WILDFLOWER SOCIETY OF WESTERN AUSTRALIA (Inc)

Feedback regarding the Discussion Paper *Modernising the Environmental Protection Act*.

28 January 2020

Dear Sir/Madam

The Wildflower Society of Western Australia (WSWA) supports a review of the *Environmental Protection Act 1986* (EP Act).

We note that the proposed amendments to the Act have been framed to address the McGowan Government's Service Priority Review's four directions for reform by, amongst other things, '*ensuring that community expectations for a healthy environment are promoted and achieved*'.

We believe that the current EP Act does not adequately support community expectations for a healthy environment. This is attested by the substantial environmental degradation and destruction that has occurred in the past 30 years in many parts of Western Australia.

The WSWA acknowledges that the Act has likely been successful to some degree in reducing impacts from large-scale projects. It has not, however, adequately prevented cumulative impacts from numerous small-scale projects.

We also note that the proposed amendments have been designed to '*modernise and streamline processes for environmental impact assessment, clearing permits, works approvals and licences*'. We are concerned that this is inconsistent with the Service Priority mentioned above.

A revised EP Act should strengthen the ability of regulatory agencies to reject projects that impact significant conservation values, rather than streamlining approvals.

The Environmental Protection Authority (EPA) published its last State of the Environment report in 2007 (a concerning issue in itself, given that no report has been published in the last 13 years). This clearly showed that biodiversity in Western Australia was in serious decline. For example, 'only 30% of the State's rivers [were] in good condition', and 'wetland vegetation on the Swan Coastal Plain [was] being lost or degraded at a rate of two football fields per day'.

The 2007 report indicated that knowledge, monitoring and management of the environment was inadequate. We strongly believe that the current review of the EP Act should be primarily framed to address this, to ensure community expectations for a healthy environment.

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From the WSWA's perspective, a revised and improved *EP Act* should not only provide a framework that strongly protects the environment of Western Australia, but in practice ensure that there is no further clearing of:

- remnant vegetation with less than 10% of pre-European extent still extant;
- Threatened or Priority plant species or communities;
- linear corridors such as road reserves and remnant pockets in highly cleared bioregions;
- regionally significant flora, ecological communities or corridors; and
- habitats (roosting and foraging) of conservation-significant fauna.

We provide our suggestions and comments with regard to these concerns of the WSWA. The order is aligned with the Discussion Paper.

Yours faithfully,

President of the Wildflower Society of Western Australia

Foreword

We welcome the Hon. Minister for the Environment's recognition that "Western Australia is home to some of the world's most biologically diverse flora and fauna" and that it is necessary to find a balance between "delivering on the full economic potential of our resources" and "ensuring sustainable development". We are concerned that if business-as-usual continues Western Australia will not meet the latter of Minister Dawson's goals. The WSWA strongly believes that streamlining procedures for developers should be a secondary not primary consideration for the *EP Act* if the objective is to "protect the environment of the State".

1.2 Policy Drivers

In alignment with the Hon. Minister's foreword, we note that this section de-emphasizes environment and focuses on business. Only one of five points in the second dot-point list is primarily about environmental protection and a healthy environment. The remainder list as drivers "delivering more efficient services to business" and "supporting investment, employment and business creation in the State". Good environmental outcomes are very unlikely if reform of the Act is designed to make it even easier for environmental values to be degraded.

1.3 Why the legislation needs to be reformed

Again, the underlying focus is industry driven. No comprehensive and easily accessible information has been provided to the public since the last State of the Environment Report (2007), which can assure the WSWA that the natural environment of Western Australia is being adequately and properly protected. Given that the Act is a primary instrument in WA for environmental protection, we strongly believe that the needs of the environment, rather than the needs of industry, must dominate the focus.

2.1 New areas of environmental reform Bilateral Agreements with the Commonwealth

The WSWA believes that the current bilateral agreement between the State and Commonwealth governments is not improving environmental outcomes for Western Australia. Any bilateral agreement must ensure that environmental protection is paramount.

The WSWA agrees that administrative changes may be beneficial for the assessment process. We are very concerned, however, given that "the amendments in relation to bilateral agreements are expected to have a positive benefit to business, consumers and the economy", that environmental protection is not the core intent.

Environmental Protection Covenants
Environmental Protection Covenants must be legally binding and enforceable by law. We do not believe they should be 'more flexible' if the actual outcome is that they will be weaker.

Environmental monitoring programs

The WSWA strongly supports the concept of user-pays in relation to monitoring. However, we are concerned that regulatory capture is a real possibility in any user-pays system (as has been amply demonstrated by the Commonwealth's Banking Royal Commission), and strong steps need to be taken to prevent this occurring.

Monitoring data should also be made available for public scrutiny, at the proponent's rather than the public's cost.

Provide a head power for certified environmental practitioners
The WSWA supports this initiative, however the principles must also apply to government department staff whose roles are to make environmental assessments, and to members of the EPA Board. The accreditation of consultants, government agency staff and board members must be transparent during the processes of assessment.

Injunction to apply to a broader range of matters
The WSWA supports this initiative.

2.2 Improvements to administrative efficiency

The WSWA does not disagree with these amendments; however, we believe that amending the purpose of a clearing permit should not be permitted where the environmental impacts on the environment are substantially different from the original proposed.

2.4 Part II Environmental Protection Authority

Given the role of the EPA as an agent of the State that advises the Minister on environmental matters, it is prudent that all members of the EPA should be accredited and certified as experienced in a field of science related to the environment and its protection such as botany, biology, ecology, geomorphology, hydrology, air quality, waste management, greenhouse gas emissions etc. Conflicts of interest must be avoided rather than managed, by ensuring that Board members have no vested interests that could compromise their decision-making.

EPA chairman to be either full-time or part-time
Given the importance of the role, the WSWA strongly supports a full-time EPA chairperson.

2.5 Part III Environmental Protection Policies

The Discussion Paper acknowledges that "environmental protection policies have mixed effectiveness" but does not provide any indication as to why this has been the case. We strongly endorse EPPs having the force of law. We believe that EPPs should be used more to protect specific areas and specific Matters of National Environmental Significance (MNES) under the *EPBC Act*.

Section 2.6 PART IV – Environmental Impact Assessment

Assessment of proposals
The WSWA supports these changes.

Strategic Assessments
The WSWA supports this change, particularly if it results in less cumulative impact on the environment.

However, given the number of species and vegetation communities now considered threatened, the *EP Act* and the *EPBC Act* have proven unsuccessful in providing protection to the State's environmental values in the past thirty years. Currently, even native vegetation or fauna habitat that fits the definitions of highly significant cannot be protected if these lands have been rezoned for development. State planners may or may not have been aware of environmental attributes during rezoning important remnants of native vegetation. If future strategic assessments have a focus on business and the economy, we believe the environment will continue to degrade and decline.

The WSWA also strongly recommends that the State government takes the extra step of strategically assessing Western Australia's natural assets (native vegetation and fauna habitat) in a manner as detailed and comprehensive as that adopted by the Planning Commission in identifying areas of basic raw materials in its Basic Raw Materials (BRM) Policy (see 3.1a New Ideas).

Recommendations in this and other State policies should be reviewed and incorporated into assessments of clearing and other proposals that impact environmental values. For example, section 6.1 of the Basic Raw Materials (BRM) Policy states that (a) land use planning and development proposals should aim to minimise the use of BRM by avoiding low-lying areas and (b) utilising existing sources of BRM in (c) close proximity. These have in effect attempted to minimise environmental impacts for a highly damaging industry.

Implementation decisions for proposals
The WSWA strongly opposes changes to the Act that give Ministers powers to overturn a decision on a proposal that has been deemed environmentally unacceptable. The advice of the EPA must be upheld regardless of other matters, as this leaves the process open to the government of the day and individuals with vested interests in projects proceeding.

Conditions
The WSWA is concerned that a Minister may impose conditions without adequate regard to real environmental impacts. For example, money provided to a fund or offsets may never be able to compensate for the loss of certain vegetation communities or fauna habitats.

Compliance and enforcement
The WSWA fully support this change to the Act. Taking actions that the Minister has decided against should be considered a criminal offence, and the penalty should be fully commensurate with the value to society of the asset lost or impact created (e.g. pollution or illegal clearing).

Cost recovery
The WSWA supports the amendment to recover costs from proponents. However, we would not support extending this to cost-recovery from members of the public seeking information on development approvals, conditions, or impacts.

2.7 Part V – Environmental Regulation

The WSWA supports the consideration of constraints when assessing applications for related developments.

Clearing of Native Vegetation

It is of great concern to the WSWA that "the Bill simplifies and improves the provisions for clearing of native vegetation". We acknowledge that clearing provisions are complex. However, we strongly believe that the most effective way to simplify clearing provisions is to rigorously and comprehensively assess the conservation status and land tenure of remaining native vegetation in the State and to protect all significant remaining vegetation, particularly in over-cleared bioregions such as the Swan Coastal Plain, Wheatbelt, and other bioregions of the South West.

Declaration of Environmentally Sensitive Areas

We are concerned by the proposal that "consultation requirements can be tailored to the nature of the change, rather than needing to follow a prescriptive approach". We believe that a likely outcome of this approach will be the undermining of protection afforded by ESA status, in much the same way that Threatened Ecological Communities can be dismissed because they do not fit arbitrary standards. We strongly recommend that all state and federally listed TEC's should be explicitly declared ESA's under the EP Act.

Referral process for clearing permits

We are concerned that this section provides a loophole for clearing applications. Again, a comprehensive and rigorous conservation of all native vegetation in WA (with an initial priority on heavily cleared bioregions), would clarify the scope of permitted clearing and provide for:

- purchase or rezoning of land to incorporate native vegetation into the conservation estate (all native vegetation that is not adequately represented); or
- approval of clearing where native vegetation is absent or substantially degraded.

Use of satellite imagery

Whilst satellite imagery may prove adequate for prosecutions of illegal clearing, it should not be used to assess representativeness of native vegetation, as current satellite imagery cannot capture species composition or allow accurate estimation of cover.

Regulation of prescribed activities

If an individual is granted permission to conduct a 'prescribed activity' they should be made legally responsible for that activity and be personally liable if it causes environmental harm, in a similar way to the proceeds of crime legislation.

Defences

The WSWA is extremely concerned with the proposal to allow clearing in environmentally sensitive areas to 'prevent danger'. This is likely to provide a very broad and unmanageable exemption to other provisions of the Act. For example, given the public's concern about fire hazards, almost any development activity that could reduce hazard may be approved under this provision.

We also strongly believe that land outside of referrals should not be considered 'available' to provide fire or pollution buffers, and the proponents of developments should have to include these provisions within their development envelopes.

2.9 Part VIA – Legal Proceedings and Penalties

Profits
The WSWA strongly supports the amendment of "monetary benefits" to include profits that would make committing an offence a worthwhile financial exercise in the past.

Minister's decision on appeal
The WSWA strongly supports that a Minister cannot make a final decision on an appeal without receiving or considering a report from the Appeals Convenor or appeal committee. The Minister's decision regardless should not be final or not subject to appeal.

2.13 Schedule 5

Definition of 'threatened ecological community'
The WSWA welcomes the incorporation of the *EPBC Act* vegetation communities into the *EP Act*. We hope this will improve the protection of these communities.

3 Further issues for consideration

3.1 New Ideas

The WSWA concurs with the first two ideas.

3.2 Delegations

The WSWA concurs with this idea.

3.3 Role of the Environmental Protection Authority

The WSWA concurs with the first two suggestions.

3.4 Environmental Protection Policies

The WSWA concurs with the three suggestions.

3.5 Assessment

The WSWA concurs strongly with the first two statements:

- It will streamline and make the legislation more intelligible if administrative procedures were included in the body of the Act.

- We strongly agree that the use of Section 38A, if amended to make it mandatory for the EPA to consider and report on cumulative impacts, will help restore trust in the process of government agencies managing the environment.
- We strongly believe that regular State of the Environment reporting must be renewed. Without these the public can legitimately be doubtful that the government is protecting their assets.

The WSWA also agrees in principle with the other five suggestions in this section.

3.6 Decision making

The WSWA concurs with all the suggestions within this section, particularly the third and last dot points.

3.7 Offsets

The WSWA strongly believes that offsets will never replace the loss of high conservation value native vegetation. Existing and past offsets should be reviewed and evaluated to assess how much they have or have not compensated for the loss of native vegetation and fauna habitat.

Section 3.8 Clearing of native vegetation

The WSWA concurs with these dot points but notes that reform of the clearing provisions in Part V alone is not adequate to protect what is left of native vegetation, particularly in the Swan Coastal Plain and Wheatbelt bioregions.

The WSWA strongly believes that clearing of remaining native vegetation in heavily cleared regions and clearing of vegetation types that have been over-cleared must be halted completely. For example, most wetlands of the Swan Coastal Plain have now been cleared, a trend that was first recognised 30 years ago. Legislation, regulation and government policies continue to facilitate their loss to this day.

3.10 Compliance and Enforcement

The WSWA strongly supports these ideas.

3.11 Appeals

The WSWA supports the two suggestions provided. We believe that the current appeals system is flawed (for example, the Department of Biodiversity and Attractions may advise that an area is of high conservation value or a Threatened Ecological Community, yet still support its clearing).

Have your say

Reverse the approach

The current approach is to evaluate referrals as they are presented, even if they have already been zoned by planning as urban, urban-deferred, industrial etc.

Environmental protection has largely failed in the past 30 years due to this reverse-logic approach, because even if an area is subsequently recognised as high conservation value (e.g. a Threatened Ecological Community), it is near impossible to reverse the planning decisions made. This results in a waste of resources, not only for the proponents and State taxpayers but for those community members who are concerned about the long term destruction of our environment.

To address this, all TEC's, both state listed and federally listed under the *EPBC Act*, and habitat of declared rare species should be included on the list of 'Environmentally Sensitive Areas' and specified under the *EP Act*. Exemptions must not apply to these areas, and clearing for housing and other urban developments must be assessed under either the clearing regulations or by the EPA. Clearing must be declared environmentally unacceptable, and a clearing permit refused under provisions of the *EP Act*, with no compensation payable.

Unfortunately, many planning decisions appear to be made without a comprehensive assessment of adequate environmental data or the application of the precautionary principle. Areas supporting native vegetation that are outside reserves seem not to have been recognised as of any conservation value.

The WSWA strongly advises that the approach should be reversed. All remnant vegetation in Western Australia should be comprehensively and rigorously assessed, and proposals considered on the basis of that assessment. We believe that this approach would bring substantial environmental benefits and reduce cost in the long term. For example, if native vegetation remnants were assessed for their conservation values in a similar fashion to the approach used for State Planning Policy 2.4 Basic Raw Materials Policy (October 2018 WA Planning Commission) a long-term framework would be in place that could identify and provide:

- a Comprehensive, Adequate and Representative reserve system (CAR) a strategy that was endorsed by all Australian governments as signatories to the *National Strategy for Conservation of Australia's Biological Diversity (2010)* and the *National Forest Policy statement (1992)*. Scientific priority for biodiversity conservation and thus an approach for identifying areas of vegetation that must be retained are spelt out clearly in https://www.environment.gov.au/land/nrs/science/scientific-framework; and
- areas where there are no constraints to development in terms of vegetation clearing.

The initial focus must be on bioregions where vegetation communities and native flora and fauna are under real threat, such as the Wheatbelt and Swan Coastal Plain.

Where land is zoned for development and is recognised as high conservation value, a process for resumption, acquisition and compensation must be established. The *EP Act* and policies would then be able to truly recognise high conservation value vegetation as assets that are as important to our long-term future as other resources.

It should also be recognised that the ecosystem services provided by the natural environment have a very high economic value. Costanza (1997) estimated that ecosystem services worldwide were worth an average $33 trillion dollars per year. In 2010 the World Bank initiated a programme to incorporate the value of ecosystem services into accounting systems to manage ecosystems whilst reaping maximum economic benefits. The loss of most wetlands on the Swan Coastal Plain, for example, has resulted in a decline of quantity and quality of groundwater resources. The loss of this ecosystem service has led to the cost of desalinating water for an expanding population, a very high opportunity cost. Similarly, the loss of native vegetation is detrimental both in direct impacts on plant and animal species and vegetation communities and indirectly through loss of carbon sequestering, cooling effects, and other intrinsic values including aesthetics.

Other points of note from the amended Bill

51O (3). Giving Ministers and CEOs the power to overturn decisions that have been assessed by engineers, scientists, other specialists in their field and the public is fraught with danger. The WSWA therefore recommends changing the following wording:

> 'the CEO may make a decision that is seriously at variance with the clearing principle if, and only if, in the CEO's opinion there is a good reason for doing so'

to:

> ' the CEO may not make a decision to approve a Clearing Permit that is seriously at variance with the clearing principles.'

51P(a) the WSWA recommends changing the following wording in the Bill:

> 'Despite anything in this section – (a) if the CEO is satisfied that, as a result of environmental circumstances having changed, the environment or environmental values of the area concerned requires a higher level of protection than would be provided by the standards required by or under any approved policy, the CEO may grant or amend a clearing permit so as to make the permit subject to conditions which specify standards that more stringent than those required by or under the approved policy'

to:

> 'Despite anything in this section – (a) if the CEO is satisfied that, as a result of environmental circumstances having changed, the environment or an environmental value of the area concerned requires a higher level of protection than would be provided by the standards required by or under any approved policy, the CEO should **not grant** a clearing permit'

51P(4) the proposed change to subsection (3) 'does not authorise the imposition of a condition that is contrary to, or not in accordance with, an implementation agreement or decision.'

The implementation agreement or decision report thus needs to very explicitly and carefully state what the environmental impacts are that need to be addressed.

51S Clearing Injunctions removed? Is it replaced by or superfluous to, Section 70?

REFERENCES

Costanza, R. et. al. (1997) *The value of the world's ecosystem services and natural capital.* Nature 387(6630):253-260. http://dx.doi.org/10.1038/387253a0.

EPA (2007) State of the Environment Report 2007 http://www.epa.wa.gov.au/state-environment-report-2007

The World Bank (2011) *Wealth Accounting and the Valuation of Ecosystem Services: A global partnership Program.* http://go.worldbank.org/1FM01NZUO0

Western Australian Planning Commission (2019) *State Planning Policy 2.4 Basic Raw Material* (DPLH-052) https://www.dplh.wa.gov.au/getmedia/747b8fec-4cf9-40a1-b35d-ec99d097663a/DRAFT_SPP_2-4_Basic_raw-materials