

New Guidelines for Assessing Environmental Effects Consultation draft February 2006

RESPONSE FORM

**Please forward to the below address
by 5.00pm Friday, 24 February 2006**

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Please use this format, attaching additional notes as required.

STRUCTURE

The Minerals Council of Australia (MCA) is pleased to acknowledge that the final draft Ministerial Guidelines for Assessment of Environmental Effects released for comment on 6 February 2006 is a very good document - it provides the harmonisation between the three levels of government that we have been pushing for, and progresses three very important principles, namely:

- the requirement that the preparation of an EES needs to be risk-based, with the level of investigation scaled accordingly;
- the precautionary principle that requires that a specific threat be identified; and
- decisions to be based on the principles for ecological sustainability and in particular the need to balance economic, social and environmental impacts.

The MCA is also pleased to note that most of the issues identified in its submission of September 2005 to the earlier draft guidelines have been satisfactorily addressed by the Department of Sustainability and Environment (DSE) in this final draft guideline.

The following submission identifies the few issues identified with the final draft and discusses related matters that are impacted by the new guidelines that will require attention. Several recommendations are made.

In addition, we have identified significant opportunities for regulatory reform to reduce red tape and improve efficiency through further legislative amendment to the *Environment Effects Act 1978*. These opportunities will be documented separately.

CONTENT

1 <i>Introduction</i>

The Introduction chapter is supported.

2 <i>Understanding the EES process</i>

The Understanding the EES Process chapter is supported.

3 <i>Determining the need for an EES</i>

Page no.5: *When does a project need to be referred to the Minister?*

Paragraph 1: The guidance for what needs referral to the minister, applies a different test to government projects compared to private ones. Government projects need to refer if it could reasonably be considered capable of having a significant effect on the environment, whereas for private works it is the absolute test of whether it has a significant effect or not. The term 'reasonably considered' has a well established legal meaning, and this wording has the effect of limiting the liability of government.

An impact on the environment is an impact on the environment, irrespective of whether it is a public or a private proponent undertaking the works, so there should not be a difference in the test that is applied. This is an issue of principle rather than application, as all mining related projects will be private investments.

Page no.6: What happens if the Minister directs that a project be referred?

Paragraph 1: “The Minister may direct a decision-maker to refer a project for consideration as to whether an EES is required.” This is an entirely redundant action. In effect, the Minister will write someone a letter, saying 'please write me a letter about this project'. The decision-maker then writes to the proponent who then writes back to the Minister. Why can't the Minister communicate directly with the proponent?

Clearly, for the Minister to direct a decision-maker to refer a project, the Minister must already have some information (and concerns) about the project in question. It would be a more efficient action for the Minister to write directly to the proponent seeking any further information required to allow a proper review and, invite comments from the decision-maker and the proponent.

The paragraph has two typos that require attention. Firstly, the 'to' in line 2 between 'provide' and 'the Minister' requires removal. Secondly, the 'about' in line 5 between 'sought' and 'from' requires removal.

Paragraph 2: The statement that the decision-maker cannot make a decision about the project until the Minister decides whether an EES is required is a sound statement. However, we would expect that other unrelated project approval processes continue for the project so as not to create unnecessary delays. **It is recommended that the guideline encourage the continuance of other unrelated project approval processes whilst the Minister is making his/her decision.**

Page no.9: What information should be submitted?

The second dot point on page 9 refers to “other activities” in the list of preliminary environmental information. In many instances it is unreasonable to expect a proponent or a decision-maker to be aware of other activities being planned by other companies in the district that could have potential for cumulative effects.

4 Scoping and preparing an EES

Page no.11: How will scoping requirements be developed?

Paragraph 2: Even though the proponent has provided information to enable the Minister to prepare the draft scoping requirements it is important that the proponent as well as the public be invited to comment.

It is unreasonable to expect a proponent to pay for the advertising of what is a Government process.

Page no.11: What consultation occurs during the preparation of an EES?

The draft guideline refers to the need for a Consultation Program. This to many will mean a simple schedule of consultation fora etc. It is unreasonable to expect a proponent to publish a schedule of meetings with stakeholders at the commencement of the process. Complex

projects with a wide variety of stakeholders with differing needs and aspirations require sophisticated consultative processes that vary and adjust as the project evolves. It is far more appropriate to expect a competent proponent to prepare a Consultation Plan which will detail the form, frequency and stakeholder groups to be consulted through the stages of the EES and feasibility studies.

It is recommended that reference to 'Consultation Program' be changed to 'Consultation Plan'.

Page no.12: What is a Technical Reference Group?

Paragraph 2: A significant failing of TRG's is the continual turn-over of Agency representation such that there is no consistent knowledge base established on the project in the Agency. Also, it is important that the Agency representatives appointed to serve on a TRG have the authority to speak on behalf of the Agency such that the determinations are not countermanded by Head Office at the 11th hour. The guideline should detail the obligations of TRG representatives.

Page no.17: Consistency with statutory provisions

Paragraph 2: It needs to be made explicit in this section that it is one of the prime responsibilities of the Government members of the TRG to advise the proponent as to the required approvals/consents/licences required by each Agency. It is a reasonable precursor to this that the proponent must provide the TRG with a comprehensive briefing on the project and its likely impacts.

Where some doubt may exist as to which legislation, regulation or standards apply, the TRG should advise of that also.

Page no.17: Consistency with relevant statutory provisions

A common feature of EES process is the debate within the TRG as to the standards that are to apply to the project once it has been approved. This is usually played out as "this is the current standard/policy, but in several months time the standard will be different." Government commonly argues that it wants the draft standard, guideline or policy to apply.

This is costly and unfair to the proponent. In reality, policies, legislation and standards are in a constant state of flux across all jurisdictions and Ministries; however, industry does not have that advantage when it is making its investment decision. Retrofitting new standards, new legislation and new policies comes at a cost to industry which can harm the viability of a project. Industry needs to know that once the conditions of operation are set, and unless the project itself changes, then those conditions are set for the life of the project.

It is recommended that the guideline state that the proponent and the project is assessed according to the laws, regulations, policies and standards that are in force at the point the EES goes on exhibition. The community, industry and Government can then know with certainty, what will apply in the Government's assessment of the project, and not something that is draft or in development.

Page no.21: How should the proponent respond to public submissions?

Paragraph 1: The first sentence is poorly worded in that it refers to the proponent producing a document responding to issues raised together with a proposed response (presumably to issues raised).

Paragraph 2: The reference to negotiation with submitters to seek a resolution is a good one. The best time for it to occur is prior to the Directions Hearing. At that point, the outcomes will be far more useful in making arrangements for the panel hearing, including the need for a panel hearing at all.

Page no. 22: How will submissions be considered?

It is entirely unreasonable to expect a proponent to contribute to the costs of an inquiry as this is a Government directed process and the proponent will have significant representational expenses of his/her own.

6 Making the final Assessment

Page no.25: When will a Minister's Assessment be provided?

The guideline provides a timeline for the Minister once he/she receives the report of an inquiry and also provides a timeline if there is no inquiry. There should be a timeline, say 25 days from the completion of the public hearings, for the preparation of the inquiry report.

7 Coordination of other statutory processes

Page no.27: What happens when other statutory approvals are required?

EPBC Act

The fact that the referral processes proposed in the final draft guideline are very closely aligned with the referral processes of the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) opens up opportunities for efficiency gains. There is already a precedent under the *Great Barrier Reef (Aquaculture) Regulations 2000* to merge the referral processes into a single, relatively seamless 'one-stop-shop" approach, where there is a single online form to fill out for proponents. **It is recommended that the Australian and Victorian Governments agree on a single application form for referrals.**

In addition, the closer that the Victorian system gets to the EPBC system, the easier it is to put in place an approvals bilateral agreement, where the entire assessment and approval process is delegated to the State for a specific sector (say, mining, for instance). It is appreciated that this is a big undertaking and is subject to disallowance procedures by the Federal parliament, but it formally removes the Commonwealth from the entire assessment and approval system which has significant efficiency gains in that it reduces red tape. **It is recommended that the Victorian Government seek such a bilateral agreement with the Commonwealth.**

ENDS
