



Submission
Department of Environment Regulation
Regulatory Principles: Effective and Efficient Regulation

December 2014

Status of this Submission

This Submission has been prepared through the Municipal Waste Advisory Council (MWAC) for the Western Australian Local Government Association (WALGA). MWAC is a standing committee of WALGA, with delegated authority to represent the Association in all matters relating to solid waste management. MWAC's membership includes the major Regional Councils (waste management) as well as a number of Local Government representatives. This makes MWAC a unique forum through which all the major Local Government waste management organisations cooperate. This Submission therefore represents the consolidated view of Western Australia Local Government. However, individual Local Governments and Regional Councils may have views that differ from the positions taken here.

This Submission was endorsed by MWAC on **Wednesday 10 December**.

Executive Summary

Local Government welcomes the opportunity to comment on the Department of Environment Regulation Regulatory Principles, as these principles will form the basis of Local Government expectations in relation to DER's future activities. The key points for Local Government are:

Active engagement with stakeholders as a key part of DER's role as a regulator - The importance of the DER actively engaging with stakeholders cannot be overstated. The Association understands that the Department is operating in a resource constrained environment and appreciates the efforts by staff to ensure the sector is fully informed of upcoming regulation. The approach that is suggested in this Submission is that DER puts in place a formal consultation policy which would assist and assure stakeholders as to the approach the DER intends to take. The Victorian EPA's Policy on Consultation has been referenced as a good example of a concise and thorough process.

Identify how principles will be applied in practice - Local Government supports the articulation of the principles governing the DER's approach to regulation, however notes that it is vital for all stakeholders to understand how these principles will be applied in operation. This can be achieved by providing clear examples and outlining the related processes within the final Guidance Statement.

Timeliness of Decision Making - It is an expectation of Local Government that all decisions the Department makes, whether they apply to a works approval or compliance activity will be undertaken in a timely manner. Local Government is subject to enormous pressure from the community and funding bodies to ensure projects occur on time and this cannot be achieved if regulatory processes are not occurring in a timely fashion.

Ensure sufficient staffing to undertake activities - For DER to undertake its role as an efficient and effective regulator, a sufficient number of suitably qualified staff is required. Local Government considers it is vital that the Department is able to fulfil its role and has sufficient resourcing to ensure this can occur. Alternatively, the Department could investigate options, such as employing an external certification process.

Introduction

Local Government supports the clear definition of the principles that drive the Departments regulatory activities, and welcomes the opportunity to comment on the draft Guidance Statement. Local Government has a number of perspectives in commenting on the draft Guidance Statement. These perspectives are due to the multiple roles that Local Government plays:

- As a community representative - Local Government agrees that public health and the environment must be protected.
- As a provider of a diverse range of community services - Local Government is itself subject to regulation by multiple government agencies.
- As a regulator - Local Government understands the importance of regulation and that any regulation should be undertaken in an effective and efficient manner.

In other jurisdictions, regulatory agencies have also taken steps to formalise the principles that guide their activities. The approaches used in other jurisdictions may vary from that of the DER however the intent appears to be similar. For example, in other jurisdictions the principles are articulated through a formal policy or in a strategic plan. The Victorian EPA's Engagement Policy¹, South Australian EPA's Vision, Goals and Priorities² and the New South Wales EPA's Compliance Policy³ are examples that cover very similar topics to that of the DER's draft Guidance Statement. At the national level, the Council of Australian Governments' (COAG) has an agreed set of Principles of Best Practice Regulation⁴. These Principles are shown in Figure 1. A number of these principles are already reflected in the DER's draft Guidance Statement; however there are some other aspects that should also be highlighted. In WA, the EPA's Environmental Assessment Guideline for Applying the Significance Framework has a similar intent to that of the DER's draft Guidance Statement, and clearly sets out the framework for the EPA's decision making. This includes using a risk based approach and ensuring consistency of decision making⁵.

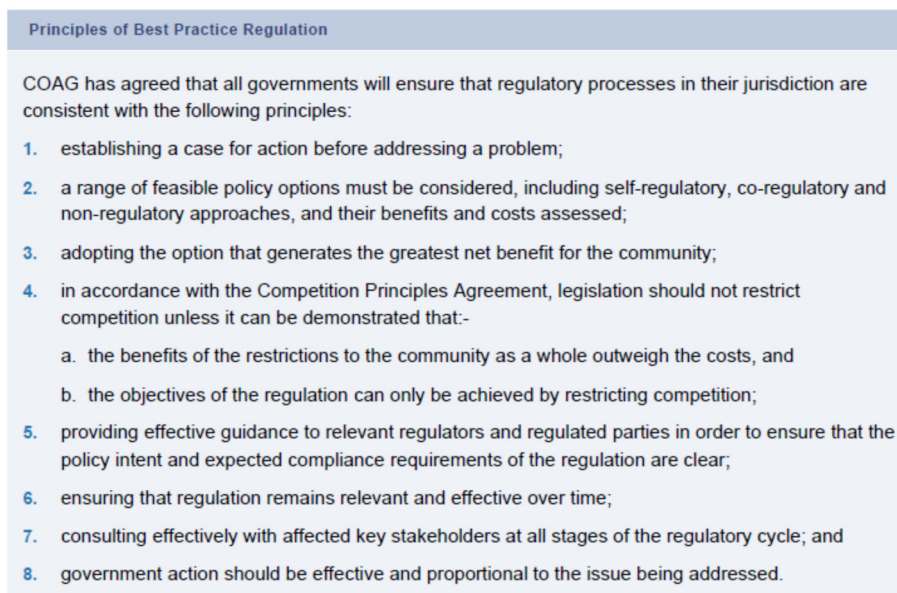


Figure 1. COAG Principles of Best Practice Regulation.

Local Government would consider that many of the principles outlined in the draft Guidance Statement would already be standard practice for the Department, as several are included in the s.4A of the *Environmental Protection Act 1986* (the EP Act). Local Government expects this document to translate the EP Act's high level principles into DER's everyday application. Instead, parts of the draft Guidance Statement appear to simply repeat the broad high level

¹ Victorian EPA (2012). Engagement Policy. Available online. <http://www.epa.vic.gov.au/~media/Publications/1502.pdf>.

² South Australian EPA (2012). Vision, Goals, and Priorities. Available online.

http://www.epa.sa.gov.au/about_epa/our_vision_goals_and_priorities

³ NSW EPA (2013). Compliance Policy. Available online. <http://www.epa.nsw.gov.au/resources/legislation/130251epacompol.pdf/>.

⁴ COAG (2007). Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies. Available online. https://www.dpmc.gov.au/deregulation/obpr/proposal/coag_requirements/coag-guidance.cfm.

⁵ EPA WA (2013). Environmental Assessment Guideline for the Application of a Significance Framework in the Environmental Impact Assessment process. Available online.

http://www.epa.wa.gov.au/EPADocLib/EAG%209%20Significance_framework2013.pdf.

principles without enough detail to provide guidance. Local Government is also interested in how these principles will be imbedded in the organisation and made operational, particularly in the current resource restrained environment.

This Submission provides some general comments on the draft Guidance Statement, then outlines support or suggested amendments to the various principles and the makes comment on the approach that will be taken to apply the principles.

General Comments

The principles outlined are generally supported, however to assist a broad audience to understand these principles it is suggested that more examples of how they will be made operational are included. Without more specific examples of how the approaches will be implemented, through use of the various DER tools, there may be scepticism about the DER's commitment to these principles. In this Submission examples are suggested under some of the Principles as to how examples could be included.

Recommendation: In the Guidance Statement include specific examples of how the various principles will be operationalised.

In the background section of the Draft Guidance Statement, the EP Act is given as the main area where DER undertakes environment regulatory functions. However it should be noted that the DER also has a range of other Acts which require some action by the Department, for example the *Contaminated Sites Act 2003*. To show the true scope of the DERs regulatory responsibilities it would be useful to include the range of State and Federal Legislation that the Department has a role in implementing. It should also be noted that as well as being a regulator, DER also has an advisory role, for example matters may be referred to the DER under the *Planning and Development Act 2005*.

Recommendation: Include all of the State and Federal Legislation/Regulation which the Department of Environment Regulation has a role in regulating.

The draft Guidance Statement uses certain parts of s.4A of the EP Act. The purpose of this section of the EP Act is to set the overall objective for the Act, being to protect the environment of the State, and identify the principles which will guide activities to protect the environment. Local Government appreciates that the draft Guidance Statement is about identifying regulatory principles; however it would be useful for the reader if there was a reproduction of s.4A of the EP Act within the Statement.

Recommendation: Attach s.4A of the Act, as an Appendix to the Guidance Statement to provide a full context on the role of the Department of Environment Regulation.

In the DER's draft Guidance Statement, Figure 1 shows the hierarchy of regulatory instruments that are used by the Department. Local Governments experience of regulation indicates that the relationship between the different tiers in the hierarchy is more complex than the diagram shows. For example, the DER's Guidelines for Managing Asbestos at Construction and Demolition Waste Recycling Facilities, were introduced as 'Guidance Material' but then included in licenses, thus becoming 'Regulatory Instruments'. It is not clear where the 'Environmental Standards' that are mentioned as a principle would sit within this hierarchy. It is also suggested that the Department reference the source of the Regulatory Hierarchy.

Recommendation: In the final Guidance Statement provide further context on the origin and practical application of the hierarchy of regulatory instruments.

Regulatory Principles

PRINCIPLE: Risk-based regulation – Support

Local Government supports a risk based approach to regulation, as it has the benefit of focusing regulatory attention to the areas of greatest potential impact and regulating outcomes rather than processes.

Risk-based regulation – Application

To ensure that there is a consistent approach to the implementation of risk based regulation clear guidance needs to be given to both regulators and those being regulated on how this approach will be applied. Feedback from Local Governments on the current regulatory environment indicted that the interpretation of regulations can vary between DER officers. The Association understands that this is a challenge for regulators, however clear guidance on the application of various approaches helps to reduce the issue. The NSW EPA Compliance Policy provides an example of more detailed and specific information on the factors that will be considered in a Risk Based Assessment (see Appendix 1).

Recommendation: Include a more detailed explanation of the range of factors the Department of Environment Regulation will use in a risk based approach and provide greater guidance on how the risk of activities and the seriousness of potential / actual harm will be determined.

PRINCIPLE: Polluter pays – Support

Local Government supports the application of the polluter pays principle.

Polluter pays - Application

There are a variety of ways that the Department applies this principle, such as through the Waste Avoidance and Resource Recovery Levy and through prosecution. The variety of approaches the Department uses to apply the polluter pays principle, should be included to provide more context.

Recommendation: Include the range of ways that the Department of Environment Regulation is able to apply the Polluter Pays principle.

PRINCIPLE: Evidence based decision-making – Support, with amendment

Local Government supports the use of evidence based decision-making. The reference to evidence based decision-making should be linked to the precautionary principle contained in s.4A of the Act. Local Government is concerned that the precautionary principle has not been adequately included in the Guidance Statement.

Recommendation: Include a clear commitment to the precautionary principle in the Guidance Statement.

The type of evidence that DER will consider requires further clarification. For example, in decision making the DER should consider not just the evidence related to the specific project/license but also the cumulative impacts on the environment.

Recommendation: Include cumulative impacts in the range of considerations related to the principle of 'evidence based decision making'.

PRINCIPLE: Application of Environmental Standards – Support, with amendment

Local Government requests clarification on the use of Environmental Standards, specifically the type of documents that will be included under the banner of 'Environmental Standards'. Currently DER has a range of documents such as Guidance Statements and Guidelines, but no documents titled 'Standards.' Environmental Standards are also not mentioned in the Regulatory Hierarchy so further clarification on their role in that structure is requested, as well as the timeline for their development.

Recommendation: That Department of Environment Regulation clarifies the role of Environmental Standards in the regulatory hierarchy and in the Departments operations.

The principle includes the comment that '*Environmental performance beyond environmental standards will be encouraged and supported through non-regulatory means.*' Further clarification is needed on the mechanisms the Department intends to use to actively encourage good practice. Local Government suggests that the Department investigates the use of incentives such as lower application fees, quicker approvals for applications etc. In some cases, there are no mechanisms that will allow the Department to determine which operators are doing well, and whose operations should be encouraged.

Recommendation: Include the mechanisms that will be used to actively encourage good practice.

PRINCIPLE: Appropriate conditions - Support

Local Government supports the appropriate conditions principle, but has comments on the application of the 'outcomes based' approach.

Appropriate conditions - Application

Local Government supports the use of an outcomes based approach to regulation. While this is included in the appropriate conditions section, further clarity is needed on what situations outcome based approaches would be used. The current phrase '*where practical and appropriate*' does not provide a high degree of guidance. Further guidance could include reference to defined standards of expected outcomes being in place, for example an Australian Standard or a set emissions level.

Additionally, consideration needs to be made on the impact of certain conditions on Local Governments, and their ability to meet the conditions.

Recommendation: Include further information in the Guidance Statement as to when outcome based regulation will be considered 'practical and appropriate'.

PRINCIPLE: Fair and equitable decision-making processes – Support, with amendment:

Local Government supports the principle of 'fair and equitable decision making processes'. With reference to the final dot point in the principle, Local Government would like to highlight that it is the expectation of stakeholders that *all processes* the DER undertakes will occur 'fairly without bias or undue delay' not just the 'compliance and enforcement' actions.

Recommendation: Amend the final dot point to include "licensing, approvals, compliance and enforcement actions will be undertaken fairly without bias or undue delay..."

Fair and equitable decision-making processes - Application

In relation to the need for 'undue delay' to include all of the DER's operations, Local Government is subject to pressure from the community and funding bodies to ensure work is undertaken in a timely manner. Feedback from Local Government indicates that Works approval processes can take anywhere up to 18 months. When essential services such as waste management are involved, priority needs to be assigned to ensure that the activity can be undertaken to meet community expectations and the essential operational needs of the facility. Local Government supports the Department employing resources/expertise if this means that that licensing, approvals, compliance and enforcement can occur without 'undue delay'. Alternatively, the Department could investigate alternative options, such as employing an external certification process.

Local Government is keen to see this principle applied across sectors within industries. For example, in recent months there has been a concerted effort by the Department to assess the compliance of peri-urban Local Governments with regard to their Waste Avoidance and Resource Recovery Levy liabilities. Local Government understands that the Department has made a decision based on the risk based principle to undertake this compliance. In pursuing the application of fair and equitable decision making processes, DER needs to be aware of a perception in Local Government that they as a sector are targeted more frequently than the private sector. A way to address this perception would be to better communicate enforcement activities – see subsequent principle.

PRINCIPLE: Consultation and transparency – suggested Amendment

From Local Governments view point, an essential part of the regulatory process is to communicate and effectively engage with stakeholders. The COAG Principles articulate this as "providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear." The regulatory bodies in other jurisdictions have very strong statements regarding active engagement with stakeholders. One of the key strategic priorities of the South Australian EPA, is to undertake genuine engagement, the Victorian EPA's Engagement Policy states "We will engage with our stakeholders across all areas of the EPA operating model. We will conduct purposeful and planned engagement which will work towards our goal of providing a healthy environment that supports a liveable and prosperous Victoria."⁶ Local Government is required to undertake a high level of consultation as part of its activities. This includes developing Strategic Community Plans⁷ and assessing Development Applications (please refer to the Planning and Development Act 2005, the R-codes, Model Scheme Text etc).

Unfortunately the current wording of this principle seems to imply that rather than the Department actively engaging with stakeholders, the onus is on stakeholders to approach the Department. Without active stakeholder engagement, it will be difficult to achieve effective and efficient regulation. The mistrust and misunderstandings that have arisen from previous consultation processes / implementation of new approaches will continue.

Recommendation: That the principle be renamed as Engagement, Consultation and Transparency.

Recommendation: That the principle include a commitment from the DER to actively engage with Stakeholders to ensure they understand and can apply the regulation.

The sector has a number of concerns with the process used by the Department in the application of new requirements - whether these are Guidelines, Better Practice etc. A commitment is required from the Department for a genuine and planned stakeholder engagement process to occur in the development of Environmental Standards, especially in

⁶ Victorian Environment Protection Authority (access 26 November 2014). EPA Victoria Engagement Policy. Available online <http://www.epa.vic.gov.au/~media/Publications/1502.pdf>

⁷ Department of Local Government and Communities (accessed 24 November 2014). Getting Started – Strategic Community Plan. Available online. <http://integratedplanning.dlg.wa.gov.au/StrategicCommunityPlan.aspx>

instances where they will be linked to licence conditions. This may mean that the Department requires additional staff to ensure this engagement can occur.

Recommendation: DER develops a Consultation Policy, which outlines how the Department intends to actively engage with Stakeholders.

PRINCIPLE: Competitive neutrality – Support

Local Government supports regulation which applies equally to all industry participants. Regulation exists to provide a 'level playing field' for those in the industry.

Summary of key points

Active engagement with stakeholders as a key part of DER's role as a regulator

The importance of the DER actively engaging with stakeholders cannot be overstated. The Association understands that the Department is operating in a resource constrained environment and appreciates the efforts by staff to ensure the sector is fully informed of upcoming regulation. The approach that is suggested in this Submission is that DER puts in place a formal consultation policy which would assist and assure stakeholders as to the approach the DER intends to take. The Victorian EPA's Policy on Consultation has been referenced as a good example of a concise and thorough process.

Identify how principles will be applied in practice

Local Government supports the articulation of the principles governing the DER's approach to regulation, however notes that it is vital for all stakeholders to understand how these principles will be applied in operation. This can be achieved by providing clear examples and outlining the related processes within the final Guidance Statement.

Timeliness of Decision Making

It is an expectation of Local Government that all decisions the Department makes, whether they apply to a works approval or compliance activity will be undertaken in a timely manner. Local Government is subject to enormous pressure from the community and funding bodies to ensure projects occur on time and this cannot be achieved if regulatory processes are not occurring in a timely fashion.

Ensure sufficient staffing to undertake activities

For DER to undertake its role as an efficient and effective regulator, a sufficient number of suitably qualified staff is required. Local Government considers it is vital that the Department is able to fulfil its role and has sufficient resourcing to ensure this can occur. The Department could investigate alternative options, such as employing an external certification process.

APPENDIX ONE: Excerpt from NSW EPA Compliance Policy – Risk based regulation

2.2 Risk-based regulation

The EPA applies a responsive and risk-based approach to its regulatory functions.

In an environmental context, risk is measured in terms of the likelihood of an event occurring and the risk of harm to human health and the environment.

Applying a risk-based approach helps the EPA make informed regulatory decisions that ensure its compliance and enforcement activities focus on the biggest risks to the environment and health and target those businesses and people least likely to comply. This approach is consistent with the Australian/New Zealand Joint Standard on Risk Management (AS/NZ ISO 31000:2009) and internal risk management policies and procedures.

The EPA considers the following factors when it assesses environmental risk:

- the environmental media involved (air, odour, water and noise emissions, chemicals and waste)
- the processes and operations that may have an impact on the environment and the controls in place to mitigate them
- the sensitivity of the local environment, such as the proximity to residential premises or waterways, or the impacts on air quality
- the compliance history of the business or person being regulated.

Figure 2: The EPA's environmental risk matrix

