



CENTRAL LAND COUNCIL

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

1. *Guidance for preparing a supplementary environmental report*
2. *Guidance for preparing an environmental impact statement*

June 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 reiterates recommendations regarding the operation of these guidance notes that were outlined in the submission the previous two guidance notes: guidance for stakeholders and making a submission and guidance for proponents referring a significant variation.

In addition to the previous feedback, CLC also recommends that the EPA outline more detail on how it will determine whether the level of detail required to be provided by a proponent for an SER or EIS is commensurate with the level of risk. The direction in both guidance notes stating that the level of detail should be commensurate with the “level of significance of the potential impact” is not sufficient to effectively direct the decision making of the proponent as it will require them to subjectively determine what is commensurate. This also obscures the internal decision making of the EPA. It should be clear that it is not up to the proponent to determine an appropriate level of detail but rather the EPA. For this to be effective the guidance notes should include more specific detail on the internal process for determining proportionality between impact and detail. This should then be reflected in the NT EPA direction to the proponent.

Recommendations

1. The EPA must clearly outline the level of detail that is expected from a proponent for an SER or EIS and link that to specific impacts or risks.
2. Emphasise section 3(e) as a key object to guide interpretation of the Act which will inform the EIA process.
3. Clarify the legal operation of the guidance notes.
4. Include a glossary of key operational terms, such as significant impact and ecological integrity.
5. Limit the opportunity for discretion and communicate issues where there are mandatory requirements and duties imposed on proponents.
6. 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 proponents – Preparing a supplementary environmental report

Purpose of the guidance

The statement “to ensure proponents and their constituents include all relevant information required for the NT EPA to complete its assessment, and *for the Minister to issue an environmental approval*” is misleading and inappropriate. It suggests that the issuing of an approval is an inevitable outcome of the EIA process thus pre-empting the decision of both the EPA and the Minister.

The purpose of this guidance note is not to ensure that proponents are granted an approval but rather that they comply with legal procedure and regulation required during the EIA process, of which the Ministerial decision is one part. The sentence should be amended to read: and *adequate information for the Minister to be able to make a determination about whether the project poses an unacceptable risk to the environment or whether it can be approved, and if so with what conditions.*

When a SER is required

This section needs more detailed information on when an SER would be required and how the EPA makes a determination about the significance of an impact requiring an EIS or lesser form of assessment. The first sentence is unclear with circular logic effectively stating that an SER is required when an SER is required but the document does not detail any specific information about the EPA decision making process and the criteria considered when making that determination.

Again this is a systemic issue in these guidance notes as they still allow for excessive discretion, are overly ambiguous and lack specificity.

The CLC should be invited to make a submission on additional information on an SER if they have provided a submission or have otherwise been directly engaged in the EIA process.

Information provided

Offsetting programs or strategies should be undertaken in consultation with Aboriginal land owners, managers and affected communities during on country meetings. There needs to be practical detail about how offsetting could be implemented in the CLC region and whether this is considered applicable to land in arid NT.

Stakeholder engagement

The proponent should be required to demonstrate compliance with section 43 of the Act by outlining what engagement and consultation has occurred including plans for ongoing engagement and consultation in a culturally appropriate manner. It should note that the position of Aboriginal communities impacted by the project should be prioritised. These specific issues or values in the affected area need to be specifically addressed by the proponent.

The guidance document should be providing more detail on how the EPA will evaluate compliance against the Act. While it is important to have a direct reference to section 43, the lack of detail on how that compliance is going to be assessed is a risk to compliance. CLC would like to see more detailed guidance on how a proponent demonstrates they have complied specifically with sections 43 (b) and (d).

More information should be included here as a way to direct proponents to undertake consultation in a culturally appropriate manner while also showing that they have addressed values, rights and interests of Aboriginal communities impacted by the proposal. There is insufficient guidance on how a proponent is to develop an SER to properly address the rights, values and interests of Aboriginal communities as required by section 3(e) of the Act.

An SER should not be used to evaluate and assess the impact of proposals on Matters of National Environmental Significance (MNES). MNES should only be assessed through a comprehensive EIS process. This guidance document cannot be taken to constitute formal bilateral assessment processes.

2. EIA guidance for proponents – Preparing an Environmental Impact Statement

Purpose of the guidance document

The guidance first states that it is for proponents but then states the guidance is for statutory decision makers and the community. This is confusing and detracts from the effectiveness as a policy document. If it is intended to inform government decision making, it should include more detail on how the EPA will exercise their decision making power regarding an EIS, such as the level of detail required and when an EIS is considered appropriate.

The Guidance note should explicitly identify object 3 (e) of the Act and the role this plays in the EIA process. Proponents are required to prepare an EIS that is cognisant of this critical factor, especially the role of Aboriginal people in informing the content of the EIS. Section 3(e) of the Act should provide a direction to proponents to indicate how feedback from affected communities and Aboriginal people has been considered in the EIS and how such feedback has informed specific impacts and management strategies.

When an EIS is required

It is not sufficient to state that an EIS is required when an SER or referral information is not appropriate. The guidance note requires more detail or examples of specific circumstances or actions where the EPA would determine that referral information or SER is not sufficient to meet the objects of the Act. The guidance note should outline how an EIS will address each object, particularly 3(e). CLC recommends that direct engagement with Aboriginal people and affected communities should lead to the identification of specific values and interests and the risks posed by the action. This feedback must inform the management strategies outlined in the EIS. Such feedback is instrumental in identifying any unacceptable impacts of the proposal.

Strategic and statutory framework:

This should include a direct reference to the *Native Title Act* and the *Aboriginal Land Rights Act* and how processes of free prior and informed consent have been facilitated by the proponent during consultation. The EPA should outline a requirement for the proponent to detail how the requirements of those Acts are integrated into the broader EIA process.

Stakeholder engagement

This section should include the requirement to outline strategies the proponent will use to undertake culturally appropriate consultation with affected Aboriginal communities. The proponent should also outline how feedback from affected communities has been incorporated into the EIS and supplementary information. The proponent should draw from community engagement, including Aboriginal knowledge to inform the impacts and risks while also planning for their avoidance or mitigation. However, it is also important for the proponent to outline how they will protect from disclosure and properly manage any information that is culturally protected.

Appendix A. The extent of impact is limited to numerical amounts or areas and this will not address the full range of issues that are relevant or significant to Aboriginal communities. There will need to be a consideration of qualitative impacts that can be easily communicated to communities where English is often a second language. This table should also outline the social and economic impacts and examples of cultural risks such as impacts on sacred sites and culturally important species.

Recommendations

1. Include an overview of the duties and responsibilities of a proponent under the *Native Title* and *Aboriginal Land Rights Act* and how this intersects with the EIA process.
2. Emphasise the importance of section 3(e) in directing the design, content and processes of an EIS.
3. Develop qualitative examples of impacts and risks posed by a proposal and guidance on how a proponent is able to evaluate this in an EIS.
4. Reiterate the importance of culturally appropriate consultation during the SER and EIS processes.