Mining, Exploration and Geoscience
Department of Regional NSW

Explanatory guide

Proposed Mining and Petroleum (Onshore) Regulation Amendments

Overview - September 2022

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Introduction

The NSW Government supports the state's resources industry and the benefits it delivers to the NSW community. The Department of Regional NSW's division of Mining, Exploration and Geoscience (MEG) is progressing a range of reforms that support the responsible development of the state's mineral resources and will position NSW to become Australia's premier destination for exploration and mining investment.

The *Mining Act and Petroleum Legislation Amendment Act 2022* was passed by both houses of Parliament on 17 May 2022. The proposed Mining Amendment Regulation 2022 will support these legislative amendments, to enable faster and more efficient decision-making, streamline and modernise processes, improve clarity and enhance compliance.

In addition, the Amendment Regulation will also take the opportunity to make the following amendments to the Mining Regulation 2016—

- the prescribing of hydrogen and other nonmetals (being helium, neon, argon, krypton, xenon, and radon) under the Mining Regulation to regulate exploration and mining for these minerals under the *Mining Act 1992*
- minor amendments to definitions under Schedule 8A to confirm the application of the rehabilitation conditions under the Schedule to ancillary mining activities carried out in conjunction with a mining lease
- further minor miscellaneous amendments to the Regulation that are intended to improve operational and administrative settings.

An amendment to the Petroleum (Onshore) Regulation 2016 is also proposed under the separate Petroleum (Onshore) Amendment Regulation 2022. This amendment proposes to define the 'well-head' of petroleum, which may be used in the calculation of royalties under the Petroleum (Onshore) Act 1991 and the Regulation.

Purpose of this document

The purpose of this document is to provide an overview of the proposed changes contained in the Amendment Regulations and to support stakeholders in giving feedback on the Amendment Regulations. The contents of this document do not constitute legal advice and is not intended to be a substitute for legal advice. It should not be relied upon as such. You should seek legal advice or other professional advice in relation to any matters this document raises for you or your organisation.

Publication of submissions

MEG may publish submissions on its website unless the submission is accompanied by a request for confidentiality with acceptable reasons. Please clearly mark 'IN CONFIDENCE' on your submission, or specific parts of it, if you wish material to remain confidential.

MEG may publish or reference findings from the consultation process in an anonymised way that does not disclose confidential information. Any personal details (for example, home and email addresses, signatures, and phone, mobile and fax numbers) will be removed from submissions made by individuals to protect personal information.

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1. Regulatory amendments arising from the Amendment Act — Mining Regulation

The Mining Act contains a large number of prescriptive requirements for giving applications, notices, objections, requests, withdrawals or other documents, which makes it hard to respond to changing circumstances and make improvements to these statutory requirements. There are also some redundant or duplicative requirements within the legislation, which has the potential to create confusion.

The changes under the Amendment Act and proposed Amendment Regulation will allow the Secretary or regulations to set the information requirements, manner and form of lodgement for a variety of these processes that were previously detailed in the Act.

Furthermore, the Amendment Regulation will provide additional provisions to give effect to the declaration procedures for persons deemed not fit and proper, and the relinquishment of land upon renewal of an exploration licence, both of which were introduced under the Amendment Act.

Amendments of a housekeeping nature will also be made including fixing minor errors in drafting and terminology, ensuring consistency in terminology and improving language and grammar.

1.1. Application requirements

Following changes made by the Amendment Act, the Mining Act will provide that applications or tenders for certain authorisations must be accompanied by the information that is specified in the Regulations. The Amendment Regulation will prescribe the requirements as follows —

- the information required to accompany various applications, tenders and work programs required under the Act — see clauses 14, 15A, 21, 25, 33, 35, 42 and 45, and amendments to clauses 18, 23, 28 and 50,
- the timeframes within which essential components of these applications must be provided or the application may otherwise be rejected — see clauses 26A, 94AA and 94AB,
- the periods within which certain applications for renewal of authorities must be lodged with the Department — see clauses 32B and 44A,
- the information that a decision-maker must provide in a notice of renewal of authority — see clause 32D,
- providing that applications for devolution, joint tenancy and agricultural land objections must be in writing, with the Amendment Regulation further setting out the way in which agricultural land objections must be submitted — see clauses 89K and 90A.

1.2. Fees and levies

The Mining Act requires an authorisation holder to pay fees and levies associated with being a holder of a mining authorisation. This includes rental fees and administrative levies that are applied during the period of the authorisation.

For these purposes, the Amendment Regulation will provide the following —

- the calculation methods for administrative levies and late payment fees, which retains the Mining Act's current processes under section 292K, 292L and 292M for calculating these fees and levies — see clauses 79A, 86 and 86C,
- the payment date for annual rental fees and annual administrative levies in circumstances where the date has not been otherwise specified by the Secretary in a written notice — see clauses 85A and 86B,

- redrafting the existing provisions of the Mining Regulation's clauses 85 and 86, which apply annual rental fees and annual administrative levies for authorisations that, by virtue of section 117 of the Mining Act, continue to have effect while the renewal application for the authorisation is being assessed — see clauses 85 and 86A.

1.3. Declarations about persons not fit and proper

The Amendment Act introduced Part 18, Division 2 to the Mining Act, which enables a decision-maker to make a determination, at any time, that a person is not a fit and proper person for an authorisation for which the person is the holder, applicant or proposed transferee.

To give further effect to Part 18, Division 2 of the Act, the Amendment Regulation provides —

- matters which a decision-maker may take into account in determining whether a person is a fit and proper person for authorisations under the Act — see clause 89D,
- further orders that may be made in relation to a person being deemed to not be a fit and proper person, including where the person is a joint holder of an authorisation or joint applicant — see clause 89E and Part 9B, Division 2.

1.4. Method of publishing notices

The Amendment Act enables the publication requirements for giving notice of various applications, tenders and proposed regulatory reforms to be further prescribed in the Mining Regulation. For that purpose, the Amendment Regulation prescribes the publication requirements for notice of the following —

- proposed applications for exploration licences, assessment leases and mining leases, invitations to tender for exploration licences and assessment leases, and compensation assessments under Part 13, Division 3 of the Act — see clause 89I,
- the Secretary's registration of access management plans for small-scale titles — see clause 89J,
- the Department's proposals for certain regulatory reform of fees and levies and conditions imposed by regulation — see clauses 32A and 79B.

1.5. Security deposits

Under Part 12A of the Mining Act, a decision-maker may impose a condition on an authorisation requiring the authorisation holder to provide the Department with a security deposit to secure funding of the holder's obligations under the authorisation.

The amount of the security deposit is known as the ***assessed deposit*** — the amount assessed by the Secretary for the authorisation or authorisations concerned under (section 261BC of the Act) — or, if there is no assessed deposit, the ***minimum deposit*** for an authorisation as defined by section 261BF of the Act.

The Amendment Regulation will provide the following for how security deposits are dealt with —

- for assessed deposits for 'group security deposits' provided and maintained in respect of more than one authorisation, the minimum amount which may be set as that assessed deposit — see clause 92A,
- the requirements for an authorisation holder's application which seeks Ministerial review of the Secretary's assessment of a security deposit amount — see clause 92B,

- matters which may be included as part of a security deposit condition on an authorisation, which retains the matters that are currently listed in the Mining Act's section 261C(1) and (2) for this purpose — see clause 93A.

1.6. Penalty notices

The Mining Act's section 378K provides for the ability to issue a person suspected of committing an offence under the Act or Mining Regulation with a penalty notice. Schedule 10 of the Mining Regulation currently prescribes the offences which may be dealt with by the issuing of penalty notices, along with the amount of penalty payable for the offence if dealt with in this way.

The Amendment Regulation will propose additions to Schedule 10 to provide the ability to deal with the Amendment Act's new offences under sections 140 and 394(5) by way of penalty notice. Furthermore, these amendments will provide that penalty notices will be able to be issued for the commission of existing offences under sections 6, 246R, 248B(1) and 378D(2) of the Act.

1.7. Further amendments giving effect to the Amendment Act

The Amendment Regulation will also make the following additional amendments to give further effect to the terms of the Amendment Act —

- for the purposes of the Amendment Act's section 114A(3), the matters to which a decision-maker may have regard for when deciding whether an area of land is genuinely required to support a proposed work program accompanying a renewal application for an exploration licence — see clause 32C,
- for the purposes of the Amendment Act's Schedule 1A, clause 3A, the participation charge required to accompany a competitive selection application — see clause 94B,
- for the purposes of the Amendment Act's section 383(1)(g), the ability to serve notices under the Mining Act on a deregistered company by serving the notice on the Australian Securities and Investments Commission (ASIC) — see clause 99A,
- a two-year transition period whereby the previous 'immediate vicinity' standard will continue to apply to offences under the Mining Act's sections 6(2) and (4) to those lawfully carrying out designated ancillary mining activities at that time, following the Amendment Act's change to this standard from 'immediate vicinity' to 'vicinity' — see clause 101A,
- consequential amendments and corrections required to give effect to the changes proposed to the Mining Regulation further discussed above.

1.8. Regulatory changes not included in this Amendment Regulation

This Amendment Regulation does not include provisions relating to the Royalties for Rejuvenation Fund, which are being proposed under the draft *Mining Amendment (Royalties for Rejuvenation Fund) Regulation 2022*. The Department has completed its consultation on the draft and is considering the feedback provided to assist with the finalisation of those regulations. Once finalised, those amendments will be progressed separately to these Amendment Regulations.

2. Regulating hydrogen and nonmetals under the *Mining Act 1992*

Advances in renewable technologies and low-carbon fuels have created a surge in demand for hydrogen and other nonmetals. Naturally occurring hydrogen, and other nonmetals found in underground reservoirs, is an area of interest for the Department.

The Department has been undertaking a desktop review of natural hydrogen potential in NSW and has found that there is prospectivity for natural hydrogen in parts of NSW. The hydrogen investigation program in collaboration with Geoscience Australia will further improve our understanding of the natural hydrogen potential in NSW.

The Amendment Regulation proposes to prescribe hydrogen and other nonmetals (certain helium, neon, argon, krypton, xenon, and radon) as minerals under Schedules 1 and 2 of the Mining Regulation. Prescribing these elements as 'minerals' under the Mining Regulation will enable the *Mining Act 1992* to regulate the exploration and mining of these substances and enable the development of this emerging industry.

Once regulated, the NSW Government would impose a mineral allocation area for hydrogen and other nonmetals over the whole of NSW. Mineral Allocation Areas prevent the grant of authorisations to explore for the respective minerals without the Minister's consent and provide control of the release of exploration rights in these areas. This would allow the NSW Government to better understand the potential opportunities associated with this emerging industry before exploration occurs.

Meanwhile, the exploration and production of helium that is found in a naturally occurring mixture with hydrocarbons will remain under the governance of the *Petroleum (Onshore) Act 1991*.

Similarly, Schedule 3, clause 4 of the Amendment Regulation will confirm that the activities of holders of petroleum titles under the *Petroleum (Onshore) Act 1991* in respect of exploring for natural reservoirs and use of beneficial gas recovered under the title, provided for under sections 28A and 28B of that Act, will not be taken to constitute prospecting or mining under the *Mining Act 1992*. The Amendment Regulation's clause 13(4) further confirms that the *Mining Act 1992* will not be used to seek the payment of royalties for publicly owned minerals recovered as a result of those activities.

3. Amendment to definitions under standard conditions of mining leases

Schedule 1B, clause 7(1)(e) of the Mining Act provides that an authorisation granted under the Act will be subject to any conditions prescribed by the regulations.

For that purpose, the Mining Regulation's Schedule 8A, Part 2 prescribes further conditions that apply to a mining lease. These conditions primarily relate to the obligations to rehabilitate land within the area of the mining lease, with further conditions requiring the preparation of associated risk assessments, management plans, outcome documents and reports associated with the rehabilitation of the land.

The Amendment Regulation will amend the definitions of ***activities*** and ***mining area*** in Schedule 8A, Part 1 of the Mining Regulation to further confirm the application of these rehabilitation conditions to ancillary mining activities carried out in conjunction with a mining lease.

Firstly, clause 1 of Schedule 8A currently provides that a reference to ***activities*** under the mining lease in the Schedule includes the carrying out of ancillary mining activities under the mining lease. The Amendment Regulation will further verify that these ancillary mining activities included for the purposes of the Schedule are those—

- authorised to be carried out under the mining lease on the mining area, and
- which are regulated by a condition imposed under the Mining Act's Schedule 1B, clause 7B.

Similarly, clause 1 currently provides that a reference to the ***mining area*** in the Schedule, for a mining lease that does not include the surface of land, includes the part of the surface of land on which the holder of the mining lease is authorised to carry out activities under section 81 of the Mining Act.

The Amendment Regulation will additionally provide that for a mining lease in respect of a mineral or minerals, a reference in the Schedule to the ***mining area*** includes land—

a) in the vicinity of the land subject to the mining lease, and

b) on which an ancillary mining activity is carried out to directly facilitate the mining lease, and

c) identified as part of the mining area for the purposes of Schedule 8A in a written direction given to the mining leaseholder from the Secretary.

4. Miscellaneous amendments to the Mining Regulation

The Amendment Regulation will also take the opportunity to make the following amendments to the Mining Regulation 2016 to improve the administration of the Mining Act and Regulation:

- to further prescribe people who are taken to be ***landholders*** in relation to reserved land under the Dictionary to the Mining Act and for the purposes of the Act — see clause 8,
- to require the use of Map Grid of Australia 2020 and Geocentric Datum of Australia 2020 when supplying a standard map with certain applications — see clause 9,
- to provide that a person may fossick using a hand-held metal detector — see clause 12,
- to specify activities that are taken not to be prospecting or mining under the Act within Schedule 3 to the Regulation — see clause 13 and Schedule 3,
- to provide that applications for partial cancellation of exploration licences, assessment leases or mining leases must include a map of the land retained under the licence or lease, rather than identify the area of land over which the title will be cancelled, which will commence in tandem with minor amendments made to the Mining Act via a future Statute Law (Miscellaneous Provisions) Bill — see the amendment to clauses 19, 24 and 29,
- to provide that a subsurface mining leaseholder may rehabilitate surface disturbance in accordance with section 81 of the Act — see clause 27,
- to enable the holder of an authorisation to apply for an extension for the time within which a partial relinquishment or final report is required to be lodged — see clause 67,
- to prescribe the *Dams Safety Act 2015* as prescribed legislation for the purposes of sharing information under the Act — see clause 71,
- to confirm that annual rental fees are also payable over part units, as is currently the case with part hectares, square kilometres or square metres — see clause 80,
- to remove a redundant provision regarding the aggregation of labour and expenditure conditions, which is no longer required as a result of the general powers to impose conditions under the Mining Act's Schedule 1B, Part 3 — see the omission of clause 30,
- to correct an incorrect reference in Schedule 9, item 18 of the Mining Regulation, which amends the reference to Schedule 1B, clause 14(3) to Schedule 1B, clause 14(1).

5. Regulatory amendments arising from the Amendment Act — Petroleum Regulation

Royalties — defining the 'well-head' of petroleum

The *Petroleum (Onshore) Act 1991* (the Act) provides that petroleum titleholders must pay royalties in relation to petroleum recovered under their petroleum title at the rate prescribed in the regulations. The Act further provides that the regulations may prescribe the rate of royalty as a percentage of the value at the 'well-head' of the petroleum.

To provide further clarity for what is regarded as the 'well-head' of petroleum, the Amendment Act omits the Act's current means of determining the equipment that constitutes a well-head under section 88. Instead, the Amendment Act enables the 'well-head' concept to be further defined in the regulations.

The proposed *Petroleum (Onshore) Amendment Regulation 2022* will provide a definition of 'well-head' for this purpose under a proposed new clause 51A of the *Petroleum (Onshore) Regulation 2016*. This definition confirms the nature of the equipment and its components that are taken to be the well-head of petroleum for royalty calculation purposes under the Act.

5.1. Regulatory changes not included in this Amendment Regulation

The Department will consider further amendments to the Petroleum (Onshore) Regulation 2016 at a later date to give effect to the remainder of Amendment Act's changes to the *Petroleum (Onshore) Act 1991*.