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NT EPA  
PO Box 3675  
DARWIN NT 0801  
Mode of delivery  
Email to: [ntepa.consult@nt.gov.au](mailto:ntepa.consult@nt.gov.au)

To Whom it May Concern,

**Submission in relation to the Draft Guidance Note entitled “Stakeholder engagement and consultation”**

Thank you for the opportunity to provide a submission in relation to the Draft Guidance Note entitled “Stakeholder engagement and consultation”. This submission is made jointly by the Environment Centre NT (ECNT) and the Arid Lands Environment Centre (ALEC).

ECNT is the peak community sector environment organisation in the Northern Territory, raising awareness amongst community, government, business and industry about environmental issues and assisting people to reduce their environmental impact and supporting community members to participate in decision-making processes and action.

ALEC is central Australia's own environmental organisation that has advocated for the protection of nature and sustainable livelihoods since 1980. Based in Alice Springs, ALEC's vision of 'healthy futures for arid lands and people' drives its advocacy and project work across the region.

**Summary and overarching comments**

Public participation is a central component of any legitimate and rigorous environmental impact assessment regime for projects with the potential to have a significant impact on the environment. Public participation improves environmental decision-making in a number of ways, including:

- (a) assisting proponents and government decision-makers to understand and identify public interest concerns in relation to major developments;
- (b) promoting environmental justice, and ensuring ecological and social considerations are integrated into environmental decision-making; and
- (c) enhancing the accountability, and hence acceptability, of environmental decisions.

An effective public/stakeholder engagement process can lead to less litigation, fewer delays and generally better implementation of environmental decisions.

We note that poor public and stakeholder engagement was a core feature of the NT's previous environmental assessment regime, which seriously eroded public confidence in that system. This was commonly demonstrated by the comparatively low number of public submissions lodged with respect to the environmental assessment of major projects in the NT. To take one example, the recent environmental impact assessment of the environmentally and politically contentious McArthur River Mine elicited only 3 submissions (from peak bodies). By comparison, the recent Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (Pepper Inquiry) yielded more than 1250 submissions that directly influenced and enhanced that inquiry's findings, demonstrating that the high levels of public participation that can be achieved in the NT if the public and stakeholders are more effectively engaged.

As a general comment, we commend the NTEPA on the development of this Draft Guidance, which should significantly improve stakeholder engagement in the environmental impact assessment process in the NT, particularly by clarifying the duties imposed on proponents to ensure sufficient public and stakeholder participation early on in the environmental assessment process.

However, the Draft Guidance could be improved so that the potential for ensuring public/stakeholder participation in environmental decision-making is enhanced and complies with the law.

First, we are concerned that (like in other Draft Guidance notes put out for public consultation), very little guidance is provided for how the Minister/NTEPA should ensure compliance with *their* legal obligations to ensure sufficient public/stakeholder engagement in environmental decision-making in accordance with the legislation. Indeed, the Draft Guidance seems to proceed on the basis that it is only the proponent which has a legislative duty to ensure adequate public/stakeholder engagement, with the focus predominantly on the pre-referral ("scoping") stage and the incorporation of stakeholder views into EIS documentation. We believe that this is a mischaracterisation of the law. Specifically, sections 3 and 42 of the *Environment Protection Act* impose ongoing obligations on the Minister/NTEPA as the relevant decision-makers, as well as proponents, to ensure and take into account stakeholder views for the entirety of the environmental assessment process (ie from scoping through to approval). Regulation 157(1)(g) of the *Environment Protection Regulations 2020* imposes a positive obligation on the NTEPA to consider any submissions received throughout the environmental impact assessment process. Section 73 of the *Environment Protection Act* imposes a positive obligation on the Minister to be satisfied that the community has been consulted on the potential environmental impacts and benefits of any proposed action when deciding an environmental approval. However, these obligations are not reflected in the Draft Guidance Note.

Relatedly, we are concerned that the Draft Guidance, while replicating useful high-level principles for public/stakeholder engagement, does not adequately tailor those high-level principles to the specific legislative context. For example, while there are references to the need for early stakeholder analysis/mapping, stakeholder engagement plans, and stakeholder engagement prior to referral, the results of which are to be documented in any EIS/SER, other stakeholder/public participation processes that form part of the environmental assessment process are not sufficiently integrated into the Draft Guidance. We submit that the legal obligations to ensure stakeholder participation are *ongoing* for the entirety of the environmental assessment process, and comprise far more than merely ensuring stakeholder input into environmental assessment documentation prepared by the proponent. To be meaningful and effective, the Draft Guidance needs to take the high-level principles in the document and apply them to the particular legislative context. In particular, the Draft Guidance Note should more clearly set out the statutory framework for public/stakeholder engagement in environmental decision-making from the scoping (ie pre-referral) stage all the way through to approval.

Finally, we are concerned about inaccuracies in the description of the other applicable statutory frameworks operating with respect to engagement with Indigenous peoples, which are likely to mislead

proponents and the public. The Draft Guidance Notes appears to conflate these other statutory processes with the proponent/the Minister/the NTEPA's obligations to ensure adequate public participation under the *Environment Protection Act*. Specifically, the application or otherwise of the *Northern Territory Sacred Sites Act*, the *Aboriginal Land Rights (Northern Territory) Act*, or the *Native Title Act* has little bearing on whether or not the requirements for public participation/engagement are met under the *Environment Protection Act*. We recommend that the wording of these sections should be expressly cleared with Northern Territory land councils and the Aboriginal Areas Protection Authority (AAPA) to avoid proponents falling into error.

### **The statutory context: enhancing public and stakeholder participation for the entirety of the environmental assessment process**

We suggest that the Draft Guidance Note should more clearly set out the statutory framework for public/stakeholder engagement in environmental decision-making from the scoping (ie pre-referral) stage all the way through to approval, including by explaining the relevant legal obligations imposed on the proponent/public/NTEPA/Minister by the legislation, as well as the statutory opportunities for public consultation/engagement at each stage of the environmental assessment process.

As pointed out in the Draft Guidance Note, the objects of the *Environment Protection Act* relevantly include (ss 3(d) and 3(e)):

- to provide for broad community involvement during the process of environmental impact assessment and environmental approval;
- to recognise the role that Aboriginal people have as stewards of their country as conferred under their traditions and recognised in law, and the importance of participation by Aboriginal people and communities in environmental decision-making processes.

Section 42 of the *Environment Protection Act* lists one of the purposes of environmental impact assessment as being to ensure that “the community is provided with an opportunity to participate, and have its views considered, in decisions on proposed actions”.

Section 43 imposes specific duties on proponents to ensure public participation, including (inter alia):

- (a) to provide communities that may be affected by a proposed action with information and opportunities for consultation to assist each community's understanding of the proposed action and its potential impacts and benefits;
- (b) to consult with affected communities, including Aboriginal communities, in a culturally appropriate manner;
- (c) to seek and document community knowledge and understanding (including scientific and traditional knowledge and understanding) of the natural and cultural values of areas that may be impacted by the proposed action;
- (d) to address Aboriginal values and the rights and interests of Aboriginal communities in relation to areas that may be impacted by the proposed action.

We note that the Draft Guidance Note primarily appears to address the proponent's obligations under s43 of the *Environment Protection Act*. However, sections 3(d) and (e) and section 42 also apply to the Minister/NTEPA as the relevant decision-makers under the legislation. In this respect, ECNT refers to principle 2 from the IAP2 core values of engagement (cited in the Draft Guidance), which states that “public participation includes the promise that the stakeholder's contribution will influence the decision”.

Since it is the Minister/NTEPA which are the relevant decision-makers at different points of the process, it is critical they appropriately consider or take into account public/stakeholder views. In ECNT's view, this Draft Guidance Note should address not only the proponent's obligations to ensure public/stakeholder participation, but also the Minister/NTEPA's obligations to ensure such participation and how it will be considered or taken into account.

Relatedly, the duties on both proponents and the NTEPA/Minister to ensure sufficient public/stakeholder engagement and participation are *ongoing*. Therefore, they must be complied with for each relevant step of the environmental impact assessment process from referral through to approval (or a finding of unacceptable impact, if that is the ultimate decision). This should be made explicit in the Draft Guidance, which currently seems to suggest that these obligations for proponent stakeholder engagement end at the point at which an SER or EIS is produced (for example, see p 17 which talks about reporting in the "outcomes" of stakeholder engagement in an SER or EIS). While there is a brief reference to "further engagement activities" being required for the supplement to the draft EIS (p 17), no meaningful guidance is provided for what is required to discharge the proponent's stakeholder engagement duties at this point.

Perhaps most importantly, there is little guidance given about how the NTEPA should synthesise and take into account stakeholder/public views gathered through the statutory consultation process. We note that the legislation/regulations set out multiple opportunities for statutory public/stakeholder consultations during the environmental impact assessment process. The relevant junctures at which public/stakeholder consultation can occur include:

- on acceptance of a referral for assessment (regulation 52(2)(a), (b), (c) and (d) of the *Environment Protection Regulations*);
- on publication of notice of the draft terms of reference (regulation 102);
- on publication of notice of the draft amending terms of reference (regulation 111);
- on publication of notice of a supplementary environment report (regulation 123);
- on publication of notice of the draft EIS (regulation 133);
- on publication of a supplement to a draft EIS (regulation 139);
- on publication of a notice of significant variation to an assessment (regulation 170(2)(a), (b), (c), (d));
- on publication of notice of the draft amending TOR for a significant variation during the assessment process (regulation 185).

Currently, the Draft Guidance does not address how the information received as a consequence of these opportunities is to be synthesised and taken into account by proponents or the Minister or NTEPA in accordance with their legal obligations (cited above) and throughout the entirety of the environmental process. Nor is guidance given about when it might be appropriate to extend the timeframes for these public submissions, or in what circumstances the NTEPA would consider it appropriate to invite public submissions during the assessment process outside of these opportunities.

We recommend the Draft Guidance Note be reworked to clearly address the requirements for public/stakeholder participation *for the duration* of the environmental assessment process, including how public consultation/feedback will be integrated at the various junctures for public consultation. Further, obligations on the NTEPA and the Minister (and other parties) to ensure sufficient public/stakeholder engagement should be clearly set out, and explained.

By way of assistance, the NSW Department of Planning and Environment has released a draft “Community and Stakeholder Engagement” guidance which enshrines best practice in stakeholder engagement and usefully sets out at Figure 2 the obligations/opportunities for stakeholder and public participation in environmental impact assessment for the entirety of the process. This Figure divides stakeholder/public engagement into four key sections: scoping, EIS preparation and public exhibition, assessment and determination, and post approval and compliance. It also clearly delineates proponent, community, department and other government agencies’ responsibilities for each stage of the process (<https://www.planning.nsw.gov.au/~media/Files/DPE/Guidelines/guideline-6-draft-community-and-stakeholder-engagement-2017-06.ashx>). ECNT suggests that a similar approach should be employed in this Draft Guidance.

### **Obligations with respect to consultation and engagement with Indigenous peoples**

The Draft Guidance Note correctly notes the special significance given in the legislation to ensuring effective consultation with Indigenous stakeholders. Large scale projects with the potential for significant environmental impacts disproportionately impact Indigenous people and lands in the NT. Many Indigenous residents are located remotely, speak English as a second or third language, with poor telecommunications access. Special care is needed to ensure that the environmental impacts of proposed developments are communicated to Indigenous peoples and communities, and their input sought in relation to environmental impact assessment of these proposals under the legislation.

The Draft Guidance Note indicates that proponents have a special duty to provide communities that may be affected by a proposed action with information about that action, to consult with affected Indigenous communities in a culturally appropriate manner, and to address Indigenous values and the rights and interests of Aboriginal communities (s43).

However, we note that the Minister/NTEPA also have obligations to ensure that the legislative object of ensuring participation by Aboriginal people and communities in environmental decision-making processes is met (see in particular, section 3(e)). This should be explicitly stated in the Draft Guidance Note. Echoing the comments above, ECNT notes that the Draft Guidance Note should ensure that culturally appropriate Indigenous participation/engagement is integrated at *every* step of the environmental assessment process, from scoping through to approval (and post-approval compliance). In short, Indigenous engagement should be *ongoing* for the duration of the project, not merely sought at the scoping/initial assessment stage and in preparation of environmental assessment documentation by proponents (which is the current focus/bias of the Draft Guidance Note). This entails not only elucidating obligations to be fulfilled by proponents, but also explaining the points at which NTEPA action is required. The Draft Guidance Note should be amended to reflect this.

We are also concerned about inaccuracies in the description of the other applicable statutory frameworks operating with respect to engagement with Indigenous peoples. This has the potential to seriously mislead proponents and the public. In particular, the Draft Guidance Note appears to conflate these other statutory processes with the proponent/Minister’s/NTEPA’s obligations to ensure adequate Indigenous engagement under the *Environment Protection Act*. Specifically, the application or otherwise of the *Northern Territory Sacred Sites Act*, the *Aboriginal Land Rights (Northern Territory) Act*, or the *Native Title Act* (each addressing completely different legislative subject matter) has little bearing on whether or not the requirements for public participation/engagement are met under the *Environment Protection Act*. The Draft Guidance Note should state that compliance with these statutory frameworks should not be viewed by proponents or the NTEPA as a proxy for compliance with the requirements for engagement with Indigenous groups and communities in the *Environment Protection Act*. Further, the Draft Guidance should

clearly state that proponents must seek their own legal advice regarding compliance with these legislative frameworks. We recommend that the wording of these sections should be cleared with Northern Territory land councils and the Aboriginal Areas Protection Authority (AAPA) prior to finalisation of the Draft Guidance Note.

We highlight the following specific inaccuracies in the Draft Guidance Note which should also be corrected:

- AAPA does not have a stand-alone statutory obligation under the *Northern Territory Sacred Sites Act* to consult with custodians with respect to sacred sites issues in the vicinity of a project. The obligation for AAPA to consult with custodians is only invoked if an application for an authority certificate is made. Authority certificates are voluntary, not mandatory.
- On Aboriginal land owned under the *Land Rights Act*, land councils do not have a statutory function of providing assistance to proponents with advice for their compliance with Indigenous participation/consultation requirements under the *Environment Protection Act*. Land councils' role of identifying and consulting traditional owners is typically engaged in relation to the negotiation of agreements for the purposes of compliance with or implementation of the *Land Rights Act*. Indeed, it would be rare for a land council to disclose the identity of traditional owners or provide anthropological information and expertise to support proponent consultations/engagement under the *Environment Protection Act*.
- On land which may be subject to native title rights and interests, the *Native Title Act* applies. The Draft Guidance Note incorrectly states that the National Native Title Tribunal has responsibility to consult with native title holders under this legislation. Rather, obligations to consult with native title holders only arise in certain contexts (depending on whether and which part of the future act regime is invoked in the *Native Title Act*), and such consultations are the responsibility of either native title representative bodies prior to a native title determination by the Federal Court (ie the Northern Land Council or Central Land Council) or prescribed bodies corporate after such a determination. As with Aboriginal land, these institutions have no explicit statutory function of providing assistance to proponents with advice for their compliance with Indigenous participation/consultation requirements under the *Environment Protection Act*.
- The Draft Guidance Note incorrectly refers to s38 of the *Northern Territory Sacred Sites Act* as imposing a general prohibition on the disclosure of information that is secret according to Aboriginal tradition. This section only applies to documents furnished or produced for the purposes of this legislation.

If you have any questions in relation to ECNT's submission, please contact Shar Molloy on [shar.molloy@ecnt.org](mailto:shar.molloy@ecnt.org)

Yours faithfully,

Shar Molloy, Director  
Environment Centre NT

Jimmy Cocking, CEO  
Arid Lands Environment Centre