



CENTRAL LAND COUNCIL

Submission to the Northern Territory Environment Protection Authority on the guidance notes for the implementation of the *Environment Protection Act*

May 2020

Introduction and context

The Central Land Council (CLC) welcomes this opportunity to provide a submission to the Northern Territory Environment Protection Authority (NTEPA) on the guidance documents for the implementation of the *Environment Protection Act* and *Environment Protection Regulations*.

The CLC is a Commonwealth corporate entity established under the *Aboriginal Land Rights (Northern Territory) Act 1976* ('ALRA'). Amongst other functions, it has statutory responsibilities for Aboriginal land acquisition and land management in the southern half of the Northern Territory. The CLC is also a Native Title Representative Body established under the *Native Title Act 1993* ('NTA'). Pursuant to the ALRA more than 50% of the NT and more than 85% of the NT coastline is now held by Aboriginal Land Trusts on behalf of traditional owners. A further 253,886 square kilometres of land and water is also held under native title. The CLC region covers approximately 780,000 km² of land, and 417,318 km² is Aboriginal land under the ALRA. Given existing pastoral land was not able to be claimed this Aboriginal land tends to be very arid and remote. In addition, rights have been asserted and won under the *Native Title Act 1993*, and traditional owners unable to claim land under the ALRA have succeeded in obtaining rights to small areas known as Community Living Areas, under NT legislation.

Through its elected representative Council of 90 community delegates the CLC continues to represent the aspirations and interests of approximately 17,500 traditional landowners and other Aboriginal people resident in its region, on a wide range of land-based and socio-political issues.

The CLC aims to improve the lives and futures of its Aboriginal constituents through sustainable development and change. The CLC's development approach is based on an integrated and strengths-based strategy of building economic, social and cultural capital. Significant work is being done under the various functions of the CLC in each of these related areas through initiatives in: natural and cultural resource management; the development of remote enterprise and employment pathways; innovative community development work, ensuring land owners use income generated from land use agreements for broad community benefit; and land administration and land use agreements for third parties and traditional owners.

The CLC has been actively engaged in the environmental regulatory reform agenda and has contributed comprehensive submissions throughout, including the Draft Environment Protection Bill in collaboration with the Northern Land Council. The key priorities throughout the reform remain the same for these guidance notes: ensuring that the EIA process is consistent with the requirements of free prior and informed consent, that community engagement is culturally appropriate and that the rights and interests of Aboriginal people and landholders are properly acknowledged and protected throughout EIA.

General comment on the guidance documents

The CLC view these guidance notes as a critical instrument to communicate to proponents the EPA's expectations of compliance with the increased responsibilities and obligations imposed by the new *Environment Protection Act and Regulations*. It is important that the additional authority entrusted with the EPA is effectively exercised and communicated to proponents. These guidance notes should be used to demonstrate how the EPA is intending to deliver improved accountability, rigour and independence to the EIA process by detailing internal decision making processes. However, the guidance notes contain an excessive degree of discretion and uncertainty, particularly around key operational terms and fail to illuminate important internal decision making processes. The guidance notes should be amended to rectify this weakness.

First and foremost the legal operation of these guidance notes needs to be clarified. It is not clear how these documents will be integrated into EPA decision making. The guidance note needs to include more information on how these will be used to inform decision making processes and how stakeholders and people who have made a submission can rely on these when reviewing a decision of the EPA. Compliance against these guidance notes should be capable of being reviewed by a tribunal or court if a decision is reviewed, either on its merits or judicially.

The guidance notes need to demonstrate that the EPA will act as a responsible and independent environmental regulator by outlining clear responsibilities and duties on proponents. The documents should also indicate how the EPA will use the powers available to them under the expanded regulatory framework to ensure that the rights and interests of Aboriginal people affected by the proposal will be considered and protected during EIA.

The effectiveness of the guidance note could be improved by including additional information that will aid the interpretation of the Act, including extraneous material to support compliance consistent with policy objectives and process to protect the rights and interests of Aboriginal people impacted by a variation.

Recommendations

1. Clarify the legal operation of the guidance notes.
2. Include a glossary of key operational terms, such as significant impact, ecological integrity.
3. Limit the opportunity for discretion and communicate issue where there are mandatory requirements and duties imposed on proponents.
4. Outline a process in both guidance documents that details how projects at various stages of the EIA process will be transitioned into the new framework.

1. EIA guidance for stakeholders – Making a public submission during the impact assessment process

Purpose and use of the guidance

This section should be expanded to provide more detail on the situations in which a stakeholder can provide a submission, what constitutes a valid and genuine submission and the rights that are afforded to someone who makes such a submission.

The guidance note should explicitly acknowledge that comments and submissions received by the EPA are also considered by the Minister when making decisions under the Act, and that the EPA is required to provide the Minister with their comments on any submissions received during the EIA process. Stakeholders should be made aware that the Minister and the EPA have a duty in law to consider valid submissions received.

The guidance document should include an exhaustive list of the opportunities available to stakeholders to make a submission, including but not limited to: regulations 203, 226, 104, 224, 225.

This guidance note should also identify the range of forms that are approved by the EPA and would constitute a valid submission in accordance with regulation 276(1)(d). There is scope for the EPA to approve other forms of submissions. Ultimately this guidance note needs to include a clear definition of what would constitute a *genuine and valid* submission in accordance with the Act. The document should also note that by making a submission a person or group therefore becomes entitled to seek judicial review of a relevant decision made during the EIA process.¹

In relation to the due date, the guidance note should communicate the operation of section 276(2) (b). Stakeholders need to be aware that if a submission is received after the due date, that it may not be considered and it *will* preclude them from being able to seek judicial review of a relevant decision relating to the project in question.

Recommendations

1. Explicitly identify all the opportunities for a stakeholder to make a submission during the EIA as listed in the Act and Regulations.
2. Include a definition of a valid and genuine submission that does not exclude any comments that relate to the acceptability of or support for a proposal.
3. Strengthen the guidance notes by outlining best practice procedure for referring a variation.
4. Outline a process to demonstrate how a variation will trigger transition into the new framework if it has already commenced assessment under the previous framework.

Appropriate comments

The guidance document should not prescribe comments that are considered inappropriate and will not be accepted by the EPA. It is unreasonable to limit the content of a submission to the technical scope of the EIA process considering many stakeholders are unlikely to have a comprehensive understanding of environmental impact assessment processes or the technical scientific information contained in EIA documents. The content of a submission should be sufficiently

¹ Section 276(1).

flexible to ensure that a stakeholder can provide feedback on a proposal that is considered by the EPA.

Comments that indicate support for or opposition to aspects or components of the project need to be accepted as relevant information to be considered by the EPA during EIA. The guidance document must not preclude a person for indicating a position on the proposal as this is directly relevant to the social, economic and cultural implications of a project. It is important that the submission process is able to inform the EPA of community sentiment and the acceptability or otherwise of particular aspects of the project.

2. EIA guidance for proponents – Referring a significant variation to the NT EPA

A proponent should be required to refer a variation if there has been an increase in the magnitude, scale or scope of the impacts, it need not be significant. The EPA is authorised to determine whether an increase is *substantial* or otherwise. By removing reference to substantial in table 1, the guidance note will ensure that the EPA is properly utilised as the competent regulator. This will remove the inherent risk of relying on a subjective determination by the proponent and ensure variations are referred. Simply put, the EPA should be responsible, rather than the proponent, for determining whether a variation is significant to ensure that projects are referred as needed.

There may be circumstances where a variation is not considered significant by the EPA, where for example the total footprint of the project is reduced, but there are nonetheless significant risks or implications of the variation that impact on the rights and interests of Traditional Owners and other Aboriginal people. The guidance document should therefore explicitly note that even if the total footprint is less, the variation may nonetheless be considered significant by those communities who are affected by the variation.

The CLC should be notified in all situations, as a matter of best practice, of a potential variation to inform the referral documentation that is received by the EPA. The EPA should then have particular regard to the feedback from the CLC as representing the interests of potentially affected Aboriginal people. Best practice should include proactive and upfront consultation with the CLC, especially if they have made a submission on the project, to ensure that Traditional Owners and other Aboriginal people affected by the proposal are engaged in the variation process.

The proponent should not have an unfettered right to claim information as confidential in the referral of the variation. There must be a justifiable basis for claiming confidentiality for particular information during and EIA process. The Proponent should be required to justify why the information is commercial in confidence. On the other hand, the guidance note should also identify the importance of protecting information that is culturally sensitive and should therefore be treated as confidential during the variation process.

There should be a presumption of on country consultations that include culturally appropriate communication. This consultation needs to engage the relevant TOs as well as the broader impacted community.

Recommendations

1. The guidance document should state that even if a variation is not significant it may still warrant a referral.
2. A proponent should be encouraged to always proactively inform the CLC prior to referring the variation for assessment.

Potential environmental impact of a significant variation

The proponent should provide supporting documents to demonstrate consultation with impacted stakeholders and their comments and feedback on the variation. This information should include details of the nature of the consultation, meeting notices, locations as well as the outcomes. The proponent should be informed of the expectation to conduct those consultations in a culturally appropriate manner, especially concerning projects on *ALRA* or *Native Title* land.

The proponent should consult on the variation by communicating the full range of impacts and values, not limited to the environmental impacts. The variation should also detail transport issues, infrastructure, social and cultural impacts.

Recommendations

1. Explicitly identify all the opportunities for a stakeholder to make a submission during the EIA as listed in the Act and Regulations.
2. Include a definition of a valid and genuine submission that does not exclude any comments that relate to the acceptability of or support for a proposal.
3. Clarify the legal operation of the guidance notes to include prescribing best practice procedures and their role in review of decisions.
4. Include a glossary of key operational terms, such as significant impact, ecological integrity.
5. Limit the opportunity for discretion and communicate issue where there are mandatory requirements and duties imposed on proponents.
6. Traditional owners and other Aboriginal people with rights and interests in the affected land should be consulted on the impact of the variation on the factors and objectives before a referral is made to the EPA.