

Extractive Industry Association of NT Inc. (EIA) response to the Northern Territory Governments Consultation Paper on Regulation of mining activities - Environmental regulatory reform – Feb 2021 (Consultation Paper)

Overview.

General community acceptance of massive development of the Northern Territory (NT) has been confirmed by the 2020 re-election of the Gunner NT Government (NTG) with its articulated ambitious goal of a \$40 billion economy by 2030. This goal is supported by amongst other reports, the recent Territory Economic Reconstruction Commission's (TERC) 2020 report¹.

It is impossible to have this massive development without a vibrant extractive industry (Extractives) as the products, rock, sand, and gravel are the building blocks of all physical infrastructure. It would be possible to argue extractive operations are an essential product and service.

The Extractive Industry Association of NT Incorporated (EIA)² represents most of the sectors participants and our members are much of the annual revenue of \$45 million generated in 2019/2020³.

Consultation Paper.

This is an important process of endeavouring to improve the regulation of mining activities, we revel in, respect, and appreciate this opportunity and intend to contribute wherever possible in a spirit of cooperation and for the betterment of all stake holders.

In that spirit and to that end before we address the 31 specific questions asked, we comment on and in some cases challenge the assumptions made in sections 1, 2, 4, 5 & 6 of the Consultation Paper. We agree with section 3.

Section 1, assumes in paragraph 3 page 1 that *"to ensure the effective environmental oversight of the industry"* it will require *"the migration of all environmental management provisions to the new EP ACT."* We propose that this is not the only option to ensure the effective environmental oversight of the extractive industry and is not the most efficient way to achieve that result. We propose that one more efficient option is to continue to have the extractive industry activities approved and regulated by the "one stop shop" that is the Mines Section within the Department of Industry, Tourism & Trade (DITT).

Section 2, We agree in principle with the three key objectives, comments on each below, however *"the purpose and outcomes being sought from the reforms"* are concerning to us and we offer comments on them below.

- Objective – *"Improved investor certainty"*
 - o For Extractives, the issues around investor certainty are.
 - Forward Government Planning and availability of next use of mine site plans (or agreement with landholder of next use of mine site) so that effective and definitive rehabilitation and closure plans can be made and implemented from the initial application for a Mining Management Plan (MMP).
 - Transferability of MMP's and potentially Environment Management Plans/Licences if this Consultation Paper proposals are implemented.

¹ [Territory Economic Reconstruction Commission - Final Report](#)

² [Extractive Industry Association of NT Inc. \(EIA\)](#)

³ [NT Government Production and Value of Mining Statistics](#)

- Changes by (in essence retrospective) government decree e.g., threatened species proclamations, water, waste/pollution.
 - Increasing or proposed increases in number and value of fees (Section 9.1 of Consultation Paper)
- Objective – *“Better environmental outcomes”*
 - For Extractives, we are not aware of any current environmental outcomes of significant concern and we request clarification/definition as to what “better environmental outcomes” would be or look like.
 - Are their current or past problems/issues with outcomes, perhaps requiring use of Mining Remediation Fund (MRF) resources?
 - Extractive operators already have higher levels of environmental outcome requirements than Department of Infrastructure Planning and Logistics (DIPL) borrow pits⁴, or graziers and indigenous leaseholders using product for their own needs.
- Objective – *“Building community confidence”*.
 - For Extractives, we are not aware of any significant loss of community’s confidence in our sector.
 - Are there issues we are not aware of? Has a study been completed?
 - If so, are they affecting our current performance or future ability to operate and supply.

“In addition to these objectives the purpose and outcomes being sought from the reforms to the environmental regulation of mining include:”

- *“Clear separation of responsibilities for environmental regulatory functions on mine sites”*.
 - For Extractives, we do not see this as adding a benefit rather it complicates lines of authority and who is responsible for what.
- *“Ensuring appropriate environmental oversight of mining activities to ensure operational impacts of activities are minimised and environmental incidents are negligible”*.
 - For Extractives, considering current operational impacts are already minimised and environmental incidents negligible the current “one stop shop” appears more efficient and investor confidence building..
- *“Developing a system that supports front-end planning to ensure minimal and managed environmental impacts both during and post mining activities”*.
 - Extractives support this” front-end planning” however we observe that the front-end planning that is lacking is predominantly with the broader NTG and DIPL. This “front-end planning” is primarily needed so that post mining use of land is determined prior to mining to facilitate rehabilitation and closure design and implementation.
- *“Implementing a polluter pays approach to environmental protection”*.
 - For Extractives, the risk of pollution is low and, in any case, covered under the current security bond arrangements. We are not aware of any material, past or current pollution control issues relating to our extractive activities.
- *“Compliance and enforcement of environmental conditions and obligations on mine sites, commensurate with risk”*.

⁴ [s35 DIPL Standard Specifications for Environmental Management 2019](#)

- For Extractives, we understand this is already in place and working effectively.
- *“Any mining legacies are avoided, or if they do arise are effectively managed”.*
 - For Extractives, looking at history, mining legacy sites are rare and already pre-emptively provided for on current leases through Security Bonds and if necessary, for legacy sites the Mining Remediation Fund (MRF). None of the MRF to date, to the best of our knowledge has been used on extractive leases, indicated limited issues.

“The purpose and outcomes being sought from the reforms to mining management include”:

- *“Improved definitions and regulatory tools for the ongoing management of mining securities, the mining levy, care and maintenance periods, the Mining Remediation Fund (MRF) and legacy mines”.*
 - Extractives needs more information about what improved definitions mean and imply and what regulatory tools are proposed before and informed comment can be made.
- *“A streamlined approval process to authorise mining activities in parallel with environmental approvals”.*
 - Extractives are not at all convinced that splitting the current process of approval into two and having two Government Departments working in parallel will make gaining approval to mine more efficient. We are not aware of any examples of this being the case.
- *“A reduced regulatory burden on industry by removing the need for mining management plans (MMP’s) in their current form”.*
 - Extractives with the Mines Section of DITT have recently reviewed and subsequently simplified the Extractives MMP. It is difficult to envision how putting the responsibility of gaining separate approval from two Government Departments onto the proponent is more efficient than having one lead Government Department manage the entire process.
- *“A reduced regulatory burden through implementation of a risk based whole of mine life approach to authorisations”.*
 - Extractives support strongly a whole of mine life approach both for mining operations and environmental outcomes however, we do not see the need for proponents to have to deal with two departments directly.
- *“Clear and cost-effective avenues for merit review and appeal to the Northern Territory Civil and Administrative Tribunal (NTCAT) for decisions made under the MMA”.*
 - Extractives support this.

We agree with the second to last paragraph of section 2 on page 2 however are not confident the intent of the last paragraph on page 2 is realistic, smooth cooperation between government departments has not been readily observed by us in the past, indeed even within Government Departments cooperation can at times be strained.

Section 3, Extractives agrees strongly with this section of the Consultation Paper.

Section 4, Extractives agree with this section however challenge the last sentence of point 4 on page 4 where the author has moved into conjecture within a section that is meant to be and is a factual rendition of the existing regulatory framework for mining and by doing so has created ambiguity which history has proven time and time again is negative to investor confidence. The new EP Act either applies to Extractives or does not. We assert that the new EP Act is a significant overreach for

Extractives as indicated by this ambiguous comment made even before the industry has responded and therefore Extractives needs to be treated on its own merits in the most efficient way possible.

Section 5, Extractives suppose this to be the driver of the proposed changes. It concerns Extractives greatly. Extractives refute the claim of “*Sectoral Capture*”, referenced in the Hawke II⁵ report, where it noted that, “*the current environmental regulatory framework for mining activities inherently presumes that the mining activity will in all cases trump the potential environmental impact*”. The review went on to note that “*while this may not be true in practice, it creates perceptions that are inconsistent with attempts to build community confidence that potential environmental impacts can be actively managed to ensure they do not arise*”.

Extractives proffer that if this is “*not true in practice.*” as noted by Hawke, which is Extractives observation also, then fixing a perception in Extractives opinion is best done by a addressing the perceived problem directly rather than shifting the perceived problem to another Government Department or as proposed by having two departments address the same perceived problem. We see no empirical evidence that this perception is either real or widespread. There are 125 authorised extractive mining projects currently in the NT. These have been authorised in the last 16 years, an average of 8 authorisation per annum. This number, less the closure of other extractive activities (number unknow) does not demonstrate a sectoral capture scenario in fact it could well represent the opposite which considering the massive drive for growth by the community represented by the Government maybe a limiting factor.

We also note the Hawke finding of “*The review also found that overlapping jurisdiction for environmental regulators resulting from the on/off site regulatory regime “has the potential to create significant inefficiencies and uncertainties”, and “that requirements to create multiple, duplicate, documents drawing on the same information – which result from a lack of transparency in mining management plans – was contributing significant transaction costs to the approval process, as well as increasing uncertainty about environmental management expectations and mining operator responsibilities*”. Extractives find that the current Consultation proposal to have two Government Agencies responsible for the approvals of mines is more likely than the current system of approval to create significant inefficiencies and uncertainties. It will guarantee at least two sets or documents, likely to be multiple and/or duplicate.

“*In summary the key concerns that regulatory reforms for the mining industry will seek to address include*”:

- “*Perceptions of sectoral capture and conflicts of interest in decision making processes*”.
 - o The adding of a further additional Government Department to oversee a portion of the decision making may internally overcome these perceptions which should in Extractives opinion be quantified immediately and address directly, if they are real, before being moved to another Government Department most likely adding complexity.
- “*Uncertainty on regulatory roles and responsibilities and duplication of effort for industry and the regulators*”.
 - o Extractives fail to see how separating out a current singular process into two processes and two Government Departments addresses these issues if they are real and, in any case, will likely increase the effort for industry.
- “*A largely non risk based approach to regulating mining activities*”.

⁵ [Executive Summary page v Sectoral Capture: hawke-ii-review](#)

- Extractives challenges this assumption. We observe that the approval or not of Extractive operations and associated mining management requirements are risk based as each application for and MMP granted is uniquely assessed on its merits.
- *“A lack of public transparency in approvals process”.*
 - Extractives fails to see how the public knowing, should they wish to know, (and we doubt they will unless they have an emotional axe to grind) about the approval process of an extractive mine, adds value to the process or achieves any of the key objectives of this reform. Approval and regulation of extractive operations is a technical and experience rich process.
- *“The size, complexity and cost of developing MMPs in their current form”.*
 - For Extractives, this “size, complexity and cost” has been recently addressed with the imminent release of the revised MMP. The Consultation Paper proposed change in our opinion is very unlikely to simplify or reduce the cost of MMP’s and Environmental Management Plans (EMP)’s when the combined effort to produce and manage both is considered.
- *“No defined timelines for reviewing and approving MMPs”.*
 - There are defined timelines for reviewing current MMP’s already in the Mining Management Act 2001 (MMA)⁶, further defined in Authorisations documentation and we would welcome agreed MMP approval timelines being developed and set.
- *“Historical failures resulting in legacy mines”.*
 - Extractives is not aware of any Extractive operation legacy mine issue as indicated by no MRF funds being allocated to Extractive sites. MRF is in place to address past issues and security payments in place to address potential issues. We do not see a need for any further fees or perpetual recourse legislation.
- *“Incidents of contaminated waterways and damage to sacred sites”.*
 - Extractives is not aware that this has been an issue and does not see potential for it to be in the future.
- *“Downstream impacts on flora and fauna from mining activity contamination”.*
 - Extractives is not aware that this has been an issue and does not see potential for it to be in the future.

With regards to the last paragraph of Section 5, Extractives suggests that the real issues at hand e.g., *“assessment and approval timeframes”* and these are better addressed by *“increased guidance and resourcing”* rather than legislative change as already sighted by this Consultation Paper.

Section 6, confirms Extractives concerns that the Consultation Paper’s proposed changes are based on perceptions “sectoral capture” and unrealistic expectations, unclear requirements e.g., *“this is most likely to apply to mining operations as opposed to exploration or extractive activities”* and these changes would lead to confusion and double ups e.g., Department of Environment, Parks and Water Security (DPWES) & DITT would both be responsible for closure objectives or plans (top of page 7 of the Consultation Paper).

⁶ [Section 41 \(1\) and 41 \(2\) of the Mining Management Act 2001\(MMA\)](#)

All the above having been documented, we answer the specific questions of the Consultation Paper and make our comments for sections 6.1 through Section 9.2 below and we premise that these responses are assuming our request for this Proposal not to proceed is unsuccessful.

1. *“Is the approach of imposing general (mining) environmental obligations or duties to provide a ‘safety net’ and support for the licensing and registration scheme supported? If not, why?”*
 - a. No, because the “obligations” proposed are “motherhood” in nature and a mine site is inherently different to the surrounding areas, even as Section 6.1, suggest in the last paragraph of the section *“it is unlikely to be appropriate to require mining operators to meet the criteria to avoid clearing sensitive or significant vegetation under the Territory’s ‘Land Clearing Guidelines’ (2019), which are primarily designed to manage broad scale clearing for pasture and horticultural developments.”* It is unrealistic to try and fit general environmental norms to a mine site, they are unique and need to be addressed and managed uniquely, as currently conducted by individual and wholistic MMP('s).
2. *“What alternatives should be considered?”*
 - a. As per above.
3. *What other general (mining) environmental obligations should be included?*
 - a. As per above.
4. *“Rather than relying on a non-exhaustive list of substantial disturbance activities such as that contained in s.35 of the MMA, should the new framework legislation identify an exhaustive list of non-disturbing activities? This could include, for example, airborne surveys and terrestrial seismic surveys undertaken using existing tracks”.*
 - a. Extractives suggest the exhaustive list of non-disturbance activities be in addition to the non-exhaustive list of substantial disturbance. This will possibly add to the clarity of requirements and give further proponent certainty.
5. *“Are there any mining related activities that currently require authorisation and a mining management plan that should not be subject to the new framework”?*
 - a. No
6. *“Are there mining related activities that are not currently required to be authorised that should be under these reforms”?*
 - a. No

Section 6.2, Extractives observes that under the current NT Environment Protection Authority (NT EPA) check list⁷ for referral almost all current and proposed mining operations would fit into the referral category. This is contradictory to what this Consultation Paper suggest in Section 4. 4 on page 4 and Section 6.4 paragraph one, page 12 of the Consultation Paper.

Section 6.3, Extractives is positive towards the proposed tiered system from Registration to Tailored licence but only if it is for the complete mine site operations, not just environment. The complexity of one system for mining and another environment in our opinion is fraught with difficulties. In addition, we need clarity on what the Standard Conditions are proposed to be, before we can give specific feedback.

7. *“Under what other circumstances should the CEO be able to amend the conditions of a licence”?*
 - a. Extractives ask that the DEPWS CEO only be able to amend the conditions of license outside of the formal licence review,
 - i. at the request of the mining operator and/or

⁷ [pg. 25 to 30 NTEPA Referring a proposal - Environmental impact assessment - Guidance for proponents](#)

- ii. where the operator has breached statutory conditions.
8. *“What protections could be included in the legislation to ensure peer review powers are only used when required to ensure that the licensing process provides the necessary environmental protections and meets the objectives of the EP Act”?*
 - a. Extractives propose that prior to any “peer review” being conducted the proponent be consulted (as suggested) and if agreement cannot be reached a pre-defined arbitration process be available to the parties.
 9. *What information or assistance could you provide to enable administrative guidance that supports a “prepare once, use many” approach to peer review documents to be developed?*
 - a. Extractives propose a “Extractives Facts Data Base” of all “non-commercial in confidence” materials be established and maintained by the Mines Sector of DITT which would include mining and environment information. e.g., water bore data base.

Section 6.8 Extractives strongly supports the inclusion of “*decision, making timelines*” not only for environment approvals but mining operation (MMP’s) approvals as well.

10. *Are there any compliance and enforcement tools not currently available in the EP Act or the MMA that should be considered for inclusion as part of these reforms?*
 - a. No

Section 6.11 Extractives strongly support the first two paragraphs of this section. It is imperative the “next use” of proposed mine sites is determined early in the process, as this drive’s rehabilitation and closure requirements. Extractives do not accept that there needs to be two departments involved in the approval of a closure of a mine site. Extractives do agree with the last sentence of this section “*As part of the process to improve certainty and guidance for proponents, mine environmental remediation(rehabilitation) guidelines will be developed*”. These guidelines must be consistent for all Extractive operations regardless of end use of the product extracted and we would recommend the DIPL guile lines⁸ as appropriate.

11. *“What improvements to the mining authorisation process do you consider would improve efficiency and effectiveness”?*
 - a. Extractives need a defined timeline for the approval process.
12. *How can the mining securities framework be improved?*

Life of mine approach with the opportunity to break down security payments into disturbed areas.
13. *How can the management of mining securities be improved to provide greater incentives and reward for progressive rehabilitation?*
 - a. Early agreement on next use of land. More in field inspections by appropriately qualified Mining Officers to assess and agree on rehabilitated areas so securities can be released or rolled to other areas.
14. *What improvements could be made to the calculation of mining securities to better address potential environmental risks and impacts?*
 - a. There has been ongoing correspondence and conversations between EIA and DITT (previously DPIR) with regards to this subject and we refer to that here.
15. *What other matters would you like to see considered as part of a review of mining security assessment?*
 - a. As above.
16. *“Should mining operators have standing to seek a merits review of the proposed environmental and/or infrastructure security? Why”?*

⁸ [s35 DIPL Standard Specifications for Environmental Management 2019](#)

- a. Yes, however, Extractives observation is that the Mining Board has not been effectively established over recent years. We also note that Extractives has not needed either a Judicial or Merits review in the past. Despite this, Extractives recommends an option for both a merits and judicial review be included in any future legislation. It is always appropriate in business and law to have a strong review process available.
17. *“How should ‘care and maintenance’ be defined”?*
- a. *“processes and conditions on a closed mine site where there is potential to recommence operations at a later date.”*
18. *“What other mechanisms could be adopted to improve the management of environmental impacts during care and maintenance periods”?*

19. This should be addresses case by case as per MMP’s *“Should the legislation impose a time limitation on how long a site can remain in ‘care and maintenance’? If so, what period may be appropriate”*? No
20. *“What, if any, standard obligations for environmental management during care and maintenance periods should be incorporated into the EP Act”*?
 - a. This should be addresses case by case as per MMP’s.
21. *“In addition to the proposals contained in this paper, what other mechanisms could the Territory introduce to minimise the potential for legacy sites to be created in the future”*?
 - a. Extractives observe that there are no extractive legacy mine sites currently. Potential for legacy Extractive sites is low, with history as our guide and should there be a legacy site come about, the MRF is well placed to address same.
22. *“In what ways can industry be encouraged and supported to play a larger role in undertaking remediation works on legacy sites”*?
 - a. Extractives will respond to commercial opportunities, therefore offering financial gain e.g., low-cost access to any valuable material, from undertaking remediation work on legacy sites would be supported by the Extractive industry.
23. *“In what ways could the management and administration of land access arrangements be improved for both mineral title holders and affected landholders or leaseholders”*?
 - a. Extractives finds the current tried and proven land access regime is appropriate when adhered to by all parties, including the NTG. We observe this is not always the case and subsequently an uneven commercial playing field occurs. This would be best addressed from within the current legislation.
24. *“How would the proposed transitional arrangements effect your mining activity”*?
 - a. Extractives see this question and the next four as hypothetical. We propose these questions be addressed at a future time if necessary.
25. *“What improvements could be made to the proposed transitional arrangements to facilitate the transfer of projects into the new system in a timely, staged and efficient manner”*?
 - a. As per questions 24
26. *“For each type of mining activity – exploration, extraction and mining operations – what would be an appropriate timeframe in which to require the activity to obtain an environmental registration or licence”*?
 - a. As per questions 24
27. *“Are the proposed arrangements for non-finalised processes appropriate? If not, what alternative processes should be considered”*?
 - a. As per questions 24
28. *“What arrangements would you propose for operators that wish to transfer the mining activity”*?
 - a. As per questions 24
29. *“What elements would you like to see included in a residual risk framework”*?
 - a. Extractives strongly disagrees with the establishment of a “residual risk” fee.
30. *“Are there specific matters that should be considered as part of developing a residual risk framework applicable to mining activities”*?
 - a. Extractives are opposed to Residual Risk payments. We do not agree that these payments differ materially from Mining Securities or the MRF levy and these two fees in our option are already designed to protect the Government/Community from mine sites that have been abandoned or maybe abandoned. In addition, closure of a mine site designates the final responsibility for that site by the operator. It is not practical or realistic for there to be a perpetual responsibility.
31. *“What benefits might there be to applying chain of responsibility laws to mining and other environmentally impacting activities”*?

- a. Extractives see no benefits to any “chain of responsibility laws”. It sees several disadvantages primarily a significant increase in investor uncertainty. It also sees that both the Mining levy and MRF are designed to cover this potential issue and both a “Residual Risk payment and chain of responsibility law” are double ups on current fees.

Conclusion.

As identified in the consultation paper item 4.4 (page 4) Extractive are different from other mining activities *“In general terms, these processes are unlikely to apply to exploration activities and the majority of smaller extractive activities.”* therefore, Extractives should be removed from this proposed all-encompassing legislation and identified and treated separately and uniquely, entirely within the Mines section of DITT. Additionally, resources within this Mines Sector need to be increased with defined specialist roles, filled by persons with mining skills and/or experience as specified in subsequently revamped Position Descriptions.

Investor confidence can be improved by having transferrable, life of mine MMP’s, and no ability, without compensation from the Government, for Government decree to change mine site use. E.g., water, waste, threatened species. Improved compliance with the Mining Titles Act 2010 & MMA on sale/use of product from indigenous, lease held lands and borrow pits would add to investor confidence levels.

Further, Extractives request a single fee structure. This would minimise Extractive operational costs by only having the one Security Bond that as it does currently capture’s the need for mining operational security and environmental security, all managed by Mines section of DITT. We see no rational argument for Extractives to continue to be a part of the MRF as it has never been used for rehabilitation of Extractive operations and not likely to be, nor do we see any reasonable argument for Extractives to lumbered with another fee of the Residual Risk Fund or the investment confidence sapping possibility of a Chain of Responsibility law.