

Managing the transition of existing environmental impact assessment processes after commencement of the Environment Protection Act 2019

An NT EPA Policy Position

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Contact details	Northern Territory Environment Protection Authority (NT EPA)
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1	15 April 2020	Environment Policy	Version 1
2	8 May 2020	Environmental Assessments	Updated section 3.2, added section 4.5

Glossary	Full form
Environmental principles	Refer to the principles of ecologically sustainable development (ESD) and requirements for waste minimisation specified in the 'NT EPA Environmental Factors and Objectives'
Clause 14A variation	Notice of an alteration to a proposal submitted in accordance with clause 14A of the EAAP
Significant variation	See s.12 of the EP Act
EA Act	Environmental Assessment Act 1982
EP Act	Environment Protection Act 2019
EAAP	Environmental Assessment Administrative Procedures 1984
Regulations	Environment Protection Regulations 2020

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1. Introduction

The Northern Territory Environment Protection Authority (NT EPA) conducts an environmental impact assessment, on behalf of the Northern Territory (NT) Government, for all proposed actions that are likely to cause a significant impact on the environment.

Environmental impact assessment requirements are specified in the *Environmental Assessment Act 1982* (EA Act) and supporting Environmental Assessment Administrative Procedures 1984 (EAAP).

The NT Government has passed the *Environment Protection Act 2019* (the EP Act). Once commenced, the EP Act and the supporting Environment Protection Regulations 2020 (the Regulations) will replace the EA Act and EAAP.

The EP Act contains a number of provisions designed to address proposals that have commenced the environmental impact assessment process prior to the commencement of the EP Act (transitional provisions).

In summary, these provisions have been designed to:

- minimise disruption and interruption to proponents currently undertaking impact assessments
- provide consistency between the calculation of timeframes under the EA Act and EP Act by establishing all timeframes as business days, improving the ability of the NT EPA to finalise assessment related decisions and documentation within legislated timeframes
- support greater transparency and public participation in assessment processes.

In developing this policy, the NT EPA has considered the objects of both the EA Act and the EP Act, the intentions in designing the transition arrangements and ensuring that transition processes are efficient and effective.

1.1. Purpose of this policy

This policy communicates how the NT EPA will apply the EP Act and Regulations to existing environmental impact assessment processes under the EA Act. This policy also outlines how the NT EPA defines existing environmental impact assessment processes, and how the NT EPA will transition matters that are not considered existing environmental impact assessment processes.

This policy applies to existing environmental impact assessment processes. That is, where:

- a notice of intent has been referred to the NT EPA under clause 6 of the EAAP; and
- the NT EPA has decided, under clause 8 of the EAAP, that assessment is required (a public environmental report or environmental impact statement is necessary); and
- the NT EPA has not completed an Assessment Report for proposed action.

A proposal is also considered to be in an existing environmental impact assessment process if a proponent has advised the NT EPA that a proposal has been varied (clause 14A of the EAAP) and the NT EPA has made a decision that the environmental significance has changed and assessment is required at the level of a public environmental report or environmental impact statement.

This policy will be reviewed after 12 months.

2. Policy position

Existing environmental impact assessment processes will be managed with the key goals of:

1. minimising disruption to existing proponents, while
2. supporting community engagement and increased transparency.

The NT EPA approaches existing environmental impact assessment processes in a forward looking manner so as not to require proponents to duplicate previous steps that have been undertaken in the assessment process while ensuring that the NT EPA is provided with the information it requires to meet its obligations under the EA Act and EP Act.

3. Arrangements where policy does not apply

The EP Act does not provide transition arrangements for proposals that are not in an existing environmental impact assessment process, such as:

- proposals that have been referred to the NT EPA under clause 6 of the EAAP (a notice of intent has been lodged with the NT EPA) and the NT EPA has not made a decision under clause 8 of the EAAP at the time of commencement of the EP Act
- proposals where a proponent notifies the NT EPA about a significant alteration to a proposal after an assessment report has been completed.

The arrangements for proposals falling into these categories are outlined below.

3.1. Notice of intent

A notice of intent (NOI), also known as a referral, is the documentation provided by a proponent to give notice to the NT EPA of a proposed action that may have a significant impact on the environment (clause 6 of the EAAP). The consideration of the NOI results in a decision by the NT EPA that environmental impact assessment is, or is not, required for the proposal (clause 8 of the EAAP).

Consequently, the period after lodgement of an NOI, until the NT EPA has made a decision under clause 8 of the EAAP is not considered to form part of an existing environmental impact assessment process.

If an NOI has been submitted to the NT EPA under the EAAP and the NT EPA has not made a decision on the NOI (that assessment is required or not) prior to commencement of the EP Act, the NOI will be treated as a referral under the EP Act and Regulations.

Consistent with publication requirements under the EP Act and Regulations, the referral will be placed on public exhibition before the NT EPA makes its assessment decision.

A proponent that does not wish to have its NOI published may withdraw the NOI by advising the NT EPA in writing. A proponent that withdraws an NOI must determine whether a referral is required under the EP Act and, if so, make a referral prior to commencing the proposal.

Where, prior to the commencement of the EP Act, the NT EPA has requested further information in relation to the NOI, the NT EPA will not publish the NOI until the further information is received.

For the purposes of s.48 of the EP Act, the NOI and further information will collectively be taken to be a referral.

A decision on the acceptance of the referral and its publication will be made in accordance with regulation 44 of the Regulations. An accepted referral will be published for public consultation in accordance with regulations 51 and 52.

3.2. Variation to proposal (clause 14A of the EAAP) if Assessment Report completed

A 'clause 14A variation' is the term used to refer to the documentation provided by a proponent to give notice to the NT EPA of alterations to a proposed action that was the subject of an environmental impact assessment process.

The consideration of the clause 14A variation results in a decision by the NT EPA that environmental impact assessment is, or is not, required for the altered proposal.

Consequently, the clause 14A variation and its consideration are not considered to form part of an existing environmental impact assessment process.

If a clause 14A variation has been submitted to the NT EPA under the EAAP and the NT EPA has not made a decision on the variation (that assessment is required or not) prior to commencement of the EP Act, the variation will be treated as a referral of a new proposal under the EP Act and Regulations.

Consistent with publication requirements under the EP Act and Regulations, the referral will be placed on public exhibition before the NT EPA makes its assessment decision.

A proponent that does not wish to have its variation published as a referral may withdraw the variation by advising the NT EPA in writing.

If the proponent withdraws the clause 14A variation, the proponent must consider whether a referral will be required under the EP Act and, if so, make the referral prior to commencing the proposal.

4. Effect of policy on existing environmental impact assessment process

There are a number of environmental impact assessment processes that are currently in progress. Relevantly, the EP Act provides that:

s.296

(1) Subject to this Division, if an assessment of a proposed action commenced under the former Act but an assessment report was not completed before the commencement, the former Act continues to apply to that assessment as if section 294 had not commenced.

s.301

(1) This section applies if an assessment report for a proposed action is completed under the former Act after the commencement.

(2) An environmental approval is required under this Act for the proposed action.

For the purposes of s.296, the EP Act broadly further provides that:

- references in the EAAP to "days" are to be read as "business days"

- a supplement that is prepared after the commencement of the EP Act is to be made available for public comment for a period of not more than 15 business days.

Section 42 of the EP Act identifies the purpose of the environmental impact assessment process, while s.43 specifies general duties of proponents under an environmental impact assessment process. These sections, while not applying to existing assessment processes, provide additional clarity about the role of the environmental impact assessment process in protecting the Northern Territory environment.

4.1. Terms of reference

Where the proponent is developing a draft environmental impact statement at the commencement of the EP Act, the NT EPA will, in consultation with the proponent, consider whether the environmental impact assessment and approval process may be enhanced through an amendment to the approved terms of reference to ensure that the NT EPA can fulfil its obligations in preparing a draft environmental approval.

4.2. Draft environmental impact statements

Draft environmental impact statements are prepared in consideration of the approved terms of reference.

A draft environmental impact statement received after the commencement of the EP Act will be published for public consultation for the period specified by the NT EPA in the terms of reference as though the period was specified in business days, unless otherwise agreed with the proponent.

4.3. Supplements

Where the NT EPA directs a proponent to prepare a supplement after the commencement of the EP Act, the NT EPA will, in consultation with the proponent, include in the direction any matter that is required to ensure that the NT EPA can fulfil its obligations in preparing an environmental approval.

4.3.1. Supplements received before the commencement date

A supplement received before the commencement of the EP Act will, as soon as practicable following commencement, be published on the NT EPA website. Publication is for information purposes only.

Consistent with clause 14(2) of the EAAP, the NT EPA may request further information in relation to a supplement within 21 days of receiving the supplement. This timeframe will be calculated as business days from the commencement of the EP Act.

4.3.2. Supplements received after the commencement date

A supplement received after the commencement of the EP Act will, as soon as practicable, be published on the NT EPA website.

The NT EPA will also publish a notice advising that the supplement has been received and is available for public comment. The public comment period will not exceed 15 business days.

The NT EPA may request further information in relation to a supplement. This information will be requested within 21 days of the close of the public comment period and will be calculated in business days.

4.4. Further information requests

The NT EPA will, as soon as practicable after receiving further information that it has requested consistent with clause 14(2) of the EAAP, publish the further information. Publication is for information purposes only.

4.5. Variation to proposal (clause 14A of the EAAP) if Assessment Report not completed

If the proposal is in a current assessment process (i.e. an Assessment Report has not been completed), a proponent may lodge a 'clause 14A variation' (the documentation provided by a proponent to give notice to the NT EPA of alterations to the proposal).

If submitted prior to commencement of the EP Act, the notice of significant variation under clause 14A of the EAAP will be treated as a notice of significant variation under the EP Act and Regulations. Specifically, the EP Regulations Part 7 Division 1 will apply.

Consistent with publication requirements under the EP Act and Regulations, the notice of significant variation will be placed on public exhibition before the NT EPA makes its assessment decision.

A proponent that does not wish to have its clause 14A variation published as a notice of significant variation may withdraw the variation by advising the NT EPA in writing.

If the proponent withdraws the clause 14A notice of variation, the proponent must consider whether a notice of significant variation will be required under the EP Act, and if so, submit the notice. If not, the proponent will be required to continue the existing assessment process, unless the proponent withdraws the proposal from assessment.

If the proponent withdraws the proposal, the proponent must consider whether a referral will be required under the EP Act, and if so, make the referral.

4.6. Assessment reports

Under clause 14(3)(a) of the EAAP, the NT EPA prepares an assessment report about the proposed action for the protection of the environment.

Section 7(2)(g) of the EA Act identifies that the assessment report is an examination of the information supplied in accordance with the EAAP and the NT EPA's comments, suggestions or recommendations about the matters to which the information relates, including suggestions or recommendations concerning the conditions that should be imposed on approvals, agreements or other matters.

4.6.1. Matters addressed in the assessment report

Assessment reports will be prepared in consideration of the approved terms of reference and material obtained during the assessment process.

To the extent practicable, and to the extent that doing so is not inconsistent with the requirements of the EA Act and EAAP, the NT EPA will have regard to s.42 and s.43 of the EP Act in developing its assessment report.

4.6.2. Timeframe for preparing assessment reports

The timeframe for preparing an assessment report is:

- for an environmental impact assessment where the supplement is received prior to commencement of the EP Act – 35 days from the receipt of the supplement
- for an environmental impact assessment where the supplement is received after the commencement of the EP Act – 35 days from the close of public comments on the supplement.

Where the timeframe for preparing an assessment report commences prior to the commencement of the EP Act, the NT EPA will calculate the time period using calendar days only.

Where the timeframe for preparing an assessment report commences after the commencement of the EP Act, the NT EPA will calculate the time period using business days.

5. Termination of existing assessment processes

Section 297 of the EP Act provides that the NT EPA may terminate an environmental impact assessment process commenced under the EA Act if the proponent has “taken no steps or only limited steps in the assessment process before commencement”. Under s.297(3) of the EP Act, the NT EPA must give notice to a proponent of a proposed termination and provide the proponent an opportunity to make submissions in relation to the proposed termination before the NT EPA makes its decision.

The NT EPA will consider each existing environmental impact assessment of a proposed action to determine whether s.297 of the EP Act may apply.

Broadly, the NT EPA will consider the period of time that has lapsed between the last action of the NT EPA or proponent in relation to the impact assessment of the proposal. Specifically:

- when the decision that environmental impact assessment was made
- when the terms of reference for the environmental impact assessment were approved
- whether the time prescribed for submitting an EIS or Supplement has lapsed.

5.1. Termination if terms of reference approved prior to commencement

Where the NT EPA has approved draft terms of reference but has not received a draft environmental impact statement, the NT EPA may consider that the proponent has taken no or limited steps in the assessment process.

Following commencement of the EP Act, the NT EPA may seek to terminate the assessment process where the NT EPA has not received a draft environmental impact statement and:

- a period exceeding 3 years has lapsed since approval of the terms of reference, or
- a period exceeding 12 months has lapsed since the date the draft EIS was to be submitted to the NT EPA in accordance with a direction under clause 8(6)(b) of the EAAP.

The NT EPA will informally consult with the proponent prior to issuing any statutory notice under s.297(3).

5.2. Termination if draft environmental impact statement received prior to commencement

Where the NT EPA has received a draft environmental impact statement prior to the commencement of the EP Act it considers that the proponent has taken steps in the assessment process.

The NT EPA will consult with the proponent regarding completion of the impact assessment process where:

- a period exceeding 12 months has lapsed since the date the supplement was to be submitted to the NT EPA in accordance with a direction under clause 12(3)(a) of the EAAP, or
- a period exceeding 12 months has lapsed since the date additional information was to be submitted to the NT EPA in accordance with a direction under clause 14(2)(a) of the EAAP.

Where appropriate, the NT EPA will seek the proponent's withdrawal of the proposal.

6. Obligation of the NT EPA to prepare draft environmental approval

Where the environmental impact assessment process is completed following commencement of the EP Act, the NT EPA is required to submit to the Minister an assessment report and:

- a draft environmental approval prepared in accordance with the Regulations that meets the requirements of s.61 and s.73 of the EP Act, or
- a statement of unacceptable impact prepared in accordance with the Regulations that meets the requirements of s.66 and s.76(2) and (5) of the EP Act.

The NT EPA will use its best endeavours to identify any additional information required to enable it to fulfil its functions in preparing a draft environmental approval under the EP Act as early as possible within the assessment process in order to minimise adverse impacts on proponents.

As a result, the NT EPA may, in consultation with the proponent, seek to amend any existing terms of reference or direction that has been made to the proponent regarding the matters to be addressed in assessment documentation.