Submission on the *Regulation of mining activities: environmental regulatory reform* consultation paper

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Submitted via email to Environment Policy, Northern Territory Department of Environment, Parks and Water Security, environment.policy@nt.gov.au

1. The Environmental Defenders Office (**EDO**) welcomes the opportunity to provide comment on the "*Regulation of mining activities: environmental regulatory reform*" consultation paper (**Mining Consultation Paper**).

2. The EDO is an independent community legal centre specialising in public interest environmental law. The EDO advocates for strong environmental laws and effective compliance and enforcement of the regulatory frameworks that protect our important natural assets and unique landscapes.

3. The EDO supports the NT Government's (**NTG**) commitment to modernising the Territory's environmental laws and we look forward to continuing to work with the NTG on its proposed environmental reforms.

Executive summary

4. We have reviewed the Mining Consultation Paper. At a general level, it appears that the proposed reforms will broadly be an improvement on the current laws. However, there are numerous areas of the proposed reform that require further consideration, specific detail and clarity. The EDO welcomes the opportunity to provide more detailed comments as the reforms progress, including during any further briefing meetings with the Department of Environment, Parks and Water Security (**DEPWS**) and the Department of Industry, Trade and Tourism (**DITT**).

No industry should receive preferential treatment

5. The Mining Consultation Paper proposes reforms that will both support the resources industry and protect the environment. The paper emphasises that the reforms propose a regulatory regime that is "contemporary and robust" and is the "most-up-to-date". In our view environmental reforms to the mining industry in any jurisdiction of a developed country such as Australia in 2021 should commit to world's best practice mine regulation, without limitation. That said, the EDO welcomes the proposed reforms and strongly supports the modernising of the regulatory regime for mining that will enhance environmental protections in the NT.

6. We note with concern that the tone, language and focus of the Mining Consultation Paper are heavily favoured to the mining industry. As the Mining Consultation Paper acknowledges,[1] the 2015 Hawke Review[2] identified numerous concerns with the existing regime whereby there appears an inherent presumption that mining activities will always trump environmental impacts. In our experience with the current regime, this is usually the case. Accordingly, we are concerned that if the reforms continue to preference industry and do not give adequate weight to environmental and social considerations, the regulatory framework will remain outdated and will not produce a modern and robust regulatory regime.

7. In our opinion, reforms that are truly contemporary, transparent and robust will only be achieved if greater detail, specificity and weight is given to environmental and social considerations. A good starting point to setting a more balanced and contemporary tone are three stated objectives set out in the Mining Consultation Paper:

    a. "improve investor certainty": as with the below two objectives, this objective should include objective standards against which success may be measured. In our opinion, if each of the below objectives are properly implemented with requisite detail and specificity, a transparent and modern regime will be achieved and improved investor certainty will follow.

    b. "better environmental outcomes": This immediately raises the question, better than what? If the reforms are benchmarked against the existing regulatory regime, then the NTG will fail to meet its commitment of achieving the "*most up to date environmental law overseeing environmental protection*". To assess whether the reform will achieve its stated commitments, we suggest including specific environmental outcomes and benchmarks for measuring those outcomes against. This approach should be followed through in all aspects of the reforms.

    c. "building community confidence": As with environmental outcomes, this overarching objective will only be met if the reforms address it in sufficient detail. As presently framed, the Mining Consultation Paper provides very little detail about community consultation, which is a cornerstone of building community confidence. Although

[1] At Part 5, page 5.
[2] Hawke, A. 2015. 'Review of the Northern Territory Environmental Assessment and Approval Process', pp.34-35 available: https://DEPWS.nt.gov.au/environment-information/environmental-policy-reform/environmental-regulatory-reform-archive-news/reports/hawke-ii-review

the paper proposes some increased transparency (e.g. of plans), and opportunities to comment on mining activities that do not trigger assessment under the *Environmental Protection Act 2019* (NT) (**EP Act**), of significant concern is the absence of any mention at all of engaging with Aboriginal communities.

8. The Mining Consultation Paper emphasises the economic contribution of mining to the NT economy. We accept that mining is a large contributor to NT economy. However, mining is highly complex and takes substantial government resources to assess, approve and regulate. Further, mining is inherently environmental risky and the economic contribution of mining is usually at substantial environmental cost. The regulatory regime should recognise the risks and costs of mining and should make clear that any operator who seeks approval to exploit the resources of NT for private profit will be held to a high standard of environmental assessment, conditioning, regulation, compliance and rehabilitation.

9. The regime needs to strike the right balance to ensure that incentives to industry are not prioritised over good governance and transparent, accountable environmental assessment, approvals and compliance activities for mining. The mining industry should be conditioned and regulated in the same way as other industry – commensurate with environmental risk. If the NTG truly seeks to achieve a "contemporary, robust and transparent" mining regime it must ensure that mining industry is held to account and to the same environmental rigour as all other industry. Accordingly, we recommend that mining regime only be specific to mining where necessary for technical reasons, not to give the mining industry *carte blanche* and continue to override environmental and social considerations.

Proposed environmental framework

10. We strongly support the clear separation of regulatory responsibilities and the proposal to adopt a consistent approach to the environmental regulation of the onshore petroleum industry. We look forward to receiving more detailed information about the proposed regulatory separation, particularly with respect to how DEPWS and DITT will consult with each other during the assessment, compliance and remediation stages of a mining project.

11. Regarding the environmental assessment framework, we recommend that all primary decision-making legislation used to authorise projects and developments require the decision maker to: consider the environmental impacts of an action and assess those impacts against objective standards; implement, via conditions, any advice of the NT EPA;

impose risk-based environmental conditions that are clear, consistent and enforceable, including ecologically feasible offsets and requirements for management plans; and require public reporting on performance monitoring via a government administered public register. We also recommend that any concurrent or integrated approval process under the *Mining Management Act* be tested and accredited against objective environmental criteria to ensure that any such approval is consistent with the environmental assessment and approval granted by the DEPWS.

12. We look forward to engaging with DEPWS and DITT as the reforms progress and welcome the opportunity to provide further comment as further details of the proposed regime are developed.

Proposed alternative to mining management plans

13. A critical issue in the Mining Consultation Paper is the proposal to replace mining management plans with environmental management plans (**EMP**) administered by DEPWS and 'Mining Programs' administered by DITT. While we have no issue with this in principle, the effectiveness of this proposed reform will depend on how it is implemented. In this regard, we note the following:

    a. A key issue with EMPs in other jurisdictions is that approvals are granted on the condition that an EMP will be developed. That defers commitments and details to the plan down the track, and some EMPs are weak and not enforced. We strongly recommend against adopting such an approach in the NT.

    b. It is also not clear what happens where there is inconsistency between the plan and program as there is potential overlap (e.g. environmental impacts of infrastructure management, closure, rehabilitation). This must be clarified.

    c. All EMPs should be made publicly available and any approval granted following assessment of an EMP must have clear enforceable conditions.

14. We suggest that any framework in which EMPs are to be developed, assessed and administered be subject to the following:

    a. Consultations between DEPWS, DITT and the Northern Territory Environment Protection Authority (**NT EPA**) to ensure that the guidelines for preparation of the environmental component of EMPs are fit for purpose.

b. Guidance materials for the preparation of EMPs to ensure that they are risk-based and outcome-focused. Actions to manage environmental risk must be expressed in clear terms with clear objective performance statements that can be monitored and enforced effectively.

c. Establish as a measurable performance standard for EMPs requiring that "adverse effects on the environment are managed to reduce environmental damage to as low as reasonably practicable".

d. Increased transparency and confidence in the process by providing public Statements of Reasons for key decisions including: any decision to, or not to, refer an EMP to the NT EPA; and any decision about the acceptability of the environmental controls in EMPs.

Monitoring, compliance and enforcement

15. We generally support a risk based licencing scheme on the basis that the risk level of any proposed action is assessed accurately and by reference to objective criteria. We note that the terminology is slightly confusing and could be simpler and easier to understand. For example, a registration could simply be a category 1 licence to reflect that it is a standard licence. The licence number could increase to reflect the risk, i.e. licence category 2 is medium risk with some non-standard conditions and licence category 3 is higher risk with more tailored conditions.

16. We do not support the proposal for no registration for activities of alleged no or low impact such as aerial surveys etc. All activities have impacts on the environment and should be regulated and registered in the licence system to ensure compliance. Additionally, it is appropriate that the NTG charge an administrative fee for those activities to fund the regulatory burden on the NTG.

17. It is not clear how the new regime will be funded and resourced. There will be significant costs of not only reforming the system, but ongoing administrative costs including resourcing and training suitable operational staff. One option is that the proposed licencing scheme charge administrative fees to licence holders. This is consistent with NSW regime. Administrative fees should reflect risk and environmental impacts and incentives should be awarded to good environmental performers, as with the NSW risk-based licensing system.

18. The environmental approvals system and licensing regime should reward proponents with a good environmental track record. The rewards could comprise of a lighter regulatory touch and lower administrative fees. This is an extension of the risk-based approach to regulation, championed by the Australian National Audit Office: "Adopting a risk-based approach to regulatory administration can have benefits for both regulated entities and regulators. Compliance costs for regulated entities can be minimised with entities assessed as lower risk being subject to a lighter touch compliance approach without unnecessary intrusion by regulators. On the other hand, higher risk entities may be subject to more scrutiny by a regulator and incur additional compliance costs which are offset by improved regulatory outcomes and benefits for the community." An extension of this principle is that the proponent, not the NT, should carry the risk of non-performance. This is particularly so where documentation provided by a proponent is inadequate for confident, transparent decision making.

19. All licence holders should be required to carry out an independently verified annual audit that includes a declaration of accuracy by the company. The regime should impose criminal sanctions against those who fail to report or report inaccurate information.

20. We support the creation of a public register and recommend that in addition to licences, relevant approval documents and annual audits, all information relating to compliance actions should be on the public register. Again, this is consistent with the NSW public register system. It is transparent and builds community confidence.

Assurance monitoring and reporting

21. Consistent with the recommendations of the Hawke Review, we support the NT EPA being tasked with assurance monitoring and reporting on the operation of the system. This monitoring should have a performance improvement orientation, as opposed to a compliance orientation, and should focus on:

    a. The integrity of the assessment system, namely whether systems are in place and operating effectively.

    b. The operation of risk management arrangements within the assessment and approval system to ensure that they are robust, well-modulated and used to achieve ecologically sustainable development outcomes.

c. The compliance of proponents with disclosure and environmental performance reporting obligations.

d. The effectiveness of compliance and enforcement monitoring and reporting.

22. To support the above functions, the NT EPA must receive further budget allocation to ensure that it is adequately resourced. As discussed above, given the high cost of mining regulation, we suggest that the regulatory regime impose administrative fees on mining operators. The amount of the administrative fee should be commensurate with the environmental risk and regulatory complexity of the mine. As noted above, we suggest that good environmental performance should be rewarded and the regime should build in financial capacity to discount administrative fees for mines that consistently demonstrate good environmental performance.

Mining security, rehabilitation and closure

Security

23. There is clear evidence from around the country, including the NT, that the current approach to security bonds is an insufficient guarantee that the NTG and community will not be left to foot the bill for mine rehabilitation. To ensure that the NTG and community are not left with more derelict mine liabilities in the future, a significant change is required to the way security bonds are calculated and managed in the NT to include a more encompassing mine rehabilitation bond.

24. The EDO strongly supports improved transparency around security bond calculation, closure planning and rehabilitation. Improved transparency will lead to more consistent decision making measured against objective standards. For example, compliance with approval conditions should not be 'to the satisfaction of' a particular office holder. This is inappropriate where objective, scientifically based targets can be set.

25. The process by which a mine security bond is calculated must be overhauled to be substantially more transparent. Both the methodology and relevant data inputs, being the level of disturbance, should be made publicly available to ensure that the public can be confident with respect to how a mines security is calculated. The NTG has historically not disclosed the security bond methodology and data. One example of this is the security for the McArthur River Mine. The EDO has acted on behalf of clients in Northern Territory Civil and Administrative Tribunal proceedings to simply know what the security amount was and

is currently acting on behalf of clients in the NT Supreme Court regarding the calculation of the security. We strongly recommend that the calculation method be transparent and relevant data input be publicly available. This will ensure consistent and equitable decision making that will improve public confidence and accords with the Hawke Review recommendations.

Rehabilitation

26. The EDO strongly supports a requirement for a life of mine plan, including detailed rehabilitation proposals, to be provided as part of feasibility studies and initial development assessment, the details of which would be included in the conditions of consent and subsequent management plans. Such an approach will help to ensure that decision makers and the community have a more in-depth understanding of the expected outcomes and long-term impacts arising from mining, and ensure that mining companies build in appropriate operational procedures to minimise costs of eventual rehabilitation. Detailed information at the assessment phase will also help to avoid situations, as seen during the Ashton South East Open Cut mine approval process in NSW, where changes made to general rehabilitation commitments during the different assessment phases meant that the project has effectively committed to achieving conflicting goals in relation to water and biodiversity management as part of the rehabilitation.

27. One significant area of concern that must be addressed in the reforms is the ability of mines to use 'care and maintenance' to avoid rehabilitation. The ability to enter care and maintenance, and the timeframes over which it can be applied, are highly subjective and there is strong evidence that mines may use care and maintenance to avoid rehabilitation liability. We recommend that entering care and maintenance should only be permitted in exceptional circumstances and any approval to enter care and maintenance must be based on a transparent assessment process against predesigned criteria and provide clear timeframes for the length of the care and maintenance arrangements.

Closure

28. As noted above, the EDO strongly supports the separation of responsibilities and notes that the proposal to do so is consistent with best practice and the recommendations of the Hawke Review. However, in our view, DEPWS should also be responsible for mine closure certification. Closure certification is contingent on the mining operator achieving an

appropriate standard of environmental remediation at the end of mining operations. It is therefore logical that closure certification would sit with the department that has the regulatory responsibility for environmental assessment and compliance.

29. To ensure that the costs of rehabilitation are incurred as environmental harm is caused (and the profits from the extracted minerals are received), security bonds should be adjusted annually. In practice, this means that a bond would grow in the initial years of a project, as the profits and disturbance from the mining operation grow, and then reduce as progressive rehabilitation is undertaken and the disturbance is reduced. Any proposed bond needs to be subject to an independent cost review, rather than a departmental review of the mine operator's assessment.

Concluding comments

General observations

30. At this early stage of the reform process, and based on the limited information provided in the Mining Consultation Paper, we make the following general comments and recommendations, which are consistent with the recommendations arising from the Hawke Review. These are key guiding principles which we expect will be emphasised in future reform papers and draft legislation:

    a. Clarity: on which decision maker/department is responsible for assessing or approving projects or actions and regulating thereafter.

    b. Consistency and equity: the two agencies approach to setting conditions must be consistent and based on objective standards.

    c. Transparency: in how environmental conditions are set following delivery of the NT EPA's Assessment Report.

    d. Compliance: ensure that compliance activities are supported across agencies through open transparent information sharing and through clear consistent enforceable environmental conditions.

Further future consultation

31. We look forward to receiving and engaging with more detailed information regarding the proposed reforms. While the Mining Consultation Paper provides a high-level overview of the

proposed reforms, the success of its implementation will depend on the detail of the legislative reform and its supporting administrative framework.

32. We strongly support broad consultation on the proposed reforms with a diverse range of community stakeholders, including concerted efforts to meaningfully engage with Aboriginal communities.

National environmental law reforms

33. As you will be aware, Professor Graeme Samuel's Final Report of the independent 10-year EPBC Act Review proposes significant reforms proposed to national environmental law.[3] The Final Report confirms the current laws are failing and recommends a comprehensive package of reforms including strong improvements to standards and assurance under the EPBC Act. New national environmental standards are the centrepiece of the proposed reforms, and the Final Report proposes interim standards that should be implemented in the short term, with an initial tranche of amendments to the EPBC Act. This is to be followed by further tranches of substantial reform. Professor Samuels sets out an accreditation model based on new standards involving related reforms for independent oversight, improved compliance, enforcement, data, information and community and First Nations engagement.

34. On our analysis,[4] current NT laws do not meet existing EBPC Act requirements, and on our analysis, current NT laws do not meet the proposed interim standards either. In light of this, we recommend that the proposed mining reforms at least take into account the proposed interim national environmental standards, noting that mining often impacts matters of national environmental significance, and the current intention of the Commonwealth and NT governments to enter into a new assessment bilateral agreement.

Terminology

35. To ensure that the reforms are contemporary, we also suggest that outdated terminology such as "flora and fauna" be replaced with more current language such as "biodiversity". We also note that while the reforms propose to address "incidents of contaminated waterways" no reference has made to potential impacts on groundwater or aquifers. We strongly recommend that the reforms consider and address all environmental impacts of mining.

[3] Available at: Final report | Independent review of the EPBC Act (environment.gov.au)
[44] 201004-EDO-PYL-Devolving-Extinction-Report-FINAL.pdf

Resourcing

36. Finally, there must be substantially enhanced resourcing for the DEPWS to ensure sufficient capacity exists within the NTG to deliver and implement the proposed reform framework. In the absence of proper resourcing, the proposed regime will not deliver effective environmental outcomes in the NT.

Next steps

37. We would welcome the opportunity to discuss our comments at any time and thank the DEPWS and DITT for the opportunity to engage with these important reforms.

38. To discuss this submission, please contact the author on (08) 8981 5883 or via stacey.ella@edo.org.au.

Yours sincerely

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