GOVERNMENT OF
WESTERN AUSTRALIA

Penalties

Position Paper
18 October 2020

Implementation of the Government's Response to the Independent Scientific Panel Inquiry into Hydraulic Fracture Stimulation in Western Australia

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Introduction

In September 2017, the Western Australian Government (the Government) announced an Independent Scientific Panel Inquiry into Hydraulic Fracture Stimulation in Western Australia (the Inquiry). The Inquiry handed its final report (the Report) to the Government in September 2018. The Report contains 91 findings and 44 recommendations. The Government has accepted in-principle all recommendations resulting from the Inquiry.

The Report noted there were a variety of submissions reflecting differing views on the current or potential regulatory regime for petroleum activities and its appropriateness to regulate hydraulic fracture stimulation activities.

The Inquiry found that the penalties available for environmental offences under the *Petroleum and Geothermal Energy Resources Act 1967* (PGERA) and subsidiary legislation are too low to provide an effective deterrent to non-compliance and do not reflect community expectations. This finding reflects the earlier recommendation in the Western Australian Parliamentary Inquiry 2015.

PURPOSE

In July 2019, the Government released an Implementation Plan in the form of 20 consolidated Actions detailing how and when the Inquiry's recommendations and subsequent Government policy decisions will be implemented.

This paper addresses Action 13 of the Implementation Plan, which outlines the Government's response to Recommendation 40 of the Report.

Action 13: Introduce a new system of penalties for environmental offences for inclusion in the *Petroleum and Geothermal Energy Resources Act 1967*.

Recommendation 40: Environmental offences, and a system of penalties scaled for seriousness of harm and degree of deliberate intent, as per the EP Act, be incorporated into the PGER Act. These penalties should extend to both the company and its directors.

This paper summarises the current enforcement capabilities for petroleum activities in Western Australia (WA) and identifies the Government's intended actions to implement the Recommendation.

Further detail regarding the specific legislative amendments will be provided in the Bill, which will be released for public comment in the first half of 2021.

Scope

In addressing some of the Implementation Plan actions it is neither practical nor logical to restrict the amendments to hydraulic fracture stimulation activities, given the broader considerations of the State's petroleum regime. Therefore the penalty amendments are proposed to apply across all onshore petroleum activities regulated in WA.

Summary of enforcement capabilities for petroleum activities in WA

The Government is committed to ensuring petroleum activities are conducted in an environmentally safe and responsible manner. To protect the State's interests it is essential that adequate enforcement mechanisms exist to provide an effective deterrent against non-compliance and that these mechanisms are reflective of community expectations.

Petroleum Specific Legislation

Petroleum activities by their nature pose environmental risks and require a specific regulatory regime to proactively minimise and manage those risks. All onshore petroleum proposals (proposals) in WA are assessed by the Department of Mines, Industry Regulation and Safety (DMIRS) under the PGERA and subsidiary legislation. The Petroleum and Geothermal Energy Resources (Environment) Regulations 2012 (PGER Environment Regulations), require that all petroleum activities have an approved environment plan which addresses the mitigation and management of environmental risks.

There are no explicit offences relating to environmental impacts under the PGERA although section 117 (Interference with other rights etc.) places responsibility on a titleholder to protect the environment with a penalty of $10,000 for non-compliance. Some offences relating to submission of applications and compliance with approvals are found in the PGER Environment Regulations, and the Petroleum and Geothermal Energy Resources (Resource Management and Administration) Regulations 2015.

The current maximum penalty for non-compliance with regulations under the PGERA is a fine not exceeding $10,000 or a fine not exceeding that amount for each day on which the offence occurs (section 153(3)) (Figure 1). For a corporation, under the *Sentencing Act 1995*, this fine can be multiplied five times.

The same maximum available penalty applies regardless of the severity of the offence. In addition, the imposition of the penalty requires the commencement of court action, the costs for which are often prohibitive in comparison to the enforcement outcome.

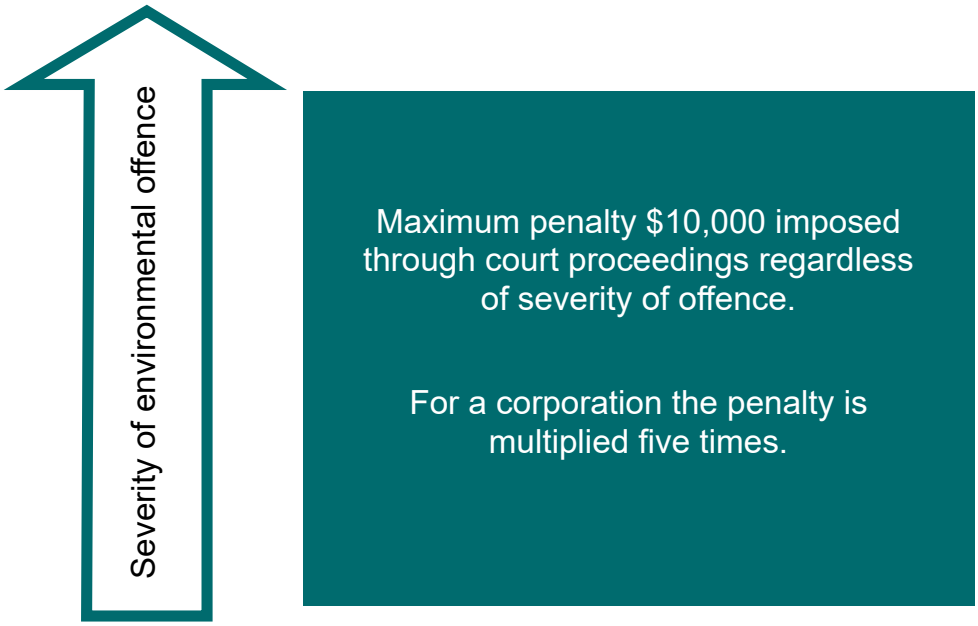

Figure 1: Current penalty framework under the PGERA

As Recommendation 40 of the Inquiry identified, the penalties available in response to non-compliance with the regulation of such activities are too low to be an effective deterrent for non-compliance. Similar issues are experienced across all regulatory activities implemented under the petroleum regulations such as the Petroleum and Geothermal Energy Resources (Resource Management and Administration) Regulations 2015.

Other enforcement tools available to the regulator include directions by the Minister, and the withdrawal of an environment plan approval. However, these tools are restrictive and are not always an effective deterrent against non-compliance. For example, if an operator failed to comply with a direction, the corresponding maximum penalty would be $10,000 (multiplied by five for a corporation) and must be imposed through court action. Similarly, withdrawal of the environment plan approval is unlikely to be an effective deterrent as the maximum penalty for undertaking a petroleum activity without an approved environment plan is only $10,000 (multiplied by five for a corporation).

The *Environmental Protection Act 1986* (EP Act)

Any petroleum activity which causes material or serious environmental harm commits an offence under sections 50A and 50B of the EP Act. As defined in section 3A of the EP Act, material environmental harm includes environmental harm that is neither trivial nor negligible or which results in actual or potential loss, property damage or damage costs exceeding $20,000. Serious environmental harm includes environmental harm that is irreversible, high impact or on a wide scale, or is in an area of high conservation value or special significance.

In addition to these environmental harm offences, it is an offence under the EP Act to cause pollution or allow pollution to be caused, or emit or cause an unreasonable emission under section 49 of the EP Act. An unreasonable emission is emission or transmission of noise, odour or electromagnetic radiation which unreasonably interferes with the health, welfare, convenience, comfort or amenity of any person. The penalties for offences are commensurate to the level of deliberate intent or negligence in causing or allowing the pollution or unreasonable emission to occur.

Where approval for implementation of a proposal has been given via Ministerial Statement under section 45(5) of the EP Act, and the proponent does not ensure that any implementation of the proposal to which the statement relates is carried out in accordance with the implementation conditions, the proponent commits an offence.

The EP Act defines environmental offences and associated penalties and recognises that offence provisions and penalties should scale with the degree of environmental harm and the degree of deliberate intent (Figure 2). The EP Act has a system of tiered penalties for offences, with increased penalties for bodies corporate. The EP Act also provides for modified penalties to be issued by the Chief Executive Officer for certain Tier 2 offences. Infringement notices can also be issued by a designated person for Tier 3 offences or an offence against the regulations.

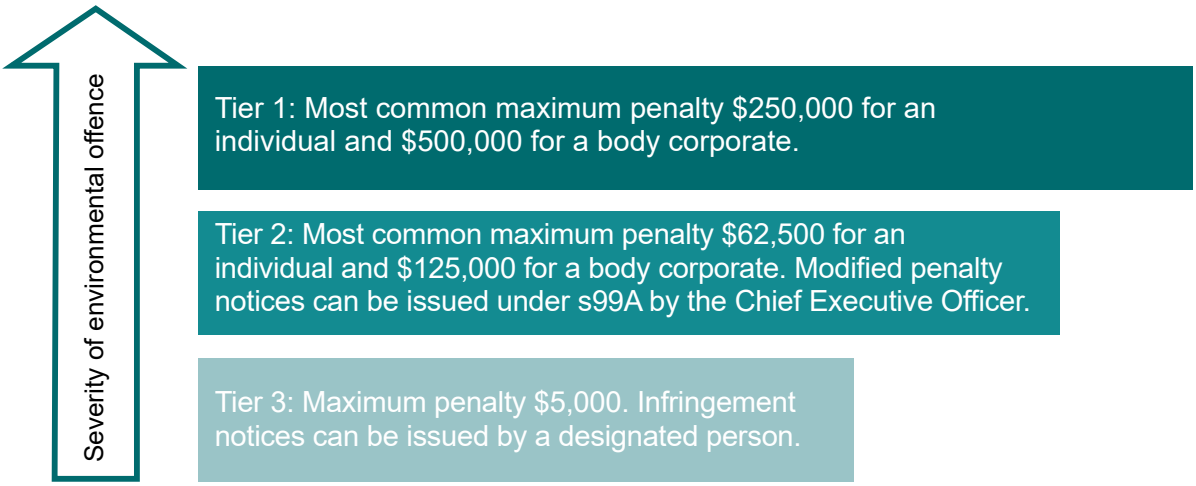

Figure 2: Penalty framework under the EP Act

PROPOSED CHANGES

In line with Recommendation 40 of the Report, enforcement capabilities have been reviewed to ensure there is clarity around environmental offences and that the compliance system has available options commensurate to the scale and deliberate intent of the offence and, where possible, a penalty regime consistent with the EP Act.

Relocating Offences into PGERA

The Government proposes that key offences are relocated from the PGER Environment Regulations and inserted into the PGERA, which will enable the increase of penalties to an amount more proportional to the offence.

The following key offences to be relocated from the PGER Environment Regulations into the PGERA include:

- Regulation 6 - the offence of carrying out an activity without an approved environment plan.
- Regulation 7 - carrying out an activity in a way that is contrary to an environment plan or associated conditions.

The penalty for the above offences will be increased from $10,000 to $250,000 for a person and a penalty of $1,250,000 for a body corporate. It is proposed that the corporation penalties should be visible in the Act rather than relying on the provisions of the *Sentencing Act 1995*.

Increasing existing penalties in the PGERA

The following amendments will also be enacted to ensure appropriate and proportional penalties can be applied:

- Increase the penalty for non-compliance with a Direction issued by the Minister under section 95 of the PGERA from $10,000 to $250,000 for a person and a penalty of $1,250,000 for a corporation.
- Increase the maximum penalty for regulations under the Act from $10,000 to $250,000 for a person and $1,250,000 for a corporation. An amendment is also required to section 153(3b) of the PGERA to provide that daily penalties may be imposed for continuing offences. This amendment, (modelled on a similar provision in Schedule 1 of the EP Act) will also indicate that the maximum daily penalty will be one fifth of the ordinary penalty.
- Introduction of a higher penalty where an offence is intentional or undertaken with criminal negligence. It is proposed that the penalties for offences done intentionally or with criminal negligence are increased eight fold from the current levels to $500,000 for a person and $2,500,000 for a corporation.
- Insertion of a reference to 'harm to the environment' in the PGERA as an element of the offence e.g. making it an offence to breach an environment plan in a manner that harms or is likely to harm the environment. This could ensure that the penalty does not apply equally to minor and more serious examples of the offence.

CONCLUSION

The Western Australian Government is committed to supporting a safe, responsible and compliant approach to petroleum development. This includes ensuring that appropriate and proportional penalties can be applied according to the nature and scale of offences under the PGERA.

The proposed amendments will be included in a Bill amending the PGERA with consequential amendments also required to the PGER Environment Regulations prior to commencement. These amendments will ensure that appropriate and proportional penalties can be applied according to the nature and scale of offences under the PGERA.

Further detail regarding the specific legislative amendments will be provided in the Bill, which will be released for public comment in the first half of 2021.

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