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Submission on the Environmental Regulatory Reform Discussion Paper

The Arid Lands Environment Centre (ALEC) is the peak regional environmental organisation serving the community and protecting the country of central Australia for more than 37 years. ALEC has taken an active role in engaging with Government to develop progressive and robust environmental regulatory frameworks. We are committed to working with the Department of Environment and Natural Resources to develop an integrated, equitable and sustainable system of environmental assessment and approval. The current framework has many systemic failures which must be addressed in this reform. This process is a unique opportunity for the Territory to implement a progressive and robust system that rivals any other in Australia.

ALEC is heartened by the commitment of the Department to improving environmental governance of the Territory and implement a 21st century system of environmental assessment. We are supportive of the theoretical foundation of these reforms through the statement of principles but would also like to see the inclusion of additional environmental protection principles. Acknowledging that the majority of indicators of environmental health are deteriorating in the Northern Territory, and the ever-growing risk of climate change, these regulations must aim to strive for a distinct shift in the protection afforded to the environment as a result of development and industry (TNRM 2016). Assessment and approval processes should be able to guarantee positive environmental outcomes as well as regulate appropriate development and minimise pollution.

This submission will provide feedback on each chapter of the Discussion Paper outlining how the reforms could be tailored to better fulfill the objectives of ecologically sustainable development, non-regression of law, restoration and enhancement of environmental quality and health. The Australian Panel of Experts of Environmental Law (APEEL) have suggested it is ultimately necessary to ask when undergoing such regulatory reform what the system is designed to achieve in a broader socio-cultural sense and how legal frameworks can be shifted beyond current models. Environmental assessment and approval must be able to restore and enhance environmental value and promote sustainability rather than merely minimise the impact of growth (APEEL 2017a).

This submission is informed by the principles of restoration, enhancement, non-regression and environmental rights/justice. It will begin by outlining the case for including environmental justice. The process should be guided by the need for sustainability in the true sense of the term. These reforms are drastically needed to improve public confidence in the assessment and approval system by demonstrating that government can protect the environment while providing for ecologically sustainable development.

Environmental justice

Environmental justice is emerging as a progressive principle of environmental governance that will improve the equity of environmental decisions and strengthen the protection from contamination. Rather than simply preventing harm, environmental law, like administrative law must be able to guarantee positive rights and responsibilities that government and industry owe to both citizens and the environment. It is no longer sufficient that environmental law facilitates development and determines what level of pollution is appropriate (APEEL 2017).

Environmental justice is a normative concept that is drastically needed to guide assessment, approval and post approval by providing values by which to assess the fairness, equity and environmental value of decisions. Environmental justice should play a strong role in the next generation of environmental governance in the NT to address the disproportionate burden of development and pollution that is experienced by marginalized Indigenous and lower socio-economic communities without equivalent benefit.

Environmental justice is defined by the US EPA as: "the fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to development, implementation and enforcement of environmental laws, regulations, and policies" (US EPA). Fair treatment means that no group of people, including racial, ethnic or socio-economic group bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal and commercial operations or the execution of federal, state, local and tribal programs and policies" (US EPA).

Environmental justice is therefore comprised of distributive and procedural justice. Environmental regulation outlines the procedure to redress injustice and ensures the equitable distribution of benefits and burdens. The avenues for public participation will be greatly strengthened by including environmental justice in the Act, as well as improving the legitimacy of assessment and approval decisions. Legitimacy and public acceptance of decisions is only possible through ensuring that they are genuinely informed by "meaningful involvement". The public needs to be assured that public consultation and submissions can influence the outcome of decisions and that projects are only approved if there is sufficient community support.

Reform of the Victorian EPA has resulted in a commitment from the Victorian Government to implement a "whole of Government Environmental Justice Framework" (EJA 2017). The Victorian EPA review of compliance and enforcement discussed the potential role for environmental justice to "guide it in decision making" (Krpan 2011). The 2011 review outlined the various components of environmental justice and recommended its incorporation into the new environmental assessment Act (Krpan 2011). The principle is thus present in environmental assessment debate in Australia and could play a role in the future of environmental assessment in the Territory. This is especially pertinent considering the significant overlap with issues of land rights and self-determination for indigenous peoples in the NT.

An example of environmental justice is the idea of common but differentiated responsibilities which recognises that the impact and cost associated with climate change are not equally distributed across the globe. Distributive justice, through the principle of intergenerational equity is also present in policy debate but is yet to be explicitly recognised as an element of best practice environmental assessment in Australia. This allows for the identification of any patterns in the impact of projects against vulnerable communities or sensitive environments.

Environmental justice could provide definitional guidance to broad terms such as significant impact, accountability and prevention. There is a need for more clarity on the operation of terms such as these and how they can include the experience of traditionally marginalised or impacted communities. Those that bear the brunt of industrial development often have the weakest access to justice and opportunities to be heard in the decision-making process. Meaningful involvement in the approval process is fundamental to ensuring only ecologically sustainable development is supported in the NT.

Environmental justice in the NT

Environmental justice could operate as an underlying guiding principle in the reform, through including it as an explicit objective in the new Act. During consultation, proponents should be required to include an "environmental justice assessment" that would assess the needs of the community that is going to be affected by a proposal. This would guide the provision of services and inform the consultation process as it moves through assessment, approval and post approval. These reforms are an opportunity to embed lasting progressive environmental governance for the Territory that is invulnerable to the political or economic agendas of successive Governments. The new Act should protect due legal process and guarantee environmental protection. The McArthur River mine example illustrates the dangers of political intrusion into due process that results in significant environmental and social consequences:

> "Despite the fact that the Court found that due process was not followed and that the significant concerns of the Traditional Owners and environmentalists (including the NT EPA) were not addressed during the assessment process, the legislation passed quickly and without much comment (Ruddock 2008)."

These reforms should protect due process and incorporate community concerns in perpetuity. This can be provided by recognising the principle of non-regression as an aspect of environmental justice so that political intervention cannot erode the gains made in environmental protection; environmental regulation should only move forward and it should not be weakened.

Environmental justice will help protect remote communities from the growing contamination threat posed by legacy mines and inform economic modelling of projects by including distributive justice as an essential consideration. This will go a long way to improving the organisational legitimacy of the EPA and strengthen public support for participation in the assessment and approval process. Environmental justice could inform decisions made relating to Territory Environmental Objectives (TEO), for example if there is tension or contradiction in the TEOs this could be resolved by determining which delivers environmental justice.

Recommendations

- That the working group include normative statements and principles into the reform process such as sustainability and environmental justice.
- That ecological sustainability is included as a guiding principle of the reforms.
- That the new regulations incorporate positive obligations that are outcome based rather than simply design including: restoration, non-regression, enhancement and environmental rights.
- That the new Act should embed environmental justice as a directing principle with related rights of enforcement.

- That proponents must conduct an environmental justice assessment of the project through consultation with the affected community.
- That environmental justice is included in the objects of the Act and informs the Territory Environmental Objectives.

Environmental assessment

The above-mentioned norms and principles have been sourced from the work of the Australian Panel of Experts on Environmental Law (APEEL). APEEL has outlined a comprehensive blueprint for the next generation of environmental law in Australia including new norms of environmental law. Their recommendations are built on the work of environmental law academics and policy expertise and provide a commendable foundation of principles and mechanisms to shift environmental law towards a more equitable and sustainable system. APEEL presents the notion of guiding and directing principles to help governments implement basic environmental law concepts such as the precautionary principle and ecologically sustainable development (APEEL 2017). The current framework is characterized by a high level of discretion which permits broad interpretations of "impact" and opaque decision making over assessments. By including new norms that guide interpretation, decision makers are directed to make decisions which deliver specific outcomes. This will reduce the role of discretion in the process.

It is fundamental that the people of the Northern Territory are able to decide what they want environmental assessment and approval regulations to achieve. In addition to commitments to process and assessment tiers, the assessment and approval framework must be able to prevent development that would otherwise have an unacceptable impact on the environment. There must therefore be maximum thresholds imposed that allow decision makers to outright reject certain proposals and that such a ruling is immune to external political intrusion.

Strategic Environmental Assessment (SEA) is a complex concept that can be applied in a variety of forms. Considering the complexity and sensitivity of environments in the NT granting a blanket approval to a specific sector could compromise the integrity of the approval and assessment process. SEA may undermine the ability of the people most affected by one project to influence the decision-making process as the scale of information will be less focused on local impacts and focused on more general regional observations.

However, if SEA is used as a tool to incorporate specific bioregional concerns and ecological factors well before the assessment level then this could promote positive environmental outcomes. SEA could promote positive outcomes if it is used in a proactive way that informs environmental plans and zoning decisions (Dalal-Clayton & Sadler 1999). It could be used to provide an additional level of assessment so that the environmental impact of activities is not only assessed on an individual project basis but rather incorporates a landscape scale assessment of the cumulative impacts of activities. SEA could be developed to provide an evaluation of the carrying capacity of a specific bioregion or catchment. These assessments would be able to inform project level assessment by providing a measure of the potential cumulative stressors that are already impacting on an area.

Until more details are released about how SEA will operate and what it is trying to achieve ALEC can only offer qualified support. SEA should not be used to streamline large-scale industrial projects that can have a significant impact on the environment on their own right.

Recommendations

- That ecologically sustainable development is a matter which decision makers must have specific regard to.
- That a projects compliance with the principles of ESD should be a mandatory relevant consideration.
- That SEA is used as an additional level of assessment rather than as a substitute.
- That SEA is designed to provide a landscape scale evaluation of environmental condition through cumulative assessments.
- That SEA is not used to facilitate regional development of one industry where each project poses a significant risk to the environment.
- That the Act allows for certain developments to be rejected outright if they present a serious or irreparable environmental risk.

Significant impact

Significant impact is an elusive and contentious term that can be broadly defined. ALEC therefore supports the inclusion of clear prescriptive standards that define impact but it should remain flexible and include a range of community perspectives. ALEC supports a renewed effort to define the scope of significant impact and limit the role of executive discretion in that decision.

Environmental assessment and approval terminology is value laden; determined through a multitude of political, economic, social and environmental factors. The TEOs will refine the definition of what could be impacted but it does not yet specifically define what an "impact" is. There will need to be procedural guidance on how the TEOs are meant to interact with the Regulations and the Act. Publishing the TEOs in the Gazette will not guarantee that they direct decision makers during assessment and approval which will therefore undermine their effectiveness. Gazetting of objectives is not standard legal practice and while it may promote transparency and flexibility, the objectives of the reform could be better realised if the TEOs are explicitly listed in the Act. The TEOs should include relational elements such as ecological functioning and value the inclusion of qualitative data as not all environmental relationships are quantifiable.

Impact should not be defined through a managerial or balancing act between competing stakeholders but rather informed by up to date science, environmental justice and its bearing on sustainability (APEEL, 2017). The disproportionate spread of burdens or benefits should be considered in determining the scope of a projects impact. Impact should also include a temporal and cumulative dimension so that long-term impacts are considered in the initial assessment decision. Finally, impact should include an assessment of opportunity costs, such as the relationship of a project against a potentially more sustainable alternative or the impact of a project on climate change mitigation strategies. Project assessments should be required to include a statement about the impacts of climate change upon the project in addition to a projects impact on climate change.

Recommendations

- That significant impact is defined by prescriptive standards developed through community consultation.
- That impact is informed by eco-centric based thinking.

- That impact should include short, medium and long-term impacts as well as indirect impacts.
- That impact should include a cumulative lifecycle assessment of the project.
- That impact should include an assessment of the opportunity costs of a project.
- That the act includes a specific statement to guide decision makers that requires greater weight to be placed on environmental factors vis-à-vis economic factors, particularly where the impact of an action is subject to a degree of uncertainty.

Duty of care

ALEC is wholly supportive of the recognised need to limit the extent of discretionary power that currently characterises environmental assessment in the NT. Democracy and the rule of law require limitations on executive discretion and the imposition of clear and unambiguous duties on public officials.

The inclusion of environmental rights through a duty of care into environmental legislation is widely becoming accepted as part of the new paradigm of environmental regulation (APEEL 2017). A duty of care is axiomatic in private law and public liability so it should be extended to include environmental rights. Recognizing that people have legitimate expectations for a clean and healthy environment should be enshrined in environmental governance through a duty of care on the behalf of industry and government. This is possible through creating positive obligations to protect and general prohibitions against polluting the environment.

ALEC recommends the inclusion of a general statutory environmental duty of care to guide all policy decisions and administrative decisions made under the Environment Assessment Act. Proponents under the Act will thus be obliged to care for the land in which they operate and will be liable for any harm resulting from a breach of this duty. An environmental duty of care already exists in several state jurisdictions in Australia, including general prohibitions against pollution. There should be a general prohibition against causing environmental harm.

Recommendations

- That all environmental approvals include a standard clause that provides it is a strict liability offence to breach approval conditions.
- That all officials exercising authority through environmental assessment or approval have a duty of care to the affected people and the environment.
- That there are appropriate remedies to enforce a breach of the environmental duty of care.
- That the Act includes the responsibility of a proponent to provide access to clean air, water and land to persons affected by an activity.

Purposes and principles

ALEC supports all the principles underlying the discussion paper and the justifications for reform. However as previously mentioned this section should include additional normative principles to ensure the reform process addresses specific flaws in the current system. Accountability is desirable but it is an ambiguous term that is liberally applied in policy debate. The operation of accountability has several moral and social implications for the Territory considering a history of perceived administrative and bureaucratic failings through nepotism and opaque decision-making processes. Environmental regulation needs to be able to demonstrate it is accountable to the people that are the most affected by a development decision.

Law should be accountable to the health and integrity of ecological systems. Accountability is not only a measure of bureaucratic efficiency and fiscal responsibility but should also include environmental accountability and the need to develop organisational legitimacy in local communities. Organisational legitimacy can only be guaranteed through demonstrating that decision makers are answerable to the people affected by decisions.

Traditional ecological knowledge and Indigenous consultation should play a greater role in assessment and approval through valuing qualitative data and other forms of knowledge that have not traditionally been valued in western science. This may include the impact of altered ecological relationships on indigenous cultural practices and ways of life. Traditional knowledge should not be used without a fully informed consensual understanding of mutual benefit. This will take a concerted effort to challenge embedded assumptions of management and commit to consult in a meaningful rather than tokenistic sense (Veland *et al* 2013).

To improve transparency, the reform should address linkages with other departmental regulations and procedure to reduce barriers to the communication of information. Freedom of information laws should be linked to the assessment and approval processes with these reforms, as well as connections with other authorities such as the Development Consent Authority and local councils. If decisions of the Development Consent Authority (DCA) may cause a significant environmental impact then concurrent consent should be required by the Environment Protection Authority or the Department of Environment and Natural Resources. The reforms should look at improving inter-departmental communication and expanding concurrence powers to strengthen the authority of the EPA and promote whole of government transparency.

Recommendations

- That indigenous ecological knowledge will only be incorporated if the community is consulted on their needs on how they can benefit from the project.
- That the reforms investigate the potential for greater connectivity with the DCA through concurrence requirements with the EPA.
- That a DCA decision capable of having a significant environmental impact should require concurrent consent from the EPA.

Defined assessment triggers

ALEC supports defined assessment triggers as a way of reducing the role of discretion and encouraging compliance. Assessment triggers should not only be based on risks but include an assessment against outcomes, such as their ability to provide for the principles of restoration, non-regression and sustainability. For example, if one trigger contradicts another, the principle of non-regression will help to resolve the contradiction by ensuring the outcome is no worse than the previous system and only results in a positive environmental outcome.

Ecosystem based thinking should inform assessment triggers rather than assessing each issue in its own distinct component part. Truly integrated and adaptive management requires innovative and progressive perspectives that incorporate relational thinking about environmental systems rather than categorical separation. This is also another opportunity to create space for the incorporation of indigenous ecological knowledge. TEOs will help improve community and industry engagement with assessment processes but it is not entirely clear how these will operate in a way that is distinct from the regular objects of an Act.

In acknowledging that objectives are often weakly implemented and contradictory in law, especially regarding the principles of ecologically sustainable development, it is important to address how the TEOs will improve outcomes compared to the current system (APEEL 2017, paper 1). Objects of the Act can only guide decision making in the event of ambiguity so it is important to give proper effect to the TEOs, new norms and the principles of environmental justice by listing them in the Act as mandatory considerations for a decision maker. TEOs will need to provide greater definitional clarity to encourage self-compliance and reporting. Climate change should inform all the environmental objectives recognising that resilience and adaptation should inform all assessment and approval decisions.

Recommendations

- That there should be absolute liability for offences of non-compliance with referral provisions.
- That there are prescriptive and unambiguous standards for self-referral and assessment tiers.

Assessment process commensurate with risk

The assessment process should be based on risk but also connected to foreseeable outcomes and the potential for projects to deliver on the environmental outcomes of enhancement, restoration and non-regression. Risk can only be properly assessed if it is compared against the project's ability to deliver desired outcomes, in addition to the TEOs.

A tiered approach to assessment is supported but there is not enough information detailing how each tier is separate from the next. It is important to know how the scale of impact will be assessed while still reducing the role of discretion in the assessment and approval decision.

Recommendations

- That the regulations explicitly list mandatory considerations for the decision maker during an assessment or approval decision.
- That assessment considerations include: societal distribution of burdens and benefits, environmental history of the proponent, any relevant strategic assessment and ability to enhance or restore environmental quality.

Quality of information

This is a very constructive and positive component of the discussion paper. While EIS statements are commonly accepted as providing a standard of science that is comparable to peer review, there are no processes or standards to substantiate such a belief. The adequacy scorecard is a novel idea that has the potential to improve the validity of the science in an EIS.

In addition to this the Department could ensure that EIS and project documents are assessed through peer review. To remove any conflict of interest and improve transparency a panel of accredited consultants who are randomly assigned to review EIS or randomly assigned work from the Department, could be employed so there is no direct link between the proponent and the consultants hired to undertake the assessment. This will ensure that the conclusions and assumptions made by the proponent are reliable and valid.

The environmental history of the proponent must be made publicly available and completely transparent. This will help to improve community confidence in the assessment process, accountability and will allow proponents to more effectively gain a social licence. Part of accessing this history may require addressing the barriers of commercial in confidence. This is especially notable in the context of mining royalties that often remain outside the public eye. Informing the community of the benefit of a project and how much a proponent intends to contribute to a local economy is essential to ensure decisions are based on fully informed prior consent.

Recommendations

- That EIS documents undergo some level of independent peer review if they are especially significant or complex.
- That the EPA can require, in response to the NOI that EIS documents undergo peer review.
- That the environmental history of a proponent must be listed in the NOI and EIS.
- That the regulations mandate public disclosure of royalty agreements.

Public participation

This is another positive chapter of the proposal. Public participation is an essential condition of proper environmental assessment. These reforms must strive to enshrine consultation that goes beyond tokenistic recognition and ensures public participation can determine the outcome of the decision-making process. The consultation report and public participation plan are supported and should be legally reviewable components of approval and assessment. This will help address systemic flaws in the current system which is viewed as only providing tokenistic methods of consultation. A public inquiry should be used for assessment if a requisite number of objections are received by the public. However, a decision made through a public inquiry should not preclude the ability to subsequently challenge it on its merits or legality.

The draft environmental impact assessment of projects of regional or Territory significance, or posing a significant environmental impact, should be available for public review. This could help improve efficiency by precluding subsequent more lengthy reviews or challenges. Public participation will be most equitable and effective if projects are only able to proceed with significant levels of community support. All monitoring, compliance and enforcement actions and reports should be publicly available, including penalties and sanctions for non-compliance. Continuing to approve projects with limited public support will only encourage popular opposition and lead to political instability and unjust outcomes.

Recommendation

- That public consultation reports of an EIS can be challenged through review or merits review.
- That the EPA establish publicly accessible records of the compliance and reporting history of projects.
- That annual compliance reports from a proponent are made publicly available.

Improving environmental outcomes and accountability

A primary objective of these reforms should be to improve environmental outcomes. ALEC supports the inclusion of additional offences relating to false or misleading information and a schedule of activities that require an approval. Decision making should incorporate principles of ecosystem based management and adaptive management following approval. Post approval is as important as the initial approval to guaranteeing environmental outcomes. Conditional approvals should mandate a monitoring and compliance regime that includes penalties and enforcement options in the event of non-compliance with the conditions of approval.

Monitoring criteria and approval conditions should not only be based on risk but include outcome based performance indicators. If a project is found to be non-compliant because it is not meeting the outcomes of the conditional approval then powers should be enforced against a proponent, like stop work orders or termination of an approval. These mechanisms are now commonplace in other Australian assessment and approval frameworks.

The conditions placed on an approval should include sustainable development indicators, environmental quality and a requirement to incorporate the best available techniques (APEEL 2017, paper 1). Including adaptive management in monitoring plans will ensure that as techniques improve and environmental outcomes are progressively assessed, licence conditions may be appropriately strengthened and cannot be weakened. Compliance with adaptive and progressive approval decisions will be a condition for the ongoing operation of the project.

Recommendations

- That approval conditions must always include the requirement to address adaptive management.
- That compliance with approval conditions is strictly monitored and enforced to ensure only the approved impacts are occurring.
- That ecologically sustainable development (ESD) is listed as an object of the Act and as a mandatory consideration for decision makers.

Making the best use of community's eyes and ears

Involving the community in monitoring and compliance of projects will reduce organisational burden and improve outcomes. To provide access to enforcement mechanisms the Act should include a general right for any person to enforce an apprehended or actual breach of the Act. The *Environmental Planning and Assessment Act* NSW for example provides in section 123 that:

> "Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach."

Adaptation and indigenous impacts should not be limited to maintaining the status quo but be informed by the principle of restorative justice. Climate change adaptation strategies should "ask how climate change adaptation can help to address the impacts of colonisation on Indigenous social structures" (Veland *et al* 2013). It is important to frame adaption strategies through indigenous perceptions of environmental change. Law should make use of indigenous experience of change in the environment to allow for more comprehensive and adaptive management (Veland *et al* 2013). Monitoring should ensure that adaptive strategies, where possible, incorporate

indigenous perceptions of environmental change. The impacts of climate change are not absolute phenomena to be understood universally but rather are experienced subjectively through a range of cultural, personal, environmental and political elements (Veland *et al* 2013). In other words, the reform should provide for culturally appropriate adaptive management.

A significant caveat to using indigenous knowledge is that any benefit obtained from indigenous communities must result in an equivalent or greater benefit for that community. Knowledge should not be taken and exploited for management priorities but should rather help build capacity in indigenous communities to take a more empowered role in monitoring and compliance procedures. Environmental approvals must be required to demonstrate how they contribute to Indigenous economic and political empowerment.

Recommendations

- That the Act allow for any person to apply for an injunction to prevent an apprehended or actual breach of the Act that is causing or likely to cause environmental harm.
- That conditions of approval should accommodate for culturally appropriate monitoring and adaptation strategies.
- That proponents are legally required to produce simplified and easily comprehendible EIS supplement summary documents that are not only published over the internet.

Introducing review (appeals) processes

Access to administrative tribunals and courts as a check on administrative and executive power is a fundamental pillar of good governance and environmental management. Principles of open standing and enshrined appeal rights are necessary to provide access to legal remedies that allow the public to enforce the law and ensure decisions are guided by the principle of legality. There is a significant public interest to be served by providing mechanisms for the public to review decisions based on their merits and reviewing the decisions based on their legality. Public interest environmental litigation has played an integral role in progressing environmental law, protecting the environment and developing the principles of ESD in their respective jurisdictions (Preston, 2013).

Public interest enforcement of environmental assessment need not involve the enforcement of a private right; in order to overcome this barrier, the rules of legal standing need to be relaxed. ALEC commends the range of review and appeal options being considered by the department in this discussion paper and wholly supports the inclusion of comprehensive open rights to merits and judicial review. Such review rights are recognised as the basic minimum standards of proper environmental governance and transparent democracy (APEEL 2017). The ability to review environmental decisions on their merits is fundamental to developing an environmental jurisprudence, improving institutional and environmental accountability and providing better outcomes through improving the quality of decision making (EDO NSW 2016). Merit and judicial review should be available for both assessment and approval decisions; essentially at any part of the process in which executive and administrative power is exercised. Introducing merits review and open standing is one of the most effective methods of countering inappropriate decision making and improving environmental governance in the Territory (EDO NSW, 2016).

Environmental jurisprudence is needed to help define the key concepts of environmental assessment such as significant impact, the scope of ESD and the precautionary principle. Such a jurisprudence is only possible with liberal standing provisions and explicit merit and judicial

review rights. Judicial determinations of ESD are fundamental to guiding decision making during assessment and approval so it is important that they are determined by the public review and appeal processes. Third party objectors to a project should have the ability to challenge an approval based on the merits. It is important to note that courts and tribunals have adequate safeguards against vexatious litigants and unmeritorious applications. There is no evidence of third party review rights being abused in other jurisdictions so it is very unlikely such abuse would occur here.

Recommendations

- That the act includes provisions for third party appeal and review rights for assessment and approval conditions.
- That the Act outline clear procedure for assessment and approval decisions to guide decision makers and create the ability for judicial review.

Roles and responsibilities

The introduction of additional roles and responsibilities for the EPA is a positive and significant step forward for environmental assessment and approval. New powers to stop work, call in powers and search powers are necessary to enforce compliance with approval conditions and operate as an incentive for self-regulation. The EPA should be tasked with the assessment, monitoring, compliance and enforcement of projects. In addition to introduced and expanded powers, there needs to be an equivalent commitment to resource the positions that are responsible for enforcing these powers. These reforms are striving for a significant shift in enforcement culture of environmental law in the NT that will require a significant increase in the resourcing of the EPA. The introduction of new powers will only be effective at improving outcomes if there is enhanced institutional capability to ensure enforcement and compliance.

In addition to the above powers there is potential for increased collaboration between the EPA and the Development Consent Authority. Certain DCA decisions should require concurrent consent authority from the EPA if zoning decisions or certain significant developments are likely to have a significant environmental impact.

Recommendation

- That the Act mandate concurrent approval from the EPA if a DCA decision will have a significant environmental impact.
- That offences relating to referral and compliance are absolute liability offences.

Introducing environmental offsets:

Offsets are considered controversial in environmental management for their inability to guarantee net positive environmental outcomes, difficulty in comparing like for like and legitimising otherwise unsustainable development. Offsets should only be utilised as a method of last resort to enhance environmental value or prevent the loss of areas of high conservation or biological value. They must not be used as a way of rendering an otherwise inappropriate project sustainable.

There is a notable lack of strategic direction or guidance on the net positive environmental outcomes of offsets in Australia (EDO NSW 2014). This is because of the ongoing debate about the effectiveness of offsets in the context of biodiversity conservation and threatened species

protection (EDO NSW 2014). There must be mechanisms in place that guarantee no net loss of biodiversity or conservation values. This can be done by requiring that only offsets of like for like are considered and that there is a net positive impact on conservation values. Offsets could be used to protect high conservation value areas in exchange for the loss of lower conservation or degraded sites. Any use of offsets must be granted in perpetuity to ensure they are not sacrificed in any subsequent development.

While ALEC in principle supports the offset hierarchy, offsets must be approached with caution. There is a need for continued research and the development of consistent standards before offsets can be responsibly utilised in the NT.

Recommendations

- That offsets are excluded from certain areas of high conservation, cultural or biodiversity value.
- That only like-for-like offsets are used to provide net positive environmental outcomes.
- That if an offset is granted it must be granted in perpetuity.
- That offsets are only applied as a method of last resort.
- That the best most up to date science informs any prospective offset policy.

Conclusion

The environmental regulatory reform discussion paper outlines positive and comprehensive aspirations for the future of environmental assessment and approval in the NT. It describes a progressive framework for reform that addresses the systemic failures of the current system while also striving to introduce a more robust and independent system. While many of the aspirations are positive there is still a notable lack of detail about how certain key components will interact and operate. These include the grandfathering of existing projects without a licence that are impacting the environment, the operation of SEA and the intention of TEOs once their content is clarified.

In addition to striving for improvements in accountability, transparency and efficiency the reforms should recognise and enshrine normative concepts that enable an integrated and participatory approach to compliance and enforcement. Environmental justice and an environmental duty of care should be included to ensure environmental regulation enhances environmental value and promotes environmental protection. These values have been included in the submission to guide the development of the draft bill that should enable ecologically sustainable and equitable development. It is hoped the principles and norms mentioned above are useful in guiding the development of TEOs and clarifying the underlying purpose of environmental assessment, reducing the role of discretion in decision making.

This submission was largely informed by the Technical papers of the Australian Panel of Experts in Environmental Law (APEEL). ALEC supports the observations and recommendations of these papers and encourages the NT Policy team to consult these informative documents, especially Technical Paper 1 and the recommendations. ALEC is committed to this reform process and will remain engaged as it progresses its agenda for a progressive and equitable system that will make the Northern Territory a model of best practice in Australia.

List of recommendations

1. That the working group include normative statements and principles into the reform process such as sustainability and environmental justice.
2. That ecological sustainability is included as a guiding principle of the reforms.
3. That the new regulations incorporate positive obligations that are outcome based rather than simply design including: restoration, non-regression, enhancement and environmental rights.
4. That the new Act should embed environmental justice as a directing principle with related rights of enforcement.
5. That proponents must conduct an environmental justice assessment of the project through consultation with the effected community.
6. That environmental justice is included in the objects of the Act and informs the Territory Environmental Objectives.
7. That ecologically sustainable development is a matter which decision makers must have specific regard to.
8. That a projects compliance with the principles of ESD should be a mandatory relevant consideration.
9. That SEA is used as an additional level of assessment rather than as a substitute.
10. That SEA is designed to provide a landscape scale evaluation of environmental condition through cumulative assessments.
11. That SEA is not used to facilitate regional development of one industry where each project poses a significant risk to the environment.
12. That the Act allows for certain developments to be rejected outright if they present a serious or irreparable environmental risk.
13. That significant impact is defined by prescriptive standards developed through community consultation.
14. That impact is informed by eco-centric based thinking.
15. That impact should include short, medium and long-term impacts as well as indirect impacts.
16. That impact should include a cumulative lifecycle assessment of the project.
17. That impact should include an assessment of the opportunity costs of a project.
18. That the act includes a specific statement to guide decision makers that requires greater weight be placed on environmental factors vis-à-vis economic factors, particularly where a certain action's impacts are subject to a degree of uncertainty.
19. That all environmental approvals include a standard clause that provides it is a strict liability offence to breach approval conditions.
20. That all officials exercising authority through environmental assessment or approval have a duty of care to the affected people and the environment.
21. That there are appropriate remedies to enforce a breach of the environmental duty of care.
22. That the Act includes the responsibility of a proponent to provide access to clean air, water and land to affected persons.
23. That indigenous ecological knowledge will only be incorporated if the community is consulted on their needs on how they can benefit from the project.
24. That the reforms investigate the potential for greater connectivity with the DCA through concurrence requirements with the EPA.
25. That a DCA decision capable of having a significant environmental impact should require concurrent consent from the EPA.
26. That there should be absolute liability for offences of non-compliance with referral provisions.

27. That there are prescriptive and unambiguous standards for self-referral and assessment tiers.
28. That the regulations explicitly list mandatory considerations for the decision maker during an assessment or approval decision.
29. That assessment considerations include: societal distribution of burdens and benefits, environmental history of the proponent, any relevant strategic assessment and ability to enhance or restore environmental quality.
30. That EIS documents undergo some level of independent peer review if they are especially significant or complex.
31. That the EPA can require, in response to the NOI that EIS documents undergo peer review.
32. That the environmental history of a proponent must be listed in the NOI and EIS.
33. That the regulations mandate public disclosure of royalty agreements.
34. That public consultation reports of an EIS can be challenged through review or merits review.
35. That the EPA establish publicly accessible records of the compliance and reporting history of projects.
36. That annual compliance reports from a proponent are made publicly available.
37. That approval conditions must always include the requirement to address adaptive management.
38. That compliance with approval conditions is strictly monitored and enforced to ensure only the approved impacts are occurring.
39. That ecologically sustainable development (ESD) is listed as an object of the Act and as a mandatory consideration for decision makers.
40. That the Act allow for any person to apply for an injunction to prevent an apprehended or actual breach of the Act that is causing or likely to cause environmental harm.
41. That conditions of approval should accommodate for culturally appropriate monitoring and adaptation strategies.
42. That proponents are legally required to produce simplified and easily comprehendible EIS supplement summary documents that are not only published over the internet.
43. That the act includes provisions for third party appeal and review rights for assessment and approval conditions.
44. That the Act outline clear procedure that guides assessment and approval decisions to guide decision makers and create the ability for judicial review.
45. That the Act mandate concurrent approval from the EPA if a DCA decision will have a significant environmental impact.
46. That offences relating to referral and compliance are absolute liability offences.
47. That offsets are excluded from certain areas of high conservation, cultural or biodiversity value.
48. That only like-for-like offsets are used to provide net positive environmental outcomes.
49. That if an offset is granted it must be granted in perpetuity.
50. That offsets are only applied as a method of last resort.
51. That the best most up to date science informs any prospective offset policy.

References

ANEDO NSW, "Submission to the Inquiry into Environmental Offsets" (2014) < http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1440/attachments/original/1399508918/100408_ANEDO_Submission_to_Senate_Inquiry_into_Environmental_Offsets.pdf?1399508918>

APEEL, "57 Recommendations for the Next Generation of Australia's Environmental Laws" (2017)

APEEL, "The Foundations of Environmental Law: Goals, Objects, Principles and Norms, Technical Paper 1" (2017)< https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e5f852d1758eb801c117d8/1491466330447/APEEL_Foundations_for_environmental_law.pdf>

Dalal-Clayton, D. & Sadler, B. (Strategic Environmental Assessment: A Rapidly Evolving Approach" (1999) *Environmental Planning Issues* 18 http://pubs.iied.org/pdfs/7790IIED.pdf

EDO NSW, "EDO NSW Report: Merits Review in Planning in NSW" (2016)

EDO VIC, "Submission in response to ENRC Inquiry into the Environment Effects Statement process in Victoria" (2010) <https://www.parliament.vic.gov.au/images/stories/committees/enrc/environmental_effects/submissions/Environment_Defenders_Office.pdf>

Environmental Justice Australia, "Briefing paper: Reform of the Victorian EPA and Environmental Protection Act – What is the Government Proposing?" (2017)

Greiner, Romy. "Environmental Duty of Care: From Ethical Principle Towards a Code of Practice for the Grazing Industry in Queensland (Australia)" (2014) *Journal of Agricultural Environmental Ethics* 27: 527-547.

Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses, US EPA 1998

Justice Brian J Preston, "Environmental Public Interest Litigation: Conditions for Success, presentation to the International Symposium" (2013) < http://www.lec.justice.nsw.gov.au/Documents/preston_environmental%20public%20interest%20litigation.pdf>

Krpan, S. "Compliance and Enforcement Review, A review of EPA Victoria's approach" (2011)

Ruddock, K. "Justice in the Northern Territory" (2008) 7(2) *Indigenous Law Bulletin* 21

Territory Natural Resource Management, "Northern Territory Natural Resource Management Plan 2016-2020, Arid Lands Region" (2016)

US EPA, Environmental Justice, < https://www.epa.gov/environmentaljustice>

Veland, S., Howitt, R., Dominey-Howes, D., Thomalla, F, & Houston, D. “Procedural vulnerability: Understanding environmental change in a remote indigenous community” (2013) *Global Environmental Change* 28:314-326

From: environment policy
Sent: Wednesday, 28 June 2017 4:58 PM
To: environment policy
Subject: Environmental Regulatory Reform

Please provide any comments you may have on the NT EPA's Roadmap.

Critical of strategic environmental assessment. Onerous assessments should be avoided but each project should be assessed on its own merits and avoid leading to large scale approval of projects that together have an impact that is greater than the sum of one project.

What other initiatives could be introduced to improve the quality of information available in the assessment and approval process?

In addition to adequacy report, a process or mechanism to assess the scientific integrity of the research presented. EIS documentation is taken as truth but it is not peer reviewed work. There should be provision to assess the information on issues of validity and reliability in addition to its adequacy through the assessment process. Could employ a panel of independent experts that assesse the quality of the EIS. Furthermore the EPA could appoint an independent consultant to undertake the assessment on behalf of the proponent to separate the proponent and the consultancy.

What mechanisms could be introduced to better access and use Indigenous traditional knowledge in the system?

While this effort is likely based on good intentions it is important to note that the relationship between indigenous knowledge and development is often one directional and can result in exploitative relationships. Using indigenous traditional knowledge should only be permitted in contexts in which there are equal and informed relationships that have been based on the consent of the community and an understanding that there is concomitant benefit to be gained for the community that is providing the knowledge.

Should draft Environmental Assessment Reports be made available for review? Either to proponents or publicly? What value is there for either proponents or the public by making the draft reports available for review?

Allowing review of an assessment report would likely strengthen public participation and encourage greater transparency and accountability for the EPA and the proponent. It could operate as an additional avenue for community input into conditions of approval to ensure that the assessment is reasonably based on the findings and information provided in the EIS. It could prove invaluable by strengthening public confidence in the assessment process by reinforcing the community that there are more parties than just the proponent and government in the assessment of projects.

Should upfront engagement with the community be legislated so that all referral documents are required to contain a consultation report as well as an ongoing stakeholder engagement plan?

Community consultation is a fundamental pillar of best practice environmental assessment and should be mandated from the beginning of a proposal. The proponent should be legally obliged to develop a stakeholder engagement plan that is outcome and process based. It must be possible to assessment the adequacy and progress of all community consultation as a condition of progressing through the review process.

How can meaningful community engagement be achieved in the EIA process while keeping timeframes manageable?

Timelines could be flexible in the sense that there may be extended options available if they are requested by the public. If these are not opted for then shorter time frames may be determined. Again it is valuable to base time frames on outcomes rather than risks to ensure that adequate consultation is occurring. This is especially important considering the challenges of remoteness and English not being a first language for many people who will be affected by proposals. There should be space to consider cultural factors and an effort to simplify EIS documents.

Should draft EIS documents that are provided to the NT EPA before publication (for adequacy review) include a consultation report (outlining the outcomes of engagement through the EIA process and how this has informed the draft EIS) as well as a proposed stakeholder engagement plan to illustrate how the public is to be engaged through the exhibition period? Should an EIS document fail its adequacy review if it does not provide evidence of ongoing engagement and community input into the project?

Sufficient and proven community consultation and engagement should be an essential pre-condition of an adequate EIS. One of the fundamental purposes of an EIS is to inform the public about the nature of a proposal to allow the community to make informed decisions about the economic development of a region. Transparent and up front information during the entire process is essential to make such an informed decision. Benchmark indicators and outcome based criteria should be included as a way of ensuring adequate ongoing community consultation.

Do you support any of the options outlined? Please provide information to explain why an option is supported.

Support the inclusion of third part referral powers, especially for CLCs and environmental groups. The public should be encouraged to participate in environmental governance and providing this power will improve public confidence in government and industry accountability. However referral is meaningless unless there are mechanisms available to ensure compliance. Injunctions are therefore supported as an effective mechanism of ensuring compliance with environmental process. Injunctions are also supported for their ability to prevent immediate environmental harm.

If you do not support third-party referrals, please provide information to support this position. Are there other mechanisms to address the issue of regulating consistently and fairly across the whole of the Territory?

I do support extensive third party referral rights. In our opinion concerns for time delays are only masked economic concerns for lost profits because of the cost involved in compliance.

Cost that is a essential aspect of legitimate business. There is no evidence to suggest court procedure is incapable of preventing vexatious litigants or unsubstantiated legal challenges.

Should the legislation include provisions that allow for third-party injunctions and if so, how broadly should these be applied (that is, to the public or to defined groups?). Please outline the concerns you have if you do not support third-party injunctions.

Fully support third-party injunction rights. This is best practice administrative law and environmental governance. It should be available to the public and defined environmental groups. The question of standing could be legislated by providing that anyone who has an environmental interest and enforcement of the act may access the processes of the court.

How can this proposal be improved to strike the appropriate balance between providing business certainty and ensuring accountability in decision making? What groups or entities should be included or not included? Please provide information to explain your position.

Appeal and review is one method of a system of checks and balances. It should not be used as the ultimate form of proving accountability and enforcement in the system. The possibility of appeals should be legislated in such a way that they are not a source of uncertainty to proponents. They should be confident in their ability to comply with the correct legal procedure. Self-enforcement and compliance should be able to provide sufficient certainty and only in rare cases will appeal or review disrupt that process.

Do you have any suggestions for how we can ensure frivolous and vexatious applications are minimised or avoided?

Regular court guidelines and tribunal guidelines are more than capable of restricting frivolous applications. There is no evidence this is a problem in environmental issues in any Australian Jurisdiction.

Which decisions made in the assessment, approval and monitoring system should be reviewable? Please provide information to explain your position.

Assessment report should be reviewable, approval should be reviewable, compliance reports should be reviewable.

Should a statement or recommendation made in an assessment report be subject to review?

Which option (1, 2, 3 or 4) is best for the Territory? Please provide information to explain your position.

What alternative option do you suggest we consider?

An option that allows for both forms of review, regardless of who is making it. Legality should always be guaranteed by the administration and merits should be available whenever executive decision are being made, ie assessment.

Might your position change depending on who is given responsibility for decisions in the assessment and approval processes? i.e. Might your position change if the NT EPA was not responsible for decisions in the assessment system?

The form or title of the authority is less relevant, what is important is the function to be performed by the institution institution. It the process is subject to legally enforceable duties for procedure then judicial review should be available to guarantee the legality. Where as if the function is administrative, as an extension of executive authority then these decisions should be reviewable on their merits. So the availability of certain forms of review or remedies will not change depending on the title of the authority but rather the allocation of functions and duties.

What combination of responsibilities should the NT EPA be given? Please provide information to explain why an option is supported. What improvements to the environmental management system will be achieved as a result of the NT EPA having these responsibilities?

The NT EPA should have comprehensive and far reaching powers of enforcement, compliance and monitoring. Stop and search powers, powers of entry, data access powers, injunctions, penalties, sanctions, stop work orders, call in powers.

If you consider the NT EPA should not retain any of its existing responsibilities, who should be tasked with those responsibilities as the alternative? Please provide information to explain your position.

Any other comments?

Details

Please select one Community Organisation

Name Arid Lands Environment Centre

Publish - Please choose Agree to publish name