

May 2020

About the *Water Supply (Critical Needs) Act 2019*

This document answers frequently asked questions about the Water Supply (Critical Needs) Act 2019 and the processes involved in using the Act as a pathway to authorise critical water infrastructure developments.

Overview of the Act

What does the Act do?

The [Water Supply \(Critical Needs\) Act 2019](#) creates a rapid pathway for the Minister for Water, Property and Housing to authorise critical and urgent water infrastructure developments during the current drought where the usual planning approval pathways would be too slow to prevent a town or locality running out of water.

The approval pathway comprises two steps:

1. Under the Act, town or locality water supplies and associated water supply developments can be declared as critical where the Act is likely to provide the only pathway for proponents to legally and practically address the risk of water supplies running out. These declarations are made by Regulation to amend Schedules 1 and 2 of the Act respectively.
2. This declaration allows public authorities, such as local councils and WaterNSW, to apply for an authorisation for proposed developments under a streamlined pathway provided in the Act.

The streamlined pathway involves consultation with all relevant authorities and concurrence of the Minister for the Environment. Authorisations are issued with conditions to ensure developments are carried out appropriately.

The Act enables the minister to turn off or modify the *Water Management Act 2000* to enable or speed up the granting or amendment of water licences and approvals required for critical town water supplies.

The Act also declares certain developments relating to dams to be 'Critical State significant infrastructure' for the purpose of the *Environmental Planning and Assessment Act 1979* to make certain these dams get built to enhance future water supply and security. These are listed in Schedule 3 of the Act.

What safeguards are there to protect water for the environment, cultural users and basic landholder rights?

Concurrence of the minister administering the Biodiversity Conservation Act (currently the Minister for Environment) must be obtained, and the ministers responsible for planning, fisheries and heritage legislation must be consulted before a town or locality water supply and development are listed. The Minister for Environment must be in agreement before an authorisation is issued.

The application for authorisation will need to set out the measures proposed to avoid, minimise or offset the environmental or other impacts of the development. The authorisation itself may be subject to conditions that can include conditions to lessen these impacts. If an unforeseen issue arises, the Act provides a power to the minister to amend conditions, which may include imposing additional conditions.

Why does the Act have a two-year expiry date? Can it be extended?

This is special-purpose, temporary legislation that gives the Minister for Water additional powers needed to secure regional town water supplies against drought.

The Act came into force on 21 November 2019 and will stop operating after two years, unless the Minister for Water extends it due to continuing risks to town water security. The Act can be extended only once.

Authorisations under the Act will expire either before or when the Act expires. The appropriate future approval arrangements for developments listed in Schedule 2 should be sought by proponents well ahead of the Act expiring.

Dams and weirs projects that are specifically listed in Schedule 3 as 'Critical State significant infrastructure' will continue listed as such after the two-year period.

Who can use the authorisation pathway?

Only public authorities such as WaterNSW and local councils who are proposing to carry out developments listed in Schedule 2 of the Act can use the drought authorisation pathway provided in section 8 of the Act.

Where does the Act apply?

The Act applies to all of NSW apart from the Sydney drinking water catchment and the land within the Sydney Metropolitan area, which is excluded from the Act.

Water infrastructure in Sydney can be approved through the usual pathways available under the *Environmental Planning and Assessment Act 1979*.

Who do I contact to obtain more information about the Act?

Further information for public authorities about the process for declaring a new town or locality water supply or development as critical can be obtained by contacting the relevant departmental water utilities regional manager.

Alternatively, contact the department at landuse.enquiries@dpi.nsw.gov.au for more information about the process or to check the progress of a submitted application.

Process for declaring critical town or localities and developments under the Act (Schedules 1 and 2)

What is the process for accessing the authorisation pathway under the Act?

The Act has a multi-step process for accessing its authorisation pathways.

The first step is to declare critical towns and localities with critical water supply needs under Schedule 1 of the Act. Then declare developments required to address those critical water supply needs under Schedule 2 of the Act.

These declarations do not provide any approval in themselves and will not automatically lead to an approval being granted. Rather, these declarations are a prerequisite to accessing the special authorisation pathway under the Act.

Once declarations of critical towns and related development are made, the proponent will need to prepare an application for authorisation. If approved, conditions may be placed on an authorisation.

What is the first step to be listed in Schedule 1 and 2 of the Act and what is required?

The public authority should first consult with the relevant departmental water utilities regional managers to better understand whether the Act might help them improve their future water supply.

A request to the department to declare certain towns or localities as being in critical need of water in Schedule 1 will need to be supported by evidence demonstrating:

- the reason/s for the critical need including:
 - the size of the population affected
 - the expected date that the water supply will run out
 - that other options such as carting water are not feasible
- likely barriers to securing the supply of water within the required timeframes that can be addressed by pathways under the Act.

A request to declare development as being required to address an identified critical water supply need in Schedule 2 will need to be supported by evidence demonstrating the reasons for the request, including:

- how the proposed development will address the critical water supply need within the timeframe required
- why the existing NSW approval pathways are likely to be too lengthy to enable the development to be completed in the timeframe required, and how the alternate pathway provided by the Act will address this
- how other requirements such as federal legislation or land access and ownership legislation not covered by the exemption from development control legislation will be addressed
- how the potential impacts of the development have been considered and will be mitigated
- whether the development will be required once the drought conditions have eased, and if so, how the development is intended to be authorised once the Act expires (currently scheduled for 21 November 2021).

What types of projects can be listed in Schedule 2 of the Act?

The types of projects that may be listed are time-critical water supply projects that cannot be delivered in time to address immediate water risks using the usual approval pathways.

Public authorities should consider whether the existing pathways are effective before making a request for listing under the Act.

The pathway established by the Act cannot be applied to projects being pursued as part of longer-term water security solutions that are not immediately required to address critical water supply needs.

What developments cannot be listed in Schedule 2 of the Act?

The Act prohibits new dams or the increase of storage capacity for existing dams being listed as development in Schedule 2.

Authorisation process

What is the second step in getting authorisation for a development under section 8 of the Act and what is required?

A public authority can obtain authorisation once a critical town water supply and development is listed in Schedule 2. They can do this by making an application to the Planning Secretary in writing in accordance with section 8 of the Act.

The application must describe the proposed development, including:

- where it will be carried out
- planned construction dates
- measures proposed to avoid, minimise or offset environmental or other impacts
- any other information requested by the Planning Secretary.

The Planning Secretary must consult with other relevant public authorities on the application and provide a consultation report to the Minister for Water outlining any issues raised.

The minister then decides whether to authorise the development. Before giving an authorisation, the minister must obtain the agreement of the Minister for Environment.

The Minister for Water may grant an authorisation subject to conditions, which may include specified environmental assessments to be undertaken first, and any requirements specified by the Minister for Environment.

What kinds of assessment, mitigation, rectifications and controls may be put on an authorisation for development?

Authorisation conditions will reflect the nature of the development and possible impacts.

Conditions will be set by the Minister for Water, considering the issues raised during consultation with public authorities and by the Minister for the Environment. Examples of conditions may include requirements to:

- monitor specific biodiversity impacts to enable adaptive management
- develop a biodiversity management plan to mitigate impacts on native vegetation, threatened species, threatened ecological communities, and habitat
- provide biodiversity offsets
- undertake Aboriginal cultural heritage assessments and/or consult Aboriginal communities
- remove temporary works before the relevant authorisation expires
- state hours and other conditions of construction/operation
- develop and implement monitoring and reporting requirements
- notify the public about of the development.

How will the government ensure public authorities comply with conditions?

Section 8 (10) of the Act allows the minister to direct a public authority to comply with conditions if the minister feels the authority is not doing so.

This direction requires the agreement of the minister responsible for the public authority concerned.

Impact of the Act on other legislation

What does the Act do to the *Environmental Planning and Assessment Act 1979*?

An authorisation granted under section 8 of the Act exempts specified critical water supply developments undertaken by a public authority from the *Environmental Planning and Assessment Act 1979* and certain other legislation, subject to the terms of the authorisation issued by the Minister for Water.

However, dams and weirs projects that are specifically listed in Schedule 3 as 'Critical State significant infrastructure' will be assessed under the *Environmental Planning and Assessment Act 1979* pathway if a state-significant infrastructure application is lodged with the Department of Planning, Industry and Environment.

Does the Act exempt some developments from development control legislation?

Development described in Schedule 2 and authorised by the Minister for Water is exempt from development control legislation in NSW. This development control legislation is defined under Clause 6 of the Act and refers to certain provisions under the *Environmental Planning and Assessment Act 1979* or any other Act in NSW that would prohibit development or require other approvals before development can be carried out. This does not include the *Water Management Act 2000*.

How does the Act relate to federal legislation?

The *Water Supply (Critical Needs) Act 2019* has no effect on federal legislation.

This means exemptions under the *Water Supply (Critical Needs) Act 2019* do not apply to controlled actions under the Australian Government's *Environment Protection and Biodiversity Conservation Act 1999*.

If significant impacts are considered likely, then the potential draft 'controlled action' should be discussed with the Australian Government's Department of Agriculture, Water and the Environment as soon as possible.

What does the Act do in relation to compensation?

Compensation is not payable in relation to critical town water supply matters where an action or omission was undertaken in good faith. However, this does not apply to actions or omissions that cause personal injury or death.

Critical water supply-related matter is defined in section 17 of the Act to mean development or works done under an authorisation, the administration of the Act or the exercise of functions of the Act.

The Act does not affect the scheme for compensating land owners under the *Land Acquisition (Just Terms Compensation) Act 1991*.

The Act does not affect any aspect of compensation relevant to the three dams and weir project listed in Schedule 3.

Does the Act have any effect on land ownership?

The Act does not affect land ownership or access arrangements.

Applicants should consider the effect of any ownership or access requirements on the proposed development, the timeframe for completion, and implications for potential fast-tracking under the Act.

Does the Act have any effect on native title claims?

The Act does not affect the normal operation of the *Native Title (New South Wales) Act 1994* or the federal *Native Title Act 1993*.

Critical State significant infrastructure (Schedule 3)

What infrastructure developments have been listed in Schedule 3 and declared as 'Critical State significant infrastructure'?

The Act declares the two new dams, Mole River and Dungowan, and the Wyangala Dam wall-raising project to be 'Critical State significant infrastructure'. These will be co-funded by the NSW and Australian governments.

The Act also declares that the Western Weirs Program is 'Critical State significant infrastructure'.

There is an existing environmental assessment framework designed for projects declared as 'Critical State significant infrastructure' that includes robust environmental assessment processes and final approval requirements by the Minister for Planning.

More information about the status of these projects can be found on the [WaterNSW website](#).

Is this the first time that 'Critical State significant infrastructure' approval pathway has been used in the regions?

No. There is an established approval pathway for 'Critical State significant infrastructure' under the *Environmental Planning and Assessment Act, 1979*. Other projects deemed such in the regions include:

- Pacific Highway projects
- inland rail
- Snowy 2.0
- Project EnergyConnect.

Will an environmental impact statement (EIS) be prepared for the three dams projects and the weirs program listed on Schedule 3 (Wyangala, Mole, Dungowan and the Western Weirs Program)?

Yes. An EIS must be prepared for all 'Critical State-significant infrastructure' to enable it to be placed on exhibition and assessed.

An EIS would need to be prepared for the Wyangala Dam wall raising and construction of the Mole River dam and Dungowan dam, before any 'Critical State significant infrastructure' application is lodged.

Will there be an opportunity for public comment on the three dams and the weir project listed on Schedule 3 (Wyangala, Mole, Dungowan and Western Weir)?

Yes. All 'Critical State significant infrastructure' applications are subject to public consultation (with a statutory minimum consultation period of 28 days).

How will the public know what is happening on the three dams and the weirs projects listed on Schedule 3 (Wyangala, Mole, Dungowan and Western Weir)?

All 'Critical State significant infrastructure' applications are listed on the department's major projects website tracking system, which identifies what stage a project is up to in the assessment process. The tracking commences when the applicant lodges a request for assessment requirements for an application.

During exhibition of 'Critical State significant infrastructure' applications, the department's major projects website facilitates the community and agencies lodging submissions in relation to the proposal. All submissions are considered as part of the department's assessment.

The department's assessment report and the minister's determination (including conditions of approval or reasons for refusal) are also made available to view on the major projects website following determination.

Regulations to disapply or modify the *Water Management Act 2000*

How can certain rules under the *Water Management Act 2000* be disapplied or modified?

A request to disapply or modify certain rules under the *Water Management Act 2000* for the purpose of securing the supply of water to a declared town or locality with a critical water supply need will need to be supported by evidence demonstrating:

- the existing rules prohibit required arrangements to secure the supply of water, or prescribe authorisation processes that are likely to be too lengthy to enable the supply of water to be secured in the timeframe required
- how the potential impacts of securing the supply of water for the declared town or locality have been considered and will be mitigated
- whether the supply of water will be required once the drought conditions have eased, and if so, how it is intended to be authorised once the Act expires (currently scheduled for 21 November 2021).

What types of changes can be made to the water management framework through disapplication or modification of existing rules?

The Act gives the Minister for Water the power to, with the agreement of the Minister for Environment, make regulations to support declared critical towns and authorised critical town water supply developments.

Examples where the minister may need to exercise these regulation-making powers to mitigate the risks to towns include:

- suspending rules in a water sharing plan to enable the granting of water access licences or approvals required in relation to developments listed on Schedule 2 of the Act
- temporarily changing normal water sharing arrangements to reallocate water in favour of a declared town or locality during extreme drought conditions. For example, a regulation may temporarily modify the water sharing principles set out in sections 5 and 9 of the *Water Management Act 2000* to give priority to town water supply over other users, including the environment, where critical. It may also disapply rules in water sharing plans, such as end-of-system flow rules or requirements to release water from a dam for the environment, to enable water to be provided to the town
- streamlining the application process for the granting of water access licences and a water supply work approval, such as by removing advertising requirements.

These modifications can only be done with the agreement of the Minister for the Environment and will only operate for the time that the *Water Supply (Critical Needs) Act 2019* is in force, unless specifically permitted by regulations made under section 20(2) of the Act.

Will licence holders lose any water allocations?

No. There is no intention to use the regulations under the *Water Supply (Critical Needs) Act 2019* to reduce water allocations.

This Act is about ensuring that critical infrastructure can be built and/or operated to deliver water to towns, or conserve water for towns, before they run out. It is about supporting communities in time of critical need.

Will changes be made that affect the whole of the state under the regulations?

No. The regulations under the *Water Supply (Critical Needs) Act 2019* can only make changes to the *Water Management Act 2000* or water sharing rules in relation to those critical town and locality water supplies declared under the Act.

What about water for the environment? Will environmental flows be stopped under the regulations? Will replenishment flows be stopped under the regulations?

During the worst drought on record, we have already had to prioritise water for town water supplies. In some regulated rivers, environmental flows have already been reduced or suspended under Sections 49A or 49B of the *Water Management Act 2000*, and there may be a need to suspend environmental flows further.

The Act ensures that agreement of the Minister for the Environment will continue to be necessary to put any of these kinds of measures in place. It is recognised that some sensitive but temporary measures may be required to provide water to towns in critical need.

Will changes be made to local council or WaterNSW water licences or work approvals under the regulations?

Regulations may be used to make sure that necessary amendments to water access licences and water supply work approvals can be made so that water can be delivered to towns in critical need.

Will the suspension of water sharing plans be fast tracked under the regulations?

The suspension of water sharing plan rules can only occur under the *Water Management Act 2000* if there is a water shortage, water quality event or an extreme event, and the agreement of the Minister for Environment is required.

It is possible that new regulations may be used to fast track the suspension process for certain rules in a water sharing plan for a critical town or locality. However, this would still require the agreement of the Minister for the Environment.

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