

Draft Environment Protection Bill and draft Environment Protection Regulations Submission

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Dear Minister for Environment,

The following is my submission regarding the draft Environment Protection Bill (draft Bill) and draft Environment Protection Regulations (draft Regulations).

I welcome the fact that the NT Government has recognised the need to update our currently inadequate environmental protection laws. I would have appreciated a consultative information session with a Q&A, to better inform myself and the public about the proposed changes.

While there are many positive changes included in the draft EIA laws, some items do concern me.

For example, the EIA laws must include open standing for judicial review appeals (cl 254) and third party merits appeal rights (cl 255). These rights of appeal are vital to protecting the environment and public interests and were recommended by the NT Fracking Inquiry Panel in their Final Report.

'Fact Sheet 8: A simplified environmental impact assessment process' lays out the time frames for EIA processes. I feel these time frames are far too narrow to allow proper consideration and consultation to take place. Also, for environmental impacts to properly be assessed, the proposed location would require water, wildlife and other environmental impact surveys to be conducted over 12 months to capture any seasonal changes or migratory species.

Removing the broad power to exempt people from complying with the new laws (cl 267 (f)) and the Minister's broad power to amend environmental approval conditions (cl 104) is also necessary.

I would also recommend increasing the penalties for non-compliance and consider it essential that adequate resources are allocated for the implementation of the new laws, including resources for environmental assessment, public consultation, monitoring, compliance and enforcement.

I have added the suggestions made by EDONT as Appendix 1, as I agree with their assessment of the draft laws.

We only have one NT, it is vital that our environmental protection laws are robust enough to genuinely protect what we have.

Kind Regards,

Pauline Cass

Appendix 1.

Environmental Defenders Office NT (EDONT) Suggestions

Positive elements

1. A standalone environmental approval from the Minister for the Environment, on advice from NTEPA

This is the core, essential element of the new EIA laws. For the first time, an environmental approval will now be issued by the Minister for the Environment, on the advice of the NTEPA. The NTEPA may recommend an approval should be refused if it has 'unacceptable impact'. The Minister needs to consider a range of matters including whether the proponent is a 'fit and proper person' to hold an approval.

This differs from the current situation where the 'sector' Minister approves the environmental impacts of a project (e.g. the mining Minister endorses the environmental impacts of a mine) – a situation which inherently gives rise to potential conflict of interest. Although the NTEPA currently can provide recommendations about environmental impacts, under the law, these can be ignored.

2. Strong guiding objects and principles to govern how decisions are made

The principles of ecological sustainable development (ESD) are included in the draft Bill and decision-makers must 'have regard to' them when making decisions.

ESD principles are well-accepted in equivalent legislation around Australia, and are based on principles adopted by all States and Territories in 1992. They include concepts such as 'inter-generational equity' (considering both current and future generations in making decisions) and 'the precautionary principle' (scientific uncertainty shouldn't be used to defer actions to protect the environment). Their inclusion provides important guidance for how decisions should be made and how the draft EIA laws will be interpreted and administered.

The draft Bill also includes a decision-making hierarchy to ensure that activities:

1. take steps to avoid impacts on the environment;
2. take steps to mitigate adverse impacts; and finally,
3. offset remaining impacts.

This approach is generally consistent with international best practice.

3. Detailed framework and process for environmental impact assessment

The Act sets out a detailed procedure for environmental impact assessment and approval of development that may impact the environment. Detailed, mandatory processes are important to bring clarity, certainty, rigour and accountability to the EIA system in the NT, which is currently lacking.

The draft Bill enables 'triggers' to be set by the Minister that will automatically require an approval based on an activity (e.g. fracking) or a locality (e.g. proximity to threatened species habitat). Similarly, triggers may be set for when a proponent must refer their proposal to the NTEPA for a decision about whether it needs an approval or not.

The new process incorporates important elements to increase public participation opportunities in EIA in the NT – including requirements for public comments for most key decisions, such as proposed triggers, and approvals.

The new EIA laws should also improve transparency, as they require all approvals and assessment documents to be available to the public (on an ongoing basis) and require reasons for decisions to be published. These provisions are vital for transparent and accountable decision-making.

4. An enforceable ‘general environmental duty’ to avoid environmental harm

The draft Bill establishes a new ‘duty’ to avoid or take steps to minimise environmental harm. It will be an offence to engage ‘recklessly’ in unauthorised conduct that causes environmental harm. This duty is an environmental safeguard that will be available as a tool for the government to hold accountable anyone who causes environmental harm without approval.

5. Strong protection tools and financial tools for Environmental Minister/ Department

The Environment Minister and Department are provided with new environmental protection tools under the draft EIA laws. These include an ability to declare protected environmental areas, to prohibit certain actions (to protect the environment) and to create environment protection policies.

The draft Bill also establishes a range of financial tools, including requiring bonds as a condition of approval, applying a levy to an industry, and establishing funds for environmental protection.

6. Comprehensive compliance and enforcement powers

The draft EIA laws contain a comprehensive suite of compliance and enforcement powers, many of which are currently not available to protect the environment in the NT.

The draft Bill includes a range of offences in cases where a proponent does not comply with requirements specified under the draft EIA laws. The Department and NTEPA are given important powers to investigate potential breaches and take action to enforce compliance, including environment protection notices, stop work notices and closure notices. There are also opportunities for civil enforcement (e.g. seeking an injunction to prevent something occurring that will harm the environment).

Key concerns and areas for improvement

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

The draft EIA laws are silent on the environmental, social and cultural interests of Aboriginal communities and people in relation to activities that have an impact on the environment. It fails to appropriately have regard to Aboriginal culture and communities in the decision-making process.

We strongly consider the draft EIA laws need to explicitly recognise and implement culturally appropriate consultation practices for Aboriginal communities and people, including through integrating these ideas in the guiding principles of the draft Bill.

2. Appeal rights are excluded for those acting in the public interest to protect the environment

EDONT strongly considers that third party appeal rights, both for ‘judicial review’ and for ‘merits appeal’ must be included in the draft EIA laws to ensure these laws operate for the public interest.

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

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

3. Some elements of the EIA process undermine accountability and good decision-making for the environment and the public interest

Some provisions in the draft EIA laws are inconsistent with accountable, best-practice decision-making focused on protecting the environment and the public interest.

Examples include:

- Although decision-makers must consider the principles of ESD (see above), they are not required to specify how the principles have been considered in a statement of reasons. This undermines genuine, transparent consideration of these principles.
- Timeframes in the EIA process are too short (e.g. 30 days exhibition of complex draft environmental impact statements), undermining genuine public participation and input.
- If there is a delay in the Minister reaching a decision on an approval within a required timeframe, the approval is assumed to be approved. This undermines accountable, considered decision-making.
- At times, proponents are given inappropriate access to influence the EIA process. For example, proponents (but not the public) are invited to comment on their draft approval. This creates risk for undue influence and corruption and needs to be removed to ensure objective, accountable and transparent decision-making.

4. The draft Bill includes a wide power to exempt anyone from the Act

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

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

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

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

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

6. Some important details are currently missing in the exhibition materials

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

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

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

7. Proper resourcing will be essential to success of the new system

Finally, it is important to emphasise that the new EIA laws will be ineffective if sufficient resources are not directed towards implementing and properly administering them, and compliance and enforcement is not properly resourced.

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