

Authorisation	Exploration Licence No. 9155 (Act 1992)
Licence Holder	Shree Minerals Ltd (ACN: 130 618 683)
Legislation	Section 240AA of the <i>Mining Act 1992</i>
Decision maker	Peter Day Executive Director, NSW Resources Regulator Department of Regional NSW

## SECTION 240AA DIRECTION

As authorised by Section 240AA of the *Mining Act 1992* (**Act**), I Peter Day, having delegated authority from the Secretary of the Department of Regional NSW (**Department**), direct Shree Minerals Ltd (**SML**) to:

**“Immediately suspend all operations under Exploration Licence No. 9155 (Act 1992), with the exception of those activities required to maintain a safe workplace or as otherwise directed by the NSW Resources Regulator under a notice issued pursuant to section 240 of the Mining Act 1992”**

This direction takes effect and is in force immediately upon SML being notified of this decision. The direction remains in force until the suspension notice is revoked or varied by written notice of the Secretary or delegate.

## REASONS FOR DECISION

### Legislation

- Section 240AA(1) of the Act provides that the Secretary may, by written notice (a **suspension notice**), direct a responsible person to suspend (for such period as is specified in the direction or until further notice) all, or any specified, operations under an authorisation or suspend any activity approval relating to the operations if the Secretary considers that:
  - circumstances exist that could constitute a ground for cancellation of the authorisation under section 125(1)(b)-(g), 203(1)(b)-(e) or (h) or 233(1)(b)-(d), or
  - circumstances exist that could constitute a ground for cancellation of the authorisation under section 125(1)(h), 203(1)(i) or 233(1)(f), in relation to a breach of a direction under section 240 only.

2. Section 240AA(2) of the Act provides that before giving a suspension notice, the Secretary is to:
  - a. cause written notice of the proposed suspension notice and the grounds for it to be served on the holder of the authorisation;
  - b. give the holder a reasonable opportunity to make representations with respect to the proposed suspension notice; and
  - c. take any such representations into consideration.
3. Section 125(1) of the Act sets out a number of grounds for cancellation which can be relied upon when issuing a suspension notice. These include if the decision-maker is satisfied that:
  - a. Section 125(1)(b) – the holder of the authority has contravened a provision of the Act or the regulations (whether or not the holder is prosecuted or convicted of any offence arising from the contravention), and
  - b. Section 125(1)(c) – a person has contravened a condition of the authority (whether or not the person is prosecuted or convicted of any offence arising from the contravention).
4. Section 363(2) of the Act provides that the Secretary may delegate any function under the Act to any person, except this power of delegation or any function delegated to the Secretary by the Minister. The Secretary has delegated the functions to suspend all, or any specified, operations under an authorisation or suspend any activity approval relating to the operations under section 240AA of the Act to the Executive Director of the NSW Resources Regulator (**Regulator**).

## Background

5. On 4 May 2021, Exploration Licence No. 9155 (Act 1992) (**EL 9155**) was granted to SML for a term of five years ending on 4 May 2026.
6. EL 9155 comprises an area of 59 units and is located about 25km south-south-west of Cooma.
7. EL 9155 gives SML exclusive rights to prospect for group one minerals in respect of the land to which the licence relates and advises SML that it may need to obtain further approvals before carrying out prospecting operations.
8. On 10 September 2021, an 'ESF4 Application to conduct exploration activities for assessable prospecting operations' form (**the Application**) together with Appendix I – Rock Lodge Drill Traverse Photos and the 'Rehabilitation Objectives and Completion Criteria' for this project were lodged with the Regulator by an agent acting for SML.
9. The Application described the activity as consisting of up to 25 Reverse Circulation drillholes with possible diamond drill tails within two project areas to test geophysical targets and historical workings.

10. On 1 October 2021, the Regulator granted the activity approval [MAAG0012185 – LETT0006595] (**the Activity Approval**) under section 23A(7) of the Act. The Activity Approval was subject to the following terms:

**“General**

1. *The licence holder must carry out the Activity in accordance with the Application.*

**Exploration Code of Practice: Environmental Management**

2. *When carrying out the Activity, the licence holder must comply with Part B of the Exploration Code of Practice: Environmental Management (NSW Department of Planning and Environment, July 2015, as amended from time to time).*

**Note:** *Part B of the Exploration Code of Practice: Environmental Management (NSW Department of Planning and Environment, July 2015 prevails in the event of any inconsistency in it and the Application.”*

11. On 14 April 2022, the Regulator conducted an announced inspection of EL 9155, specifically project area 1 as defined in the Application. As a result, the Regulator has commenced an investigation into the actions of SML regarding its failure to comply with the Activity Approval.
12. On 21 April 2022, the Regulator issued SML a commencement of investigation letter and a Notice under section 240(1)(d) of the Act [NTCE0010106] directing SML to immediately cease all works associated with the Activity Approval until it is notified that this notice has been revoked.

## Grounds for Suspension

13. On 3 May 2022, I issued a notice of proposed directions to suspend specific operations at EL 9155. This notice outlined the grounds for cancellation relied upon in proposing suspension.
14. These grounds related to a failure to comply with the Activity Approval and included the following:
- Failure to comply with safeguards – Aboriginal heritage sites;
  - Unapproved clearing of vegetation; and
  - Failure to have sediment and erosion controls.
15. Each of these three constitute both a contravention of a provision of the Act and a contravention of a condition of the authority, grounds for cancellation under section 125(1)(b) and (c).
16. Specific details are outlined below:

### Failure to comply with safeguards – Aboriginal heritage sites

17. Part B of the Exploration Code of Practice: Environmental Management, March 2022 (**the Environmental Management Code**) outlines the mandatory requirements for

licence holders. The objective of these requirements is to ensure *“that exploration for all resources is conducted with sound and ongoing environmental management practices to prevent, minimise (where prevention is not practical) harm or disruption to the environment”*.

18. Mandatory Requirement 10.1 within Part B of the Environmental Management Code states,

*“The title holder must implement all measures to prevent, so far as practicable harm to Aboriginal cultural heritage and non-indigenous cultural heritage.”*

19. The guidelines contained in Appendix 1 to the Environmental Management Code advises title holders that they should undertake an Aboriginal heritage due diligence assessment in accordance with the requirements of the NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects (NSW Minerals Council Ltd, 2010). The due diligence process includes the checking of the NSW’s online Aboriginal Heritage Information Management System (**AHIMS**).

20. Further, the guidelines contained in Appendix 1 to the Environmental Management Code states,

*“All known Aboriginal objects, places or sensitive sites located inside the disturbance area and within approximately 50 metres of the disturbance area should be noted and appropriate measures put in place to prevent harm. This could include demarcation with flagging tape or fencing”*.

21. Clause 12 of the Application provides information on the site description and existing environment, with subclause 12.11. relating specifically to Aboriginal heritage sites.

The Application states at 12.11.1.

*“An AHIMS search has recorded 12 Aboriginal heritage sites on project area 1 (see Figure 3). The following safeguards will be implemented to protect Aboriginal Objects:*

- Access to the identified 12 Aboriginal heritage sites will not be permitted and they will not be impacted by the drilling program. Should any other Aboriginal objects or places be discovered during exploration, work must stop in that area and the area must be left untouched and access limited to avoid any disturbance. The NSW Department of Planning, Industry and Environment is to be notified.*
- If human remains are found, work must stop and the site must be secured (taped off with a 20m buffer zone) and the NSW Police and the NSW Department of Planning, Industry and Environment are to be notified.”*

22. Clause 15 of the Application provides details relating to the impact thresholds and criteria, with subclause 15.5. specifically relating to Aboriginal heritage. In response to the question at 15.5.1., will the activity harm Aboriginal objects? the Application flagged the ‘No’ check box and went on to state,

*“An Aboriginal Heritage Due Diligence Assessment has been undertaken in accordance with the requirements of the Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales (NSW Government, September 2010)”.*

The Application repeats the above statement made at 12.11.1.

23. Among other things, Figure 3 attached to the Application identifies the location of the planned drillholes in proximity to the Aboriginal heritage sites, with 12 of the sites being in close proximity. The **AHIMS** search attached to the Application identifies the exact location of these sites.
24. On 14 April 2022, Inspectors with the Regulator conducted a site inspection of EL 9155. Amongst other things, the Inspectors attended each of the 12 Aboriginal heritage sites located in proximity to the planned drillholes (identified in Figure 3 of the Application) where they observed disturbance and harm on eight sites. There was no delineation or protection found at any of the sites.
25. Table 1 provides a summary of the Inspectors’ observations.

**Table 1:** Regulator observations – Aboriginal Heritage Sites 14.04.2022

#	Location	Regulator Observation
1	SU1/L1	Object location next to access track. Evidence of traffic over location without delineation or protection.
2	SU3/L1	No evidence of disturbance. Object next to road without delineation or protection.
3	SU4/L1	No evidence of disturbance. No delineation or protection of object location.
4	SU5/L1	Evidence that parts of access track have been formed on the object location. No evidence of delineation or protection of the object location.
5	SU2/L7	No on ground delineation of object location. Evidence of vehicle traffic over the location.
6	SU2/L6	Evidence of vehicle traffic over the object location. No delineation or protection of object location.
7	SU2/L5	No evidence of disturbance. No delineation or protection of object location.
8	SU2/L4	No evidence of disturbance. No delineation or protection of object location.
9	SU2/L3	No evidence of delineation or protection of the object location from damage. Vehicle traffic over the location.

10	SU5/L2	Evidence of a drill pad that has been constructed on the object location. No evidence of delineation of the object location or protection of the object location.
11	SU2/L2	Evidence of heavy vehicle traffic over the object location. No evidence of delineation or protection of the location.
12	SU2/L1	Access track formed on the object location. Vehicle traffic over the object location. No evidence of delineation or protection of the object location.

## Clearing of vegetation

26. Mandatory Requirement 6.1(a) within Part B of the Environmental Management Code states that the title holder must *“minimise the extent of any vegetation clearing and surface disturbance to as low as practicable.”*
27. The guidelines for vegetation clearing contained in Appendix 1 to the Environmental Management Code states,
- “To minimise the area of disturbance to vegetation and fauna, the following or similar measures should be used:*
- *avoid disturbing large and/or mature trees*
  - *avoid disturbing habitat trees*
  - *select specific trees to be cleared and avoid causing damage to surrounding vegetation*
  - *avoid vegetation removal in windbreaks and shelter belts*
  - *where practical, leave the rootstock intact to promote regeneration and regrowth.”*
28. Clause 12 of the Application provides a site description and information on the existing environment. Subclause 12.6 ‘Vegetation cover’ states,
- “Project area 1 is in open eucalypt forest. Project area 2 is open cleared rural land and is vegetated with pasture grasses. Existing farm tracks will be used where possible to access drill sites. Five tracks that are each about 200 - 250m in length will be made to access drill sites within project area 1. No new tracks will be required to access drill sites within project area 2, which is an open grazing paddock. Up to 25 drill pads will be required for this drilling program. No trees will be removed or cleared for this drilling program.”*
29. Clause 13 of the Application provides a description of the exploration activity. In doing so, subclause 13.1. states amongst other things,
- “Access to drill sites will be via existing farm tracks and by grading short new extensions from these tracks where required, following the specific directions of landholders. The total length of new track required to access the drill sites is about 442m. No other ground vegetation or soil (other than a maximum of 1m square around each drillhole itself) will be cleared. No trees or bushes will be removed or cleared.”*



30. Subclause 13.3. provides information on the total surface disturbance. The Application states,
- “Total surface disturbance for this drilling program is 9,268sqm (0.93ha) based on 7,500sqm (25 X 15m X 20m) disturbance for the construction of 25 drill pads and 1,768 (0.18ha) for the construction of new access tracks (442m length of tracks X 4m width). No trees will be removed or cleared.”*
31. Subclause 13.4. provides further information on the proposed earthworks and vegetation clearing. Amongst other things, the Application states,
- “Access to the drill sites will be via existing farm tracks and by grading short new extensions from these tracks where required, following the specific directions of landholders. The total length of new track required to access the drill sites is about 442m. No other ground vegetation or soil will be cleared. No trees or bushes will be removed or cleared.”*
32. Clause 17 of the Application comprised of a Targeted Review of Environmental Factors (REF) for non-complying exploration activities. Specifically, clause 17.2. of the REF relates to Biological impacts.
33. Subclause 17.2.1. details whether any vegetation is to be cleared or modified, including vegetation of conservation significance.
34. The REF states that the proposed activities have a ‘low adverse’ impact level. In describing the impact, the Application states amongst other things,
- “No trees will be removed or cleared. No other vegetation clearing, earthworks or site preparation will be required to access the drill sites.”*
35. Subclause 17.2.3. of the REF goes on to state, *“No clearing of trees will be undertaken.”*
36. On 14 April 2022, Inspectors with the Regulator conducted a site inspection of EL 9155. Amongst other things, the Inspectors observed significant tree clearing and removal had taken place in constructing access tracks and drill pads at project area 1. New tracks and drill pads were constructed which resulted in mature woodland trees being felled with significant faunal habitat potential. The felled trees had been wind-rowed to the side of the drill pads and access tracks.
37. No protocols were identified by the Inspectors to be in place for the assessment of the habitat significance of these trees.

### **Sediment and erosion**

38. Mandatory Requirement 6.3 within Part B of the Environmental Management Code states,

*“The title holder must implement all measures to prevent, so far as is practicable, causing any land degradation or pollution of land or water.”*

39. The guidelines for sediment and erosion control contained in Appendix 1 to the Environmental Management Code states,

*“In all instances of surface disturbance (other than that associated with road or track construction), the title holder should implement erosion and sediment controls in accordance with Managing Urban Stormwater: Soils and Construction Volume 2E, Mines and Quarries (DECC 2008b).*

*The key principles to be considered in the design and implementation of erosion and sediment controls include:*

- *assess the soil and water implications of the activity at the planning stage*
- *plan for erosion and sediment control during the design of the activity before any surface disturbance occurs*
- *minimise the area of soil disturbed and exposed to erosion*
- *control water flow from the top of and through the site by diverting up-slope clean water away from disturbed areas and ensuring that concentrated flows are below erosive levels and sediment is retained within disturbed areas*
- *rehabilitate disturbed lands quickly*
- *maintain erosion and control measures effectively”*

40. In addition, condition 6. ‘Rehabilitation’ imposed on EL 9155 at the time of grant states,

*“6. The licence holder must carry out rehabilitation of all disturbance caused by activities carried out under this licence in accordance with the requirements in Part B of the Exploration Code of Practice: Rehabilitation (July 2015) to the satisfaction of the Minister.”*

This condition continues to have effect.

41. Part B: Mandatory requirements within the Exploration Code of Practice: Rehabilitation (March 2022) (**the Rehabilitation Code**) states that it is essential that rehabilitation is undertaken so that areas disturbed by exploration activities are returned to a condition that is safe and stable; and to achieve this outcome, rehabilitation planning and practices must be integrated throughout all phases of an exploration program. Furthermore, *“title holders should aim to prevent or minimise (where prevention is not practicable) the extent of disturbance associated with exploration activities as a means to reduce the extent of rehabilitation required”*.
42. Mandatory Requirement 2 within Part B of the Rehabilitation Code required SML to provide rehabilitation objectives and completion criteria for the activity no later than 14 days prior to the commencement of any surface disturbance activity associated with that activity.



43. It is noted that specific rehabilitation objectives and completion criteria were provided with the Application on 10 September 2022.
44. In granting the Activity Approval, the Application was taken to include these rehabilitation objectives and completion criteria.
45. The Rehabilitation Program Checklist table contained within the rehabilitation objectives and completion criteria identified the following control ‘during ground disturbance works’,

*“Implement erosion and sediment controls in accordance with the practices and principles of Managing Urban Stormwater: Soils and Construction (Landcom 2004) and Managing Urban Stormwater: Soils and Construction Volume 2E, Mines and Quarries (DECC 2008b)”*
46. On 14 April 2022, Inspectors with the Regulator conducted a site inspection of EL 9155. Amongst other things, the Inspectors did not observe any erosion or sediment controls erected downslope of the drill pads or access tracks.
47. Of particular concern was drillhole SRL012 which had recently been drilled prior to the inspection and evidence of sediment, drill cuttings and waste eroding downslope from the drill pads following heavy rains was observed. No sediment fences or bunding had been instated to prevent this.

## Representations

48. On 3 May 2022, I wrote to SML in accordance with section 240AA(2) of the Act, inviting SML to provide a submission in response to my proposed decision to suspend EL 9155. Any submission was due by no later than 5.00pm on 1 June 2022.
49. On 16 May 2022, the Regulator received a 3-page submission from a geological and exploration consultant (**the Consultant**) on behalf of SML.
50. On 23 May 2022, the Regulator received a further 11-page submission from SML’s legal representative.
51. No further submissions were received in relation to this matter.
52. The submission of 16 May 2022 states amongst other things:
  - a. Almost all of the relevant work was carried out under his supervision in late 2021 and early 2022.
  - b. The consultant accepts responsibility for infringements, which related mainly to the preparation of the drill pads and access tracks, not the drilling operations.
  - c. Specific response to the Aboriginal heritage sites:
    - i. During the soil sampling program in September 2021 a broken aboriginal axe head was located and was left precisely where it lay. It was noted that location was 12 to 25m from the locations listed in the AHIMS search. It was

- suggested that either the AHIMS coordinates were quite inaccurate or that there are numerous unrecorded artefacts in the prospect area, with the latter making it near impossible to avoid impacting some artefacts during the access preparation activities.
- ii. The pickup of the artefact sites recorded in AHIMS was done using a hand-held GPS meter and is likely to be fairly unreliable.
  - iii. At the request of the drillers, two drill pads were widened to accommodate the diamond drilling equipment.
  - iv. The consultant forgot to take details of the artefact sites to the job, citing that they were in a rush to pack equipment and consumables as the bulldozer had arrived on site. Once on site they were unable to leave to arrange a copy and had no mobile phone reception. They were aware that artifacts were present and scanned the ground for mineralized rock float and artefacts and none were seen. The visual inspection was relied upon in concluding that the imminent earthworks were unlikely to impact any artifacts.
  - v. 5 of the recorded sites lie immediately adjacent to a farm access track. It is submitted that it is possible that the artifacts were exposed by earlier European activity or that the AHIMS recorder did not venture off the established track.
- d. Specific response to the clearing of vegetation:
- i. The majority of the access track preparation was limited to light clearing of ground cover and small shrubs with the blade.
  - ii. In a few cases, side cutting of soil and bedrock was needed to provide access to the drill pads.
  - iii. During the site preparation process some of the original drill pad locations were changed slightly to avoid damaging or removing large trees. In a few cases the removal of some large trees was unavoidable.
  - iv. At a later stage, a larger machine was used to widen two of the pads and to break off some boughs which partially overhung the prepared pads as they were seen to be a safety issue by the drilling contractor.
  - v. The activity was being conducted in mostly wooded area and the clearing of grass, bushes and selected trees would be inevitable. It was unfortunate that the statement *“No trees or bushes will be removed or cleared”* was included in Clause 13.1 of the Application and it was inadvertently left in the application form. Further, the field operator was unaware of it when preparing the sites.
- e. Specific response to sediment and erosion:

- i. No silt fencing was installed below the banks of the pads during construction as almost all of the material being excavated was ripped bedrock, which is likely to be very stable and only minimally affected by erosion. Further, it was porous enough for water to percolate through it.
  - ii. When inspected in February 2022, strong grass growth was noted on the slopes with minor erosional rilling seen on only one pad. It was considered that any soil or gravel discharged from the site was likely to have been filtered by grass, undergrowth and dead timber and unlikely to have reached or entered Ginny Brother Creek.
  - iii. It was understood at the time that sediment control requirements were not required if the risk of significant erosion was minimal.
  - iv. SML will install silt or hay bale fencing at the base of the affected pads and any subsequently affected sites once they are allowed to resume work.
  - f. Proposed remedial work:
    - i. Establish hay bale site fences below the susceptible drill pads, including below the two diamond drill sites which are yet to be drilled.
    - ii. Make every endeavour to accurately locate aboriginal artefacts listed in the AHIMS search, and to recover ones which were buried during track construction.
    - iii. If no artefacts are found an experienced archaeologist will be employed to carry out a further search.
    - iv. The bulk drill sample bags will be removed and disposed of.
    - v. Seek expert advice on tree species which can be replanted to regenerate the drill pads.
53. The submission of 23 May 2022 states amongst other things:
- a. The alleged contraventions were not caused by SML, rather the Consultant who had extensive mining exploration experience, and who had been engaged to supervise and manage the works as a result of COVID-19 travel restrictions experienced by SML.
  - b. SML took all reasonable steps to prevent any contravention and met its obligations of environmental care under the Act.
  - c. SML is committed to rectifying any environmental harm and disturbance to Aboriginal sites.
  - d. In addition to the proposed remedial works outlined in the submission of 16 May 2022 [point 51.f.], the parties have resolved to:

- i. Engage a qualified Aboriginal heritage consultant or experienced archaeologist and use every endeavour to conduct a thorough search to locate, mark, recover and restore any Aboriginal artefacts that may have been disturbed during the works carried out.
  - ii. Carry out any other proposed works by the Regulator to restore the site and ensure sufficient environmental management moving forward.
- e. Request that the Regulator revoke the notice [NTCE0010106] and not issue a direction to suspend operations.
- f. It is asserted that SML took all reasonable steps to, not only ensure it complied with its obligations under the Act, but that sufficient heritage and environmental management processes were taken in respect of work carried out under EL 9155.
- g. Reference is made to the Regulator’s ‘Compliance Approach’, in particular the compliance pyramid and submits it falls within the “Assisted compliance” level which promotes the Regulator’s response to “counsel and provide feedback”.
- h. SML is a company of good corporate standing, that the contraventions did not cause significant or irreparable environmental damage and it is willing to work collaboratively with the Regulator to rectify the contraventions caused by the Consultant.
- i. It did not seek to take advantage of any of the contraventions and did everything it reasonably considered necessary to ensure compliance with the Activity Approval. Further, it has been transparent and responsive with the Regulator and seeks to remediate any disturbance or environmental harm as a matter of priority.
- j. Specific response to the Aboriginal heritage sites:
  - i. 7 of the Aboriginal sites are located over an existing farm access track, suggesting that the existing track may have caused disturbance prior to any works being carried out under EL 9155. Further, the original clearing of the farm track could have brought the artefacts to the surface.
  - ii. The failure to comply with safeguards was by, or caused under the supervision and management of the Consultant.
  - iii. On numerous occasions SML highlighted to the Consultant the existence of the Aboriginal heritage sites and the importance of avoiding any actions that would cause these sites to be disturbed.
  - iv. SML relied on the expertise of the Consultant to adequately assess the area and implement the correct methods to flag the sites and avoid them in any earthmoving activities.
- k. Specific response to the clearing of vegetation:

- i. The Consultant was engaged to supervise and manage preparatory site work and as a result of this engaged and supervised a bulldozer operator who performed clearing works under their instructions.
  - ii. Standard exploration practices were not adhered to by the earthmoving contractor / bulldozer operator who was supervised by the Consultant. These practices include the avoidance of mature trees when clearing, and the avoidance of clearing to form new access tracks unless unavoidable obstructions exist that may hinder the passage of the drill rig and support vehicles.
  - iii. The clearing of mature trees was not the intent of the proposal submitted in the Application and latter approved by the Activity Approval; however, some clearing of 'bush' was required.
  - iv. The Consultant did not provide sufficient supervision of the bulldozer operator.
  - v. SML has initially selected a small drill rig with a light footprint in a bid to minimise any potential impact, but it became apparent when brought on site it had insufficient capacity for the planned holes. A larger drill reg was mobilised to complete the drill program due to the steep terrain.
  - vi. The access tracks and pads were modified to ensure the drilling contractors could install the larger drill rigs and operate the drilling works in a safe manner.
  - vii. Every effort was made by SML at each step to utilise machinery with minimal environmental impact.
- I. Specific response to sediment and erosion:
- i. The Consultant was engaged to carry out exploration works and supervise (where required) such works in accordance with the Activity Approval. The Consultant was to make all necessary decisions pertaining to the application of the Activity Approval including whether or not to employ sediment controls and sediment fences or bunding. SML relied on the Consultant's extensive experience to make these assessments as the supervising geologist.
  - ii. The assessment as to the requirement and subsequent implementation of sediment controls should have been conducted as part of the site preparation work carried out by the Consultant and then further assessed while the Consultant was present at the instillation of the drill rig.
  - iii. The failure to employ sediment traps / fences on the downslope from the drill pads could not have been assessed by SML without being present.

- iv. In engaging the Consultant, it was reasonable for SML to expect that sediment controls and other amendments or variations to the initial drill plan would have been adequately assessed and implemented as part of the site preparation work conducted by the Consultant.
- m. It is asserted that SML took all reasonable steps to, not only ensure it complied with its obligations under the Act, but that sufficient heritage and environmental management processes were taken in respect of work carried out under EL 9155.
- n. Reference is made to the Regulator’s ‘Compliance Approach’, in particular the compliance pyramid and submits it falls within the “Assisted compliance” level which promotes the Regulator’s response to “counsel and provide feedback”.
- o. SML is a company of good corporate standing, that the contraventions did not cause significant or irreparable environmental damage and it is willing to work collaboratively with the Regulator to rectify the contraventions caused by the Consultant.
- p. It did not seek to take advantage of any of the contraventions and did everything it reasonably considered necessary to ensure compliance with the Activity Approval. Further, it has been transparent and responsive with the Regulator and seeks to remediate any disturbance or environmental harm as a matter of priority.

## Considerations and findings

- 54. I am satisfied that the requirements of section 240AA(2) of the Act to notify SML in writing of the proposed suspension notice have been adhered to. SML was afforded reasonable opportunity to make representations and these representations have been fully considered in making my decision.
- 55. In doing so, I have carefully considered the evidence before me and I have given due regard to the following:
  - a. The Activity Approval granted on 1 October 2021.
  - b. The results of the inspection conducted by the Regulator on 14 April 2022.
  - c. The full representations made by both the Consultant and SML.
- 56. I also note that the Regulator is conducting an ongoing investigation into EL 9155 and has issued commencement of investigation letters and conducted a further inspection on 3 May 2022 with representatives from NSW Biodiversity and Conservation and Heritage NSW.
- 57. In making my decision I have had regard to the objects of the Act, particularly the need to ensure mineral resources are identified and developed in ways that minimise impacts on the environment (section 3 A(g) of the Act).

## Failure to comply with safeguards – Aboriginal heritage sites



58. Having regard to the information available to me, I am satisfied that:
- a. Pursuant to the Environmental Management Code, SML must implement all measures to prevent, so far as practicable harm to Aboriginal cultural heritage. Furthermore, SML should undertake an appropriate due diligence assessment and note all sensitive sites and put appropriate measures in place to prevent harm, including demarcation and flagging tape or fencing.
  - b. The Application made specific reference to 12 aboriginal heritage sites in the vicinity where the drilling program was being conducted and states that they will not be impacted by the drilling program. Furthermore, should any new sites be identified, work will stop and the Department of Planning, Industry and Environment [now known as the Department of Planning and Environment] will be notified.
  - c. The Application stated that a due diligence assessment had been undertaken.
  - d. The site inspection conducted by the Regulator on 14 April 2022 confirmed disturbance at 8 of the 12 aboriginal heritage sites. In addition to this, there was no delineation or protection found at any of the sites.
59. I note the Consultant's submission makes specific reference to a broken axe head being located during the soil sampling program in a different location to those listed in the AHIMS search, and that the artefact was left precisely where it lay. I am concerned that the submissions make no reference to the Department of Planning and Environment being notified.
60. I note the submissions claim that the AHIMS coordinates were inaccurate or there were numerous unrecorded artefacts in the area, with several sites being located over an existing farm access track.
61. I also note that SML places the blame on the Consultant in failing to comply with safeguards and adequately supervise and manage the drilling program. The Consultant states that they were aware of the artifacts, however forgot to take details of the sites with them when they attended the location.
62. Despite these representations, and the blame placed on the Consultant by SML, I remain satisfied that SML has failed to comply with its requirements under the Activity Approval, a statutory condition under section 23A(7) of the Act and a contravention of section 378D(1) of the Act.
63. SML has failed to conduct or otherwise ensure adequate due diligence was conducted prior to commencing the drilling program in confirming the location of the Aboriginal heritage sites. Furthermore, no safeguards or measures were put into effect to prevent the harm to aboriginal heritage sites.
64. I accept SML's representations that it highlighted the existence of the aboriginal heritage sites to the Consultant and highlighted the importance of avoiding these sites,

however this itself does not establish an adequate defence under section 378E of the Act. Despite the engagement of a Consultant, SML maintains responsibility for ensuring compliance with all conditions of the Authority.

## Clearing of vegetation

65. Having regard to the information available to me, I am satisfied that:
- Pursuant to the Environmental Management Code, SML must minimise the extent of any vegetation clearing too as low as practicable.
  - The Application states on numerous occasions that no trees or bushes will be removed or cleared, and the Activity Approval was granted in accordance with the Application.
  - The site inspection conducted by the Regulator on 14 April 2022 observed significant tree clearing had occurred in constructing access tracks and drill pads, which included the felling of mature woodland trees with significant fauna habitat potential.
66. I note the Consultant, in their submission, accepts responsibility however states that the access track preparation was limited to light clearing of ground cover and small shrubs. The Consultant goes further to state that the statement that *“No trees or bushes will be removed or clearer”* was an error and was inadvertently left in the application.
67. I also note that SML again places the blame on the Consultant in failing to adequately supervise the bulldozer operator and states that it was not the intent of the proposal submitted in the Application to clear mature trees, however some clearing of bush was required.
68. It was also noted that a larger drill rig was required due to the steep terrain which resulted in a larger footprint on site.
69. As with the previous offence, the actions of the Consultant in failing to comply with the Activity Approval do not provide a defence. I remain satisfied that SML has failed to comply with its requirements under the Activity Approval, a statutory condition under section 23A(7) of the Act and a contravention of section 378D(1) of the Act.

## Sediment and erosion

70. Having regard to the information available to me, I am satisfied that:
- Pursuant to the Environmental Management Code, SML must implement all measures to prevent any land degradation or pollution.
  - The rehabilitation objectives and completion criteria submitted with the Application in accordance with the Rehabilitation Code, and which subsequently formed part of the Activity Approval referred to the implementation of erosion and sediment controls during the ground disturbance works.

- c. The site inspection conducted by the Regulator on 14 April 2022 failed to observe any erosion or sediment controls downslope of the drill pads or access tracks.
71. I note the Consultants comments concerning the construction of the drill pads and the claim that sediment controls were not required; however, having considered the Regulators findings from the inspection, it is clear to me that sediment controls were required and should have been put in place.
  72. I note that SML has again placed sole responsibility for the assessment and implementation of sediment controls on the Consultant. As with the previous offences, these representations do not provide an offence. I remain satisfied that SML has failed to comply with its requirements under the Activity Approval, a statutory condition under section 23A(7) of the Act and a contravention of section 378D(1) of the Act.

## Conclusion

73. Despite SML's claims that the offending is the fault of the Consultant, I am of a firm view that the responsibility to ensure compliance rests squarely with SML as the licence holder.
74. I am of the view that the offending behaviour resulted in not only breaches of the SML's legislative requirements, but also caused adverse environmental and cultural outcomes.
75. It is imperative that licence holders take all reasonable steps to safeguard and protect Aboriginal heritage sites and the environment when conducting prospecting operations.
76. I note that strong commitments have been made to address the offending behaviour. These include:
  - a. Establish hay bale silt fences below the susceptible drill pads, including below the two diamond drill sites which are yet to be drilled.
  - b. Make every endeavour to locate the aboriginal artefacts listed in the AHIMS search and recover once which were buried during track construction. If no artifacts are found, an experienced archaeologist will be employed to carry out a further search.
  - c. The bulk drill sample bags will be removed and disposed of.
  - d. Seek expert advice on tree species which can be replanted to regenerate the drill pads.
  - e. Will consult with the Regulator on the best way forward to restore the cleared sites.
  - f. Engage a qualified Aboriginal heritage consultant or experienced archaeologist and use every endeavour to conduct a thorough search to locate, mark, recover and restore any Aboriginal artefacts that may have been disturbed during the works carried out.

- g. Carry out any other proposed works by the Regulator to restore the site and ensure sufficient environmental management moving forward.
77. However, despite these commitments, I am of the view that the offending behaviour is not acceptable and warrants a strong regulatory response.
78. I note SML's representations make specific reference to the Regulator's compliance approach and that they consider the offending behaviour to fall within the "Assisted compliance" level. This would infer that the offending behaviour was accidental or inadvertent non-compliance.
79. I however, am of the firm view that the offending is serious, and the lack of direct supervision and management of operations by SML is unacceptable. Regardless of the circumstances, a licence holder cannot remove themselves from their legislative responsibilities when engaging a consultant or a third party to conduct works. It is essential that adequate processes are put in place to ensure ongoing control and oversight of the works at all times.
80. Having carefully considered the regulatory options available to me, I am satisfied that the above considerations warrant the immediate (and mandatory) suspension of all operations under EL 9155, with the exception of those activities required to maintain a safe workplace or as otherwise directed by the Regulator under a notice issued pursuant to section 240 of the Act.
- a. In this respect, I am satisfied that SML has failed to comply with the Activity Approval granted on 1 October 2021 and that these actions constitute breaches of section 23A of the Act (a statutory condition); an offence under section 378D(1) of the Act 'Contravention of condition of authorisation – offence by holder'.
- b. Contravening a provision of the Act or a condition of the authorisation constitutes grounds for the decision-maker to cancel an authorisation, pursuant to section 125(1)(b) and section 125(1)(c) of the Act.
- c. Therefore, based on the material before me, I am satisfied that circumstances exist that constitute grounds for cancellation of EL 9155 under section 125(1)(b) and 125(1)(c) of the Act.
81. The suspension notice takes effect immediately upon SML being notified of the decision and will remain in force until such time as the suspension notice is revoked or varied by written notice of the Secretary or delegate.
82. This suspension will supersede Notice NTCE0010106. [Refer to the attached revocation notice issued under section 240B of the Act].

83. Consideration will be given to revoking the suspension notice once SML has:
- a. Commissioned a suitably qualified independent person, to the satisfaction of the Regulator, to conduct a review of the licence holder's systems and processes for meeting its compliance obligations under the Act for EL 9155 [to include the management systems applying to activity approvals].
  - b. Commissioned a suitably qualified independent person, to the satisfaction of the Regulator, to conduct an ecological review and assessment of the vegetation community within Project Area 1 identified in the Application, with particular emphasis on the significance of the site in terms of the floral and faunal components. The review must be conducted in accordance with the principles of the NSW [Biodiversity Assessment Method 2020](#) (DPIE 2020).
  - c. Submitted a detailed report, to the satisfaction of the NSW Resources Regulator, that details the key findings, recommendations and corrective actions required by SML arising from the reviews undertaken at points a) and b) above (including copies of both reports completed by the independent persons).
  - d. Submitted a detailed report, to the satisfaction of the Regulator, that details SML's intended responses to the sediment and erosion issued and rehabilitation requirements resulting from the works undertaken under the Activity Approval not otherwise covered the report provided at point c) above.
  - e. Applied for and been granted from Heritage NSW, an Aboriginal Heritage Impact Permit (AHIP) in response to the work already undertaken, the remaining work approved under the Activity Approval, and any other work otherwise required to be undertaken under the Activity Approval, including rehabilitation. The AHIP application must include:
    - i. Appropriate documentation and mapping as outlined in [Applying for an Aboriginal Heritage Impact Permit. Guide for Applicants](#) (OEH 2011) and with reference to the requirements of the Guide to Investigating, assessing and reporting on Aboriginal cultural heritage in NSW (OEH 2011).
    - ii. Include fully documented consultation with the Aboriginal community undertaken in accordance with the [Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010](#) (DECCW 2010).
    - iii. Complete records satisfying the requirements of the [Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales](#) (DECCW 2010).
  - f. Note: Further information on applying for an AHIP can be found at [www.heritage.nsw.gov.au](http://www.heritage.nsw.gov.au), including information on applying for an AHIP.

# Mining Act – Suspension Notice

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Reasons for decision



Regional  
NSW

Date of decision: 28 June 2022

A handwritten signature in black ink that reads 'Peter Day'.

**Peter Day**

Executive Director

NSW Resources Regulator

**Note:** In accordance with its Public Comment Policy, a copy of this decision will be published on the NSW Resources Regulator's website: [www.resourcesregulator.nsw.gov.au](http://www.resourcesregulator.nsw.gov.au)



## WARNING AND INFORMATION ABOUT THIS NOTICE

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- It is an offence under section 240C of the *Mining Act 1992* to fail to comply with this direction.
- The maximum penalty for this offence is, for a corporation, \$1,100,000 and a further \$110,000 for each day the offence continues, and, for a natural person, \$220,000 and a further \$22,000 for each day the offence continues.
- An offence against section 240C may attract executive liability against a director of the corporation, or an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation – section 378F of the *Mining Act 1992*
- If you fail to take the measures specified above, the Minister may take any action necessary to give effect to the direction including authorising another person to take those measures and recover the costs and expenses so incurred from you, or applying to the Land and Environment Court for an injunction directing you to comply with this direction – section 241 of the *Mining Act 1992*.
- The serving of this direction and the matters required of you pursuant to this direction in no way preclude, hinder or otherwise restrain the Department of Regional NSW from taking further action against you including by commencing legal proceedings.
- The words and expressions used in this direction have the same meaning as they have in the *Mining Act 1992*.