental Siting which were developed to inform the risk assessment used to support decision-making for works approvals and licences. There is no link to these documents in the Guidance Statement on Environmental Risk Assessment Framework.

CME recommends the Guidance Statement on Environmental Risk Assessment Framework should be updated to ensure the risk of projects within, or within proximity to, Specified Ecosystems and the distance to Sensitive Receptors are appropriately considered.

In doing so, the approach to the risk assessment should therefore be consistent in the event the risk rating is ‘low’ and considered acceptable. In such events, the proponent would be subject to no further regulatory controls (in accordance with Appendix 3 draft Environmental Risk Assessment Framework).

Undertaking the Risk Assessment

In undertaking the analysis of the pathway/receptor, DER will undertake an assessment of the consequence and likelihood of the effect of the emission on the receptor.

The likelihood and consequence table in Appendix 2 is qualitative and CME is concerned the DER may not have the required expertise to ensure consistent assessment of risks by Licencing Officers. To reduce this risk, **CME recommends DER Licencing Officers are trained and supported on the implementation of the new environmental risk assessment process and ongoing monitoring undertaken to ensure a consistent approach to assessments occurs.**

CME is concerned the environmental risk assessment framework doesn’t allow applicants to submit baseline data to inform the risk assessment. For example, the Health Risk

Assessments (HRA) data which has detailed modelling of information above the information DER may have. CME considers there will be circumstances where the use of applicant baseline data will allow for a more accurate risk assessment is undertaken.

CME recommends the Guidance Statement on Environmental Risk Assessment Framework is updated to allow the applicant to submit baseline data to inform the risk assessment.

Monitoring and Review

The Guidance Statement on Environmental Risk Assessment Framework states the DER will consider monitoring and review as part of the regulatory risk management process. Further, the DER will undertake monitoring and review at the following stages:

- a) Incident or event reported under section 72 of the EP Act;
- b) Annual Environmental Reports / Annual Audit Compliance Reports;
- c) Compliance inspections;
- d) Complaints; and
- e) Enforcement.

The reviews should be proportionate to the incident or non-compliance as the requirement to undertake review at the stages listed will result in a large volume of reviews even if the incident was administrative in nature. As such, **CME recommends the Monitoring and Review section is updated to state “DER may undertake monitoring and review at the following stages” to prevent unnecessary changes to works approvals and licenses.**

Appendix 2 – Risk Assessment Matrix and Criteria

The Public Health criteria used to determine the consequences of a risk occurring includes the following criteria for an “insignificant” consequence:

- No detectable impacts to health
- No detectable impacts to amenity
- Health criteria met

However, CME considers the term “*insignificant*” implies there has been some impact, but the impact is not significant.

CME recommends the definition of “*insignificant*” should be changed to remove “no detectable impacts” and better describe what DER considers as an “*insignificant*” consequence to Public Health.

Appendix 2 of the Guidance Statement on Environmental Risk Assessment Framework includes the following clause, “*Deviation from criteria may be appropriate to allow for higher or lower level of controls based on the risk to, the environmental value of the receiving environment. Any deviation sought below the proxy criteria is required to demonstrate that the level of impact to the environmental value will be acceptable*”.

CME considers the likelihood and consequence table criteria is based on the value of the receptor and/or protection of vulnerable groups and sensitive receptors. CME is concerned this clause effectively allows DER to ignore the criteria and Licensing Officers may place more onerous requirements on the proponent. To ensure consistency in the assessment of risks, CME considers DER should not deviate from the criteria listed where this results in higher levels of controls without adequately consulting with the proponent.

CME recommends Appendix 2 is updated to state “*Deviation from criteria may be appropriate to allow for higher or lower level of controls based on the risk to, and the*

environmental value of the receiving environment. DER will consult applicants where deviation from criteria results in a higher level of controls.”

Appendix 4 – Risk Assessment Template

In conducting the risk assessment, DER will utilise the criteria listed (e.g. Australia and New Zealand Guidelines for Fresh and Marine Water Quality in Appendix 2) or other standards/guidelines. The DER will then document its assessment of risks in accordance with the Risk Assessment Template set out in Appendix 4. However, the template doesn't include a column for 'related Criteria/Standards/Guidelines'. CME considers the Risk Assessment template shown in Appendix 4 would be more transparent if an extra column was added for this to reflect which standards/guidelines the DER have used when conducting the risk assessment.

Additionally, there should be a 'Current Controls' column in the template to allow the existing controls at a facility to be considered as part of the risk assessment. This is important for instances where an applicant is seeking a licence amendment.

CME recommends the risk assessment template in Appendix 4 should be updated to include columns for 'Related Criteria/Standards/Guidelines' and 'Current Controls'.

Appendix 4 of the Guidance Statement on Environmental Risk Assessment suggests the DER will commence the regulation of high consequence risks, even if these are regulated by other government agencies. Specifically, the inclusion of "Upset conditions" under the "Source of emissions and discharge" may result in Major Environment Events (MEEs) being assessed by DER. As previously stated, the DER's assessment process should not duplicate assessments carried out by other government departments.

CME recommends the DER's risk assessment process does not duplicate the assessment process conducted by DMP for MEEs.

Appendix 5 – Health and Ecosystem Criteria

The Health and Ecosystem Criteria listed in Appendix 5 includes the Department of Health assessment criteria and Department of Environment and Conservation (DEC) New South Wales (NSW) 2005 criteria. These criteria are more stringent than the widely accepted hierarchy of primary health criteria currently used in Western Australian industry health risk assessments and it is unclear why more stringent criteria will be applied to the assessment of risks for works approvals and licences.

It is also unclear how the criteria will be applied to the proposed activities. For example, would the DER apply the Health and Ecosystem Criteria at the edge of a pipe, mixing zone or sensitive receptor?

CME recommends DER justifies the use and proposed application of more stringent Health and Ecosystem Criteria for the environmental risk assessment.

Guidance Statement on Regulatory Controls

The Guidance Statement on Regulatory Controls states "in assessing, DER will identify the inherent risks on the premises in accordance with Table 1 of the Regulatory Controls Matrix".

CME considers, at the stage of identifying regulatory controls, the identification of risks has already been completed in accordance with the Guidance Statement on Environmental Risk Assessment Framework. Therefore, the identification of inherent risks should be removed.

CME recommends point 3(a) of the Guidance Statement on Regulatory Controls is updated to remove the identification of inherent risks.

The Guidance Statement on Regulatory Controls also states "Secondary Controls are controls that will be in addition to Primary Controls only if additional controls are required for

high to extreme risk ranked events". However, Appendix 3 of the Guidance Statement on Environmental Risk Assessment Framework outlines the risk rating "Extreme" is unacceptable and will not be tolerated and DER will refuse proposals. CME considers consistency is required as these documents are meant to be read together as a package.

CME recommends the Appendix 3 of the Guidance Statement on Environmental Risk Assessment Framework is updated to combine high and extreme risk ratings to be "Acceptable subject to primary and secondary controls".

Appendix 1 – Regulatory Control Matrix

As previously mentioned, the identification of risks in the Guidance Statement on Regulatory Controls is inappropriate. As such, Table 1 *Risks for Prescribe Premises* would be better placed in the Guidance Statement on Environmental Risk Assessment Framework to better assist DER in completing the Risk Assessment Template (Appendix 4 in Guidance Statement on Environmental Risk Assessment Framework).

CME recommends Table 1 *Risks for Prescribe Premises* is removed from the Guidance Statement on Regulatory Controls and included in the Guidance Statement on Environmental Risk Assessment Framework.

Table 2 *Risk and Controls* sets out the primary and secondary regulatory controls applicable to the risks. It unclear how the risk rating given to the proposal/facility under the Environment Risk Assessment Framework links to Table 2 and whether the controls for High risk proposals differ from the controls for Low risk proposals. Without this clarification, it is unclear why DER rates risks.

CME recommends Table 2 *Risk and Controls* is updated to clearly outline how risk ratings will be treated when determining controls.

Once a project is constructed and transitioning to a licence, the infrastructure has been built and siting of infrastructure cannot be altered. Therefore, the control types outlined in Table 2 for "Siting of Infrastructure" can only be applied to a works approval.

Similarly, "Infrastructure Requirements" may also not be applicable to licences, particularly if previously approved infrastructure has already been constructed, design and retrofitting is not practicable.

CME recommends Table 2 *Risk and Controls* is updated to acknowledge the limitations to altering the siting of or specifying infrastructure requirements for licences and licence amendments.

Other Issues

The DER has recently released a Guidance Statement on Setting Conditions to guide on the setting of conditions on works approvals and licences and the Conditions Library (sample) which provided an overview of the primary and secondary controls which will guide DER in setting appropriate conditions. However, the Guidance Statement on Regulatory Controls does not clearly identify how the Guidance Statements are related or linked.

CME recommends Guidance Statement on Regulatory Controls is updated to clearly identify the interaction with the Guidance Statement on Setting Conditions and DER's Conditions Library.

Conclusion

CME welcomes the opportunity to review and provide feedback on the DER's draft Guidance Statements on Regulatory Assessment Framework, Environmental Risk Assessment Framework and Regulatory Controls. CME looks forward to ongoing engagement during the implementation of DER's regulatory reform under Part V of the EP Act.

If you have any further queries regarding the above matters, please contact Kirrillie Caldwell, Policy Adviser – Environment, on (08) 9220 8507 or k.caldwell@cmewa.com.

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