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Draft Biodiversity Offsets Policy submission

The Arid Lands Environment Centre (ALEC) is Central Australia's peak community environmental organisation that has been advocating for the protection of nature and growing sustainable communities in the arid lands since 1980. ALEC actively contributes to the development of biodiversity and conservation policy through participation on Alice Springs Regional Weeds Reference Group, a member of the New Established Weeds Priority Framework Interim Steering Committee, written submissions, community education and advocacy.

ALEC welcomes the opportunity to comment on the Draft Biodiversity Offsets Policy (Draft Policy).

ALEC first considers the policy context in which the Draft Policy has been developed. Then, we consider what is proposed in the Draft Policy. Finally we provide ALEC's perspective on the Draft Policy. We comment on the existing weak regulatory environment, whether this policy can be implemented, the Draft Policy's application to land clearing, concerns with monitoring, compliance and enforcement, additionality, permanence, legal enforceability, climate change, indirect offsets and the offset calculator.

It is important to note that ALEC opposes the Draft Policy and does not think the policy should be advanced due to major structural issues around the regulation of biodiversity in the Northern Territory. We note that across Australia biodiversity offsets remain problematic, often failing to have achieved ecological goals.^{1,2}

1. Policy Context

The development of the Draft Policy appears to be guided by two key reports:

- The independent Scientific Inquiry into Hydraulic Fracturing of Onshore Unconventional Reservoirs in the Northern Territory (Pepper Inquiry).
- Territory Economic Reconstruction Commission Final Report (TERC);

a. Pepper Inquiry

On 14 September 2016, the Northern Territory Government established a moratorium on hydraulic fracturing of onshore-shale gas, commonly known as 'fracking'. On 3 December 2016, the Pepper Inquiry was established to investigate the environmental, social and economic risks associated with

¹ Cox, L, 2022. "Utterly damning' review finds offsets scheme fails to protect NSW environment'. The Guardian.

² Cox, L, 2022. 'How the environmental offset scheme is failing the Australian wildlife it is meant to protect'. The Guardian.

fracking in the Northern Territory.

On the 27 March 2018, the Final Report of the Pepper Inquiry was released including 135 recommendations. On 16 April 2018, the Northern Territory Government adopted all 135 recommendations and lifted its moratorium on fracking.

Recommendation 8.9 states: 'That to compensate for any local vegetation, habitat and biodiversity loss, the Government develops and implements an environmental offset policy to ensure that, where environmental impacts and risks are unable to be avoided or adequately mitigated, they are offset. That the Government considers the funding of local Aboriginal land ranger programs to undertake land conservation activities as an appropriate offset.'

Instead of the recommended 3-5 years to implement key recommendations of the Pepper Inquiry, the Northern Territory Government adopted an 18 month time-frame with a commitment to complete all 135 recommendations by the end of 2022.

b. TERC

The TERC's goal is to grow the Territory's \$26 billion economy in 2020 to \$40 billion in 2030. This will be done by 'tak[ing] the red carpet to the investor', and by 'prioritising actions to make the Territory the easiest place to do business and invest'.³

All Northern Territory Department's were restructured to align with the goals and recommendations of the TERC. It is a plan which heavily promotes the extraction of gas, a term which is stated 106 times. Biodiversity by comparison is mentioned twice. Gas, water for irrigated horticulture and the mining of minerals form the foundation of the Territory's 'economic reconstruction'.

The TERC has promoted the rapid expansion of development across the Territory. To enable this development, a TERC-ready regulatory environment is required.

2. What does the Draft Policy attempt to do

The draft Policy attempts to develop a biodiversity offset regime in the Northern Territory. Instead of adopting a 'like for like' offset approach as conventionally employed, the Draft Policy adopts a target-based approach to result in a net gain in the ecological condition of natural habitat in the Territory. Offsets may apply to projects that are referred to the Northern Territory Environment Protection Agency (NT EPA) to gain environmental approvals. The NT EPA may recommend to the Environment Minister that a biodiversity offset should be applied to the project.

Where proponents are required to develop a biodiversity offset, they are required to develop a biodiversity offset plan outlining how offsets will be designed and delivered. As per the NT Offsets Framework, offsets must be additional and secured.

The Draft Policy and the Draft Biodiversity Offsets Technical Guidelines (Draft Guidelines) outlines some offset activities that may be permitted in one of three biomes across the Territory; monsoonal

³ Territory Economic Reconstruction Commission: Final Report, 2020, p.11, p.29.

north, arid south and estuarine and marine.

3. ALEC's view on the Draft Policy

ALEC opposes the Draft Policy as it is weak, overly simplistic and is not supported by robust regulatory structures. The policy is extremely lacking and is doomed to fail. Unintentionally, the Draft Policy highlights the extreme shortcomings which exist around biodiversity conservation law and governance in the Northern Territory. The shortcomings of this policy are discussed more below.

In addition, it appears to be an exercise in developing regulation to embolden the Government's economic development agenda, where biodiversity conservation is not the priority. It is a novel attempt to align with the TERC and maximise the economic benefit of the offset to the Northern Territory economy. However, due to the extremely weak existing regulatory environment, there are few mechanisms to ensure there is an overall benefit to biodiversity conservation.

4. The policy is an outlier in the existing regulatory environment

This policy lacks rigour due to the weak existing laws and governance arrangements for biodiversity conservation in the Northern Territory. This includes the NT having:

- No native vegetation laws; the only jurisdiction in Australia to not have these laws;
- No Territory-wide biodiversity strategy and subsequent biodiversity targets;
- No State of the Environment reporting; only jurisdiction nationally to have never produced a State of the Environment report.;
- Arguably the weakest regulation for land clearing nationally, which is administered through the *Pastoral Land Act 1992* and *Planning Act 1999*;
- Outstanding research gaps where baseline biodiversity data is often non-existent;
- Poor remote sensing data and baselines;
- Little existing connectivity between climate change impacts and risks to biodiversity conservation outcomes. The *Northern Territory's climate change response: Towards 2050* provides some direction but the *Biodiversity Maintenance and Restoration Strategy* has not been developed and areas of high value ecosystems and biodiversity at risk from climate change have still not been identified and prioritised;⁴

Without comprehensive biodiversity conservation reform the Draft Policy is doomed to fail. There are limited systems to ensure it can be implemented, managed and enforced. It is a standalone policy that is vague in its language and has few statutory mechanisms to guide and enforce its implementation. ALEC has serious concerns regarding whether the Draft Policy without any regulatory support, can be implemented and enforced. We discuss this more below.

5. The Draft policy may be impossible to implement

By focusing on target-based, habitat-focused policy the Northern Territory requires a comprehensive understanding of the state of biodiversity across affected habitats. This approach requires a level of certainty that does not exist in the Northern Territory. For example, it requires:

⁴ Northern Territory's Climate Change Response Towards 2050: annual progress report - September 2022. Northern Territory Government.

- Comprehensive remote sensing data and baselines;
- Comprehensive ecological survey baselines, including for the 141 threatened species across the Northern Territory;
- Comprehensive understanding of key threatening processes across different habitats and vegetation types;
- Regulatory control of processes which contribute to biodiversity decline (e.g. land clearing, invasive species, groundwater depletion, fire, climate change); and,
- Key targets guiding biodiversity outcomes.

A good understanding of these considerations do not exist in the Northern Territory.

These factors ensure that when an offset of this type is prescribed that it can be secured and is additional. It allows the activities to be linked to ecological considerations which are known. There is very little and at times no knowledge of some of these factors in the Northern Territory. For example, the 2021 Commonwealth State of the Environment Report found that over 20% of EPBC listed threatened species have no known distribution, and thus no means of protection in the Northern Territory. That level of uncertainty is at least two times higher than all other states and territories.⁵ This policy cannot account for some threatened species as their distribution is not known. As another example, in identifying key threats in the Draft Policy there is no linkage with *Pastoral Land Act 1992* and limited linkage with *Weeds Management Act 2001* and subsequent policy, highlighting the existing regulatory failures to control weeds (such as buffel grass) and feral species under legislation.

When we consider these factors in addition to the major regulatory gaps considered at section 4, it is clear that the implementation of this policy is likely impossible.

6. The policy will not apply to most land clearing activities

ALEC has major concerns that the policy will only apply to activities that are referred under the *Environment Protection Act 2019* (EP Act) or other statutory authorisation under the *Environment Protection Regulations*, and where the residual impact is considered 'significant'. We note that the gap for those activities that don't meet the high bar is unacceptable. This widely limits the scope of activities that this policy will apply to, where ALEC has no knowledge of a pastoral land clearing application that has ever been referred to the NT EPA for assessment.

Pastoral land clearing applications deal with thousands of hectares at a time. 15,743.17 hectares of land have already been permitted to be cleared in 2022. On top of that, there is currently 16,881 hectares of land that is under assessment to be cleared on the pastoral estate. It is ALEC's understanding that no pastoral land application has ever been rejected by the Pastoral Lands Board. This is a significant portion of habitat that will be destroyed across the Northern Territory, yet the Draft Policy will likely not apply.

ALEC notes that land clearing on the pastoral estate that has a significant residual impact should not be approved by the Pastoral Land Board, as the land clearing activity is an 'avoidable' impact.

⁵ Biodiversity report, p.137.

7. Limited monitoring, reporting, compliance and enforcement

The policy offers little confidence that monitoring and compliance will be enforced. This was communicated in our meeting with the Department that compliance will primarily be conducted through self-reporting. The Draft Policy's guidance for reporting is remarkably scant and it is not mentioned at all in the Draft Guidelines. Further, the Draft Policy and Draft Guidelines provide little direction on compliance and enforcement pathways.

This policy already lacks rigour due to the state of regulation and governance in the Territory. It is deeply disappointing that compliance and enforcement is not being prioritised. Without a comprehensive strategy to ensure the stated policy will be enforced, the policy offers little confidence that even the low bar it sets will be implemented.

8. Offsets should be long-term, not short-term as outlined in the Draft Policy

It is vital that offsets contribute to long-term outcomes. Permanence is a core pillar of biodiversity offsets. It is unclear how the destruction of habitat can be offset by management of a threat for a minimum of 15-20 years (depending on Arid or Top-End location) or for the life of a project.

The Draft Policy is in conflict with the OECD's position on biodiversity offsets, that 'biodiversity offsets should deliver conservation outcomes for at least as long as the biodiversity loss persists at the development site'.⁶

9. The Draft Policy provides limited guidance around the additional and secured nature of offsets

The Draft Guideline and Draft Policy provide little input on the parameters of how an offset is additional and secured. The Draft Guideline states that:

- 'An additional gain of 20% is required to support the overall target of net gain;
- An additional gain of 10% is required to address the risk of lower than expected gains'.⁷

There is limited guidance on the securing of offsets. Secured offsets are not mentioned at all in the Draft Guidelines. While it is welcome that there will be a public offset register to maintain a transparent record of offsets that are secured under Territory legislation, it is unclear how an offset will be secured. This is a problem and raises serious doubt in the rigour of the Draft Policy. Unlike conventional biodiversity offsets which would at least have strict like for like criteria and be based on the principle of perpetuity, it may be difficult to even measure the effectiveness of management activities, let alone ensure that the offset is maintained over time.

There appears to be no scrutiny of whether what is proposed is 'additional' or whether the activity is appropriate as an offset. Further, there seems to be essentially no criteria beside a description of what activities e.g. feral ungulates, may be suitable in a particular habitat. A clear criteria is essential to ensuring that a biodiversity offset can be achieved. This is not the case under the Draft Policy.

⁶ OECD, 2016, p.7. 'Biodiversity offsets: effective design and implementation. Policy highlights.'

⁷ p.9

Further the Draft Policy and Draft Guideline provide no detail on areas of land that may not be suitable for offsets, beyond the 'ecologically compromised' descriptor. Who is deciding what land is ecologically compromised? If it is self-assessment by the proponents then the criteria may mean very little. The failure to have comprehensive remote sensing data and baselines across the Territory should add precaution in understanding the state of the environment, not assume that the right thing will be done by proponents. This lack of guidance undermines how additional an offset may be.

The Draft Policy fails to ensure that offsets are additional and secured.

10. The time lag in securing offsets and gains is minimised

Offsets should be secured and improvements achieved before any loss of biodiversity occurs, otherwise it is a net-loss in biodiversity outcomes.

11. Offsets are transparent and legally enforceable

Offsets should be enshrined under legislation with strong compliance and enforcement mechanisms. The Draft Policy is unenforceable.

12. Climate change considerations should be accounted

The Draft Policy has no linkage with climate change considerations. Climate change will have a significant impact upon biodiversity. It is key that biodiversity offset mechanisms should account of climate change considerations. This may include incorporating climate change risk into the offset calculator.

13. Indirect offsets

ALEC does not support indirect offsets. Research, engagement and education are not offsets. They are immeasurable with unclear 'gains' to biodiversity.

14. Offsets calculator

The offsets calculator lacks rigour due to the major uncertainty around biodiversity conservation in the Northern Territory. It cannot be accurate due to these major knowledge gaps that are discussed above.

15. Recommendations

Recommendation 1: State of the Environment reporting is a prerequisite for the Draft Policy to proceed;

Recommendation 2: Territory wide biodiversity strategy with biodiversity targets is a prerequisite for the Draft Policy to proceed;

Recommendation 3: Native vegetation laws or biodiversity conservation laws are a prerequisite for the Draft Policy to proceed;

Recommendation 4: Biodiversity offsets should not apply to pastoral leases that are used for pastoral purposes;

Recommendation 5: Clear guidance is provided on how offsets are to be additional and secured;

Recommendation 6: Biodiversity offsets are long-term;

Recommendation 7: Monitoring, reporting, compliance and enforcement is prioritised and resourced under the proposed policy;

Recommendation 8: Indirect offsets are not applied, or only in exceptional circumstances;

Recommendation 9: Climate change risk is a consideration of the offsets calculation and Draft policy;

Recommendation 10: Offsets are enshrined under legislation.

Kind regards,



Alex Vaughan

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