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16 December 2019

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SUBMISSION ON EXPOSURE DRAFT OF THE *ENVIRONMENT PROTECTION REGULATIONS 2019*

We thank the Northern Territory Government for the opportunity to provide submissions on the proposed *Environmental Protection Regulations* 2019 (**EP Regulations**). We have significant and substantial concerns with the proposals, concerns borne of the collective decades of the experience of the authors of these submissions in environmental impact assessments and environmental impact assessment law, both in Australia and internationally, including eight of the last ten completed Environmental Impact Statements in the Northern Territory.

The proposed regulations are an exercise in overreach. In many respects outlined below they increase the regulatory burden without any corresponding benefit. Regulations should be viewed through the lens of seeking timely action, certainty in the implementation of the enabling legislation, and providing investor security. Many of these proposed regulation fail in those accounts.

Throughout the process of enacting the *Environment Protection Act 2019* (**Act**) the regulators touted what they believe to be certainty in the process through the establishment of time frames. These regulations, though, create loopholes and exceptions that make regulatory time frames virtually meaningless. What is even more disappointing is the imposition of deadlines on project proponents, an indelicate attempt to ensure that regulators can nevertheless still tout adherence to those time frames. The ability of NT EPA to produces directives and obtain advice at virtually any point during the process must be curtailed, along with the resultant carte blanche ability to stop the clock on the assessment process. Consultation periods with other government agencies and departments must also always be accompanied by a time limit.

We also oppose granting NT EPA the power to recommend to Minister what is effectively a statement of unacceptable impact, and the Minister to accept that recommendation, without ever having assessed the impacts. This is a primary example of overreach.

Certainty of time is not the only certainty lacking in these draft regulations. Regulations should provide clarity to concepts put forth in the Act. Concepts in the Act are just that, concepts, and require "fleshing out" in the regulations.

What a significant impact is, for example, should be determined by use of regulatory thresholds that have been tabled and subject to disallowance. That is lacking in these regulations. These draft regulations offer little beyond framework that could just as easily have been in the Act itself.

Comments on individual regulations are organised below by regulation number.

Regulation 6(1) – Fit and proper person

The test in regulation 6(1) is too subjective for an approval that does nothing except allow a proponent to seek another permit that would actually allow him or her to construct or operate something. During consideration of the Act, DENR responded to a Scrutiny Committee question on the fit and proper person test by pointing to a number of other jurisdiction whose environmental legislation contains that test. On closer inspection, though, none of those jurisdictions apply the test to an approval, such as an Environmental Approval under the Act, that does not serve as a license or permit to operate. Under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), for example, the test is only applied for membership on the Board for Commonwealth reserves on indigenous people's land (s 379). In the Victoria *Environment Protection Act 1970* (s 20C) the fit and proper person test is applied to a holder of an authorisation, defined as:

> a works approval; (b) a licence; (ba) an accreditation; (c) a research, development and demonstration approval; or (d) a permit to transport hazardous or industrial waste.

Under the New South *Wales Protection of the Environment Operations Act 1997*, the fit and proper person test applies to holders of an environmental protection license, which is defined as an authorization to carry out an activity. (ss 43 and 45).

DENR notes that many jurisdictions include such tests in their mining and petroleum project approval legislations. We accept that the test may be appropriate at the project or operational approval phase, such as a license to operate a hazardous waste facility or the approval of a mining management plan. A test this subjective, however, does not belong at the assessment stage since the information provided by a project proponent will be scrutinised by both NT EPA and the public before a proponent can apply for operational permits, which themselves may contain a fit and proper person test.

Regulation 6(2) – Fit and proper person

While the Act uses the language "believes on reasonable grounds", an approach that provides no objective standards by which "reasonable grounds" can at least be broadly defined allows for a presumption of guilt unless proven innocent. The more that standard is tied to something objective (such as an investigation by a public agency that has resulted in less than full exoneration, for example), the less potential there is for mischief.

Regulation 11 – Public consultation

In what manner is the notice to be published? It should include both on-line and in newspaper(s) of general circulation in the affected areas. NT EPA/DENR should also consider a requirement to keep a register of persons, organisations, and other entities who wish to receive notice related to any regulatory activity involving triggers or objectives.

Regulation 12 – Decision on draft declaration

The Minister should be required to publish her decision and statement of reasons, as is required for a review of objectives and triggers, subject to our comment with regard to regulation 16(3).

Regulation 16(3) – Decision on review

The regulation should expressly specify that a decision is not final for purposes of Part 12 of the Act until the decision and statement of reasons is published.

Regulations 21 and 26 – Decision on draft amended declaration/draft revocation

The comments are the same as those for regulation 12. The Minister should be required to publish her decision and statement of reasons, as is required for a review of objectives and triggers. The regulation should also expressly specify that a decision is not final for purposes of Part 12 of the Act until the decision and statement of reasons is published.

Division 2, Subdivision 2 – Process for declaring protected environmental area or prohibited action

Declaring protected environmental areas or prohibited actions goes well beyond developing and determining standards to be applied to environmental impact assessment. The potential impacts of these types of declarations are too significant and too wide-ranging for decision making to conclude at the Ministerial level. These declarations must be tabled in the Legislative Assembly and subject to disallowance.

For the sake of consistency, this should also extend to the process for revoking permanent declarations in Division 2, subdivision 4.

Regulation 32 – Decision on draft declaration

There is no requirement to publish a notice of the decision and a statement of reasons. There should be, and it should be expressly noted in the regulations that any decision is not final for purposes of Part 12 of the Act until the decision and statement of reasons is published.

This fault in the regulation and our comment on it, however, should not be seen as alteration of our belief detailed above that these declarations should be tabled in the Legislative Assembly.

Regulation 37 – Decision of draft revocation

There is no requirement to publish a notice of the decision and a statement of reasons. There should be, and it should be expressly noted in the regulations that any decision is not final for purposes of Part 12 of the Act until the decision and statement of reasons is published.

This fault in the regulation and our comment on it, however, should not be seen as alteration of our belief detailed above that these declarations and revocations of any declarations should be tabled in the Legislative Assembly.

Regulation 49 – Notice of decision

It should be clarified that the decision should not be deemed final until the decision and statement of reasons are provided to the proponent.

Regulation 50 – Publication of documents

There is also valid reason why the material in sub-regulation 50(2) cannot be published concurrent with the notice of decision.

Regulation 51 – Public consultation

The only decisions arising at this stage are contained in regulation 56(2) for accepted referrals other than proponent initiated EIS referral and regulation 57(1) for proponent initiated EIS referrals. To avoid unnecessary delay, the regulations should provide that NT EPA is to disregard submissions made pursuant to regulation 51 to the extent they address matters other than that provided for in 56(2) and 57(1). Interested parties will have the opportunity for further submission if further environmental assessment is required, and can address items under consideration at that time, such as draft Terms of Reference, an EIS, and a supplement to an EIS.

Because the only submissions for which NT EPA should have regard are those directly related to the type of assessment a proposal should undergo, any increase in the submission periods in 51(2) would be unwarranted, creating delay with no corresponding benefit.

Regulation 52 – Consultation with government authorities

Whilst the phrase "considers may hold views" is used throughout the Act in relation to NT EPA consultation with other government authorities, the regulation should be used as an opportunity to clarify the phrase to mean government authorities that may have responsibility for some element of the action being referred, either as a permitting authority or an authority with a trustee relationship to resources that may be impacted.

Since inviting a government authority to makes submissions is the reasonable effort to obtain the authority's views, regulation 52(a) is redundant and should be deleted. If regulation 52(a) is intended to provide a regulatory means to seek the authority's views away from the public scrutiny that the submission process provides or extend the time for consultation beyond the submission period, then 52(a) is offensive to the open and transparent process the Act and the draft Regulations purport to provide, and should be discarded on that ground.

Part 4, Division 3 and Division 4 – Consideration of accepted referral and Minister's declaration on recommendation

Large chunks of these two divisions give NT EPA the power to recommend to Minister what is effectively a statement of unacceptable impact, and the Minister to accept that recommendation, without ever having assessed the impacts. The powers are granted with NT EPA not even having decided what type of assessment should be undertaken. This is wholly inappropriate.

Provisions for any recommendation or decision to refuse to grant an environmental approval should only come at the end of Part 6 of the regulations, after assessment has been undertaken.

Regulation 56(2)(d) – Decision on accepted referral other than proponent initiated EIS referral;
Regulation 57(1)(e) – Decision on proponent initiated EIS referral; and
Regulation 61 – Consultation on proposed recommendation to refuse environmental approval

These regulations are wholly and totally inappropriate. This Division in which these regulations sit addresses what type of assessment, if any, should be applied to an accepted referral. How can NT EPA recommend that an action be refused an environmental approval at this stage if NT EPA hasn't actually assessed the action, let alone determined what type of assessment to use? There are already provisions for refusal to grant an environmental approval. It's called a statement of unacceptable impact and provided for in the appropriate location in the regulations and at the appropriate time - after the assessment is undertaken. These regulations should be deleted.

Regulation 59 – Consultation on assessment by inquiry

Defined time limits should be placed on consultation. The ability to consult with the Minister should not be open ended.

Regulations 64 – Minister's decision on recommendation

Please refer to the comments above for regulations 56(2)(d), 57(1)(e), and 61. Because NT EPA should not have the power to make the recommendations provided for in those regulations, regulation 64(2) should be deleted. There should be no power to refuse to grant an environmental approval until after assessment is undertaken.

Regulation 65 – Consultation on proposal to refuse to grant environmental approval

Please refer to the comments above for regulations 56(2)(d), 57(1)(e), and 61. Because NT EPA should not have the power to make the recommendations provided for in those regulations, regulation 65 should be deleted. Any process related to a refusal to grant an environmental approval in inappropriate at this stage. There should be no power to refuse to grant an environmental approval until after assessment is undertaken.

Notwithstanding our opposition to regulation 65, any time a proposed regulation uses the phrase "considers may hold views" with respect to government authority consultation the language should be clarified to refer only to statutory decision-makers with some regulatory authority over the action.

Notwithstanding our opposition to regulation 65, there should be no consultation periods unaccompanied by a defined time limit.

Regulation 66 – show cause process

Please refer to the comments above for regulations 56(2)(d), 57(1)(e), and 61. Because NT EPA should not have the power to make the recommendations provided for in those regulations, regulation 66 should be deleted. Any process related to a refusal to grant an environmental approval in inappropriate at this stage. There should be no power to refuse to grant an environmental approval until after assessment is undertaken.

Sub-regulations 67(3) and 67(4) – Time for making a decision

Please refer to the comments above for regulations 56(2)(d), 57(1)(e), and 61. Because NT EPA should not have the power to make the recommendations provided for in those regulations, and because the Minister should not have the power to refuse to grant an environmental approval until after assessment is completed, regulations 67(3) and 67(4) should be deleted.

Sub-regulation 68(2) – Statement of reasons

Please refer to the comments above for regulations 56(2)(d), 57(1)(e), and 61. Because NT EPA should not have the power to make the recommendations provided for in those regulations, and because the Minister should not have the power to refuse to grant an environmental approval until after assessment is completed, regulation 68(2) should be deleted.

Sub-regulation 69(4) – Notice of decision

Please refer to the comments above for regulations 56(2)(d), 57(1)(e), and 61. Because NT EPA should not have the power to make the recommendations provided for in those regulations, and because the Minister should not have the power to refuse to grant an environmental approval until after assessment is completed, the reference to regulation 67(4) in regulation 69(4) should be deleted

Regulation 77 generally and 77(1), specifically – Additional information during the assessment process

This is overreach and the regulation should be deleted. NT EPA should not have unfettered discretion to demand additional information at any time during the assessment process. The regulation runs counter to any notion of an orderly assessment process on which proponents and members of the public should be able to rely. The appropriate vehicle for NT EPA to seek additional information is through a direction for information about a referral, through the Terms of Reference process, the SER process, or the Supplement to an EIS process already provided for elsewhere in the regulations.

Regulation 77 generally and 77(2), specifically – Additional information during the assessment process

This is overreach and the regulation should be deleted. There are provisions for a proponent to voluntarily provide Terms of Reference through a Proponent Initiated EIR Referral. For NT EPA to be given unfettered discretion to demand a proponent prepare Terms of Reference smacks of NT EPA shirking it responsibility under the Act.

Regulations 78 and 79 – Publication or direction and public consultation

Because regulations 78 and 79 are tied to regulation 77, the criticism of regulation 77 is equally applicable here. Regulations 78 and 79 should be deleted.

Regulation 80(1) – Publication of submissions

Using an "as soon as practicable after they are received" standard for publication of submission runs counter to any notion of an orderly assessment process on which proponents and members of the public should be able to rely. Publication of submissions should be directly tied to publication of a decision or other specified action. For example, publication of submissions on method of assessment should be published at the time a notice of decision is published on the method of assessment. Submissions on an EIS should be published upon publication of a Supplement to an EIS, or more appropriately as an annexure to the Supplement since the proponent will have had to respond to them in the supplement. That may be the regulators' intent, but it should expressly state so in the regulations.

Regulation 81 – Power to obtain advice

If NTEPA decides to outsource assessment, that cost should not be borne by the proponent. Our objections to cost recovery generally, and unfettered cost recovery specifically, are discussed under regulation 241.

Regulation 82 – Direction to proponent to obtain independent review

This is an unnecessary regulation that creates an unfortunate conundrum for proponents. It is unnecessary because any assertions or conclusions put forward by a proponent must be supported by evidence that could only be provided by a qualified person. The conundrum is that, unless NT EPA is willing to bear the costs of the independent review provided for in regulation 82, a proponent will be open to charges that the review is not "independent" because the qualified person will have presumably been paid by the proponent.

Regulation 85 – Suspension of assessment

The total lack of necessity of this regulation is borne out in the fact that the regulations generally impose no regulatory clock on NT EPA to complete its assessment. How can you stop a clock when none exist?

Where there may be a time frame in which NT EPA must act, this regulation unfairly imposes unnecessary costs and delays on a proponent. A proponent should not be forced to suffer delay and increased costs occasioned by any NT EPA decision to outsource some portion of the assessment.

Notwithstanding our opposition to the entirety of the regulation, NT EPA should not be granted additional time to assess the assessment, as is allowed under 85(c).

Regulation 87 – Termination of assessment process

While we recognise that the application of the regulation is discretionary, sub-regulation 87(1)(e) should expressly exclude variations made with a reasonable expectation of environmental superiority.

Regulation 90 – NT EPA may reconsider method of assessment

This regulation runs counter to any notion of an orderly assessment process on which proponents and members of the public should be able to rely.

With regard to sub-regulations 90(1)(a) and 90(1)(b) in particular, the whole point of the assessment process is to test assumptions, analyse data provided with the referral, and analyse further information provided over the course of the assessment process. Substantial new information about the impacts of the proposed action – or new impacts altogether – may be discovered as a result of further information; that would not necessarily be seen as uncommon. Circumstances may also change, especially given the length of time it takes to conclude the process. That does not, however, mean that NT EPA has lost the ability to assess those impacts and see the imposition of conditions or mitigation through an Environmental Approval regardless of whether NT EPA might have made a different decision about method of assessment. Sub-regulations 90(1) and 90(2) provide no substantive authority that NT EPA would not already have under the Act and proposed regulations, and only create a moving target that serves as a disincentive to invest in the Northern Territory.

Regulation 93 – Assessment by referral information

While we object to regulation 77 in its entirety, what is the purpose of excluding such information from the assessment by referral process?

Regulation 96 – Submission period for supplementary environmental report

The regulation is overreach and should be deleted. Why should NT EPA be granted to authority to specify a period within which an SER must be submitted? A proponent is well-aware that it is in its best interest to complete an SER in as timely a manner as possible, and if NT EPA believes there is inappropriate delay it may make use of the termination provisions. While a proponent could seek an extension of time, that is an additional unnecessary regulatory burden that should not be placed on a proponent

Regulation 97 – Extension of period to submit supplementary environmental report

Our opposition to regulation 96 notwithstanding (and thus 97, as well), NT EPA should not have the authority to refuse a reasonable request to extending the time in which the SER can be submitted.

Regulatory 100 – Consultation with government authorities

There is no valid reason for requiring a proponent to give a copy of a supplementary environmental report to any government authority specified by NT EPA. That is NT EPA's job.

Since NT EPA is the body making reasonable efforts to obtain the view of other government authorities and inviting them to make submissions (regulation 100(2)), it should be incumbent on the NT EPA – not the proponent – to provide those authorities with the SER concurrent with its invitation.

Whilst the phrase "considers may hold views" is used throughout the Act in relation to NT EPA consultation with other government authorities, the regulation should be used as an opportunity to clarify the phrase to mean government authorities that may have responsibility for some element of the action being referred, either as a permitting authority or an authority with a trustee relationship to resources that may be impacted.

Since inviting a government authority to makes submissions is the reasonable effort to obtain the authority's views, sub-regulation 100(2)(a) is redundant and should be deleted. If sub-regulation 100(2)(a) is intended to provide a regulatory means to seek the authority's views away from the public scrutiny that the submission process provides or somehow result in an extension of time for consultation beyond the submission period, then regulation 100(2)(a) is offensive to the open and transparent process the Act and the draft Regulations purport to provide, and should be discarded on that ground.

Regulation 105 - Terms of reference for assessment by EIS

There is no valid reason for requiring a proponent to submit an EIS within a specified time. This is regulatory overreach. The extreme variations in the length of time necessary to

complete an EIS (data easily accessible from the NT EPA website) shows the complete unworkability of sub-regulations 105(2) and 105(3).

Conformance with those specific sub-regulations will also no doubt result in delay in the issuance of Terms of Reference with no corresponding benefit. Simply put, regulations 105(2) and 105(3) serve no valid purpose and should be deleted.

A proponent is well-aware that it is in its best interest to complete an EIS in as timely a manner as possible, and if NT EPA believes there is inappropriate delay it may make use of the termination provisions. While a proponent could seek an extension of time, that is an additional unnecessary regulatory burden that should not be placed on a proponent.

We have noted our objection above to regulation 77. The reference to regulation 77(2) in regulation 105(1) should be deleted.

Regulation 107 – NT EPA to publish draft terms of reference for assessment

What is the penalty for NT EPA's failure to provide Terms of Reference in a timely manner? A cursory review of the NT EPA website for projects currently under assessment – using the dates of the Notices of Intent and issuance of the Terms of Reference shows a general inability to meet a 40 day deadline, suggesting the deadline is not much more than a false promise.

Regulation 108 – Public consultation

The only decision arising at this stage is contained in regulation 104, preparation of terms of reference. The regulations should provide that NT EPA is to disregard submissions made pursuant to regulation 108 to the extent they address matters other than the matter provided for in regulation. Interested parties will have the opportunity later for further submission on the assessment itself.

Given that the only submissions for which NTEPA should have regard at this stage are on the Terms of Reference themselves, any increase in the timeframe in sub-regulation 108(3) would be unwarranted.

Regulation 109 – Consultation with government authorities

Whilst the phrase "considers may hold views" is used throughout the Act in relation to NT EPA consultation with other government authorities, the regulation should be used as an opportunity to clarify the phrase to mean government authorities that may have responsibility for some element of the action being referred, either as a permitting authority or an authority with a trustee relationship to resources that may be impacted, with consultation limited to views on relevant terms of reference.

Since inviting a government authority to makes submissions is the reasonable effort to obtain the authority's views, regulation 109(a) is redundant and should be deleted. If regulation 109(a) is intended to provide a regulatory means to seek the authority's views away from the public scrutiny that the submission process provides or somehow result in an extension of time for consultation beyond the submission period, then regulation 109(a) is offensive to the open and transparent process the Act and the draft Regulations purport to provide, and should be discarded on that ground

Part 5, Division 5, Subdivision 2 – Amendment of Terms of Reference

We object to the grant of authority to essentially derail the assessment process. The Terms of Reference guide decisions regarding project management, scoping, resource allocation, timelines, and related matters in what may be a multi-year and multimillion dollar process. A project proponent should be able to have the confidence that the Terms of Reference issued for an EIS are final. If truly new information or circumstance arise during the EIS process, it can be addressed through direction at the Supplement to an EIS stage. If the issue arises at a later stage, it can be addressed through conditions applicable to the operational entitlement to which the Environmental Approval will attach.

Notwithstanding our opposition to the subdivision in its entirety, we offer submissions below on specific regulations within the subdivision (regulations 113-122) below.

Regulation 115 – Consultation with proponent

We believe that NT EPA must consult with the proponent. It should also be specified that the consultation is considered complete for the purposes of the regulation upon the receipt upon any written submissions from the proponent.

Regulation 116 – NT EPA to publish draft amending terms of reference

What is the penalty if NT EPA fails to meet the specified timeframe?

Regulation 118 – Consultation with government authorities

Whilst the phrase "considers may hold views" is used throughout the Act in relation to NT EPA consultation with other government authorities, the regulation should be used as an opportunity to clarify the phrase to mean government authorities that may have responsibility for some element of the action, either as a permitting authority or an authority with a trustee relationship to resources that may be impacted.

Since inviting a government authority to makes submissions is the reasonable effort to obtain the authority's views, regulation 118(a) is redundant and should be deleted. If regulation 118(a) is intended to provide a regulatory means to seek the authority's views away from the public scrutiny that the submission process provides or provides a means to extend consultation beyond the submission period, then 118(a) is offensive to the open and transparent process the Act and the draft Regulations purport to provide, and should be discarded on that ground.

Regulation 119(2)

What is the penalty if NT EPA fails to meet the specified timeframe?

Regulation 122

As noted above, Terms of Reference serve as the basis for decisions regarding project management, scoping, resource allocation, timelines in what may be a multi-year and multimillion dollar process. It is critical that the process not be delayed whilst any new or amended Terms of Reference are under consideration.

Regulations 124

Specific to 124(2) and (3), what purpose is served by a regulation that says essentially says NT EPA has to follow the rules NT EPA established for itself, and then tell a proponent it has to follow the regulations?

Regulation 125 – Preparation of EIS

Requiring a proponent to submit an EIS within a time specified by NT EPA has no valid purpose and is regulatory overreach. The extreme variations in the length of time necessary to complete an EIS (data easily retrievable from the NT EPA website) shows the complete unworkability of Regulations 105(2) and 125(2).

A proponent is well-aware that it is in its best interest to complete an EIS in as timely a manner as possible, and if NT EPA believes there is inappropriate delay it may make use of the termination provisions. While a proponent could seek an extension of time, the process under regulations 126-129 is an additional unnecessary regulatory burden that should not be placed on a proponent.

Specific to sub-regulation 125(1), what purpose is served by a regulation that says you have to comply with the regulations?

Regulations 126-129 relating to extension of time to prepare an EIS

Because sub-regulations 105(2) and 105(3), and regulation 125 should be deleted, regulations 126-129 should also be deleted.

Regulation 130 – Submission of draft environmental impact statement to NT EPA

Specific to regulation 130(2), what purpose is served by a regulation that essentially says you have to comply with the regulations?

Regulation 132(3) – Public consultation

We believe that a maximum submission period of between 30 and 60 days is appropriate, with the ability to extend whatever period is initially provided only upon agreement between NT EPA and the proponent. The time is sufficient because there will already have been opportunity for interested parties to review and submit at other stages of the process, including review and submission on the referral materials and on the Terms of Reference.

Regulation 133 – Consultation with government authorities

Whilst the phrase "considers may hold views" is used throughout the Act in relation to NT EPA consultation with other government authorities, the regulation should be used as an opportunity to clarify the phrase to mean government authorities that may have responsibility for some element of the action, either as a permitting authority or an authority with a trustee relationship to resources that may be impacted.

Since inviting a government authority to makes submissions is the reasonable effort to obtain the authority's views, sub-regulation 133(2)(a) is redundant and should be deleted. If sub-regulation 133(2)(a) is intended to provide a regulatory means to seek the authority's views away from the public scrutiny that the submission process provides or provides a means to extend the consultation period beyond the submission period, then 133(2)(a) is offensive to the open and transparent process the Act and the draft Regulations purport to provide, and should be discarded on that ground.

Regulation 136 – Submission period for supplement to draft EIS

Requiring a proponent to submit a supplement to a draft EIS within a time specified by NT EPA has no valid purpose and is regulatory overreach. NT EPA should not be given the discretion to so order.

A proponent is well-aware that it is in its best interest to complete a supplement in as timely a manner as possible, and if NT EPA believes there is inappropriate foot dragging going on it may make use of the termination provisions. While a proponent could seek an extension of time, the process under regulation 137 is an additional unnecessary regulatory burden that should not be placed on a proponent.

Regulation 137 – Extension of period to submit supplement

As regulation 137 relates to regulation 136, it too should be discarded.

Regulation 140 – Consultation with government authorities

Whilst the phrase "considers may hold views" is used throughout the Act in relation to NT EPA consultation with other government authorities, the regulation should be used as an opportunity to clarify the phrase to mean government authorities that may have responsibility for some element of the action, either as a permitting authority or an authority with a trustee relationship to resources that may be impacted.

Since inviting a government authority to makes submissions is the reasonable effort to obtain the authority's views, regulation 140(2)(a) is redundant and should be deleted. If regulation 140(2)(a) is intended to provide a regulatory means to seek the authority's views away from the public scrutiny that the submission process provides or provides a means to extend to consultation period beyond the submission period, then 140(2)(a) is offensive to the open

and transparent process the Act and the draft Regulations purport to provide, and should be discarded on that ground

Regulation 143 – Additional information in relation to EIS

We presume the intent of the regulation is in regard to additional information sought after the delivery of a supplement to a draft EIS to NT EPA. The regulation should be explicit in this regard.

The practical purpose of regulation 143 is to give NT EPA a means to address what it perceives may be deficiencies in an EIS before final consideration. If NT EPA is to give direction, it should first be required to consult with the proponent, and do so without staying the period in 143(2). Even with a requirement to consult with the proponent, what is effectively a full month to provide direction is more than sufficient.

Regulation 145 – NT EPA may invite submissions

The practical effect of this regulation is to give parties the opportunity to make submissions on directions to provide further information in support of submissions those parties have already made.

This regulation creates delay without any corresponding benefit and should be deleted. We further note that there is no time for submissions specified in the regulations, something to which we oppose as a general matter. Even if there was one here, though, it is still a regulation that creates delay without any corresponding benefit.

Regulation 156(2) – Preparation of assessment report

The regulation should be revised to expressly provide that NT EPA does not have the authority to rely on material outside of regulation 156(1) without the proponent having had the opportunity to see and formally comment on the material NT EPA intends to consider. The authority to consider material without that safeguard is offensive to notions of fairness and natural justice.

Regulation 159(2)(a) – Consultation

Whilst the phrase "considers may hold views" is used throughout the Act in relation to NT EPA consultation with other government authorities, the regulation should be used as an opportunity to clarify the phrase to mean statutory decision-makers with some regulatory authority over the action.

Regulations 159(2) and 159(3) – Consultation

An actual maximum time for submissions should be specified in the regulation and it should be relatively short with respect to regulation 159(2). We believe ten business days is sufficient, with the proponent having the opportunity to seek an extension of time for its submissions.

The reason for a short submission period is that the authorities and decision-makers in question will already have been given the opportunity to submit on that which is being assessed, including any additional information NT EPA has sought. We expect that, as a practical matter, NT EPA will have been informally consulting with relevant government departments and other government entities at this stage of the process as it prepares either the statement or the conditions that it intended to include in the environmental approval. This is a recognition that those entities will have the expertise and be in the best position to recommend conditions that fall within their respective spheres of influence. We also presume that Assessment Reports and environmental approvals have not been and will not be prepared in an NT EPA vacuum, and the parties in identified 159(2) will have had the opportunity to weigh in throughout the entirety of the assessment process. As such, a longer submission period is neither necessary nor required.

This reasoning will not apply to a proponent, who will not have had the benefit of informal discussions that are like to occur between NT EPA and other government authorities.

Regulation 162 – NT EPA may suspend assessment process

The authority to suspend the assessment process should be limited to circumstances where the regulatory clock of regulation 56, 57, 67, or 110 is ticking, or at any point after the final EIS for the action being varied has been accepted by NT EPA. These are situations where NT EPA or the Minister has to produce material or make a decision within a specified period of time. We acknowledge that it may make sense to allow a suspension of the process (including regulatory time frames in which NT EPA or the Minister must act) in those circumstances, but only those circumstances. At any other time, it is the proponent preparing materials and should be able to accept the risk of moving forward knowing it may be subject to a different requirement.

Regulation 167 – Notice to proponent of decision

There appears to be an inadvertent error in 167(2)(a); the word 'strategic' should be 'significant'. The sub-regulation also needs to reflect that the refusal may because the variation is not deemed significant. See 167(2)(d).

Regulation 172 – Decision on significant variation

One of the options available throughout the regulation is "the assessment can continue to assess the proposed action or strategic proposal with the existing assessment method, but a new assessment is required for the matters in the significant variation..." The language is unclear. The language reads as though an entirely separate assessment is required for the variation. Is that the intent? This seems to be so in looking at regulation 178.

Some explanation is necessary as to what the author of the proposed regulations envisions under this option. The language runs counter to an objective of assessing the whole of an action at one time.

Regulation 176 – Assessment to continue without change

"[A]s soon as practicable after the decision is made" is an inappropriate standard. There is no valid reason to delay the assessment process once the decision is made, and the clock should start running again as of that time.

Regulation 178 – New assessment for significant variation

Please refer to the comment under Regulation 172. Some explanation is necessary as to what the author of the proposed regulations envisions under this option.

Regulation 185 – Consultation with government authorities

Whilst the phrase "considers may hold views" is used throughout the Act in relation to NT EPA consultation with other government authorities, the regulation should be used as an opportunity to clarify the phrase to mean government authorities that may have responsibility for some element of the action, either as a permitting authority or an authority with a trustee relationship to resources that may be impacted.

Regulation 190 – Application of Division

Implicit in this regulation is that the Assessment Report and Environmental Approval have been delivered to the Minister for her consideration. Is this a correct interpretation?

Regulation 197 – Notice of decision

The regulation should be clarified to provide that a decision to refuse notice of a referral for consideration is not final for purposes of Part 12 of the Act until notice and the statement of reasons is provided to the proponent.

Regulation 200 – Consultation with government authorities

Whilst the phrase "considers may hold views" is used throughout the Act in relation to NT EPA consultation with other government authorities, the regulation should be used as an opportunity to clarify the phrase to mean government authorities that may have responsibility for some element of the action, either as a permitting authority or an authority with a trustee relationship to resources that may be impacted by the proposed variation.

Regulation 203 – Decision if statement of unacceptable impact prepared

Impacts can always mitigated or managed through conditions of approval. Sub-regulation 203(2) should probably be clarified to refer to mitigation or management of significant impacts to an acceptable level.

Regulation 219 – Notice to approval holder of decision

The regulation should be clarified to provide that a decision to refuse a referral is not final for purposes of Part 12 of the Act until notice and the statement of reasons is provided to the proponent.

Regulation 241 – Recovery of Costs

NT EPA has a statutory mandate to run the environmental impact assessment process, a process it undertakes for its benefit and the benefit of the public. It is paid for through the public purse, including taxes paid the business community and royalties paid by the resources sector, royalty payments which make up 20% of the Territory government's revenue. It should remain that way.

Nevertheless, we recognize the Northern Territory's desire to recover some costs of processing environmental assessments. While we do so, though, the open-ended approach proposed here provides no caps and does not provide the certainty or transparency critical for investment decision-making. Capping is also necessary to avoid inflating costs.

Any recovery of costs must be according to adopted schedules and capped. There must also be dispute resolution provisions if a proponent believes that costs are unjustified, unreasonable, or excessive. These provisions must also not result in a Hobson's choice for a proponent; payment of unreasonable costs or no assessment. Regulators must also understand at this stage that moving to a cost recovery system (as opposed to an application fee system) will require a level of financial record-keeping that they may not be used to, but that will be critical and necessary for fairness and transparency.

If it is the Northern Territory's intention to move to a fee-for-service cost recovery approach then the regulations must also provide for an accounting and return of any remaining funds in a timely manner upon termination or conclusion of the assessment process

We also note that assessment levies on a group, as might occur for a strategic assessment, may legally be considered a form of taxation that requires legislative, rather than regulatory, action in order to take effect.

Again, we thank the Northern Territory to provide these submissions.

Yours faithfully
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