



SEWPaC Comments on the draft NT EPA Environmental Guidelines

July 2013

The Department of Sustainability, Environment, Water, Population and Communities (the department) is supportive of increased guidance for proponents about environmental assessment requirements and their obligations under relevant legislation. These comments are provided to improve the clarity with which the NT EPA draft environmental guidelines refer to the requirements of Australian Government legislation administered by the department, including the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the *Environment Protection (Sea Dumping) Act 1981* (Sea Dumping Act) and the *Historic Shipwrecks Act 1976*.

1. General Comments

- The department notes that most of the draft environmental guidelines include some general information regarding the EPBC Act, where it is relevant, including a list of the matters of national environmental significance (MNES). This section requires amendment for accuracy and clarity. In particular, the list of MNES in all relevant guidelines should be updated to include the new matter, "a water resource, in relation to coal seam gas development and large coal mining development". This amendment to the EPBC Act became law on 22 June 2013.
- The text below is recommended to replace the existing general text regarding the EPBC Act in all relevant policies. This information should also be included in the 'Guidelines for the Preparation of an Economic and Social Impact Assessment' and the 'Guideline for Disposal of Waste by Incineration'. These guidelines do not currently contain information about the requirements of the EPBC Act:

Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)

The Commonwealth EPBC Act is the Australian Government's key piece of environmental legislation. Under the EPBC Act you need approval from the Australian Government environment minister for any proposed action—including projects, developments, activities, or alteration of these things — likely to have a significant impact on a matter protected by the EPBC Act. The environment assessment process of the EPBC Act protects matters of national environmental significance including:

- world heritage properties
- national heritage places
- wetlands of international importance
- threatened species and ecological communities
- migratory species
- Commonwealth marine areas
- the Great Barrier Reef Marine Park

- nuclear actions (including uranium mines), and
- a water resource, in relation to coal seam gas development and large coal mining development.

The EPBC Act also protects:

- the environment, where actions proposed are on, or will affect Commonwealth land, and
- the environment, where Commonwealth agencies are proposing to take an action.

There are significant penalties, including fines and imprisonment, for taking such an action without approval. If you intend to take an action that is likely to have a significant impact on a matter protected by the EPBC Act, it is important to make a referral as early as possible in the planning and development stages.

Further information on matters of national environmental significance can be found at: <http://www.environment.gov.au/epbc/protect/index.html>.

Further information about actions on, or impacting upon, Commonwealth land and actions by Commonwealth Agencies can be found at: <http://www.environment.gov.au/epbc/publications/commonwealth-guidelines.html>

Guidance on determining whether an action is likely to have a significant impact on a matter protected under the EPBC Act is found at: <http://www.environment.gov.au/epbc/publications/neg-guidelines.html>

The EPBC Act webpage also has a search tool that helps determine whether NES matters occur in the area of a proposed activity. To generate a map and environmental report on the area refer to: <http://www.environment.gov.au/erin/ert/epbc/index.html>

Activities within Commonwealth marine and terrestrial reserves, including Uluru-Kata Tjuta and Kakadu National Parks, may be subject to specific additional requirements. Further information can be found at <http://www.environment.gov.au/parks/parks/index.html>.

- Some of the draft guideline documents include an assessment checklist that includes reference to the EPBC Act. This includes: 'Development proposals submitted under the *Planning Act*'; 'Mining exploration or production proposals submitted under the *Mining Management Act*' 'Onshore petroleum exploration or production proposals submitted under the *Petroleum Act*'; and, 'Land clearing proposals submitted under the *Pastoral Land Act*'.

The item in the checklist related to the EPBC Act states, 'The proposed development is unlikely to have a significant impact... based on the application of the 'Significant Impact Guidelines 1.1 – Matters of National Environmental Significance'. It is suggested that following text replace the existing paragraph in the checklist:

"The requirement to refer the proposed development under the EPBC Act has been considered, and it has been determined that a referral is not required OR the proposal has been referred and the Australian Government Minister has determined that further

assessment is not required (ie: not a controlled action or not a controlled action – particular manner).”

2. Comments on specific guidelines

Guidelines on environmental offsets and associated approval conditions

Section 1

- The following statement suggests that offsets are a mandatory requirement: “All State and Territory governments and the Commonwealth government impose some form of ‘environmental offset’ or other compensatory approval condition”. Under the EPBC Act, environmental offsets may be considered as part of the conditions of approval where residual impacts cannot otherwise be avoided or mitigated. It is suggested that the word ‘impose’ is replaced with ‘may require’.

Section 3

- The information in this section related to the EPBC Act should be revised as per the text outlined in the ‘general comments’ section of this document.

Section 5

- The first sentence states, “Offset/conditions of approval requirements in the Northern Territory are imposed under...”. The word ‘are’ should be replaced with ‘may be’.

Section 5.1

Paragraph 1

- The statement that, “The EPBC Act provides for offsets in circumstances... etc”, should be amended, as offsets are not specifically mentioned in the EPBC Act. The EPBC Act does provide for conditions to be attached to an approval (refer s.134), which may include environmental offsets. The following replacement text is suggested: “Where an action is approved under the EPBC Act, offsets may be required as a condition of approval where a matter of national environmental significance is subject to some form of residual impact from the proposed action. In those cases the Commonwealth Environment Minister may have regard to the ‘EPBC Act Environmental Offsets Policy’ which can be accessed at: <http://www.environment.gov.au/epbc/publications/environmental-offsets-policy.html>”.
- If a list of protected matters relevant to the Northern Territory is included within this section, it should note that protected matters are “most likely to include” these matters. Commonwealth land should also be included in this list.
- The following sentence does not clearly explain the EPBC Act policy settings on direct vs. indirect offsets: “An offset must preferably involve a direct offset and be of a size and scale proportionate to the residual impact on the protected matter.” Section 7.2 of the EPBC Act offsets policy provides more information. The following replacement text is suggested: “Generally, when considering residual impacts on threatened species or ecological communities, the Commonwealth requires that 90% of an offset package consist of ‘direct’ offsets (i.e. offsets that result in an immediate on-ground conservation benefit for the

relevant matter of national environmental significance) and be of a size and scale proportionate to the impact”.

- The following sentence should be amended: “Direct offsets . . . are intended to be permanent”. Not all direct offsets are permanent. The following replacement text is suggested: “Where an offset is being established to compensate for permanent impacts, the offset must also be permanent”.

Paragraph 2

- Reference to considering offset requirements during the development of a Public Environment Report or Environmental Impact Statement excludes the need to consider offset requirements under other assessment approaches under the EPBC Act. It would be more appropriate to refer to the consideration of offsets “during the assessment process”.
- Please replace the text “this offset program” with “the EPBC Act environmental offsets policy”.
- The website link for the offsets policy is incomplete. The correct address should be: <http://www.environment.gov.au/epbc/publications/environmental-offsets-policy.html>

Paragraph 3

- The text of this paragraph, which begins, “The highly inflexible requirement for an offset can be implemented with a level of flexibility”, is not clear. To highlight the flexibility with which offsets can be designed, the following text is suggested to replace the existing paragraph:

“To be accepted by the Commonwealth an offset must provide a conservation benefit for the specific matter of national environmental significance that is being impacted. There are often a wide range of activities that can be pursued in meeting this offset requirement – including, for example, land acquisition, rehabilitation works, predator proof fencing or feral animal control. This creates a degree of flexibility around how an offset can be designed and implemented”.

Section 6

- As noted above, please use the general phrase, ‘the assessment process’, instead of, ‘a Public Environment Report or Environmental Impact Statement’.

Guidelines for the environmental assessment of marine dredging in the Northern Territory

The following comments are provided to improve the accuracy and consistency of the document as it relates to Commonwealth legislation.

Section 2.1

- Paragraph 5 of this section (beginning ‘The Commonwealth Department of Sustainability, Environment, Water, Population and Communities...’) contains some inaccuracies. It is recommended that the following text replace the existing paragraph.

"Commonwealth legislation may also be relevant for a dredging project and for offshore disposal of dredged material undertaken in the Northern Territory. In particular, the *Environment Protection (Sea Dumping) Act 1981* (Sea Dumping Act) regulates the loading and disposal of wastes at sea. The *Environment Protection and Biodiversity Act 1999* (EPBC Act) provides for the protection and management of matters of national environmental significance. The *Historic Shipwrecks Act 1976* provides for the protection of shipwrecks and their associated relics. These Guidelines only provide generic information on the application of this Commonwealth legislation (refer Section 3.1.3), and it is recommended that proponents contact the Australian Government Department of Sustainability, Environment, Water, Population and Communities for specific advice on legislation that may be relevant to a dredging proposal."

Section 3.1.1

- The clarity of this section could be improved by noting that the EPBC Act, Sea Dumping Act and Historic Shipwrecks Act may also apply within coastal waters. The Australian Government Department of Sustainability, Environment, Water, Population and Communities should be contacted for specific advice on the legislation that may be relevant to a dredging proposal.

Section 3.1.3

- The following text is suggested to replace the first three paragraphs of this section to ensure clarity regarding the legislative requirements.

"3.1.3 Commonwealth Legislation

Some dredging proposals may need consideration under Commonwealth legislation. This includes the *Environment Protection (Sea Dumping) Act 1981* (Sea Dumping Act), *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and *Historic Shipwrecks Act 1976* (Historic Shipwrecks Act).

The application of this legislation will often depend on the location of the dredging action, whether the dredge spoil is proposed to be disposed offshore, and the location of the offshore disposal ground. The proponent should contact the Australian Government Department of Sustainability, Environment, Water, Population and Communities if they wish to seek advice on the application of Commonwealth legislation.

Where assessment is required under multiple pieces of legislation, departments will work together to coordinate the assessment processes as much as possible. However, proponents should seek advice from the relevant agencies as early as possible to facilitate a coordinated approach."

Section 3.1.3.1

- This section should be revised as per the general text outlined in the 'general comments' section of this document.

Section 3.1.3.2

- To ensure clarity regarding the requirements of the Sea Dumping Act, the following text should replace the existing description:

"3.1.3.2 Environment Protection (Sea Dumping) Act 1981

The Sea Dumping Act implements Australia's obligations under the London Protocol¹, which aims to prevent marine pollution by dumping of wastes and other matter. The Sea Dumping Act applies in all Australian waters, except areas determined to be within the 'limits of a State or of the Northern Territory'. The *National Assessment Guidelines for Dredging, 2009* (NAGD) sets out the framework for assessing and permitting offshore disposal of dredged material and the requirements of the Sea Dumping Act. The NAGD includes a definition of 'waters within the limits of the State' as follows:

'Waters within the limits of a State are those waters that lie within the constitutional limits of the State as determined by Letters Patent issued to the Governors of each of the States at Federation. They can include features such as bays, gulfs, estuaries, rivers, creeks, inlets, ports or harbours. Generally, the limits of the States are low water along the coastline together with bay closing lines (usually of no more than 6 nm in length) and also river closing lines. In some areas of the coastline, locating the limits of the State may be difficult. This can occur particularly where islands lie very close to the coastline and in relation to certain bays. In such cases there are detailed legal principles that must be applied to determine the exact location of the State limits.'

A permit under the Sea Dumping Act may be required if dredge spoil from a project undertaken in the Northern Territory, is to be disposed of in Australian waters. It is recommended that proponents contact the Australian Government Department of Sustainability, Environment, Water, Population and Communities for clarification on whether the Sea Dumping Act will apply for a particular offshore disposal ground.

The NAGD can be found at:

<http://www.environment.gov.au/coasts/pollution/dumping/guidelines.html>"

Section 3.1.3.3

- The reference to the 'Minister for the Environment and Heritage' should be replaced with 'Minister for the Environment, Heritage and Water'.

Section 5

- The first sentence should more clearly reference the Australian Government National Assessment Guidelines for Dredging (2009). The existing reference, "Commonwealth (2009)" does not align with the reference list at the end of the document.
- The second sentence, "The Commonwealth guidance is for proponents who may need to dredge in, and/or dispose of dredge spoil to, Commonwealth waters" is incorrect, as the Sea Dumping Act applies in all Australian waters, except areas determined to be within the 'limits of a State or of the Northern Territory', as outlined in previous comments. It is suggested this sentence is replaced with the following: "The Australian Government guidance is for proponents undertaking dredging or disposal in Australian waters, and outlines the Commonwealth legislative requirements."

¹ 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972

Section 5.1

- It is unclear what is intended by the statement, "Some of the principles applied to management of mine tailings can be applied to the management of dredge spoil on land". This sentence may be improved by providing some examples.

Section 5.7.6

- The guidance within this section would be improved by noting that the identification of critical windows of sensitivity is particularly important for matters protected under the EPBC Act.

Section 6.7

- This section appears to indicate that an assessment of costs and benefits of land disposal will only need to be undertaken if chemical contaminants exceed screening levels, and toxicity or other tests indicate that levels are of concern. This is inconsistent with the Australian Government approach. All alternatives to ocean disposal must be considered, and analysed through a comparative assessment.

It is noted that Section 2.3 of the draft guideline states that the NT EPA views that unconfined ocean disposal of dredged spoil should only be considered after the environmental, social and economic costs and benefits of alternatives for reuse and confined disposal have been fully explored (page 7). This is consistent with the Australian Government approach and is supported. It is suggested that Section 6.7 be reviewed to ensure that the approach to consideration of alternatives is consistent across the document.

Section 6.10

- The second paragraph refers to, 'matters of National Significance (NES)'. This should read, 'matters of National Environmental Significance (NES)'.

Appendix 1 (Approvals and Permits for Dredging Operations).

- The table states that a sea dumping permit may be required for "the dumping of spoil at sea outside the limits of NT waters". This is not accurate. It is recommended that the first sentence is replaced with the following text: "A permit under the Sea Dumping Act may be required if dredge spoil from a project undertaken in the Northern Territory, is to be disposed of in Australian waters."
- The table should include approval under the EPBC Act as a potential regulatory requirement.

Appendix 3 (NT Environmental Assessment Process)

- The flowchart states that if the action is determined to be a controlled action under the EPBC Act, the Bilateral Agreement will apply. This may not be the case, particularly if the action takes place in Commonwealth land or in the Commonwealth marine area. This should be reflected in the flowchart.

Appendix 4 (Dredging Approvals Process in the Northern Territory)

- This flowchart does not accurately describe where the Sea Dumping Act and EPBC Act may apply. Both pieces of legislation may be relevant to actions within NT waters, however the flowchart currently suggests that they would only apply outside NT waters. SEWPaC would be happy to assist with further revisions to this flowchart.

Guidelines for assessment of impacts on terrestrial biodiversity

General Comments

- The department suggests that the NT EPA draft environmental guidelines clearly distinguish the Environmental Impact Assessment (EIA) process under the EPBC Act from the assessment process in the NT. There are various policies which guide the EPBC Act EIA process including: the Significant Impact Guidelines 1.1 – Matters of National Environmental Significance; the Significant Impact Guidelines 1.2 – Actions on, or impacting upon, Commonwealth land and actions by commonwealth agencies; Offshore seismic guidelines; Bioregional plans; Offset guidelines; and specific significant impact and referral guidelines on species such as the Northern Quoll:
<http://www.environment.gov.au/epbc/publications/guidelines.html>
- The department notes that in assessing the conservation significance of flora, fauna and ecological communities, the EPBC Act criteria for endangered and vulnerable species as well as the criteria for ecological communities should be considered (not just the Heritage and Migratory species criteria from the Significant Impact Guidelines 1.1 – Matters of National Environmental Significance). In addition the department notes that the NT uses different IUCN criteria when assessing the state species. Consideration should be given to whether there are any implications of this difference in terms of an EIA.
- The department notes that the Commonwealth uses the terms 'important populations' and 'habitat critical to the survival' when considering the significance of impacts. It is noted that in this document different terms such as 'congregations' and 'important sites' are used in impact assessment under NT processes.
- The department maintains the Species Profiles and Threats database (SPRAT). SPRAT has an abundance of ecological and biological information that may assist with planning surveys and assessing significance and should be included in a desktop assessment as it is a valuable tool.
- The department seeks to clarify that the survey guidelines are only for determining the presence or the probability of presence. They do not establish or assess species abundance. The department does not have guidelines for surveying the abundance of species. Accordingly, during assessment and approval under the EPBC Act, surveys outside the scope of the department's survey guidelines may be required in order to address impacts to large areas or projects with long term impacts. Further, the department notes that executing a survey to the department's guidelines and identifying listed species presence does not in itself predict a significant impact. Species presence is one of many factors that increase the likelihood of significant impact. Information on whether the occurrence constitutes a 'population' or 'important population' will not necessarily be generated by surveys conducted using these guidelines.

- The department is currently developing survey guidelines for EPBC listed orchids. In addition, the department is proposing to develop further EIA guidance on several NT species including the bilby, gouldian finch, the bare rumped sheath tail bat, and the red goshawk.
- The department's protected matters search tool does not provide "a less reliable understanding of threatened and/or migratory fauna possibly occurring in an area". It is a tool used in the first stages of an EIA to capture all potential MNES in an area and may include distribution modelling to allow for the precautionary principle. More information about the protected matters search tool can be found at:
<http://www.environment.gov.au/arcgis-framework/apps/pmst/pmst-help.jsf#about>.

Specific Comments

Table of Contents

- Section 3 Limitations (to be found on page 4) is missing from this table.

Section 1.1

- It should be noted here, or at least in Section 8 of these draft guidelines, that, under the Commonwealth EPBC Act, rehabilitation of an impacted environment is akin to impact offsetting and, therefore, cannot be assessed as a form of impact-mitigation.

Section 2.1.1.1

- The information in this section regarding the EPBC Act should be revised as per the text outlined in the 'general comments' section of this document.

Section 5.2.1

- Query whether this section needs to address whether mapping at these scales is recommended or required.

Section 5.3

- Regarding the fourth dot point, "ecosystems" listed under the EPBC Act needs to be referred to here as "ecological communities".

Section 5.4

- Consider breaking up the second paragraph into smaller paragraphs or dot points for clarity.
- Regarding the last sentence, suggest re-wording to say that it is the vegetation, rather than the "impacts" on the vegetation that are likely to recover.
- Suggest adding a section explaining the importance of considering scope, duration, intensity etc when assessing an impact.

Section 7

- The web address for the EPBC Act Survey guidelines (referenced in section 7.2.2) should be: <http://www.environment.gov.au/epbc/guidelines-policies.html#threatened>

Section 7.2

- This section advises that sampling should be undertaken according to either the Commonwealth survey guidelines or the “standard DLRM fauna survey methods”. The department seeks confirmation from the NT EPA that these respective guidelines are consistent.

Section 8

- This section refers to the EPBC Act Significant Impact Guidelines as a good example for how to consider the extent of impacts on biodiversity. The section could be more clearly drafted, however, as the relevance of this document to the NT process is not immediately apparent. In particular, the use of the word ‘consequences’ in this paragraph is potentially confusing, as this term is not typically used to describe the extent of potential impacts under the EPBC Act. It may improve clarity to use some specific examples from the EPBC Act Significant Impact Guidelines to illustrate the impact assessment process.
- The correct web address for the EPBC Act Significant Impact Guidelines is: <http://www.environment.gov.au/epbc/publications/nes-guidelines.html>

Guidelines for the Preparation of an Economic and Social Impact Assessment

- As noted in the general comments, this guideline should include a section containing general information about the EPBC Act.
- This section should also note that any assessment of the ‘environment’ under the EPBC Act would need to include social and economic considerations. The following text is recommended:

In considering the impacts of the following actions, the likelihood of a significant impact on the ‘environment’ must be considered:

- a nuclear action (sections 21, 22 and 22A);
- an action in a Commonwealth marine area (sections 23 and 24A);
- an action on Commonwealth land (sections 26 and 27A);
- any action undertaken by the Commonwealth (section 28).

The environment includes:

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) natural and physical resources; and

(c) the qualities and characteristics of locations, places and areas; and

(d) Heritage values of places; and

(e) the **social, economic and cultural aspects of a thing** mentioned in paragraph (a), (b), or (c).

