

FINAL DRAFT

Latrobe City Council Submission to:

Mineral Resources (Sustainable Development) (Mineral Industries) Regulations 2019

April 2019

DATE	PREPARED	REVIEWED	REVIEWED
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EXECUTIVE SUMMARY

Latrobe City Council welcomes the opportunity to provide this submission to the draft *Mineral Resources (Sustainable Development) (Mineral Industries) Regulations 2019* (Draft Regulations). Maintaining and developing further relationships with regulating agencies such as Earth Resources Regulation branch, is vital for ensuring that consideration is given to Local Governments interests and Latrobe City Councils community's needs are represented in processes undertaken by Department of Jobs, Precincts and Regions (DJPR).

The Latrobe City community has a long history and association with the coal mining operations due to the large coal reserves which underlay the municipality. Whilst Council and the broader community understand the economic importance of the coal resource, there is also a high level of sensitivity about existing and future land use conflicts, as well as associated community health and safety concerns.

Present sensitivity follows events including mine batter collapses adjoining the Latrobe River, the Hazelwood Mine fire, Princess Highway closure due to road subsidence and the recent AGL Loy Yang submission to Planning Scheme Amendment C87 Traralgon Growth Areas Review (which highlighted landslip and subsidence concerns resulting from open cut mining to both future and existing urban areas). The recent closure of the Hazelwood Mine area and the subsequent initiation of work to now determine a safe and stable rehabilitation solution is considered to be a particular priority for improvement within Governing regulations.

It is Council's understanding that the draft regulations have been prepared as the current 2018 Regulations are due to sunset 30 June 2019. The Draft Regulations are proposed to replace them and therefore the scope of this review does not include changes to key areas of interest to Latrobe City Council, in particular the allocation of royalties. In this regard, Latrobe City Council notes its position of advocacy for the establishment of a Brown Coal Royalties Fund that would underpin the economic diversification of coal resources and the Latrobe City economy.

Council considers that the majority of proposed changes to be reasonable and beneficial, in the sense that they clarify and streamline a number of requirements as well as introduce sensible improvements, particularly in relation to rehabilitation requirements.

It is our understanding this review of the regulations is expected to be followed by further changes to the Code of Practice and *Mineral Resources (Sustainable Development) Act 1990* (the Act). Latrobe City Council requests that opportunities to participate in these further reviews is made available to Council, recognising the multifaceted role of Local Government as an advocate for the community and responsible authority.

It is noted that due to the tight timeframes in which submissions were required, this submission has been prepared by Council Officers and has not been formally endorsed by Council resolution. Council may therefore require the opportunity to provide an addendum to this submission, following a Councillor briefing session to be held 20 May 2019.

Should the DJPR have any questions regarding this submission, please contact Jody Riordan, Manager Planning Services via phone 03 5128 6178 or email Jody.Riordan@latrobe.vic.gov.au.

INTRODUCTION

This submission provides a response to both the Draft Regulations and the *Regulatory Impact Statement* (RIS) prepared for the Draft Regulations.

The Draft Regulations largely remake the *Mineral Resources (Sustainable Development) (Mineral Industries) Interim Regulations 2018* (Current Regulations), with changes to the following areas:

- streamlining information requirements for licence applications/renewals and removing the requirement for a survey unless required by the Department Head;
- requiring performance standards to be included in risk management plans and the introduction of the ability for the licence holder to rely upon compliance with a Code of Practice for certain risks (Code yet to be developed);
- improved requirements in relation to rehabilitation plans for new or varied work plans to strengthen the rehabilitation, post-closure and engagement obligations;
- introduction of more flexibility to allow alternative methods of advertising/notice of licence applications in accordance with a proposed guideline approved by the Department Head (yet to be prepared); and
- changes to reporting requirements, including improvements to the reporting requirements associated with rehabilitation; and introduction of additional infringement offences.

Further detail about each of the above areas of change and possible implications for Council and the community is provided within the body of this submission.

Council considers that the majority of proposed changes to be reasonable and beneficial, in the sense that they clarify and streamline a number of requirements as well as introduce sensible improvements, particularly in relation to rehabilitation requirements. This is largely due to the fact that the key requirements and overall framework for the regulation of mining activities in the State is contained within the ACT with further, supporting detail contained in the Regulations.

However, a lot of the key detail around how these changes will operate in practice is proposed to be contained in guidelines, in the context of the risk management plan and a Code of Practice document, which have not yet been finalised. The RIS also indicates the intention to make amendments to the Act during 2019.

Given the above, Council requests that adequate consultation opportunities are provided, particularly in relation to the Code of Practice, once it and other guidelines have been developed.

Putting aside the need for forthcoming details, Council does not consider that the changes materially alter the general risk profile for Council and its community associated with mining activities within the municipality.

BACKGROUND

The Act provides the legal framework for the regulation of Victoria's mineral resources sector. The purpose of the Act is to encourage economically viable mining and extractive industries that make the best use of resources, compatible with the economic, social and environmental objectives of the State.

The current Regulations have been made under the Act to operationalise and provide further controls regarding key elements of the Act. In particular, key matters which are dealt with under the current Regulations include:

- the information required to be included in licence applications/renewals, including advertising/notification requirements;
- the information that is required to be included in work plans;
- reporting requirements;
- requirements for declared mines; and
- infringements.

Where a change in regulations is proposed, the *Subordinate Legislation Act 1994* requires the preparation of a RIS which includes a summary of the changes proposed by the Draft Regulations compared with the Current Regulations, as well as an assessment of other regulatory and non-regulatory options.

The RIS acknowledges that in recent years the regulatory framework for the mineral industry sector has been subject to a number of investigations and review, including the Hazelwood Mine Fire Inquiry (2016) and the Commissioner for Better Regulation's report *Getting the Groundwork Right – Better regulation of mines and quarries* (2017). A common theme of the recommendations of these inquiries is a call for a modern, responsive and outcome-based regulation which underpins a number of the proposed changes in the Draft Regulations.

The RIS also notes that the Victorian Government plans to amend the Act. Proposed amendments to the Act include establishing a Mine Land Rehabilitation Authority, clarifying rehabilitation and post-closure obligations and setting up a post-closure fund. Latrobe City welcomes the attention being paid to these matters.

ASSESSMENT OF PROPOSED CHANGES TO THE REGULATIONS

With support of independent advice sought by Council in preparation of its submission, comments are provided to the following changes proposed to the regulations:

1. information requirements for licence applications/renewals;
2. risk management plans which form part of the work plan, including the proposal to introduce the ability for the licence holder to rely upon compliance with a Code of Practice;
3. rehabilitation plans for new or varied work plans to strengthen the rehabilitation, post-closure and engagement obligations;
4. licence advertising/notice requirements to introduce more flexibility to allow alternative methods of advertising approved by the Department Head;
5. reporting requirements, particularly in relation to rehabilitation; and
6. introduction of additional infringements to encourage compliance.

Each of these areas of change are considered in further detail below.

The Draft Regulations do *not* propose any changes to the quantum of fees, rents, royalties or levies. This is consistent with the recommendation of the Commissioner for Better Regulation in the *Getting the Groundwork Right* report (2017) which recommended fee changes occur no earlier than 1 July 2020.

1. Information Requirements for licence applications/renewals

The key changes to the information requirements proposed by the Draft Regulations are:

- consolidating all of the information requirements into the one division of the Draft Regulations (cl. 13-19) rather than having these requirements spread across the regulations and schedules;
- reducing the level of prescription by authorising the Department Head to determine the form and procedure for the provision of this information, rather than prescribing forms to be used within schedules to the regulations; and
- only requiring mining and retention licence holders to include a survey when the Department Head is satisfied it is necessary, rather than always requiring a survey.

The consolidation of the information requirements within the Regulations and removing prescribed forms from the schedules does not have a significant impact on the substance of the information requirements. These changes do, however, make the Draft Regulations easier to navigate by reducing complexity.

The proposed survey requirement is also logical as it removes the obligation for a survey unless the location of the application is uncertain or there is the possibility of a boundary dispute. However, we recommend that the following matters be clarified in the final drafting of the Regulations in relation to this change:

- The current proposed wording in clause 24 of the Draft Regulations states that the Department Head may “request” a survey if satisfied that it is required to ensure the location of the application area is specified accurately or to avoid the possibility of a boundary dispute with a nearby licence. Whereas the obligation for the licence holder to provide the survey is if they are “required” to do so. For consistency, we recommend that the word “request” be replaced with “require” in Clause 24 of the Draft Regulations; and
- The Draft Regulations should clearly specify that the Department Head can require a survey at any time during the licence application process if they become satisfied that it is required.

For example, if a possible dispute or uncertainty as to location is identified following the advertising of the licence application, it should be clear that the Department Head can require a survey be prepared at this point, even if a survey has not previously been required.

2. Risk Management Plan Requirements

The current Regulations require the work plan to include a risk management plan that includes an identification of risks and specifies what the licensee will do to address those risks “*as far as reasonably practicable*”.

The RIS notes that industry has expressed concern that these current requirements are too prescriptive and do not enable proportionate approaches to risk management. This view is supported by an independent analysis of the regulatory burden of the Current Regulations, prepared by ACIL Allen Consulting. The RIS also notes that the *Getting the Groundworks Right* report (2017) found that:

“The costs associated with producing a risk management plan can be considerable – enough to cause operators to defer works that would trigger a variation. This conceivably includes new or changed works that would reduce risk overall or facilitate better, lower-cost compliance outcomes”.

To address these concerns, the Draft Regulations propose amendments to the risk management plan requirements by:

- clarifying that risk management plans should be expressed as performance standards; and
- allowing parties to meet obligations to manage risks by incorporating performance standards contained in a Code of Practice.

These changes are proposed to be supported with Ministerial Guidelines for risk assessment. The proposed introduction of a Code of Practice for risk management is a substantive proposed change. It is proposed to provide suitable measures to address hazards as well as performance standards that these measures would need to achieve. The Code of Practice has not yet been developed, however a consultation outline of the proposed Code has been prepared as part of RIS for the Draft Regulations.

This outline notes that the current risk management guidelines would provide much of the basis for developing the proposed Code, in terms of the types of hazards, the applicable measures or “controls” and also the relevant performance standards to identify that the risk has been adequately managed. It also notes that the measures in the Code could only be adopted for a particular activity if:

- The adoption of the measure listed in the Code would achieve the relevant performance standard contained in the Code; *and* the residual risk would be low, as assessed in accordance with the relevant guideline.

If both these criteria were not met for a particular hazard, a case-specific risk management plan would still be required for that risk. Whilst this dual-level of satisfaction is a good protection measure, we consider the key challenge associated with the proposal to introduce the Code of Practice is ensuring adequate review and consideration of the circumstances where the Code of Practice is proposed to be relied upon in order to ensure:

- the Code of Practice standards are not being used where the standards are inadequate to address the risks; and/or
- risks that are not covered by the Code of Practice are still being adequately considered and captured in a case-specific risk management plan.

The consultation outline for the proposed Code of Practice sets out examples of how the Code is proposed to work and poses specific questions for feedback as part of the consultation process. Given the specific and technical nature of both the possible hazard scenarios and also the performance standards specified in the consultation outline, we request that Council be included in the development of this Code, or at a minimum, be further consulted prior to the Code being finalised.

3. Rehabilitation Plan Requirements

The Current Regulations require a work plan to contain a rehabilitation plan that:

- (a) *addresses concepts for the end utilisation of the mine site; and*
- (b) *includes proposals for the progressive rehabilitation, stabilisation and revegetation of extraction areas, waste disposal areas, stockpile areas, dams and other land affected by the operation; and*
- (c) *includes proposals for landscaping to minimise the visual impact of the mine site; and*
- (d) *includes proposals for the final rehabilitation and closure of the site, including the security of the site and the removal of plant and equipment, taking into account any potential long-term degradation of the environment.*

(Schedule 14, Part 1, 5.1 of Current Regulations)

The RIS notes that these requirements are vague and were subject to criticism in the Hazelwood Mine Fire Inquiry, particularly in relation to the lack of clarity around what the scope and criteria for progressive rehabilitation should be.

The Draft Regulations seek to address some of the recommendations from the Hazelwood Mine Fire Inquiry by providing greater clarity about the rehabilitation requirements. In particular, the Draft Regulations introduce much more extensive and clear standards for what must be included in a rehabilitation plan, including rehabilitation objectives, progressive rehabilitation milestones and completion criteria which will enable more comprehensive monitoring and assessment of the rehabilitation activities.

The requirements for a rehabilitation plan under the Draft Regulations are:

- (a) *proposed land uses for the affected land after it has been rehabilitated, that considers community views expressed during consultation; and*
- (b) *a land form that will be achieved to complete rehabilitation, which must—*
 - (i) *be safe, stable and sustainable; and*

- (ii) *be capable of supporting the proposed land use referred to in paragraph (a); and*
- (c) *objectives that set out distinct domains that collectively amount to the land form described in paragraph (b);*
- (d) *criteria for measuring whether the objectives described in paragraph (c) have been met; and*
- (e) *a description of, and timing schedule for, rehabilitation milestones; and*
- (f) *an identification and assessment of risks that the rehabilitated land may pose to the environment, to any member of the public or to land, property or infrastructure in the vicinity of the rehabilitated land that will require monitoring, maintenance, treatment or other ongoing land management activities after completion of the work and rehabilitation under the licence, including—*
 - (i) *the type, likelihood and consequence of the risks; and*
 - (ii) *the activities required to manage those risks; and*
 - (iii) *the projected costs to manage the risks; and*
 - (iv) *any other matter that may be relevant to risks arising from the rehabilitated land.*

The RIS notes that these requirements are proposed to be supported by a Ministerial Guideline which provides additional guidance to industry on compliance. They also set out in more detail the basis for the Minister or their delegate to approve or reject a rehabilitation plan and to ultimately certify if rehabilitation is complete.

It is intended that licensees will be empowered to set their own rehabilitation objectives and completion criteria, but they must meet the prescribed outcome of a *safe, stable and sustainable land form*. Supporting guidelines are also proposed to assist with this task and the proposed objectives and completion criteria will also be subject to the approval via the work plan approval processes under the Act (which includes the review of the work plan by referral authorities such as Council as part of the statutory endorsement process).

The requirements to include ‘rehabilitation milestones’, including a timing schedule for delivery will enable meaningful monitoring and assessment of rehabilitation works being undertaken during the life of the mine. This is considered to be a necessary inclusion, given the demonstrated inadequacies of current reactionary effort to resolve present mine void rehabilitation within Latrobe City.

The introduction of a requirement to identify any post-closure risks and obligations associated with ongoing land management activities (e.g. monitoring and maintenance) will help ensure that there is a better consideration and understanding of the long-term risks and costs post closure which, in turn, is hoped to:

- inform decisions on appropriate rehabilitation objectives and completion criteria; and
- help inform the Government of the long-term implications of approving the works and rehabilitation plan.

However, the RIS also notes that licensees would not be responsible for delivering these ongoing land management responsibilities under the Act and instead responsibility for this delivery would

depend on the specific land tenure arrangements which do not form part of the RIS. What this means in practice is that the inclusion of the post-closure risks and obligations within the rehabilitation plan is really for 'information only', and will not be able to be enforced against the licence holder under the Act.

This may enable sale of land assets (and associated liability) to a third party who may, have limited capacity to undertake ongoing land management responsibilities. This is a significant matter to which Council considers necessary to correct as part of future revisions to the Act.

4. Licence advertising/notice requirements

Under the Current Regulations, exploration, retention, mining and prospecting licence applicants are required to advertise the licence application:

- in a Wednesday edition of a newspaper circulating generally in Victoria;
- in a newspaper circulating in each location of the licence application area (i.e. a local newspaper); and
- on an internet site maintained by the applicant for at least 21 days after the newspaper advertisements – or, if an internet site is not available – by including the information in a notice or by another method approved by the Department Head on application from the applicant.

The Draft Regulations propose to introduce greater flexibility to advertising requirements. They propose to provide licence applicants the choice between the current advertising requirements specified above or an alternative method approved by the Department Head in a guideline published in the Government Gazette. The RIS noted that these guidelines would contain a list of alternative media (such as social media and radio) and specify necessary characteristics. The guidelines would also be able to be updated with greater frequency than the Regulations as information technology. Council provides the following observations in relation to the above:

- as the proposed guidelines have not yet been established it is not possible to comment on their adequacy. Council may also wish to request that they are consulted in relation to any proposed guidelines before they are finalised; and
- consideration of a transition period where the use of alternative media still also requires advertising in at least one newspaper.

As a final consideration regarding advertising, Council is aware that the Act currently makes it clear that the onus is on the applicant to advertise the application. As a result, the RIS notes that this limits the ability for the Government to support greater community awareness and participation through providing a platform for advertising or placing advertising itself.

Whilst it is understood that the scope of the Draft Regulations does not consider introduction of changes to Government responsibilities for advertising, this position is something that Council suggests would be a valuable addition, whereby a centralised platform for the advertising of mining licence applications and variations would be introduced.

Regardless, Latrobe City Council (and community) should be made aware and have access to mine licence applications and variations. Awareness of possible and likely implications of any changes to mining licences and/or resource mining activity. This awareness would enable Latrobe City Council to respond and plan for changes on the surrounding land use.

5. Reporting requirements

The Current Regulations require licensees to provide information to DJPR about their operations, expenditure, risk and compliance. The RIS identifies a number of shortfalls with the current approach including:

- reporting on rehabilitation activities in the expenditure and activities return is limited by a narrow definition of “rehabilitated” which does not align with all of rehabilitation obligations under the Act in their totality. Not only does this potentially create regulatory confusing but it also does not support informed decision making regarding changes to rehabilitation liabilities and bonds;
- the reporting requirements are currently spread across the Regulations and schedules making it unduly complex to identify each of the requirements; and
- the large volume of reports being made in the June quarter each year.

To address these issues, the Draft Regulations propose:

- to remove the narrow definition of ‘rehabilitated’ and update the reporting requirements on rehabilitation to include:
 - (a) reporting on rehabilitation (including progressive rehabilitation) that specifies progress towards achieving the rehabilitation milestones; and
 - (b) an estimation of the net change in rehabilitation liability from the previous reporting period (the balance of new land disturbance because of mining or prospecting and progressive rehabilitation).
- to incorporate all of the reporting requirements into the body of the regulations to reduce duplication and assist readability; and
- to require reports for exploration and retention licences granted after 1 July 2019 to be submitted on the anniversary of the date the licence was granted in order to smooth out the receipt of reports throughout the year.

The amendments to the rehabilitation reporting requirements are considered to be substantive and significantly improve the level of information that DJPR will receive on rehabilitation requirements which in turn should help DJPR improve its monitoring, oversight and compliance role in relation to rehabilitation.

Section 116 of the Act currently provides that information provided to the Minister by licensees can be made publicly available:

- *at any time after the licence ceases to be in force; or*
- *if the licensee consents to the Minister doing so; or*
- *if the licensee refuses consent, but the Minister is satisfied that the licensee is acting unreasonably in refusing to consent and that it is in the public interest that the information should be released while the licence is still in force.*

Whilst strictly outside the scope of the Draft Regulations, Council request that certain information, particularly in relation to progress on rehabilitation should be made publicly available in a broader range of circumstances. It is expected that this would support greater compliance license conditions for rehabilitation whilst lowering overall risk and associated liabilities.

6. Infringements

The Draft Regulations introduce a small number of additional infringements offences. Each of the new infringement offences are each existing offences under the Act or Regulations so the impact of the amendment is limited to broadening the type of enforcement action that can be taken in relation to these offences by enabling an infringement notice to be issued rather than requiring proceedings to be commenced.

The RIS notes that the Infringements System Oversight Unit within the Department of Justice and Community Safety have reviewed the infringements and penalties proposed under the Draft Regulations and consider them to be suitable.

CONCLUSION

As stated within this submission, Council considers that the majority of proposed changes to be reasonable and beneficial, in the sense that they clarify and streamline a number of requirements as well as introduce sensible improvements, particularly in relation to rehabilitation requirements.

However, a lot of the key detail around how these changes will operate in practice is proposed to be contained in guidelines or in the context of the risk management plan, a Code of Practice, which have not yet been completed.

As a result, it is apt to use the adage that *'the devil is in the detail'* and at present this detail is unknown. Council therefore seeks to ensure that further consultation opportunities are provided, particularly in relation to the Code of Practice, once it and other guidelines have been developed. Council also request opportunities to participate in the planned revision to the Act in the interest of Local Government regulatory responsibilities and potential implications to community and environment.

Putting aside the need for forthcoming details, Council does not consider that the changes materially alter the general risk profile for Council and its community associated with mining activities within the municipality. Suggested changes to the regulations outlined by this submission are considered to result in further improvements to what is proposed.