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Submitted via NT EPA consultation website

NT Environment Protection Authority
GPO Box 3675
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Dear Sir/Madam

**SUBMISSION ON DRAFT ENVIRONMENTAL FACTOR GUIDANCE:
ATMOSPHERIC PROCESSES**

We thank NT EPA for the opportunity to provide submissions on the development draft *Environmental factor guidance: Atmospheric processes (draft Guidance)*. We have significant and substantial concerns with the proposals, concerns borne of the collective decades of the experience of the authors of these submissions in environmental impact assessments and environmental impact assessment law, both in Australia and internationally, including approximately half the completed Environmental Impact Statements in the Northern Territory since 2016 and several currently undergoing assessment.

Our concerns are both with form and substance. Chief amongst them is NT EPA's adoption of thresholds of significance while reserving for itself the authority to ignore those thresholds. Adopting thresholds of significance means adopting standards by which the significance of a given environmental effect may be determined. The purpose of adopting thresholds is to promote consistency, efficiency, and predictability in the process of determining whether an action should be referred. Asserting the authority to ignore adopted threshold is entirely contrary to that purpose.

Specific comments are as follows:

Section 4 Legal Context

On page 5 is the following paragraph:

[Section 24(b)] of the EP Act applies to all proposed actions that may have a significant impact on the environment. It is not limited to those proposals where the NT EPA has determined that the potential greenhouse gas emissions associated with the proposed action may have a significant impact.

Please explain how an action can have a potentially significant impact on the environment if no determination has been made that an action may have a significant impact on the environment.

Simply quoting sections of the *Environment Protection Act 2019 (EP Act)* with no explanation, as the draft Guidance does in its mention on page 6 of section 43, provides no guidance and is of little utility. While sophisticated project proponents and consultants for example, may know that the waste management hierarchy establishes prevention as the most favoured/preferred option and disposal is the least favoured/preferred option, that type of information and more specificity as to its application should be provided so the public at large understands the concepts from the EP Act to which the draft Guidance refers.

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Section 5 Application of this guideline

By this section, NT EPA is adopting thresholds of significance, with the thresholds specified in section 6 and arising from the Territory's *Greenhouse Gas Emissions Management for New and Expanding Large Emitters* policy (**Large Emitters policy**). We acknowledge that thresholds may be drawn from external policy and recognise that actions must be referred when these thresholds are exceeded.

The draft Guidance, however, goes on to state that "if a proposed action does not meet the threshold identified in this document and a proponent is required to refer the proposed action" as a result of an environmental factor other than atmospheric processes, the project proponent must still provide a significant amount of information related to atmospheric processes. We believe this requirement is contrary to section 42(b) of the *Environment Protection Act 2019*.

Section 42(b) provides that "the purpose of the environmental impact assessment process is to ensure that all actions that may have a significant impact on the environment are assessed, planned and carried out taken into account" several policy directives. A threshold of significance is a standard that takes into account those directives. If a project's emissions have not crossed the threshold of significance, there is no significant impact. NT EPA should be requiring referral and assessment of an environmental factor whose threshold has been exceeded, not an environmental factor whose threshold has not. Requiring referral (or calling in) and requiring assessment where a threshold of significance has not been crossed may be an *ultra vires* action on the part of NT EPA.

If a project is being referred as the result of exceeding a threshold other than for greenhouse gas emissions, it is appropriate for the project proponent to demonstrate that the project's emissions do not exceed the threshold, nothing more.

What is the purpose of the supporting information beginning at page 6? The manner in which it is presented is somewhat odd. Is it to be included in the final Guidance?

We do not believe it is appropriate to 'cherry-pick' data from the Commonwealth Department of Industry, Science, Energy and Resources' - "State and territory greenhouse gas inventories: annual emissions" (**Emissions Inventory**), published as part of the *National Greenhouse Accounts 2019*.¹ (**NGA 2019**)

For example, why is 2005 used as a baseline year? According to the NGA 2019, emissions in the Northern Territory actually decreased on 2000 levels, although have increased 52.9% since 1990. The year 2005 appears to have been used as the baseline year solely because "Emissions have increased by 46.5% on 2005 levels" is a dot point in the Emission Inventory's "Data insights." The dot point appears to have been cut and pasted from the NGA 2019 without consideration of whether different data or evidentiary insights might be more appropriate.

We note, as well, that the data in the NGA 2019 may be outdated. *National Greenhouse Accounts 2020 (NGA 2020)* has been released,² and emissions data appears to have been revised. According to the NGA 2020, emissions in the Northern Territory only increased by 4.5% from 1990 to 2020, far less than the number in the NGA 2019.

The "National inventory by economic sector: annual emissions" in the National Greenhouse Accounts (**National Inventory**) (which can also be broken down by state and territory) uses different sectors than the Emissions Inventory; Agriculture, Forestry and Fishing; Changes in Inventories in Forest and Wood Products Stock; Commercial Services; Construction; Electricity, Gas, Water and Waste

¹ State and Territory Greenhouse Gas Inventories, Commonwealth Department of Industry, Science, Energy and Resources, <https://www.industry.gov.au/data-and-publications/national-greenhouse-accounts-2019> (accessed 24 June 2022).

² State and Territory Greenhouse Gas Inventories, Commonwealth Department of Industry, Science, Energy and Resources, <https://www.industry.gov.au/data-and-publications/national-greenhouse-accounts-2020> (accessed 24 June 2022).

Services, Manufacturing, Mining, Residential; and, Transport, Postal and Warehousing. Why has the Emissions Inventory been used instead of the National Inventory?

Noting that LULUCF emissions in the Northern Territory have decreased by 48% from 1990 to 2019 according to the NGA 2019 (and 75% from the high in 2000), what is the purpose of including a statement that the Northern Territory is one of the few jurisdictions in Australia where the sector is an emissions source rather than an emissions sink? We further note that the decrease identified in the NGA 2020 is 96% from 1990 to 2020, and the sector was an emissions sink in 2021 and 2018.

With further respect to the supporting information, land clearing should be examined against all emissions, not just LULUCF emissions, for a proper context. In proper context, land clearing contributes less than 0.5% of all Northern Territory emissions.

Section 6 Referring an action to NT EPA

The last sentence is contrary to section 42(b). By this guidance, NT EPA is establishing thresholds of significance. What the draft Guidance is telegraphing by the sentence, though, is that it can ignore those thresholds. Indeed, in the Supporting Information – the NT EPA's considerations (page 9), the draft Guidance asserts NT EPA has unfettered discretion to determine potential significance on an ad hoc basis, threshold or not.

This is evident through statements in the supporting information like, "[i]t is NT EPA who decides whether assessment is required or not, and this cannot be directed by government policy." This is an extraordinary statement. The draft Guidance is asserting that NT EPA can operate free of legislative or regulatory dictate and can simply ignore government policy.

The last two sentences of the following paragraph provide an equally extraordinary assertion:

The NT EPA proposes to adopt the threshold as a guide to when a proposed action requires referral to the NT EPA for consideration under the EP Act. In taking this approach, the NT EPA maintains discretion in its determination of significance.

By using the phrase "maintains discretion," NT EPA is asserting that it has the power to ignore the threshold. We believe such an action would be *ultra vires*.

In the last paragraph of the supporting information section, the draft Guidance provides, "[a]dopting the Large Emitters Policy thresholds as referral thresholds allows the NT EPA to call-in proposed action for environmental assessment even when the thresholds have not been met." How does adopting a threshold of significance authorise NT EPA to ignore the threshold of significance?

General

Has NT EPA considered guidance documents from other jurisdictions?

Again, we thank the NT EPA for the opportunity to provide these submissions and look forward to the responses to our questions and comments. Please contact the undersigned if you have any questions.

Yours faithfully
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