Environmental Defenders Office

Submission on the Northern Territory Draft Greenhouse Gas Emissions Offsets Policy and Technical Guidelines

15 October 2021

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

Submitted via email at environment.policy@nt.gov.au

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Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to provide comments on the draft *Greenhouse Gas Emissions Offsets Policy and Technical Guidelines* (**draft Policy**) from the Northern Territory (**NT**) Department of Environment, Parks and Water Security (**DEPWS**).

EDO is an independent community legal centre specialising in public interest environmental law. EDO advocates for strong environmental laws and effective compliance and enforcement of the regulatory frameworks that protect our important natural assets and unique landscapes, including policy relating to the regulation of greenhouse gases.

We have reviewed the draft Policy. The draft Policy aims to identify how and when to use offsets in the NT to compensate for greenhouse gas (**GHG**) emissions, and is a statutory instrument under the *Environment Protection Act 2019* (NT) (**EP Act**).[1] The draft Policy forms a component of the Northern Territory Offsets Framework (**the NT Offsets Framework**) alongside the NT Offsets Principles, the NT Biodiversity Offsets Policy and Technical Guidelines, the Administrative Guidelines and the Offsets Register.[2] The draft Policy refers to the NT Government's 'Climate Change Response: Towards 2050' (**Climate Change Response**) which identifies the NT Government's target to achieve net zero GHG emissions by 2050.[3] In this context, we make a number of recommendations.

Recommendations

It is EDO's view that, to effectively reduce GHG emissions and the risks associated with climate change, it is essential that the draft Policy:

a. specify that the goal of the draft Policy should be to facilitate an overarching goal of making projects carbon neutral (i.e., no net emissions);

b. include a clear definition of the 'Prescribed Acts' to which it applies;

[1] *Environmental Protection Act 2019* (NT) s 125(2).
[2] *Greenhouse Gas Emissions Offsets Policy Consultation Draft 2021* (NT) 1-2 (**Draft Policy**).
[3] Draft Policy 1.

c. include a clear definition of terms associated with emissions offsets (e.g. land clearing, resource exploration and extraction, and the establishment and ongoing operation of a facility);

d. address how emissions offsetting may impact First Nations communities, and outline steps to avoid negative impacts on these communities;

e. require proponents to prove they have explored all possible options to acquire a sufficient amount of Territory-generated Australian Carbon Credit Units (**ACCUs**);

f. require proponents, where it is not possible to solely use Territory-generated ACCUs, to have their emissions offsets consist of at least 50% direct emissions offsets and at least 50% offsets that provide clearly identified tangible co-benefits to the NT (the policy should also include a definition of 'co-benefits');

g. be accompanied by the prompt development of the Administrative Guidelines under the NT Offsets Framework;

h. require that plans or strategies provided as part of an emissions offset approval condition include estimates of both annual and total emissions over the life of the proposal;

i. require public reporting under an emissions offset approval condition to occur on an annual basis;

j. specify more clearly the enforcement mechanism for offsets, including assessing reports, conducting and referring to audits, gathering information and undertaking inspections;

k. include compliance mechanisms relating to requirements for annual public reporting and annual review by the Minister or the Northern Territory Environment Protection Authority (**NT EPA**);

l. require proponents to describe in a Greenhouse Gas Abatement Plan (**GGAP**) the cumulative impacts of a proposal's GHG emissions in the context of Australia's commitment to limiting global average temperature rise to 1.5^{o}C; and

m. specify the amount of emissions that constitutes a significant residual emission.

This submission addresses the following nine issues:

- **Purpose and target of emissions offsets**
- **Policy application and scope**
- **Applying emissions offset requirements**
- **Types of emissions offsets**
- **Emission offsets: order of priority**
- **Delivery requirements and timeframes**
- **Expressing offset requirements in an emissions offset approval condition**
- **Compliance and enforcement**
- **Monitoring, adjustments and reporting**

1. Purpose and target of emissions offsets

The purpose of the draft Policy—to establish how offsets will be used to assist with the NT Government's goal of achieving net zero GHG emissions by 2050[4]—seeks to make an important contribution to the problem of climate change. However, a net zero target by 2050 is not sufficient to achieve the goals of the Paris Agreement, namely to limit global warming to well below 2, preferably to 1.5 degrees, Celsius (**°C**) compared to pre-industrial levels.[5] On its own, a net zero target by 2050 does not limit GHG emissions to a carbon budget consistent with limiting to warming to 1.5°C. It is important that any goal of net zero GHG emissions be informed by the carbon budget that is required to achieve this goal **and** limit warming in line with the Paris Agreement. The contribution of offsets must be considered in this context.

Australia is already experiencing the impacts of climate change, which include the warming and acidification of oceans, sea level rise, increased and more intense rainfall in the north of the country, and long-term increases in extreme fire weather. Extreme heat days, longer dry spells, and harsher fire weather will become increasingly common, although the severity of impacts experienced will be less if emissions can be reduced.[6]

In light of the unequivocal scientific evidence of the impacts of anthropogenic climate change, the international community agreed in late 2015 to limit the increase in global average temperature

[4] Draft Policy 1.
[5] *Adoption of the Paris Agreement*, FCCC/CP/2015/L.9/Rev.1, 'Annex - Paris Agreement', Article 2 ('*Paris Agreement*')
[6] The Bureau of Meteorology and CSIRO, *State of the Climate 2020* (2020).

to well below 2°C above pre-industrial levels and to pursue efforts to limit the increase to 1.5°C.[7] The Paris Agreement provides clear impetus for strong action and targets on climate change across government, business and community sectors. Failing to limit global warming to 1.5°C will have catastrophic impacts including greater levels of sea-level rise and coastal inundation, extreme heatwaves, severe droughts, coral reef bleaching, and mass extinctions.[8] The impacts of climate change are not just environmental: there will be significant implications across all sectors, including health, the economy and national security.[9]

Hence, strong action must be taken to avoid new or expanded sources of GHG emissions. We recommend that the final Policy specify the target for emissions offsets is to ensure that **all new projects are carbon neutral** (i.e. any projects that have residual emissions after applying the offset hierarchy should be required to achieve no net emissions). In this context, we note the importance of the offset hierarchy and support the recognition in the draft Policy that "(a)voiding or mitigating GHG emissions (emissions) is the preferred approach."[10]

2. Policy application and scope

We recommend that the draft Policy be expanded to include strong, proactive targets for specific industries. The Grattan Institute's report *Towards net zero: Practical policies to offset carbon emissions* ('**Grattan Report**') highlights industries that could benefit from a clear path to net zero. This includes light vehicles, diesel and aviation fuel, energy efficiency in industry, and agriculture.[11] A similar approach could be taken with the mining and gas industry. The Grattan Report approach also relates to the provision of a list of 'Prescribed Acts' in the draft Policy. The NT Government should look at where the most significant GHG emissions in the NT are sourced and work with those industries to achieve net zero through more ambitious targets. As a final step, offsets should supplement the ambitious targets where there are unavoidable emissions.

[7] In December 2015, over 190 nations affirmed a goal to reduce GHG emissions to limit average global warming to well below 2°C above pre-industrial levels and to pursue efforts to limit warming to 1.5°C: *Paris Agreement*. The Paris Agreement builds on past international commitments in Cancun, Lima and elsewhere under the 1992 UN Framework Convention on Climate Change.

[8] Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018).

[9] Ibid.

[10] Draft Policy 4.

[11] Tony Wood, *Towards net zero: Practical policies to offset carbon emissions* (Grattan Institute Report No. 2021-13, October 2021) 29 ('Grattan Report').

The draft Policy should also address how emission offsetting may impact First Nations communities, land, culture and heritage. This is an essential factor to consider, given the significant number of First Nations communities residing within the NT. A variety of issues arise from the interaction between emissions reduction schemes and native title regimes, including "whether indigenous land tenure extends to a right to benefit from carbon-management activities; how indigenous rights are affected by third-party interests; whether a native title resource right in respect of emissions reductions can be recognised; and the overarching relationship between these various rights and regulatory schemes for emissions reduction and carbon sequestration."[12] The draft Policy does not appear to deal with these issues. Similarly, the draft Policy does not refer to the Northern Territory Aboriginal Carbon Industry Strategy, despite the Strategy discussing, among other things, the rights of native title holders in the carbon offsets context.[13]

EDO welcomes the statement that the draft Policy applies in addition to the Commonwealth Safeguard Mechanism and strongly supports this proposal.

3. Applying emissions offset requirements

The draft Policy states that offsets should be applied to a project where significant residual emissions are produced.[14] In our view, the draft Policy should have as its goal the requirement that any residual GHG emissions should be offset in order to ensure new projects are carbon neutral.

In the absence of such an approach, it is recommended that the draft Policy specify what amount of emissions constitutes "significant residual emissions", rather than simply listing factors the decision maker should take into account when considering the volume of emissions that will amount to "significant residual emissions".

The draft Policy does not refer to the cumulative impact of GHG emissions from projects. Consideration of cumulative impacts is crucial in effectively assessing the contribution of proposals to global emissions and the impacts of climate change. All sources of GHGs contribute to climate change regardless of their origin or nature, which makes scope 3 GHG emissions relevant in calculating cumulative emissions. The New South Wales Land and Environment Court

[12] Maureen Tehan, "Indigenous Land Tenures and Carbon Mitigation Schemes: Lessons from Northern Australia", in Tehan, Godden, Young and Gover (eds), *The Impact of Climate Change Mitigation on Indigenous and Forest Communities International, National and Local Law Perspectives on REDD+* (Cambridge University Press, 2017) 287.
[13] Department of Environment and Natural Resources, *Northern Territory Aboriginal Carbon Industry Strategy* (2021).
[14] Draft Policy 7.1.

in *Gloucester Resources Limited v Minister for Planning* recognised the contribution of a mine's cumulative emissions to global GHG emissions and climate impacts, stating:

> *"There is a causal link between the [mine's] cumulative GHG emissions and climate change and its consequences. The [mine's] cumulative GHG emissions will contribute to the global total of GHG concentrations in the atmosphere. The global total of GHG concentrations will affect the climate system and cause climate change impacts. The [mine's] cumulative GHG emissions are therefore likely to contribute to the future changes to the climate system and the impacts of climate change."*[15]

In the absence of a requirement for projects to be carbon neutral, the draft Policy must consider the cumulative impacts of emissions from proposals. The DEPWS or the Minister should not consider the emissions of each proposal in isolation but should instead consider such emissions in the context of other existing and reasonably foreseeable future proposals. This is essential for carbon budgets to be met. The draft Policy should therefore require proponents to describe in a GGAP the cumulative impacts of a proposal's GHG emissions in the context of Australia's commitment to limit global average temperature rise to 1.5°C, compared to pre-industrial levels.

EDO disagrees with the distinction made in section 7.2 of the draft Policy between fixed emissions and threshold emissions. The inability to accurately define the GHG emissions for the life of a proposal at the assessment stage should not negate the need to offset all emissions from the proposal as the draft Policy currently expresses. While it is appropriate to provide a mechanism to ensure the amount of offsets delivered is responsive to actual measured emissions, it is not necessary to introduce a minimum threshold for those emissions.

4. Types of emissions offsets

EDO is concerned about the types of emissions offsets that could be used to satisfy approval conditions. The draft Policy provides that direct emissions offsets must be delivered using emissions offset units that are recognised by the Australian Government, including ACCUs administered and regulated under Commonwealth legislation or eligible offset units listed under the Commonwealth Climate Active Neutral Standards.[16] Further, indirect emissions offsets are to

[15] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [525].
[16] Draft Policy 8-10.

be delivered by contributing funding towards research and development that will support emissions abatement in the Territory and contribute to the 2050 net zero target.[17]

While we welcome the use of the Commonwealth Climate Active Neutral Standards, there is concern that the draft Policy fails to appreciate the role of the different types of offsets that are required to achieve the goals of the Paris Agreement.

EDO submits that offsets must be strictly regulated via a robust, science-based scheme, developed with advice from independent expert consultants, that meets best practice and considers differences between the geological and active carbon cycle.[18]

'Land carbon' offsets, such as those obtained from reforestation, are part of the 'active' carbon cycle, meaning the carbon cycles between the ocean, the atmosphere, and land. Land carbon may be released back into the atmosphere through, for example, bushfires. By contrast, carbon released into the atmosphere by burning fossil fuels is not part of the active carbon cycle but is instead geological, and additional to the active carbon cycle. Offsets utilizing 'land carbon' are, therefore, of limited utility in addressing emissions generated by fossil fuels.[19]

EDO recommends that the final Policy make a distinction between the types of offsets permitted for different projects, and should require that fossil fuel projects may only utilise offsets that are derived from mechanisms that permanently sequester carbon.

EDO is concerned that the ability for a proponent to invest in indirect offsets where the intellectual property is held by the NT Government creates the potential for a conflict of interest in project approvals. Indirect offsets should be a mechanism of last resort and very limited in application. The draft Policy should not create a potential financial incentive for the NT Government to approve the use of indirect offsets.

5. Emission offsets: order of priority

Under the draft Policy, Territory-generated ACCUs must be used to deliver as much of the required amount of emissions offsets as possible. Proponents must ensure (and be able to demonstrate)

[17] Draft Policy 10-11.
[18] Will Steffen, Jacqui Fenwick and Martin Rice, *Land Carbon: No Substitute for Action on Fossil Fuels* (2016).
[19] Ibid.

that all possible options to acquire a sufficient amount of Territory-generated ACCUs have been explored.[20]

Where Territory-generated ACCUs cannot be used to entirely satisfy offset requirements, at least 50 per cent of the required amount of emissions offsets ought to be delivered using direct emissions offsets and at least 50 per cent of the required amount of emissions offsets ought to be delivered using offsets that provide co-benefits to the Territory.[21] We recommend that 'co-benefits' be defined. We also note that simply funding R&D does not necessarily equate to actual emissions reduction.

Subject to our previous recommendation regarding the different types of offsets that should be required for different project types, EDO recommends that the draft Policy:

- require proponents to prove they have explored all possible options to acquire a sufficient amount of Territory-generated ACCUs;

- require proponents, where it is not possible to solely use Territory-generated ACCUs, to have their emissions offsets consist of at least 50% direct emissions offsets and at least 50% offsets that provide clearly identified tangible co-benefits to the Territory;

- give examples of situations where ACCUs acquired under the Commonwealth ACCU Framework may need to be used as direct emission offsets within the NT Offsets Framework; and

- explicitly state the key restrictions applicable (as currently listed on the clean energy regulator website).

6. Delivery requirements and timeframes

The draft Policy states that "an emissions offset must be delivered in accordance with the emissions offset approval condition, this policy, or the NT Offset Principles and the Administrative

[20] Draft Policy 9.
[21] Draft Policy 9.

Guidelines".[22] At the time of writing, the Administrative Guidelines have not yet been developed,[23] which creates uncertainty for the delivery of emissions offsets.

EDO is also concerned that the proposal to allow GHG emissions to be managed through an offset plan risks delaying the introduction of those offsets and makes it impossible for the community to engage in the proposed offsets. Proposals that will result in GHG emissions should be required to, at the time of assessment, provide information on how any offsets will be delivered. We expand on this below.

7. Expressing offset requirements in an emissions offset approval condition

The draft Policy states that "an emissions offset approval condition should specify the amount of emissions that need to be offset for each emitting event or period", or alternatively in "an overarching plan or strategy… prepared by the proponent and… built into an emissions offset approval condition".[24]

EDO submits that the plan or strategy should be required to include estimates of both annual and total emissions over the life of the proposal. In our view, this information is essential for decision-makers to properly assess the overall and total likely impact of the proposal on the NT's environment. For example, we note that the recent review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) proposes national standards and recommends requirements for disclosing the full emissions of projects.[25] Including similar requirements for the annual and total emissions of a proposal within the NT would provide greater clarity for decision makers.

8. Compliance and enforcement

The draft Policy requires emissions offset approval conditions to be "subject to compliance, monitoring and enforcement".[26] EDO is concerned about the lack of specificity in how compliance

[22] Draft Policy 10.
[23] 'Offsets Framework Administrative Guidelines', *Northern Territory Government* (Webpage, 2021) <https://depws.nt.gov.au/environment-information/northern-territory-offsets-framework/offsets-framework-administrative-guidelines>.
[24] Draft Policy 8.
[25] Professor Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report* (October 2020).
[26] Draft Policy 14.

with offset conditions will be enforced. The regulator's compliance and enforcement approach should be detailed in the draft Policy.

9. Monitoring, adjustments and reporting

The draft Policy requires submission of reports at regular intervals about the monitoring of actual emissions and the delivery of emissions offsets, and a final report demonstrating the overall completion of offset delivery.[27] We recommend that the draft Policy require public reporting under an emissions offset approval condition to occur on an annual basis. This will ensure that reporting occurs regularly.

EDO further recommends that the draft Policy incorporate adaptative management into the calculation of project emissions and offsets required. Ongoing monitoring, adjustments and reporting should be required to ensure that carbon offsets are sufficient. Measurement practice and technology can improve over time, resulting in new figures for both emissions and offsets, and nature-based emissions may change with the risk of climate impacts including bushfires, droughts, and floods. The ongoing process of quantifying emissions and offsets should be set at a regular interval and would need to be updated throughout the entire life of the project and offsets. According to the Grattan Report, "methods… cannot be 'set and forget': they need to be regularly reassessed both for improvements in measurement and verification and advances in their underpinning science; and also for the impacts of a changing climate on previous assumptions".[28]

The draft Policy needs to ensure the integrity of offsets by ensuring that offsets are genuine carbon removals or avoided emissions. The criteria for certifying the offsets would need to include baselining, permanence, additionality, double counting, harm and monitoring.[29] These terms are defined in the Grattan Report as follows:[30]

- Baselining is establishing a realistic and credible baseline to measure emissions avoidance.

- Permanence is the amount of time that the carbon will be locked up.

[27] Draft Policy 13.
[28] Grattan Report 31.
[29] Grattan Report 12.
[30] Grattan Report 12.

- Additionality is whether the activity would have occurred without the offsetting for example due to legal compliance.

- Double counting is where the offset is taken into account in another activity.

- Harm is so that the offset activity does not cause an adverse effect.

- Monitoring is ensuring that the offset is having the specified impact.