



Having your say on mining and quarries: Fact sheet 3

The EPBC Act and the EES process

Introduction

Environmental impact assessment is a process for assessing the impacts on the environment likely to result from development proposals. A key aspect of the Victorian process is preparation of an environment effects statement (EES) by the **proponent** (the project proposer). The EES process aims to identify and mitigate the impacts of proposals that could have a 'significant effect' on the environment. Such proposals might include projects like mines, quarries, roads, boat ramps, prisons, hazardous waste storage facilities, pipelines or power stations.

The various stages of the EES process are regulated by the *Environment Effects Act 1978* (the EE Act). The legal framework is administered by the Minister for Planning and the Department of Environment, Land, Water and Planning (DELWP). Most of the details about the EES process are set out in the **Ministerial Guidelines for Assessment of Environmental Effects under the Environment Effects Act 1978** (the Ministerial Guidelines). The Act and the Ministerial Guidelines can be found at www.planning.vic.gov.au/environmental-assessment/what-is-the-ees-process-in-victoria.

This fact sheet explains how a proposed project assessed under the Victorian EES process may additionally be regulated not only by Victorian law, but also by Commonwealth legislation – the **Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)**. It focuses on how the EES process works where that is the case.

This is part of a set of fact sheets developed to help communities who may be affected by major new mining and quarrying projects in Victoria, to participate effectively in the EES process. It may be helpful first to read the broad overview of the EES process and the steps involved (see **Fact Sheet 1**).

The EPBC Act

The Victorian government is responsible for most legislation related to natural resource use, environmental protection and environmental impact assessment. An important exception is the EPBC Act, which is Commonwealth Government legislation that operates concurrently with Victorian laws. The EPBC Act regulates proposed actions that are likely to have a significant impact on things that have been determined to be of national environmental significance, such as some threatened species, and internationally recognised wetlands.

The EPBC Act will not always apply to Victorian mining and quarrying proposals, however if it does a separate approval will be required for the proposal under the Act. This approval will be informed by an environmental impact assessment process, with the Victorian EES process often accredited for this purpose.

Which proposals might go through both the EES and EPBC processes?

Under the EPBC Act, the Commonwealth Government is responsible for regulating impacts on **matters of national environmental significance**.

There are nine matters of national environmental significance protected under the EPBC Act. The first three listed below are the matters most likely to be relevant to Victorian mine/quarry project proposals :

- wetlands of international importance (Ramsar Wetlands – named after the international treaty that lists them);
- listed threatened species and ecological communities;
- migratory species protected under international agreements;
- a water resource, in relation to coal seam gas development and large coal mining development;
- world heritage properties;
- national heritage places;
- Commonwealth marine areas;
- the Great Barrier Reef Marine Park; and
- nuclear actions (including uranium mines).

An **action** that is likely to have a **significant impact** on a matter of national environmental significance or Commonwealth land may be deemed to be a **controlled action**. An ‘action’ is a project, a development, an undertaking, an activity or a series of activities, or an alteration of any of these things. ‘Significant impact’ is not defined in the EPBC Act, but see www.environment.gov.au/epbc/publications/significant-impact-guidelines-11-matters-national-environmental-significance.

A proposed Victorian project that has been required to undergo the EES process, such as a mine, may also be a controlled action under Commonwealth law. Unless a controlled action falls within a limited number of exemptions, it is prohibited to take that action without approval from the federal Minister for the Environment and Energy (Environment Minister).

An action that is likely to have a significant impact on a matter of national environmental significance must be referred to the Environment Minister by the person taking the action (the **proponent**). A State government or local council, or a Commonwealth agency, can also refer an action. The Minister can also request a referral if they believe a controlled action is about to be taken.

After the Environment Minister has received a referral, it is published online for **10 days for public comment** (see www.environment.gov.au/epbc/public-notices). The Minister has **20 days** following referral (including the 10 day public comment period) to decide whether the action referred is a controlled action, and therefore whether it needs formal assessment and approval under the EPBC Act. The Minister must take the public comments into account.

What happens if a Victorian proposal is a controlled action?

The Environment Minister may decide that the proposed action is not a controlled action because it is **unlikely to have a significant impact on a matter of national environmental significance**. Approval under the EPBC Act is therefore not

required if the action is taken in accordance with the referral. Consequently, for Victorian proposals, that action can then proceed, provided any necessary approvals are obtained following the EES process.

If the Environment Minister decides that the proposed action is **likely to be significant**, and therefore is a controlled action, it **will require approval and is therefore subject to further assessment and decision-making**.

Under the [Assessment Bilateral Agreement](#)¹ between the Commonwealth and Victoria, controlled actions can be assessed under relevant accredited Victorian legislative systems. The Agreement accredits environmental impact assessment processes including an EES under the *Environment Effects Act 1978 (Vic)* for the purposes of the EPBC Act. This means that if the proposed project is a controlled action, additional criteria and requirements are introduced into the EES process, and therefore contribute to the scope of the EES that is open for public submissions. For examples of what additional considerations may be incorporated into the process, see 'Decision whether to approve a controlled action' below.

The purpose of the Agreement is to avoid duplication of assessment processes, by allowing Victoria to assess proposals that the Commonwealth has determined as controlled actions that are likely to have a significant impact on the environment. The Commonwealth will still make the approval decision under the EPBC Act, informed by the EES documentation and the assessment from the Victorian Planning Minister.

Decision whether to approve a controlled action

In deciding whether to approve the action/proposal, the Environment Minister must consider issues relevant to any matter of national environmental significance, and economic and social matters. The Minister must also take into account factors listed in section 136(2) of the EPBC Act, including:

- the assessment report;
- information provided by other ministers; and
- the principles of ecologically sustainable development.

The principles of ecologically sustainable development are:

- a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;²
- c) the principle of inter-generational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- e) improved valuation, pricing and incentive mechanisms should be promoted. (s 3A, EPBC Act)

The Minister may also consider whether the person is a **suitable person** to be granted an approval, by considering their history in relation to environmental matters (s 136(4)). Note that 'person' includes bodies such as companies.

There are further requirements for Ministerial decision-making, where the action is likely to have an impact on world heritage, national heritage places, Ramsar wetlands, threatened and endangered communities, or migratory species (section 137-140). These generally require the Minister to make the decision consistently with relevant conventions and management plans or principles. The Minister must not approve the construction or operation of certain nuclear installations (s 140A).

¹ <http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/vic>.

² See also the precautionary principle in section 391 of the EPBC Act.

If an action is approved

If approval is granted, there may be conditions imposed, to protect or repair or mitigate damage to a matter of national environmental significance (s 134).

Appeal and enforcement rights under the EPBC Act

An important difference between the EPBC Act and most Victorian legislation is the existence of appeal and enforcement rights under the EPBC Act. Decisions under the EPBC Act can be challenged by an individual or group whose objects or purposes include environmental protection, and who has been actively engaged in environmental protection for the previous two years (s 487).

In some circumstances a failure to comply with the Act, or decisions under the EPBC Act at an earlier stage of the process (for example a decision about whether a proposal is a 'controlled action') may also be the subject of enforcement action or appeal rights.

Exercising these rights is expensive, complicated and subject to time limits. It is advisable to seek legal advice if you wish to challenge a decision under the EPBC Act or seek to enforce its provisions.

Further information

For more detail and examples of referrals and assessments, see:

www.planning.vic.gov.au/environmental-assessment/environmental-assessment-bilateral-agreement

epbcnotices.environment.gov.au/referralslist

www.environment.gov.au/protection/environment-assessments

For specific detail on matters of national significance, including lists of threatened species and heritage places and properties, see:

www.environment.gov.au/epbc/what-is-protected/biodiversity-conservation

For more on how other legislation interacts with the EES process, see the other fact sheets in this series, listed on the following page.

Fact sheets in this series

Download all fact sheets from our website: www.cels.org.au/kits-and-fact-sheets/#having-your-say.

1. An overview of environmental impact assessment under the *Environment Effects Act 1978*
2. Mine/quarry proposals and the EES process
3. The EPBC Act and the EES process
4. Getting your voice heard in the EES process

About the Community Environmental Legal Service (CELS)

Providing legal help to Victorians as part of the Community Environmental Legal Service (CELS) program is one of the many ways Environmental Justice Australia pursues access to justice.

The CELS program provides legal help for Victorians through the publication of kits, fact sheets and videos which provide accessible and practical environmental law information to the Victorian community. Through the CELS program we also conduct legal workshops in Victoria, run by one of our expert environmental lawyers to suit the needs of community groups or groups of individuals concerned about or impacted by environmental issues.

Environmental Justice Australia believes that all Australians have a right to clean air, clean water, and intact ecosystems. It's also crucial that our communities have a real say over what happens to our environment, and that means participating in decision-making processes. We're working to pursue environmental justice for communities affected by environmental harm by supporting their right to information, their right to participate in the legal and legislative process, and their right to participate in decision-making about their communities and the places where they live.

If you have a query about anything in this Fact Sheet, or would like the Community Environmental Legal Service to assist you to protect the environment, please call us: **8341 3100 (metropolitan)** or **1300 336 842 (regional)**

Donate at: www.envirojustice.org.au/donate

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The education program will better equip local community members to participate in public consultation processes and engage with project proponents and other stakeholders.

DISCLAIMER

This fact sheet is intended to provide information only and is not a substitute for legal advice specific to your circumstances.

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