LOCK THE GATE ALLIANCE
AUSTRALIANS WORKING TOGETHER TO PROTECT OUR LAND, WATER, AND FUTURE

3 December 2018

Department of Environment and Natural Resources

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

To who it may concern,

RE: Submission on the draft Environment Protection Bill and draft Environment Protection Regulations, by the Lock the Gate Alliance

By way of introduction, Lock the Gate Alliance is a national grassroots organisation made up of 100,000 individuals and over 250 local groups who are concerned about unsafe or inappropriate mining. The mission of the Lock the Gate Alliance is to protect Australia's agricultural, environmental, and cultural resources from inappropriate mining and to educate and empower all Australians to demand sustainable solutions to food and energy production. Lock the Gate works across the NT and is committed to advocating for environmental and community health, and the productivity of local economies.

Lock the Gate welcomes the opportunity to make a submission to the draft Environment Protection Bill and draft Environment Protection Regulations. It is pleasing to note that for the first time, an environmental approval will now be issued by the Minister for the Environment, on the advice of the NTEPA.

We support the draft Bill in establishing a range of financial tools, including requiring bonds as a condition of approval, applying a levy to industry, and establishing funds for environmental protection. We also support the Department and NTEPA in now having important powers to investigate potential breaches and take action to enforce compliance, including environment protection notices, stop work notices and closure notices, plus the important new opportunities for civil enforcement.

Please find below some short comments on both the Bill and the regulations for improvements needed. For clarity, in certain sections we have simply written our suggestions for improvements in red. In this short submission we have sought to make suggestions we consider to be extremely important for the improvement of the Bill and regulations. Our aim in these comments is to further the intention of the Bill and regulations to protect the environment.

1. Points on the draft Bill

In the Bill, there is a need for additional inclusions on what the decision maker must turn their mind to when considering environmental assessments. Please see below for additional inclusions suggested in red.

Division 2 Decision of Minister on environmental approval

87 Matters to be considered by Minister in deciding on environmental approval

(1) The Minister must have regard to the following in deciding whether to grant or refuse an environmental approval for an action:
(a) the objects of this Act;
(b) whether the proponent is a fit and proper person to hold an environmental approval;
(c) the potential impacts and benefits associated with the action;
(d) the public interest;
(e) any submissions made by the public;
(f) the environment generally;
(g) relevant Territory and Commonwealth policies and instruments;
(h) any other matters the Minister considers relevant.

(2) Before granting an environmental approval for an action, the Minister must be satisfied that:
(a) the community has been adequately consulted on the design of the action; and
(b) the [delete: significant] impacts of the action have been appropriately avoided or mitigated or can be appropriately managed; and
(c) the environmental impacts of the action are acceptable; and
(d) the action is consistent with the principles of ecologically sustainable development;
(e) if appropriate, residual significant impacts will be appropriately offset;
(f) Traditional owners and locally impacted landholders have granted free, prior and informed consent for the action;
(g) that the requirements of the EIS have been adequately met; and
(h) the action is not inconsistent with any Territory or Commonwealth environmental policy or commitment.

The draft EIA laws fail to acknowledge Aboriginal interests and integrate appropriate consultation and participation for Aboriginal people and communities.

The draft EIA laws are silent on the environmental, social and cultural interests of Aboriginal communities and people in relation to activities that have an impact on the environment. It

fails to appropriately have regard to Aboriginal culture and communities in the decision-making process.

We strongly consider the draft EIA laws need to explicitly recognise and implement culturally appropriate consultation practices for Aboriginal communities and people, including through integrating these ideas in the guiding principles of the draft Bill. We encourage formal consideration of the internationally accepted principles of free, prior and informed consent.

We note that this process of consultation on the draft Environment Protection Bill did not include many opportunities for thoughtful engagement and feedback in remote areas or with diverse Aboriginal interests across the Northern Territory. Additional time and resourcing should be granted and specified within the Bill to allow for more thorough consultation practices.

2. Points on the draft Regulations

Please amend Division 6 to include the following improvements to the EIS assessment inclusions.

84 Matters to be included in environmental impact statement assessment

(1) The matters to be included in environmental impact statement assessment must include all ~~or any~~ of the following:

(a) an assessment which considers the potential impact of the action on the biological or physical environment (a biological or physical environment assessment);

(b) an assessment which considers the potential impacts of an action on human health and wellbeing (a health impact assessment);

(c) an assessment which considers the potential impact of an action on society (a social impact assessment);

(d) an assessment which considers the potential impact of an action on Aboriginal culture or sacred sites or the Territory's natural or built heritage (a cultural impact assessment);

(e) an assessment which considers the potential economic costs and benefits of an action to the Territory or to a regional or local area of the Territory (an economic assessment);

(f) an assessment which considers the greenhouse gas emissions that will be produced by the project, including Scope 1, Scope 2 and Scope 3 emissions (a greenhouse gas emissions assessment); and

(g) an assessment which considers the potential cumulative impacts of the project and takes into account the combined impact of the project alongside other projects approved or being assessed (a cumulative impact assessment).

We are concerned that the draft regulations are attempting to constrain the ways that the public can have their say.

On page 32 of the Draft Regulations, it currently states:

(5) For subregulation (2), a **genuine and valid submission** by a person does not include:
(a) a submission by the person in the form of a form letter prepared by another body or organisation or a petition; or
(b) a submission made after the end of the submission period under regulation 91, unless the NT EPA considers that in the circumstances it should be considered a genuine and valid submission.

Form letters or petitions with key points to help the community to have their say are a well utilized tool for Government run submission processes across other jurisdictions of Australia. It is concerning that the draft regulations in the NT would attempt to disallow the community to have their say in this way, particularly as many members of the community are interested in participating in these processes yet are time poor. Attempts to constraint the community opportunities to participate in the submission process goes against the intent of the improvements and should be amended.

We recommend the definition is updated to simply state:

(5) For subregulation (2), a **genuine and valid submission** by a person does not include:
(a) ~~a submission by the person in the form of a form letter prepared by another body or organisation or a petition; or~~
~~(b)~~ a submission made after the end of the submission period under regulation 91, unless the NT EPA considers that in the circumstances it should be considered a genuine and valid submission.

We are concerned the consultation process gives proponents undue access to influence the decision making.

On page 37 of the regulation, it states under 117 Consultation

(1) The NT EPA must:
(a) give a copy of the draft assessment report, draft environmental approval or draft statement of unacceptable impact to any relevant statutory decision-maker; and
(b) invite the statutory decision-maker to make a submission to the NT EPA on the draft report, approval or statement within the period specified by the NT EPA.

(2) The NT EPA may:
(a) give a copy of the draft assessment report, draft environmental approval or draft statement of unacceptable impact to the proponent; and
(b) invite the proponent to make a submission to the NT EPA on the draft report, approval or statement within the period specified by the NT EPA.

We submit that any step that involves the proponent should also involve the public. As currently drafted, the process allows a lobbying opportunity by the proponent that excludes the public. The procedure sets up too many opportunities for the proponent to exert to undue influence.

We suggest a line is included below (2) b) above, along the lines of:

If the NT EPA chooses to provide this feedback opportunity to the proponent, the public must also be given the opportunity for another window of feedback based on the same documents provided to the proponent.

We also note that through the process outlined, the EPA can say there is an unacceptable impact, but the Minister can approve it anyway. There should be a more formal requirement for the Minister to consider all the advice from the EPA.

3. Other general feedback that is important to improve the draft Bill and regulations.

Feedback on the timelines in the draft Bill and regulations

We are concerned that the timeframes are too short for meaningful engagement, particularly across remote areas and with Aboriginal communities. Depending on the time of year, parts of the NT are inaccessible and communications can be difficult. At other peak times, interested parties such as tourism operators and small business owners are completely run off their feet and unable to give time to reading EIS documents and formulating individual responses.

We recommend at least doubling the public submission response time to 60 days, and doubling the allowable response time for all other consultation processes outlined. This would give the community more certainty that the Government was not seeking to rush something through.

We also note that forcing the Minister to make decisions within such a tight timeframe is completely unreasonable. Currently as drafted, if there is a delay in the Minister reaching a decision on an approval within a required timeframe, the approval is assumed to be approved. This undermines accountable, considered decision-making.

For major projects, giving the EPA three months to consider all the documentation and come to a decision would be reasonable.

It is not appropriate for appeal rights to have been excluded for those acting in the public interest to protect the environment.

Third party appeal rights, both for 'judicial review' and for 'merits appeal' must be included in the draft EIA laws to ensure these laws operate for the public interest.

These appeal rights are critical for ensuring accountable decision-making, acting as a safeguard against corruption and upholding the rule of law.

Although the draft Bill currently includes these fundamental rights, the NT Government has recently back-flipped and publicly committed to significantly narrowing (for judicial review) and removing (for merits review) these rights from the draft Bill. This will significantly undermine accountable decision-making, restrict access to justice and undermine the rule of law. This decision is particularly disappointing as including merits appeals to NTCAT was part of the election commitment (p13) and would be consistent with the recommendations and findings of the Final Report of the *Scientific Inquiry into Hydraulic Fracturing in the NT*.

Feedback on the ESD principles inclusion

We are pleased to see the principles of ecological sustainable development (ESD) are included in the draft Bill and decision-makers must 'have regard to' them when making decisions. However, although decision-makers must consider the principles of ESD, they are not required to specify how the principles have been considered in a statement of reasons. This undermines genuine, transparent consideration of these principles. Please update these requirements to ensure that the consideration of ESD is adequately reported on through the statement of reasons.

Concerns the draft Bill includes a wide power to exempt anyone from the Act

The draft Bill allows the Regulations to exclude any person from complying with the Act. There are no constraints or safeguards placed on when this power can be used. This exemption means that Regulations, which are not subject to Parliamentary scrutiny and debate, could be used to exclude an entire industry (e.g. fracking, pastoralism or mining) from compliance with the Act.

This is an excessive power to be included in Regulations and could be used to fundamentally undermine the Act's operation and confidence in the regime. A more appropriate approach needs to be included in the Act, such as subjecting this power to a requirement that the Regulations can only exclude compliance with the Act if this is consistent with the objects of the Act, and requiring reasons to be published for any exemption.

Procedures for EIA should be in the draft Bill, not the Regulations

The Regulations currently contain all the procedures for environmental impact assessment under the various 'pathways,' including how proposals are amended and modified. They also include significant provisions for public participation, transparency and accountability.

These are all matters that are ordinarily included in an Act, not Regulations, which can be changed easily without Parliamentary oversight. The substance of the entire EIA process must be included in the draft Bill. The Regulations are suitable for administrative matters, such as setting application fees.

Some important details are currently missing in the exhibition materials

The draft EIA laws are missing important details in some key areas, including:

- What the proposed 'location' and 'activity' triggers will be – how these triggers are set will be crucial in determining what activities and impacts will require assessment under the new Act
- Maximum penalty amount for offences – to ensure that offences act as an appropriate deterrent (and punishment), they must be set at a high enough level to ensure they cannot be factored into the 'cost of doing business
- Transitional arrangements – how proponents that are currently being assessed under the existing legislation (*Environmental Assessment Act*) will be transitioned to the new system, and how projects that have been approved under other legislation will be

transitioned to having an environmental approval, will be critical for ensuring the ongoing legitimacy of the new system.

The NT Government should release details about their proposals on these issues as soon as possible.

Proper resourcing will be essential to success of the new system

The new EIA laws will be ineffective if sufficient resources are not directed towards implementing and properly administering them, and compliance and enforcement is not properly resourced.

The NT Government must commit to proper resourcing of the new system to deliver genuine reform to the NT's environmental regulatory framework.

Thank you for your consideration of these further amendments to the Environment Protection Bill and regulations 2018.

Yours truly,

Naomi Hogan
Lock the Gate Alliance