

# Draft Environment Protection Regulations 2019

Summary and response to submissions

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<b>Contact details</b>	Department of Environment and Natural Resources, Environment Division
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## 1. Introduction

The new Environment Protection Act 2019 (EP Act) was passed in September 2019.

The EP Act modernises the environmental impact assessment process for the Northern Territory (NT) and introduces new features to support a strengthened and more sophisticated approach to environmental regulation; including an environmental approval, provision for environmental offsets and an option for strategic assessment.

Draft Environment Protection Regulations (draft Regulations) have been prepared to support the EP Act. They contain four core elements:

1. processes for the Minister for Environment and Natural Resources (the Minister) to follow when making declarations of environmental objectives or a referral trigger
2. processes for the Minister to follow when making declarations of protected environmental areas or prohibited actions
3. processes for the Northern Territory Environment Protection Authority (NT EPA) to follow in conducting the environmental impact assessment process
4. prescribing a number of matters required by the Act; e.g. specifying matters to be contained in public registers and processes to be followed when calling on an environment bond.

The Draft Regulations were released for public consultation in November 2019 for a period of six weeks. The Department of Environment and Natural Resources also met with key stakeholders to provide a briefing on the Regulations and address any initial questions or concerns.

This report summarises the key issues on the draft Regulations identified in the submissions and the proposed changes or response to the issues raised. It does not address all comments made on the draft legislation.

## 2. Background

Ten submissions were received from:

1. The Environment Institute of Australia and New Zealand (EIANZ)
2. The Association of Mining and Exploration Companies (AMEC)
3. NT Farmers Association
4. The Northern Land Council (NLC)
5. Ward Keller, The Territory Law Firm
6. Arid Lands Environment Centre (ALEC)
7. Australian Petroleum Production and Exploration Association (APPEA)
8. The Environmental Defenders Office NT (EDO)
9. The Environment Centre NT (ECNT)
10. The Minerals Council of Australia, NT (MCA)

The key areas of support communicated by a number of the submissions relate to increased clarity and certainty, particularly associated with prescribed timeframes, and greater transparency and accountability

within decision-making. A clear statutory decision-making process was recognised as an important part of improving certainty for investment.

The intent of the legislation in modernising the environmental impact assessment and environmental approval framework was also recognised and drafting the Regulations to provide a high level of protection for the environment was supported.

Conversely, key areas of concern relate to the potential for decreasing certainty for proponents associated with a perceived increase in regulatory burden. This is linked to Regulations that allow the NT EPA to require additional information and an associated ability to stop the clock. Uncertainty was also linked to the NT EPA's ability to respond to new information by amending terms of reference or requiring a different environmental impact assessment methodology. There was also a perceived lack of accountability for the NT EPA and government authorities in meeting their timeframes.

## 3. Key Issues

### 3.1. Issue - Supporting documentation

There were numerous areas in the draft Regulations where submissions suggested the need for guidelines, controls and standards to support decision-making of the NT EPA and the Minister for Environment and Natural Resources. This includes:

- Determining a fit and proper person.
- Declarations of protected environmental areas and prohibited areas.
- Requiring additional information through the environmental impact assessment process.
- Interpretation of 'significant impact' and its use in decision-making.
- Determining/ measuring cumulative impact.
- Consideration of climate change within the environmental impact assessment process.
- Clarification of assessment requirements for strategic proposals.
- Flowcharts to illustrate all environmental impact assessment processes, including those for significant variations.

An industry submission proposed further guidance for proponents to assist during the pre-referral stage of the environmental impact assessment process and another two other submissions recommended guidance for a proponent undertaking cultural impact assessment.

#### **Response**

*The EP Act and Regulations will be supported by extensive guidance as required.*

### 3.2. Issue – Timeframes

Most submissions recognised that defined timeframes provided certainty within the environmental impact assessment process however there was a mixed response to the timeframes proposed and their implementation.

For industry, prolonged and unmet timeframes are costly for a proponent and the submissions questioned the accountability of NT EPA and government authorities in not meeting legislated timeframes.

Industry submissions also raised concern about the NT EPA applying the 'stop the clock' process when seeking additional information and information from Government agencies.

On the other hand, the environment groups questioned the adequacy of timelines. *The Regulations must find a balance between prescription and the need for culturally appropriate consultation with Aboriginal peoples which would rarely be possible within 15 days (EIANZ).* One submission had the view that the proposed timelines do not adequately take into account the range and complexity of projects and suggests that timelines should be more responsive to risk and provide for greater flexibility.

Timeframes associated with the referral stage of the environmental impact assessment process were questioned. This included the adequacy of the 15 business days given to the NT EPA to determine to accept or refuse to accept all types of referrals it receives and the 15 business day public consultation process for referrals (noting that this will be the only public consultation opportunity if an action is to be assessed on referral information).

### **Response**

*The timeframes in the Regulations were reviewed and amendments made to increase timeframes around the referral stage of the process. Timeframes for public consultation on referral documentation will be extended from 15 business days to 20 business days, as will the period for making a decision on whether impact assessment is required and the method of assessment. This ensures that the Regulations are workable for all stakeholders who participate in the environmental impact assessment process, including the community and the NT EPA.*

*It is recognised that extended timeframes come at a cost for proponents and the Regulations have been drafted to keep timeframes as minimal as possible. For example, consultation periods with government agencies will either occur during public consultation periods or in conjunction with consultation with the proponent. The draft Regulations do not permit the NT EPA to cease its assessment to wait for such comments except with the agreement of the proponent.*

*The stop the clock provisions apply when the NT EPA is seeking information – from the proponent or experts. Other stop the clock provisions apply when the proponent is required to make a referral under the Environment Protection and Biodiversity Conservation Act 1999 (Cth; EPBC Act). The NT EPA will not be able to stop the clock to make allowance for Government departments who do not provide information within the consultation periods.*

*The Department of Environment and Natural Resources (DENR) notes the specific concerns raised about certain proposed timeframes, and the concerns about capacity for the Regulations to support appropriate consultation with Aboriginal peoples during the impact assessment process. The Regulations have been amended to allow the NT EPA to extend timeframes in consultation with proponents.*

*With respect to the concerns raised about Aboriginal peoples' participation in the process, it is incumbent on proponents to ensure that they have conducted appropriate consultation (refer s.43 of the Act) as part of developing initial referrals and assessment documentation. Consultation during assessment processes is designed to provide an additional opportunity for consultation with the broader community and does not replace appropriate consultation with impacted communities.*

*Inclusion of a timeframe for drafting terms of reference places an onus on the NT EPA to develop draft terms of reference in a timely manner*

### **3.3. Issue – Breadth of consultation in the environmental impact assessment process**

There were a number of concerns relating to consultation requirements in the environmental impact assessment process. Firstly, some industry submissions stated that the consultation requirements were too broad, specifically in the inclusion of government authorities, which had the potential to impact on timeframes and efficiency within the process. Associated with this is concern of the timeliness of government authorities in providing input into the environmental impact assessment process. One submission raised issue with the wording “may have a view on the matter” as the criteria on which

government authorities will be included in a consultation process, suggesting that only government authorities with responsibility for an element of an action should be included in the consultation process.

**Response**

*The Act and Regulations have been drafted to ensure an open and transparent EIA process, providing appropriate opportunity for the public and all relevant stakeholders to input and provide comment on an action. The inclusion of the wording “may have a view on the matter” allows for government authorities to participate in the environmental impact assessment process regardless of whether they have regulatory responsibilities relating to the action. The contribution of agencies such as the Department of Trade, Business and Innovation supports considered and effective decision making.*

A submission recommended that the Regulations be specific about the matters raised in public submissions that the NT EPA could consider, ensuring it focused only on matters relevant to the decision point within the EIA process.

**Response**

*Environmental impact assessment provides an iterative approach to information collection. This may initially start off with a broad examination of likely issues and increasingly narrow down to an examination of quite specific matters. While each step of the impact assessment process supports the honing of understanding they also provide a piece of a bigger picture. Directing the NT EPA to disregard information that is not solely relevant to a decision point does not support the mechanics of impact assessment. It may also result in additional legal challenges about whether the NT EPA correctly, or incorrectly, disregarded information. For example, at any particular stage of the environmental impact assessment process it would be difficult to prove whether the NT EPA’s understanding on a matter has come from submissions received at the current decision-making point or at an earlier stage of the process.*

A couple of the submissions recommend that the Regulations be amended to require consultation with Northern Territory Land Councils. There was also a suggestion for consultation to extend to Native Title Representative Bodies, Native Title Bodies Corporate, or Registered Native Title Parties (Aboriginal Land Holders).

**Response**

*It will not always be relevant for Land Councils and similar bodies to be consulted.*

*It is incumbent on proponents to ensure that they have conducted appropriate consultation (refer s.43 of the Act) as part of developing initial referrals and assessment documentation. Consultation during assessment processes is designed to provide an additional opportunity for consultation with the broader community and does not replace appropriate consultation with impacted communities.*

Two non-government organisations view the number of opportunities for consultation with a proponent during the decision-making process as being excessive (particularly in comparison with public consultation) and raise concern on a proponent’s ability to influence the process.

**Response**

*The Regulations allow the NT EPA to liaise with a proponent at a couple of points in the environmental impact assessment process, including the drafting of terms of reference as well as the drafting of an environmental approval. The opportunities for engagement with a proponent are aimed at achieving a clear, focussed and effective environmental impact assessment process.*

*The intent is to ensure that the NT EPA and the proponent both have a common understanding of the matters that are subject of the assessment. Ensuring the proponent is conversant with the concerns of the NT EPA and the expectations it has for the assessment process allows for a clearer and more focused assessment. Similarly, ensuring that the NT EPA fully understands a proponent’s proposed action, mitigation measures, operations etc.*

*allows for a more focused assessment and ensures an environmental approval will achieve the outcome being sought by the approval and its conditions.*

*Show cause and consultation processes also ensure natural justice.*

### **3.4. Issue – Strategic assessment**

Environment organisations posed a number of questions about strategic assessment, aimed at ensuring that the strategic assessment provisions will provide a high level of rigour and lead to stronger environmental outcomes. The submissions stated that guidance and clarification was required to inform the circumstances of when a strategic environmental assessment would be required and how it would operate.

There was concern expressed in one submission that a proponent may avoid the strategic assessment of cumulative impacts associated with an action by separating it into its key elements and submitting separate referral documents for a standard assessment.

#### **Response**

*Guidance material will be developed to assist proponents in determining when it would be appropriate to submit a strategic proposal.*

*The NT EPA may refuse to accept a referral on the basis the referral relates to part of a larger action by the proponent and information on the whole action is required to make an assessment decision. This applies to both strategic and standard assessment processes.*

### **3.5. Issue – Matters for inclusion in the environmental impact assessment process**

The Regulations provide for a suite of matters to be included in the environmental impact assessment process ensuring that an assessment document gives focus to all elements of 'environment' as defined in the EP Act as *may be required*. In general this element of the Regulations was supported, however a number of submissions sought for the provisions to be further strengthened by *requiring* all matters to be considered, at least in the pre-referral and referral stages. It was argued that good scoping and early engagement will help ensure that studies are proportionate to the level of likely impact, enhancing the efficiency and effectiveness of impact assessment. There was also argument that there needs to be a greater focus on quality social, cultural and economic studies in impact assessment documents.

#### **Response**

*The Regulations use the word 'may be required' because not all matters are always relevant to an assessment of an action. Requiring the consideration of all matters, even when those matters are not relevant to the action, does not support an efficient impact assessment process.*

*DENR and the NT EPA agree that there needs to be a better focus on quality social, cultural and economic studies as part of the environmental impact assessment process. A social impact policy for the NT is being drafted. The NT EPA will review and revise its guidelines for social impact assessment once the Policy is finalised.*

It was suggested that a policy or protocol on cultural impact assessment should be developed in consultation with the NT's land councils and the Aboriginal Areas Protection Authority.

#### **Response**

*DENR and the NT EPA will engage with all relevant stakeholders throughout the development of guidance material and implementation of the new legislation.*

It was argued by one submission that the spectrum of assessment matters was duplicative, overlapping with areas regulated by other government agencies with expertise in those areas. It also questioned the expertise of the NT EPA in assessing cultural impact assessment documents and sought clarification on the hierarchy of matters.

**Response**

*It is the responsibility of the NT EPA to satisfy itself that the potentially significant impacts on the environment have been properly assessed and addressed through project identification and planning. Environment is defined broadly and includes social, cultural and economic matters as well as the biophysical environment. The NT EPA obtains expert advice from a range of Government agencies and external stakeholders during the assessment process. This includes agencies and stakeholders with expertise in assessing and regulating cultural matters.*

*The draft Regulations do not provide a hierarchy of assessments and to do so would add unnecessarily to the process. Different assessments are required based on the specifics of the proposed project.*

Another submission raised concerns with the definition of 'cumulative impact assessment', expressing concern that it may not properly capture the matters that should be considered.

**Response**

*The draft Regulation has been reviewed and amended to provide a broader suite of matters to be considered.*

### 3.6. Issue – Referral process

There were a number of issues raised about the referral process. A number of submissions stated that proponents will require guidance to understand the types of actions that will need to be referred to the NT EPA; this is particularly important to industries where experience in the environmental impact assessment process is limited.

**Response**

*The NT EPA will prepare guidance material to assist proponents to undertake self-assessments and to determine when referral may be required.*

One submission stated that the Regulations should specify the minimum threshold of information that must be provided for a referral. Another submission argued that the Regulations needed to ensure a referral document included outcomes of the proponent's consultation with Aboriginal communities.

**Response**

*There will be public guidance outlining the information requirements for the preparation of a referral document.*

*It is incumbent on proponents to ensure that they have conducted appropriate consultation (refer s.43 of the Act) as part of their general duties under the environmental impact assessment process.*

A submission from an industry sector stated their support for a referral based upon a proposed action's potential for significant impact. It was argued that activity-based triggers for referrals could result in a distortion of the assessment process where restrictions are applied to one industry and not to another.

**Response**

*The Regulations include a publicly consultative process for developing referral triggers to ensure industry and community concerns around specific activities can be considered.*

*Where triggers have not been declared, referral is based on the potential for significant impact on the environment which provides a risk based approach to the environmental impact assessment system.*

*There are currently no activity or location based triggers proposed.*

A submission from an industry representative argued for a limited consultation process to support the referral process (in respect to government authorities) and expressed their concern about the NT EPA considering public submissions made on an accepted referral that raise issues not immediately relevant to the decision of whether a proposed action requires impact assessment.

**Response**

*The environmental impact assessment process for an action will focus on those matters that have the potential for significant impact on the environment and submissions received during the assessment process will contribute to the NT EPA's understanding of potentially significant impacts. This focus on matters of significant impact means that not all matters identified in a submission will be accepted as relevant for the assessment process.*

*Directing the NT EPA to disregard information that is not solely relevant to a decision point does not support the mechanics of impact assessment. It may also result in additional legal challenges about whether the NT EPA correctly, or incorrectly, disregarded information.*

### 3.7. Issue – NT EPA decision on an accepted referral

There were a number of issues raised in submissions about the process for the NT EPA's decision on an accepted referral as well as the decision options available to the NT EPA.

A couple of the submissions argued for the NT EPA's decision-making criteria to include the level of community interest in the proposed action. It was recommended that the Regulations make it explicit that the NT EPA's judgement of impact reflected potential significant environmental impacts as well as high levels of community concern.

A submission raised concern that the Regulations could be inappropriately relied upon by the NT EPA to determine that a proposed action be subject to an assessment methodology that does not reflect the complexity or potential significance of a proposed action.

**Response**

*It is incumbent on proponents to ensure that they have conducted appropriate consultation (refer s.43 of the Act) as part of developing initial referrals and assessment documentation.*

*Consultation during assessment processes is designed to provide an additional opportunity for consultation with the broader community and does not replace appropriate consultation with impacted communities. It is appropriate for the NT EPA to consider the engagement that has occurred in making an assessment decision.*

*The level of public interest or concern about a proposal is not a risk based measure of the potential impacts of the project. The criteria include requirements that consider the level of engagement that has occurred with the impacted community.*

A submission raised concerns at some subjectivity within the criteria that is to be used by the NT EPA to determine the methodology of environmental assessment. It also raised concern that the wording of the criteria referring to communities likely to be affected by a proposed action could be interpreted in a manner that limits consultation on technical aspects of the action.

**Response**

*The criteria that refers to a community's capacity to access and understand information ensures the NT EPA considers an EIA methodology that best meets the needs of potentially impacted communities (for example, requiring information to be published in language or provided orally etc.).*

Submissions from industry representatives strongly opposed the inclusion of an early refusal provision in the Regulations. It was argued that the NT EPA should not be able to make a recommendation to the

Minister to refuse to grant approval to an action before the action has completed an environmental impact assessment.

**Response**

*Government has determined to include an 'early refusal' process as a mechanism for limiting costs to proponents and Government for clearly unacceptable projects.*

*This power accords with powers contained in the EPBC Act.*

### **3.8. Issue – Reconsideration of method of environmental impact assessment**

A couple of submissions raised concern about the ability of the NT EPA to reconsider the environmental impact assessment methodology for an action during the environmental impact assessment process. It was argued that these provisions were contrary to a process based on certainty and would act as a disincentive to investment.

**Response**

*The Regulations have been amended to ensure any amendment to the environmental impact assessment methodology for an action is justified and related to the potential significant impacts of an action.*

*Being responsive to a change in circumstance means the stringency of an assessment methodology for an action is able to increase or decrease. This ensures the assessment process is able to be cost-effective and efficient.*

*It should be noted that the circumstances of when the NT EPA can amend the assessment methodology are limited. The Regulations identify the circumstances under which the NT EPA can seek to amend the methodology, and the changes must be necessary for an assessment to meet the objects of the Act and to achieve the purpose of environmental impact assessment.*

### **3.9. Issue – Public consultation**

The inclusion of public consultation through the environmental impact assessment process was supported by some of the submissions, including the requirement for issues raised in submissions to be considered and the requirement for the submissions to be published.

The issue of withholding information was raised in a number of submissions. Industry representatives argued that some of the information provided cannot be placed in the public arena because of commercial in confidence issues; accordingly the Regulation that provides for confidential information being withheld was supported.

It was also argued that all culturally sensitive information to be provided appropriate protection.

**Response**

*The Regulations allow a person making a submission to request their submission (or part of the submission) not be published.*

*The EP Act also includes provisions that allow for information to be withheld from the public, including for commercial in confidence reasons, cultural reasons, legal professional privilege etc.*

There were a couple of points of public consultation where a submission argued for the consultation period to be longer.

An industry representative questioned the requirement of the Regulations for the publication of submissions to occur 'as soon as practicable after they are received'. It proposed that submissions be published only in conjunction with decision points in the environmental impact assessment process.

**Response**

*The publication of material, including submissions, occurring as soon as practicable provides greater transparency in the impact assessment process. Submissions being published only in conjunction with decision points in the environmental impact assessment process does not support the principle of transparency. The term 'as soon as practicable' is used where the inclusion of a specific timeframe (such as 10 business days) may be too long or too short in the circumstances.*

### **3.10. Issue – Setting timeframes for proponents to lodge environmental impact assessment documents**

Submissions from industry representatives question the provisions contained in the Regulations that allow the NT EPA to determine the timeframe in which environmental impact assessment documentation is to be lodged. It was argued that these provisions are not required because the cost of an assessment acts as a driver for the timely completion of the assessment process. The submissions further argued that if the provisions are to remain it needs to be clear that the NT EPA's direction on timeframes should be constrained to what is fair and reasonable and must be done in consultation with the proponent. It was also argued that provisions allowing a proponent to seek an extension to the time period creates regulatory burden and any reasonable request for an extension should not be refused by the NT EPA.

**Response**

*Timeframes imposed on proponents are framed in the context of 'the period specified by the NT EPA' which provides flexibility and allows the NT EPA and proponent to discuss proposed timeframes. The Regulations set out matters that the NT EPA needs to consider when determining the assessment period. Timeframes may be extended at the request of the proponent and the NT EPA cannot unreasonably refuse a request.*

### **3.11. Issue – Process for drafting and amending terms of reference**

The main issue raised about the process for setting terms of reference (for either an environmental impact statement or assessment by inquiry) was whether the proponent should be consulted during the drafting process. Submissions from industry representatives argued that a proponent *must* be consulted whereas an environmental non-government organisation argued that consultation with a proponent should not occur.

**Response**

*It is usual practice for the NT EPA to consult with proponents during the preparation of draft terms of reference. The Regulations will remain unchanged to support this practice. The Regulations will not be amended to state that all proponents must be consulted because not all proponents need or want to be consulted.*

A submission raised concern about the NT EPA's broad powers to include any matter in the Terms of Reference.

**Response**

*The definition of environment is broad and includes the biophysical environment as well as social, cultural and economic matters.*

*The NT EPA needs broad powers to include in terms of reference any matter that is incorporated into this definition of environment.*

Allowing terms of reference to be amended once they have been finalised raised concern with industry representatives. It was argued that the provisions reduce certainty and are potentially highly disruptive to the assessment process. A submission also stated that the use of these provisions needs to be restricted to ensure they would only apply to newly recognised environmental risks. This submission also suggested that the Regulations be more specific about the kinds of new information that would warrant the NT EPA seeking to amend terms of reference. Another submission argued for the inclusion of a show cause process to ensure the reasoning of the NT EPA is understood, supporting increased transparency within the process.

An industry submission also sought for the Regulations to ensure that the NT EPA is only authorised to amend terms of reference or prepare an addendum to the original terms of reference in the event that a proponent submits a significant variation. This ensures the NT EPA does not take the opportunity to expand the terms of reference beyond what is required to adequately address the variation.

### **Response**

*The draft regulation is consistent with similar provisions contained in the EPBC Act and other environmental legislation.*

*The Regulations have been updated to ensure an amendment of terms of reference only occurs if the NT EPA considers it necessary to meet the objects of the Act and to achieve the purpose of environmental impact assessment as set out in the Act.*

## **3.12. Issue – Preparation of supplement to draft environmental impact statement**

A concern was raised about a proponent being required to respond to all issues raised in public submissions, arguing that the NT EPA should have a role in vetting the submissions. Another submission suggested that requiring a proponent to only “respond” to public submissions may be inadequate, particularly when a proponent should be required to address concerns raised in a sufficient manner.

### **Response**

*Amending the regulation as suggested places an onus on the NT EPA to judge the efficacy of comments made during the public submission process and does not provide the proponent with natural justice. Proponents may choose not to respond to submissions or to aggregate their responses where submissions address similar matters. In the circumstances that a proponent does not adequately address concerns raised in a submission the NT EPA has the option of seeking additional information (where that information is necessary)*

A couple of the submissions raised concerns about provisions that allow the NT EPA to waive the requirement for a supplement to an environmental impact statement. It was recommended that the Regulations be amended to specify that the NT EPA may only waive the requirement for a supplement in exceptional circumstances, stating that this should only occur if it's in the public interest to do so.

### **Response**

*This power is appropriate. There may be circumstances where there are no submissions or the submissions do not raise new matters requiring a response. Guidance will be developed to assist proponents and the community understand when a request for a waiver may be granted.*

## **3.13. Issue – Assessment by inquiry process**

One submission raised concerns about the assessment by inquiry process, seeking clarification about the likely process, the circumstances of when it may be required, the cost, the involvement of the proponent and the mechanics of an assessment by inquiry process being run concurrently with another environmental

impact assessment methodology. There was also concern that an assessment by inquiry process done in conjunction with another assessment methodology may result in duplication on assessment matters.

**Response**

*The Regulations require the NT EPA to consult with the Minister and proponent before recommending an assessment by inquiry.*

*The inquiry panel is to develop and publish procedures for the inquiry. This ensures flexibility in the inquiry process ensuring the process is responsive to the needs of the project.*

*The Regulations have been amended to clarify that where an assessment by inquiry is undertaken in conjunction with another assessment methodology the two processes are not to duplicate each other.*

*Guidance material will be developed to assist the NT EPA and proponents in determining when an inquiry may be an appropriate method of assessment*

### **3.14. Issue – Assessment reports process**

There were a few concerns raised by some submissions about the assessment report process. The MCA raised concern that the NT EPA may consult a proponent when preparing a statement of unacceptable impact, arguing it was required. Conversely, environmental NGOs argued against consultation on either the draft environmental approval or draft statement of unacceptable impact.

**Response**

*The Regulations state the NT EPA may give a copy of a draft statement of unacceptable impact to a proponent (rather than requiring a copy be given to the proponent) because there is a compulsion on the Minister, as decision maker, to consult with the proponent if they intend to refuse to grant an environmental approval. It has been drafted in this way to minimise duplication of process.*

*The Regulations include show cause processes and consultation processes to provide certainty and ensure natural justice.*

A submission questioned the natural justice of the NT EPA being able to consider information in its assessment that was not either provided by the proponent or raised in a submission which had been shared with the proponent.

**Response**

*Directing the NT EPA to disregard information may result in additional legal challenges about whether the NT EPA correctly, or incorrectly, disregarded information. For example, at any particular stage of the environmental impact assessment process it would be difficult to prove whether the NT EPA's understanding on a matter has come from submissions received at the current decision-making point or at an earlier stage of the process.*

A submission argued against the regulation which allows the NT EPA to disregard any new information in a submission if it is satisfied that the information could have been raised earlier in the assessment process.

**Response**

*The regulation was included as a protection for industry to limit the introduction of new information at the end of the assessment process where that information could have been presented and considered earlier. However, it was recognised that the NT EPA has the expertise to determine the appropriate weighting for information it receives at various stages of the assessment process and the regulation has been removed.*

A submission argued that the Regulations should ensure the Land Councils are also invited to comment on a draft environmental approval or draft statement of unacceptable impact.

**Response**

*It will not always be relevant for Land Councils to be consulted.*

*Government has previously determined that there will be no public or stakeholder consultation in regard to the conditions on proposed approvals.*

### **3.15. Issue – Requiring additional information during the environmental impact assessment process**

The Regulations provide for the NT EPA to require additional information at any time through the environmental impact assessment process. Submissions from industry representatives were not supportive of these provisions and the associated ability of the NT EPA to stop the clock or suspend the environmental impact assessment process. It was argued that it went against normal process, impacting on certainty and timeframes. There was argument that there is no justification for the NT EPA to suspend an environmental impact assessment underway if it seeks, or requires the proponent to seek, expert advice, unless the advice is not provided by the end of the environmental impact assessment process.

It was recommended that this element of the Regulations needed to be coupled with a requirement on the NT EPA to demonstrate why the information is essential.

**Response**

*The Regulations recognise that circumstances may change during the assessment process. This may include changes in knowledge or situation. These provisions provide the flexibility for the NT EPA to respond to changes in circumstance, noting that any request for additional information must be in keeping with the objects of the Act.*

### **3.16. Issue – Amending environmental impact assessment methodology**

The submissions from industry representatives did not support Regulations that allow the NT EPA to reconsider the method of environmental impact assessment for a proposed action, arguing that it is contrary to certainty and acts as a disincentive to investment. They argued that the Regulations were appropriate only in the circumstance that the change in environmental impact assessment methodology is necessary because the proponent changes the design, location or other essential characteristic of the action. It was argued that in the circumstance where additional information becomes available the NT EPA should use the Regulations to seek the information it requires to complete its assessment (rather than amending the environmental impact assessment methodology). It was also argued that the NT EPA must be required to justify its decision to reconsider the method of environmental impact assessment.

**Response**

*The Regulations provide the NT EPA the power to request additional information from a proponent and this would be the most likely and practical method of dealing with new information about impacts of a project. The inclusion of the regulation that allows the NT EPA to amend the environmental impact assessment methodology provides a formal mechanism for a situation where a proponent does not adhere to the request for information. Amendments can occur if the changes are necessary for an assessment to meet the objects of the Act and to achieve the purpose of environmental impact assessment.*

*Being responsive to a change in circumstance means the stringency of an assessment methodology for an action is able to increase or decrease. This ensures the assessment process is able to be cost-effective and efficient.*

### 3.17. Issue – Suspension/ Termination of environmental impact assessment process

The Regulations set out the circumstances of when the NT EPA may suspend an environmental impact assessment process, for example, at the request of a proponent, or to allow the action to be referred to the Commonwealth Government. The submissions from industry representatives did not support the NT EPA being able to suspend the environmental impact assessment process in the circumstance that it seeks or requires the proponent to seek expert advice, arguing that it would unnecessarily delay and prolong the environmental impact assessment process.

#### **Response**

*The inclusion of the Regulation that allows the assessment process to be suspended in the event that expert advice is sought provides the practical logistic of ensuring the advice is both received and considered during the assessment period. The removal of this Regulation may result in expert advice being given once the assessment of an action has been completed. Suspension of the process will be dependent on the advice being sought and the time required to consider the advice. It is likely however that work will continue on those aspects of the assessment that are unaffected/separate to the matter on which advice is being sought.*

### 3.18. Issue – Power to obtain advice/ direction to proponent to obtain an independent review

Industry representatives raised concern with the regulation that allows the NT EPA to apply a cost recovery process to pay for the advice it requires. There is the view that the proponent should not be required to pay for the provision of advice that the NT EPA independently sources – this should be a cost taken on by the NT EPA.

#### **Response**

*Independent reviews need to be conducted by a person that is not an employee or otherwise related to the proponent. While it is standard practice for industry to pay for 'independent reviews' the Regulation ensures that the proponent is consulted where costs may be incurred that are intended to be charged to the proponent.*

### 3.19. Issue – Cost recovery provisions

The industry representatives made submission on this element of the Regulations – one submission argued against the inclusion of cost recovery, whereas other submissions recognised that cost recovery is a well-known practice and recommend that the Regulations impose a cap to the costs that can be recovered. It was also argued that a cost recovery service needs to be accompanied by a process for accounting for and returning funds at the conclusion of the assessment process.

#### **Response**

*Fees for assessment processes are not being introduced at this time. Consultation will be undertaken before they are introduced.*

*Fees for assessment processes would be prescribed in a schedule of fees that would be attached to the regulations.*

### 3.20. Issue – Notice of significant variation

The Regulations set out the process for when a notice of significant variation is received by the NT EPA, including the decision options available to the NT EPA, depending on when in the environmental impact assessment and approval it is received.

The Regulations allow the NT EPA to consider a notice of significant variation after it has drafted an assessment report and prepared a statement of unacceptable impact. In this circumstance the Regulations allow the NT EPA to assess the information in the notice of significant variation and change its advice, determining that the significant impacts of the proposed action can be avoided or mitigated or managed through the conditions of an environmental approval. A submission expressed concern with this option arguing that it seriously undermines the accountability and transparency of the decision making process.

**Response**

*The NT EPA's decision will be informed by public consultation on the significant variation referral. Under the Regulations the NT EPA is required to prepare an assessment report explaining its decision to recommend the statement of unacceptable impact be rescinded and an environmental approval be granted. This process effectively provides an assessment on referral information and contains the same public consultation requirements as that of an assessment process.*

### 3.21. Other issues

The submissions raised a number of issues. This report addresses those issues that were common among a number of respondents. A summary of other matters is provided at Attachment A.

## 4. Where to from here?

The Regulations have been reviewed and amended based upon the feedback received during face to face consultations as well as the written submissions from stakeholders. It is anticipated the Regulations will commence operation by mid 2020.