



**NORTHERN
LAND COUNCIL**

Submission to the Northern Territory Government

on

Draft Surface Water Take – Wet Season Flows Policy

Draft Interference with a Waterway Guideline

January 2023

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1. About the Northern Land Council

The Northern Land Council (NLC) was established in 1973 and following the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the NLC became an independent statutory authority responsible for assisting Aboriginal people in the northern region of the Northern Territory (NT) to acquire and manage their traditional lands and waters.

In 1994 the NLC became a Native Title Representative Body under the *Native Title Act 1993* (Cth), whose role and functions are set out under Part 11, Division 3 of the Act.

The NLC represents more than 51,000 Aboriginal people and assists its constituents by providing services in output areas including land, sea and water management, land acquisition, community development, Aboriginal land trust administration, native title services, advocacy, information and policy advice.

A key function of the NLC is to express the wishes and protect the interests of Aboriginal people throughout its region.

This submission is based on the NLC's functions and its long history and experience working with Aboriginal people in the NT.

2. Recommendations

Recommendation 1: In finalising the policy and guideline, the questions and comments raised by the NLC in the Steering Group process and provided as Appendix 1 to this submission should be addressed.

Recommendation 2: Water plans, informed by effective stakeholder engagement should determine the acceptable volume of water extraction and the type of infrastructure used to support extraction. The issuing of water extraction licences and required permits should only be considered in instances where a declared water plan governs the acceptable water extraction and infrastructure development.

Recommendation 3: The NLC is calling for the policy and guideline to include mechanisms that ensure interference with a waterway permit applications adequately consider cultural heritage and sacred site protection currently provided by a AAPA Authority Certificate; that the permit applications are provided to native title holders with sufficient time to provide comment prior to issuing permits; and that the Department creates and maintains a public register of all permit applications and approvals.

Recommendation 4: The current legislative arrangements restrict Aboriginal water reserves being available to use until such time as a water allocation plan is declared for relevant water resources. In order to ensure Aboriginal water reserves are available for use, water allocation plans should be declared prior to issuing wet season surface water extraction licences.

Recommendation 5: Independent advice should be sought to determine the appropriateness of the dataset proposed to be used in implementing the policy, the model coverage of the NT, and the measurement of interception activities.

Recommendation 6: The policy should include provisions to take provisions within the licence conditions, as well as cease to take rules.

Recommendation 7: Additional information regarding the proposed monitoring and compliance requirements associated with wet season surface water take and interference with waterways should be included in the finalisation of the policy and the guideline.

3. Introduction

The NLC welcomes the opportunity to provide comments to the Department of Environment Parks and Water Security (Department) on the draft surface water take – wet season flows policy (policy) and the draft interference with a waterway guideline (guideline).

Water is incredibly important for Aboriginal people across the Top End. There are significant cultural values associated with water places; many sacred sites are intrinsically linked with water; and the benefits associated with harvesting food from rivers, creeks and billabongs is significant.

In 2012, Tropical Rivers and Coastal Knowledge and CSIRO undertook research into Aboriginal water values and management in northern Australia. Aboriginal people talked about their relationship with water, and how important it is for water places to be healthy.¹ In the same year NLC and the North Australian Indigenous Land and Sea Management Alliance (NAILSMA) produced a DVD as a submission on the draft Mataranka water allocation plan.²

While these are now ten years old, the messages from traditional owners remain the same today as they did back then.

A finalised policy and guideline must ensure Aboriginal people are part of decisions that will affect them. The following points were raised through the two projects and are provided here as a snapshot of the views of Aboriginal people along the Daly and the Roper Rivers. It is important that the Department considers these points as part of the finalisation of the policy and guideline relating to taking water and constructing infrastructure on waterways:

- Water was given to us. It was there from the dreamtime. We have to cherish our water because water is sacred.
- Rivers and creeks are important as we rely on those places for foods and for medicine.
- Collecting bush tucker is important – it is healthy for us as it gets people out on country. We hunt and forage for things that are in the rivers, creeks and billabongs.
- For thousands of years Aboriginal people have used these waterways, and continue hunting and fishing practices to this day. It is vital that kids have the opportunity to learn how to hunt and fish these places.
- Being in the water places and collecting food heals our spirit and teaches young people about country.
- We need to consider the implications of water changes not just on a single community, but on a much broader scale.
- We need water for culture, drinking and fishing. If all the water is gone, we'll have nothing.
- But when decisions are being made about land and water, we are often not included. No one talks to us about how important those water places are for hunting and fishing.
- We need to work together to ensure the plants and animals are protected, and our traditions preserved. We want the government mob to listen to us.

¹ TRaCK and CSIRO 2012. Aboriginal water values and management in northern Australia. DVD focusing on research conducted in the Daly River catchment.

² NLC and NAILSMA 2012. Making Our Submission Our Way.

The NLC was appointed to the Surface Water Steering Group to inform the development of the Surface Water Harvest policy in May 2021, and attended eight meetings between May 2021 and April 2022.

The purpose of the group was to *provide stakeholder advice to the development of the guiding policy principles for regulating the surface water take during the wet season in the Northern Territory*. The functions of the group were to *provide a forum for the consideration and resolution of policy principles for surface water harvesting; share information and perspectives associated with surface water harvesting; provide sector representation to inform the development of the policy.*³

This submission reiterates the input provided through NLC's involvement in the Steering Group – one of the key functions was to describe the user perspectives, and define what success looks like with a surface water harvesting policy in place.

The NLC presented information to the Steering Group in July 2021, and a copy of the comments made by NLC is provided in Appendix 1. The questions and comments made by the NLC through this process remain valid and should be addressed in finalising the policy and guideline.

The purpose of the draft policy is to *establish the allocation rules for quantifying wet season water flow volumes available for consumptive use from a river basin, while maintaining free flowing rivers and important environmental and cultural values*.

The NLC supports the policy purpose, however the draft policy and guideline do not enable to the purpose to be achieved. The documents do not include adequate protection of the rights and interests of Aboriginal people in the NLC region, and do not provide adequate actions to ensure cultural values are protected.

Therefore, the NLC does not support the draft policy or guideline in their current forms. The draft documents require substantial change and should be updated in accordance with the recommendations made in this submission.

The NLC looks forward to commenting on an updated draft policy and guideline that addresses the recommendations made in this submission.

Recommendation 1: In finalising the policy and guideline, the questions and comments raised by the NLC in the Steering Group process and provided as Appendix 1 to this submission should be addressed.

³ Surface Water Steering Group Terms of Reference, May 2021.

4. Comments on the Draft Surface Water Take – Wet Season Flows Policy and Draft Interference with a Waterway Guideline

I. Water planning

Interception activities refer to the capture of surface water or groundwater that would otherwise flow, directly or indirectly, into a waterway, lake, wetland, aquifer, dam or reservoir. Interception activities in the catchment can reduce inflows and therefore the volume of water available to both the consumptive pool and non-consumptive uses such as cultural values and the environment.⁴

The NLC's position is that wet season surface water take and interference with waterways should only be considered in areas where effective water planning processes occur, and declared water plans are in place. Water planning is the only effective way that meaningful stakeholder and community engagement can occur to determine acceptable water management arrangements.

The National Water Initiative (NWI) aligns with the NLC position and includes a requirement that water plans consider water interception activities.⁵ In order to be compliant with the NWI, Indigenous needs should be recognised in relation to water access and management. This should be done through statutory based water planning and implementing a licensing framework whereby decisions are made consistent with the water plan.

The draft policy does not commit water plans to be declared prior to issuing wet season water extraction licences. The guideline does not make any mention of water plans being used to inform acceptable infrastructure developments in a catchment.

The draft policy notes that scientific research will be used to inform licence decisions while maintaining cultural water requirements.

The NLC supports the need for scientific research to establish flow volumes and determine acceptable infrastructure developments. However, it is unclear how Indigenous knowledges are incorporated in scientific research to inform decisions and how competing ideologies will be managed. An effective water planning process would be an effective way to incorporate Indigenous knowledges.

The NLC reiterates our advice from the Steering Group process that wet season water extraction licence applications should only be considered by the Controller of Water Resources (the Controller) in areas where there are effective water planning processes and declared water plans are in place which cover wet season surface water take and interference with waterways. These planning processes must be informed by effective and meaningful stakeholder and community engagement.

A policy and guideline that makes this commitment would be one of the factors the Controller considers in deciding whether to grant a licence or permit under s 90(1k) of the *Water Act*.

⁴ Productivity Commission 2021. Water entitlements and planning Supporting Paper A. National Water Reform 2020 Inquiry Report no. 96

⁵ Productivity Commission 2021. Water entitlements and planning Supporting Paper A. National Water Reform 2020 Inquiry Report no. 96

Recommendation 2: Water plans, informed by effective stakeholder engagement should determine the acceptable volume of water extraction and the type of infrastructure used to support extraction. The issuing of water extraction licences and required permits should only be considered in instances where a declared water plan governs the acceptable water extraction and infrastructure development.

II. Sacred site protection

The draft Territory Water Plan (2022) states *almost one third (approximately 5,000 of 15,000) of all sacred site records across the Territory are water-related. Protection of these sacred sites, and other culturally significant places that are yet to be recorded, and the values associated with them, are paramount to protecting living Aboriginal culture.*

The Interference with a Waterway guideline includes examples of interference activities – dredging, sand or gravel extraction from a waterway; construction of infrastructure within a waterway such as culverts and pipelines; construction of boat ramps and bridges; flood levee construction; drainage works on waterways; diversion from a waterway; and construction of dams and off-stream water storages.

The guideline states that there are four primary risks associated with an interference with a waterway: erosion and sedimentation; changes to water quality; changes to hydrology; and changes to substrate. There is no consideration of cultural values or sacred sites, or any direction of identifying and mitigating risks to them from interference activities.

The NLC is aware the Department intends to remove the current requirement for an AAPA Authority Certificate to be provided as part of a permit to interfere with a waterway application.

The NLC recognises that the removal of the obligations to acquire an AAPA Certificate as part of the permit approval process does not make a proponent immune should sacred site damage occur, and any impacts will still be considered under the *Northern Territory Sacred Sites Act 1989*. It does however, result in one less opportunity for traditional owners to have their sacred sites protected from potential harm.

Part 3 of the *Water Regulations* state that the Controller of Water Resources may publish a notice of an application for a permit to interfere with a waterway. The NLC is not aware of any permit applications being published, and there is no public register of approved permits. There is also no requirement to notify native title holders about permit applications. Native title holders have a right under s 24GB and s 24GE of the *Native Title Act 1993* to be notified about interference with waterway permit applications as they may constitute future acts and/or will detrimentally affect native title holders' ability to continue to exercise their native title rights.

The removal of a requirement for an AAPA Authority Certificate and the lack of consideration of native title rights in the policy and the guideline is deeply concerning. This may contribute to an authorising environment whereby the approval of permits to interfere with waterways results in cultural heritage destruction. In a post-Juukan Gorge era of improving cultural heritage protections, we must see improvements in the way that cultural heritage is protected through this policy and guideline.

Recommendation 3: The NLC is calling for the policy and guideline to include mechanisms that ensure interference with a waterway permit applications adequately consider cultural heritage and sacred site protection currently provided by a AAPA Authority Certificate; that the permit applications are provided to native title holders with sufficient time to provide comment prior to issuing permits; and that the Department creates and maintains a public register of all permit applications and approvals.

III. Consideration of the Aboriginal Water Reserve

The Aboriginal water reserve is a reserve of water allocated in a water allocation plan for Aboriginal economic development. In accordance with the *Water Act 1992*, eligible land is designated for land within a water allocation plan under s 22C. Water allocation plans are therefore the mechanism for making water in the Aboriginal water reserve available for eligible land owners.

The draft policy does not mention the Aboriginal water reserve and how it will be considered under the policy.

The NLC is concerned Aboriginal people are left out of the water allocation process. In some cases this could be due to water resources being fully, or overallocated prior to the declaration of a water plan. This has already happened in a number of water allocation plans across the Top End, including the Katherine Tindall and the Ooloo Dolostone water allocation plans. It is likely that the same will happen with the Mataranka Tindall water allocation plan when it is finalised.

It is critical that the approach of allowing substantial groundwater extraction licensing to occur prior to making the Aboriginal water reserve available is not repeated with wet season surface water licensing.

In recent groundwater licensing decisions made outside of water allocation plan areas, the Controller of Water Resources has made mention of Aboriginal water reserves, in some cases noting that there will be water available in the reserve when a water allocation plan is developed in the future. It is anticipated that this is the approach that will be applied when wet season surface water licences are issued. Having water set aside, and ensuring it is available for eligible people to access and use are very different considerations. The NLC wants to see licences from the reserve, not just water being set aside.

Recommendation 4: The current legislative arrangements restrict Aboriginal water reserves being available to use until such time as a water allocation plan is declared for relevant water resources. In order to ensure Aboriginal water reserves are available for use, water allocation plans should be declared prior to issuing wet season surface water extraction licences.

IV. Information availability, regulation and compliance

The NSW Healthy Floodplains Project presented information to the Steering Group in September 2021. They highlighted four key principles as advice to the group:⁶

- Prevention is better and cheaper than cure.
- Development controls are much cheaper than volumetric licensing.
- Flood structures and flood diversions have similar impacts.
- Invest in data and science early.

It is important that we learn from the experiences of other jurisdictions so that adverse outcomes are avoided.⁷ In the NT we should be making sure we have the data and invest in the science up front; we should be putting in place clear planning mechanisms that look at development controls as well as volumetric licensing; and we should be making sure our regulation and compliance tools are the best available so as to protect the environmental and cultural values of the community in a proactive way.

The NLC is not confident the learnings from NSW have been adequately addressed in the policy and guideline in particular reference to information availability, regulation and compliance.

Calculation of wet season consumptive pool

One of the main components of the policy is the contingent allocations. In determining the contingent allocations, five percent of the twenty-fifth percentile of flow for the three wettest months will be calculated.

The policy states that the flows will be determined using the historical data (typically 50 years). If there is no historical data available, the total flows will be calculated using the Departments' surface water models.

Relying on the last 50 years of data to determine water licensing volumes is concerning.

A recent study found that since the start of record keeping in the 1970s, river flows have been steadily increasing. Using tree-ring chronologies, the study found the recent magnitude and frequency of high flow events of the last 40-years is unprecedented in comparison to the last ~600 years. The authors caution against using the recent period of high flows as a basis for management to decide on sustainable future water allocations as despite the trends in high flows, multi-year dry events still occur.⁸

Where historical data is not available, the Department proposes using surface water models to determine the wet season consumptive pool. Using models to determine wet season water availability for extraction is a shift in the way models have generally been used in the NT. Water resource models are generally used to predict dry season conditions, and in-channel river flows.

It is crucial there is adequate calibration of models against real data to ensure their predictions are sound. In order to have confidence in any model used to underpin wet season surface water

⁶ Surface water steering group – summary notes 6 October 2021.

⁷ For example, NWS irrigators under investigation over 'unexplained' flood plain harvesting of 200GL of water <https://www.theguardian.com/environment/2022/sep/06/nsw-irrigators-under-investigation-over-unexplained-flood-plain-harvesting-of-200gl-of-water>

⁸ Higgins et al. 2022. Unprecedented high Northern Australian streamflow linked to an intensification of the Indo-Australian monsoon. Journal of Water Resources Research.

licences, the models should be independently reviewed and any recommendations should be implemented prior to relying on the model for decisions.

Additionally, the policy does not include any recognition of climate change impacts, or how new information will be incorporated in to the licensing regime. The Productivity Commission's advice to the Commonwealth Government on a renewed NWI includes a requirement for water planning processes to have a strong focus on dealing with climate change.⁹

It is not only the volume of water take that is important. The Productivity Commission found that inaccurate measurement of interception activities (including on-farm dams) pose a risk to water availability and undermine the integrity of the entitlements system.¹⁰ The policy and guideline do not provide advice about how the measurement of interception activities will be undertaken, and how their impacts will be considered in the licensing regime.

Ultimately, if the calculation of the wet season consumptive pool is flawed, it will be those values outside of the licensing regime that will suffer – namely cultural and environmental values that rely on water to be set aside prior to the consumptive pool being allocated.

Recommendation 5: Independent advice should be sought to determine the appropriateness of the dataset proposed to be used in implementing the policy, the model coverage of the NT, and the measurement of interception activities.

Licence conditions

The draft policy includes reference to minimum (low) flow conditions. When minimum flow conditions are met, the policy states that water take will stop. The NLC advocates for a 'commence to take' approach as well as a 'cease to extract' criteria to underpin the policy.

The draft policy currently proposes the default position of licence holders being able to take water at the start of the wet season, and then ceasing take when flows in the river drop to a certain level – the onus to determine when to stop being solely on the licence holder. This approach does not adequately consider the implications of a delayed wet season onset, or protect the water system in dry wet seasons as it only considers rules to stop extraction, rather than rules to start extraction.

The regulator (i.e. Controller of Water Resources) has a responsibility to ensure that environmental and cultural values are protected, along with the rights of other water users to take water they are legally entitled to.

In order to do this, the Controller should be responsible for determining when there has been sufficient rainfall and run-off such that non-consumptive values are protected, and that there is sufficient water in the system for licence holders to begin extracting. The rules underpinning the Controller's determination need to be defined in specific water allocation plans to ensure transparency.

Once the Controller has determined conditions to be acceptable to commence take in a particular area, a 'commence to take' determination could then be made by the Controller.

This type of approach is used for annual announced allocations whereby the Controller issues allocations against licences, prior to extraction occurring. The Controller should have the authority to

⁹ Productivity Commission 2021. National Water Reform 2020. Productivity Commission Inquiry Report no. 96

¹⁰ Productivity Commission 2021. National Water Reform 2020. Productivity Commission Inquiry Report no. 96

extend this approach such that a determination is made and advertised online to allow licence holders to commence wet season take.

The specific commence to take rules should be determined in water allocation plans which are developed with a water advisory group including traditional owner representation. The commence to take rules should be determined in order to protect environmental and cultural values as a first priority in accordance with the *Water Act*, and through documentation in the relevant water allocation plan will be publicly available to ensure transparency.

Recommendation 6: The policy should include commence to take provisions within the licence conditions, as well as cease to take rules.

Monitoring sites

As the water take proposed under this policy will occur in the wet season, when access to water monitoring infrastructure sites is limited, it is important that the water data underpinning extraction rules is available on a real-time basis.

Reliable telemetered water monitoring sites will therefore be required as the draft policy includes reference to licence conditions that consider instantaneous flows. Based on two examples where surface water flow is linked to water extraction conditions, the NLC is concerned that the NT's water data system and network of telemetered sites is not sufficient to mitigate risks of over extraction that could adversely impact the rights and interests of traditional owners.

For example, there is an existing water extraction licence that includes a cease to take clause linked to telemetered site G8140161. The licence condition states that the licence holder must stop taking water when the telemetered site records water level height or discharge of certain levels.

Despite this condition, the water data portal that is used in the licence does not display real-time data. As at 6 January 2023, the water data portal only displayed water level and flow readings up until 24 September 2022.

In another case, water extraction licence 9031020 (issued August 2022) states that the licence holder must install and maintain a water gauging station within 12 months of water extraction occurring under the licence. The licence conditions require the licence holder cease extraction when flows at the gauging station fall below a certain level, and the licence holder is responsible for determining their own cease to pump trigger at the point of water extraction.

It is unacceptable that licences are issued which allow the extraction of significant volumes of water, prior to installing required infrastructure to ensure the licence conditions are adhered to. It is not clear in the draft policy if this arrangement will be applied to wet season water extraction licences, and whether the responsibility for installation and maintenance of gauging stations will also sit with licence holders rather than the regulator.

In order for community and stakeholders to have confidence that the regulator can impose the required licence conditions to protect cultural and environmental values, there must be an improvement to the telemetered monitoring network to improve coverage and timeliness of data availability.

Recommendation 7: Additional information regarding the proposed monitoring and compliance requirements associated with wet season surface water take and interference with waterways should be included in the finalisation of the policy and the guideline.

Appendix 1

NLC Input to the Surface Water Harvesting Steering Group

Surface Water Harvesting – NLC Perspective provided to the Surface Water Harvesting Steering Group July 2021.

‘User perspectives and what success looks like with a surface water harvest policy in place’

The following questions are important for NLC, and need to be resolved before we can understand implications of a surface water harvesting policy:

- What are the tangible benefits to Aboriginal people and communities expected as a result of surface water harvesting?
- How can we ensure there will be no adverse impact to cultural values, including the values that people hold in relation to floodplain production e.g. use of plants and animals?
- We need to have a holistic view of what is being proposed. We cannot look at water harvesting in the absence of floodplain modification, and construction of structures etc. Surface water harvesting needs to part of a broader discussion – when and how will this occur?
- What happens if we see something unexpected or unanticipated – there appears to be some challenges with adaptive management in groundwater management so what are the proposals for surface water management?
- How do we ensure that the current water management arrangements are correct and working effectively (e.g. groundwater management) before moving towards floodplain harvesting?
- When and how will meaningful conversations about holistic water management occur with Aboriginal people in accordance with the National Agreement on Closing the Gap agreement (e.g. shared decision-making) and recognising the interconnectedness of all water, land, culture and Country?
- How do we ensure we know what we need to know about the system, and ensure that the values and ecosystem processes are protected?
- How will the legal rights to water and land for Aboriginal people be considered as part of surface water harvesting?
- How is Government considering the impacts of climate change in informing an approach to surface water harvesting?

In relation to any surface water harvesting policy, NLC seeks confirmation from Government that:

- Free, prior and informed consent of Aboriginal people underscores all decision-making about surface water harvesting.
- Protection of sacred sites must be ensured.
- Decision-making processes adhere to the NT Government commitments under the National Agreement on Closing the Gap – including commitments to new ways of working and prioritizing shared decision-making.
- Surface water harvesting only be considered in areas where there is effective water planning processes and declared water plans that have been informed by effective and meaningful stakeholder and community engagement.
- There needs to be specific, placed-based conversations with relevant Aboriginal people to determine whether, and how surface water harvesting should be done.

- Holistic ecosystem health is at the forefront and must guide considerations for surface water harvesting.
- Surface water harvesting should not be done to address the failure of other aspects of water management – e.g. Overallocation of groundwater resources.
- There needs to be concerted efforts to rebalance the water resources (including legal rights for eligible landholders to access the AWR) before looking for ‘new’ sources of water to take.
- There must be no risk of water contamination as a result of surface water harvesting activities e.g. we need to have a holistic view of developments to ensure water resources; floodplains and wetlands (including plants and animals) are protected.
- Regulation and reporting must be effective, including information about what is being done and where is it being done. How do Aboriginal people know what is being proposed, and how is it regulated and reported. Need advice from Government about how monitoring, compliance, regulation, reporting and enforcement will occur in the long run.