



Environmental Defenders Office

3 July 2020

Northern Territory Environment Protection Authority (**NT EPA**)
c/ Environmental Assessment Unit
PO Box 3675
Darwin NT 0801

By email: ntepa.consult@nt.gov.au

Dear Environmental Assessment Unit

Submission on Stakeholder Engagement and Consultation Guidance under the Environment Protection Act 2019

The Environmental Defenders Office (**EDO**) welcomes the opportunity to make this submission on the Stakeholder Engagement and Consultation Guidance document (**Guidance Document**) under the *Environment Protection Act 2019* (NT) (**Act**) and Environment Protection Regulations 2020 (NT) (**Regulations**).

The EDO is a community legal centre dedicated to protecting the environment. We regularly advise clients in relation to environmental impact assessment (**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. Consistent with our previous submissions on the implementation of the Act dated 1 and 11 June 2020, our focus is 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.

While we generally support the Guidance Document, we make some comments below on specific issues.

1. Approach and principles

Subject to our comments in this submission, we support the Guidance Document and the principles that underpin its approach to public participation and stakeholder engagement in the EIA process. We consider that if properly operationalised in accordance with the Act (by both proponents and relevant decision-makers), there should be a significant improvement in public participation and consultation in the EIA process in the Northern Territory. This improvement is notable in light of practices under the *Environmental Assessment Act 1982* which resulted in many projects in the Northern Territory having a troubled history of community consultation, illustrated

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most acutely in the case of the contentious, divisive and environmentally damaging McArthur River Mine¹.

One of the primary benefits of public participation in the EIA process is achieving better environmental and community outcomes, which are generated because the process provides individuals and communities with the opportunity to genuinely influence decision-making. To deliver these benefits, consultation must be commenced early, and carried out iteratively throughout the whole EIA process, with the clear acknowledgement that it is not a 'one off' and static process, but an ongoing one.

We therefore support the explicit recognition and emphasis in the Guidance Document of these ideas, including through reference to the IAP2 standard and its core values. We consider that the adoption of this approach accords with the objects and principles, and the purpose of the EIA process as set out in the Act (ss 3, 18, 42).

2. Purpose and emphasis

However, consistent with our concerns with previous guidance materials that have been prepared for the implementation of the Act, we are concerned that the Guidance Document does not properly substantiate or give adequate interpretive guidance about the statutory provisions of the Act and Regulations - in this case, with respect to community consultation.

On our review, the Guidance Document focuses primarily on:

- providing general guidance and principles in relation to implementing stakeholder engagement (sections 1 and 2); and
- providing general guidance on planning for and engaging with stakeholders (sections 3 and 4).

While the information described in sections 1-4 is contextually useful and will no doubt be of assistance to some proponents (particularly those inexperienced with such processes), in our view the underlying purpose of the Guidance Document must be to provide detail about the standards expected for consultation, as required by the Act. These are the various matters that are currently included, very much in brief, in section 5, 'reporting on stakeholder engagement'.

The purpose of the Guidance Document should be to communicate to proponents and the community what standards of stakeholder engagement and consultation are expected on the part of proponents in order to meet the requirements of the Act (both to ensure the proponents legal obligations are satisfied, as well as those of the key decision-makers in the Act, the NTEPA and the Minister). This includes:

- Articulating how the various provisions of the Act that relate to public participation and consultation operate together to frame what obligations are placed on proponents and decision-makers (including specifically in relation to Aboriginal communities);
- Providing clarification about what participation and consultation is required at the various stages of the EIA process (from pre-referral to post approval) and the level of engagement anticipated under each assessment pathway, in order to satisfy the requirements of the Act;
- Outlining the expected standards for stakeholder engagement and consultation (based on the best practice principles and approaches discussed in the earlier parts of the document) to deliver compliance with the Act's provisions; and

¹ See for example, the EDO's comments in response to the EIS for the McArthur River Mine Overburden Management Project: https://ntepa.nt.gov.au/___data/assets/pdf_file/0009/554796/mrm_overburden_public_submissions.pdf

- Explaining how compliance with these standards is intended to be implemented through the administration of the Act (e.g. through approval conditions relating to ongoing engagement and consultation over the life of an action).

As such, in our view section 5 on ‘reporting’ for the purposes of an EIA document should be fundamentally expanded on and re-characterised to set out the consultation standards that must be adhered to (and demonstrated by a proponent) to satisfy the legal obligations imposed by key sections of the Act and Regulations, and in particular, ss3, 18, 42, 43 and 73 of the Act.

3. EIA pathways and statutory consultation requirements

Noting that the Act and Regulations establish different EIA pathways, each with varying processes and timeframes underpinning public consultation obligations, as noted above we are concerned that the Guidance Document does not endeavour to explain how the consultation standards may apply to each pathway, and what level of consultation is expected for each, in order to meet the obligations of the Act.

This is particularly relevant for the “inquiry” component of the EIA process, which has limited substantive detail provided for in the Regulations, but is also applicable for the key steps in each pathway (e.g. pre-submission, scoping / TORs, referral, draft EIS/ SER and significant variations, as well as post approval).

In our view it is appropriate, and clearly warranted given the statutory provisions of the Act and Regulations that place critical emphasis on public participation and consultation, for the Guidance Document to set out clear standards and expectations for consultation at each key stage of the EIA process and for each assessment pathway.

4. Engaging with Aboriginal stakeholders

We acknowledge and support the emphasis in the Guidance Document on the importance of consulting with Aboriginal people and communities, given this is clearly reflected in the provisions of the Act (including ss3 and 43), together with the document’s recognition of Australia’s acceptance of the *United Nations Declaration on the Rights of Indigenous Peoples*.

We also support the specific emphasis placed in the Guidance Document on the special circumstances associated with consulting with Aboriginal communities, and the cultural context that requires particular consultation approaches to be undertaken. To this end, we support the matters identified in Table 1 outlining actions that can be taken to improve engagement with Aboriginal stakeholders.

However, we do have concerns in relation to the framing of some aspects of engagement with Aboriginal communities, as per sections 4.2 and 4.3 of the Guidance Document.

Based on our experiences with the EIA process in the Northern Territory, and advising and representing Aboriginal individuals and communities impacted by major development, we consider that it is critical that the Guidance Document clearly emphasises that Aboriginal individuals and communities are broadly impacted by, and must be consulted on a wide range of matters in the EIA process, as is the case with any other community.

This means Aboriginal individuals and communities must be consulted on the broad range of interests and concerns that they may have, including impacts on Country and the environment. Under the Act, all impacted Aboriginal people and communities in relation to major development (e.g. communities downstream of a polluting industrial development) must be consulted on all matters relevant under the Act that are of concern to them. Consultation cannot be limited to tenure-related rights, nor impacts on cultural heritage and sacred sites alone, notwithstanding that of course these are also critical matters.

We are concerned that the Guidance Document mischaracterises the nature of this consultation obligation under the Act. For example, section 4.3 states that “there may also be circumstances where Aboriginal people, while not holding the legislative rights to be consulted, are residents of a particular community and have the right to be consulted like that of any other member in that community”. This sentence suggests that the obligation to consult impacted Aboriginal communities in EIA processes may be the case in only some circumstances. However, in our view the EIA process under the Act specifically mandates that Aboriginal people and communities have broad rights to be consulted and involved in decision-making processes under the Act for any decisions that affect them, without limitation. Sections 4.2 and 4.3 should therefore be reviewed and amended to ensure this position is clear.

The Guidance Document should also be very explicit in noting that consultation processes under the *Native Title Act 1993*, the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Sacred Sites Act 1984* (NT) are entirely separate statutory obligations with different objectives and purposes to the EIA process under the Act. The fulfilment of requirements of one process will not necessarily deliver compliance with another. The Guidance Document must be very clear that this is not what is implied by providing the information in section 4.3. In our view, the commentary at 4.3 should be removed or significantly amended and reduced (e.g. through the inclusion of a simple reminder that proponents will have separate statutory obligations to consult Aboriginal people under other legislative regimes).

We would welcome the opportunity to discuss our comments at any time and thank the NTEPA for the various opportunities to engage with the implementation of the *Environment Protection Act 2019*.

Yours sincerely,

Environmental Defenders Office

A handwritten signature in black ink, appearing to read 'G Duggin', written in a cursive style.

Gillian Duggin

Managing Lawyer