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Dear Mr Jacob

Response to EPA's draft Guidance Statement 19: Environmental Offsets

This letter is a brief submission in response to the EPA's Draft Guidance for the Assessment of Environmental Factors No 19: Environmental Offsets. Thank you for the short extension to the submission period to allow for our input.

Introduction

The principle of environmental offsets has been and always will be driven by the perceived need to facilitate economic growth. It is impossible to homogenise environmental values from different locations in WA. Each area is unique; to treat them as parcels of supposedly the same worth is an exercise in futility.

However, if one assumes that most development proposals will ultimately be approved, any form of mitigation that the EPA can achieve is very much a step in the right direction.

There are issues of transparency about the way offsets are currently administered, which have to be addressed if the principles enumerated in the draft Guidance Statement are to be achieved.

There is also some apparent confusion in translating into this draft Guidance Statement, from the previous EPA Position Statement on this topic, the tests for when offsets might be considered appropriate. We also have question marks about the circumstances in which "critical assets" will be protected from the offsets regime.

Placing the acquisition of land for conservation in the category of a direct offset is also in direct contradiction of the principle “like for like or better”.

Specific comments

Scope of this draft Guidance Statement

We note from page 1 of the draft Guidance Statement that offsets for greenhouse gas emissions are not intended to be covered. We will be keen to participate in consultation processes about that topic in due course.

2.2 Principles

F. Environmental offsets must meet all statutory requirements.

G. Environmental offsets must be clearly defined, transparent, measurable and enforceable.

These same principles are enumerated in the EPA’s Policy Statement No. 9.

On behalf of a client, I recently requested information on offset conditions in relation to native vegetation clearing permits given to local governments. I was instructed that in response to a request from my client, the DEC has thus far refused to supply the offset proposals submitted by the relevant local government and approved by DEC.

The offset conditions in recent local government native vegetation clearing permits are presumably one of the key considerations for allowing such clearing to go ahead. Not to release the offset proposals that resulted from those conditions is clearly contrary to the spirit of the *Environmental Protection Act* and *Environmental Protection (Clearing of Native Vegetation) Regulations*. The Environmental Protection Authority’s policy plainly states in section G of Position Statement No. 9 on Environmental Offsets (and now in principle G of this draft Guidance Statement) that offsets should be fully documented, that they must be open and accountable, and that the general public should be able to see the offset principles have been put into practice.

Additionally, the Department CEO is also required by the *Environmental Protection Act* section 51Q to publish particulars of clearing permit records. These particulars are enumerated in the *Environmental Protection (Clearing of Native Vegetation) Regulations* – regulation 8(2)(b) calls for publication of all records required to be kept, with the exception of the address of the permit holder, including “the conditions to which the permit is subject” under regulation 8(1)(b)(vi).

The majority of the particulars have already been published on the Department’s internet website pursuant to section 51Q and regulation 8(3). All particulars bar the permit holder’s address are supposed to be published, not just a selection of records. To leave out the offset proposals that resulted from offset conditions which were pivotal to these local governments being granted their permits would seem to be unlawful on the part of the Department as well as being contrary to public policy.

We would have similar concerns if offset proposals relating to works approvals or licences were not completely published, as would seem to be required by section 63A of the EP Act.

2.3 *Applying and formulating offsets*

Given that the concept of offsets has gained acceptance in WA, it is essential that the EPA only allows for offsets after the mitigation sequence outlined on pages 4 and 5 of the draft Guidance Statement is rigorously applied. Further, given that offsets will be allowed, it is at least very positive that the EPA retains the concepts of “critical assets” and that such assets are not “up for sale”. We appreciate the need to clarify for industry what those critical assets are, but we would urge that the EPA retain some flexibility in this regard in case the list at Appendix 3 of this draft is found to be deficient in some way.

Within the framework of allowing offsets, we would also support the notion of “high value assets”, where proposed offsets are less readily accepted. We note that critical assets and high value assets seem to be listed together on pages 5 to 7 of Chapter B1 of draft Guidance Statement 33. For ease of reference high value assets should be separately listed, and both lists should appear in the body of the final Guidance Statement 19 itself (in complete form, not the abbreviated form currently found in draft Guidance Statement 19 at Appendix 3). We would again urge that the EPA retain some flexibility in this regard in case the list ultimately produced is found to be deficient in some way (and we note that the list on pages 5 to 7 of Chapter B1 of draft Guidance Statement 33 seems to adopt this approach in para viii) and x) in particular.

2.4 *Tests for applying and formulating offsets*

There appears to be some confusion introduced from the translation of the tests in Position Statement 9 into this draft Guidance Statement. On page 6 of this draft Guidance Statement it says that offsets will be appropriate if the statements below all apply, but the statements below that comment do not seem to contemplate the possibility that residual environmental impacts are expected, but not so as to have an adverse effect on critical or high value assets (i.e. the opposite of test 4). The tests in Figure 3 (see page 10 of the draft Guidance Statement) seem more appropriate in this regard.

We note also that there appears to be an inconsistency between the test suggested here “The EPA is unlikely to accept the use of offsets, or to recommend approval for proposals with significant residual impacts on critical assets” and the test originally put forward in the Position Statement: “Therefore, the EPA in providing its advice will adopt a presumption against approval of project proposals where significant adverse impacts affect ‘critical assets’” (see page 19 of the Position Statement). We would prefer the latter formulation.

There is arguably a similar inconsistency between the test suggested here and the formulation on page 5 of this draft Guidance Statement:

“Critical environmental assets represent the State’s most important environmental assets and therefore, the EPA does not endorse the use of environmental offsets where a project is predicted to have a significant adverse impact on a critical asset.”

If the latter is considered a different formulation, we would prefer it.

To add an extra layer of complexity, if there was a difference between the Position Statement’s “presumption against” and page 5 of the draft Guidance Statement’s “does not endorse”, we would suggest the latter is stronger, and we would prefer it.

3.1 *Offsets and other approvals processes*

The purpose of this draft Guidance Statement is “to provide advice to proponents, responsible authorities and the public generally about the minimum requirements for environmental management in Western Australia which the EPA would expect to be met.” However, “[t]he EPA *generally encourages* agencies to adopt guidelines for the application of offsets that align with the EPA’s Position Statement” (see page 8).

We accept that decisions need to have some capacity to be flexible to accommodate differing circumstances, but it seems illogical that on one hand this draft Guidance Statement might define a “minimum requirement” but on the other hand that this standard will only be something that other agencies are “generally encouraged” to comply with.

It may be that this apparent discrepancy is explained in the reference in the final paragraph of page 8 to “different agency roles and legislative requirements”. If that is so, we would strongly urge State Government to pursue legislative changes that will provide consistent principles for the use of offsets in all contexts in WA. Alternatively, an offsets policy might well be made the subject of a binding Environmental Protection Policy under the *Environmental Protection Act*.

Figure 3

As above, we note also that there appears to be an inconsistency between the tests suggested here “EPA unlikely to accept offsets or to recommend approval for project” (see the top of page 10 of the draft Guidance Statement, and also the bottom left hand side of that page) and the test originally put forward in the Position Statement: “Therefore, the EPA in providing its advice will adopt a presumption against approval of project proposals where significant adverse impacts affect ‘critical assets’” (see page 19 of the Position Statement). We would prefer the latter formulation.

As above, there is arguably a similar inconsistency between the test suggested here and the formulation on page 5 of this draft Guidance Statement.

4 HOW SHOULD ENVIRONMENTAL OFFSETS BE FORMULATED?

Given our concerns about the concept of offsets in general, it should come as no surprise that we support the EPA’s proposed “case-by-case approach” to offsets (see page 11 of the draft Guidance Statement). The possible loss side of the offset ledger will invariably be complex (especially in the case of the proposed loss of native vegetation), so the proposed ‘upside’ should hopefully be similarly detailed.

We strongly support the EPA not itself negotiating the terms of a proposed offset (see page 11 of the draft Guidance Statement), given that it must express an opinion on the acceptability of the proposed offset. We note that offsets for clearing permits are problematic in this regard, with the DEC both negotiating the offset with its former CALM staff and evaluating the offset with its former DoE staff (native vegetation branch), and both such groups being ultimately responsible to the same Director-General.

4.1 Steps to assist proponents and responsible authorities to develop an offsets package

We strongly support the following statement on the bottom of page 14 of the draft Guidance Statement:

“The offsets package must not include (a) actions that would be readily implemented in the absence of the project, (b) actions that are normal on-site environmental management requirements for the project, or (c) actions that comprise part of the environmental management measures for another project.”

4.4 Achieving ‘like for like or better’

The test proposed to achieve ‘like for like or better’ is neither ‘like for like’ nor better. Merely protecting something which is already there while allowing the degradation of another supposedly similar site will always amount in a net loss for the environment.

The proviso under 6.1 (see further below) on the direct offset of acquiring land for conservation that “adverse impacts to one critical asset should not be justified by the conservation of another critical asset” (see page 22 of the draft Guidance Statement) does something to mitigate this problem, although it arguably also amounts to a concession that acquiring land for conservation cannot truly be considered a direct offset.

4.5 Positive offset ratios

We agree that in the case of offsets for impacts on native vegetation “it is expected that positive offset ratios will be applied in almost every case” (see page 17 of the draft Guidance Statement). We note in passing that by reference to this criterion the offset negotiated with Ravensthorpe Nickel (see Figure 5 on page 24 of the draft Guidance Statement) is disappointing.

5.2 When to present an offsets package

We agree that the absence of information about an offset should be a factor that the EPA considers in deciding whether or not to formally assess a proposal (see page 18 of the draft Guidance Statement).

6.1 Types of offset actions

We strongly support the following statement at the top of page 21 of the draft Guidance Statement:

“For an activity to be considered as an offset by the EPA it must not be part of normal best practice on-site environmental management requirements for the project, for example, rehabilitation of land disturbed during construction, on-site recovery plans for species, or collection and analysis of data that is required for effective impact assessment, management and/or mitigation of impacts as a result of the proposal. Neither should an offset be an activity that would be readily implemented in the absence of the project. For example, purchase of a site already earmarked for acquisition for conservation in the short term would usually not be acceptable as an offset.”

Direct offsets

Restoration, rehabilitation and re-establishment in terms of direct offsets clearly help to improve the environmental values of the area. Acquiring land for conservation (see page 22 of the draft Guidance Statement) is a different matter. As the recommendation in Case Study 8 shows, the direct offset was to secure an area in already good condition. The adverse impact on this area causing degradation was due to illegal dumping. This degradation shouldn't have been occurring in the first place.

Offsets recommended by the EPA in Case Study 8 are basically to degrade 2 hectares worth of bush and 'off-setting' this by 'securing and managing' an existing adjacent area which is already in 'excellent' to 'very good' condition. Net environmental loss is still 2 hectares worth of bush. This practice doesn't comply with what the true spirit of offsets would dictate; namely that if two hectares of bush are lost somewhere, two similar hectares are actually gained (i.e. revegetated or at least rehabilitated) elsewhere.

Changing the classification of the area from 'residential' to 'conservation and recreation' produces no real environmental gain in the offset "balancing act" and should instead be considered a type of enhanced 'protection' and / or 'management' (being two types of contributing offset listed on page 22 of the draft Guidance Statement).

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We are unable to provide more detailed comment on the draft Guidance Statement at this stage, but we would be keen to be involved in subsequent consultations on these issues.

Yours sincerely



CAMERON POUSTIE
Principal Solicitor