



Ms Alexandra O'Mara
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NSW Department of Planning and Environment
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16 July 2014

State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2014

Dear Ms O'Mara

Thank you for the opportunity to comment on Mining SEPP Amendment 2014.

The NSW Minerals Council (NSWMC) has two significant issues for your consideration when finalising the package of amendments.

1. Transitional provisions for modifications

The proposed transitional provisions for new development applications located outside the Upper Hunter and New England North West regions are reasonable and reflect the approach taken in the Upper Hunter and New England North West regions. NSWMC supports the proposal.

However, there appears to be an unintended consequence for s 96 and s 75W modifications as a result of the proposed amendments.

The amendments to the Mining SEPP made on 28 January 2014 only applied to development applications (and modification applications) lodged on or after 28 January 2014.

The changes to the transitional provisions now being proposed appear to make the 28 January 2014 amendments apply retrospectively in relation to s 96 and s 75W modification applications and requests lodged on or after 4 October 2013.

Consider, for example, a hypothetical mining proponent who lodged a s 75W modification request in November 2013 along with its Environmental Assessment. The development the subject of the s 75W request constituted "mining development" for the purpose of the Gateway Process, but was on land outside the Strategic Agricultural Land Map at the time, so the Gateway Process did not apply and no gateway certificate or site verification certificate accompanied the request. On 28 January 2014, the s 75W request remained undetermined,

and the Strategic Agricultural Land Map is amended by the 28 January 2014 amendments to include the land subject of the s 75W request. By operation of the proposed amendments to the transitional arrangements, the proponent will be required to procure a Gateway certificate or a site verification certificate before the s 75W request can be determined, notwithstanding that at the time it was lodged, the Gateway Process did not apply to the application.

NSWMC has not assessed the number or status of s 96 and s 75W applications and requests made between 4 October 2013 and 28 February 2014. If there are projects that are affected by this situation then appropriate changes to the proposed transitional amendments are outlined below:

Environmental Planning and Assessment Act 1979

Schedule 6A, clause 20

Insert after clause 20 (10):

(10A) In addition to subclause (10), this clause does not apply to or with respect to a request or application if:

- (a) the land to which the request or application relates was not shown (whether in whole or in part) on the Strategic Agricultural Land Map before 28 January 2014, and*
- (b) the request or application was made, but not determined, on or before ~~3 October 2013~~ 28 January 2014.*

(10B) However, the Minister or the Director-General, in dealing with a request or application referred to in subclause (10) or (10A), may seek the advice of the Gateway Panel.

Environmental Planning and Assessment Regulation 2000

Clause 119A Special provisions relating to applications under section 96 (2) relating to strategic agricultural land

Insert after clause 119A (5):

(5A) In addition to subclause (5), this clause does not apply to or with respect to an application under section 96 (2) of the Act if:

- (a) the land to which the application relates was not shown (whether in whole or in part) on the Strategic Agricultural Land Map before 28 January 2014, and*
- (b) the application was made, but not determined, on or before ~~3 October 2013~~ 28 January 2014.*

(5B) However, the Minister or the Director-General, in dealing with an application referred to in subclause (5) or (5A), may seek the advice of the Gateway Panel.

2. Existing drafting inconsistencies

While it is not associated with the current package of amendments, there is a drafting issue with clauses 50A and 119A of the EP&A Regulation and clause 20 of Schedule 6A of the EP&A Act which creates uncertainty in respect of the Gateway Process. There is an opportunity to address this issue in the current package of amendments.

The issue relates to whether a Gateway certificate is required for an entire development application area or modification application area, or is only required in respect of "the mining area" of a proposed mining lease.

Clause 17A of the Mining SEPP and the fact sheet issued by DP&E titled *Strategic Regional Land Use Policy — Guideline for Gateway Applicants* (September 2013) both make it clear that the Gateway Process is only intended to apply to the mining area of a mining lease and is not intended to apply to other aspects of the development, such as rail loops and spurs.

However, clauses 50A and 119A of the EP&A Regulation and clause 20 of Schedule 6A of the EP&A Act are inconsistent with clause 17A of the Mining SEPP and the abovementioned fact sheet.

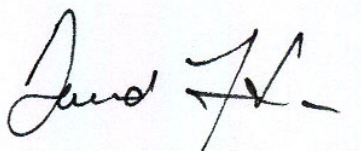
The use of the phrases "relates to mining or petroleum development" in clauses 50A(1), 119A(1) and 20(1) and the use of the phrase "proposed development" in clauses 50A(2), 119A(2) and 20(4) means that on a literal interpretation, these clauses require the entire development which is the subject of the application or request to be subject to the Gateway Process and not just those components that are within the definition of "mining or petroleum development" provided in clause 17A of the Mining SEPP.

It appears likely that this inconsistency is simply a drafting error that could be easily rectified by inserting the words "mining or petroleum" between the words "proposed" and "development" where those words appear in clauses 50A(2), 119A(2) and 20(4).

NSWMC strongly believes this inconsistency should be addressed in the current package of amendments to eliminate any uncertainty.

Thank you for the opportunity to comment on the proposals. If you would like any further information, please contact me on 9274 1400.

Yours sincerely

A handwritten signature in black ink, appearing to read "David Frith".

David Frith
DIRECTOR INDUSTRY AND ENVIRONMENT