Government of Western Australia
Department of Water and Environmental Regulation

Explanatory note: Draft Environmental Protection (Bilateral Agreements) Regulations 2021

Amendments to the *Environmental Protection Act 1986* (*EP Act*) provide for a person to apply for a matter to be considered a 'bilateral matter'. In broad terms, this is a process for a person who is potentially covered by a bilateral agreement to opt in to being dealt with under that bilateral agreement.

The draft Environmental Protection (Bilateral Agreements) Regulations 2021 (Draft Regulations) set out procedures for how and when a person may apply for a matter to be dealt as a 'bilateral matter' under a bilateral agreement.

This consultation applies to the regulations only and not to any potential approval bilateral agreement.

What is the difference between the Draft Regulations and a bilateral agreement?

A bilateral agreement provides streamlining by removing duplication between State and Commonwealth environmental assessment and approval processes, while maintaining high environmental standards.

Western Australia has an existing (2014) assessment bilateral agreement with the Commonwealth under the Commonwealth *Environment Protection and Biodiversity and Conservation Act 1999 (EPBC Act).*

This agreement currently operates in relation to clearing permit applications under Part V, Division 2 of the *EP Act*. Assessments of proposals undertaken by the Environmental Protection Authority (EPA) under Part IV of the EP Act are currently accredited by the Commonwealth on a case-by-case basis and are no longer covered by the existing agreement. This means that assessments undertaken by the State under the EP Act can be used to inform the Commonwealth decisions under the EPBC Act.

The State is in discussions with the Commonwealth to draft an approval bilateral agreement. This would enable State approvals under accredited authorisation processes to have effect under the EPBC Act. To achieve this the Commonwealth Government will need to pass amendments to the EPBC Act in Federal Parliament. Once an approval bilateral agreement is drafted this would be subject to a separate 28-day statutory public comment period under the EPBC Act.

These Draft Regulations simply set out the procedures which would allow a person to apply for a matter to be dealt with under a bilateral agreement that is in place between the State and Commonwealth Governments. The Draft Regulations, once finalised would apply to the existing (2014) assessment bilateral agreement and any new bilateral agreement that may be entered into in the future.

The procedures as set out in the Draft Regulations providing for a person to apply for a matter to be considered a 'bilateral matter' include the following:

Regulation 3 – Terms used

Some terms used in the regulations will be defined in section 124A of the EP Act. These terms are:

> ***bilateral agreement*** means an agreement referred to in the Commonwealth Environment Act section 45(2) to which the State is a party
>
> ***bilateral matter*** means a matter in respect of which an application has been made in accordance with regulations referred to in section 124D
>
> ***State entity*** means the Minister, the Chief Executive Officer or the Authority.

Regulation 3 defines the additional terms 'bilateral application', 'initiating process' and 'relevant State entity'.

Regulation 4 – Application to have a matter dealt with as a bilateral matter

Regulation 4(1) is expressed consistently with the new section 124D of the EP Act. It confirms that a person may apply for a matter to be dealt with under the EP Act as a 'bilateral matter' if 'under a bilateral agreement, the performance of functions in respect of the matter by a State entity will or may have effect for the purposes of the Commonwealth Environment Act.'

Under regulation 4(1), the application is made to the 'relevant State entity'. This term is defined in regulation 3 by reference to the relevant 'initiating process' under the EP Act. For example, because an application for a clearing permit is given to the CEO, the CEO will be the 'relevant State entity' when a person applies for that clearing to be dealt with under the assessment bilateral agreement. This is consistent with current practice under the assessment bilateral agreement.

Regulation 4(2) concerns the time at which a bilateral application must ordinarily be made. The general rule is that the application must be made on the day in which the 'initiating process' (e.g. the application for a clearing permit) is submitted.

However, to futureproof the Regulations to accommodate an updated assessment bilateral agreement, or an approval bilateral agreement, which may also include the environmental impact assessment process under Part IV of the EP Act, regulation 4(2)(a) ensures that where a proposal has been referred to the EPA by a person other than the proponent, the proponent may still make an application for the matter to be a bilateral matter.

In practice, where the EPA receives a third-party referral it writes to the proponent seeking information about the proposal and confirmation that it is the proponent. Once the amendments to the EP Act commence, this will be done under the new section 38F. Regulation 4(2)(a) allows the proponent to make a bilateral matter application within the period specified in a notice given under section 38F.

Regulation 4(3) provides a discretion for the relevant State entity, where it is considered appropriate to do so, to allow a bilateral application to be made at a later date than that allowed under regulation 4(2).

Regulation 4(4) provides that in making a decision under regulation 4(3), the relevant State entity must have regard to the extent to which it has performed its functions under the Act. This recognises that the later in the process that a bilateral application is received, the less likely it is that it will be accepted as the requirements of the bilateral agreement may no longer be able to be met, or it may not be reasonable or practicable to do so.

Regulation 5 - Requirements for bilateral application

This regulation would require that the application is in writing, and where a specific form has been approved by the CEO of the Department of Water and Environmental Regulation, that the application must be made on the approved form.

The regulation also requires that the form must be accompanied by, or include information as required by, the approved form. Examples of information that may be required on an approved form include:

- Information about whether a matter fits within the scope of a relevant bilateral agreement
- Information regarding potential impacts to matters of national environmental significance.

Regulation 6 – Transitional provisions relating to applications about bilateral matters made before commencement day.

This regulation ensures that clearing permit applications being assessed under the existing assessment bilateral agreement between the State and Commonwealth would continue to be assessed without the need for a new application when the new regulations come into effect.