Response to the exposure draft Environmental Protection Act Regulations 2019

Attention: Karen Avery, Executive Director, Environment Policy and Support, Department of Environment and Natural Resources, Northern Territory.

Introduction

AMEC appreciates the opportunity to be consulted on this proposal and has been active in engaging with the Department of Environment and Natural Resources on this matter to articulate the real and potential operational problems that will arise for the mining and exploration industry.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is the national peak industry body representing over 275 mining and mineral exploration companies across Australia, with 20 member companies actively exploring, mining and developing projects in the Northern Territory.

Response

The following comments are provided on behalf of Industry and are organised by clause number.

Part 2

Clause 4 Meaning of significant environmental harm

The prescribed amount that triggers consideration by the NT EPA is $50,000 of environmental impact. This mirrors the amount that is the minimum amount of rehabilitation liability estimate for the Western Australian Mining Rehabilitation Fund (MRF)[1]. However, the Western Australia MRF figure is reached based on the use of a Rehabilitation Liability Assessment calculator[2]. It is unclear what $50,000 worth of environmental harm that "would, or is likely to, cost more to remediate than the monetary amount prescribed" specifically in the Territory. This lack of certainty underpins AMEC's questions over when will a project be considered significant. Clarification of what the Government considers $50,000 impact is, would improve the transparency of the determination of significance.

Industry considers that $50,000 of environmental impact will cover nearly every single mineral exploration, mining and pastoral project in the Northern Territory. As $50,000 will barely cover the mobilisation costs to get the required staff and equipment to most non-urban sites in the Territory.

It must be noted that the NT EPA is currently not resourced to consider that volume of applications.

The current drafting means every single exploration activity will require NT EPA consideration, regardless of the scale of the activity. AMEC proposes the regulations be adjusted to allow the NT EPA the capacity for certain "low-risk" exploration and prospecting activities to not require submission for regulatory assessment.

The lack of an environmental assessment by the NT EPA, would not extinguish the requirement for tenement holder to undertake the appropriate environmental appraisal and maintain records and

[1] https://www.dmp.wa.gov.au/Environment/What-is-the-MRF-19522.aspx
[2] https://ace.dmp.wa.gov.au/ACE/Public/MrfRleCalculator/RleCalculator

evidence that the exploration activity is low-risk and does not adversely impact on sensitive flora, fauna, etc.

It is proposed that under such an arrangement, environmental obligations would be maintained through prescribed and standardised environmental management conditions. In addition, the tenement holder would remain obliged to report disturbance through the Mining Remediation Fund levy.

Clause 5, Methods of environmental impact assessment

How an assessment by Inquiry will be conducted separately, or concurrently with other method of assessment, needs greater definition. There is a potential for conflict with one form of assessment coming to a different outcome than the Inquiry.

An addition to the subclause that clearly states that an Assessment by Inquiry may occur, but it must not duplicate an existing assessment, will remove this potential conflict.

Clause 6 Fit and Proper Person

The fit and proper person test outlined under Clause 6 is very broad. It will extend beyond the performance of the proponent and via the Board Directors and Executives, who often hold multi-Directorships and had multiple roles, could include a wide range of companies.

It is uncertain how this will be implemented in practice, as it is unclear how far back this test will be taken and could unfairly prejudice against companies.

Part 3, Environmental protection declarations

Division 1 Objective and trigger

A minor clerical inconsistency is that the decision on a review of objectives and triggers must be published 'as soon as practicable' (Clause 16, 3) where as the 'Process for declaring objective or trigger' does not specify a timeframe, or a necessity to publish. This should be corrected, for consistency the process for declaring objective or trigger should include the provision of an explanation of reasons. In future this explanation of reasons could prove crucial to the interpretation of the objective and triggers if (or when) they are considered in Court, similarly as the second reading speech for legislation is a source of clarification.

Part 3, Division 2 Protected Environmental Areas and Prohibited Actions

This section should be amended to require the Minister to table the proposed Protected Environmental Area and/or Prohibited Action in Parliament.

Parliamentary oversight is needed for the declaration of Protected Environmental Areas and Prohibited Actions. The current drafting grants the Minister powers similar to the declaration of a National Park, a process that requires Parliamentary approval. Parliamentary oversight will hold the approving Minister accountable for their decision under this section and ensure that such decisions accord with the will of the Parliament.

The Sovereignty of Parliament should also be and extended to the process for revoking permanent declarations in Division 2, subdivision 4.

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Part 4, Referrals of proposed actions and strategic proposals

Division 2, Clause 52 Consultation with government authorities

It is of considerable frustration for Industry that timeframes are not met by Government.

Of greater frustration is when duplicative questions are asked by multiple Departments through the consultation process. Each question asked with a subtle variation, but little substantive difference, that under the current regulations will need to be answered. The coordination of the NT EPA to coalesce the asked questions from Government before requiring the proponent to ask them would reduce the workload, cut duplication and lead to a better consultation process for both the NT EPA and the proponent.

The current drafting of the Regulations has an unanswered tension of what will occur if (and when) a Department or Agency does not reply to a request for information? This likely eventually should be provided for in the drafting. The addition of provisions to allow the NT EPA to move on in the approvals process, without the comment of a Department or an agency should be included. This will allow for an administrative failure to receive a comment from a Department to not necessarily trigger a judicial review.

Part 5, Subdivision 1: Types of assessment

Clause 76

This clause details the possible assessments. As outlined by AMEC in our previous submissions, this spectrum of assessments is duplicative. Does the fact the environmental objectives reference an area justify a further assessment? Each of these areas is already regulated by another agency which has specialisation and skills in that area.

As per the environmental impact assessment as in the legislation, NT EPA must consider these areas. This requirement is distinct from the NT EPA necessarily originating or commissioning unique assessments of each area. Provision should be made for the NT EPA to accept an approval or licence granted under other legislation.

It may be argued that in practice, this will be the reality, however we are concerned with future strict compliance.

Clause 76 (4) places the onus on the “Minister responsible” which is broad. This is out of step with the focus of the other regulations. The existing regulation is currently shaped around the NT EPA undertaking the assessment, the responsibility for what it will accept should remain with the NT EPA rather than the Minister responsible.

A proposed subclause:

> **77 (5) The NT EPA may include an assessment or approval undertaken by another Government agency or recognised body in lieu of undertaking a separate assessment.**

Health impact assessment

Clauses 77, 2 and 3 are welcomed as sensible regulation that places the health impact assessment in the existing framework of approvals. This approach should be applied to the other assessments.

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Cultural heritage assessment

Respecting cultural heritage is important for AMEC members. Clarification is urgently needed of the place of this assessment in the hierarchy of broader Government approvals.

These assessments are already undertaken as per existing legislative requirements by groups with access to the appropriate knowledge holders and traditional owners. As has been questioned during the legislative review, does the NT EPA and the Department have the necessary skill sets for the assessment of these documents?

Many companies establish commercially confidential agreements with the appropriate Land Council that includes cultural heritage assessment. The commercial confidentiality of these documents make it difficult for other regulators, such as the NT EPA, to assess the content.

AMEC recommends that the Government make amendments to the regulations to clearly allow the EPA to accept an approval from the Aboriginal Area's Protection Authority and/or the Land Council.

Cumulative impact assessment

It is unclear how the NT EPA will enact this regulation. How will the NT EPA measure the 'cumulative impact', and what range will be considered? The transparency of how cumulative impact will be measured will influence investment into areas that already have historical impact is currently lacking.

Clause 77

This provision appears at odds with the normal due process, which has the "Supplemental" as the defined stage when a proponent will answer any outstanding questions from the NT EPA. The "stop the clock" mechanism, to allow the proponent to answer the information sought, "at any time during the process", will lead to the approvals process extending in practice.

There is substantial concern from within Industry that this Clause will reduce the structure of the environmental approvals process, with information being sought on an ad hoc basis. This could prove costly, and inefficient.

Clause 81(2)

AMEC is supportive of this clause that the NT EPA is required to consult with the proponent. However, there is a concern that the proponent may not be consulted if they are not required to pay for the advice sought. For the sake of transparency, the part *"if the NT EPA proposes to require the proponent to pay the costs of that engagement under regulation 241(1)(a)"* should be removed. If advice is being sought by the NT EPA, the proponent whose approval is under consideration should know what is occurring.

Clause 82

It has been questioned by Industry whether a review paid for by the proponent is considered completely independent. There are further questions of what constitutes independence, for example when a proponent has operated in the Territory for a long period of time and has engaged through the normal course of business every qualified individual in some capacity, how will independence be guaranteed?

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Clause 85

This provision lacks a firm timeframe and does not provide any certainty to the proponent of when the approval process will restart if advice is being sought. To provide greater certainty for the proponent, the NT EPA must be required to detail a timeframe of when advice will be required.

Clause 90

AMEC is concerned that granting the NT EPA the privilege to change the level of assessment mid process further erodes the certainty of approvals.

A proponent who has chosen to invest in the Northern Territory should be given the legal certainty that once the Level of Assessment has been determined they will not be altered. "Shifting the goal posts" could disadvantage the proponent and increases the sovereign risk of investing in the Territory.

Furthermore, it is unclear why this Clause is necessary:

- The level of assessment is entirely independent in this drafting to the conditions placed on the project by the Minister at the recommendation of the NT EPA;
- Clause 5(2) allows for *"an assessment by inquiry may be conducted separately or with any other method of environmental impact assessment"*. In the current drafting this does not specify when in the process this decision needs to be made.

The threshold for reassessing a project's assessment is ambiguous, as the reference to "significant" in Clause 2 is prescribed at $50,000. As discussed earlier, given mobilisation costs in remote areas of the Territory, this is a very low trigger.

Clause 100

As specified for Division 2, Clause 52, AMEC has considerable concern about the lack of meaningfully enforceable timeframes on Government Departments.

Clause 103

It is unclear what the process is for the NT EPA and the proponent once these submissions have been received under 'the requested additional information to the supplemental'. In the consideration of natural justice, the proponent should be given a right of reply to whatever statements are made in the submissions.

Clause 105

It has been noted by Industry that the NT EPA has incredibly broad powers to include any matter in the Terms of Reference. A literal reading of subclause (3) (e) means any matter can be considered and included in the Terms of Reference by the NT EPA. This seems excessive given the expansive areas covered in (a) – (d) of the subclause.

Clause 106

The Terms of Reference will define the assessment. The NT EPA should consult with the proponent, so that they are prepared for the public consultation period.

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Part 5, Division 5, Subdivision 2, Amendment to the Term of Reference

The current drafting of these clauses raises considerable concern for industry as it will reduce certainty, increase sovereign risk and may be highly disruptive to the assessment process.

The NT EPA already has an ability to ask for supplementary information, they hold the authority to make recommendations to the Minister and they can draft the subsequent conditions.

The justification for wanting to adjust the Terms of Reference in the middle of an assessment has not been made.

Secondly, given the prevalence of Show Cause provisions throughout the regulations, such as Clause 91, it is unusual that this Subdivision does not have one. There needs to be increased transparency for the NT EPA to elaborate their reasoning for undertaking an amendment and remove doubt of any arbitrariness in the decision making.

Clause 113 (2) which requires the NT EPA to state reasons, differs from a Show Cause provision. A 'Show Cause' provision occurs at the beginning of the process of amending the Terms of Reference and allows the proponent to provide a submission in response. Clause 115 does not require the NT EPA to consult the proponent on the amendments to the Terms of Reference. This must be changed as the proponent should be consulted prior to "other interested parties".

Clause 122 creates an ambiguity. A proponent cannot afford the costly assessment process to then find due to the amended Terms of Reference it will not be considered by the regulator. If the intent of this clause it to allow for the continuation of the EIS for the other sections of the Terms of Reference that are not being amended, it should be more clearly articulated in the text.

Clause 135

The drafting of Clause 135 suggests that proponent 'may' have to respond to every single submission received. It is unclear as to which of the received submissions should be replied to or not. So, in practical reality, the proponent will be obliged under this clause to reply to every single submission.

It does not place an obligation on the NT EPA to collate, edit or even check the submissions that have been made. Such an obligation should exist, as has been the case in previous EPA assessments, where duplicative requests were made that could have been easily resolved by the NT EPA collating the submissions. This would ultimately reduce the administrative burden on the NT EPA and on the proponent.

Therefore, Clause 135 (1) (a) should be amended to state: *Consider any submissions received on the draft environmental impact statement as identified by the NT EPA;*

Division 7: Assessment by Inquiry

Industry feedback suggests that the current drafting is not transparent as to how the inquiry process will occur.

Furthermore, the relevance of the report and recommendation of the Inquiry panel to the NT EPA's decision-making process for the environmental approval is unclear. Under Clause 154, the proponent must have "regard to the report", but is unclear to what end?

The Inquiry seems to be entirely independent of the Minister, Parliament or other decision making.

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An Inquiry could be a costly exercise, both for the proponent, the NT EPA and the Government Minister involved. AMEC recommends there should be Ministerial sign off on the NT EPA decision to go to Inquiry.

In discussion with the Department it was referenced this Inquiry, may be applied to only a portion of the environmental assessment. Firstly, it is unclear what the process would be for the NT EPA to determine that an Inquiry was appropriate. Secondly, it is unclear how the Inquiry will relate to the satisfaction of the existing terms of reference by the Proponent. Finally, it is unclear what will happen if the Inquiry report clashes with the Environmental Impact Assessment? The precedence of these assessments in relation to each other, must be clarified and standardised.

The procedure of the Inquiry Panel is unclear, other than it would appear there will be public hearings and that the panel will not be bound by the rules of evidence (Subclause 150 (1) (C)). The inquiry panel is currently not bound to produce and publish the procedure they will follow. This "may" in Sub Clause 150 (1) (a) should be amended to a "must". Given that this will be a costly and important exercise, this "must" is needed for transparency.

The intent of Sub Clause 153 (3) is to protect confidential evidence. However, there is concern that an issue of natural justice could emerge if confidential evidence was presented and (as per an interpretation of the wording) not given to the proponent.

Clause 156

The Subclause, (4) which allows the NT EPA to "disregard any new information in a submission if the NT EPA is satisfied that the that information could reasonably have been brought to the attention of the NT EPA at an earlier stage in the … process" is of concern to industry.

The concern is that new information can genuinely be discovered late in the process, and that information should not be disregarded because the NT EPA is frustrated by its presentation. It is also unclear which "submission" this clause refers to.

Our chief concern is regards to the role of the NT EPA. The NT EPA is an advisory body, and not a decision-making body. The NT EPA advises the Minister who makes the decision. It would appear this Clause is in direct contradiction to that position. As a result, these Clauses must be reworded for the NT EPA to make a recommendation to the appropriate Minister.

This clause does not encourage open and transparent engagement and should be reconsidered, nor does its substantial change the ability of the NT EPA to consider or not consider information.

Clause 160

The clarity of timeframes for decisions on this assessment reports as detailed under this clause is appreciated.

Part 7: Significant Variations

Clause 165 and 166

Clause 165 and 166 appear to allow the NT EPA to refuse to consider a 'significant' variation. AMEC strongly considers that that decision is solely in the purview of the Minister. The NT EPA is an advisory body not a decision-making body, and it would appear these Clauses are in direct contradiction to that position. As a result, these Clauses must be reworded for the NT EPA to make a recommendation to the appropriate Minister.

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Clause 177

As an advisory body it should not be the decision of the NT EPA to terminate an existing environmental approval process. Similar to Clauses 156, 165 and 166, the decision not to assess appears to be in contradiction with the role of the NT EPA as an advisory body. Instead these Clauses make it the decision maker. This Clause should be reworded for the NT EPA to make a recommendation to the appropriate Minister to decide.

Part 7, Division 3

How Significant Variations after environmental approval granted are managed is of interest to the Industry.

Anecdotally in other jurisdictions around Australia, this "post approval" approval process is considered the most time consuming. For that reason, it is applauded that this Division mostly has clear timeframes, however, the lack of a timeframe under Clauses 224 must be remedied.

Part 9: Register of Environmental Auditors and Environmental Practitioners

AMEC and Industry are supportive of the implementation of registered environmental auditors and practitioners. However, these regulations should make provision to allow for Environmental Practitioners to support the Department and NT EPA in making low impact decisions as determined by the CEO of DENR.

The use of environmental auditors and practitioners should have a focus on a "support model" initially to be on 'low risk' approvals and post-approvals support, recognising that DENR and the NT EPA need to retain ownership of key decisions and advice to manage external stakeholder and certain public sector risks.

Specific areas of 'low risk' support is identified to include:

- Approvals support – specifically: preparation and/or review of Environmental Impact Assessments; or in the future the preparation and/or review of Native Vegetation Clearing Permits (NVCPs) and related applications;
- Post-approvals support – specifically: preparation and/or review of Environmental Impact Assessments.
- Part 7 support - specifically: preparation and/or review of low risk works approval or amendment submissions following a significant variation.
- To be non-prescriptive on the mode of engagement of industry recognised reviewers, to support the objective of enabling an efficient process to access the right expertise, with lowest practical administration burden on DENR.

The current drafting of the regulations does not allow the Northern Territory to make use of Environmental Practitioners and Auditors in this manner. This model is under active consideration in Western Australia to reduce timeframes and administrative burden.

The regulations should be adjusted to allow for this future possibility.

Part 12 General Matters

Clause 240

A concern for industry around the use of oral submissions has been raised by some in Industry, as the current drafting of the regulations does not require the transcription of the oral submission. Instead "a statement of substance" will be provided, which introduces a degree of interpretation into the process. A transcript should be applied.

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Clause 241

AMEC is strongly opposed to any cost recovery regime to fund 'core' Government statutory based activities or generate additional income to support a budget shortfall. Industry pay a range of taxes and royalties with the understanding that they are used to finance the activities of Government.

The mining and mineral exploration industry has limited discretionary expenditure or capacity to bear any further increases in business input costs without unintended economic and social consequences.

An environmental approval is costly for a company, who will spend over a million dollars on surveys, testing and consultants to complete the necessary documentation alone. This figure does not include the ongoing costs which AMEC have estimated from a sample of listed mineral exploration companies to be $1million per annum in holding costs alone.

At the very least the amount that is cost recovered from a company must be capped as it is in other jurisdictions.

Other jurisdictions have recognised this:

- The Commonwealth Government's Department of Environment and Energy sends a cost estimate to a company that triggers assessment under the Environmental Protection and Biodiversity Act.
- South Australia announced recently that a Program of Environmental Protection and Rehabilitation will cost half of the Capital Fee cost fee. The capital cost fee is a rigid amount calculated on the project value.
- Tasmania has defined fees under regulation.

AMEC strongly recommends that the Government consider placing a cap on the cost of environmental approval.

Clause 244

The provision to withhold commercially confidential information is critical for Industry, as competitive information will be shared in the environmental approval process. This provision must remain.

Schedule: Infringement notice offences and prescribed offences

As this Schedule is incomplete we are unable to comment on it.

General comments

"As soon as practicable"

The imprecise phrase "as soon as practicable" is used frequently in the regulations. It would be AMEC's preference that a defined timeframe is given of 10 business days. This would provide certainty for industry and to increase the transparency of when a decision would be reached.

Furthermore, it is unclear what occurs if the legislated deadline is breached.

Nomenclature

It would appear the terms Regulation, Section and Clause are used throughout these Regulations interchangeably. The use of these specific terms should be standardised for clarity sake.

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Climate Change

It has been noted by Industry, that climate change was a late addition to the definition of environment in the Act, but it is not referenced anywhere in the regulation. The regulations provide no further clarity or guidance to the proponent of how the NT EPA will consider this subject.

For further comment on this submission or any other matters of relevance please contact:

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