

IAIA 08 Paper

Title

The Environmental Appeal Process in Western Australia: A check and balance on EIA.

Author

Garry Middle; Appeals Convenor, Office of the Appeals Convenor; Level 13 Allendale Square, 77 St Georges Tce, PERTH Western Australia 6000; garry.middle@appealsconvenor.wa.gov.au

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Abstract

The EIA process in Western Australia is subject to merits-based, not legal, appeals. The Appeals Convenor manages the appeals process and is independent of both the peak environmental agency, the EPA, and the final decision maker, the Minister for the Environment. The appeals process has a statutory framework, provides an additional opportunity for public participation, has worked to provide a check and balance on EIA, and effectively acts to further minimise political interference in EIA. Eight key principles are adopted in considering appeals. A description of the appeals process is provided along with data on the outcomes of appeals.

Introduction

Whilst the need for public participation has been central to environmental impacts assessment (EIA) (Sinclair and Fitzpatrick 2002), it is not uncommon for authors to express concern about the nature and extent of public participation (Diduck, Sinclair et al. 2007; Ward 2001; Palerm 1999). Although Wiklund (2005:282) notes that

Although there are many barriers, I would like to claim that EA (*environmental assessment*) has a 'hidden' deliberative potential. Much of this potential follows from the institutional flexibility that tends to characterise EA systems.

The EIA process in Western Australia (WA) provides for an additional public participation process which may not be common to practices in other countries. Legislation allows for interested parties to lodge 'appeals' at various stages in the EIA process. These appeals are not legal based but are against the environmental merits of the EIA. This paper provides an overview of that appeal process.

Overview of EIA in WA and the opportunities for appeals

A detailed description of the EIA process in WA has been provided elsewhere (Morrison-Saunders and Bailey 2000; Wood and Bailey 1994), but in summary it usually involves the following key steps:

- The Environmental Protection Authority (EPA), and independent statutory authority, decides to assess (and if so what 'level' of assessment is required) or not assess a proposal;
- Where formal EIA is required, the proponent produces an Environmental Review (ER) document for public scrutiny and the EPA received public submission on the ER;
- Following consideration of the ER, public submissions, the proponent's response to public submissions and any other advice it has sought, the EPA completes its assessment and reports to the Minister for the Environment (the Minister) on the outcomes of that assessment, including any draft conditions that should apply to the proposal, in a publicly available report (Bulletin); and
- The Minister sets the final legally binding conditions on the proposal should the Minister determine that it should proceed.

As can be seen, the role of the EPA is advisory only, and it is the Minister who is the ultimate decision maker. However, the EIA and appeals processes provide significant effective

constraints on the Minister's decision, as discussed below.

The legislation allows for the following to be appealed:

- The decision of the EPA to not assess a proposal;
- Where the EPA is to assess a proposal, the level of assessment set by the EPA;
- The contents of the EPA assessment report (the environmental assessment); and
- The final conditions set by the Minister.

For the first three types of appeals, any individual or organisation may submit an appeal (third party appeals), whereas only the proponent may appeal the final conditions.

Determining appeals

The Minister has been given the power to determine all appeals other than appeals lodged against his own decisions on conditions. In this latter case, an independent appeals committee must be set up whose decision is final. This does not, however, give the Minister effective unlimited discretion in determining appeals.

To assist the Minister in making appeal decisions, and to provide a level of independence to the advice that the Minister receives, the position of Appeals Convenor was created (through legislation). The Appeals Convenor is appointed by the Governor and is independent of both the EPA and the Minister. The Appeals Convenor investigates all appeals except those requiring a committee, and provides advice to the Minister on how appeals should be determined. Importantly, whilst the role of the Appeals Convenor is advisory only, the advice offered to the Minister is made publicly available, and, should the Minister not accept that advice, there is an expectation that he publish the reasons for varying from that advice. In practice, it is extremely rare for the Minister to not accept the advice of the Appeals Convenor.

Possible outcomes of appeals

In all cases, the Minister can dismiss the appeals, but other options are available where the merits of the appeals can be established. For appeals against a decision of the EPA to not assess a proposal, the Minister may uphold the appeal and require a formal EIA, or he can remit the proposal to the EPA for a fresh decision.

The decision of the EPA to assess a proposal is itself not appealable, although the level of assessment can be. In this case, the Minister can require a 'higher' level of assessment (more full and/or more public) or he can remit the proposal to the EPA for it to make a fresh decision. In so doing, the EPA could decide to not assess the proposal, but the Minister cannot direct the EPA to not assess a proposal or to set a 'lower' level of assessment.

This constraint on the powers of the Minister preventing him from directing the EPA to not assess a proposal or to lower the level of assessment provides a useful check against possible political interference. Further, it strengthens the independence and authority of the EPA as the peak environmental agency in WA.

Appeals against an EPA assessment report can be against any part of the report, including the draft conditions recommended by the EPA. The Minister could allow the appeals and vary the assessment of the EPA, which could also have implications for any environmental conditions. The Minister could also choose to remit the proposal to the EPA for further assessment, either for the whole proposal or for specific environmental factors.

The EPA recommendations and the draft conditions are used by the Minister as the basis upon which the Minister needs to get agreement with his fellow decision making Ministers on whether the proposal should proceed and, if so, what conditions should apply. The legislation constrains the Minister in that these decisions must be consistent with his decision on any appeals lodged. In effect, the EPA report and the draft conditions are the default position on the proposal unless appealed. The primacy of the EPA assessment and the transparency of the appeals process minimises the potential for political interference in the EIA process.

The nature of appeals - established practice

Appeals are environmental merits-based, with matters of law dealt with separate from the environmental appeals process. Eight general appeal principles have been developed to guide to appellants in formulating their appeals and the Appeals Convenor in preparing advice for the Minister. They are:

- The matters of concern should be environmental and not socio-economic;
- The scale of the environmental issue should be of at least regional significance – local environmental issues are dealt with by other agencies;
- Has the EPA made any technical errors in support of its decision or assessment?
- Is there new relevant information not previously made available to the EPA or did the EPA consider information that is not relevant to the decision/assessment?
- Did the EPA not apply its own policies correctly or did it consider irrelevant policy considerations?
- Has the proposal already been the subject of an appeal decision by the Minister and are there inconsistencies between that appeal decision and the current EPA decision/assessment?
- In trying to balance competing environmental objectives did the EPA arrive at an inappropriate balance?
- Should the EPA have adopted a different policy position than what it applied?

In general, the appeals process is not a new EIA, but focuses on specific aspects of the EPA's assessment. The practice has been that where significant errors are shown to have occurred, significant new information is produced or policy related matters arise, the Appeals Convenor recommends, and the Minister usually accepts, remittal of the proposal to the EPA for fresh assessment. In this way, the status of the EPA as the peak environmental agency is maintained.

Legislative constraints

A two week statutory appeals periods applies, with no flexibility for late appeals to be considered. As well, all of these appeals attract a \$10 appeal fee. In practice, this acts to prevent most 'protest' appeals and encourages appellants to submit substantial merit-based appeals.

The appeals process in practice

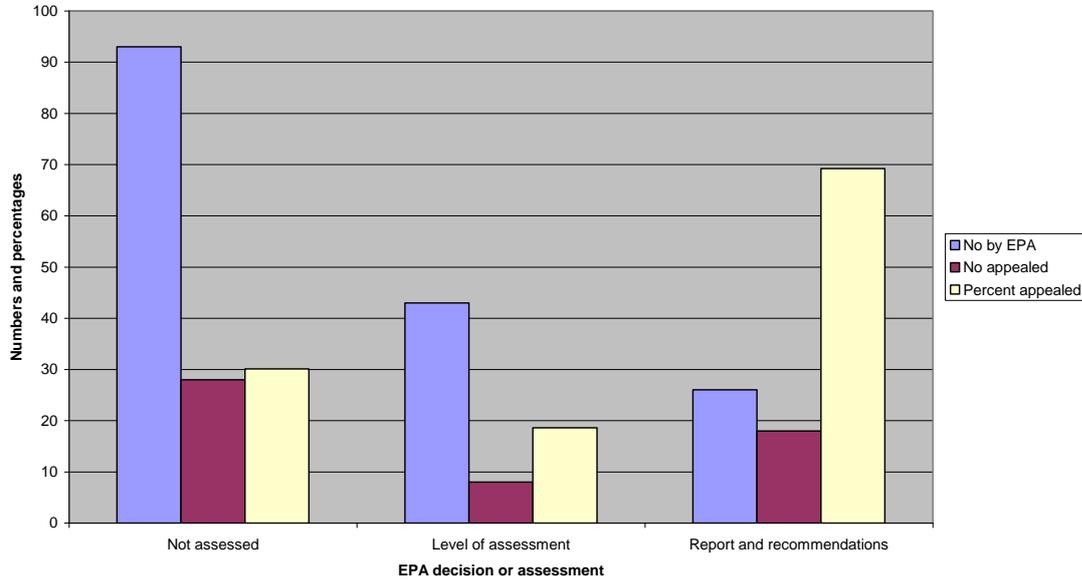
The following steps are followed by the Appeals Convenor in preparing advice for the Minister:

- Copies of the appeals are sent to the EPA for a 'right of reply';
- The contents of the appeals are also sent to the proponent to allow it the opportunity to respond but appellants' names are withheld at this stage;
- Appellants are offered the opportunity to meet with the Appeals Convenor or one of his officers to discuss the appeal and provide supplementary information – this is usually done after the EPA has responded to appeals;
- Independent expert advice can be sought if required;
- Joint sessions can be organised involving appellants, officers from the EPA and the proponent – these are done to allow for certain issues to be discussed, to see if common ground can be found, and to inform the Appeals Convenor on the nature of the debate surrounding the issue/issues the subject of the joint session – this is not mediation;
- The Appeals Convenor prepares a report for the Minister usually with a specific set of recommendations on how the appeals should be determined – the report is not published at this time;
- The Minister considers all the information relevant to the appeals and makes his determination, and write to appellants; and
- The Appeals Convenor's report and the Minister's decision are published on the Appeals Convenor website.

Appeal process data

Below are some recent data on the appeals against EPA decisions and assessments. Figure 1 shows, for 2007, the total number of appealable decisions and assessment reports for 2007, the number of those that were appealed, and the percent that were appealed.

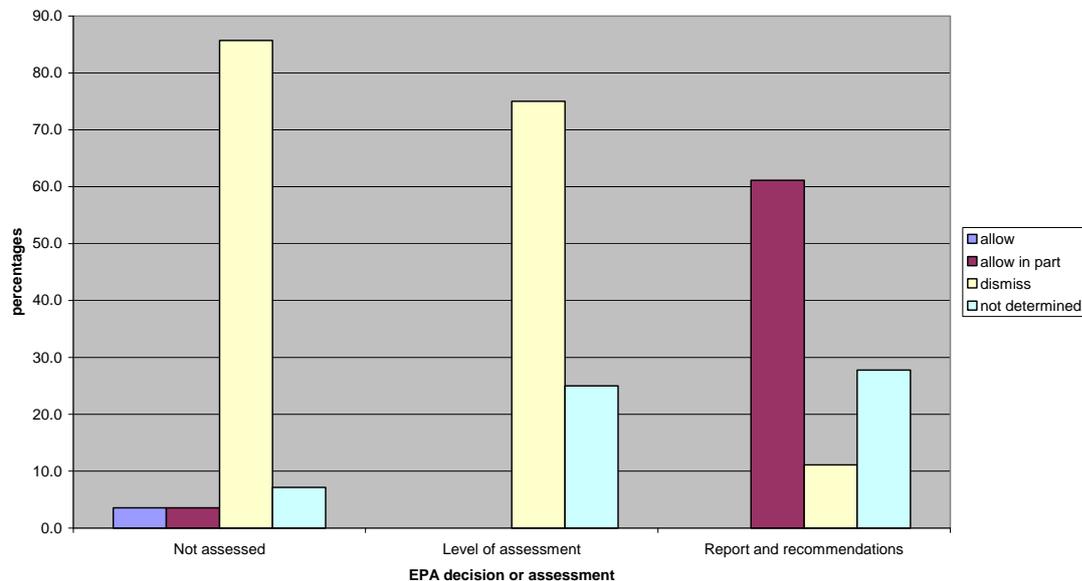
Figure 1: Portion of EPA decisions and assessment appealed - 2007



As can be seen, whilst the decisions by the EPA to not assess a proposal represents the largest portion of appealable matters (well over 50%) and attracted the most appeals, it was the EPA assessment reports that were most likely to be appealed.

Figure 2 shows the outcomes of the appeals by EPA decision type and assessment report.

Figure 2: Outcome of appeals against EPA decisions and assessments - 2007



As can be seen, appeals against the EPA decisions are unlikely to be successful, whereas appeals against EPA assessments are likely to be allowed at least in part. This usually involves the Minister making minor changes to outcomes of the EIA. In 2007 one of the assessments concluded with the EPA recommending against the proposal, and was subsequently appeal by the proponent. The appeal was supported by updated information,

and the appeal process resulted in remittal to the EPA. On re-assessment of the new information the EPA found that the proposal could proceed. Not surprisingly, appeals were received against that reassessment from some in the conservation movement. In the end, the Minister allowed the proposal to proceed, but did require some additional conditions.

Conclusion

The environmental appeals process in WA provides an additional opportunity for public involvement in EIA and provides a check and balance on EPA decisions and assessments. The focus of the appeal process is on environmental outcomes rather than legal questions and as a result adds real value to EIA, but the process should not be seen as a follow-up EIA. In this way the status of the EPA as the lead environmental agency is maintained. Whilst it is the Minister who determines the appeals, the limitations on how the Minister can determine some appeals, the independence of the EPA assessment, the role of the independent Appeals Convenor and the transparency of the appeals process ensures that political interference in the EIA process is minimal and the EPA assessment is central to the final outcome of EIA in WA.

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