Environmental Defenders Office

Mining and Coal Seam Gas in NSW

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Overview

This factsheet explains how land-based mining and coal seam gas (**CSG**) projects are assessed and approved in NSW, including the process for negotiating land access arrangements.

Legislative framework

In NSW, mining is regulated under the:

- *Mining Act 1992* (NSW)
- *Mining Regulation 2016* (NSW)

Coal seam gas (**CSG**) is a type of petroleum. The onshore exploration and production of CSG is regulated under the following laws:

- *Petroleum (Onshore) Act 1991* (NSW)
- *Petroleum (Onshore) Regulation 2016* (NSW)

Both mining and CSG are also regulated by the:

- *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
- *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth)
- *Environmental Planning and Assessment Act 1979* (NSW)
- *Environmental Planning and Assessment Regulation 2000* (NSW)
- *State Environmental Planning Policy (State and Regional Development) 2011* (NSW)
- *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW)
- Strategic Regional Land Use Policies

- Code of Practice for CSG Well Integrity
- Code of Practice for Coal Seam Gas Fracture Stimulation

Who owns minerals and petroleum?

As a general rule, the Crown owns minerals and petroleum, even on privately owned land.[1] Because almost all minerals and petroleum are owned by the Crown and not the landowner, the NSW Government has the power to authorise others to look for and remove them from land.

Responsible Ministers and Departments

The NSW Minister for Regional NSW, Industry and Trade is responsible for regulating mining and CSG activities in NSW through the Department of Regional NSW – Mining, Exploration and Geoscience (**MEG**).

The NSW Minister for Planning, the NSW Department of Planning, Industry and Environment (**DPIE**) and the Independent Planning Commission may be responsible for assessing and approving certain mining developments, depending on the type of activity being proposed.

The NSW Environment Protection Authority (**EPA**) is the lead regulator for CSG activities in NSW once they have commenced. The EPA is responsible for the enforcement of the various approvals required for CSG, including development consent and conditions, pollution, and water use.[2]

Visit: The Regional NSW website, particularly the Mining, Exploration and Geoscience section for more information on how CSG and mining is regulated

Visit: The NSW Department of Planning, Industry and Environment website

Visit: The NSW Independent Planning Commission website

Visit: The NSW EPA's page on Licensing for more on how they regulate CSG activities

Types of approvals

Mining and CSG companies require permission (in the form of a title) to look for and remove minerals and petroleum. The Minister for Resources is usually responsible for granting these titles, which include:

- Exploration licences;
- Assessment leases, and;
- Mining leases and petroleum production leases.

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[1] *Coal Acquisition Act 1981* (NSW), s 5; *Mining Act 1992* (NSW), s 282 (**Mining Act**); *Petroleum (Onshore) Act 1991* (NSW), s 6 (**Petroleum Act**).
[2] See: http://www.epa.nsw.gov.au/licensing/csgfaqs.htm.

In addition, some form of development consent is often needed under the NSW planning system.

A range of other approvals are often necessary before a mining or CSG project can commence. For example, a pollution licence may be required from the EPA.

In some circumstances, the consent of the Federal Environment Minister will also be required under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

Exploration licences

Exploration involves looking for minerals or petroleum and testing whether the land contains a commercial amount of the resource. An exploration licence gives the holder the exclusive right to explore for specified minerals or petroleum within the area specified in the licence.[3] Exploration licences can be issued for up to 6 years and are renewable.[4]

Process for issuing an exploration licence

Before a company can apply for an exploration licence, the NSW Government must first release the land for exploration and call for bids from companies interested in applying for an exploration licence. Which land is released for exploration is governed by the Strategic Release Framework for Coal and Petroleum Exploration. The Framework is implemented by an inter-agency Advisory Body for Strategic Release.

Visit: The Regional NSW page on Strategic Release Framework for Coal and Petroleum Exploration

The process for determining which areas will be released for exploration involves:

- A resource assessment to determine the potential for coal or CSG in the area which is carried out by the Department of Regional NSW – MEG.
- If the outcome of the resource assessment indicates exploration is warranted, the DPIE will conduct a Preliminary Regional Issues Assessment which is an up-front assessment of the likely social, economic and environmental impacts of releasing the area for exploration. Community consultation occurs at this stage.

If an area is deemed appropriate for release, the Government will publish an invitation for bids from interested companies. A reserve price is set (based on recovery of the state's costs in assessing and releasing the area).

[3] Mining Act, s 29; Petroleum Act, s 31.
[4] Mining Act, s 27; Petroleum Act, s 31.

Only applicants that meet pre-qualification minimum standards will be permitted to participate in the auction process.

If the reserve price is met, the Advisory Body will recommend a successful applicant to the Minister. The Minister then seeks Cabinet endorsement of the successful applicant. The successful applicant is then granted an exploration licence.

The Minister must not make a decision before taking into account the need to conserve and protect the environment.[5]

Exploration licences for coal or CSG can be granted for a period of up to 6 years. CSG exploration licences can be granted over an area of up to 140 blocks.[6] There is no limitation on the size of the exploration area for coal.[7]

Landholder notification

Affected landholders do not have to be personally notified that an exploration licence has been applied for over their land. However, if the licence relates to coal, the applicant must publish a notice of their application in both State-wide and local newspapers within 45 days of receiving confirmation from the Secretary that the application has been lodged.[8] These notices must contain a plan of the proposed exploration area.[9]

There is no requirement for applications for CSG exploration licences to be publicly notified.

Conditions

If the licence is granted, it can be subject to conditions.[10] Conditions can address a range of issues and are often designed to minimise or avoid environmental impacts. For example, they may require the applicant to take steps to protect the environment from harm or mitigate such harm, or to rehabilitate the land or water that has been affected by exploration activities.[11] Importantly, conditions are not limited to land that is covered by the exploration licence, but can also apply to other land which may be impacted by the exploration activities.[12]
Conditions are legally binding. If the conditions are being breached, the Minister, the Secretary or an inspector can direct the licence holder to take steps to comply with the

[5] Mining Act, Sch 1B Part 2; Petroleum Act, Sch 1B Part 2.
[6] Petroleum Act, s 30. A block is a 'graticular' section of the Earth's surface. Graticular sections are made up of 5 minutes of latitude and 5 minutes of longitude
[7] Mining Act, s 25; *Mining Regulation 2016* (NSW), cl 16, Sch 2.
[8] Mining Act, s 13A*; Mining Regulations 2010* (NSW), cl15(1), 21(1).
[9] Mining Act, s 13A.
[10] Mining Act, s 22, Sch 1B; Petroleum Act, Sch 1B.
[11] Mining Act, Sch 1B; Petroleum Act, Sch 1B.
[12] Mining Act, Sch 1B; Petroleum Act, Sch 1B.

condition within a set period of time.[13] It is an offence to not comply with such a direction.[14]

If the licence holder does not comply with a direction to rehabilitate the land, the work can be undertaken by the Minister at the licence holder's expense.[15]

N.B. Requirement for a security deposit

One important condition that can be attached to a title is for the applicant to give and maintain a financial security to ensure the applicant fulfils their legal obligations, including those imposed by the conditions.[16] This condition is not often applied in practice, but is one way the Government could help ensure that mining and CSG companies rehabilitate the site properly after the activities are finished.

Environmental assessment of exploration activities

If the exploration licence is granted, the licence holder may still need an activity approval before undertaking the actual exploration work. In granting such an approval, the Minister has a duty to examine and take into account to the fullest extent possible all matters that are likely to affect the environment if the activity goes ahead.[17] After considering the environmental impacts, the Minister can then either approve or refuse the activity.[18] Binding conditions can be attached to any approval.

In order to assist the Minister to make a decision, the licence holder needs to prepare a report that assesses the likely impacts of the exploration on the environment. This is usually done through a Review of Environmental Factors (**REF**). A REF is a preliminary study that provides a basic overview of the potential environmental impacts of a proposed project, and any measures that will be taken to minimise those impacts.

A REF is usually prepared by an environmental consultant who is engaged by the applicant. REFs are only published once the activity has been approved. The public therefore doesn't get the opportunity to comment on the REF.

If the REF reveals that there is likely to be a significant environmental impact, the licence holder will need to undertake an Environmental Impact Statement (**EIS**). An EIS is a much more detailed assessment of the possible environmental impacts of the development.[19] In cases where there is likely to be a significant effect on threatened species, populations, ecological communities or their habitat, a Species Impact Statement (**SIS**) may also be required.[20] Where an EIS or a SIS is required, the study

[13] Mining Act, s 240; Petroleum Act, s 77.
[14] Mining Act, s 240C; Petroleum Act, s 78A.
[15] Mining Act, s 241; Petroleum Act, s 78D.
[16] Mining Act, ss 261B, 261BA; Petroleum Act, ss 106B, 106C.
[17] *Environmental Planning and Assessment Act 1979* (NSW) s 5.5 (**EP&A Act**).
[18] Ibid, s 5.7.
[19] EP&A Act, s 5.7.
[20] Ibid, s 5.7.

must be made publicly available and the community must be given an opportunity to make submissions for at least 30 days.[21]

Visit: The NSW DPIE page on Guidelines for Preparing a Review of Environmental Factors for more information on how to prepare a REF

Exploration activities that do not require environmental assessment

Certain low intensity exploration activities do not require environmental assessment unless they are on critical habitat or land that is part of a wilderness area. These include:[22]

- the construction, maintenance and use of equipment for the monitoring of weather, noise, air, groundwater or subsidence;
- geological mapping and airborne surveying;
- sampling and coring using hand-held equipment;
- geophysical (but not seismic) surveying and downhole logging, and;
- accessing areas by vehicle that does not involve the construction of an access way such as a track or road.

For all other coal and CSG exploration activities, the applicant needs to lodge their environmental impact assessment as part of an activity approval application to the Division of Resources and Geoscience.

Even if an activity approval has been granted, exploration activities on private land cannot commence without an access arrangement being in place between the mining or CSG company and the landholder. See Access Arrangements below for more information.

Renewals

Where an application has been made for a renewal of a title, the Minister can renew or refuse the application.[23]
The Minister may refuse to renew an application on any ground, particularly where the applicant has breached the law or the conditions attached to the title.[24]

While there is no legal right for the public to comment on whether an exploration licence is granted, it is Government policy to allow the public to comment on applications for coal and CSG exploration licences. However, comment will only be sought on the effects of *exploration*. Comments on the potential impacts of any future mining or petroleum production will not be considered.

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[21] Ibid, s 5.8.
[22] Ibid, s 4.1; *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, cl 10.
[23] Mining Act, s 114(1); Petroleum Act, s 19(2B).
[24] Mining Act, s 114, Sch 1B; Petroleum Act, s 19, Sch 1B.

Where a licence is being renewed, there is no legal requirement to inform the public of the renewal application and no formal opportunity for the community to comment.

If the project needs development consent there will be further opportunities for the public to have a say.

Affected landholders will also get a say on what happens to their land if they choose to negotiate an access arrangement with the company.

Visit: The Regional NSW – MEG page on Public Comment on Coal and Petroleum Titles to learn more

Are there any restrictions on exploration?

Generally, exploration licences can be granted over any land, including privately owned land.[25]

However, there are some restrictions which mostly relate to the rights of other title holders. For example, an exploration licence cannot be granted over land that is subject to an existing title such as another exploration licence.[26]

There are also some restrictions on where exploration can take place. These are designed to protect certain land, including some public places and some privately owned land. These restrictions are outlined below.

1 – Protections for houses, gardens and other significant improvements

Exploration on the *surface* of private land is restricted to protect the assets of the landholder. As a general rule, exploration on the surface of land cannot come within:[27]

- 200 metres of a dwelling house that is the principal place of residence of the person occupying it; or
- 50 metres of a garden for coal; or
- 50 metres of a garden, vineyard or orchard for CSG.

Exploration also cannot occur over any 'significant improvement' (see below).[28]

Exploration can only go ahead in these areas with the written consent of the landowner and, in the case of a dwelling house, with the written consent of the occupier as well.[29] Once written consent is given, it cannot be taken back.[30]

[25] Mining Act, s 24 (3); Petroleum Act, s 9.
[26] Mining Act, s 19; Petroleum Act, s 9.
[27] Mining Act, s 31; Petroleum Act, s 72.
[28] Mining Act, s 31; Petroleum Act, s 72.
[29]Mining Act, s 31; Petroleum Act, s 72.
[30] Mining Act, s 31(3); Petroleum Act, s 72(2).

It is also possible for mining and CSG exploration to take place *under* these areas.

Significant improvements

A 'significant improvement' is a work or structure that:[31]

(a) is a substantial and valuable improvement to the land, and

(b) is reasonably necessary for the operation of the landholder's lawful business or use of the land, and

(c) is fit for its purpose (immediately or with minimal repair), and

(d) cannot reasonably co-exist with the exercise of rights under the exploration licence or the access arrangement without the full and unencumbered operation or functionality of the work or structure being hindered, and

(e) cannot reasonably be relocated or substituted without material detriment to the landholder.

The restriction only applies to the actual land containing the improvement, not the entire parcel of land upon which there are improvements.[32]

For both coal and CSG, disputes over whether something is a 'significant improvement' will be decided by the Land and Environment Court. Either party can apply to the Court for a ruling.[33]

2 – Protections for water

For coal, if an exploration licence is granted over the surface of land, a landholder who is entitled to use the land for stock watering or water drainage purposes is entitled to free and uninterrupted access for those purposes to the water in any stream, lagoon or swamp either on the land or on neighbouring land.[34] This does not apply to CSG.

3 – Protections for exempted areas

Exempted areas are places where no exploration activities can take place under an exploration licence without the specific consent of the Minister.[35]

Exempted areas tend to be land that is held for a public purpose. Examples include State Forests, Travelling Stock Reserves, State Conservation Areas, public reserves, community land, Crown land and land held on trust as a racecourse, cricket ground, recreation reserve, park or permanent common.[36]

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[31] Mining Act, Dictionary; Petroleum Act, s 72(6).
[32] *Ulan Coal Mines Ltd v Minister for Mineral Resources* [2007] NSWSC 1299.
[33] Mining Act, s 31(5); Petroleum Act, s 72(4).
[34] Mining Act, s 165.
[35] Mining Act, s 30; Petroleum Act, s 70.
[36] Mining Act, Dictionary; Petroleum Act, s 70.

The Minister can, however, issue an 'exempted area consent' to allow for exploration in these areas.[37]

4 – Protections for National Parks and other Special Areas

It is generally unlawful to explore in a National Park, historic site, nature reserve, karst conservation reserve or Aboriginal area.[38] However, a special Act of Parliament can authorise exploration in these areas[39] or the reserved status of the land could be revoked to allow for exploration to occur.

It is also possible for the NSW Environment Minister to approve exploration in these areas if the exploration is being undertaken on behalf of the Government.[40]

5 – Protections for exclusion zones and 'off limits' areas

New CSG exploration is prohibited on or within 2 kilometres of the following CSG exclusion zones:[41]

1. Land within a residential zone.
2. Future residential growth area land.
3. Additional rural village land.

New CSG exploration is also prohibited on 'critical industry cluster land' (**CIC land**).[42] This is land with a concentration of equine (horse) and viticulture (wine) industries that has been mapped by the NSW Government in the Upper Hunter.

Visit: The NSW DPIE Planning Portal page on Open Data to view datasets and resources in relation to the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007

Visit: The NSW DPIE page on the Critical Industry Clusters in the Upper Hunter to view the CIC maps

These exclusion zones do not apply to coal. However, open cut coal mines are prohibited in parts of NSW.[43]

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[37] Mining Act, s 30; Petroleum Act, s 70.
[38] *National Parks and Wildlife Act 1974* (NSW), ss 41, 54, 58O and 64 (**NPW Act**).
[39] Ibid, s 41.
[40] Ibid, ss 41(4), 54, 58O and 64. A person can be nominated to undertake the exploration on behalf of the Government.
[41] 'CSG developments' include development for the purpose of CSG exploration; SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cll 9A, 3 (**Mining SEPP**). But note that pipelines that are ancillary to coal seam gas development are not prohibited in the 2km buffer zone.
[42] Mining SEPP, cll 9A, 3.
[43] Mining SEPP, cl 9, Sch 1.

Further exclusion zones or 'off limits' areas can be created by amending the Mining SEPP.[44]

Access Arrangements

What is an access arrangement?

An exploration licence can be granted over private land without the landholder's consent. However, no exploration can take place on land until an access arrangement is in place.[45]

An access arrangement sets out the terms upon which the exploration company can access land to explore for minerals or petroleum, including any compensation that is to be paid to the landholder . The exploration activities must be carried out in accordance with the terms of the access arrangement (and the exploration licence).

Access arrangements are only legally required at the exploration stage for coal mining but are also required at the petroleum production stage for CSG.[46]

What is the process for making an access arrangement?

1. Licence holder serves the landholder with an intention to seek an access arrangement

   The mining or CSG company who holds the exploration licence will serve the landholder with a written notice of their intention to enter into an access arrangement.[47] The notice will often include a draft access arrangement. Access arrangements can range from simple one-page documents to detailed contracts.

   There is a template access arrangement for minerals and coal, use of which is voluntary. This template does not apply to CSG, but there is a code of practice for negotiating access arrangements for CSG exploration.[48]

Visit: The Regional NSW – MEG pages on:

- Land Access for Mineral Exploration to view the template
- Exploration Code of Practice: Petroleum Land Access

2. The landholder and licence holder negotiate the terms of the access arrangement

   The draft access arrangement can be used as the basis for negotiations or the parties can start negotiations from scratch. Some landholders prepare their own access arrangements.

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[44] Ibid.
[45] Mining Act, s 140; Petroleum Act, s 69C.
[46] Petroleum Act, s 69X.
[47] Mining Act, s 142; Petroleum Act, s 69E.
[48] Petroleum Act, ss 69DA, 69DB; *Petroleum (Onshore) Regulation 2016* (NSW), cl 16A.

Landholders should seek independent legal advice before signing anything.

The licence holder must pay the reasonable costs of the landholder in negotiating the access arrangement.[49] The maximum amount determined by the Minister as of December 2016 is $2,500.

3. The access arrangement is finalised or the parties may go to arbitration

   If the parties reach agreement about the access arrangement all the parties will sign the arrangement and it will become binding on them.[50]

   Landholders who do not wish to negotiate do not have to. However, if no agreement can be reached within 28 days of the landholder being notified of the licence holder's intention to seek an access arrangement, the licence holder *may* choose to start the arbitration process.[51]

What happens at arbitration?

Arbitration is a process for settling disputes outside of court.

Any person can be chosen as the arbitrator so long as both parties agree.[52] If the parties cannot agree, either party can apply to the Secretary of the Department of Regional NSW - MEG who will choose an arbitrator from a list.[53]

There are guidelines that set out a procedure for land access arbitration.[54] At all times, the arbitrator must act fairly and in good conscience.[55]

The arbitrator will first try to get the parties to agree through mediation.[56]

Visit: The Regional NSW – MEG page on Current Arbitrators to view the list of current arbitrators

If the parties cannot agree, the arbitrator will set a time and place for conducting a hearing.[57] Both the licence holder and the landholder/s are allowed to appear at the hearing and be heard, and also have the right to be represented by an agent or a lawyer.[58]

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[49] Mining Act, s 142(2A); Petroleum Act, s 69E(2A).
[50] Mining Act, s 142(3); Petroleum Act, s 69E(3).
[51] Mining Act, ss 139, 140(b), 143 – 153.
[52] Mining Act, s 143; Petroleum Act, s 69F.
[53] Mining Act, s 144; Petroleum Act, s 69G.
[54] Mining Act, s 148A; Petroleum Act, s 69KA. See: http://www.resourcesandenergy.nsw.gov.au/__data/assets/pdf_file/0009/688590/PUB16-543-Land-Access-Arbitration-Procedure.pdf.
[55] Mining Act, s 148; Petroleum Act, s 69K.
[56] Mining Act, s 145; Petroleum Act, s 69H.
[57] Mining Act, s 145; Petroleum Act, s 69H.
[58] Mining Act, s 146; Petroleum Act, s 69I.

Either party can appeal the arbitrator's decision

Landholders and licence holders who are unhappy with the arbitrator's decision can apply to the Land and Environment Court for a review of the determination.[59] This must be done within 28 days of an interim determination being served, or within 14 days of a final determination being served.[60]

The decision of the Court is final.

What rights does an access arrangement give the licence holder?

This will depend on the terms of the access arrangement. Generally, the access arrangement will allow the licence holder to enter land at certain times to do certain things authorised by the exploration licence.

Beyond that, any restrictions will be decided by the terms of the access arrangement.

Landholders are entitled to protect their interests. The more detailed and thorough the access arrangement is the more protections will be in place for the landholder. Landholders should seek the advice of a lawyer to ensure the access arrangement is drafted in such a way as to protect their interests as much as possible.

What happens if the licence holder breaches the access arrangement?

The licence holder can only carry out exploration activities in accordance with the access arrangement.[61]

If the licence holder breaches the access arrangement, the landholder is allowed to deny the licence holder access until they stop breaching the arrangement, or the breach is remedied to the reasonable satisfaction of an arbitrator appointed by the Secretary.[62]

Where a breach has occurred, a landholder can request the Secretary to appoint an arbitrator to decide how the breach should be fixed, or whether the breach has been fixed properly.[63] The licence holder can also request an arbitrator to be appointed. The Secretary must appoint an arbitrator within 48 hours of being requested to do so, and the arbitrator must deal with the matter within 5 business days of being appointed.

What are the landholder's obligations under an access arrangement?

Once an exploration licence is granted and an access arrangement is finalised, landholders are legally obliged to grant access in accordance with the access arrangement. If a landholder unlawfully prevents the licence holder from accessing their

[59] Mining Act, s 155; Petroleum Act, s 69R.
[60] Mining Act, s 155; Petroleum Act, s 69R.
[61] Mining Act, s 140(1); Petroleum Act, s 69C(1).
[62] Mining Act, s 141(4); Petroleum Act, s 69D(4).
[63] Mining Act, s 141(4); Petroleum Act, s 69D(4).

land or carrying out authorised activities, they will be committing an offence. The maximum penalty for this offence is $11,000.[64]

However, landholders can lawfully deny access to prevent an ongoing breach of the access arrangement by the licence holder.

Assessment leases

An assessment lease is designed to allow the retention of rights over an area where a significant mineral or petroleum deposit has been identified if mining the deposit is not commercially viable in the short term but there is a reasonable prospect that it will be in the longer term. An assessment lease for coal or CSG can be granted for up to 6 years.[65]

Mining and petroleum production leases

In order to mine for coal it is first necessary to get a mining lease which is issued by the Minister for Regional NSW. A mining lease allows the holder to prospect and mine on a specified area of land for a specific mineral or group of minerals. It will also allow the holder to carry out primary treatment operations such as crushing, sizing, grading, washing and leaching the ore to separate minerals.[66] Mining leases can be granted for up to 21 years.[67]

For CSG, pilot production can be authorised under an exploration licence, but in order to move to full production it is first necessary to get a petroleum production lease which is issued by the Minister for Regional NSW. A petroleum production lease allows the holder to conduct petroleum production operations on the land together with the right to construct associated works such as buildings, plant, waterways, roads, pipelines, dams, reservoirs, tanks, pumping stations, tramways, railways, telephone lines, electricity power lines etc.[68] A petroleum production lease can be granted for up to 21 years[69] and must not cover an area greater than 4 blocks.[70]

Once granted, mining and petroleum production leases can be wholly or partially renewed. There are strict requirements for renewing leases, particularly with regards to the timing of renewal applications.[71] If an application for renewal is made, the lease will

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[64] Mining Act, s 378B; Petroleum Act, s 136(3).
[65] Mining Act, s 45; Petroleum Act, s 35.
[66] Mining Act, s 73.
[67] Ibid, s 71.
[68] Petroleum Act, s 41.
[69] Ibid, s 45.
[70] Ibid, s 44. A block is a 'graticular' section of the Earth's surface. Graticular sections are made up of 5 minutes of latitude and 5 minutes of longitude.
[71] Mining Act, s 113; Petroleum Act, s 19.

continue to operate until the lease is renewed or cancelled, even if the original lease expires.[72]

In addition to a mining or petroleum production lease, development consent is also needed under the planning system.

Process for issuing a mining lease or petroleum production lease

1. Applicant lodges an application

   Applications can be initiated by the applicant or can be in response to an invitation for tenders (coal) or applications (CSG) made by the Minister.[73]

   Before inviting tenders for a mining lease, the Minister must publish a notice in a newspaper circulating generally in the State and in one or more newspapers circulating in the local area.[74]

   Applications are lodged with the Secretary of the Department of Regional NSW – MEG.[75] For coal, the application must describe the proposed mining area.[76] For CSG, the application must be accompanied by a map or plan that shows the boundaries of the proposed petroleum production area.[77] The application must also be accompanied by a program of works that the applicant proposes to carry out.[78]

   All applications must be accompanied by a fee.[79]

2. The applicant notifies the public of the application

   For coal, the applicant must publish a notice in both a State-wide newspaper and local newspaper within 45 days of lodging the application for a mining lease.[80] The notice must contain a plan of the proposed mining area.[81]

   Affected landholders also have a right to be personally notified of a mining lease application if it extends to the *surface* of their land. This notice should inform landholders of their right to object to the granting of the lease, for example, on the grounds that the land is agricultural land, and to make a claim that there is a significant improvement on the land.[82]

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[72] Mining Act, s 117; Petroleum Act, s 20.
[73] Mining Act, ss 51, 52; Petroleum Act, s 42. Invitations are published in a newspaper circulating generally throughout the State, and in one or more newspapers circulating in the locality in which the land concerned is situated (coal), or the NSW Government Gazette (CSG).
[74] Mining Act, Sch 1 cl 24.
[75] Mining Act, s 51; Petroleum Act, s 11.
[76] Mining Act, s 51.
[77] Petroleum Act, s 13.
[78] Mining Act, s 129A; Petroleum Act, s 14.
[79] *Mining Regulation 2016* (NSW) Sch 9; *Petroleum (Onshore Regulation) 2016*, sch 1.
[80] Mining Act, s 51A; *Mining Regulation 2016* (NSW), cl 26.
[81] Mining Act, s 51A.
[82] Mining Act, Sch 1 cl 21.

For CSG, the applicant must publish a notice in a State-wide newspaper within 21 days of lodging an application.[83] Affected landholders do not have the right to be personally notified.

3. Environmental assessment

   The environmental assessment is undertaken at the development application stage. See below for more information.

4. Decision

   The Department of Regional NSW - MEG assesses the application but the decision to approve or refuse the application is made by the Minister.

   The Minister must not make a decision before taking into account the need to conserve and protect the environment in or on the land over which the lease is sought.[84]

   The Minister can grant or refuse to grant the lease and can grant a lease subject. However, for CSG, if the applicant held the land under an exploration licence, they are legally entitled to be granted the production lease in respect of the land if they complied with the terms and conditions of the exploration licence and accept the conditions of the proposed petroleum production lease.[85]

   A lease may be refused for any number of reasons, including where the Minister decides that the company has an unsatisfactory compliance history.[86]

   If the lease is granted, it can be subject to conditions.[87] These conditions are in addition to any conditions imposed as part of a development consent.

Conditions

Conditions can relate to any number of things and are typically designed to avoid or minimise the impacts of the activity. For example, they may require the applicant to take steps to protect or rehabilitate the environment, protect land or water from harm or mitigate such harm.[88] Other conditions can require the company to ensure the safety of the public.[89] Importantly, conditions can apply to land that is not covered by the title, but which may be impacted by the activities.[90]

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[83] Petroleum Act, s 43. *The Land* is often chosen to make such notifications.
[84] Mining Act, Sch 1B cl 3; Petroleum Act, Sch 1B cl 3.
[85] *Petroleum (Onshore) Act 1991* (NSW), s 42. Also, granting the lease must not breach the *Environmental Planning and Assessment Act 1979* (NSW) or any other Act.
[86] Mining Act, Sch 1B cl 6; Petroleum Act, Sch 1B cl 6.
[87] Mining Act, Sch 1B Part 3; Petroleum Act, Sch 1B Part 3.
[88] Mining Act, Sch 1B Part 3; Petroleum Act, Sch 1B Part 3.
[89] Mining Act, Sch 1B Part 3; Petroleum Act, Sch 1B Part 3.
[90] Mining Act, Sch 1B Part 3; Petroleum Act, Sch 1B Part 3.

One important condition that can be attached to an approval is for the applicant to give and maintain a financial security to ensure the applicant fulfils their legal obligations, including those imposed by the conditions.[91]

Conditions are legally binding. If conditions are breached, the Secretary can direct the leaseholder to take steps to comply with the condition within a set period of time.[92] It is an offence to not comply with a direction.[93]

If the leaseholder does not comply with a direction to rehabilitate the land, the work can be carried out by the Minister at the leaseholder's expense.[94]

Does the public get a say?

For coal, any person may object to the granting of a mining lease, whether or not their land is covered by the mining lease. Landholders who own agricultural land have special rights to object to the granting of a mining lease over the surface of their land.

For CSG, members of the public, including affected landholders, are not provided with the opportunity to comment on whether the production lease should be granted.[95]

For both coal and CSG, government agencies and local councils can object to the granting of a lease.[96] There is also an opportunity for the public to have a say at the time the development application goes on exhibition under the planning system.

Where a lease is being renewed, there is no legal requirement to inform the public of the renewal application and no formal opportunity for the community to comment.

Are there any restrictions on mining/petroleum production?

Generally, mining and petroleum production leases can be granted over any land, including privately owned land.[97]

However, there are some restrictions which mostly relate to the rights of other title holders. For example, a mining or petroleum production lease can't be granted over land that is subject to an existing title such as an exploration licence or another lease.[98] There are also restrictions designed to protect certain land, including some public places and some privately owned land.

1. Protections for houses, gardens and significant improvements

[91] Mining Act, s 261B; Petroleum Act, s 106B.
[92] Mining Act, s 240; Petroleum Act, s 77.
[93] Mining Act, s 240C; Petroleum Act, s 78A.
[94] Mining Act, s 241; Petroleum Act, s 78D.
[95] Mining Act, Sch 1 cll 26, 28.
[96] Mining Act, Sch 1 Div 1, 3; Petroleum Act, Part 4 Div 2, 3.
[97] Mining Act, s 68; Petroleum Act, s 9(3).
[98] Mining Act, s 58; Petroleum Act, s 9.

As a general rule, mining and CSG production activities are not permitted on the *surface* of land:[99]

- within 200 metres of a dwelling house that is the principal place of residence of the person occupying it;
- within 50 metres of a garden for coal;
- within 50 metres of a garden, vineyard or orchard for CSG; or
- on which there is a 'significant improvement'.

It is possible for mining and CSG production to go ahead in these areas with the written consent of the landowner and, in the case of a dwelling house, with the written consent of the occupier as well.[100] Once written consent is given, it cannot be taken back.[101]

It is also possible for mining and CSG production to take place *under* these areas.

For coal, it is important to note that landholder consent is only required if the house, garden or significant improvement existed at the 'relevant date'.[102] What this date is will depend on the specific circumstances of each situation. For example, the relevant date could be the date that an exploration licence application was lodged over the land by the mining company which is now seeking the mining lease.[103] This does not apply to CSG.

Significant improvements

A 'significant improvement' is a work or structure that:[104]

(a) is a substantial and valuable improvement to the land, and

(b) is reasonably necessary for the operation of the landholder's lawful business or use of the land, and

(c) is fit for its purpose (immediately or with minimal repair), and

(d) cannot reasonably co-exist with the exercise of rights under the exploration licence or the access arrangement without the full and unencumbered operation or functionality of the work or structure being hindered, and

(e) cannot reasonably be relocated or substituted without material detriment to the landholder.

[99] Mining Act, s 62; Petroleum Act, s 72.
[100] Mining Act, s 62; Petroleum Act, s 72.
[101] Mining Act, s 62; Petroleum Act, s 72.
[102] Mining Act, s 62(5).
[103] Mining Act, s 62(5). It is important to seek legal advice about what the 'relevant date' is in any particular situation.
[104] Mining Act, Dictionary; Petroleum Act, s 72(6).

The restriction only applies to the actual land containing the improvement, not the entire parcel of land upon which there are improvements.[105]

For coal, a landholder wanting to claim that something is a significant improvement must write to the Secretary within 28 days of being notified of the mining lease application or the intention to invite tenders.[106] The claim must provide details of the improvements such as what they are and where they are located.[107] There is no procedure set out in the law for claiming a significant improvement for CSG applications.

For both coal and CSG, disputes over whether something is a 'significant improvement' will be decided by the Land and Environment Court. Either party can apply to the Court for a ruling.[108]

2. Protections for agricultural land and cultivated land

Coal – Agricultural land

A landholder can object to the inviting of tenders or the granting of a mining lease over their land on the grounds that the land, or part of it, is *agricultural land*.[109]

The objection must be made in writing to the Secretary and must be lodged within 28 days of receiving notice of a mining lease application or intention to invite tenders.[110]

Agricultural land is legally defined as:[111]

- land that has been sown with at least 2 crops of an annual species during the 10 years prior to the invitation for tenders for the mining lease being published or the application for the mining lease being lodged; or
- land that has been sown with 1 crop of an annual species during the 10 years prior to the application for the mining lease being lodged in cases where it would not be reasonable to expect more than one crop to have been sown, and there was a sufficient reason for not having brought the land under cultivation at an earlier date;[112] or
- land on which shade, shelter or windbreak trees are growing, or at any time during the past 10 years, edible fruit or nut trees, vines or any other perennial crop approved by the Secretary or their delegate has been growing; or
- pastures that are sown with seed of a species and at a rate of application, or treated with fertiliser of a composition and at a rate of application, satisfactory to the Secretary or their delegate, and that have, as a result of that sowing or

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[105] *Ulan Coal Mines Ltd v Minister for Mineral Resources* [2007] NSWSC 1299.
[106] Mining Act, Sch 1 cl 23A.
[107] Ibid, Sch 1 cl 23A.
[108] Ibid, s 31(5); Petroleum Act, s 72(6A).
[109] Ibid, Sch 1 cl 22.
[110] Ibid, Sch 1 cl 22.
[111] Ibid, Sch 2 cll 1, 2.
[112] Unless the Secretary believes that more than one crop should reasonably have been sown in that time or that the land should have been brought under cultivation at an earlier date.

treatment, maintained a level of pasture production that is substantially above that which might be expected of natural pastures; or

- land that is used, to an extent acceptable to the Secretary or their delegate, for the production of grass seed, pasture legume seed, hay or silage; or
- land that has a preponderance of improved species of pasture grasses.

Whether or not land is agricultural land will often depend on what has happened to the land over the 10 years preceding the invitation for tenders or the lodgement of a mining lease application. However, in cases where the mining lease applicant also held an exploration licence over the land, the Secretary will have to decide whether the land was agricultural land for the 10 years preceding the exploration licence application.[113]

If the Secretary finds that the land is agricultural land, a mining lease *cannot* be granted and an invitation for tenders cannot be made without the written consent of the landholder.[114] If the landholder gives consent, the consent cannot be revoked.[115]

However, a mining lease can be granted over agricultural land if the Minister considers that the granting of the lease over that land is necessary to give access to any other part of the land to which the lease applies.[116]

A mining lease may not be granted beneath the surface of any agricultural land except at such depths, and subject to such conditions, as the Minister considers sufficient to minimise damage to the surface.[117]

CSG – Cultivated land

As a general rule, the holder of a petroleum production lease cannot carry out any production operations on the *surface* of any land which is under cultivation except with the consent of the landholder.[118]

However, the Minister can define an area of cultivated land on which production activities can be carried out if the Minister thinks the circumstances warrant it.[119] If this happens, a compensation assessment has to be made before any production activities start to ensure the landholder is compensated for any loss or damage to any crop on the land concerned.[120]

There is no legal definition for what constitutes cultivated land; however, cultivation for the growth and spread of pasture grasses is not to be taken to be cultivation unless

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[113] Mining Act, Sch 2 cll 2, 3.
[114] Ibid, Sch 1 cl 23.
[115] Ibid, Sch 1 cl 23(2), 22(4).
[116] Ibid, Sch 1 cl 23(4).
[117] Ibid, Sch 1 cl 23(3).
[118] Petroleum Act, s 71(1).
[119] Ibid, s 71(2).
[120] Ibid, s 71(2A). The assessment can be made between the landholder and the gas company or, if they can't agree, by the Land and Environment Court.

the Minister thinks the circumstances warrant it.[121] If there is a dispute about whether particular land is cultivated, the Minister has the final say.[122]

There is no formal right to object to the granting of a production lease, so it is unclear where in the process a landholder should raise the fact that the land is under cultivation. It is recommended that affected landholders alert the Minister that the land is cultivated land as soon as they become aware that the land is covered by a title (exploration or production lease).

3. Protections for water

There are mandatory requirements for mining and CSG companies to prepare Groundwater Monitoring and Modelling Plans in consultation with the Department of Planning, Industry and Environment - Water prior to constructing or using any borehole or petroleum well.

For coal, if a mining lease is granted over the surface of land, a landholder who is entitled to use the land for stock watering or water drainage purposes is entitled to free and uninterrupted access for those purposes to the water in any stream, lagoon or swamp either on the land or on neighbouring land.[123]

Visit: The NSW Resources Regulator's page on Environmental Management to read the Exploration Code of Practice: Environmental Management

4. Protections for exempted areas

There are a number of areas where no CSG production activities can take place under a production lease without the specific consent of the Minister. [124] These exempted areas don't apply to coal mining (but do apply to coal exploration).

Exempted areas tend to be land that is held for a public purpose. Examples include State Forests, public reserves, community land, Crown land and land held on trust as a racecourse, cricket ground, recreation reserve, park or permanent common.[125]

Notwithstanding this restriction, the Minister can always issue an 'exempted areas consent' to allow CSG production in such areas.[126]

5. Protections for National Parks and other Special Areas

[121] Petroleum Act, s 71(3).
[122] Ibid, s 71(4).
[123] Mining Act, s 165.
[124] Petroleum Act, s 70.
[125] Ibid, s 70.
[126] Ibid.

It is unlawful to carry out mining or CSG production in a National Park, historic site, nature reserve, karst conservation reserve or Aboriginal area.[127] A special Act of Parliament would be needed to authorise mining in these areas. Some National Parks go to the centre of the Earth, while some have depth restrictions. If there is a depth restriction, it is possible to mine beneath the National Park below that depth.

6. Protections for exclusion zones and 'off limits' areas

New CSG developments are prohibited on, or within 2 kilometres of, the following CSG exclusion zones:[128]

1 – Land within a residential zone.
2 – Future residential growth area land.
3 – Additional rural village land.

New CSG developments are also prohibited on 'critical industry cluster land'.[129] This is land with a concentration of equine (horse) and viticulture (wine) industries that has been mapped by the NSW Government in the Upper Hunter.

These exclusion zones do not apply to coal. However, open cut coal mines are prohibited in parts of NSW.[130]

Further exclusion zones or 'off limits' areas can be created by amending the Mining SEPP.[131]

Visit: The NSW DPIE Planning Portal page on Open Data to view datasets and resources in relation to the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007

Visit: The NSW DPIE page on the Critical Industry Clusters in the Upper Hunter to view the CIC maps

Development consent

In addition to a mining or petroleum production lease, many mining and CSG projects require some kind of development consent under the planning system before they can go ahead. This means a two-stream approval process applies.

[127] *National Parks and Wildlife Act 1974* (NSW), ss. 41, 54, 58O and 64.
[128] 'CSG developments' include development for the purpose of CSG exploration: Mining SEPP, cll 9A, 3. But note that pipelines that are ancillary to coal seam gas development are not prohibited in the 2km buffer zone.
[129] Mining SEPP, cl 9A.
[130] Ibid, cl 9, Sch 1..
[131] Ibid, cl 9, Sch 1.

In general, coal mining and CSG production developments will fall into the category of State Significant Development (**SSD**). These are projects that are deemed to be of State or regional planning significance.[132]

State Significant Development (SSD)

All development for the purposes of coal mining and CSG production is classified as State Significant Development (**SSD**).[133] However, coal and CSG exploration activities are not classified as SSD.[134]

Many developments related to mining and CSG production, such as processing plants, storage facilities or pipelines are also classified as SSD or State Significant Infrastructure (**SSI**).[135]

Read: EDO Factsheet on **State Significant Development and State Significant Infrastructure** for more information about the development assessment process for SSD and SSI.

Gateway Certificate required if coal or CSG development is proposed over 'strategic agricultural land'

There are special requirements for coal and CSG developments proposed over 'strategic agricultural land'.[136]

There are two types of strategic agricultural land:

1. **Biophysical strategic agricultural land**; and
2. **Critical industry cluster land**.

Biophysical strategic agricultural land

Biophysical strategic agricultural land is land that has been mapped as such by the NSW Government due to the presence of high quality soil and water resources capable of sustaining high levels of productivity on that land. 2.8 million hectares of biophysical strategic agricultural land has been identified and mapped in NSW.

Visit: The NSW DPIE page on Safeguarding Our Agricultural Land to learn more and to view the map of biophysical strategic agricultural land across the state

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[132] They are assessed under Part 4, Division 4.1 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). Types of SSD are listed in the State Environmental Planning Policy (State and Regional Development) 2011, Sch. 5 and 6 (**State and Regional Development SEPP**).
[133] State and Regional Development SEPP, Sch 1 cll 5, 6.
[134] Ibid, Sch 1 cl 5.
[135] Ibid, Sch 1 cl 5.
[136] *Environmental Planning and Assessment Regulation 2000* (NSW), cl 50A (**EP&A Regulation**) .

All development applications for new coal or CSG development on mapped biophysical strategic agricultural land must be accompanied by either a 'gateway certificate' or a 'site verification certificate' that indicates the land is not biophysical strategic agricultural land. See below for more information.

Critical industry cluster land

Critical industry cluster land is land with a concentration of equine (horse) and viticulture (wine) industries that has been mapped by the NSW Government in the Upper Hunter.

Visit: The NSW DPIE page on the Critical Industry Clusters in the Upper Hunter to view the CIC maps

CSG developments are prohibited on critical industry cluster land.[137]

Coal developments can still happen on this land, but development applications must be accompanied by a gateway certificate.

There is no opportunity to obtain a site verification certificate with regards to critical industry cluster land.

Site verification certificate

A site verification certificate certifies that the land either is or is not biophysical strategic agricultural land. The Secretary of the Department of Planning, Industry and Environment can issue a site verification certificate at the request of either the landholder or the coal or CSG company.[138]

If the site verification certificate confirms that the land is *not* biophysical strategic agricultural land, no gateway certificate will be required.

Visit: The NSW DPIE page on Safeguarding Our Agricultural Land to read the Interim Protocol for Site Verification and Mapping of Biophysical Strategic Agricultural Land

Gateway certificate

A gateway certificate is issued by the Mining and Petroleum Gateway Panel, following a preliminary assessment of a coal or CSG proposal against criteria relating to agricultural and water impacts. This 'gateway assessment' is an additional step towards achieving development consent that happens prior to the development application being lodged.[139]

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[137] Mining SEPP, cl 9A(5).
[138] Mining SEPP, cl 17C.
[139] EP&A Regulation, cl 50A; Mining SEPP, Part 4AA.

The Gateway Panel is appointed by the Minister and is made up of members with expertise in agricultural science, hydrogeology or mining and petroleum development.[140]

The Gateway Panel has 90 days to assess the proposal against a set of criteria:[141]

1. In relation to biophysical strategic agricultural land (above), whether the proposed development will significantly reduce the agricultural productivity the land, based on a consideration of:
    - any impacts on the land through surface area disturbance and subsidence,
    - any impacts on soil fertility, effective rooting depth or soil drainage,
    - increases in land surface micro-relief, soil salinity, rock outcrop, slope and surface rockiness or significant changes to soil pH,
    - any impacts on highly productive groundwater,[142]
    - any fragmentation of agricultural land uses,
    - any reduction in the area of biophysical strategic agricultural land.
2. In relation to critical industry cluster land (above), whether the proposed development will have a significant impact on the relevant critical industry based on a consideration of the following:
    - any impacts on the land through surface area disturbance and subsidence,
    - reduced access to, or impacts on, water resources and agricultural resources,
    - reduced access to support services and infrastructure,
    - reduced access to transport routes,
    - the loss of scenic and landscape values.

The Gateway Panel cannot refuse to issue a gateway certificate; it will either state that the proposed development meets the relevant criteria and issue an unconditional gateway certificate or state that the proposed development does not meet the relevant criteria and issue a conditional gateway certificate.[143]

If a conditional certificate is issued it must include recommendations to address the proposed development's failure to meet the relevant criteria. It can also include a recommendation that specified studies or further studies be undertaken by the applicant regarding the proposed development.[144]

These recommendations must be addressed in the Secretary's Environmental Assessment Requirements (**SEARs**) discussed below.

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[140] Mining SEPP, cl 17P.
[141] Ibid, cl 17H.
[142] Highly productive groundwater is defined in the Aquifer Interference Policy.
[143] Mining SEPP, cl 17H.
[144] Ibid.

Assessment Process for State Significant Development

1. Applicant applies for the environmental assessment requirements

The applicant starts the process by lodging an online application and request for the Secretary's Environmental Assessment Requirements (**SEARs**).[145] The SEARs set out what the applicant needs to cover in their environmental impact assessment, and typically include groundwater and surface water studies, biodiversity impact studies, dust and noise impact studies, etc.

2. Secretary sets environmental assessment requirements

In preparing the SEARs, the Secretary must consult with relevant public authorities such as the Division of Environment, Energy and Science and the local council in the area where the project is to take place to ensure that all key issues are identified and assessed.[146]

N.B. The NSW Government has released Indicative Secretary's Environmental Assessment Requirements (SEARs), which outline common assessment requirements

If a gateway certificate has been issued, the Secretary must address any recommendations of the Gateway Panel set out in the certificate.[147]

3. Applicant lodges an environmental impact statement

The applicant must then prepare an environmental impact statement (**EIS**) that meets the environmental assessment requirements that have been set by the Secretary. In practice, this role is performed by an environmental consultant engaged by the applicant.
In addition to addressing the SEARs, an EIS must also meet statutory requirements which include a requirement to: [148]

- analyse any feasible alternatives to carrying out the development, and;
- analyse the likely impacts of the development on the environment, including any measures proposed to reduce or avoid those impacts.

The applicant must also complete a cost benefit analysis and a local area assessment as part of its economic assessment.[149]

The applicant often consults with local council, government agencies and the community when preparing the EIS.

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[145] EP&A Regulation, Sch 2 cl 3(1).
[146] Ibid, Sch 2 cl 3(4).
[147] Ibid, Sch 2 cl 3(4A).
[148] Ibid, Sch 2 cl 7.
[149] The Guidelines for the economic assessment of mining and coal seam gas proposals is part of the Integrated Mining Policy. See: http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Integrated-Mining-Policy.

4. The EIS goes on public exhibition and the public is notified

If the EIS is accepted by the Department, it will be placed on public exhibition on the planning portal. The minimum exhibition period for SSD is 28 days.[150]

The NSW DPIE must notify the public of the application in accordance with its Community Participation Plan.

Visit: The NSW DPIE's:

- On Exhibition page to view the SSD projects open for public comment
- Community Participation Plan page to read the Plan

5. The public can make submissions

During this exhibition period, any person can make a written submission to the Department about the project.[151] It is important for objectors to make written submissions on time as this preserves any merit appeal rights later on.

The Secretary of Planning must then either pass the submissions, or a summary of them, to the applicant.[152] The submissions must also be published on the planning portal.[153] The Secretary may decide to ask the applicant to respond to any issues raised in the submissions.[154] While this does not always happen, it usually does with mines and CSG projects where objections have been raised. The applicant's response to submissions must also be published on the planning portal.[155]

If the applicant proposes minor changes in response to submissions, the Department will take steps to finalise the assessment, and no further community consultation is required. The Secretary may re-exhibit the amended application for further public comment.[156]

6. Decision

The consent authority for SSD can vary. Where an environmental planning instrument declares the Independent Planning Commission (IPC) to be the consent authority, it is the IPC that will make the decision. In all other cases, it is the Minister for Planning (who can delegate that power to the Department of Planning, Industry and Environment).[157]

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[150] EP&A Act, Sch 1 cl 9.
[151] Ibid, Sch 1 cl 15.
[152] Ibid, cl 82.
[153] Ibid, cl 82(3).
[154] Ibid, cl 82(2).
[155] Ibid, cl 82(3).
[156] NSW DPIE, *Department of Planning, Industry and Environment Community Participation Plan 2019*, p. 21.
[157] EP&A Act, s 4.5(a).

The IPC is declared to be the consent authority for SSD in the following circumstances (unless the development is proposed by a public authority):[158]

- The relevant local council has made a submission objecting to the development;
- There have been at least 50 submissions (other than from council) objecting to the development; or
- The applicant has made a reportable political donation.

The Independent Planning Commission

The Independent Planning Commission (**IPC**) is a planning body that is not subject to the direction or control of the Minister (unless authorised under the EP&A Act).[159] However, its members are appointed by the Minister for Planning.[160]

The IPC consists of a Chairperson, and members who must have expertise in at least one area of planning, architecture, the environment, urban design, land economics, soil or agricultural science, hydro-geology, mining or petroleum development, traffic and transport, law, engineering, tourism or government and public administration.[161]

The IPC holds the functions of the consent authority for some SSD projects (including mines), and its role can also involve advising the Minister or the Planning Secretary on any matter on which the Minister or Secretary requests advice.

The IPC can also hold public hearings into planning matters at the request of the Minister.[162]

When assessing SSD projects, the decision-maker must take a number of things into account, including:[163]

- any environmental planning instrument (such as a local environmental plan or State Environmental Planning Policy) that applies to the land. Of particular relevance will be the Mining SEPP;
- the likely impacts of the development, including environmental impacts on the natural and built environments, social impacts and economic impacts;
- the suitability of the site for the development;
- public submissions; and
- the public interest.

[158] State and Regional SEPP, cl 8A.
[159] EP&A Act, s 2.7.
[160] Ibid, s 2.8.
[161] Ibid, s 2.3(3).
[162] Ibid, s 2.9.
[163] EP&A Act, s 4.15.

In addition, the decision-maker must also consider:

- The existing uses and planned uses of the land in the vicinity of the development, the impact of the development on these uses, and any ways in which the development could be incompatible with those uses.[164] The decision-maker must then evaluate and compare the public benefit of the development and those other land uses, taking into account any measures that the applicant has proposed to avoid or minimise such incompatibility.[165]
- The impact that the proposed development might have on other mining or CSG operations already existing in the vicinity.[166]
- Whether or not the consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner, such as conditions to minimise the impacts on water, threatened species and greenhouse gas emissions.[167]
- The efficiency of the development in terms of resource recovery and whether any conditions can be attached to the approval to maximise such efficiency.[168]
- Whether or not the consent should be issued subject to conditions that minimise the impact of the development on local transport infrastructure, especially public roads.[169]
- Whether or not the consent should be subject to conditions aimed at ensuring the rehabilitation of land that will be affected by the development.[170]

The decision-maker can approve or refuse the development[171] and can attach legally binding conditions to any approval.[172] Conditions are designed to minimise the adverse impacts of the development. In practice, standard conditions are often attached. The Department of Planning, Industry and Environment has published model and standard conditions for open cut mining and underground mining on its website. There are also non-discretionary development standards relating to noise, air quality, ground vibration, and aquifer interference that, if complied with by the proponent, prevent the decision-maker from requiring more onerous standards for those things.

If there is no decision after 90 days, the project is deemed to have been refused.[173]

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[164] Mining SEPP, cl 12.
[165] Ibid, cl 12.
[166] Ibid, cl 13.
[167] Ibid, cl 14.
[168] Ibid, cl 15.
[169] Ibid, cl 16.
[170] Ibid, cl 17.
[171] EP&A Act, s 4.38.
[172] Ibid, s 4.38(1)(a).
[173] EP&A Regulation, cl 113.

Do local environmental plans apply to SSD?

Where a local environmental plan (**LEP**) wholly prohibits mining or CSG activities over particular land, those activities cannot be approved on that land.[174] Where a LEP only partly prohibits the mining or CSG activities, consent can be granted.[175] Any zone that permits agriculture or industry (either with or without consent) will automatically permit mining and CSG activities with consent by virtue of the Mining SEPP.[176]

Where mining or CSG activities are wholly prohibited on the land, a development application can be accompanied by a proposal to change the LEP so that the activity can go ahead.[177]

Only the Independent Planning Commission (**IPC**) can approve an amendment to change a LEP to facilitate SSD,[178] and only the IPC can determine the subsequent development application for the carrying out of that development.[179]

Are any other environmental approvals necessary?

Developments often need a number of approvals in addition to development consent. These approvals are often granted by other government agencies such as the NSW EPA or the NSW DPIE - Water.
With SSD, many of these additional approvals are either not required or must be given consistently with the development consent, meaning the other government agency cannot refuse the approval if it is necessary to carry out approved SSD.

Read: EDO Factsheet on **State Significant Development and State Significant Infrastructure** for more information about additional approvals for SSD

A mining lease and a petroleum production lease are still required but *must* be granted consistently with a development consent for SSD.[180] So once development consent is granted the Minister for Regional NSW cannot refuse to issue a mining or petroleum production lease.

An approval from the Commonwealth Government may be required. If a mining or CSG activity is likely to have a significant impact on a 'matter of national environmental significance',[181] it must be referred to the Commonwealth Department of Agriculture, Water and the Environment for determination as to whether it is a controlled action. If it is found to be a controlled action, the Federal Environment Minister must assess and approve the project before it can commence.

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[174] EP&A Act, s 4.38(2).
[175] Ibid, s 4.38(3).
[176] Mining SEPP, cl. 7.
[177] EP&A Act, s 4.38(5).
[178] Ibid, s 4.38(6).
[179] Ibid, s 4.38(6).
[180] Ibid, s 4.42.
[181] These are listed in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 12-25.

There are 9 matters of national environmental significance that trigger the need for Commonwealth approval, including where a coal seam gas or large coal mining operation will have a significant impact on water resources or where federally listed species or ecological communities will be impacted.

Can the project be changed?

Consent to undertake SSD can be modified, meaning the applicant can seek to alter the project in some way after consent has been granted. The applicant has to apply for a modification to the same consent authority that made the original decision. The development, as modified, must be substantially the same development as was originally approved,[182] otherwise a fresh development application will need to be lodged.

Where can I get more information?

- DIGS is a public, online archive that provides access to non confidential reports and other important documentary material held by the Geological Survey
- Have Your Say where you can find NSW Government consultations open for public comment
- The Department of Regional NSW – MEG has information on its website about exploration, mining and landholder rights.

Glossary

Department means NSW Department of Regional NSW – Mining, Exploration and Geoscience.

[182] EP&A Act, s 4.55(1A); EP&A Regulation, cl 118.

CIC land means critical industry cluster land.

DPIE means the NSW Department of Planning, Industry and Environment.

EIS means Environmental Impact Statement.

EPA means the NSW Environment Protection Authority.

Environment Minister means the NSW Minister for the Environment.

IPC means the NSW Independent Planning Commission.

LEP means Local Environmental Plan.

Mineral means substances prescribed by section 5 of the *Mining Regulation 2016* (NSW) as a 'mineral'. Minerals include coal (not coal seam gas), gold, silver, bauxite, antimony, lead, silver, and uranium.

Minister means the NSW Minister for Regional NSW.

Planning Minister means the NSW Minister for Planning.

REF means Review of Environmental Factors.

SEARs Secretary's Environmental Assessment Requirements.

SEPP means a State Environmental Planning Policy.

SIS means a Species Impact Statement.

SSD means State Significant Development.

SSI means State Significant Infrastructure.