

Submission Form for Comments and Feedback

Draft Guideline for Identification of significant effects on the environment

Submissions close: Monday 15 August 2016, 5pm

Name:	Environmental Defenders Office (NT) Inc.	Email:	edo@edont.org.au
Organisation (if applicable):	Environmental Defenders Office (NT) Inc.	Telephone:	08 8981 5883
Address:	GPO Box 4289, Darwin NT 0801		
<p>Your comments will be publicly available.</p> <p>Mark the box here <input type="checkbox"/> if you do not want your comments to be made publicly available.</p> <p>Mark the box here <input type="checkbox"/> if you do not want your identity to be made publicly available.</p>			

Section	Comment
2. Objective and scope	<ul style="list-style-type: none"> The broader purpose of the draft guideline should be acknowledged and should be the standard by which the effectiveness of the guideline should be measured. The draft guideline should be combined with the NOI guideline and should replace the four 'trigger' guidelines. The relevance of the concept of 'significant effect' beyond the initial assessment decision should be explained. Referrals should be able to be made by proponents as well as by the responsible minister, to help ensure that proposed actions that should be referred don't fall through cracks. <p>See 'General comments' for more detail</p>
3. A significant effect on the environment	<ul style="list-style-type: none"> The literal definitions are not sufficient to give good guidance. The Federal Court's definition of 'significant impacts' as used in the EPBC Act should be referred to as an example.

Please complete the form and send it via one of the following by no later than Monday 15 August 5pm:

Email: NTEPA.Consult@nt.gov.au

Post: NT EPA, GPO Box 3675, Darwin NT, 0801

Privacy: Your personal information will be used for the purpose of collecting and collating comments received on the Issues Paper. The NT EPA is subject to the *Information Act* and its Regulations. Information will not be disclosed to a third party, unless required by law or otherwise stated.

Section	Comment
	<ul style="list-style-type: none"> • The guidelines should state that where there is uncertainty about whether a proposal might have a significant impact, it should be referred. • A non-exhaustive list of trigger actions should be added to the draft guideline to give greater clarity. • The purpose of the section about relevant considerations should be better explained. • The list of relevant considerations should refer to ‘effects’, not ‘impacts’. <p>See ‘General comments’ for more detail</p>
4. Potentially significant effects on the NOI	<ul style="list-style-type: none"> • Information about what is required in a NOI should be kept in the NOI guideline, rather than in this document, to avoid inconsistency. • The title of this section should read ‘Potentially significant effects <i>in</i> the NOI’. <p>See ‘General comments’ for more detail</p>

General comments
<p>1. Comments on part 2 of the draft guideline – Objective and scope</p>
<p><i>1(a). The purpose of the draft guideline</i></p> <p>The stated objective of the draft guideline is to give guidance to proponents, responsible ministers and others about when the EPA will consider an environmental impact assessment (EIA) is required for a proposal. Implicit in this is the idea of providing certainty to prospective proponents. Also, although it is not stated in the draft guideline, EPA guidelines of this nature are aimed should be aimed at increasing transparency, the consistency of decisions and the effectiveness of the system in terms of meeting its objectives (in this case, ensuring matters affecting the environment are examined and taken into account). As noted in the 2015 Hawke Review, good practice is demonstrated by systems that increase the certainty and trust of stakeholders and focus on achieving environmental outcomes.¹ In our view, these multiple purposes provide a standard by which the effectiveness of the draft guideline should be measured.</p>
<p><i>1(b). Overlap with other guidelines</i></p> <p>In 2015 the NT EPA published the ‘Guideline for the preparation of a notice of intent’ (the NOI guideline). The NOI guideline is intended to inform</p>

¹ Allan Hawke AC, *Review of the Northern Territory Environmental Assessment and Approval Processes*, 2015 (the Hawke Review 2015, available at https://dlpe.nt.gov.au/__data/assets/pdf_file/0011/262919/hawke-review-of-the-northern-territory-environmental-assessment-and-approval-process.pdf) at 8-9.

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proponents about the role of a NOI and its minimum information requirements. Given referrals are required for proposals that might have a significant effect and that the NOI is the main source of information for the EPA's consideration of potential significant effects and therefore its decision on whether an assessment is required (the 'assessment decision'), we submit that the draft guideline and NOI guideline should be combined. As the draft guideline states, 'a NOI necessarily provides a proponent's views on what potentially significant effects on the environment might occur'.

This suggestion is notwithstanding the fact that the two guidelines are technically aimed at different audiences – the proponent in the case of the NOI guideline and the responsible minister in the case the draft guideline – because, in our view, proponents should also be able to make direct referrals and therefore would need to use the draft guideline to consider the potential for significant effects (see point 1(d) below).

If the two guidelines are to remain separate, we caution against the making references in the draft guideline to what should be included in a NOI to avoid inconsistency (see point 3(a) below).

The draft guideline also overlaps considerably with the four 'trigger' guidelines² published by the EPA and it is not clear from the draft guideline whether the trigger guidelines will now be repealed. Consistent with our 2013 submission on the trigger guidelines, our view is that the draft guideline should replace them, to help ensure consistency and certainty. A well-drafted guideline on significant effects should be sufficient to identify when a proposed action needs to be referred without the need for the existing trigger guidelines. This issue is discussed further at points 2(b) and 2(c) below.

1(c). Relevance of 'significant effects' beyond the assessment decision

Based on its stated objective, the draft guideline does not apply in subsequent stages of the EIA process, such as the EPA's final assessment of a proposal or Ministerial approval decisions. This is despite the concept of 'significant effects' remaining an underpinning consideration throughout the EIA process, by virtue of section 4 of the *Environmental Assessment Act*.

Of course, this points to a much larger problem in the Northern Territory's system of environmental protection, where there is no necessary link between the EIA process taking place and the placement of binding conditions on, or final approval of, proposals under the *Environmental Assessment Act* or other legislation. We think this problem is beyond the scope of this submission, being one that arises from the legislation itself. Notwithstanding, we take the opportunity to note our view that EIA decision-making – including the EPA's assessment of a proposed action and any approvals of proposed actions – should all be based on consistent and clearly defined criteria, whether derived from the concept of 'significant

² NT EPA, *Environmental Assessment Guidelines – When a Notice of Intent is not required for development proposals submitted under the Planning Act*; *Environmental Assessment Guidelines – When a Notice of Intent is not required for mining exploration or production proposals submitted under the Mining Management Act*; *Environmental Assessment Guidelines – When a Notice of Intent is not required for onshore petroleum exploration or productions proposals submitted under the Petroleum Act*; *Environmental Assessment Guidelines – When a Notice of Intent is not required for land clearing proposals submitted under the Pastoral Lands Act, 2014*.

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<p>effect’ or not. In addition, we note our view – and the view expressed by the 2015 Hawke Review – that the outcome of the EIA process should result in a dedicated environmental authorisation made by the Environment Minister, irrespective of the sector from which the proposal originates.³</p> <p>At this point, the draft guideline would benefit from an explanation of how the concept of ‘significant effect’, or any other applicable concept, applies beyond the assessment decision. Without this, the objectives of providing certainty, transparency and consistency in EIA processes will not be well met.</p>
<p><i>1(d). Broadening the referral base</i></p> <p>The stated objective of the draft guideline shows up a major flaw in the Northern Territory’s EIA process, relating to who is responsible for referring proposed actions. Under the EP Act, even though it is up to the EPA to decide whether a proposal will be subject to assessment due to its potentially significant effects, the ‘responsible minister’ is responsible for referring a proposal that might have significant effects and therefore needs to anticipate the EPA’s decision. In this scheme, the proponent bears no real responsibility for referrals or for anticipating the EPA’s views about significant effects, despite it being the proponent who prepares the NOI and any EIS documents.</p> <p>The indirect way in which proposed actions are referred puts the EPA at risk of being sidelined in the process, despite its responsibility for deciding whether an assessment is required. The recent experience with Port Melville is an unparalleled example. In that case, there was no ‘responsible minister’ because no other authorisations were thought to be required for the proposal, and the EPA did not exercise its ‘call-in’ powers because it was not aware of the proposal. This meant that a major port redevelopment in an area of international conservation significance occurred without being referred to the EPA and therefore without any form of EIA taking place.</p> <p>Being written into the legislation, it is beyond the scope of the draft guideline to fully resolve this problem: a better system requires a legislative overhaul to provide (at a minimum) a mechanism for proponents to refer directly to the EPA, capacity for the EPA to double-check when a proponent or responsible minister decides not to refer a proposed action, and penalties for failing to refer a proposed action that potentially has significant effects. In this regard we note the recommendation of the 2015 Hawke Review to make it clear that proponents are responsible for either referring, or ensuring a sectoral agency refers, a proposed action if it is likely to have a significant effect.⁴</p> <p>However, there is an opportunity for the draft guideline to contribute to resolving this problem by providing for as broad an understanding of ‘significant effects’ as is appropriate and requiring that, in the event of uncertainty, proposals be referred. This would encourage all potentially relevant proposals to be referred. In turn, it would improve the effectiveness of the EIA process, reduce uncertainty for both proponents and the public and increase the transparency of EIA decisions.</p>
<p>2. Comments on part 3 of the draft guideline – A significant effect on the environment</p>
<p><i>2(a). An appropriate definition of ‘significant effect’</i></p>

³ Hawke Review 2015 at 12.

⁴ Hawke Review 2015 at 21.

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We think the draft guideline does very little to clarify the meaning of 'significant effect'. It does not propose a single definition, nor does it provide examples. Unfortunately, this largely defeats the purpose of the draft guideline altogether.

The draft guideline provides a literal meaning of the words 'significant effect' but does not go so far as to specify a definition for the purposes of EIA decision-making. This is not unusual – very few jurisdictions in Australia have specifically defined the term 'significant effect' or 'significant impact', although most have some way of narrowing down the concept.

Insofar as the literal meaning of 'significant effect' is intended to provide guidance, it could be improved. The literal definitions of the individual words are more illustrative than the combined literal definition, which cuts away much of the meaning. Also, the breadth of the literal definitions of 'effect' and 'environment' is helpful, because it increases the likelihood of a wider range of proposals being referred.

However, the NT EPA has itself noted the need to update the definition of 'environment', which is both anthropocentric and gendered.⁵ Also, the phrase 'large or important enough to have an effect or be noticed', in particular, leaves room for highly subjective interpretation and therefore reduces the utility of the definitions overall. As such, the literal definitions add little in terms of certainty or transparency, and leave too much room for proponents to avoid referral by, for example, claiming their proposal isn't large or important.

We suggest the Federal Court's interpretation of the term 'significant impact', as used in the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, is of more use and would at least provide some consistency with the parallel Commonwealth system. The term was interpreted as: 'impact that is important, notable or of consequence having regard to its context or intensity'.⁶ Of course, we acknowledge that this, too, would involve some interpretation on the part of the decision maker; indeed, no definition provides the perfect degree of certainty. Again, this shows the importance of casting the concept of 'significant effect' as broadly as is practicable, so that more, rather than fewer, proposals are referred. In addition, it should be made clear that if a proponent or the responsible minister is uncertain about the potential for significant effects, they refer the proposal.

We also draw attention to the Western Australian example, where a 'significance framework' has been developed to explain the concept of 'significant effect'. Under the framework, 'significant effect' is essentially explained as an impact on a part of the environment (known as an environmental 'factor') that reduces the likelihood of meeting the Western Australian environmental protection authority's stated objectives for that factor.⁷ As well as assisting proponents to work out when to refer a proposal, this concept of significant effects is relevant throughout the process, right through to the point of assessing and placing conditions on proposals, where the authority's final recommendations will be based on whether the proposal will meet the authority's objectives. This provides for a much more transparent and measurable way of determining whether a proposal is likely to have a significant effect and, if so, how that effect will be mitigated, not only at the point of referral but also at the point of

⁵ NT EPA, *The Environment Protection Authority's Final Advice on Improving Environmental Assessment in the Northern Territory*, 2010.

⁶ *Booth v Bosworth* [2001] FCA 1453, at [99].

⁷ Western Australian Environmental Protection Authority, *Environmental Assessment Guideline No. 9 – Application of a significance framework in the environmental impact assessment process*, 2015, at 5. Environmental 'factors' and the environmental objective associated with each factor are set out in WA EPA, *Environmental Assessment Guideline No. 8 – Environmental principles, factors and objectives*, 2015.

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assessment. However, this system does rely on the articulation of specific environmental objectives, which has not been done (at least to the degree of detail that would be necessary) in the Northern Territory.

2(b). Using checklists and triggers to explain 'significant effect'

In some jurisdictions, including the Northern Territory to date, the alternative to comprehensively defining 'significant effect' is to provide a checklist or set of triggers to indicate when a significant effect might be found, or when referral is required. For example, the Commonwealth provides a list of potential outcomes that, if likely to occur, mean the action causing them needs to be referred. Queensland has a list of specific actions that trigger the EIA process without needing to further consider their effects or impacts. The current Northern Territory approach is to provide a list of criteria against which the proposal is assessed and, if one or more is not met, a referral is required.

Checklist or trigger approaches can give certainty to proponents who know their proposal involves or does not involve a particular action or outcome. However, without complementary guidance about what significant effects or impacts are, these approaches carry a high risk of being too narrow and not allowing for novel proposals or proposals with mixed, cumulative or interactive impacts. This means proposals that might have a significant effect or impact avoid referral, because they don't appear in a trigger list or don't meet the criteria in a checklist.

In relation to the existing NT trigger guidelines, the 'negative trigger' approach, which regulates what will not require assessment rather than what potentially will, is especially poor at helping identify what might be a 'significant effect'. As noted in our 2013 submission in respect of the trigger guidelines, it is difficult to see how an approach aimed at avoiding the application of the EA Act improvise its implementation and promotes best practice on the ground.

Checklist or trigger approaches also run the risk of shifting responsibility for the decision about whether or not an EIS process is required away from the actual decision maker, leaving open the possibility of a judgement being made by a proponent on the basis of little or no evidence or consultation. This could lead to arguments that the EPA is not fulfilling its obligations and result in incorrect decisions being made.

2(c). A combined approach to explaining the concept

Noting the difficulty in finding a single, all-encompassing definition and the risks associated with checklist or trigger approaches, we suggest a combined approach is appropriate for the NT. As noted, we do not think the four existing trigger guidelines should be retained. However, a non-exhaustive list of trigger actions could be added to the significant effect guidelines (or, ideally, the legislation, as was recommended in the 2015 Hawke Review⁸). This would set out actions or classes of actions that, due to their nature, location or scale, were deemed to have, or were indicative of, significant effects.

However, this would not preclude referral of actions that do not appear in the list, if those actions had potential significant effects in the sense of the definitions provided. Using triggers would mitigate against reliance on responsible ministers making referrals, as a referral would no longer depend on an action requiring another authorisation by the responsible minister. Also, the EPA could retain the ability to check assessments made

⁸ Hawke Review 2015 at 12.

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<p>by proponents or the responsible minister, and the Minister should retain the power to ‘call-in’ proposals.</p>
<p><i>2(d). Role of ‘relevant considerations’</i></p> <p>The ‘Relevant considerations’ section of the draft guideline provides little assistance in understanding how the EPA might make assessment decisions and therefore makes a limited contribution to consistency and certainty. Despite the statement that the EPA’s determination of significant effects ‘can be additionally informed through reference to performance criteria, triggers or risk criteria’, this section does not serve the purpose that a non-exhaustive list of triggers would. We note the list does make a small contribution to increasing transparency about what the EPA would take into account. Notwithstanding, given the section seems to have limited utility, we suggest a better explanation of its purpose is needed. We also reiterate that care needs to be taken to avoid inconsistency between this section and the NOI guideline.</p> <p>On a more detailed note, we suggest the word ‘impacts’ should be replaced with the word ‘effects’ throughout the list of relevant considerations.</p>
<p>3. Comments on part 4 of the draft guideline – potentially significant effects on the NOI</p>
<p><i>3(a). Overlap with other guidelines</i></p> <p>As already noted, there is some overlap between the guidance in part 4 of the draft guideline and the NOI guideline. Not only could this lead to inconsistency, but also the information in part 4 is information that is required by the proponent, whereas the draft guidelines are technically aimed at the responsible minister. All of the necessary guidance on the preparation of a NOI should be contained in the NOI guideline.</p> <p>We assume the title of this part should read ‘Potentially significant effects <i>in</i> the NOI’ and requires correction.</p>



**ENVIRONMENTAL
DEFENDERS OFFICE NT**

7 Searcy Street, Darwin, NT
GPO Box 4289 Darwin NT 0801
Tel. 08 8981 5883
edont@edont.org.au
www.edont.org.au

12 August 2016
Dr Bill Freeland
Chair
Northern Territory Environment Protection Authority

By email of ntepa.consult@nt.gov.au

Dear Dr Freeland

Comments on the draft *Environmental Guideline for Identification of significant effects on the environment*

Please find enclosed our comments on the draft *Environment Guideline for Identification of significant effects on the environment* (the draft guideline), as prepared by the Northern Territory Environmental Protection Authority (NT EPA).

At the outset we'd like to acknowledge the significant deficiencies of the legislative regime within which the NTEPA finds itself forced to operate. Many of the problems the guideline attempts to address come as a direct result of problems arising from the *Environmental Assessment Act* itself. Those problems have been highlighted, both by this office and by the NTEPA over a number of years.

Having said that, we welcome the opportunity to comment on the draft guideline, noting our submission on the NT EPA Draft Environmental Guidelines made on 15 July 2013, in which we specifically requested guidelines that promoted a better understanding of what is a 'significant effect' for the purposes of the Northern Territory's environmental assessment legislative regime.

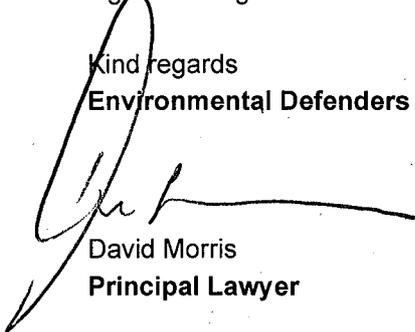
Unfortunately, we think the draft guideline fails to adequately clarify the meaning of 'significant effect' and therefore largely fails in meeting its stated objective of providing guidance on how the NT EPA will make assessment decisions. The draft guideline does effectively highlight again the flaws in the Northern Territory's system for assessing environmental impacts. In particular, it highlights the problem of proposals falling through the cracks because of the indirect referral process; and the problem of there being no necessary link between the concepts that give rise to environmental impact assessment, such as 'significant effect', and the approval of a proposed action.

We therefore take this opportunity to again call for an overhaul of the Northern Territory's system of environmental impact assessment. We note the recommendations made by Allan Hawke AC in his 2015 *Review of the Northern Territory Environmental Assessment and Approval Processes*. In our view, option 2 identified in that report is the preferred approach.

In the meantime, we suggest the draft guideline be revisited to better explain the concept of 'significant effect' for the purposes of – and as well as is possible within the scope of – the existing legislative regime.

Kind regards

Environmental Defenders Office (NT) Inc

A handwritten signature in black ink, appearing to read 'David Morris', with a long horizontal flourish extending to the right.

David Morris

Principal Lawyer