



Environment Centre NT

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Attention: Karen Avery
Environment Policy
Department of Environment and Natural Resources

Mode of delivery: By email

28th June 2017

Dear Ms Avery,

RE: Response to Environmental Regulatory Reform – Discussion paper response

Thank you for extending this opportunity to submit comments relating to the Environmental Regulatory Reform discussion paper (**Reform Paper**). The Environment Centre of the Northern Territory (**NT**) is the peak community sector environment organisation in the Northern Territory.

The purpose of the Environment Centre NT is to

- protect and restore biodiversity, ecosystems and ecological processes,
- foster sustainable living and development, and
- cut greenhouse gas emissions and build renewable energy capacity.

The Environment Centre NT (**ECNT**) works by

- advocating for the improvement of environmental policies and performance of governments, landholders, business and industry;
- partnering on projects and campaigns with conservation and climate organisations, governments, Indigenous organisations, community groups, businesses, and landholders;
- raising awareness amongst community, government, business and industry about environmental issues and assisting people to reduce their environmental impact;
- supporting community members to participate in decision making processes and action;
- recognising the rights, aspirations, responsibilities and knowledge of the Territory's Indigenous peoples; and,
- acknowledging that environmental issues have a social dimension.

For 35 years, ECNT has positively contributed to the development of environmental laws and policies in the NT, provided a voice for the community on environmental issues ,



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educated community members about how they can reduce their environmental impact and put forward innovative and well-informed projects and policies.

ECNT is committed to working with the Department of Environment and Natural Resources in developing legislation and policy that adequately address declining environmental conditions, the pressures of further 'development' and the impacts of climate change.

The NT regulatory reforms are an opportunity to not only catch up with best practice, but to lead the nation in supporting principles that enhance current ecological sustainable 'development'.

Comments on NT EPA Roadmap

ENCT endorses the NT EPA's Roadmap (**Roadmap**) as a good 'starting' point with recommendations from this Reform paper to give further detail and instruction to the Roadmap in the listed areas below plus additional considerations as follows:

- Referrals – expansion on who can refer a proposal to the NT EPA
- Appeals - including the ability to appeal the decision regarding whether an environmental impact assessment (EIS) is required and thus challenge any 'no significant impact' finding. A timeframe for appeal is preferably 60 days. Expand who can appeal according to appeal recommendations to the Reform Paper
- That a NT EPA or Minister 'statement of reason' include adequate information to understand the intellectual process of arriving at the decision.
- That 'significant impact' guidelines are defined and consideration is given to including them in the Act.
- The NT EPA can extend timelines for comment on EIS submissions
- Approval by the 'Environment' Minister does not have complete discretion for approval, whilst there is flexibility, there must also be a criteria that the Minister is guided by.
- The NT EPA can appoint a panel of experts or require 'peer review' of scientific evaluations supplied in EIS's to determine their reliability and accuracy. To support this intention the Act should include penalties for any environmental consultants providing false or misleading information.
- There must be significant deterring penalties in response to proponents choosing not to refer a project and this be an offence under the *NT Criminal Code*
- Recommendations below regarding public participation are considered.
- Consider Proponent contribution to costs of assessment and monitoring

Purpose and Principles of Assessment System

ECNT supports the inclusion of ecological sustainable development (**ESD**) as a principle to be achieved through the environmental impact assessment (**EIA**) system. In addition we encourage the enhancement of this principle further, and within the spirit of leading the nation in environmental reform, to consider recommendations by the Australian Panel of Experts on Environmental Law (APEEL). This includes relevant items in their 57



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Recommendations¹, and various technical papers including the Foundations of Environmental Law, Technical paper 1² and Democracy and the Environment Technical paper 2³. ECNT recommends the Reform process consider the following principles and how they can be adopted:

- Upholding the fundamental and enforceable right to a clean and healthy environment.
- Key procedural environmental rights including the right to information, public participation and access to environmental justice.
- A principle of environmental restoration
- A principle of non-regression – including adhering to international agreements, such as the Paris Agreement
- Prescription to the precautionary principle and the prevention principle
- A principle requiring the achievement of high level of environment protection
- A principle requiring the application of best available techniques

In addition ECNT supports:

- Mandatory assessment of climate change impacts
- Polluter pays, but also consider the proponent contributing to assessment costs when they lodge their applications and a contribution to monitoring costs.
- Considerations of intergenerational equity.

In regards to proponent self-assessment, guidelines should be provided that stipulate when a referral **is required** rather than when a **notice of intent is not required** (as is currently the case). To encourage transparency, it could be considered that all ‘self-assessments’ be submitted to the NT EPA and perhaps even detailed on a public register. At the very least, once a ‘notice of assessment’ is lodged, this detail should be publicly declared.

In regards to ‘increased powers’ ECNT supports the power of the NT EPA to refer a project. We would extend this power to responsible agencies, land councils, members of organised environmental communities, affected stakeholders, and concerned members of the public. In addition, to encourage members of the community to notify any development of concern an NT EPA ‘Hotline’ could be established.

¹ APEEL ‘57 Recommendations for the Next Generation of Australia’s Environmental Laws’ (2017).
https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58f99d3c9de4bb35974ae5a5/1492753725897/APEEL_recommendations.pdf

² APEEL “The Foundations of Environmental Law: Goals, Objectcs, Principles, Norms, Technical paper 1.
https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e5f852d1758eb801c117d8/1491466330447/APEEL_Foundations_for_environmental_law.pdf

³ APEEL “Democracy and the Environment Technical paper 2.
https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e6018e6a496356f02631c0/1491466697413/APEEL_democracy_and_environment.pdf



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Defined assessment triggers

ENCT welcomes a 'broad' definition of 'environment' that is contained within the Act and that Territory Environmental Objectives (TEO) reflect this broad definition. We suggest the 'Act' could also define the first layer of the TEO's. This will give explicit importance and safeguard the TEO's but allow flexibility for broader objectives to be established that can be specific to place, region, species etc. We suggest it is the additional layers of the TEO that can be gazetted. It will be very important that TEO's are referred to and inform other relevant government policies and departments. This would include 'Develop the North' communications and economic development policies.

ECNT suggests that consideration be given to including principles to assess 'significance' be within the Act to limit the role of executive discretion, but that in addition 'significant impact' can also be flexible to include a range of community perspectives and values. As stated by APEEL (2017 recommendations 1.7) 'risk-based' environmental regulation should not be a substitute for the application of the precautionary principle whenever the required level of scientific uncertainty exists.

Assessment processes commensurate with risk

The Reform paper needs to be very clear that strategic environmental assessment (SEA) is and 'additional' level of assessment rather than as a substitute for assessment on individual projects. ECNT is concerned where the Reform paper (p11) states that an SEA could allow a 'holistic approach to the environment assessment (rather than communities trying to navigate through individual assessment processes)' as this is seeming to indicate an individual assessment would not be required if a SEA was completed. ECNT strongly recommends that an SEA be used to assess cumulative impacts that would otherwise be missed by other levels of assessment. The SEA would then inform the EIS provided for the individual project. The SEA should not be used to facilitate regional development of one industry or industrial process.

ECNT supports genuine public inquiry including the ability of appeal and for the NT EPA to refuse a development at the point of referral, thus an early 'no-go' decision point.

Quality of information used in decision making processes

The ECNT commends the suggestions in this section of the Reform paper and the extension of information to support assessments. Providing good baseline data is imperative and we support pooling of this information. ECNT suggests that baseline data that has previously been collected also be publically made available. ECNT supports consideration be made of less impacting land uses that may be possible than the proposed assessment. Disclosure of the environmental history of the proponent is also very important to improve community confidence and trust. We support a project being rejected on the basis of inadequate information being provided.



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Q. Other initiatives to improve the quality of information available in the assessment and approval process:

- The validity of scientific information supplied could be 'peer reviewed' by an independent panel appointed by the NT EPA to ensure reliability and validity.
- Assessment authorities are empowered to access and engage expertise, knowledge and data from external sources and authorities eg. Other States, Federal Government, Universities and even other corporations.
- Addressing barriers of commercial in confidence may be required, for example in relation to royalties and other information needed to access the contribution of the project to a local economy.
- Consideration of rehabilitation and restoration plans be included where applicable, including economic plan to fund such activities.
- NT EPA to consider best available techniques as a requirement for a project being assessed

Q. What mechanisms could be introduced to better access to indigenous traditional knowledge?

Indigenous ecological knowledge should play a greater role in the assessment and approval process, including the impact of any disruption to indigenous cultural practices and way of life. This knowledge should only be included if the community is 'fully' consulted on the benefits of the project in meeting their needs and all potential risks as they become known. Knowledge should not be taken and exploited for management purposes but to build capacity and empower the community in assessment, monitoring and compliance procedures.

Encouraging Public Participation

Opportunities for consultation are an inadequate substitute for real instances of genuine community engagement. Rather than prescribing strict timeframes, benchmarks for engagement need to be created. We expect that putting this burden on proponents will result in a new standard of engagement, so that the requirement to engage will manage the timeframes. Any project that cannot demonstrate an appropriate level of engagement has also failed to demonstrate any public interest and therefore should need not proceed: if no one turns up, the assessment fails on adequacy.

The ECNT strongly supports recognition of local language, and enabling oral submissions. Our experience is that early access to the process and project information is more valuable than later. Projects that have engaged us earlier than standard policy/guidelines have found it easier to meet our concerns and accommodate our advice.

Aboriginal communities may often warrant a further stage following meetings, consultation, to allow further internal discussion with those who don't or can't participate formally. These processes still need to be sensitive to community timeframes (eg respect seasonal obligations, sorry business)



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ECNT strongly supports a public comment period for draft assessment report and strongly support a rigorous dissection of any claims of confidentiality. ECNT also supports third party review of approvals and we endorse greater professional accountability for environmental consultants. We strongly support offences for false or misleading information and must include revoking project authorisation. All monitoring, compliance and enforcement reports should be made available.

Improving environmental outcomes and accountability

It is imperative that the Reforms remove 'discretion' out of the decision making for the entire process including project assessment, approval, monitoring and compliance of conditions. This includes enforcement of stop-work orders where there is non-compliance. The public must be able to make comment at all stages of the decision making process.

Best use of our community's eyes and ears

ECNT strongly supports the broadest option for referring a project that has not sought approval and in reporting a project that is in breach of its environmental approval. Thus responsible agencies, land councils, members of organised environmental communities, affected stakeholders and concerned members of the public all have the general right of referring non approved projects and reporting non-compliance. ECNT also supports stakeholders and the general public to seek injunctions where unapproved works are proceeding or approvals are not being complied with. Ultimately this will improve environmental outcomes. The NT EPA needs to be adequately resourced to consider referrals and injunctions from any member of the public.

Introducing review (appeals) processes

ECNT supports the third parties stated in the Reform paper the right to appeal based on merits and judicial review. This will ensure adequate checks and balances are in place and supports transparent governance and democracy. Merit and judicial review should be available for both assessment and approval decisions. This will be the best method of countering inappropriate decision making and controlling executive action. The appeals process needs to be adequately resourced to support these reviews.

Roles and responsibilities

ECNT supports strengthening the NT EPA's current roles and adding additional roles and responsibilities, including new powers to stop work, refer and call in projects and recommend assessment and enforce approval conditions. There needs to be adequate budgetary resource to enforce these powers. This includes the ability to apply significant penalties where a project has not been referred through the self-assessment process and respond to any public referrals and appeals.



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Environmental Offsets

Environmental offsets can be considered only as a last resort and they should not relate to any areas of high conservation, biodiversity or cultural value. An offset must be granted into perpetuity and consider the most up to date science and best available techniques. We welcome further consultation in this area.

In summary, ECNT is heartened by the overall sentiment and aspiration of this discussion paper to significantly impact the assessment and approval process and shift the culture of enforcement and compliance of NT projects and developments. ECNT embraces the ongoing consultation process and is committed to advocating with its members and the broader community for this process to deliver the best model for the 'next generation' of environmental regulatory reform in Australia.