



# Environmental Defenders Office

1 June 2020

Northern Territory Environment Protection Authority (**NT EPA**)  
c/ Environmental Assessment Unit  
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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**):

1. Referring a significant variation to the NT EPA (**Variation Referral Guidance**);
2. Making a public submission during the impact assessment process (**Submissions 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 prior detailed submissions we have made on these reforms, including draft legislation and implementation guidance documents.

Consistent with our previous submission on the implementation of the Act dated 1 May 2020, in this submission we remain focused on ensuring the guidance materials for the Act are:

- consistent with its requirements;
- appropriate to support its robust administration; and
- in alignment 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.

### **1. Variation Referral Guidance**

We note at the outset that the Variation Referral Guidance largely appears to summarise the process around 'significant variations' as contained in the Regulations.

However, it does not provide further substantive detail for proponents and the community about how the NT EPA will determine and assess a referral of a significant variation, and what matters it will consider in doing so. As such, the document does not provide any further insight, or provide useful policy guidance on the administration of the legislation. Key definitions and matters the NT

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EPA will take into account at fundamental decision points on significant variations are not detailed. For example, the document notes (at p4) that the NT EPA will consider whether a referral may be better referred for a standard assessment or a strategic assessment. However, it does not provide any indication as to the matters it will consider when exercising this discretion.

In our view, the Variation Referral Guidance would significantly benefit from the provision of this kind of information throughout. It would enhance the administration of the EIA process for both proponents and the community, and lead to more robust, consistent and objective decision-making on the part of relevant decision-makers (particularly the NT EPA).

We provide the following additional comments on each part of the Variation Referral Guidance.

#### ***Determining whether a variation is significant (p2-3)***

The Variation Referral Guidance (p2) does not clearly address the definition of ‘significant variation’ in the Act (s12), nor seek to address how the NT EPA will apply the definition of ‘significant impact’ in circumstances of a variation.

The failure to address the threshold issue of ‘significant impact’ (in the context of ‘significant variation’) is a key gap in the document that must be addressed if the document is to operate as a useful tool in understanding how the NT EPA will administer and apply the Act. To this end, the comments made in our earlier submission of 1 May 2020 on the Referral Guidance document are also applicable to the Variation Referral Guidance. Providing detail on threshold definitions and tests would bring greater clarity, consistency and objectivity to the interpretation of the legislative provisions, for the benefit of both proponents and the community.

Further, the language of ‘substantially the same’ that is used throughout this section of the Variation Referral Guidance is, in our view, not reflected in the definition nor decision-making ‘tests’ relating to significant variations. In our view, this language should be replaced with words to the effect that the ‘potential for a significant impact’ has ‘not increased’. The language here should also be clearly linked with the matters required to be considered by the NT EPA under clause 172 of the Regulations.

Finally, we consider that some wording used in this section creates the risk that an assessment under the significant variation provisions will only consider new impacts of the variation, rather than the cumulative impact of the action as a whole, as modified. The language in the Variation Referral Guidance should be amended to ensure that it is explicit that a significant impact can be significant on its own, or cumulatively with the existing proposal or action. This should be clarified throughout the document (including, for example, on page 6, ‘significant variation after environmental approval granted’).

In our view, taken together the above issues risk the significant variation process being manipulated by proponents. It may, for example, encourage them to purposefully delay components of an action to enable a less rigorous assessment process to apply at the variation stage. A much greater level of detail about how the NT EPA will interpret and apply the legislation in relation to significant variations is required.

#### ***Initial considerations (p 3-4)***

The Variation Referral Guidance should also provide further detail around the proposed exercise of discretion for the decisions required of the NT EPA under clauses 216- 221 of the Regulations (which include decisions to accept or refuse a referral). For example, clause 219 provides that a referral can be refused if it was ‘not required to be made’. The document should clarify, for example, that this means that the NT EPA has determined that the matter is not a significant variation as defined in s12 of the Act. Similarly, the document should provide some guidance

around what the NT EPA will consider to be ‘appropriate’ in the circumstances around referrals for strategic assessments (cl 217, 220).

We also note that the brief amount of information provided in relation to public consultation timeframes is confusing, and appears incomplete. Although Table 1 refers to the timeframes provided for in clause 201 of the Regulations, it is not clear from the face of the document that these are required by legislation, and nor are other relevant provisions for public consultation around significant variations identified clearly in the document.

For the sake of community engagement in the significant variation process, there should be a clear outline of all opportunities for public consultation, that specifically refers to the whole process, and consultation available at each step in the process, within the Variation Referral Guidance.

### ***Process following acceptance of the notice of significant variation (p3-6)***

In this part, the Variation Referral Guidance appears to summarise relevant provisions of the Regulations, which are highly procedural in nature. However, it does not provide any more substantive or detailed information about the matters that the NT EPA will consider in making the various critical, discretionary decisions that it is tasked with under the Act and Regulations. Further, there is a lack of clarity about when the document is outlining legislative provisions, and if or when it is providing further detail and substance to the matters mandated in the Regulations, which is confusing.

For example:

- The document paraphrases (at p5) matters set out in clauses 172 and 203 of the Regulations, but in doing so, appears to undermine clarity around, or risk providing misleading information about, the matters required to be considered. Further, the document provides no further nor usual detail on how the NT EPA will apply the various tests (e.g. ‘potential for a significant impact’).
- The document does not provide any guidance about how the NT EPA will make the various discretionary decisions open to it under clause 173, that is, what factors it will consider in deciding when it would be appropriate for an action to an alternative assessment method. This is a critical gap in terms of providing some degree of certainty to the community about what level of assessment would be required for various levels of impact.

Given the above issues, we consider the document does not usefully assist proponents nor the community in better understanding how the significant variation process will operate and does not provide a useful guide on decision-making under legislation that focuses on procedural detail.

In our view, the Variation Referral Guidance enables excessive discretion on the part of the NT EPA, consistent with the approach that exists under the current legislative framework of the *Environmental Assessment Act 1982*. Without further clarity, this may lead to continued inconsistent and subjective decision-making, which would clearly be contrary to the outcomes sought to be achieved through the reform process.

### ***Information to be provided (including Appendices)***

In respect of the proposed forms at Appendix A, we reiterate the concerns we raised in relation to information requirements in the Referral Guidance for actions (see our submission dated 1 May 2020). In particular, we emphasise that:

- Any form should be limited to basic proponent information, with all substantive information required to be provided in attachments. This particularly applies to the table at section 6 of the current form (p14);

- The treatment of confidential information in the form (p11) is potentially misleading and does not accord with the Act. It should be significantly revised with the specific limitations applicable under sections 281 and 282 explicitly noted on the form, with clear communication to proponents that the information provided is public information, and that confidentiality will only be considered in very limited circumstances (and is a decision for the NT EPA);
- There should be a more robust requirement for a declaration relating to false and misleading information (p12), including a clear acknowledgement that the person knows it is an offence to provide false and misleading information.

We also consider that greater clarity should be provided in respect of the information required to be provided on the original proposal (p12). The language should mirror the language of the Act and Regulations. It is also not clear what information is intended to be provided by the requirement of “where relevant discuss compliance with the Environmental Approval to date”.

## **2. Submissions Guidance**

Public participation and community involvement in the environmental impact assessment process, including culturally appropriate consultation, is at the core of the Act. Key provisions include:

- The objects of the Act, include ‘to provide for broad community involvement during the process of environmental impact assessment and environmental approval’ (s3(d)) and ‘to recognise...the importance of participation by Aboriginal people and communities in environmental decision-making processes (s3(e));
- The decision-making principle, which provides that ‘decision-making processes should provide for community involvement in relation to decisions and actions that affect the community’(s18(2));
- The purpose of environmental impact assessment process (s42), which specifies that a purpose includes ensuring that ‘the community is provided with an opportunity to participate, and have its views considered, in decisions on proposed actions (s42(d));
- The general duty of proponents under an environmental impact process, which establishes duties (amongst other things) to provide communities with information and opportunities for consultation, and to consult with affected communities, including Aboriginal communities, in a culturally appropriate manner (s43(a), (b)).

For this reason, while we acknowledge that a guide for submission-writing may be a useful tool for the community, we consider that the Submissions Guidance should place a greater emphasis on outlining the importance of this role, including by setting out the rights of the community under the Act to be consulted and have their views taken into account in key decision-making processes, including by (but not limited to) submission-writing.

The Submissions Guidance should provide a more nuanced and detailed view of the EIA process and the various opportunities that arise for public submissions, and how this may affect the matters addressed in a submission. For example, submissions on a referral will clearly have a different emphasis to a submission in response to an EIS, because they are guided by different definitions, tests, decision-making criteria and information. It would be very useful for these matters to be set out, together with guidance on what matters the decision-maker will be required to take into account at each step, to assist community members to make appropriately targeted submissions.

The Submissions Guidance should also explain in more detail how submissions will be considered by the NT EPA and Minister at key decision points. For example, one of the critical decisions under

the Act is the Minister's decision whether or not to grant an approval (s73). Here, the Act specifies a range of matters the Minister is to consider and be satisfied about, including that the proponent is a fit and proper person. It also confirms the Minister must be satisfied, before granting an approval, that the community 'has been consulted on the potential environmental impacts and environmental benefits of the proposed action' (s73). This is important information that should be communicated to the community, both to inform them of the importance of consultation, as well as providing guidance on matters that would usefully be addressed in submissions.

We also make the following specific comments on language used in the Submissions Guidance.

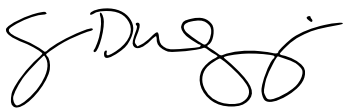
First, we are concerned that the Submissions Guidance inappropriately provides a narrow perspective on what may be 'appropriate comments' (p4) for inclusion in a submission, given that the Act and Regulations do not constrain what matters may be included in a submission. For example, it suggests that the process 'provides an opportunity for community members to raise issues about environmental management matters that they feel have not been adequately addressed'. While this is one opportunity provided by a submission, the role of public participation is much broader and much more fundamental than this, which is clearly established by the framing of the Act (noted above) and the broad public consultation provisions in the Act and Regulations.

Second, it would be worth clarifying some specific matters throughout the document. For example, what is defined as 'SPAM email' is unclear (p4). Further detail should also be provided in relation to confidential information (p5), and about when information will not be published (p6). As currently drafted, these matters are excessively discretionary. Guidance should be provided on the various terms used, and the matters the NT EPA will consider in making decisions about these forms of information, including in relation to the confidentiality provisions of the Act (s281-282), obligations under privacy legislation, and what may constitute defamatory content.

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**

A handwritten signature in black ink, appearing to read 'G Duggin', with a stylized flourish at the end.

**Gillian Duggin**  
Managing Lawyer