



Environmental Defender's Office
Western Australia (Inc)

EPA Greenhouse Gas Assessment Guidance

18 June 2019

Overview

On 14 March 2019 the Western Australian Environmental Protection Authority (**EPA**) withdrew its revised Environmental Factor Guideline and Technical Guidance on Mitigating Greenhouse Gas Emissions (**GHG Assessment Guidance**) published on 7 March 2019 in order to undertake further consultation. The draft GHG Assessment Guidance and a Background Paper were released on 10 June 2019 for 12 weeks of public consultation ending on 2 September 2019.

This Fact Sheet outlines the legislative framework that applies to the EPA's draft GHG Assessment Guidance and the content of these documents, to inform public submissions.

What is the role of the EPA?

The *Environmental Protection Act 1986* (WA) (**EP Act**) establishes the EPA as an independent body and requires it to use its best endeavours to protect the environment and to prevent, control and abate pollution and environmental harm.¹ As it is well established that greenhouse gas emissions and climate change is, and will, detrimentally impact WA's environment and climate, it is a relevant consideration for the EPA in exercising its functions under the EP Act.

The EPA is responsible for conducting environmental impact assessments (**EIAs**) of major developments in Western Australia under Part IV of the EP Act. For more information on EIAs generally see our fact sheet on **Environmental Impact Assessment in Western Australia**.

Following assessment, the EPA provides advice and recommendations on environmental impacts associated with proposals to the Minister for Environment (**Minister**). The EPA's advice and recommendations must be made on the basis of the environmental factors alone and cannot

¹ *Environmental Protection Act 1986* (WA) (**EP Act**), s 15.

This fact sheet is for general information purposes and is not legal advice. Important legal details have been omitted to provide a brief overview of this area of law. If you require legal advice relating to your specific circumstances you should contact your solicitor or the EDO.

consider or weigh the social, commercial or economic benefits of a proposal against its environmental impacts.

The EPA's advice and recommendations are then considered by the Minister, who is not bound by the advice in deciding whether to approve major developments in Western Australia, taking into account other factors (e.g. economic, commercial and social impacts).

What is the draft GHG Assessment Guidance?

The draft GHG Assessment Guidance is a policy document prepared by the EPA to inform and guide its future consideration of greenhouse gas emissions from proposals in its EIAs and provision of advice to the Minister. Once the final draft GHG Assessment Guidance is published, the EPA will apply it in assessing and advising on new proposals and changes to proposals in Western Australia.

As the EPA's Background Paper states, the draft GHG Assessment Guidance is not regulation or government policy and is not binding on the EPA or government decision-making.² Its purpose is not to direct the EPA but is to provide transparency, clarity and consistency for proponents in the EIA process.

What does the draft GHG Assessment Guidance cover?

The environmental objective of the draft GHG Assessment Guidance recognises the fundamental link between greenhouse gas emissions and their potential to harm environmental values.³ It states that considerations for EIA for greenhouse gas emissions includes application of the EPA's mitigation hierarchy to avoid, reduce and offset emissions.

The draft GHG Assessment Guidance outlines the information the EPA will require and consider in deciding whether to assess, assessing (if applicable), and advising on, greenhouse gas emissions of "significant proposals" in Western Australia. This is defined in the draft GHG Assessment Guidance as including proposals with scope 1 greenhouse gas emissions in excess of 100,000 tonnes carbon dioxide equivalent per annum (**tpa**). If a proposal does not meet this threshold, it will not be covered by the draft GHG Assessment Guidance.

If a proposal exceeds this threshold, the draft GHG Assessment Guidance states that the EPA will require the following information to determine whether it requires EIA:

- scope 1 and scope 2 greenhouse gas emissions per annum and over the life of the proposal;

² Greenhouse Gas Consultation - Background paper, p 5.

³ Environmental Factor Guideline – Greenhouse Gas Emissions, p 1.

- scope 3 emissions, where there is an established link between the proposal's activity and these emissions and they will be relatively large;
- a breakdown of emissions by source inclusive of stationary energy, fugitives, transport, and emissions associated with changes to land use;
- the projected emissions intensity (emissions per unit of production) for the proposal; and
- proposed measures to avoid, reduce or offset emissions associated with the proposal.

It also states that the EPA may expect to see what measures have been taken or are proposed to mitigate greenhouse gas emissions, including:

- avoiding emissions through best practice design and benchmarking;
- continuous improvement to reduce emissions over the project life; and
- offsetting emissions (carbon offsets).

Further, the draft GHG Assessment Guidance outlines the EPA's minimum expected requirements for management of proposals that exceed the 100,000 tpa threshold, including:

- requirement to demonstrate that all reasonable and practicable design measures, including renewable energy options, have been considered to avoid and reduce emissions at the time of seeking project approval;
- expectation to address continuous improvement measures in greenhouse gas abatement plans, and report on opportunities identified and implemented to minimise greenhouse gas emissions;
- requirement to offset any residual (net) direct emissions associated with the proposal; and
- requirement to publicly report on emissions intensity performance and measures implemented to minimise or offset greenhouse gas emissions over the life of the project.

Is the draft GHG Assessment Guidance legally valid?

The draft GHG Assessment Guidance is consistent with the EPA's governance framework for EIA and the object and guiding principles of the EP Act. As the EPA states in the Background Paper, the EPA has published environmental factor guidelines and technical guidance for environmental factors (which include land, sea, air, water and people). It is not a new practice for the EPA to consider greenhouse gas emissions and climate change. The draft GHG Assessment Guidance provides clear guidance and certainty on the EPA's consideration of these issues to ensure that proposals that contribute to Western Australia's greenhouse gas emissions are assessed in a sound and consistent manner.

The EPA has stated that the draft GHG Assessment Guidance will be reviewed after 12 months to ensure that it reflects contemporary climate science, emissions trends and existing policies and regulation.

Does the draft GHG Assessment Guidance mean that projects will not be approved?

The draft GHG Assessment Guidance does not necessarily mean that projects will not be approved. The draft GHG Assessment Guidance informs and guides the EPA's assessment and advice in relation to greenhouse gas emissions from proposals. This advice is then provided to the Minister, who is not bound by the advice, and makes the final decision whether to approve a proposal. The Minister for Environment will consider other factors and consult with other government decision-makers in making this decision.

The likelihood of the EPA's recommendations being accepted by a Minister should not be a relevant factor for the EPA in developing its policy or advice.

What about the effect of the draft GHG Assessment Guidance on WA's economy?

Economic considerations are not valid considerations for the EPA. The EPA's role under the EP Act is to assess and advise on factors affecting the 'environment' as defined in the EP Act. In the *Coastal Waters* case⁴ the Supreme Court expressly found that the EPA was precluded from considering non-environmental factors, such as economic factors, in assessing a proposal under Part IV of the EP Act.

It is outside the EPA's role to consider economic benefits which may result from a proposal being approved, or how not approving a proposal may affect the proponent, the economy, investment or jobs in Western Australia. That is instead the responsibility of the Minister, who can consider these economic, commercial and social factors associated with proposals and weigh them against the EPA's advice on environmental factors when deciding whether they should be approved.

How does the EPA consider existing Federal and State regulation and policies?

The EPA states in its Background Paper that existing Commonwealth and State regulation and policies may be relevant to the EPA in its assessment and advice on proposals if it considers that such regulation and/or policy has the effect of adequately regulating or mitigating the

⁴ (1996) 90 LGERA 136.

environmental risks associated with the proposal. This may lead to the EPA concluding that no additional advice on protection is merited through an EIA.

In the context of regulation and policy in relation to greenhouse gas emissions, the current Commonwealth legislative framework for greenhouse gas emissions has been criticised as being ineffective to ensure effective reductions in Australia's emissions.⁵ In particular, the Carbon Market Institute states:

*In its current form, the Safeguard Mechanism is unlikely to make a significant contribution to reducing emissions below business as usual levels.*⁶

This is also acknowledged by the EPA in the Background Paper, which states:

*the national framework for emissions reductions no longer imposes effective limitations on emissions through either taxation or capped trading.*⁷

In relation to the Commonwealth government's current climate policy, Climate Transparency states that they are "failing to address the need for structural change to help achieve the necessary emissions reductions".⁸

How did the EPA assess greenhouse gas emissions before the draft GHG Assessment Guidance?

Prior to the introduction of the draft GHG Assessment Guidance, the EPA's consideration and assessment of greenhouse gas emissions was informed by the Environmental Factor Guideline for Air Quality.⁹ The Air Quality guideline has a broad objective of maintaining air quality and minimising emissions. The draft GHG Assessment Guidance introduces a separate and specific Environmental Factor Guideline and supporting Technical Guidance for greenhouse gas emissions.

It is well established that the EPA can validly consider greenhouse gas emissions and climate change in assessing proposals in accordance with the EP Act, and has a history of doing so. As the Background Paper states, the EPA has advised on the greenhouse gas conditions of more than 40 proposals since 1991.¹⁰ The EPA also states in the draft GHG Assessment Guidance:

⁵ Brad Kerin, 'The ERF & Safeguard Mechanism Must Evolve to be an Effective Market-based Approach to Emissions Reduction', 13 October 2017, *Carbon Market Institute*

<<http://carbonmarketinstitute.org/the-erf-safeguard-mechanism-must-evolve-to-be-an-effective-market-based-approach-to-emissions-reduction/>>.

⁶ <http://marketplace.carbonmarketinstitute.org/wp-content/uploads/2018/10/CMI-Submission-2017-Australian-Climate-Change-Policy-Review.pdf> p 17.

⁷ Greenhouse Gas Consultation - Background Paper, p 9.

⁸ https://www.climate-transparency.org/wp-content/uploads/2019/01/BROWN-TO-GREEN_2018_Australia_FINAL.pdf, p 1.

⁹ Environmental Factor Guideline – Air Quality, available here: http://epa.wa.gov.au/sites/default/files/Policies_and_Guidance/Guideline-Air-Quality-131216_3.pdf.

¹⁰ Greenhouse Gas Consultation - Background paper, p 10.

The approaches outlined in this Guidance are not new. They have been applied to significant and relevant proposals subject to formal environmental impact assessment for almost two decades.¹¹

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The Western Australian EPA has a long-standing record of encouraging proposals undergoing environmental impact assessment to identify and minimise greenhouse gas emissions.¹²

How does the draft GHG Assessment Guidance affect State and Federal regulation and policy on greenhouse gas emissions?

The draft GHG Assessment Guidance does not determine or affect how the State or Commonwealth governments consider or deal with greenhouse gas emissions and climate change. It was developed by the EPA to inform and guide its EIA and advice on environmental issues under the EP Act.

The EPA is established as a body that is independent of the Minister and the State and Commonwealth governments. Thus, while the Western Australian Government is currently revising its climate policy, this is not a relevant consideration for the EPA in developing its draft GHG Assessment Guidance.

The role and function of the draft GHG Assessment Guidance also differs significantly from State and Commonwealth government policy on climate change. The draft GHG Assessment Guidance was developed in order to provide clarity and consistency in how the EPA will consider greenhouse gas emissions in its assessment of and advice on significant proposals in WA, and is restricted to environmental considerations. Government policy has much broader applicability to the state or country, however, and can validly include consideration of economic, commercial and social factors associated with addressing and regulating greenhouse gas emissions and climate change.

As noted above, the current Commonwealth regulatory regime for greenhouse gas emissions has been criticised as being ineffective and Western Australia does not currently have any specific regulation or contemporary policy in relation to greenhouse gas emissions.

The EPA acknowledges in the draft GHG Assessment Guidance and Background Paper that future changes in State or Commonwealth greenhouse gas regulation will potentially influence and lead to the revision of the EPA's draft GHG Assessment Guidance.

¹¹ Technical Guidance— Mitigating Greenhouse Gas Emissions, p 3.

¹² Technical Guidance— Mitigating Greenhouse Gas Emissions, p 4.

How does the draft GHG Assessment Guidance relate to Australia's international obligations?

The Paris Agreement was adopted by various nations of the international community, including Australia, on 12 December 2015 and entered into force on 4 November 2016. The Paris Agreement aims to strengthen the global response to the threat of climate change by holding the increase in global average temperature well below 2 degrees Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degrees above pre-industrial levels. In order to achieve this ambitious goal, the Paris Agreement implies that global emissions must be limited to net-zero, which requires a global reduction in GHG emissions.

In its recent Special Report on Global Warming of 1.5°C, the Intergovernmental Panel on Climate Change emphasises that reaching the Paris Agreement's 1.5°C goal implies reaching net-zero greenhouse gas emissions globally by 2050.¹³ Net-zero emissions has been defined as meaning the situation where greenhouse gas emissions are balanced by offsets such as carbon sinks or storage.¹⁴

In order to achieve its goals, the Paris Agreement requires each country to put forward its own Nationally Determined Contribution (**NDC**) and to pursue "domestic mitigation measures, with the aim of achieving the objectives of such contributions".¹⁵ In accordance with its international obligations under the Paris Agreement, Australia has committed to reducing its 2005 emissions by 26-28% by 2030.¹⁶

Despite this, the United Nations Environment Programme concludes in its recent Emissions Gap Report that Australia is not on track to meet this target. In particular, it states that:

*There has been no improvement in Australia's climate policy since 2017 and emission levels for 2030 are projected to be well above the NDC target.*¹⁷

In order for Australia to reduce its greenhouse gas emissions and meet its international obligations, robust and effective legislative and policy frameworks are required at both the State and Commonwealth level. The EPA acknowledges in the Background Paper that the primary obligation to meet Australia's international commitments lies with the Commonwealth government¹⁸ and that it is appropriate for sub-national or State jurisdictions to defer to national legislation and policies to meet these commitments, where they can be relied upon.

¹³ IPCC Special Report on Global Warming of 1.5°C, p 95.

¹⁴ <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Climate-change/achieving-net-zero-emissions-by-2050-fact-sheet-160604.pdf>, p 1.

¹⁵ Paris Agreement, art 4(2).

¹⁶ <https://www.environment.gov.au/climate-change/publications/factsheet-australias-2030-climate-change-target>.

¹⁷ http://wedocs.unep.org/bitstream/handle/20.500.11822/26895/EGR2018_FullReport_EN.pdf?sequence=1&isAllowed=y p 12.

¹⁸ Greenhouse Gas Consultation - Background Paper, p 11.

The current Commonwealth legislative framework for greenhouse gas emissions has been criticised, however, as being ineffective to ensure effective reductions in Australia's emissions.¹⁹ In light of this and the fact that Western Australia's greenhouse gas emissions are substantially increasing,²⁰ regulation of greenhouse gas emissions at the State level is crucial to reduce Western Australia's and Australia's emissions in accordance with the Paris Agreement.

The most effective arrangement would be consistent national regulation and policy that mandates that Australia's greenhouse gas emissions are reduced in accordance with the Paris Agreement and expert recommendations in relation to limiting global warming to 1.5°C .

In the absence of such regulation and policy at the Commonwealth level, the Western Australian government has the power to regulate greenhouse gas emissions by using its powers under the EP Act to impose conditions on proposals that require them to avoid, reduce and offset their emissions. As the EPA states in its Technical Guidance:

*in the absence of effective national mechanisms, a greater share of the burden will fall to regulators in state and territory jurisdictions.*²¹

In the absence of regulation and policy at the Commonwealth and State level that is capable of ensuring effective reductions, it is appropriate for the EPA to advise the Minister on how to reduce Western Australia's emissions. The EPA has developed the draft GHG Assessment Guidance to inform and guide its consideration and advice in relation to greenhouse gas emissions, which supports Australia's obligations under the Paris Agreement.

Why is the EPA providing further consultation on the draft GHG Assessment Guidance?

The EPA has committed to further consultation on the draft GHG Assessment Guidance in order to respond to concerns surrounding the draft GHG Assessment Guidance, in particular: inadequate consultation with industry and the community, uncertainty regarding its technical aspects, and the practicability of its application. The EPA is seeking to consult and engage widely during the 12 week consultation process, to ensure a high level of transparency and participation from community and industry.

As the EPA states in the Background Paper:

¹⁹ Brad Kerin, 'The ERF & Safeguard Mechanism Must Evolve to be an Effective Market-based Approach to Emissions Reduction', 13 October 2017, *Carbon Market Institute*

<<http://carbonmarketinstitute.org/the-erf-safeguard-mechanism-must-evolve-to-be-an-effective-market-based-approach-to-emissions-reduction/>>.

²⁰ <https://www.environment.gov.au/system/files/resources/a97b89a6-d103-4355-8044-3b1123e8bab6/files/state-territory-inventories-2016.pdf> p 2.

²¹ Technical Guidance – Mitigating Greenhouse Gas Emissions, p 3.

*The aim of this consultation process is to ensure the guidelines provide a robust and effective framework within which the EPA will consider the greenhouse gas emissions of future proposals.*²²

The EPA also states on its Consultation Hub:

*This consultation will help ensure the guidelines on greenhouse gas emissions are well informed by the community's views and are clear, can be practically implemented and effectively inform assessment and advice in the execution of the EPA's obligations under the Environmental Protection Act.*²³

Statements to the effect that the EPA is caving in or watering down the draft GHG Assessment Guidance are therefore inaccurate. Through this consultation, the EPA is merely trying to ensure that all stakeholders and members of the community are provided with an opportunity to provide input in relation to the Draft GHG Assessment Guidance.

What is the EPA consulting on?

The EPA is consulting on the draft GHG Assessment Guidance (published in March 2019 and subsequently withdrawn) to further inform its development. In particular, it is seeking submissions from the community and industry which it will consider when drafting and developing its draft GHG Assessment Guidance.

The Background Paper supports the consultation by providing context to the draft GHG Assessment Guidance and explaining its proposed use by the EPA. The Background Paper also outlines the areas on which the EPA is seeking further input, views and information, include the following:

- 1. The information that should be required by the EPA for Environmental Impact Assessment;**
 - information on greenhouse gas emissions and their mitigation which the EPA should expect and consider in making any advice on a proposal
 - information the EPA should expect on how a proposal aligns with Australia's emissions reduction targets
 - the need for, and any reasonable constraints on, transparency in emissions data and proposed mitigations
- 2. How emissions associated with a proposal should be considered by the EPA on the scope of emissions to be considered on the relevance and context for considering indirect (scope 3) emissions;**

²² Greenhouse Gas Consultation - Background Paper, p 2.

²³ <https://consultation.epa.wa.gov.au/policy-and-guideline-development-and-review/epa-greenhouse-gas-emissions-assessment-guidance/>.

- the scope of emissions to be considered
- the relevance and context for considering indirect (scope 3) emissions
- the relationship to national or state emissions targets and regulation
- consistency with the EPA's duty to use its best endeavours to protect the environment

3. The constraints on potential emissions mitigation conditions the EPA should recognise; and

- the appropriateness and practicability of measures to mitigate greenhouse gas emissions, including nature and level of planned reductions or offsets
- the timing of planned reductions or offsets
- the kinds or size of proposals to which the guidelines should apply

4. Any other advice related to the assessment of greenhouse gas emissions by the EPA that would further clarify or improve the guidelines.

Contrary to statements to the effect that the EPA has abandoned the requirement to require 100% offsetting of residual direct greenhouse gas emissions, the EPA seeks input in relation to offsets, in particular views and information on the appropriateness and practicability of measures to mitigate greenhouse gas emissions, including nature and level of offsets and the timing of planned offsets.²⁴

How do I get involved?

If you wish to participate in the consultation, you can make a submission to the EPA in relation to the draft GHG Assessment Guidance.

To do this, you need to:

- Visit the EPA's online consultation hub [here](#);
- Fill out your details and the relevant boxes;
- Upload any additional documents to include with your submission.

Alternatively you can send your submissions via **email** to greenhousegasconsult@epa.wa.gov.au or **post your submission** to:

Greenhouse Gas Guideline Consultation
Lock Bag 10
Joondalup DC
WA 6919

²⁴ Greenhouse Gas Consultation - Background Paper, p 12.

Please note that the EPA intends to publish all submissions on the EPA website under the name of the submitter. It will not accept any anonymous submissions. If you do not consent to your submission being treated as a public document, you need to make a specific request by identifying the information you consider to be confidential, and including an explanation. If you do not specifically mark your submission as being confidential in whole or in part, you will be taken to have consented to it being treated as a public document.

Contacts and further information

Environmental Protection Authority, Tel: +61 8 6364 7000, <http://www.epa.wa.gov.au/>

For copies of legislation, visit <http://www.legislation.wa.gov.au> (State legislation) or the Federal Register of Legislation (Commonwealth legislation), <https://www.legislation.gov.au>

The Environmental Defender's Office WA Inc

The Environmental Defender's Office WA (EDOWA) is a not-for-profit, non-government, community legal centre specialising in public interest environmental law. We empower the community to protect the environment through law and the use of legal process.

We provide community groups and individuals with:

- free or low-cost environmental legal advice and representation
- assistance in promoting environmental law reform and
- community education about environmental law.

EDOWA receives some limited funding from the State government, but to help us meet the increasing State-wide demand for our legal services you can:

- become a member of EDOWA
- make a donation
- support our fundraising activities
- volunteer your time

If you require legal advice on an environmental issue or wish to find out more about EDOWA, please contact us.

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