



NORTHERN
TERRITORY
DIVISION

2 August 2022

Mr Paul Purdon,
Executive Director Environmental Assessment and Policy
Department of Environment, Parks and Water Security
GPO Box 3675 Darwin NT 0801
By email: paul.purdon@nt.gov.au
Environment.policy@nt.gov.au

Re: Draft for Consultation – Environmental Factor Guidance: Culture and Heritage

Dear Mr Purdon,

The mining industry deeply values the cultures, knowledge, histories, rights and interests of the diverse indigenous and non-indigenous peoples and communities with whom the industry interacts, through being fellow community members and/or important stakeholders and partners in current and future developments.

In valuing these relationships, the industry recognises the importance of understanding the unique history and local cultural, social and economic context of each community and the importance of appropriate regulatory frameworks to protect significant cultural and heritage values on the lands in which it operates. This includes working with government to ensure that environmental impact assessments (EIA) are risk-based, transparent, consistent, and efficient.

To this end, the Minerals Council of Australia (MCA) welcomes production by the NT EPA of guidance documents to assist proponents in meeting the government's regulatory requirements in relation to its *Environmental Factors and Objectives*¹ that must be satisfactorily addressed in EIA documentation.

The MCA has just completed its review of the NT EPA's latest guideline: *Environmental Factor Guidance: Culture and Heritage* (the 'Guidance Document').

Specific comments

The need for threshold criteria to assess potential for significant and unacceptable impacts

Section 1 (Introduction) provides useful context on the purpose of the Guidance Document, including that projects that have the potential for significant and unacceptable impacts on cultural and heritage (including sacred sites) must be formally assessed by the NT EPA.

¹ https://ntepa.nt.gov.au/_data/assets/pdf_file/0020/804602/guide-ntepa-environmental-factors-objectives.pdf

A critical omission, however, is that guidance has not been provided on thresholds or criteria by which a proponent can evaluate whether or not their project has this potential. Unlike emission thresholds, minimum water quality standards, etc., for which numerical values have been scientifically-derived, thresholds for assessing the significance of impacts on cultural and heritage values will be based on more subjective, qualitative considerations. For this reason, the MCA strongly recommends that a second consultation document be released that addresses this issue and includes risk- and evidence-based draft thresholds/criteria for consideration by industry and the broader community. The MCA recommends that the NT EPA meet with industry and other stakeholders to discuss and agree on draft criteria that can be incorporated into this second consultation draft.

Expanded guidance on environmental decision-making hierarchy; removal of waste management hierarchy reference

In Section 2.1, the bottom of page 5 provides excerpts from the Environment Protection (EP) Act to guide a proponent through the general duty requirements of Section 43 dealing with engagement and consultation on culture and heritage with communities that may be affected by a proposed action.

Only about half of the excerpts provided just above this section, however, are useful:

- 43(e), requiring a proponent to demonstrate that the project design is consistent with ESD principles, is reasonable to include.
- 43(f), requiring a proponent to apply the 'environmental decision-making hierarchy' in the project design, is also reasonable; however, the guidance document should provide the hierarchy, from Section 26 of the EP Act.

26	Environmental decision-making hierarchy
	<p>(1) In making decisions in relation to actions that affect the environment, decision-makers, proponents and approval holders must apply the following hierarchy of approaches in order of priority:</p> <ul style="list-style-type: none">(a) ensure that actions are designed to avoid adverse impacts on the environment;(b) identify management options to mitigate adverse impacts on the environment to the greatest extent practicable;(c) if appropriate, provide for environmental offsets in accordance with this Act for residual adverse impacts on the environment that cannot be avoided or mitigated. <p>(2) In making decisions in relation to actions that affect the environment, decision-makers, proponents and approval holders must ensure that the potential for actions to enhance or restore environmental quality is identified and provided for to the extent practicable.</p>

- 43(g), requiring a proponent to consider the waste management hierarchy in the design of project plans, does not seem particularly relevant to an assessment of potential impacts on cultural or heritage values. If this hierarchy is relevant, the Guidance Document should explain why and how.

Manner of consultation does not determine potential for significant and unacceptable impacts

The last paragraph of Section 2.1 (on the top of page 6) is also problematic. The basis upon which the NT EPA decides if a formal EIA process is required is whether or not a proposed action has the potential for significant and unacceptable environmental impact (including social and cultural impacts).

It is not clear how the manner in which a proponent has engaged with potentially affected communities, under EP Act general duty requirements, could be a criterion to determine if a project has the potential for significant and unacceptable impacts on culture or heritage values of a site where an action is proposed. Instead, a more appropriate final sentence should read 'This will provide the NT EPA with information upon which it can determine whether or not the general duty requirements under Section 43 of the EP Act have been met.'

Unwarranted additional scrutiny by NT EPA if public consultation elicits a high level of concern

The last paragraph of Section 3.1 (Cultural Values), on the top of page 7, indicates that if 'public consultation elicits concerns that a proposed action may result in a significant impact on heritage and/or cultural aspects of the environment, the assessment process will...' include additional scrutiny by the NT EPA regarding

- (historic?) compliance of the proponent with existing laws and policies; and
- the quality of the engagement with the local community by the proponent to ensure the proponent fully understands and commits to protecting heritage and Aboriginal cultural values on or in the vicinity of the proposed action.

Shouldn't the NT EPA apply a consistent and adequate level of scrutiny for all proposals with a potential for significant and unacceptable environmental impacts and not just those for which the community has raised concerns?

Questionable value (and accuracy) of excerpts from cultural/heritage protection legislation without indication of relevance to meeting requirements under the EP Act

Section 3.2 (Legislative mechanisms to protect cultural values) includes several paragraphs on key provisions of five Northern Territory and Commonwealth Acts that relate to the Culture and Heritage Environmental Factor. The critically important guidance information that is missing from this section is how each of them needs to be considered by a proponent to meet requirements of the NT EP Act. In particular, how should each of these provisions be considered by a proponent in referral or other EIA documentation?

The MCA also questions the accuracy of some of the statements relating to sacred sites under the description of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* and the *Northern Territory Aboriginal Sacred Sites Act 1989 (NT)*. For example, on page 8, the Guidance Document states 'On all land tenures, any site that is "significant according to Aboriginal tradition" is defined in the ALRNT Act as a "sacred site" and is protected automatically.' The exact definition in the Act, however, states 'sacred site means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition **and includes any land that, under a law of the Northern Territory is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.**

The Aboriginal Areas Protection Authority (AAPA) is the authority on interpretation of this and the Sacred Sites Act and should have been consulted in preparation of this Guidance Document; however, a strict reading of the definition above suggests that a site of significance, according to Aboriginal tradition, is a sacred site only if has been declared to be a sacred site or declared to be of significance 'under a law of the Northern Territory.'

Still in this Section, clarification is needed on the meaning of the following statement in the paragraph on the top of page 9: 'This process (of consultation and obtaining an Authority Certificate) ensures that Aboriginal custodians inform the implications of the existence of a sacred site on a particular land use proposal on a case by case basis.' Because it is incomprehensible, it cannot provide useful guidance.

Guidance for meeting requirements of the Sacred Sites Act and AAPA

The way in which Section 4 (Considerations for conducting a cultural impact assessment) refers to AAPA processes is inaccurate and confusing. AAPA should have been consulted by the NT EPA during preparation of this Guideline Document.

The second paragraph in this section recommends that proponents engage early with AAPA to determine if there are any sites of significance in or near the project area, and the MCA endorses this advice; however, advice on obtaining an Authority Certificate needs to make clear that a proponent would not be expected to obtain one prior to completing its EIA processes.

The Guidance Document should identify the process by which a proponent should determine if the project area includes any sacred sites, e.g. by reviewing AAPA registers, but also make explicit that not all of the Territory's sacred sites are known to AAPA or included in its databases.

Pagination

The revised version released to the public should also include page numbers for easier referencing from the table of contents.

The MCA NT is available to further discuss the development of this policy at any time. For clarification or further details, please contact me on 0401 222 941 or Cathryn.tilmouth@minerals.org.au.

Yours sincerely



Cathryn Tilmouth
Executive Director Northern Australia