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EMP Content Guidelines: ALEC's submission

The Arid Lands Environment Centre (ALEC) is Central Australia's peak community environmental organisation that has been advocating for the protection of nature and ecologically sustainable development of the arid lands since 1980. ALEC actively contributes to the development of energy and resources policy through regulatory reform, written submissions, community education and advocacy within the community.

ALEC welcomes the opportunity to make a submission on *Environment Management Plan Content Guideline: Onshore Petroleum Regulated Activities (The Guideline)*.

ALEC's submission makes comment on a variety of key areas around petroleum regulation, including: hybrid regulation; cumulative impacts; acceptable environment impact; appropriate assessment of costs; contribution to climate change; and, minimum standards.

1. Hybrid regulations

The Guideline is informed by the regulatory framework, namely the *Petroleum Act 1984*, *Petroleum (Environment) Regulations 2016* and *Code of Practice for petroleum Activities in the Northern Territory* (Code of Practice). It is stated in the Guideline that the Code of Practice is a jointly administered instrument between the Department of Environment, Parks and Water Security (DEPWS) and Department of Industry, Tourism and Trade (DITT)¹. The Guideline fails to prescribe all responsibilities around the Environment Management Plans (EMPs) to DEPWS. Instead, it is unclear who is responsible for which activities.

It is integral that there is clear separation of responsibilities around petroleum activities and environmental management. Recommendation 14.34 of the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* (Fracking Inquiry) is explicit in the need for regulatory separation, stating:

That prior to the grant of any further exploration approvals, in order to ensure independence and accountability, there must be a clear separation between the agency with responsibility for regulating the environmental impacts and risks associated with any onshore shale gas industry and the agency responsible for promoting that industry.²

Instead, it is understood that DITT has retained responsibilities for well operation management plans (WOMPs). WOMPs are central to the effective governance of environmental issues relating to the petroleum industry. These responsibilities should be

¹ Environment Management Plan Content Guideline: Onshore Petroleum Regulated Activities, p.9.

² Scientific Inquiry into Hydraulic Fracturing in the Northern Territory *Final Report*, p.413.

managed and approved by DEPWS or the Minister for the Environment. It is clear that responsibilities of the Code of Practice under the *Petroleum (Environment) Regulations 2016* lie with the Minister for Environment and the Department of Environment. There is no legal basis for which DITT and the Minister for Resources should retain powers related to EMPs and any form of environmental regulation around petroleum activities in the Northern Territory.

ALEC considers it vital that EMPs are wholly administered by DEPWS, including all environmental approvals and oversight. It will reduce regulatory complexity, streamline regulatory responsibilities and ensure best practice environmental management is followed.

It is vital that all 135 recommendations of the Fracking Inquiry are implemented, including Recommendation 14.34.

2. Cumulative impacts

The Guideline is woefully inadequate in addressing cumulative impacts. Its three sentences completely undermine a section which is of critical importance to environmental management broadly and the EMP process specifically (e.g. Schedule 1, item 3(2)(b) of the *Petroleum (Environment) Regulations 2016*). Cumulative impacts can contribute to some of the most significant environmental impacts. Cumulative impacts are central to the Fracking Inquiry and recommendations handed down by Justice Pepper, including Recommendation 14.19³, Recommendation 14.21⁴ and Recommendation 12.5⁵. Adequately regulating cumulative impacts is a central step to understanding whether petroleum activities in the Northern Territory are safe and viable.

Recommendation 14.21 states:

That as part of the environmental assessment and approval process for all exploration and production approvals, the Minister be required to consider the cumulative impacts of any proposed onshore shale gas activity

For the Minister to consider cumulative impacts, the information that is provided ought to exceed a minimum standard. Instead, the Guideline provides no framework, nor does it provide any insight into how cumulative impacts should be considered. It is left entirely up to the proponent. The Guideline fails to ensure that the Minister is provided with information around cumulative impacts that meets a certain standard, is measurable and comprehensive. The Guideline's approach to cumulative impacts is subjective and entirely arbitrary.

The Guideline's failure to adequately consider cumulative impacts is deeply concerning. It is a key priority of the Territory Government to ensure that the Fracking Inquiry is implemented in a manner that is comprehensive and rigorous. This ensures that the industry is developed safely, and in a manner which protects the environment and meets the expectations of the community. The lack of detail around cumulative impacts allows perceptions to grow in the community that the Northern Territory Government is not taking the threats posed by petroleum activities and their cumulative impacts seriously. ALEC condemns the way cumulative impacts are considered in the Guideline.

³ Scientific Inquiry into Hydraulic Fracturing in the Northern Territory *Final Report*, p.414.

⁴ Scientific Inquiry into Hydraulic Fracturing in the Northern Territory *Final Report*, p.418.

⁵ Scientific Inquiry into Hydraulic Fracturing in the Northern Territory *Final Report*, p.313.

3. Acceptable environmental impact

The Guideline states several times that environmental impacts will be minimised to an extent that is ‘acceptable’⁶, ‘acceptable level’ or ‘a level that is acceptable’⁷. There is no definition of what an acceptable level means. The Guideline needs to provide more detail and clarity around what environmental impacts are ‘acceptable’.

4. Appropriate assessment of costs

An EMP must demonstrate that environmental impacts and risks are reduced to a level that is as low as reasonably practicable (ALARP). The guideline states that:

ALARP means that all reasonably practicable measures are in place to control an impact or risk considering the level of consequence and cost, time and resources involved to mitigate it. Reducing impacts and risks to ALARP centres on the construct of reasonable practicability; the weighing up of the magnitude of the impact or risk against the cost of reduction.⁸

However, there is no full definition of what ALARP is, or what costs matter. It remains unclear how temporal factors are integrated into ALARP and cost considerations. That is, are the costs of climate change considered as part of the cost. Are other costs also considered, such as the cost of greenhouse gas (GHG) emissions; the cost of cumulative impacts; the cost of habitat preservation; the cost of water usage; or who the cost impacts and when.

More detail is required to ascertain what costs mean under the ALARP and the Guideline.

5. Contribution to climate change

The Guideline should account for the contribution petroleum activities will have upon climate change. There is a precedent for this set by the NSW Land and Environment Court in 2019, in the landmark decision at Rocky Hill near Gloucester⁹. The case was the first of its kind in Australia, and the first of its kind since the Paris Agreement that the global carbon budget and the burning of fossil fuels were heard in a superior jurisdiction court. It was also the first time that an Australian court used GHG emissions and climate change considerations to block the development of fossil fuel projects. The Rocky Hill landmark decision handed down by Preston CJ sets a precedent that climate change considerations do have standing when determining whether a fossil fuel development should proceed.

Following on from this, a recent decision in the Federal Court¹⁰ has found that the Federal Environment Minister has a duty of care to young people to not to cause them physical harm in the form of personal injury from climate change. The case found that the prospect of harm is real and “reasonably foreseeable”, with one million of today’s Australian children to be hospitalised because of heat-related events. Climate impacts are no longer legally speculative, and cannot be batted off as a future problem. This precedent that Environment Ministers have a duty of care is the first step in determining claims of negligence. Ministers are now potentially liable for negligence if climate considerations are not accounted for, particularly in relation to their impact upon young people.

⁶ Environment Management Plan Content Guideline: Onshore Petroleum Regulated Activities, p.15, p.19, p.26.

⁷ Environment Management Plan Content Guideline: Onshore Petroleum Regulated Activities, p.27.

⁸ Environment Management Plan Content Guideline: Onshore Petroleum Regulated Activities, p.26.

⁹ *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7

¹⁰ *Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560

ALEC considers it necessary that the Guideline acknowledges climate change impacts, and that proponents are required to quantify their contribution to climate change. In addition, the Guideline should have a framework for determining thresholds for which developments can be approved or blocked depending on their contribution to climate change. To mitigate risk for the Northern Territory Government as well as for proponents, it is vital that climate considerations are embedded as part of the Guideline and all forms of environmental management.

6. Minimum standards

The Guideline fails to implement and outline minimum standards. ALEC considers it critical that minimum standards are a cornerstone of the Guideline. This is inline with best environmental practice.

Conclusion

ALEC has serious concerns about the proposed EMP Content Guideline, not so much by what it does include but what it doesn't. Clarity of decision-making is essential and the hybrid regulations creates uncertainty in critical areas most notably the Well Operation Management Plan. ALEC recommends that DEPWS and the Environment Minister should have oversight on all aspects of EMPs. The lack of guidance on acceptable environmental impact, the assessment of costs and minimum standards leaves too much to the subjective views of proponents. ALEC recommends that more emphasis be placed on the objectives of environmental management and the key values and minimum standards to be protected. Finally, the impact of petroleum projects on the climate must be considered and more guidance is required to ensure proponents adequately understand and report on the potential climate impacts of their proposed actions. This guidance does not provide the community confidence that the recommendations of the Pepper Inquiry are being implemented as they were intended to.

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