Environmental Defenders Office

6 November 2020

Mining Amendment Regulation Consultation Team
NSW Resources Regulator

By email: rr.feedback@planning.nsw.gov.au

Dear Mining Amendment Regulation Consultation Team,

Mining Amendment (Standard Conditions of Mining Leases – Rehabilitation) Regulation 2020

Thank you for the opportunity to comment on the *Mining Amendment (Standard Conditions of Mining Leases – Rehabilitation) Regulation 2020* (**draft Regulation**) and associated consultation material.[1] EDO strongly supports the proposal for a regulatory requirement for mine rehabilitation. We provide a number of general comments in relation to the regulation of mine rehabilitation and then provide specific comment on the draft Regulation and associated consultation material.

Minimum Rehabilitation Requirements

Requirements for mine rehabilitation should be fundamentally strengthened by improving the rehabilitation outcomes required by the *Mining Act 1992* (NSW) (**Mining Act**). Currently, the most relevant object of the Mining Act is "*to ensure effective rehabilitation of disturbed land and water*", with rehabilitation defined as "*the treatment or management of disturbed land or water for the purpose of establishing a safe and stable environment*". EDO strongly supports rehabilitation being considered an important object of the Mining Act but submits that the type of rehabilitation expected by the community and required to ensure ongoing environmental protection exceeds the concept of 'safe and stable'. We acknowledge that decision making under the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) provides for the creation of specific conditions of consent regarding rehabilitation, but these conditions remain discretionary. The Mining Act should provide a clear minimum standard with a requirement for mine rehabilitation to provide, as a minimum "*a safe, stable, non-polluting and geomorphologically, hydrologically and ecologically functional environment*".

In the absence of any changes to the Mining Act, the draft Regulation should provide a clear minimum standard for rehabilitation. It is proposed that the rehabilitation management plan will replace the current requirement for a Mine Operations Plan (**MOP**). Currently the MOP guidelines expand the recommended minimum rehabilitation outcome to safe, stable, non-polluting and sustainable. There appears to be no equivalent minimum standard in the draft Regulation. It should be made clear to any company seeking approval to exploit the resources of NSW for private profit, that a consequence of any such approval is that they will be held to a high standard of rehabilitation.

[1] Consultation materials are available at: https://www.resourcesregulator.nsw.gov.au/about-us/have-your-say/operational-rehabilitation-reforms

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The draft Regulation also provides an opportunity to substantially improve the current situation in relation to security bonds. As EDO has previously recommended, NSW should implement a system of rehabilitation bonds covering the full cost of rehabilitation, where the definition of rehabilitation is expanded to include the restoration of a geomorphologically, hydrologically and ecologically functional environment, with sufficient contingency to cover uncertainty. Such an approach would require a significant change from the calculations currently used to determine security bonds, as described in the Rehabilitation Cost Estimation Tool. This would include consideration of ongoing monitoring requirements, and contingency for future works (or residual risk payments) required to ensure ecological and biophysical processes are restored.[2]

Such an approach would be supported by the proposed annual rehabilitation report and forward program. To ensure that the costs of rehabilitation are incurred as environmental harm is caused (and the profits from the extracted minerals are received), mine rehabilitation bonds should be adjusted annually. In practice, this means that a bond would grow in the initial years of a project, as the profits from the mining operation grow, and then reduce as progressive rehabilitation is undertaken.

Draft Regulation

Clause 31A (3) sets out the relevant date for existing mining leases for both large and small mines, being the date that the standard conditions set out in Schedule 8A of the Regulation will apply. The relevant date for large mines is 12 months from the date the amending Regulation commences and 24 months for small mines. In our view, these dates could be shortened to 6 months for large mines and 12 months for small mines, on the basis that the standard conditions do not impose a far greater burden on the lease holder than existing conditions of consent. That is, the lease holder is already required to comply with a number of the conditions included in the standard conditions.

Clause 31C (1) sets out the mandatory considerations for the Secretary in determining whether to approve rehabilitation objectives, rehabilitation completion criteria or a final landform and rehabilitation plan. Clause 31C(1)(b) provides that the Secretary can take into account *"any other matters the Secretary considers relevant".* This clause bestows a very broad discretion on the Secretary. Whilst cl 31C(2) requires the Secretary to notify the lease holder if s/he determines not to approve these documents and/or plans, there is no corresponding requirement for the Secretary to notify the public of a decision to approve these documents and/or plans. As such, the public will not be privy to how the Secretary has applied cl 31C (1) when making these determinations.

Schedule 8A, Part 2, cl 2(1) – the use of the terms *'reasonable measures'* and *'reasonably practicable'* in this clause pose a number of problems in the context of compliance and enforcement of this condition. There is no definition of either term in the draft Regulation or in the Mining Act and the use of the term *'reasonably practicable'* effectively removes strict liability to prevent unauthorised harm to the environment caused by activities under the mining lease. The current wording should be changed to:

[2] For more information on EDO's position on mine rehabilitation bonds, see our comments on the Improving Mine Rehabilitation in NSW Discussion Paper, available at: https://www.edo.org.au/publication/improving-mine-rehabilitation-in-nsw-discussion-paper/

> *"The lease holder must prevent all unauthorised harm to the environment caused by activities under the mining lease. In the event of a breach of this requirement, the lease holder must take all reasonable measures to minimise environmental harm."*

Schedule 8A, Part 3, cl 3 – again the use of the term *"as soon as reasonably practicable"* makes compliance with this condition difficult to enforce. With large and complex mining operations, it may also be difficult to determine the appropriate timeframe that applies to the phrase *"after the disturbance occurs"*.

Schedule 8A, Part 46, cl. 6(6)(b) – to ensure documents are provided in a timely manner, the clause should be amended to require the lease holder to provide a copy of the rehabilitation management plan within 7 days of receiving a written request for a copy.

Schedule 8A, Part 4, cl 7 – a new section after subclause (1) should be added as follows:

> *"Rehabilitation objectives prepared in accordance with subclause (1) must, as a minimum, require rehabilitation to achieve a safe, stable, non-polluting and geomorphologically, hydrologically and ecologically functional environment."*
> [Noting that subsequent changes to internal referencing would be required]

Schedule 8A, Part 5, cl 8(5)(b) – to ensure documents are provided in a timely manner, the clause should be amended to require the lease holder to provide a copy of the forward program and annual rehabilitation report within 7 days of receiving a written request for a copy.

Schedule 8A, Part 9, cl 12(4) – this clause omits State Significant Development from the requirement for the leaseholder to notify the Secretary of lodgement of an application for development consent that relates to the mining area or an application to modify a condition of consent that relates to rehabilitation of the mining area that may affect an existing statutory obligation. In our view, the requirement to notify should also apply to State Significant Development given the impact these developments have on the environment.

Guidance Material

It is disappointing that the Department has chosen to consult on the draft Regulation without all the required supporting material being available. For example, there are significant gaps in terms of information on the mine rehabilitation portal, and examples of what would constitute acceptable rehabilitation completion criteria. Without this latter information in particular, it is not possible to fully understand the likely outcomes that will be delivered through the regulatory changes. This is particularly concerning because the guidance material suggests that the rehabilitation completion criteria may not require rehabilitation to deliver a safe, stable, non-polluting and geomorphologically, hydrologically and ecologically functional environment, or even the environmental outcomes that were committed to during the environmental impact assessment process.

The available guidance material refers to the use of analogue sites to develop criteria, but it is unclear what would constitute an acceptable analogue site (i.e. an intact stand of the targeted vegetation communities versus a previous, possibly unsuccessful rehabilitation attempt). Information provided in relation to the ecosystem and land use establishment phase being *"for at least two years (and potentially more)"* suggests that the guidelines are significantly under-estimating the time taken for successful rehabilitation, which can be tens to hundreds of years (or

thousands of years in the case of groundwater). While we recognise that the Department has indicated that *'trending towards'* an outcome is not an appropriate rehabilitation completion criteria, clarifying what will constitute an acceptable criteria is vital, particularly given the broad discretion given to the Secretary when determining whether to approve the rehabilitation completion criteria. Under the current proposals, rehabilitation completion criteria are the only opportunity to ensure that mine rehabilitation will deliver a self-sustaining ecosystem.

The consultation materials state:

> "*Following the commencement of the amended Regulation, the Department will review the conditions on every mining lease and re-issue mining lease instruments for approximately 1000 mining leases. The reforms will introduce a streamlined set of standard conditions for all mining leases. The imposition of standard, streamlined mining lease conditions in the Regulation ensures a transparent and consistent approach for the whole of the NSW mining industry.*"

While EDO recognises the value in a transparent and consistent approach to mine rehabilitation, it is important to ensure that the move to consistency does not result in the mine rehabilitation standards adopting the lowest common denominator. There must be a clear commitment that existing requirements for mine rehabilitation will not be reduced, and that the standard conditions will require a higher standard of rehabilitation.

EDO is also concerned that in the public consultation Q&A in response to the question *"Can studies into improvements for rehabilitation outcomes be classed as progressive rehabilitation?",* the Department indicated *"Yes. Rehabilitation planning is effectively another phase of mining, which is undertaken both progressively over the life of the mine, as well as the end of mining (i.e. total life cycle of a mine)."* While appropriate planning is important, studies into rehabilitation outcomes could be used inappropriately to delay undertaking actual rehabilitation. There needs to be clear limits provided on which studies can be used to delay active rehabilitation and the length of time for which this will apply.

In response to a question regarding the difference between the final landform plan and the final landform identified in the development consent, the Regulator states that the "…*FLRRP needs to be consistent with any final landform plan approved as part of the development consent*." This requirement is not a statutory requirement and is therefore not enforceable. The Secretary is required to consider whether the FLRRP is consistent with the final land use for the mining area[3], but this does not impose a statutory requirement on the lease holder. Nor does it ensure that any final landform meets the requirements of the standards conditions, as a minimum requirement. The standard conditions could be amended as follows to reflect the intent expressed in the consultation Q&A:

> Schedule 8A, cl 7(6) - *"The leaseholder must ensure the final landform rehabilitation plan is consistent with the final landform identified in the development consent or results in a better environmental outcome, if the standard conditions are applied".*

The public consultation Q&A document also states that lease holders must comply with their rehabilitation obligations even when the mine is in 'care and maintenance' mode. Again, this is

[3] Clause 31C(1)(a) of the draft Regulation.

not a statutory requirement and is therefore unenforceable. The standard conditions could be amended to reflect this intention as follows:

> Schedule 8A, cl 4(3) - *"The leaseholder must comply with the standard conditions at all times, including when the mine is in care and maintenance mode."*

The consultation materials state that an annual rehabilitation report and forward program (**ARRFP**) will replace the annual environmental management report. Based on the information provided, it would appear that the ARRFP will contain most of the same material as the current environmental management report. However, it is unclear whether information on community complaints will be included in the ARRFP. The Department should clarify where and when this information will be made publicly available.

If you would like to discuss this submission further, please contact rachel.walmsley@edo.org.au or ph: 02 9262 6989.

Yours sincerely,
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