



5. Environmental impact assessment in Western Australia

Environmental impact assessment under the *Environmental Protection Act 1986* is the main method of considering the environmental impacts of major developments in Western Australia.

This fact sheet outlines the laws relating to this process. It does not deal with the assessment of planning schemes - this is dealt with by **Fact Sheet 3: Planning law**. See also **Fact Sheet 6: Commonwealth environmental impact assessment** for information on proposals that may require assessment and approval under Commonwealth legislation.

Note: significant changes to the environmental impact assessment are currently before State Parliament and are due to be passed in Spring 2003.



What can be assessed?

The Environmental Protection Authority (EPA) can assess proposals which are likely, if implemented, to have a significant effect on the environment.

"Proposals" are defined by the *Environmental Protection Act* ("the Act") to include a project, plan, programme, policy, operation, undertaking or development or change in land use, or an amendment of any of these things. This definition is wide enough to cover not only development proposals, but also government plans and policies.

However, the requirement that a proposal must be "likely, if **implemented**, to have a significant effect on the environment" has been found by the Supreme Court to limit the proposals that the EPA can assess. The Supreme Court has found that management plans which are merely recommendations for future land use, as opposed to determinations of future land use having legal effect, cannot be assessed by the EPA.

In summary, the EPA can certainly assess development proposals which are likely to have environmental impacts. It can also assess land use plans having legal effect, such as forest management plans made under the *Conservation and Land Management Act*. However, it cannot assess government plans and policies which are merely recommendations because such plans and policies will not in themselves have a significant impact on the environment.



Who can refer a proposal to the EPA?

Any person can, in writing, refer a proposal to the EPA.

"Decision-making authorities" - such as local governments considering an application for planning approval - **must** refer to the EPA proposals that appear likely, if implemented, to have a significant effect on the environment. That referral must take place as soon as the proposal comes to the attention of the decision-making authority. If a decision making authority makes a decision on an environmentally significant proposal without referring that proposal to the EPA, then that decision may be open to challenge in the Supreme Court. The EPA also has a "call in" power which it must exercise where it considers that a proposal is likely, if implemented, to have a significant effect on the environment.



Who decides whether a proposal should be assessed?

A decision on whether a proposal should be assessed is made by the EPA or a person to whom the EPA has delegated its decision-making power. At present, the EPA has delegated its power to decide whether a proposal should be assessed to the Chair or Deputy Chair of the EPA.

Important disclaimer:

This Fact Sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this Fact Sheet.



When will a proposal be assessed?

As the Act does not say what types of proposals require assessment, the EPA has a wide discretion to decide whether a proposal should be assessed.

The EPA has adopted administrative procedures which indicate that it will require assessment where it considers that the potential environmental impact of the proposal is significant. The administrative procedures say that the EPA's judgement as to environmental significance is based upon the following factors:

- the extent and consequences of biophysical impacts;
- the environmental values of the area affected;
- the extent to which emissions (if any) may impact on the health, comfort, welfare, convenience, comfort or amenity of people;
- the potential of the biophysical impacts to significantly and adversely affect the social surroundings of people;
- the extent and rigour to which potential impacts have been investigated and described in the referral, and the confidence in the reliability of the predicted impacts;
- the extent to which the proposal implements the principles of sustainability;
- the ability of “decision-making authorities” to place conditions on the proposals to ensure required environmental outcomes are achieved; and
- the likely degree of public interest and the extent to which interested and affected people have been consulted.

The legal status of these administrative procedures is uncertain. It is likely to be the case that the EPA is not bound by the procedures, but that it is at least required to have regard to them in making its decisions.

Any person may appeal to the Minister for the Environment against a refusal by the EPA to assess a proposal. The appeal can simply be in the form of a letter to the Minister for the Environment, setting out the grounds of the appeal. The appeal must be lodged within 14 days of the EPA's decision being placed on its public record. It usually costs \$10 to lodge an appeal, but you can ask to have this waived if you have a good reason.



Can the EPA give informal advice?

Where it does not assess a proposal, the EPA may give advice and make recommendations to the proponent, any relevant decision-making authority or any other relevant person on the environmental aspects of the proposal. This advice is not legally binding. It may also decide not to assess a proposal on the basis that it believes that the proposal is capable of being managed by the conditions of a licence or works approval issued by the Department of Environmental Protection (DEP).



What types of assessment are available?

The *Environmental Protection Act* provides that the form, content, timing and procedure of any environmental impact assessment is to be determined by the EPA. The EPA's administrative procedures outline a number of different types of assessment.

1. Formal Assessment

There are four types of formal assessment:

- Assessment on Referral Information (ARI)
- Environmental Protection Statement (EPS)
- Public Environmental Review (PER)
- Environmental Review and Management Programme (ERMP)

Assessment on Referral Information (ARI)

Applies to proposals that raise one or a small number of significant environmental factors which can be readily managed but where conditions set by another decision-making authority will not be appropriate. The EPA will normally publish its decision to set this level of assessment at the same time as it publishes its assessment report to the Minister.

Environmental Protection Statement (EPS)

Applies to proposals of local interest which raise a number of significant environmental factors which can be readily managed. The EPA will usually advertise its intention to set this level of assessment before finally deciding to set it. Once this level is set, the proponent prepares and submits an EPS document. The EPA then submits a report on the proposal to the Minister and outlines conditions which it considers should be applied to the proposal.

Public Environmental Review (PER)

Applies to proposals of local or regional significance that raise a number of significant environmental factors. The proponent must submit an Environmental Scoping document setting out environmental factors and intended studies and a Public Environmental Review (PER) document which adequately addresses all the environmental factors and studies identified in the Scoping document. The PER is released for public review for a period of 4 to 8 weeks. The proponent must respond to any submissions. The EPA will then submit a report on the proposal to the Minister for the Environment.

Environmental Review and Management Programme (ERMP)

Applies to proposals of State interest which raise a number of significant environmental issues. The proponent must submit an Environmental Scoping document which may be subject to public review for 2 weeks and an ERMP which will be subject to public review for a period of 10 to 12 weeks. The proponent must respond to any submissions. The EPA will then prepare a report on the proposal for the Minister for the Environment.

2. Proposal Unlikely to be Environmentally Acceptable

This level of assessment is designed to apply to proposals that are clearly in contravention of environmental standards and procedures, could not be reasonably modified to meet the EPA's environmental objectives, or are proposed for a particularly sensitive location. Under this level of assessment, the EPA will issue a report as to why the proposal is unlikely to be found environmentally acceptable. The proponent or any other person may appeal to have the proposal assessed more fully or more publicly.

3. Public Inquiry

With the approval of the Minister for the Environment, the EPA may choose to assess a proposal through a public inquiry. A public inquiry may be conducted by the EPA, the EPA and others, or a committee appointed by the EPA. The persons conducting a public inquiry have the powers of a Royal Commission.



Can the EPA look at social impacts?

The EPA's role is to report on "environmental factors" as defined in the *Environmental Protection Act*. This term is broad enough to cover social impacts which flow from impacts on the environment, such as the impact of a mining proposal on groundwater used by neighbours. However, it is outside the EPA's role to report on the economic benefits which may result from a proposal going ahead. If it does so, its report and any decision by the Minister for the Environment based on it may be open to challenge in the Supreme Court.



What happens to other decisions during the EIA process?

It will usually be the case that a developer will need approval from a government decision-maker, such as a local government, before he or she can lawfully proceed with a proposal. While the EPA is assessing a proposal, such decision-maker may not make a decision which will have the effect of allowing the proposal to be implemented.



How can you influence the EPA's recommendations?

The main way to influence the EPA's recommendations is to make a submission on the proponent's environmental review document. A DEP publication suggests that to make your submission effective, you should recall the following points while you are writing:

- State clearly your view and your reasons for it;
- Say how your concerns might be addressed or give alternatives that might be considered;

- Provide references to any factual data such as scientific reports;
- Use photographs, maps or sketches if possible;
- Group your points under the relevant section or chapter of the proponent's review; and
- If your submission is long, summarise the main points.

You should also consider whether the EPA has published a relevant "Guidance Statement for the Assessment of Environmental Factors." These documents are developed by the EPA to set out the minimum requirements for environmental management which the EPA would expect to be met when the EPA considers a proposal as part of the assessment process. Guidance statements have been adopted in a number of specific areas, such as the management of air emissions from biomedical waste incinerators.



Can the Minister say "no" to a proposal?

Where a proposal has been assessed through one of the methods outlined above, the Minister for the Environment can say "no" to a proposal by issuing a statement that the proposal cannot be implemented. The legal effect of such a statement is limited – it does not make it an offence for the developer to go ahead with the proposal, but it does stop other decision makers from issuing other approvals. If developers go ahead without these other approvals, they may commit an offence.



Can the Minister set conditions on the proposal?

The Minister can set conditions on the implementation of the proposal. This is done as part of a statement that the proposal may be implemented. It is an offence, punishable by a fine of up to \$125,000 for an individual or \$250,000 for a corporation, to breach such a condition.



Must the Minister consult with other decision-makers?

The Minister for the Environment is obliged to consult with all "decision-making authorities" before making a final decision on whether a proposal should be implemented, and if so on what conditions.

"Decision-making authorities" includes any public body with the legal power to make a decision concerning the proposal in question.

Where a decision-making authority is another Minister, the Environment Minister must either agree with that Minister over whether the proposal should go ahead and if so on what conditions, or refer the matter to Cabinet for a final decision. In practice, government departments will tend to find common ground on behalf of their Ministers, so that a dispute does not have to go to Cabinet.

Where the decision-making authority is not another Minister, the Environment Minister can disagree with that authority, but the Environment Minister must first obtain and consider a report from an Appeals Committee (in practice the Appeals Convenor) as to the matters in dispute.



How can you ensure that Ministerial Conditions are followed?

If you believe that a Ministerial Condition has been breached, you should forward a complaint to the Department of Environmental Protection. It is the DEP's role to monitor the implementation of proposals and compliance with Ministerial Conditions.

If the CEO advises the Minister that an Ministerial Condition has not been complied with, the Minister must take one of certain actions specified in the Act, which range from a notice requiring the proponent to take specified steps to a stop work order.

If a condition has been breached, the offender may be prosecuted. Prosecutions for breaches of Ministerial Conditions can only be brought by the CEO of the DEP, acting with the consent of the Minister for the Environment. If you believe that the DEP has not properly dealt with a complaint, you can take the matter up with the Minister for the Environment or the State Ombudsman.

In extreme cases, where there is an impending breach of a Ministerial Condition and the DEP refuses to take action, you may wish to consider seeking an injunction in the Supreme Court to prevent the breach of the Ministerial Condition from occurring. You would need to get legal advice to find out whether an injunction would be available in any particular case.



Can Ministerial Conditions be amended?

Ministerial Conditions can be amended. The amendment process is started by the Minister for the Environment, who asks the EPA to report on whether the conditions should be changed. If the Minister and any relevant decision-making authorities consulted by the Minister agree that the change is a major change, the proposal should be formally assessed as if it is a new proposal. Otherwise, the EPA simply reports directly to the Minister. The Minister will then make a decision as to whether the conditions should be changed, in consultation with relevant decision-making authorities.

How can you become involved?

The environmental impact assessment process has a number of opportunities for public involvement, which have been considered in this fact sheet. The opportunities include:

- referring any proposal likely to have a significant effect on the environment to the EPA for an environmental impact assessment;
- making submissions to the DEP as part of any formal comment period during an PER or ERMP assessment;
- making submissions to the developer as part of an EPS assessment;
- reviewing EPA bulletins and lodge appeals against recommendations and the level of assessment;
- monitoring proponents compliance with Ministerial Conditions (and works approval and licences) and referring possible breaches to the Department of Environmental Protection.

Contacts and further information

Environmental Protection Authority, Perth

Tel: (08) 9222 7000

Department of Environmental Protection, Perth

Tel: (08) 9222 7000

Appeals Convenor under Environmental Protection Act, Perth

Tel: (08) 9221 8711

For copies of WA legislation considered in this fact sheet, contact the State Law Publisher

Tel: (08) 9321 7688

The Environmental Defender's Office WA (Inc)

The Environmental Defender's Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- ◆ to provide community groups and individuals with legal advice and representation to help protect the environment;
- ◆ to promote law reform that improves environmental protection; and
- ◆ to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Federal Attorney-General's Department. However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over \$2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

Environmental Defender's Office WA (Inc)
Second Floor, Kings New Office Tower
533 Hay Street, PERTH WA 6000

Tel: (08) 9221 3030 Fax: (08) 9221 3070

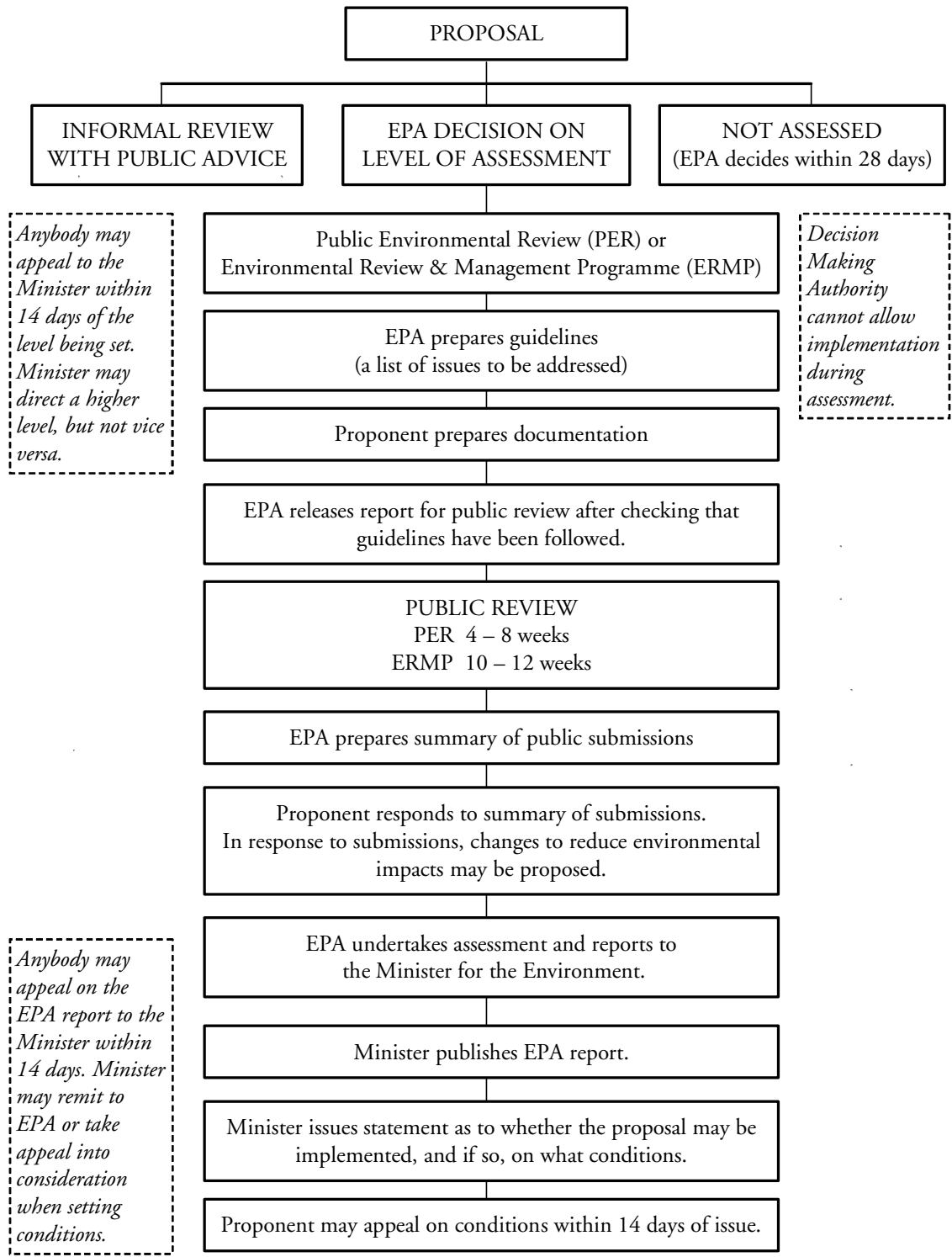
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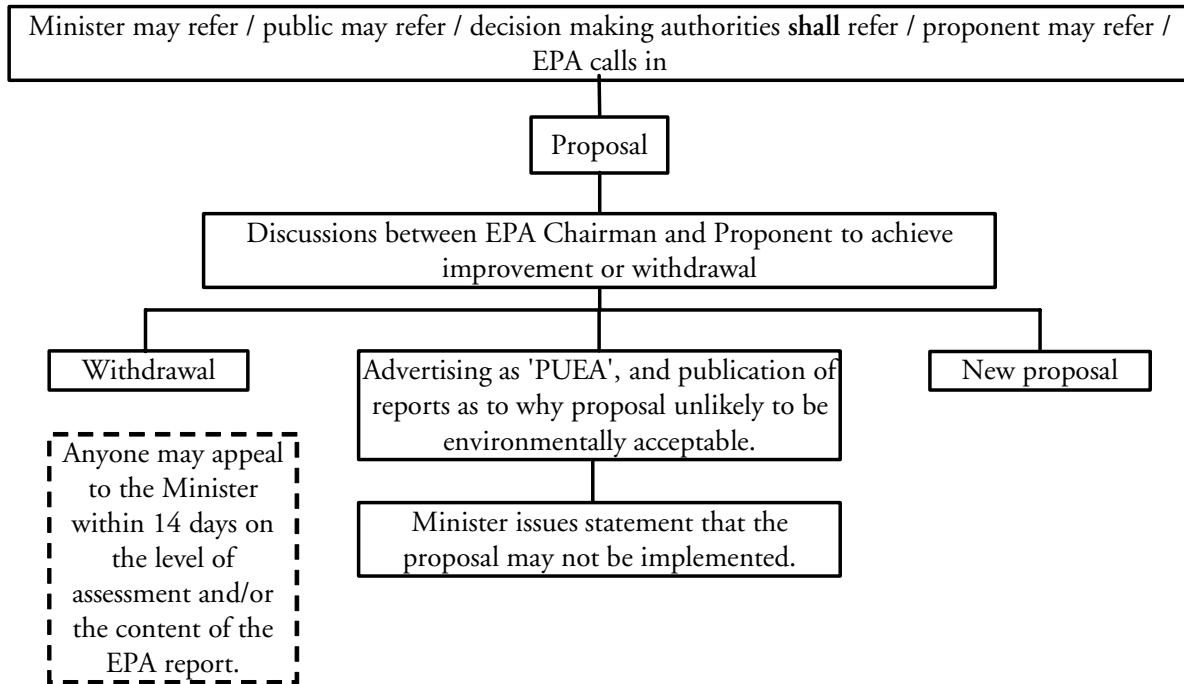
Public Environmental Review (PER) & Environmental Review and Management Programme (ERMP)

Minister may refer / Public may refer / Decision making authorities shall refer / Proponent may refer / EPA calls in

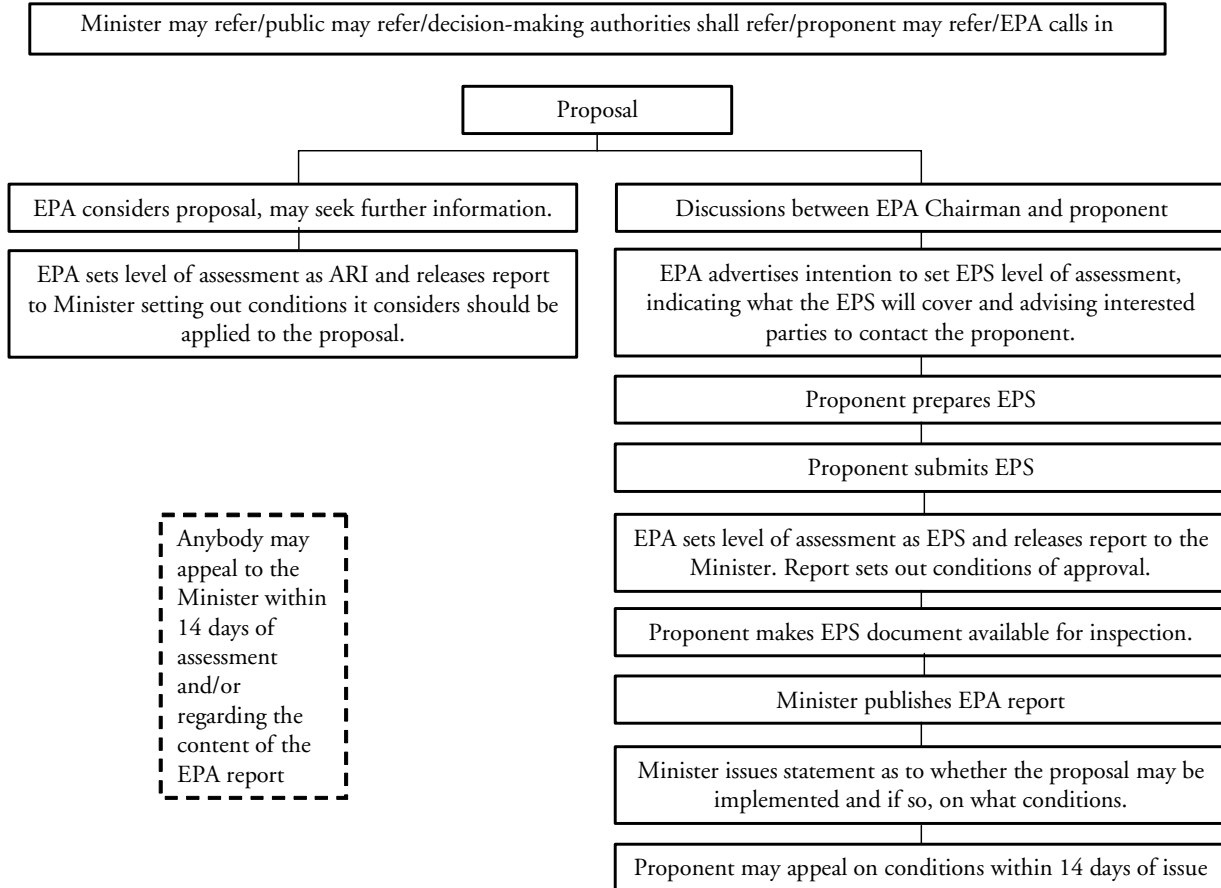


Source: Modified version of a flow chart produced by the Department of Environmental Protection

Proposal Unlikely to be Environmentally Acceptable (PUEA)



Assessment on Referral Information (ARI) & Environmental Protection Statement (EPS)



Source: Department of Environmental Protection