



Environmental Defenders Office

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Northern Territory Environment Protection Authority (**NT EPA**)
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Dear Environmental Assessment Unit

Submission on Environmental Impact Assessment Guidance documents under the Environment Protection Act 2019

The Environmental Defenders Office (**EDO**) welcomes the opportunity to make this submission on the following environmental impact assessment (**EIA**) guidance documents that will support the implementation of the *Environment Protection Act 2019* (NT) (**Act**) and Environment Protection Regulations 2020 (NT) (**Regulations**):

- Referring a proposed action to the NT EPA (**Referral Guidance**);
- NT EPA Environmental factors and objectives (**Factors and Objectives Guidance**).

The EDO is a community legal centre dedicated to protecting the environment. We regularly advise clients in relation to the existing framework for EIA in the Northern Territory, and have engaged closely on the development of the Act. This submission follows detailed submissions we have made on the draft Environment Protection Bill and draft Environment Protection Regulations throughout 2018 and 2019.

Our comments on these documents focus primarily ensuring they are consistent with the Act, and are appropriate to support its robust administration, consistent with the intended outcomes of the reform process which has seen the fundamental overhaul of the framework for EIA and approval in the Northern Territory (**NT**). We provide our comments on each document in turn.

Referral Guidance

Guidance on ‘potential for a significant impact’

We are concerned that the Referral Guidance does not provide appropriate detail on how the NT EPA will interpret the Act’s referral test of whether an action has the ‘potential to have a significant impact on the environment’.

Section 48 provides (relevantly):

*“... a proponent **must** refer to the NT EPA for assessment... a proposed action that (a) **has the potential to have a significant impact** on the environment...”*

This test is re-affirmed by section 55, which provides that:

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*“(4) the NT EPA **must determine** that an environmental impact assessment is required for a referred action... if it determines that the referred action...or actions.. have **the potential to have a significant impact** on the environment”.*

This mandatory threshold test is at the core of the EIA scheme established by the Act.

Although the Referral Guidance provides a series of matters that will be considered by the NT EPA, it fails to provide clear elucidation of the Act’s provisions in respect of this test, and does not interpret it usefully for the benefit of proponents nor the community. This detail will be essential to support understanding of how the operation of the EIA system.

In our view, the Referral Guidance’s introductory sections, as well as the section entitled ‘method for determining whether a referral is necessary,’ should be amended to clearly set out the matters required by the Act in a clear, direct manner that emphasises the mandatory nature of the ‘potential for significant impact’ test. It should then further expand on how the NT EPA will interpret this test, including by examining the definitions of ‘impact’ (s10), ‘significant impact’ (s11), and the meaning of ‘potential’.

Further, given the mandatory nature of the test as set out in the Act, we are concerned that in discussing various matters that the NT EPA will consider (as part of the ‘method’ at pp3-4), the Referral Guidance uses considerable discretionary language. The NT EPA needs to be explicit about the mandatory nature of referrals, and what will trigger a referral, and should, as a minimum, replace the use of “may” with “must” throughout its ‘method’.

Confidentiality

Sections 281 and 282 of the Act contain very limited circumstances where the NT EPA or Minister may accept that information is confidential and may determine to withhold it from publication under the EIA system.

We are highly concerned that the Referral Guidance (specifically at pp7, 18) contains vague statements about confidentiality that risk suggesting to a proponent, incorrectly, that it can simply identify what information is to be withheld as confidential. This approach does not accord with the circumstances provided under the Act when information may be considered confidential, which are specific and narrow, and the decision(s) are at the discretion of the NT EPA or Minister.

In our view, the document is potentially misleading. It is highly likely to create difficulties for the NT EPA in rigorously and efficiently administering the Act, as it may have the effect of requiring the NTEPA (or Department) to negotiate with proponents regarding identified ‘confidential’ information, undermining the intent of the statutory provisions, and the efficiency and transparency of the EIA process.

The Referral Guidance should be very explicit in noting that as a starting point, all information provided for a referral is, by its nature, public information. The document should be very explicit that only in rare and exceptional circumstances would genuinely confidential information need to be provided through a referral, and should set out that confidential information can only be one of the categories listed in section 281(2). The document should also make clear that any request to withhold confidential information should in no way impact on the detail and quality of information provided in the referral, and on the ability of the community to fully understand the proposed action and its impacts on the environment.

Format of referral documents

We consider there are likely to be considerable challenges that arise from the ‘referral form’ that is currently included at Appendix B of the Referral Guidance.

In its current format, there is a risk that insufficient information will be provided for the NT EPA to form a proper view of the referral. The NT EPA needs to be in a position to satisfactorily fulfil its statutory obligations under the Act, and to ensure that the community can engage properly with the information and understand the proposal and its potential impacts.

The current format of Appendix B, with its small text boxes, may mislead proponents to consider, inappropriately that only minimal details are required to be provided (e.g. in relation to identifying potential environmental impacts against each objective).

In our view, revising the referral format is likely to significantly improve the administration EIA process, and with a view to avoiding the need for the NT EPA to direct a proponent to provide additional information (cl 40, Regulations).

First, we strongly submit that the form and content of referrals should be notified in the Gazette in accordance with cl 263 of the Regulations, to ensure these requirements are enforceable and must be complied with by proponents. The Referral Guidance document would then operate as commentary to these formal requirements notified in the Gazette.

Second, the form itself should be limited to basic proponent information, a list or table of contents that specifies all substantive information that must be provided as attachments to the form, and appropriate checklists and declarations relating to false and misleading information, confidentiality, and fit and proper person requirements (see further below).

Information that should be set out in attachment(s) includes:

- Details on how the proponent has fulfilled its general duty as required under section 43 of the Act (which we note would include how the proponent has applied the environmental decision-making hierarchy in the design of the proposed action as per s43(f));
- A legislation and regulatory overview (currently section 3.2 of the form);
- A description of proposal (currently section 3.4 of the form);
- Details of alternatives (currently section 3.5 of the form);
- The existing environment (currently section 4 of the form);
- Environmental factors – which of these are likely to be impacted and how (currently section 5 of the form);
- Potential environmental impacts (currently section 6 of the form).

Clearly regulating the presentation of referral information in this manner, including through notice in the Gazette, will ensure that it provides the satisfactory detail required by the NT EPA and the community. It will be critical to ensure that the referral process is transparent, accountable and efficient.

Declaration relating to false and misleading information

Proponents must be given clear and accurate communications in the Referral Guidance as to the seriousness of providing false or misleading information. We consider that the declaration set out in the form (currently, p18 of the Referral Guidance) should be clarified and strengthened to ensure this is the case.

In our view, it is appropriate that the text of the declaration be drafted to be consistent with relevant provisions of the *Oaths, Affidavits and Declarations Act 2010* (for example see s21, unattested declaration). The declaration language at a minimum should require that the person submitting the form to confirm that they:

- Are authorised to do so on behalf of the proponent,
- Declare that the information in the referral and attachments is true,
- Declare that the person knows it is an offence to provide false and misleading information, noting the penalties under s260 of the Act, and s119 of the *Criminal Code Act 1983*.

Providing a strong, formal declaration requirement will underscore to proponents the importance of accurate information being provided, thereby supporting a robust, evidence-based EIA system. The effectiveness and transparency of the EIA system, and the ability of the community to participate in the process and properly scrutinise projects, is reliant on this assurance of accuracy.

Requirements to demonstrate fit and proper person status

We note that it is a matter for the Minister to determine whether or not the proponent is a ‘fit and proper person’ (Act ss 61, 73). This is not a matter for a proponent to simply declare themselves (as suggested on pp 7, 18 of the Referral Guidance).

As a result, we submit that the referral form should require the proponent to provide all information and evidence that is relevant to the criteria for a ‘fit and proper person’ that is contained in s 62 of the Act and cl 6 of the Regulations. It should then include a specific declaration as to the veracity and completeness of the information that the proponent has disclosed. The form should also specifically include a checklist of the types of documents that need to be disclosed in order to ensure the Minister is able to form the requisite opinion, with reference to the criteria contained in the statutory provisions.

This approach would ensure the obligation falls on the proponent to disclose any contraventions of relevant laws and/or provide the relevant details of any offence that involves an element of fraud or dishonesty. It ensures that if they are misleading in respect of such matters, then an offence would apply. It is critical to place this burden of disclosure on proponents in this manner to avoid the obligation falling, very inefficiently, on the NT EPA and/or Minister to identify any relevant information to ensure the Minister has adequate information needed to make the decision to grant or refuse an approval, consistent with his or her obligations under s73 of the Act.

General comment on tone

As a concluding remark on the Referral Guidance, we consider that the document, as a whole, needs to better reflect the shift in the NT EPA’s new role under the Act.

The Act represents a fundamental transformation of the EIA framework in the NT. The new powers afforded to the NT EPA and the Minister for the Environment will see a considerable shift in the regulatory role of the NT EPA and the Department (particularly in comparison to the former framework under the *Environmental Assessment Act 1982*).

The tone set by this Referral Guidance (and all other interpretive and guidance materials for proponents in relation the Act and Regulations) should better reflect this new role. This requires the use of clear rules and explicit directions to proponents that are couched in clear, mandatory language, informing proponents of their legal obligations and the NT EPA’s approach to administering those obligations. It should not simply rely on discretionary or vague, non-specific language. As such, we consider the document would benefit from being holistically reviewed and amended with a view to strengthening the approach taken, and its overarching tone, to better signal the regulatory transformation that the Act represents.

Factors and Objectives Guidance

General comments

As an initial comment, it is not clear to us why the Factors and Objectives Guidance has been developed, in circumstances where there is a specific mechanism available under the Act for the declaration of environmental objectives by the Environment Minister, including on recommendation of the NT EPA (Act, s28). Any applicable environmental objectives must be considered by the NT EPA in determining a referred action (Act, s55).

Establishing an alternative, non-binding guidance document, rather than utilising the specific statutory mechanism that exists for the same purpose, appears to undermine the Act. The document (at p1, 'purpose of the guidance') does not clearly nor sufficiently address this issue. For example, the document could specify that the current Factors and Objectives Guidance is an interim measure until the Minister formally declares environmental objectives under the Act.

We also consider that the Factors and Objectives Guidance document should better integrate the Act's key provisions throughout each section. This is important to illustrate the robust and mandatory nature of the regulatory requirements of the Act. In particular, the document should better link its purpose with the definitions, principles and tests which are mandatory (e.g. the 'significant impact' test). The final section on 'using NT EPA factors and objectives in environmental impact assessment' (p4) should specifically include the Act's provisions that the NT EPA and/or proponents (as relevant) are bound to apply. For example, the list of matters that must be taken into account (p4) should clearly reference the relevant statutory provisions, emphasising their binding nature.

Finally, the Factors and Objectives Guidance would strongly benefit from the inclusion of a glossary. In its absence, there is no clear indication of what standards are being set by various terms that are used. Key terms that are used, but not defined, include 'environmental values,' 'biological diversity' (for example, this should be defined to ensure it captures genetic diversity) and ecological integrity.

Specific comments on objectives

In relation to the factors and objectives themselves (p3), we note that many of the objectives are focused on a standard of 'maintained'. While we would support an outcome of achieving the maintenance of various environmental conditions, this relies on a baseline or benchmark standard of good condition.

However, noting that there is likely to be limited data in the NT to support an understanding of baselines or benchmarks, we consider the objectives should provide greater clarity around how the NT EPA expects that this standard will be measured, in each objective. In some circumstances, it would appear more appropriate to use national standards (e.g. air quality) as a reference point.

With respect to the various objectives (p3), we provide the following specific comments:

- *Terrestrial ecosystems* – this should adopt modern terminology, i.e. biodiversity (rather than flora and fauna), to ensure that it includes all relevant ecosystem components (fungi, bacteria, etc). This objective also needs to reflect the role of connectivity and ecosystem functionality.
- *Hydrological processes* – this objective should refer to groundwater/surface water interactions and should acknowledge that restoration may be a more suitable goal in some circumstances (e.g. rivers, water tables).
- *Inland water environmental quality* – this objective appears to include potential contradictions (e.g. ecological health and land uses), with no indication of how to determine which values will be prioritised to be 'maintained'.
- *Coastal processes* – this objective should be clearer about what is sought to be protected, given that natural geophysical and hydrological processes can negatively impact a range of environmental values (e.g. erosion may cause loss of beaches).

- *Air quality* – this objective should address both the environmental and health impacts linked to air quality.
- *Atmospheric processes* – we strongly support the inclusion of an objective focusing on reducing greenhouse gas (GHG) emissions. However, as currently framed, the target of net zero emissions by 2050 could be attained even if the NT makes a significant contribution (in the interim) to exceeding the 1.5 / 2 degree goal of the Paris Agreement. For this reason, a reference to the Paris temperature goal should be explicitly included to avoid this perverse outcome. That is, the objective should be to avoid or minimise emissions to ensure the NT contributes to meeting Paris Agreement temperature targets and will have net zero emissions by 2050. We also submit that there should be an explicit reference to scope 3 emissions as relevant in emissions reductions, for clarity. Finally, we note that the adaptation component referenced here includes a focus on adapting social structures to a changing environment, which appears to be more appropriate as a ‘society and economy’ objective.
- *Social and economy* – this objective should reflect a ‘triple bottom line’ approach, given the potential for conflict between various values that needs to be reconciled. This objective should also reflect the need to internalise the full social and environmental costs of major development across the project lifecycle (e.g. public health consequences, carbon emissions, polluter-pays incentives, rehabilitation costs).

Finally, in relation to the commentary on ‘using NTEPA factors and objectives in environmental impact assessment’ (p4), while it is positive to see references to the interconnected nature of the environment, there is no further detail provided on how synergistic and cumulative impacts will be considered by the NT EPA in the EIA process. This should be clarified.

We would welcome the opportunity to discuss our comments at any time and look forward to our continued engagement in the implementation of the *Environment Protection Act 2019*.

Yours sincerely,

Environmental Defenders Office



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