Environmental Defenders Office

EDO Briefing Note: Water licences for mining activities – proposed changes to the *Water Act 1992* (NT)

5 May 2023

Introduction

On 30 March 2023, the *Water Legislation Amendment Bill 2023* (**Bill**) was introduced to the Northern Territory Parliament. It seeks to amend the *Water Act 1992* (NT) (**Water Act**) and the *Water Regulations 1992* (NT) (**Water Regulations**), including with respect to how mining activities are regulated under this legislation.

Currently, mines which operate pursuant to a Mining Management Plan (**MMP**) approved prior to 1 July 2019 (or applied for before 1 July 2019 and approved without change) do not require a water licence for any surface or groundwater take which relate to their mining activities. These operators are only brought within the licensing scheme as new MMPs are approved, and new mining activities are authorised.

The Bill seeks to bring all excluded mining activities into the water licencing framework, by requiring all operators to apply for appropriate water licences within two years, rather than applications being triggered by the approval of a new MMP.

The EDO supports the move to bring all mining operations in the NT into the water licensing framework. However, we are concerned the Bill proposes to subject these previously excluded mining activities to less stringent licence application requirements than would ordinarily apply, exclude opportunities for public scrutiny of licence applications and prevent anyone other than the licence applicant to seek Ministerial review of a licence decision.

It is also difficult to tell how many mines will be captured by these amendments. This is because there is no legislative requirement to publish MMPs and Authorisations for mining activities under the *Mining Management Act 2001* (NT).

The Northern Territory's mining laws are not fit for purpose and sorely in need of reform. Those mining laws have not, to date, adequately or transparently regulated water take by mining operators, as the Water Act seeks to do in other contexts. As we await long-promised reforms to mining laws,[1] the Bill, as currently drafted, misses a crucial opportunity to hold mining operators to account for the environmental impacts of their activities through the water licensing framework.

[1] The Northern Territory Government released a Consultation Paper on proposed environmental regulatory reforms for mining activities in the NT in December 2020. A number of organisations, including the EDO, put in submissions. A feedback summary report on the consultation was released in September 2021. We understand that an Exposure Draft is being developed but no such draft has, to date, been released.

The amendments also cover petroleum activities carried out under Environmental Management Plans (**EMPs**) which are not related to fracking. This note primarily focuses on mining activities.

What is this Briefing Note about?

This briefing note covers the following topics:

- How are mining and petroleum activities currently regulated under the Water Act?
- What does the Bill propose to do?
- What are our concerns with the Bill as it relates to mining activities?
- What do we recommend as the way forward?

How are mining and petroleum activities currently regulated under the Water Act?

Water resources in the Northern Territory are regulated under the Water Act. Parts 5 and 6 of the Water Act deal with surface water and groundwater, respectively. Under those parts of the Act, the Controller of Water Resources (**Controller**) has the power to grant:

- **water extraction licences** for a period of up 10 years (or longer in special circumstances) to individuals and companies who wish to take surface water (s. 45) or groundwater (s. 60), subject to any terms and conditions specified in the licence document; and
- **other types of permits and licences**, such as:
    - permits to interfere with a waterway (s 41)
    - bore work permits (s 57); and
    - aquifer recharge licences (s. 67).

Prior to 2019, the Water Act stated that "mining activities and petroleum activities" were not subject to Parts 5 and 6 of the Water Act. This meant that operators carrying out mining activities were not required to hold a water extraction licence or other permits and licences under the Water Act.

The current position, set out below, was brought about by the *Water Legislation Amendment Act 2018* (NT), which was passed on 31 December 2018. These amendments apply Parts 5 and 6 of the Water Act to all mining and petroleum activities,[2] including activities related to hydraulic fracturing[3] ("fracking"), but only in some circumstances.

[2] The amendments also introduced definitions for "mining activity" and "petroleum activity" in s. 4 of the Water Act. A "mining activity" is a mining activity as defined in s. 4 of the *Mining Management Act 2001* (NT), including "another activity for a purpose ancillary to that activity". A "petroleum activity" is "exploration, extraction or processing of petroleum" under an NT Act or Commonwealth Act, "including another activity for a purpose ancillary to one of those activities".

[3] Hydraulic fracturing is defined in the transitional provisions introduced by the 2018 amendments as "the underground gas and oil extraction process involving the injection of fluids at high pressure into a geological formation to induce fractures that conduct hydrocarbons for extraction": Water Act, s. 112.

For mining and petroleum activities which are not related to fracking, Parts 5 and 6 of the Water Act only apply to 'new' activities. There is no requirement for a licence or permit under the Water Act for mining or petroleum activities involving surface water take, groundwater take, interfering with a waterway, bore work or aquifer recharge in the following circumstances:[4]

Water take related to:	Required to hold relevant licences/permits?

Mining activities	NOT required if:
	• Activity conducted in accordance with an approved **mining management plan (MMP)** under the *Mining Management Act 2001* (NT); and
	• Activity started:
	    o **On or before 30 June 2019**; or
	    o After 30 June 2019, but **pursuant to an MMP applied for before 30 June 2019, and approved without change**.

Petroleum activities which are not related to hydraulic fracturing ('fracking')	NOT required if:
	• Activity conducted in accordance with an approved **environmental management plan (EMP)** under the *Petroleum Act 1984* (NT); and
	• Activity started:
	    o **On or before 30 June 2019**; or
	    o After 30 June 2019, but **pursuant to an EMP applied for before 30 June 2019**, **and approved without change**.

Overall, this means that ongoing water take, bore work and aquifer recharge work associated with these 'old', but ongoing, mining and petroleum activities remain outside of the licence and permit regime of the Water Act, unless or until a new MMP or EMP is approved for the site, triggering a requirement to apply for a water extraction licence for both the ongoing water take and any new proposed water take.

Explainer: What is a Mining Management Plan?

If mining activities (whether in the exploration or mining stage) will cause substantial disturbance of the mining site, a mining company also needs to get an Authorisation from the Minister for Mining and Industry (**Minister**) under the *Mining Management Act 2001* (NT).

[4] Water Act, s. 113. The NT Government refers to the volume of water taken in these circumstances as "**previously authorised water entitlements"** under its current Policy on Water Extraction Licensing – mining and petroleum activity policy.

An Authorisation gives the mining company the right to carry out the mining activities specified in the Authorisation. When a mining company applies for an Authorisation, it must also submit an MMP to the Mining Minister. The MMP must include:

- details about the environmental protection management system and how it will be implemented;
- a description of the mining activities;
- a plan and costing of the activities for the closure of the mine;
- plans of the current and proposed mine workings and infrastructure; and
- details about the organisational structure of the mining company.

The Mining Minister cannot approve an MMP unless the Minister is satisfied that:

- the environmental protection management system for the site is appropriate for the activities and will, as far as practicable, operate effectively in protecting the environment; and
- mining activities under the plan will be done in accordance with good industry practice.

The Mining Minister may decide to impose conditions on an Authorisation, including conditions for the protection of the environment.

The Minister can decide to:

- refuse to approve the MMP and refuse to grant the authorisation; or
- approve the MMP and grant the authorisation.

The Mining Minister cannot grant an Authorisation unless they have approved the MMP. Once an Authorisation has been granted a mining company has to comply with its current MMP.

Under the *Mining Management Act,* there is no set time period in which an MMP must be reviewed, amended and sent to the Mining Minister for approval. Under s. 41, the operator must review and if necessary amend the MMP at intervals specified in the Authorisation or as required in writing by the Mining Minister.

What does the Bill propose to do?

Note: The below amendments **do not apply** to applications for water licences for petroleum activities related to fracking, which are already subject to the usual licence requirements under the Water Act.

The Bill seeks to bring these previously excluded mining and petroleum activities (**Previously Excluded Activities**) discussed above into the water licensing framework. In particular:

- All mining and petroleum activities which involve water take, irrespective of the date those activities commence/d, will be subject to Parts 5 and 6 of the Water Act.[5]

- If a person proposes to take surface water or groundwater for a mining activity, then they must obtain a relevant surface water licence (under s. 45 of the Water Act) or a groundwater licence (under s. 60 of the Water Act), within 2 years from the date the amendments come into operation, otherwise they are not authorised to take water.

- However, a different process applies to their applications for surface or groundwater licences, under proposed **section 71R** of the Bill (the **71R Process**). However, the **71R Process** contains substantially different application and public notification requirements to those which ordinarily apply to water licences under the Water Act.

What factors will be relevant to the determination of a licence application?

This **71R Process** applies if the following four requirements are met:

1. Immediately before 1 July 2019, the licence applicant was:
   - carrying out a mining activity reliant on water on the land on which the person proposes to take water; and
   - routinely taking surface water or water from a bore (groundwater) on the land for the mining activity.

2. From 1 July 2019 until the making of the application, the licence applicant:
   - continued to carry out that mining activity; and
   - routinely took surface water or water from a bore on the land for that specific mining activity; AND

3. The relevant activity is:
   - For a mining activity, carried out in accordance with an approved MMP;
   - For a petroleum activity, not related to fracking, and carried out in accordance with an approved EMP; AND

4. The application is made within 2 years of the Bill coming into operation.

Put another way, if a mining operator is continuing to carry out mining activities which include routine surface or groundwater take, where those activities started before 1 July 2019, in accordance with their existing MMP or EMP, then they must apply for a water licence within 2 years. If they do not do so within that timeframe, then their water take is not lawful. It is an offence under the Water Act to take surface

[5] Proposed Section 71P.

water (per s. 44) or water from a bore (groundwater) (per s. 59) if a person is not authorised under the Act to take the water.

What does the Controller have to consider when making a licence decision?

In the ordinary case, when deciding whether to grant a water extraction licence, the Controller must consider the factors set out in s. 90(1) of the Water Act (see **below**). Section 90 (1) contains factors which are crucial to assessing the environmental impacts of the water take and the impacts on other current and likely future users.

Under the s. 71R Process, the Controller may consider the above factors if they wish, but the Bill expressly states that they are not required to. The Controller may grant the licence if the licence application:[6]

- sets out how the applicant falls within the circumstances set out in s. 71R(1) (see **above**) and includes evidence of those circumstances;
  - such evidence may include (but is not limited to):
    - water use or extraction records, including records of metered water extraction;
    - a site water balance report; and/or
    - records of pumping rates and duration for taking water; and
- includes the total volume of water required under the proposed licence for each proposed year of the licence; and
- includes a copy of the relevant approved MMP or EMP.

Section 90(1) of the Water Act provides that the Water Controller must take into account any of the following factors that are relevant to the decision:

(a) the availability of water in the area in question;

(ab) any water allocation plan applying to the area in question;

(b) the existing and likely future demand for water for domestic purposes in the area in question;

(c) any adverse effects likely to be created as a result of activities under the permit, licence or consent on the supply of water to which any person other than the applicant is entitled under this Act;

(d) the quantity or quality of water to which the applicant is or may be entitled from other sources;

(e) the designated beneficial uses of the water and the quality criteria pertaining to the beneficial uses; the provisions of any agreement made by or on behalf of the Territory with a State of the Commonwealth concerning the sharing of water;

[6] Proposed cl. 14D.

(f) existing or proposed facilities on, or in the area of, the land in question for the retention, recovery or release of drainage water, whether surface or sub-surface drainage water;
(g) the adverse effects, if any, likely to be created by such drainage water resulting from activities under the licence on the quality of any other water or on the use or potential use of any other land;
(h) the provisions under the Planning Act 1999 (NT) relating to the development or use of land in the area in question;
(i) other factors the Controller thinks should be taken into account or that the Controller is required to take into account under any other law in force in the Territory.

What opportunities are available for public comment, scrutiny and review?

These historical licence applications for Previously Excluded Activities are also not subject to the same level of public scrutiny and comment as would ordinarily apply for water licences.

In particular, licence applications are not subject to Part 6A of the Water Act, which normally applies to water extraction licence applications and decisions.[7] Part 6A includes:

- the requirement for licence applications to be published with an opportunity for members of the public to provide written comments about the application to the Controller within 20 business days;
- the requirement for a water extraction licence decision and reasons for that decision to be published within 20 business days of the decision being made; and
- if a decision is subject to review by the Minister for the Environment (**Minister**) or the Water Controller, requirements for the Minister's or Controller's decision to be published within 10 business days after being made.

Under the proposed amendments, the only public notice requirement that is retained is the requirement for the Water Controller to give notice of their decision on the licence application with reasons for the decision within 20 business days of making the application, with these reasons to be kept in a publicly available register on the Department's website.[8]

Ordinarily, any "person aggrieved" by a decision of the Water Controller to grant (or refuse to grant) a water extraction licence may apply for the Minister to review the matter under s. 30 of the Water Act. This is a merits review process in which the Minister may ultimately uphold the licence decision, make a new licence decision (such as granting a licence with different conditions) or refer the matter back to the Water Controller to make a new decision. [9] Under the Bill, only licence applicants can seek review of

[7] Proposed Section 71R(4).
[8] Proposed cl. 14D(3)(b)-(c). Presumably, in this case, the NT Water Licensing Portal.
[9] The Minister may also refer the matter to the Water Resources Review Panel to consider and advise the Minister prior to the Minister making a decision: Water Act, s. 30(3)(b), (4).

the Controller's licence decisions in relation to Previously Excluded Activities, so other interested parties are shut out of the process.[10]

Comparison of licence processes

Licensing requirements	**Ordinary water licence application process**	**Proposal under the Bill re: water licences for Previously Excluded Activities**
Public scrutiny and review requirements		
Are licence applications required to be published?	Yes	No
Can the public make submissions on licence applications?	Yes	No
Are licence decisions required to be published?	Yes	Yes
Can the licence holder seek a Ministerial review of a licence decision?	Yes	Yes
Can other people "aggrieved by" a licence decision seek Ministerial review of the decision?	Yes	No – only the applicant may seek review of a licence decision.
Requirements to assess the licence		
Is the Controller required to consider the factors in s. 90 of the *Water Act*?	Yes	No

What happens if the Water Controller grants a water extraction licence which allows for a different amount of water to be extracted than that contained in the MMP or EMP approved for the relevant mining activity?

If there is an inconsistency between a water extraction licence and an approved MMP or EMP in relation to the amount of water that may be extracted for the relevant mining or petroleum activity, then the water extraction licence will prevail to the extent of the inconsistency.[11]

This provision appears to be directed to all water extraction licences pertaining to mining and petroleum activities. This means, for example, a mining operator may obtain an MMP this year for new mining activities which outlines a proposal to take a certain amount of water, and then subsequently apply for a water extraction licence for a greater amount of water. The amount set out in the water extraction licence, if approved, will prevail over what is set out in the MMP.

[10] Proposed s. 71R(6).
[11] Proposed s. 71S.

Any discrepancies between an MMP and a water extraction licence application may be difficult to scrutinise, however, because there is no statutory requirement for MMPs to be made publicly available and an MMP may not be appended to a licence application.

What are our main concerns with the Bill as it relates to mining operations?

Folding these Previously Excluded Activities into the water licence regime is, at face value, an important step forward for the regulation of mining activities in the Territory. However, we are concerned that the Bill misses a crucial opportunity to scrutinise water take by mining operators who have not previously fallen within the scheme.

Whilst mining operators have, since 2019, been required apply for water licences in relation to water take for new mining activities, the water take associated with ongoing, historically approved operations, has never been effectively regulated.

The Northern Territory government justifies the less rigorous licence application process for Previously Excluded Activities in the following way in the Explanatory Memorandum for the Bill:

> "*… different provisions [will] apply to section 45 or section 60 licence decisions for transitioning previously exempt water users efficiently into the water extraction licensing framework. Being water use that was exempt from water licensing it is generally recognised that such water use is acceptable and consequently requires no further consideration by the Controller removing the requirement to publish notices and consider section 90(1) factors.*"

The Information Paper on the Bill further notes:

> *"Reflecting the fact that eligible mine operators have already been subject to scrutiny in the grant of their mining exploration permit, mineral lease, mining authorisation and access authorities, applications during this transition period for pre-2019 mine operations will not require public notification periods."*

However, none of the processes referred to above involve meaningful scrutiny of the water proposed to be taken for Previously Excluded Activities. Those permits, leases, authorisations and authorities did not (and do not) expressly require the total amount of water to be taken per year to be specified for mining activities.[12] Nor did the factors which the Minister needed to consider when granting various approvals involve any express consideration of the types of factors set out in s. 90 of the Water Act.

Applications for Authorisations to carry out mining activities and associated MMPs[13] are not publicly advertised and there are no rights for anyone to object to the grant of an Authorisation or approval of

[12] Mineral titles for exploration and mining activities and mineral access authorities are regulated under the *Mineral Titles Act 2010* (NT). Mining authorisations and Mining Management Plans are regulated under the *Mining Management Act 2001* (NT).
[13] Section 35 of the Mining Management Act requires an operator for a mining site to have an Authorisation to carry out mining activities which will involve substantial disturbance of the mining site. An application for an Authorisation must be accompanied by an MMP for the site. The Minister may decide the application by approving the MMP and granting the Authorisation or by refusing to approve the MMP and refusing to grant the Authorisation: s. 36.

an MMP. Nor is there any requirement under the *Mining Management Act 2001* (NT) for MMPs or Authorisations to be made publicly available once they are approved. It is therefore not entirely clear how many mining operations will be covered by the present Bill nor the rigor with which their water take has been assessed under previous approval processes.

In addition, whilst *some* MMPs have been made publicly available (sometimes absent appendices, or with information deemed 'commercial in confidence' removed),[14] it is not necessarily clear how much water was being or is being proposed for extraction for mining activities under these MMPs.

The Information Paper for the amendments further notes the transitional arrangements which are currently in place under the Water Act were put in place on the basis that MMPs were approved annually (in effect, all operators would be brought into the regime as MMPs continue to be reviewed and renewed). However, the Information Paper notes that this is not in fact current practice, such that:

> "*the thresholds for requiring a water extraction licence may not be triggered for several years, if at all where a mine management plan has no review date or mining operations do not change. This is contrary to the intent of the transitional arrangement to have water extraction licences linked to approved mining activities within a short period of time.*"

The EDO's view is that this change in approval practices for MMPs does not justify subjecting mining operators to less rigorous licence requirements when bringing Previously Excluded Activities into the water licence regime. The statutory trigger to fold in these operators does not need to hinge on an updated MMP.

The way forward for mining regulation?

The EDO, in principle, supports the move to bring all mining operations in the NT into the water licensing framework. However, licence applications for Previously Excluded Activities should be subject to the same assessment criteria and review mechanisms as for any other licence application for surface water or groundwater take. This is particularly important given the overall lack of transparency around how mining operations are regulated in the Territory, including the absence of any statutory requirement to publish mining Authorisations and MMPs. We therefore urge that the Bill be amended.

The present situation is also illustrative of wider challenges and deficiencies in the regulation of mining activities in the NT generally. As we await long-promised reforms to mining laws, the Bill, as currently drafted, misses a crucial opportunity to hold mining operators to account for the environmental impacts of their activities through the water licensing framework.

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[14] See: https://industry.nt.gov.au/publications/mining-and-energy/public-environmental-reports/mining/public-mining-environmental-reports/mines