MINING AND PETROLEUM LAW

A LEGAL GUIDE FOR THE COMMUNITY

Foreword

Many people cannot afford private legal advice. This Guide fills a much needed gap by providing reliable information on how the law regulates South Australia's mining and petroleum industries particularly with regards to their possible impacts on existing communities, industries and the natural environment. The Guide sets out amongst other matters the community's rights to gain access to information, make comments on proposed activities, challenge decision making and generally participate in legal processes which affect them.

Iris Iwanicki - Chairperson, Environmental Defenders Office (SA) Inc. Committee of Management

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The Environmental Defenders Office (SA) Inc. – EDO SA – who we are; what we do.

EDO SA is a non-profit, non-government community legal centre which assists those who cannot afford private lawyers to understand and access their legal rights to protect the environment in the public interest. EDO SA also undertakes community legal education and engages in law reform activities in an effort to improve the State's environmental laws.

The information in this Guide is of a general nature only and not a substitute for specific legal advice. Contact the Environmental Defenders Office or one of the Departments referred to in this Guide for more information (for details see the end of this Guide).

TERMINOLOGY

The Minister – the South Australian Minister for Mineral Resources and Energy

(Cth) – Commonwealth or Federal Law

(SA) – South Australian Law

DSD – Department of State Development

DEWNR – Department of Environment, Water and Natural Resources

DPTI – Department of Planning, Transport and Infrastructure

EPA – Environment Protection Authority

DoE – Department of Environment

Mining Act – *Mining Act 1971* (SA)

Petroleum Act – *Petroleum and Geothermal Energy Act 2000* (SA)

NRM Act – *Natural Resources Management Act 2004* (SA)

Environment Protection Act – *Environment Protection Act 1993* (SA)

Development Act – *Development Act 1993* (SA)

EPBC Act – *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

Native Vegetation Act – *Native Vegetation Act 1991* (SA)

MNES – Matters of national environmental significance

ERD Court – Environment, Resources and Development Court

Chapter 1: General Concepts – Minerals and Petroleum Development

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Chapter 3: Petroleum Exploration and Production

Chapter 1: General Concepts – Minerals and Petroleum Development

1.1 Overview of mining and petroleum development in South Australia

Mining and petroleum are important industries for the South Australian economy but also gives rise to issues such as impacts on water quality and quantity, clearance of native vegetation, destruction of wildlife, pollution including site contamination and greenhouse gas emissions from production and burning of fossil fuels.

For the most part mining and petroleum activities are dealt with outside normal statutory land use planning and environmental controls. They are regulated by both State and Commonwealth law with the State Mining and Petroleum Acts being the most relevant to regulating these industries.

Other relevant legislation includes:

- *Mines and Works Inspection Act 1920* (SA);
- *Roxby Downs (Indenture Ratification) Act 1982* (SA);
- *Broken Hill Proprietary Company's Indenture Act 1937* (SA);
- *Opal Mining Act 1995* (SA);
- *Whyalla Steel Works Act 1958* (SA);
- *Offshore Minerals Act 2000* (SA); and
- *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).

Other State and Commonwealth environmental regulation are also important in this area and include:

- *National Parks and Wildlife Act 1972* (SA);
- *Natural Resources Management Act 2004* (SA);
- *Work, Health and Safety Act 2012* (SA);
- *Environment Protection Act 1993* (SA);
- *Native Title Act 1994* (SA); and
- *Environment Protection and Biodiversity Conservation Act* 1999 (Cth).

1.2 Ownership of minerals and petroleum; the concept of a tenement

The South Australian government owns most minerals, gas and petroleum in South Australia even if they are found beneath private freehold or leasehold land. The Government authorises the extraction of these resources through a system of permits, licences and leases. In return for licencing the use of the resources, it receives royalties which form part of the State's revenue.

1.3 The relationship between tenements and operational approvals

Tenements are issued subject to certain conditions, some of which are prescribed by the legislation, but most of which are at the Minister's discretion. Tenements generally do not authorise specific operations. A series of approvals (operational and environmental) are required before most operations are commenced.

1.4 State and Commonwealth government agencies and their respective roles

1.4.1 The Department of State Development

The DSD is the state's economic development agency responsible for the administration and management of mineral and petroleum resources in South Australia. On behalf of the Minister, the DSD issues the relevant licenses (called tenures) to the resource companies. The tenures are what give companies access to the resources.

The Department of Environment, Water and Natural Resources (DEWNR), Safework SA (SWSA), and the Department of Planning, Transport and Infrastructure (DPTI) play an advisory role to DSD with respect to resource projects.

1.4.2 The Commonwealth Department of Environment

The Commonwealth Department of the Environment is involved in the assessment and approval of projects where there are likely to be significant impacts on matters of national environmental significance (MNES). MNES matters include nationally threatened species and ecological communities, World Heritage areas, wetlands of international importance and migratory species and impact on water resources from coal seam gas and large coal mining developments.

1.5 Environmental impact assessment

Before obtaining any approvals, resource companies, particularly those proposing significant projects, must undertake under South Australian law some form of environmental impact assessment. An environmental impact statement is the most comprehensive form of assessment. Other assessments include a Development Report and a Public Environment Report.

The public are able to comment during the assessment process on the environmental, social and economic impacts of a particular project. Once the project has been assessed this allows the Government to determine whether the project should be approved at all and if approved, what conditions will be attached to the approval.

1.6 State government approvals

After a project is assessed, a series of approvals are required including approvals under the relevant mining or petroleum legislation and licences and permits issued pursuant to the Environment Protection Act and the Natural Resources Management Act.

1.7 Federal government approvals

In addition to the State government approvals, resource companies may require approval under Federal laws such as the EPBC Act (see chapter 2). Other Federal laws that may apply include:

1. *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth);
2. *Environment Protection (Sea Dumping) Act 1981* (Cth); or
3. *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth).

1.8 International laws

International laws relating to the environment are of little legal relevance unless they have been incorporated into Commonwealth or State laws, and therefore they will not be addressed in this Guide.

Chapter 2: Minerals Exploration and Production

The Mining Act provides for a two-stage authorisation process for mining in South Australia. There are various tenement types, most importantly for exploration and extraction. A proposal is submitted in support of an application for a mining tenement. Once a tenement is granted, a program for environment protection and rehabilitation must be approved by the Minister before any activities can begin. This program is reviewed during the life of the mining operation.

2.1 Exempt areas

The Minister can exempt any land from mining, a specified class of mining, a specified provision of the Act, or the whole of the Act other than specified provisions identified by the regulations (for example, with respect to illegal mining).

2.2 Authorisation Process

2.2.1 First Stage: grant of tenements

Types of Tenements and rights conferred:

Proponents may be granted access to private or public land, freehold or leasehold for different types of mining activities. Their right to come onto the land and extract the resources is called "tenure". Tenure can also be referred to as a "mining tenement" or "resource tenure". Minerals include all substances which are naturally occurring as part of the earth's crust. This Guide covers extraction of all minerals. The law relating to opal mining is not covered.

The type of tenure the proponent holds will be determined by the type of activities it is allowed to undertake. The tables below set out the various types of mining tenure in South Australia. All tenures are granted by the South Australian Minister for Mineral Resources and Energy. Proponents also require environmental authorisation (see below and Chapter 4).

Mineral claims:

Purpose	To allow prospecting
Coverage	250 ha Longest side must be <2km
Term	1 year, no renewal
Key rights	Exclusive rights to prospect for minerals, carry out approved operations and apply for mining lease or retention lease
Transferable	

Exploration Licences:

Purpose	To authorise carrying out of exploratory operations
Coverage	1000 square kilometres
Term	5 years with one right of renewal (subsequent exploration licence may be applied for)
Key rights	As provided for in the licence
Transferable	Yes
Minister power	Can say no early on

Mining Leases: (also known as production licences)

Purpose	To authorise the carrying out of mining operations for the recovery of minerals other than extractive minerals
Coverage	May be over whole or part of land subject of a mineral claim or retention lease
Term	Initially up to 21 years, with right of renewal
Key Rights	Exclusive right to mine and sell or otherwise dispose of minerals recovered
Minister power	Can say no early on

Retention Leases:

Purpose	To allow further exploration work for holders of mineral claims
Coverage	May be over whole or part of land the subject of a mineral claim
Term	Initially up to 5 years, with one right of renewal
Key Rights	Exclusive right to prospect for minerals; such other rights to conduct mining as stipulated in the lease; and an exclusive right to apply for a mining lease

Miscellaneous Purposes Licences:

Purpose	Infrastructure and facilities related to the mine
Coverage	Granted in respect of mineral land. Maximum area is 250 hectares
Term	Initially up to 21 years, with right of renewal
Key Rights	Non exclusive use of land for purposes related directly to mining

The mining tenement proposal must include a description of the operation together with information on its location, land ownership and the natural, social and economic environment in which operations are to be carried out. Where vegetation is to be cleared, the proposal needs to include details of the proposed clearance and the proposed significant environmental benefit plan to offset the loss of vegetation.

After an application has been made to the Minister, consultation occurs with other Government agencies. If an application is for exploration or production there is an opportunity for the public to make comment. Usually the application is advertised in local papers and the community is given 14 days to make comment. The proponent is required to respond to all public comments and this response is made public.

If the Minister is considering an application to mine in an area within the Murray Darling Basin they must take into account the objects of the *River Murray Act 2003* (SA). The Minister must consult with the River Murray Minister. If the Ministers cannot agree, the matter is referred to Cabinet.

Mining may also occur in regional reserves and some parks. However the proposal must be referred to the Environment Minister. If the Ministers cannot agree, the matter is referred to Cabinet.

In granting a mining tenement the Minister may limit or define the extent or scope of operations. The Minister can add, vary or revoke a term or condition of a tenement at any time if, in the Minister's opinion, such action is necessary to prevent, reduce, minimise or eliminate undue damage to the environment associated with mining operations conducted pursuant to the lease. If the Minister acts under this provision during the term of the tenement and without the agreement of the holder of the tenement, a right of appeal will lie to the Environment, Resources and Development Court.

When determining conditions to attach to a mineral exploration or production tenement, the Minister may consider any factors appropriate to a particular case, but must consider the protection of:

- the natural beauty of the area that will be affected by the proposed lease or licence;
- the flora and fauna of any natural environment or habitat in the area;
- any geological or geophysical features of the area that are of special interest; and
- any Aboriginal sites or objects of significance according to Aboriginal tradition, archaeology, anthropology or history.

2.2.2 Second Stage: assessment and approval

Once a tenement is approved the next stage is for DSD to assess the environmental impacts and net benefits of a proposal. For most mining proposals a Program for Environmental

Protection and Rehabilitation (PEPR) must be prepared. The PEPR is a legal document and must be complied with and must cover construction, operation and closure of mines.

Environment is defined broadly under law and it can include:-

- land, air, water and soil;
- plants and animals;
- social, cultural and heritage features;
- visual amenity; and
- economic and other land uses.

A PEPR documents the risks with a project and provides for environmental outcomes. An outcome is a statement of the expected impact on the environment caused by the proposed or current mining activities. The outcomes stated in the PEPR are enforced by demonstrating compliance with measurable assessment criteria. An example of an outcome is "no compromise of potential pastoral use of the south western aquifer outside the mining lease".

Specifically a PEPR must:-

- provide adequate information about the mining operations that will be conducted under the tenement;
- ensure that mining operations that have (or potentially have) adverse environmental impacts are properly managed to reduce those impacts as far as reasonably practicable;
- eliminate, as far as reasonably practicable, risk of significant long term environmental harm;
- ensure that land adversely affected by mining operations is properly rehabilitated;
- specify the mining operations that the holder of the mining tenement proposes to carry out in pursuance of the tenement;
- set out the environmental outcomes that are expected to occur as a result of the mining operations (including after taking into account any rehabilitation proposed by the holder of the tenement and other steps to manage, limit or remedy any adverse environmental impacts);
- set out the criteria to be adopted to measure those environmental outcomes;
- incorporate information about the ability of the holder of the mining tenement to achieve the environmental outcome;
- set out such other information as may be required by a condition of the tenement or by the regulations;
- comply with any other requirements prescribed by regulation; and
- include information obtained through consultation and if issues have arisen the steps taken to address these issues.

Public Consultation

There is no public consultation on the content of a proposed PEPR and many are not publically available. However, new mining leases generally contain a condition that the PEPR must be a public document at all times. When a PEPR is being amended or reviewed, which is usually every 7 years, relevant government departments and other stakeholders may be consulted where it is deemed to be appropriate in the particular circumstances

Decisions on Mining Projects

When deciding whether to allow a project to go ahead, the Minister must give proper consideration to the protection of any aspect of the environment which may be affected by the conduct of operations in pursuance of a mining tenement. The Minister must also have regard to, and seek to further, the objects of the NRM Act when looking to approve a PEPR and the applicant has the right of review in the ERD Court.

The Minister can require an audit of the environmental outcomes provided for in the PEPR. This is carried out by an independent person but the Minister has discretion as to whether the results are publicly released. Any changes made by the Minister in regard to a PEPR can be challenged in the Environment Resources and Development Court (ERD Court).

The Minister must be provided with a report on the progress of the PEPR, e.g. provide information on the rehabilitation of particular areas, summaries of management system reviews, reports on new or emerging environmental hazards and a summary of public complaints.

Major Projects: Development Act and Development Regulations

Under the Development Act "development" does not include operations carried out under the Mining Act. However, the Minister can and must (in some cases) refer some mining applications to the Planning Minister. The Planning Minister has a discretion to determine that a proposed mining project is a major development under the Development Act and that a certain level of environmental assessment must be undertaken, followed by the production of an assessment report. Either an Environmental Impact Statement (EIS) or Public Environment Report (PER) is prepared.

Normally with major projects the Development Assessment Commission determines the process but where it is a mining matter either the Minister or the Planning Minister steps into this role. However, the Planning Minister has the ultimate say in what the EIS or PER covers. Further, the Planning Minister can only direct that an environmental impact assessment in the form of a PER take place where the Mining Act EIA processes are not equivalent. Where the Ministers cannot agree on the exercise of powers in relation to public environmental reports then the matter must be referred to the Governor to be resolved.

Information on Mining matters

Mining tenement proposals, Assessment Reports, Approved Programs, Annual Compliance Reports and Incident Reporting are made publicly available on the DSD website.

UPDATE

Planning, Development and Infrastructure Bill 2015

At the time of writing this guide, this Bill is being debated by the South Australian Parliament. The Bill provides that an application for mining operations (which includes operations under both Mining Act and Petroleum Act) and associated development.

- May be referred for advice to the Planning Minister;
- Must be referred if required by the Regulations;
- Public submissions must be considered by the Planning Minister;
- Planning Minister can determine that the project be assessed via an environmental impact statement where the Minister considers the operations are of major social, economic and environmental importance:
  - Minister to determine what matters the EIS covers;
  - The Minister considers the EIS and Assessment Report then advises the State Planning Commission on whether an application should be granted and if so on what conditions in order to recognise actual or potential adverse effects on the environment; and
  - If the Commission disagrees the matter is sent to the Governor who determines whether the advice should be followed.

It is uncertain if and when this Bill will become law.

2.3 Landowner's rights

Only an affected landowner (or someone else with an estate or interest in the land) may object to the issuing of a mining tenement or entry onto land for exploration purposes, on any grounds.

Proponents need to provide a notice of entry to landowners at least 21 days prior to their entry to the land to conduct any approved activity. The notice must provide a reasonable description of the types of activities proposed and also provide reasonable information on the anticipated events and consequences associated with the proposed activities.

The notice of entry must also provide reasonable information on the rights of a landowner to claim compensation including in relation to damage to the land and expenses incurred during negotiations or in the process of resolving disputes with the proponent.

A landowner may object to the proposed entry within three months after receiving the notice of entry. The notice must be lodged in the Warden's Court. The Court sends a copy to the proponent.

If the Court is satisfied that the mining operations would be likely to result in substantial hardship or substantial damage to the land, they can determine that:-

- the land or part of it not be used for mining; or
- conditions upon which operations may be carried out on the land with least detriment to the interests of the landowner and least damage to the land.

In the above examples, the landowner may be entitled to compensation from the proponent. This is compensation for any economic loss, hardship and inconvenience suffered as a result of mining operations. The amount of compensation can be agreed by the landowner and the proponent or be determined by the appropriate Court. Compensation may cover:

- damage caused to the land by the proponent;
- loss of productivity or profits as a result of the mining operations.

Reasonable costs incurred by the landowner in connection with any negotiation or dispute related to the proponent gaining access to the land and activities to be carried out on the land may be paid . However, negotiation or dispute resolution costs will not be considered reasonable if they arise from a period when a reasonable offer of compensation was open to be accepted.

Where the proponent wishes to use declared equipment (i.e. equipment other than hand tools) approval must be sought. They also need to provide notice of use to landowners at least 21 days prior to use. A landowner may lodge a notice of objection on the basis of hardship regarding the use of the declared equipment within three months after receiving the notice of use of declared equipment. The notice must be lodged in the Warden's Court. If the court is satisfied that the use of declared equipment would be likely to result in severe or unjustified hardship or substantial damage to the land, they can determine:-

- that the declared equipment should not be used or
- upon what conditions declared equipment may be used with least detriment to the landowner and the land.

Exempt Land

Particular land may be further protected from mining – this is known as exempt land. Exempt land is defined as:-

- Land that is lawfully and genuinely used as a yard, garden, cultivated field (any field that is cultivated on a regular basis and/or is in the process of being re-established as cultivated land), plantation, orchard, vineyard, or as an airfield;
- Land that is situated within 400m of a building or structure used as a place of residence;
- Land that is situated within 150m of a building or structure with a value of $200 or more used for an industrial or commercial purpose, or a spring, well, reservoir or dam. Water bores are included in the definition of a well.

Proponents may by notice request the landowner who has the benefit of the exemption to agree to waive it. An agreement to waive the benefit of the exemption must be in writing and takes effect on the expiry of a cooling-off period. Notice rescinding an agreement must be given in writing.

If the proponent is unable to reach agreement with the landowner to waive the benefit of the exemption the proponent may apply to the Court for an order to this effect.

The Court may make an order if it is satisfied that any adverse effects of the proposed mining operations on the landowner can be appropriately addressed by the imposition of conditions on the proponent (including the payment of compensation to the landowner).

In court proceedings, the court won't make an order for costs against the landowner unless they have obstructed or unnecessarily delayed proceedings or have failed to attend court or comply with a rule, order or direction of the Court.

The waiver of the benefit of the exemption lifts once the mining operations are completed.

Landowners can receive up to $500 for the reasonable costs of obtaining any legal assistance relating to receiving a notice requesting them to waive the benefit of the exemption. Compensation may also be paid as outlined above.

2.4 Other approvals

2.4.1 Environment Protection and Biodiversity Conservation Act

Commonwealth approval may be required – see chapter 4.

2.4.2 Environment Protection Act

A proponent needs an environmental authorisation in the form of a licence to undertake any mining activity which falls within the ambit of a prescribed activity of environmental significance.

When a mining project also includes on- site processing of the mined ore approvals may also be needed.

When considering whether to grant an application the Environment Protection Authority (EPA) considers:-

- Emissions to air;
- Emissions to water;
- Noise;
- Disposal of waste material; and
- Pre-existing site contamination.

If an activity is prescribed as an activity of environmental significance an EPA licence is required. With respect to mining these activities are:-

- Mineral works (e.g. use of floatation cells, use of magnetic rolls, use of spiral classifiers and screening to remove fine impurities);
- Chemical works;
- Fuel burning;
- Waste or recycling depots including domestic waste, waste rock from mine development, tailings from mineral processing and sewage treatment; and
- Mine development including concrete batching and fuel burning.

If the proposed mining operation involves mineral processing an authorisation in the form of a Works Approval is required for construction work as well as a licence for operational matters before these activities may commence. The EPA will not grant a Works Approval and Licence until the proponent has obtained a PEPR approved by the Minister.

Importantly, wastes produced by mining operations and disposed of within the area of a Mining Act lease or licence do not have to be licensed under the Environment Protection Act nor supervised or monitored by the EPA. This function is left to the Minister and the DSD.

If a project does not include any prescribed activities of environmental significance proponents are still required by law to take all reasonable and practicable measures to prevent or minimise any resulting environmental harm. For mining projects this could include design of bunding, design of storage ponds and the dispersion of gaseous pollutants.

2.4.3 Natural Resources Management Act

Water resources for mining and other industries are regulated primarily through the NRM Act. The NRM Act provides for the sustainable management of water resources through prescription of water resources, the subsequent development of water allocation plans, the issuing of water management authorisations, restrictions where appropriate on water usage and the issue of permits for Water Affecting Activities.

The legal requirements of mining enterprises with regard to extracting water and using it for mining purposes differs depending on a number of factors including location, water source and method of extraction.

Most importantly different rules apply depending on whether the mining location and / or points of extraction of water are within a prescribed or non prescribed water resources area.

Generally, water resources are prescribed when the water resources are at risk of over use and more appropriate management is necessary. The majority of South Australia's water resources, including those where mining occurs are prescribed.

Prescription of water resources within a region or area places controls on uses of water. This means the taking of water for certain purposes from resources that are prescribed, requires a legal authorisation to do so, usually a water licence.

Mining within a prescribed water resources area requires a water licence unless authorised separately or specifically exempted. In addition, water use must be undertaken in accordance with principles set out in the relevant regional NRM plan and the relevant Water Allocation Plan (WAP). A WAP is a legal document which sets out the principles for managing, taking and using prescribed water. WAP's seek to provide security and equity between water users while balancing the capacity of the region's water resources and the needs of the environment.

In non-prescribed areas there is no requirement to hold a water licence or authorisation to extract water for mining purposes. However principles in Regional NRM Plans still apply, in particular with regards to conditions relating to the granting of permits required for Water Affecting Activities.

In addition a general duty of care exists requiring:-

- Adherence to the principles in the relevant regional NRM plan (e.g. water resources are managed sustainably);
- That there will be no significant impact to water dependant ecosystems due to mining operations;
- The quality and quantity of water supply to existing users during and post mining must be maintained to meet reasonable requirements; and

- There is no net ongoing liability to the Government related to control of impacts resulting from mining operations

In all cases proponents are responsible for sourcing their own water consistent with Action 48 of the South Australian *Water for Good* Plan.

2.4.4 Native Vegetation Act

All native vegetation in South Australia is protected under the provisions of the Native Vegetation Act. However, the Native Vegetation Act exempts proponents from the requirement to seek approval to clear native vegetation. As a majority of mining activities involve some degree of clearance of native vegetation this is a highly significant exemption.

The exemption is subject to a requirement that all mining operations (other than exploration) which involve the clearance of native vegetation must be undertaken in accordance with a management plan that the Native Vegetation Council is confident will result in a significant environmental benefit. The DSD approves the significant environmental benefit management plan, and the plan is included in the application. There are Guidelines on DEWNR's website for a *Native Vegetation Significant Environmental Benefit Policy covering the clearance of native vegetation associated with the minerals and petroleum industry*.

In those parts of the state that are exempt from the Native Vegetation Act (much of the Adelaide metropolitan area), the Development Act protects 'significant trees' (trees that meet specified circumference and height criteria or are identified as significant trees within a development plan) from damage or removal without approval. Approval may be obtained from the relevant local council authority.

2.5 Uranium Mining

South Australia has 81% of Australia's uranium reserves and 25% of the world's identified reserves. There are currently five operating mines and a similar number of uranium projects.

2.5.1 South Australian regulation

As with other mining operations a PEPR is produced by a proponent incorporating relevant regulatory requirements such as the EPA's *Radioactive Waste Management Plan* and *Australian Government Environmental Monitoring Plan*. An *Occupational Radiation Management Plan* is separate.

In the case of uranium mining a PEPR contains:-

- Evidence of capability of lease holder to operate lease;
- Background data;

- Statement of environmental outcomes;
- Management strategies to meet environmental outcomes;
- Environmental monitoring plan;
- Leading indicator criteria;
- Stakeholder consultation information;
- Schedule for compliance reporting *Radiation Waste Management Plan;* and
- Description of mining operations.

An *Occupational Radiation Management Plan* contains:-

- Description of environment and baseline radiological study;
- Statement of environmental outcomes relevant to radiation exposure;
- Waste management strategies including accidental releases and mine decommission;
- Radiation risk assessment including critical group dose assessment;
- Radiation monitoring program; and
- A schedule for compliance reporting and review of the adequacy and effectiveness of radiation protection measures.

The *Radiation Protection and Control Act 1982* (SA) (RPC Act) regulates low and intermediate radioactive waste storage facilities, specifies maximum radiation exposure levels for the community and workers in the industry and establishes a licensing regime for radioactive waste handling activities.

Of note in SA is the prohibition of other nuclear waste storage facilities by the *Nuclear Waste Storage Facility (Prohibition) Act 2000* (SA).

The RPC Act applies to mining and mineral processing operations which have the potential to produce significant occupational radiation exposures, or which generate wastes having the potential to cause a significant increase in the radiological exposure to people and the environment.

These operations broadly include:-

1. The mining and processing of ore for the production of uranium or thorium concentrates;
2. The separation of heavy mineral and mineral sands ore;
3. The mining and processing of other minerals that contain small quantities of uranium, thorium or their decay products; and
4. Processes that lead to the production of commodities, by-products, residues or wastes not normally considered radioactive, but that contain naturally occurring radionuclides.

Operations in 3 and 4 above are often referred to as NORM operations. These operations involve substances containing naturally occurring radioactive materials that are of sufficient levels to be radiologically significant.

These operations are currently either licenced or registered under the RPC Act. Conditions attached to the licence or registration require the licensee to ensure the operations are conducted in a manner that protects people and the environment from the harmful effects of ionising radiation.

EPA regulation of these operations involves authorisations and approvals of the main stages of the operation, audits to determine compliance with approved management plans, and routine and incident reporting by the operators.

Olympic Dam

The Olympic Dam mine operated by BHP Billiton since 1988 is far and away South Australia's largest uranium mine. Whilst other mines are regulated primarily by the provisions of the Mining Act, the Olympic Dam mine is regulated by a special Act – the *Roxby Downs (Indenture Ratification) Act 1982* (SA) (Indenture Act). The Act modifies the operation of a number of South Australian laws including the Environment Protection Act in relation to this project.

The Indenture Act takes precedence over any other state government environmental legislation.[1] For environmental protection within the Olympic Dam and broader area the Indenture sets up its own set of rules in Clause 11 for the "Protection and Management of the Environment". These provisions require the joint venturers to submit 3 year programs to the Minister (responsible for the Indenture) regarding the protection, management and rehabilitation (if appropriate) of the environment in respect of each project. The Minister has the sole power to approve or refuse the application on the basis of those programs.

2.5.2 Commonwealth regulation

There are a number of relevant laws, policies, Codes and Guidelines including:-

- Uranium In-Situ Recovery Policy – uranium mining, milling and rehabilitation must demonstrate best practice;
- The *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) establishes a licensing system for the operation of nuclear waste storage or disposal facilities. Importantly it also prohibits nuclear power plants, fuel fabrication, enrichment and processing plants in Australia;
- The *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth) gives effect to Australia's obligations under a number of international conventions and agreements in relation to

[1] *Roxby Downs (Indenture Ratification) Act 1982* (SA) s7(2)(a).

non-proliferation of nuclear weapons and nuclear safeguards in Australia (i.e. preventing nuclear materials or technology being diverted to non-peaceful uses);

- *Customs (Prohibited Imports) Regulations 1956* (Cth) state that specific permission is required prior to any importation of radioactive waste into Australia. Finally whenever radioactive waste is being transported in Australia the process must comply with the *Code of Practice for the safe Transport of Radioactive Material*;
- Radiation protection - ARPANSA Codes;
- Water quality – Australian and NZ Conservation Council WQ Guidelines;
- Air quality and soil contamination – National Environment Protection Measure (NEPM);
- Acid Mine Drainage assessment and management - INAP GARD;
- Low Level Radioactive Waste Disposal – Near Surface Code;
- Tailings Dam construction and operation – ANCOLD; and
- Flora and Fauna – *South Australian Biological Flora and Fauna Survey Protocol*.

Chapter 3: Petroleum Exploration and Production

3.1 Onshore Petroleum Exploration and Production

3.2 Overview

In South Australia, onshore oil and gas exploration and production activities are regulated under the Petroleum Act and *Petroleum Regulations 2013* (SA). Gas includes both conventional and unconventional gas e.g. shale. The DSD have developed guidelines to further explain management of this industry (available on the DSD website) for:-

- Onshore exploration;
- Onshore production;
- Activity notification and approval;
- Pipeline licensing and approvals;
- Wells;
- Collection and submission of data and reports;
- Annual report requirements;
- Core and cuttings submissions and removals for inspection;
- Environmental management;
- Incident reporting; and
- Fitness-for-purpose assessments and reports.

3.3 First Stage – Licensing

Lawful exploration, production, storage and transmission of petroleum products can only be conducted by a proponent when a license for these activities is issued.

A license application to the Minister must be accompanied by a work program which outlines the activity and the technical abilities of the proponent to be able to carry out the proposed operation.

There are ten different types of licenses for different processes associated with the production of petroleum. The main licenses are licenses to explore, to produce and to store petroleum.

3.3.1 Exploration License

An exploration license authorizes the licensee, subject to its terms, to carry out operations to both establish the nature and extent of a discovery of gas and establish the feasibility of production and appropriate production techniques.

3.3.2 Production License

A production license authorizes the licensee, subject to its terms, to recover gas resources either by direct recovery or underground gasification in the case of Coal Seam Methane. This license incurs a royalty of 10%.

3.3.3 Gas Storage License

A gas storage license authorizes the licensee, to use a natural reservoir (including artificiality modified structure) for the storage of unconventional gas to a maximum extent of 1000 square km. Gas storage licenses do not incur royalty fees.

License applications are published in the Government Gazette. There is a 14 calendar day period of consultation with underlying compatible license holders i.e. existing license holders. There may also be consultation with native title holders.

The application is also forwarded to the Environment Minister if the area is within a National Park, Conservation Park or a Regional Reserve or if the area is within or adjacent to the Adelaide Dolphin Sanctuary, a marine park or the River Murray Protection Area. If the Environment Minister disagrees with the Minister as to whether the license application should be approved for further environmental assessment, then the matter is referred to the Governor. The Governor makes the decision whether the license application can be forwarded to the next stage. If all the relevant Minister(s) approve the license application then the process goes on to the next stage of environmental impact assessment.

3.4 Second Stage – Environmental Impact Assessment

3.4.1 Form of Assessment

Once a license is granted the proponent must prepare and submit an Environmental Impact Report (EIR) and a Draft Statement of Environmental Objectives (SEO).

An EIR is a document prepared and submitted by the mining company to the Minister. The purpose of the EIR is to inform the Minister about the impact the project could have on Aboriginal culture, the general public and on the environment.

The SEO is usually submitted along with the EIR. It contains targets for the mitigation and rehabilitation of impacts assessed in the EIR. While the EIR outlines the risks, the SEO states the environmental goals that the mining company needs to attain to remediate or mitigate those risks or likely impacts. The SEO also includes criteria to measure performance of these goals. Rehabilitation of land adversely affected is a mandatory objective for all SEOs. While some SEOs apply to an entire region for a particular activity, others apply to a specific area for a specific activity.

3.4.2 Assessment of Impact

Based on the EIR the Minister assesses the level of impact of the project. Projects are assessed and approved differently depending on the likely level of impacts. These are classified as low, medium and high impact.

The Minister and/or their delegated officer must consider the EIR and certain criteria, to determine the level of impact. In summary they are:-

- How predictable is the impact depending on the size, consequences, duration and risks of the project?

This criterion involves determining the certainty in prediction based on the submitted EIR for the project:-

- How manageable is the impact?

This criterion assesses the level to which the environmental consequences of each event can be either avoided or mitigated. It is assessed independently to the former criterion.

3.4.3 Consultation and Referrals

The type of consultation that occurs depends upon on the assessment of the level of impact. Once the level of impact is assessed by delegated bodies, it is referred back to the Minister and Minister classifies the activity as low, medium or high impact.

If a proposal is assessed as a low impact activity, there is no public consultation required. Consultation does occur with the EPA, DEWNR, Safe Work SA and DPTI if it is an activity of a certain type e.g. within a council area. Comments must be provided within 20 business days.

If the impacts are assessed to be medium then there must be public consultation. Notices of proposals are put in newspapers circulating generally throughout the State. Members of the public can provide submissions on the contents of the Statement of Environmental Objectives within 30 business days of a notice inviting submissions. As with low impact proposals there is consultation with the same government bodies and additionally with relevant statutory authorities, relevant local councils, landowners and key stakeholders. Comments must be provided within 30 business days.

The Minister must take submissions into account when making a decision as to whether to approve an SEO.

If the impacts are assessed to be high then the application is assessed under the major project provisions in the *Development Act* 1993. However the decision to approve or disapprove is still made under the Petroleum Act.

Instead of a Statement of Environmental Objectives (SEO) the proponent must submit one of the following: Environmental Impact Statement (EIS), Public Environmental Report(PER) or a Development Report (DR).The decision on the level of the assessment is made by the Development Assessment Commission on referral by the Minister. Public submissions for an EIS, PER and DR must be lodged within 30, 30 and 15 business days respectively from the date of notice. (Note change to process in Planning, Development and Infrastructure Bill – single EIS process)

Referrals to various relevant Ministers usually occur during this consultation phase. Approval of the Environment Minister is needed where it covers any area within a National or Conservation Park. The Minister must concur where it covers any area within or adjacent to a Marine Park, the Adelaide Dolphin Sanctuary, the River Murray Protection Area or the Murray-Darling Basin. The DEWNR must be consulted where it covers any area within a Regional Reserve.

3.4.4 Decision Making

The Minister must consider comments and if necessary the EIR and draft SEO may be amended. If significant changes are make then that may warrant further consultation. The Minister can approve an SEO if they are satisfied the SEO properly reflects the relevant environmental impact assessment. Generally when making decisions the Minister must have regard to and seek to further the objects of the Natural Resources Management Act 2004.

Approval Decisions are published in the Government Gazette and the approved documents are made publicly available on the Environmental Register. An approved SEO must be reviewed at least every five years.

Federal government approval may also be required – see chapter 4.

Additionally, licenses may be required under the Environment Protection Act 1993.

3.5 Third Stage – Activity Notification and Approval

For projects deemed low level official surveillance activities, proponents must prepare and submit an Activity Notification at least 21 days prior to commencement. This includes the EIR and approved SEO. For projects deemed high level official surveillance activities proponents must submit an Activity Notification at least 35 days prior to commencement. Following this, Notices of Entry to owners of land must be submitted (see next section). Once all information has been provided and any land entry issues resolved an activity application may be approved

or declined. In the case of low level surveillance activities these may commence without approval provided all statutory time frames have been satisfied. For high level official surveillance activities they will not be approved until all information has been provided and any land entry issues resolved.

3.6 Landowner Rights – Access and Compensation

Proponents have to provide a notice of entry to a landowner. The definition of owner includes landowners, lease or license holders, responsible manager of land, person in exclusive possession, native titleholder and other prescribed persons.

A notice of entry must meet certain criteria. If the notice does not meet these criteria then the company can be penalized by way of suspension or cancellation of their license. However this may only lead to a penalty and a requirement that the process of notification be redone. It does not necessarily stop the project from going ahead.

The criteria are:-

- provided at least 21 days before entry;
- states full name and address of the owner/occupier;
- states name of the person working for the proponent who the owner/occupier can speak to about the notice;
- provides a reasonable description of the activity and identifies the place;
- provides relevant information on what to anticipate and about the consequences of the activities;
- states that the owner/occupier can object to the entry within 14 days of such a notice;
- provides reasonable information on the rights of land owners to claim compensation, on the types of compensation and also state that this compensation is not related with the value of the land including costs
- states that reasonable costs incurred in negotiating is claimable in Court; and
- states that a dispute in relation to access or compensation may be ultimately resolved in Court.

Landowners can object to entry onto their land by providing a “notice of objection” within 14 days of notice of entry. However this does not necessarily stop entry, but may lead to negotiations to resolve some grievances.

The Minister may or may not mediate between the parties to resolve the dispute. If, after 2 months of mediation the matter remains unresolved then either party can apply to the Warden’s Court for a resolution of the issue.

The Warden's Court may determine terms on which the license holder may enter land and carry out approved activities. It is important to note that landowners are not able to completely stop that entry.

Negotiating with the company is less expensive and less time consuming than going to court.

Owners/occupiers have a right to compensation to cover:-

- Deprivation or impairment of the use and enjoyment of land;
- Damage to the land;
- Damage to, or disturbance of, any business or other activity lawfully conducted on the land; and
- Consequential loss suffered or incurred on account of the regulated mining operations.

If the proponent has made a reasonable offer of compensation, which is rejected, then the Court will have to take that into consideration. If the Court finds that the offer was not reasonable then it would not be taken into account. Negotiation or dispute resolution costs may not be considered reasonable if they arise from a period when a reasonable offer of compensation was on the table.

If the proponent's activities substantially impair the owner's use and enjoyment of the land, the owner may apply to the ERD Court for the following orders:-

- transfer of the owner's land to the proponent;
- proponent to pay to the owner compensation of an amount equivalent to the market value of the land; and
- proponent to pay a further amount as compensation for disturbance if the Court considers it to be just.

If the amount is $250,000 or less then the Warden's Court decides on the issue of compensation or land acquisition. If the amount is more than $250,000 then the appropriate court is either the Environment, Resources and Development Court or the Land and Valuation Court, which is a part of the Supreme Court of South Australia.

3.7 Obligations of Petroleum Companies under the NRM Act

These are the same as they are for mining companies.

3.8 Offshore Petroleum Development

3.9 South Australian State Waters

See above

3.10 South Australian Coastal Waters

3.10.1 *Petroleum (Submerged Lands) Act 1982* (SA)

The Petroleum (Submerged Lands) Act 1982 regulates activities in the land beneath waters that are within 3 nautical miles of the coast. Specifically it provides for a process for the issue of petroleum mining exploration permits, retention leases, production licences and pipeline licences for people wishing to engage in mining activity along the coast in lands beneath waters governed by the South Australian government. It also governs occupational health and safety for mine sites.

The provisions are similar to those required for onshore mining in that exploration permits are required and the permit holder can then apply for a retention lease. Upon discovering petroleum in the area leased for exploration, a production licence can be applied for that allows for the recovery of petroleum in the location. The Act also governs the licences required for establishing pipelines.

Notice of grants of permits, leases and licences must be published in the Gazette. If the Minister responsible determines it is in the public interest to do so they have the power to suspend the rights granted by a permit or lease.

3.11 Outside State waters

The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) is the government agency for the environmental management of offshore oil and gas operations in Australian Commonwealth waters.

Offshore exploration companies, or anyone who proposes an offshore project (the Proponent), are required to submit an Offshore Project Proposal (OPP) to NOPSEMA.

An OPP must include:-

1. the name and contact details of the proponent;
2. a description of the activities involved in the project;
3. the locations of the activities;
4. a timeframe for the project;
5. a description of the required facilities;
6. a description of the existing environment, including any relevant values or sensitivities of the environment;
7. set out the project's environmental performance outcomes;
8. describe feasible alternatives to the project;
9. describe the legal requirements of the project and how those will be met; and
10. an evaluation of the environmental impacts and risks of the project.

If a proposal is approved by NOPSEMA, an environment plan must also be submitted. The environment plan is a detailed plan which must consider the environmental impacts of the OPP. When a proponent is required to submit an environment plan, they are also required to consult with certain people and agencies, including those who will be substantially affected by the offshore project. Generally, an environment plan may only be accepted by NOPSEMA after the relevant OPP has already been submitted and reviewed.

NOPSEMA is prevented from granting approvals to activities which have a significant impact on Commonwealth land, are undertaken in an area that is part of the Great Barrier Reef Marine Park, or have a significant impact on the world heritage values of the Great Barrier Reef and activities in the Antarctic, or an injection and storage of greenhouse gas.

3.11.1 What NOPSEMA does

NOPSEMA is required to ensure that any petroleum activity is:-

- Carried out in a manner that is consistent with the principles of ecologically sustainable development under the EPBC Act;
- Carried out in a manner by which environmental impacts and risks of activity will be reduced to as low as reasonably practicable; and
- Carried out in a manner by which environmental impacts and risks of the activity will be of an acceptable level.

In relation to OPPs, NOPSEMA may request a proponent to provide further written information about any matter required by regulation (listed above) to be included in the proposal.

If an OPP meets the requirements listed above and NOPSEMA decides that it is suitable, the OPP will be published and there will be an opportunity for the public to provide comment. If the OPP is deemed to not be suitable NOPSEMA must notify the proponent in writing of this decision.

In contrast, Environmental Plans are not published in full. Summaries of accepted plans are provided on NOPSEMA's website. NOPSEMA are required to accept plans that meet the following criteria:

- be appropriate for the nature and scale of the activity;
- Demonstrate that the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable;
- Demonstrate that the environmental impacts and risks of the activity will be of an acceptable level;
- Provide for appropriate environmental performance outcomes, environmental performance standards, and measurement criteria; and

- Include an appropriate implementation strategy and monitoring, recording and reporting arrangements.

NOPSEMA requires that the summarised Environment Plans, which are published on NOPSEMA's website and made available for the public, contain at least the following information:

- The location of the offshore activity;
- A description of the environment;
- A description of the activity;
- Details of environmental impacts and risks;
- A summary of the control measures for the activity;
- A summary of the arrangements for ongoing monitoring of the environmental performance of the project;
- A summary of the response arrangements in the oil pollution emergency plan;
- Details of consultation already undertaken, and plans for ongoing consultation; and
- Details of the titleholder's nominated liaison person for the activity.

3.11.2 Public comment and consultation

NOPSEMA is required to publish OPPs on its website and invite the public to comment on the proposals. Once the proposals are published online by NOPSEMA, the public have four weeks in which to make comments. During this period, the public can voice concerns and objections to the proposed offshore project.

After this period, the proponent must provide another copy of the proposal to NOPSEMA which summarizes all of the public comments received and assesses the merits of each objection or claim. This second copy of the proposal must contain a statement by the proponent responding to each objection or claim that was made in relation to the offshore project proposal.

When preparing an environment plan, proponents must consult with *relevant persons* about the proposed offshore project. This includes anyone "whose functions, interests or activities may be affected by the activities to be carried out under the environment plan". This would include people who live or work in an affected area as well as people and groups who have cultural or other special interests in the area. Each relevant person must be given sufficient information by the proponent to make an informed assessment of the possible consequences of the project, and consulted over a reasonable time frame.

Chapter 4: Commonwealth Approvals – EPBC Act

4.1 Overview

Mining and petroleum activities may also be considered controlled actions under the Environment Protection and Biodiversity Conservation Act if they could impact on one or more matters of national environmental significance. In such cases, the Commonwealth Environment Minister must assess and approve the action before it can proceed. This is in addition to approvals required under State law.

4.2 Referrals process

Generally if any activity will have, or is likely to have a significant impact on matters of national environmental significance including threatened ecological communities, migratory species, Australia's Ramsar Wetlands, Marine environments, World Heritage, Great Barrier Reef Marine Park then the proponent, or the State or the Minister of a State can refer the project to the Federal Environment Minister for approval. There is a further trigger where the proposal involves uranium project. An important final trigger are water resources impacted as a result of coal seam gas and large coal mining development.

Whether or not an action is likely to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted. It also depends upon the intensity, duration, magnitude and geographic extent of the impacts.

Within 20 business days after the Minister receives the referral they must make a decision on whether the action is a controlled action and publish a notice to this effect within 10 business days. The public has 10 business days from the date the Federal Minister publishes a notice to provide comment on whether the matter should be declared a controlled action. For projects declared to be controlled actions prior to the 25 October 2014 the proponent had to prepare either a PER or an EIS. Guidelines for these processes are set by the Federal Minister. These documents are open for public comment for not less than 20 business days.

For mining projects declared to be controlled actions after the 25 October 2014 proponents have to follow the mining lease assessment process in the Mining Act. For all projects, referrals are still made to the Commonwealth and the Commonwealth Minister decides whether to approve or not.

Chapter 5: Compliance and Enforcement

5.1 Overview

Compliance and enforcement with respect to the activities of proponents is a very important part of the regulatory system. The community has a right to expect that proponents will carry out their operations according to the law and if they do not that they and the relevant government authorities take appropriate action to rectify any problems.

5.2 Mining Act

Under the Mining Act a proponent must comply with a number of obligations. If they breach any of these enforcement actions can be taken.

Proponents must generally:-

- Follow programs for environmental protection and rehabilitation and not conduct mining unless the program is in operation;
- Audit their environmental protection and rehabilitation programs
- Twice a year, provide the DSD with a document relating to their mining operations, the minerals they recovered in their operations and the sale or disposal of those minerals;
- Keep records and samples for no less than 7 years; and
- Provide expert reports from an independent expert to the DSD

If there are any breaches there are a number of enforcement powers that may be exercised. Authorised officers are able to enter land and carry out inspections, to require persons to answer questions or to provide information (although a person will be able to refuse to answer a question or provide information if to do so might tend to incriminate the person of an offence), and to require persons to produce records for inspection. The Minister has a discretion to publish the results of any authorised investigation.

If the Minister or an authorised officer is of the view that mining operations are being conducted in a way that results in, or that is reasonably likely to result in undue damage to the environment or a breach of the environmental outcomes under a PEPR they can require a proponent to:-

- Discontinue, or not commence, a specified activity indefinitely or for a specified period or until further notice from the Minister or an authorised officer;
- Take specified action in a specified way, and within a specified period or at specified times or in specified circumstance;
- Take action to prevent or minimise any damage to the environment, or to control any specified activity;
- Undertake specified tests or monitoring;

- Take specified action to rehabilitate or restore any land; and
- Furnish the Minister with specified results or reports.

If a direction is given the Minister may review the adequacy of any relevant program and, if it appears on the review that a revised program is appropriate, the Minister may take the necessary steps to have a revised program prepared and brought into force.

Directions can be internally reviewed or a proponent may apply to the ERD Court for a review of the direction within 28 days after receiving the direction or such longer period as the Minister may allow in a particular case. Unless the Minister or the Court decides to the contrary, an application for review of an environmental direction or a rehabilitation direction does not suspend operation of the direction.

On review of an environmental direction or a rehabilitation direction, the ERD Court may confirm the direction (with or without modification) or revoke the direction. If the requirements of an environmental direction or a rehabilitation direction are not complied with, the Minister may take the action required by the direction which could include suspension of mining.

The maximum penalty for illegal mining is $250,000. This is also the maximum penalty for failure to comply with a condition of a lease or to follow a direction or order of the Minister. The maximum penalty for submitting a return which is false or misleading is $120,000.

The compliance structure comprises four strategy levels, namely: prevention, persuasion, compliance and punitive measures. Most action takes place within the prevention and persuasion strategies.

The enforcement controls that the DSD has include:-

- Reviewing the programs for environmental protection and rehabilitation at any time for any reasonable cause;
- Requesting an expert report on reasonable cause;
- Suspending or cancelling a licence or lease;
- Issuing pecuniary penalties;
- Directing rehabilitation of land;
- Making a compliance direction;
- Administrative penalties; and
- A written notice of direction.

In addition to the powers given to the DSD, the Mining Act has established a Warden's Court. The powers of the Warden's Court are quite broad and include issuing injunctions, and other judgments or orders. A warden of the Warden's Court can exercise their powers at any time

and place that they determine. Any matter of unusual difficulty or importance in the Warden's Court may be removed and heard in the ERD Court.

5.2.1 Can I take action if I think there has been a breach of the Act?

Unfortunately, under the Mining Act there are no options for enforcement available to people in the community. If you believe a proponent is not complying with the law it is advisable to contact the DSD.

5.3 Petroleum Act

There are various conditions that proponents must comply with to avoid DSD taking action under. These obligations include:-

- Complying with licence conditions;
- Keeping records of their activities, results, and audits and providing a copy of those records to the DSD;
- Reporting serious and reportable incidents to the DSD;
- Providing the DSD with incident reports, annual reports and other relevant reports as per the *Petroleum and Geothermal Energy Regulations 2013* (SA);
- Providing fitness-for-purpose assessments;
- Carrying out regulated activities with due care and in accordance with good industry practice;
- Providing an Environmental Impact Report; and
- Consulting with relevant parties determined by the DSD to classify regulated activities based on the EIR every 5 years.

Non-compliance with any of the above obligations could result in enforcement action. The DSD has an enforcement policy in place to ensure licensees comply with their obligations. These tools are primarily focused on preventing non-compliance and it sees punitive enforcement tools for non-compliance as a last resort.

The preventative tools include:-

- Education and guidelines;
- Security lodgement; and
- Public recognition of outstanding performance.

Before turning to punitive tools, the DSD will use various warnings to persuade the licensee to comply with their obligations, followed by a DSD directed activity direction or prohibition.

If the proponent fails to follow the directions of the DSD, the DSD then has the power to enforce proponents to comply with their obligations under the Petroleum Act. There are wide-ranging powers available to the DSD:

- A direction to the licensee from the DSD to carry out their obligations or cease activities;
- The licensee surrendering their licence or part of their licence;
- The licensee having their licence suspended for a specified period;
- Suspending or cancelling a licence; and
- Cancelling, suspending or imposing a penalty on a licensee for not complying with the environmental objectives which will include prohibitions or restrictions on licensees from engaging in regulated activities if they have poor environmental performance.

5.3.1 Can I take action if I think there has been a breach of the Act?

Unfortunately under the Petroleum Act there are no enforcement avenues available to members of the public. If you believe a proponent is not complying with the law it is advisable to contact the DSD.

5.4 Environment Protection Act

5.4.1 Environmental Harm

The Environment Protection Act applies in part to resource operations.

The Environment Protection Act's general duty provides that a person must not undertake an activity that pollutes, or might pollute, the environment unless the person takes all reasonable and practicable measures to prevent or minimise any resulting environmental harm.

In determining what measures are required to be taken, regard is to be had, amongst other things, to:-

- the nature of the pollution or potential pollution and the sensitivity of the receiving environment;
- the financial implications of the various measures that might be taken as those implications relate to the class of persons undertaking activities of the same or a similar kind; and
- the current state of technical knowledge and likelihood of successful application of the various measures that might be taken.

If activities associated with mining cause environmental harm there are a range of enforcement options available to the Environment Protection Authority in respect of those matters.

Various defences are available under the general duty in the event that one of the enforcement options is implemented by the EPA. Those options cannot involve criminal prosecution but could include the issuing of an administrative order such as an Environment Protection Order, a clean up order or clean up authorisation. It could also result in civil enforcement proceedings in the ERD Court. There would be many cases where the potential breach of the general environmental duty involved circumstances associated with waste from mining activities. However the provisions of the Act and in particular the enforcement powers available to the EPA can only be exercised where the pollution incident and consequential environmental harm has occurred outside the area of the lease or licence. This is also the case where a person undertaking mining activities has caused serious environmental harm, material environmental harm or an environmental nuisance.

The EPA issues guidelines on what are considered reasonable and practicable measures to avoid environmental harm; those relevant to resource extraction include, but are not limited to, the following:-

- Noise;
- Air pollution impact assessment using design ground-level pollutant concentrations;
- Bunding and spill management;
- Landfill environment management plants;
- Odour assessment using odour source modelling; and
- Wastewater and evaporation lagoon construction.

There are also a number of environment protection policies relevant to resource extraction operations. These include, but are not limited to the following:-

- *Environment Protection (Air Quality) Policy 1994* (SA) (mandatory);
- *Environment Protection (Water Quality) Policy 2003* (SA) (mandatory); and
- *Environment Protection (Noise) Policy 2007* (SA) (mandatory).

5.4.2 Site Contamination

If site contamination has been caused by mining activity, there are various obligations and requirements under the Act in relation to the identification and remediation of that contamination.

The potential for site contamination to occur as a consequence of mining activities exists. 'Site contamination' is defined to exist at a site if:-

1. Chemical substances are present on or below the surface of the site in concentrations above the background concentrations (if any); and

2. The chemical substances have, at least in part, come to be present there as a result of an activity at the site or elsewhere; and
3. The presence of the chemical substances in those concentrations has resulted in:
    a. Actual or potential harm to the health or safety of human beings that is not trivial, taking into account current or proposed land uses; or
    b. Actual or potential harm to water that is not trivial; or
    c. Other actual or potential environmental harm that is not trivial, taking into account current or proposed land uses.

Further, environmental harm is caused by the presence of chemical substances whether the harm is a direct or indirect result of the presence of chemical substances and whether the harm results from the presence of the chemical substances alone or the combined effects of the presence of the chemical substances and other factors.

If the EPA is satisfied that site contamination exists at a site or suspects that it exists at a site because a potentially contaminating activity has taken place there it may issue a site contamination assessment order (SCAO) to an appropriate person. An SCAO must require the appropriate person to take the necessary measures and tests to assess the nature and extent of any site contamination on or below the surface of the site and if required on or below the surface of land in the vicinity of the site. It may also require the person to undertake a site contamination audit.

Similarly where the EPA is satisfied that site contamination exists at a site and it considers remediation of a site is required, the EPA can issue a site remediation order (SRO) in respect of the site to an appropriate person. These orders require the appropriate person to remediate the site within a specified period to prepare and comply with a plan of remediation and the undertaking of a site contamination audit among other things. In the case of both SCAO's and SRO's the person served with the order has a right of appeal to the ERD Court. That appeal must be lodged within 14 days of service of the order upon the person.

An appropriate person is defined as:-

- the person responsible for the site contamination or
- if it is not practicable to issue an order to that person, the owner of the site provided that:
- before acquiring the site the person knew or ought reasonably to have been aware that chemical substances were present or likely to be present on or below the surface of the site, such as to require or be likely to require remediation; or
- before the person acquired the site the person knew or ought reasonably to have been aware that the activity that caused the site contamination of the site had been carried on at the site, or while the person was the owner, the person knew, or ought reasonably to have been aware that the activity that caused the site contamination of the site was being carried on at the site; and

- the activity is of a kind prescribed by the regulations as a potentially contaminating activity.

The site contamination provisions do not deal with the results from the production or disposal of waste as a consequence of an activity authorised under the Mining Act on land within the authorised lease or licence area. However once the mining activity has ceased and a lease or licence no longer exists over the land the EPA could exercise its range of powers with respect to site contamination.

5.4.3 Can I take action if I think there has been a breach of the Act?

It is also possible for community members to seek court orders against those allegedly breaching the Environment Protection Act. In order to be able to apply to the ERD Court the community member must be someone whose interests have been directly affected or they have the permission of the court to proceed. To obtain permission a community member must convince the court that their action has been brought in the public interest. Actions must be commenced within 3 years of the alleged breach. Legal advice should be sought in relation to commencing such an action.

5.5 Natural Resources Management Act

Under the NRM Act there are a various obligations that proponents must comply with. These obligations are in place to promote sustainable management of South Australia's natural resources. If there is unreasonable degradation of land or a risk of unreasonable degradation of land then there may be a breach of the NRM Act. Degradation includes a change to land that has affected any natural resources in the environment.

If there has been a breach of the NRM Act, the authorities will usually attempt to first informally resolve a matter with the owner of the land. If the non-complying party fails to voluntarily take action to address a breach or potential breach the next step is the imposition of a requirement to prepare an action plan under the NRM Act. An action plan must state how they will comply with their duties in the future. Failure to follow an action plan could lead to a court making a protection order. The purpose of these orders is to secure compliance with the requirements in place under the NRM Act to protect our natural resources. Additionally, if the authority is satisfied that there has been harm caused to natural resources the court may issue a reparation order or a reparation authorisation. The purpose of a reparation order or authorisation is to make good any damage that has been done to the natural resource.

5.5.1 Can I take action if I think there has been a breach of the Act?

It is also possible for community members to seek court orders against those allegedly breaching the NRM Act. In order to be able to apply to the ERD Court the community member must be someone whose interests have been directly affected or they have the permission of

the court to proceed. To obtain permission a community member must convince the court that their action has been brought in the public interest. Actions must be commenced within 3 years of the alleged breach. Legal advice should be sought in relation to commencing such an action.

5.6 Environment Protection and Biodiversity Conservation Act (EPBC Act)

Under the EPBC Act the Federal Government are responsible for monitoring compliance with the law and the Department of Environment (DoE) is responsible department. The breaches of the EPBC Act are broad and overlap with our State law. The main ways that mining and gas companies will be in breach of the EPBC Act include:-

- Breaching a condition of their Federal Approval; and
- Carrying out activities without obtaining approval from the Federal Government.

5.6.1 What the Department of Environment can do

There are a variety of actions that DoE can take if there is a breach. These include:-

- Taking action in the Federal Court by initiating civil or criminal proceedings;
- Asking the company to provide a written agreement stating an enforceable undertaking for any breaches of the civil penalty provisions in the EPBC Act; and
- Taking remedial action for any environmental damage.

5.6.2 Can I take action if I think there has been a breach of the Act?

If you believe there has been a breach of the EPBC Act you may consider making a complaint to DoE directly. If DoE do not act on your complaint then persons meeting the definition of an 'interested person' may take enforcement action in the Federal Court. To be considered an 'interested person' under the EPBC Act you must be:-

- A person or group who is affected by the conduct of the company; or
- A person or group who have been engaged in the protection or conservation of the environment at any time within the two years prior to the company's conduct.

An 'interested person' may be able to apply to the Federal Court for an injunction. An injunction is an order of the Court to prevent the company from continuing with any activity that is in breach of the EPBC Act. Legal advice should be sought as this is a complex area of the law.

Chapter 6: Challenging Decisions by Judicial Review

6.1 Overview

Judicial Review is a mechanism for the Courts to consider if decisions about mining or gas operations have been made correctly. This process only considers whether or not the decision was made correctly and within the relevant laws. The law does not allow the community to challenge the merits of decisions (i.e. whether they are good or bad decisions).

6.2 Judicial Review

6.2.1 Who can seek Judicial Review

It is traditionally very difficult for members of the community to bring a judicial review challenge. One major issue is that most members of the public are not considered to have the legal right to challenge the decision (this right is known as 'standing'). Generally, the only parties identified by legislation as having an interest in a particular matter are; proponents, affected landholders and the government itself.

Firstly, a party seeking judicial review must demonstrate that they have a 'special interest' in the matter. 'Special interest' has been interpreted by the Courts relatively narrowly. It requires that the applicant (the person or group seeking the review) would need to have been personally harmed by the decision being challenged. It is not sufficient to have a 'mere intellectual or emotional concern' or just a strong belief that the law should be observed. The Courts require a more direct connection to the decision.

However, Courts have been willing to accept that a person or group can have a special interest in a matter where the action under review affects the public at large and that person or group is directly involved in the preservation or protection of a particular area. Generally, the issue of standing is resolved on a case-by-case basis, where the particular interests of the parties and circumstances of the case will determine who does and does not have standing.

For decisions made under the EPBC Act, standing has been expanded to any person or group engaged in environmental activities for a period of at least two years.

6.2.2 What sort of decisions can be reviewed?

An application for review of decisions can be commenced in the Federal Court or the Federal Circuit Court. In order to apply for review, a party must be a 'person aggrieved' by:

- A decision;
- A report or recommendation that was made under an enactment before a final decision;

- conduct for the purposes of making a decision; or
- A failure to make a decision.

The distinction between a decision and reports, recommendations and conduct is important, as a decision is considered by the Act to be an ultimate or final determination and not merely a preliminary expression of opinion or statement. A decision must:-

- be administrative in character;
- be made, proposed to be made, or required to be made under an Act of Parliament (e.g. a Statute);
- not be made by the Governor-General; and
- not fall within an exemption that is listed in Schedule 1 of the ADJR Act.

Broadly, parties can seek review on the following grounds:-

- That there has been a breach of the rules of natural justice in the making of the decision. 'Natural justice' generally refers to two key components:
    - the 'fair hearing rule', which is being given the reasonable opportunity to be heard by the decision maker or Court;
    - the 'bias rule', where a decision maker must be free from actual bias or the appearance of bias.
- That the decision was made without observing the correct procedures;
- That the decision was made by someone who did not have the jurisdiction to make that decision:
    - A decision that is specifically authorised by an Act of Parliament will usually be confined to a strictly defined area by the same Act. A jurisdictional error is an error where the decision-maker has gone beyond the jurisdiction given to them by the relevant Act.
- That the decision was not authorized by the Act under which it was made;
- That the decision involved an error of law;
- That the decision involved fraud;
- That there is no evidence or other material which justifies the making of the decision; or
- That the decision was otherwise unlawful.

6.2.3 How to seek Judicial Review

As soon as you are aware of the decision you should request a Statement of Reasons from the decision maker. A statement of reasons is a key document which sets out the reasons why the decision maker made the decision they did.

To apply for a statement of reasons you must send a written request to the decision maker. This should include:

- Your name and address;
- Your organisation's name and role in the community;
- Why you have been adversely affected by the decision; and
- That you are requesting a statement of reasons for the decision.

If you are an aggrieved person, then the decision maker must respond to you. Generally, you should receive a statement of reasons within 28 days of your request being received.

If your request for a statement of reasons is declined, you can make an application to the Court for the decision maker to provide you with one.

After receiving a statement of reasons, you can check whether or not the decision maker has used the correct decision making process. This is a complex task and will usually require careful reading of the relevant Act of Parliament and identifying the proper criteria for the decision to be made under. If you think that the decision involved one or more of the errors described above, such as failing to consider relevant information, or that the decision maker appears to be biased, then you could consider applying for judicial review.

You will have 28 days from the day the statement of reasons is posted to you to make an application for judicial review. At this point it is recommended that legal advice be sought.

6.2.4 Outcomes of Judicial Review

If an application for judicial review is made for one or more of the above reasons, and the Court that the decision was in fact made incorrectly, then the Court is able to make orders to remedy the error.

It is important to note that the Court will not make a new decision to replace the earlier one, even when that early decision is found to be incorrect. However, the Court can make any of the following order that it considers will resolve the issue adequately, such as:-

- An order that the decision in question be set aside. This is generally available where the court accepts that the decision was made unlawfully;
- An order that the decision maker perform a duty that has failed to perform. For example, a decision making body that has failed to take certain facts into consideration may be ordered to do so;
- An order that the decision maker cease proceedings. This is usually sought where a decision maker has failed to exercise its jurisdiction properly or failed to provide natural justice;

- A binding declaration from the Court regarding the rights or other legal relations of the parties; and
- An order that the decision maker perform or stop doing a certain act.

The scope of judicial review is generally quite limited. Courts will only look to see if the statutory authority (the law creating the decision making body) has made a decision within the lawful limits of its authority. For example, if a decision maker such as NOPSEMA had not held the required period of public consultation before approving an environment plan, then a third party could potentially seek judicial review of that decision.

It is also important to note that if you are unsuccessful in making an application, costs will usually be awarded against you, unless you can convince the court that the application for judicial review was in the public interest.

Where to get more information

Environmental Defenders Office (SA)
Office:
Level 1, 182 Victoria Square
Adelaide SA 5000

*Phone: (*08) 8359 2222 or 1800 337 566 (for country callers)

Website: http://www.edosa.org.au

Department of State Development
Website: http://www.statedevelopment.sa.gov.au

Department of Environment, Water and Natural Resources
Website: http://www.environment.sa.gov.au

Environment Protection Authority
Website: http://www.epa.sa.gov.au

Commonwealth Department of the Environment
Website: http://www.environment.gov.au