Environmental Defenders Office

18 December 2019

Environment Policy Team
Department of Environment and Natural Resources
Level 1, Arnhemica House, 16 Parap Road
Parap NT 0820

By email: environment.policy@nt.gov.au

Dear Environment Policy Team,

Submission on draft Environment Protection Regulations 2019

The Environmental Defenders Office (EDO) welcomes the opportunity to make this submission on the draft Environment Protection Regulations (**draft Regulations**).

The EDO is a community legal centre dedicated to protecting the environment. We regularly advise clients in relation to the existing framework for environmental impact assessment in the Northern Territory and have engaged closely on the development of the *Environment Protection Act 2019* (**Act**). This submission follows, and draws on, the two detailed submissions we have made on previous iterations of the draft Environment Protection Bill and draft Environment Protection Regulations in December 2018 and June 2019.

Overarching comments

On the whole, we support the draft Regulations, subject to the recommendations we make for their refinement in this submission.

In particular, we support the prescriptive nature of the draft Regulations in guiding the environmental impact assessment (**EIA**) process. This will provide a level of clarity and certainty, and with this, greater transparency and accountability, around the decision-making framework for EIA in the Northern Territory. This does not currently exist under the current legislative framework of the *Environmental Assessment Act 1982*, which is one of its major flaws. The inclusion of transparency and consultation mechanisms at each stage of the EIA process is strongly supported, namely the publication of reasons for decisions, the requirement to publish a wide range of documents on a public register, and in most circumstances, public consultation processes.

We also note that some of the specific issues raised in our previous submissions appear to have been addressed (in full or part), for example:

- It is now clear that a referral is required to be subject to public consultation (cl 51);
- A supplement to an EIS is now subject to public consultation (cl 139) (although we object to the ability for the NTEPA to waive this requirement in cl 141, particularly where there is no criteria guiding when this may be done);
- It is now explicit that EIA by 'inquiry' can be conducted concurrently with another form of EIA (cl 5); and

T +61 8 8981 5883 W edo.org.au
E edont@edont.org.au
2/98 Woods Street, Darwin NT 0800
GPO Box 4289, Darwin NT 0801

- Criteria have been included to guide decision-making around what method of EIA will be required (e.g. cl 58).

However, one overarching concern that we retain is that in some circumstances, there remains limited guidance on various discretionary decisions. There is also a disconnect between many of the decision-making powers at key steps in the EIA process in the draft Regulations, and key substantive or 'head' provisions in the Act - particularly the objects (s3), the purpose of the EIA process (s42) and the general duty of proponents (s43). We consider that, in order to give proper effect to the intent of these important provisions of the Act, they should be better integrated and drawn on at key decision points in the draft Regulations. We make some specific comments on this issue further below in this submission.

Finally, while we acknowledged the Act has now been passed, we consider it important to reiterate our view that many of the critical procedural and public interest rights and obligations in the draft Regulations (such as core NTEPA decision-making obligations and public consultation rights) should have been included in the Act. We submit that regulations are suited to administrative matters only, given they can be more readily amended without any public scrutiny.

In the context of the final provisions of the Act, we now make the following comments on specific provisions in the draft Regulations.

Specific comments

a. Important concepts (part 2)

The 'fit and proper person' test (cl 6) is an important requirement that must be rigorously implemented. In order to ensure that it is an effective mechanism, we consider the following clarifications are required.

First, there must be a clear and explicit obligation on proponents to disclose all information relevant to enable the Minister to consider the matters required in the Act and Regulations. This is currently missing, and creates a serious gap that could undermine the proper administration of this critical requirement.

Second, in subclause (4), although we acknowledge that these factors may be relevant, in our view it is not appropriate for the Minister to 'disregard' these matters. They will remain relevant, even if the circumstances may make it appropriate for lower weight to be given to particular conduct in the circumstances. In our view, this clause should be amended to provide that the Minister may take these matters into account in determining the weight to be given to any relevant conduct, rather than 'disregarding' the conduct in its entirety.

We also consider subclause (1)(e) should be amended to capture involvement in historic winding up orders, i.e. "is" should be amended to "is or was".

b. Excessively discretion around decision-making

As noted above, we remain concerned that many key decision points in the draft Regulations do not have sufficient guidance around them. There remains excessive discretion (usually, on the part of the NTEPA) to make decisions either without any guidance, or with guidance that is linked only to their 'state of mind' rather than any objective, evidence-based criteria, which undermining their accountability. Further, as noted above, there should be better operationalisation of key provisions in the Act in the draft Regulations. It would be appropriate to link key decision points in the EIA process with core guiding provisions in the Act, namely the objects (s3), the purpose of the

EIA process (s42) and the general duty of proponents (s43). This would ensure these key guiding provisions flow through to the administration of the EIA process.

Some specific examples are as follows:

- The decisions of the Minister in Part 3 in relation to reviewing, amending or revoking objectives, triggers, protected environmental areas and prohibited actions (clauses 12, 16, 21, 26, 32, 37) should embed a requirement to consider and be satisfied that the decision is consistent with the objects of the Act and the principles of ecologically sustainable development, to better link these important decisions with the fundamental purpose and guiding provisions of the Act;
- The NTEPA is frequently given a broad discretionary power to make a decision 'if it considers it appropriate to do so'. Examples include clauses 44(1), 214 and 217. We submit that this clause should generally be deleted where it arises in the draft Regulations. Instead, it would be preferable to include objective criteria or 'tests' to support key decisions by the NTEPA, or at a minimum, provide a cross-reference to relevant provisions of the Act that do impose objective criteria. Examples of alternative language to replace subjective 'state of mind' language could include:
    - 'if the NTEPA has determined that the proponent has provided all the information required, then…'
    - 'if the NTEPA has determined that an action has the potential to have a significant impact on the environment under s55, then…'
    - 'if the NTEPA finds it is consistent with the objects and principles of the Act…'

c. Guidance around environmental impact assessment (cl 58, 76, 90)

We are generally supportive of the inclusion of new criteria to guide key decisions (e.g. in relation to the choice of EIA method, cl 58). We support the powers of the NTEPA to reconsider the method of EIA (cl 90) and consider the criteria are appropriate.

However, we are concerned that cl 58 (method of EIA) as currently drafted could be inappropriately relied upon to reduce the level of assessment that an action or strategic proposal should be subject to, rather than enhance the assessment level.

For example, we are concerned that enabling the NTEPA to consider the extent of community engagement that has already occurred may encourage proponents to undertake their own consultation (potentially, with only select portions of the community) in an effort to avoid statutory mandated processes that provide heightened scrutiny and accountability through transparency. We would also be concerned that the NTEPA could use these provisions to lower the level of impact assessment required in circumstances where it has a high 'level of confidence' in relation to the impacts, even if those impacts are still significant and of serious concern to the community, which would seriously undermine the rigour of the EIA framework.

Given the above, we consider the drafting of this section (in particular, the 'preamble' language) should be reconsidered, to make it explicit that the overarching guiding principle is that for actions with high levels of impact and high levels of community concern, a more rigorous level of assessment is warranted.

In relation to cl 76, we are concerned about the level of discretion that is given to the NTEPA. In our view, each of these matters should be mandatory requirements for an EIA, with the level of information required for each level of assessment to be determined through guidance materials and targeted appropriately to the nature of the proposal.

d. Cumulative impact assessment (cl 76)

We consider that the definition of 'cumulative impact assessment' (cl 76(1)(f)) appears too narrow to properly capture matters that should relevantly be the subject of such an assessment. As currently drafted, it appears constrained to matters the subject of an environmental approval or EIA under the Act. However, it is clearly relevant to capture activities proposed or approved under other legislation that may not have triggered an approval requirement at all or were approved or under application under previous or different legislation e.g. the *Petroleum Act*, the *Pastoral Land Act*, but nevertheless have impacts that are relevant to the current action.

For example, it would be perverse if existing petroleum exploration wells approved under an EMP (but not triggering the requirement for an environmental approval under the Act at the exploration stage) were not required to be considered in the assessment of a production scale fracking application in the same area.

Clause 76 must therefore be clarified to ensure that other activities relevant to consideration of cumulative impacts are clearly captured.

e. Statutory minimum information for referrals

On our review, the draft Regulations do not provide any minimum threshold of information that must be provided for a referral. This creates a risk of inconsistent and/or inadequate information being provided that is not subject to an enforceable obligation on the part of proponents.

Given the importance of ensuring robust and consistent information is provided, commencing at the referral stage of the process, we suggest provisions are included in the draft Regulations that require the NTEPA to publish mandatory minimum information and data standards for referrals (and other information required under the Act) and requiring proponents to comply with those standards.

f. Commonwealth referral (cl 83)

We support the ability of the NTEPA to suspend the EIA process to support referral to the Commonwealth under the *Environment Protection and Biodiversity Conservation Act 1999* and therefore support this provision. In our experience, the absence of a statutory link with the referral process under the EPBC Act at the Territory level has seriously undermined the proper referral of matters to the Commonwealth. This provision should enable improvements in visibility and accountability around referrals.

g. Assessment reports (cl 155, 156)

Although we support the inclusion for details around the purpose and preparation of an assessment report, we consider that this must be directly linked to the Act and specifically, to s 42 (the purpose of the EIA process) and s 43 (general duty of proponents). That is, the provisions relating to assessment reports (cl 155-156) should be directly underpinned by the following purposes and considerations:

- to assess whether the proponent has fulfilled with its duties (under s43 of the Act), including to assess whether a proponent has satisfactorily applied the environmental decision-making hierarchy, and
- to ensure the purposes of the EIA process (s42) are met.

h. Significant variations (part 7)

On the whole, we support the more detailed procedures that have been introduced to respond to various circumstances where a proponent seeks to vary a proposed action or strategic proposal, including requirements for public consultation on notices for significant variations and the inclusion of decision-making criteria. We also make the following specific comments.

While we support the criteria to guide what the NTEPA must consider in relation to significant variations (e.g. cl 171(2), 201(2), 223(2)), we consider the criteria should include reference to whether any new or varied mitigation or management measures proposed may have the potential to have significant impacts (or differ in a material way) – for example, if new plant at an industrial site reduces emissions, but this increases noise impacts. Similarly, we consider any variations that have implications on timing associated with an action (e.g. the extension of an operation by 10 years) should also be considered. These provisions should be amended to incorporate these additional scenarios.

We support the ability for the NTEPA to refuse to accept a notice of significant variation where the notice relates to 'part of a larger action proposed by the proponent and information on the whole action is required to make an assessment decision' (e.g. cl 195) as this should (if used by the NTEPA) reduce the potential for abuse of variation provisions. However, we submit that this should be a mandatory requirement – i.e. the NTEPA *must* refuse to accept the notice if it determines that it relates to a larger action and information about the whole action is required to properly assess the impacts of the decision.

We are also concerned about the proposed powers that would enable the NTEPA, when it has prepared a statement of unacceptable impact, to decide that the significant variation can be addressed through conditions on an environmental approval (cl 203), without any further public consultation. In this situation, it is appropriate for the possible decision pathways to be confined so that the NTEPA must send the variation back for public consultation and impact assessment – or at a minimum, to determine that any proposed environmental approval should be subject to a public consultation process to enable submissions to be made in relation to appropriate conditions of approval. To enable the NTEPA to move from providing a statement of unacceptable impact, to providing an environmental approval without any further public scrutiny would seriously undermine accountability and transparency in the decision-making process, particularly in circumstances where proponents have a 'show cause' process available to them in relation to the statement of unacceptable impact.

Finally, in relation to significant variations after an approval is granted (part 7, division 3), we are concerned that there is no clear requirement for the proposed significant variation to be assessed in the context of the original scope of the proposal. In order to avoid impact 'creep' and the manipulation of the EIA and approval process, we strongly submit that there should be an explicit requirement that the impacts associated with these variations must be considered in the context of the original proposal and against initial baselines.

i. Strategic proposals

We remain concerned that there appears to be insufficient guidance around strategic proposals, including in what circumstances an assessment by strategic proposal would be required, and how it would operate. In the absence of further guidance in the draft Regulations, we consider the draft Regulations could provide an explicit power to create a guidance document for strategic proposals, and that such guidance must be subject to public consultation in its development.

j. Excessive proponent influence

Finally, we take the opportunity to reiterate our comments in earlier submissions that we consider that there are excessive opportunities afforded in the draft Regulations for proponents to unduly influence the EIA decision-making process. Together with an over-emphasis on 'investor certainty', this leads to the undermining of accountable, transparent decision-making in the public interest. Our concerns are illustrated by range of provisions, including:

- Requirements that proponents are to be consulted prior to key decisions and in relation to draft approvals (e.g. cl 65, 159);
- The inclusion of a legislated 'show cause' process which appears to amount to legislating an opportunity for lobbying, and an opportunity to provide information to the decision-maker that was not provided as part of the consultation and assessment process (e.g. cl 66);
- The ability for a proponent to re-submit the same or substantially the same project after a 12-month period, which could enable the politicisation of decisions, for example the same project could be put before a new Minister (e.g. cl 72);
- The requirement for proponents to give their agreement to extend already constrained timeframes for public consultation (e.g. cl 132).

k. Drafting matters

Finally, we take the opportunity to note that the drafting of this iteration of the Regulations has significantly improved, and the draft Regulations are more coherent as a whole. However, we have identified some typographical and drafting errors, for example clause 197(2)(a) refers to a 'notice of strategic variation' which we assume is intended to be a 'notice of significant variation'. Clause 3 defines a 'referred significant variation', although it appears that this term does not actually appear to have been used in the substantive provisions of the draft Regulations. We have not attempted to identify all such matters and have assumed they will be rectified during finalisation of the draft Regulations.

We look forward to seeing the draft Regulations finalised, and the commencement of the new regulatory framework in 2020.

Yours sincerely,

Gillian Duggin
Managing Lawyer
Environmental Defenders Office