

**SUBMISSION**

**MINING SEPP AMENDMENT  
(RESOURCE SIGNIFICANCE)  
2013**

August 2013

**NSW MINERALS COUNCIL**



## **About the NSW Minerals Council**

The NSW Minerals Council is the peak body representing the state's \$24.5 billion mining industry.

NSWMC provides a single, united voice on behalf of our 100 member companies: 40 full members (producers and explorers), 25 associate members (junior explorers) and 35 associate members (service providers) and works closely with government, industry groups, stakeholders and the community to foster a dynamic, efficient and sustainable minerals industry in NSW.



## Executive Summary

The NSW Minerals Council (NSWMC) strongly supports the intent of the *Mining State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013* (Mining SEPP amendments). While the changes are only a modest improvement to the current problems within the NSW planning system, they will reduce some of the uncertainty that currently exists for mining projects. However, further changes are required to ensure that the amendments deliver on their intent to “restore investor confidence”<sup>1</sup>.

Confidence in the NSW mining industry is being undermined by difficult economic conditions and increasing uncertainty in the planning framework for mining projects. This is demonstrated by NSW’s successive falls in the Fraser Institute survey rankings of investor confidence over the last two years<sup>2</sup>.

As highlighted in NSWMC’s multiple submissions to the Planning System Review, the NSW planning system is plagued by uncertainty and delays. Regular changes to the planning framework over the last two years have added further regulation and complexity for the proponents of mining projects in NSW. The Planning Assessment Commission and the Land and Environment Court’s departure from existing government policy has left proponents in doubt.

The Planning System Review White Paper has not addressed any of the minerals industry’s substantive concerns, representing a lost opportunity to provide much needed improvements to the efficiency and certainty of the approvals process. It is critical that the government acts to provide certainty to the industry.

The intent of the Mining SEPP amendments to make the economic significance of resources the ‘principal consideration’ for decision makers is strongly supported by the minerals industry and aligns with the views of the broader community in NSW. Recent research conducted by ReachTEL<sup>3</sup> shows that 78 percent of the 1,700 respondents believed that jobs should be the ‘highest priority’ or a ‘high priority’ when major projects like mines are assessed.

The proposals to ensure more consistent application of the government’s existing assessment criteria relating to air quality, noise, blasting and aquifer interference are a reasonable and logical approach to provide greater certainty to all stakeholders regarding the assessment of mining projects.

However, NSWMC does not believe the amendments in their current form will deliver the government’s intended changes. We have made constructive recommendations that we believe are critical to ensure the proposed amendments successfully guide decision making. These include:

- Ensuring that the economic significance of a project is the principal consideration not only in relation to the matters in Part 3 of the Mining SEPP, but also in relation the broader matters for consideration by decision makers under the EP&A Act.
- Extending the amendments to be compulsory considerations for decision makers on outstanding Part 3A applications and to modifications under both s75W and s96 of the EP&A Act.
- Improving the drafting of the non-discretionary development standards to ensure they are clear and consistent with other aspects of the Mining SEPP.

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<sup>1</sup> Minister Hartcher media release, “Improving certainty for community and investors in mine proposals”, 29 July 2013

<sup>2</sup> Fraser Institute, Survey of Mining Companies 2012-13, February 2013

<sup>3</sup> NSW Minerals Council media release, “Research shows mining jobs priority supported by communities”, 2 August 2013

- Adding a further non-discretionary development standard stating that where the Office of Environment and Heritage certifies the adequacy of biodiversity offset and mitigation measures, consent cannot be refused on those grounds.
- Clarifying that the use of the BioBanking methodology is not a prerequisite for obtaining certification from the Office of Environment and Heritage about the adequacy of biodiversity mitigation and offset measures.
- Modifying the proposed new aim of the policy to “*promote and support the development of significant mineral resources*”, to reinforce the importance of the minerals industry.
- Modifying the definition of “private dwelling” to exclude residential accommodation owned by a company or related entity that owns or undertakes mining, petroleum production or prospecting activities.



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## Introduction

### The mining industry makes a vital contribution to communities throughout NSW

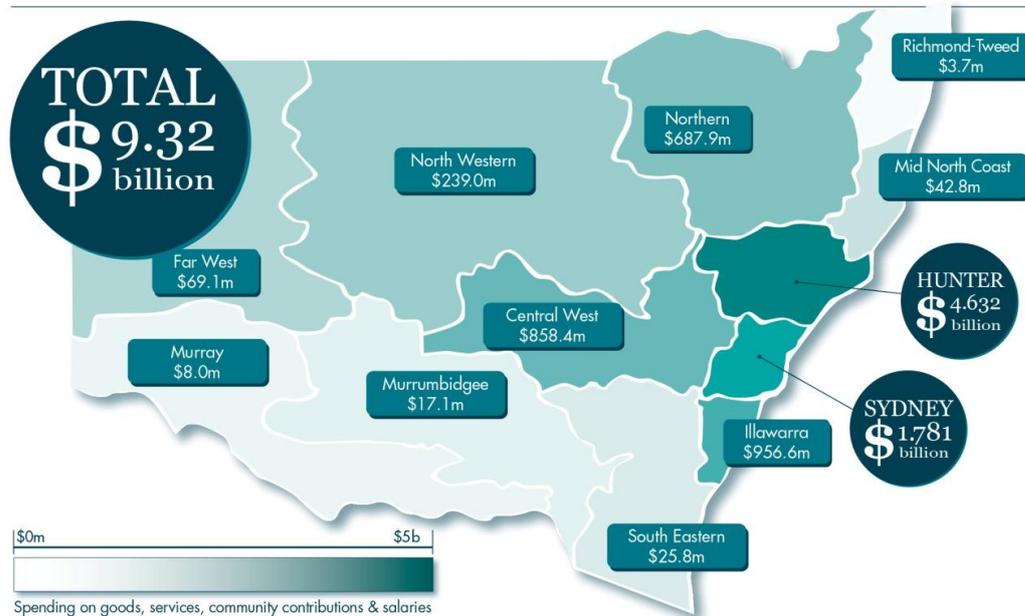
Mining is a strategic industry for NSW that underpins regional economies across the state, such as the Hunter Valley, Central West and the Illawarra.

The mining industry supports regional communities in terms of both the jobs provided to direct employees and the money spent on contractors, suppliers and community organisations, many of which are locally based.

The industry employs 44,625 people directly and the employment of thousands more is dependent on a strong mining industry<sup>4</sup>. In 2011/12 the industry directly spent \$9.3 billion on wages, contractors and suppliers, and community contributions across NSW<sup>5</sup>.

But this significant economic contribution is not immune to external pressure. Over the last 12 months thousands of jobs have been shed at NSW mines and associated businesses and there are many more at risk. While the industry is feeling the effects of the downturn in global economic conditions, the threats to some jobs are directly attributable to the planning framework<sup>6</sup> and uncertainty surrounding the planning framework is affecting the confidence of companies to invest in mining projects in NSW.

## 2011-2012 New South Wales Economic contribution of companies surveyed



<sup>4</sup> ABS, Labour Force, Cat. 6291.0.55.003, May 2013

<sup>5</sup> NSW Minerals Council, NSW Mining Economic Impact Assessment 2011/12

<sup>6</sup> Lithgow City Council Media Release, 17 July 2013

[http://www.council.lithgow.com/media/2013/130718\\_supportCoalpac.html](http://www.council.lithgow.com/media/2013/130718_supportCoalpac.html)

## Investor confidence in the NSW mining sector is falling

Confidence in the NSW mining sector has decreased significantly over the last two years. A recent survey found that NSW ranked 44<sup>th</sup> in a ranking of global mining jurisdictions, down from 32<sup>nd</sup> in 2011/12 and 20<sup>th</sup> in 2010/11. NSW was previously at or above average relative to other Australian jurisdictions, but now ranks the lowest in Australia with the exception of Tasmania.<sup>7</sup>

**Table 1 – Investor confidence in Australian States - Survey of Mining Companies 2012-13**

	2008/9	2009/10	2010/11	2011/12	2012/13
WA	21	19	17	12	15
Qld	25	24	38	28	32
NSW	<b>23</b>	<b>20</b>	<b>20</b>	<b>32</b>	<b>44</b>
SA	16	10	11	19	20
NT	20	14	27	11	22
VIC	29	30	31	44	24
Tasmania	31	23	28	30	49
Australia (Av)	<b>23.57</b>	<b>20.00</b>	<b>24.57</b>	<b>25.14</b>	<b>29.43</b>

In line with the fall in investor confidence, the last two years have seen an extremely unstable regulatory framework for the mining industry in NSW, with regular changes at both the state and commonwealth levels creating further regulation and complexity. Some of the changes that have occurred include:

- The repealing of Part 3A.
- The introduction of the 'interim' State Significant Development process.
- The ongoing Planning System Review, which will lead to yet another assessment process for mines.
- The delegation of decision making to the Planning Assessment Commission.
- The development of Strategic Regional Land Use Plans and the introduction of the proposed 'gateway process'.
- The introduction of a requirement for Agricultural Impact Statements.
- The introduction of the Aquifer Interference Policy.
- The establishment of the Commonwealth Independent Expert Scientific Committee.
- The introduction of the 'water trigger' under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

This continual increase in the regulatory requirements for NSW mining projects is not conducive to attracting investment and has generated much uncertainty for mine proponents.

Further, concerns about a lack of clear assessment policy, which have been raised for several years, have become startlingly evident as the Planning Assessment Commission and Land and Environment

<sup>7</sup> Fraser Institute, Survey of Mining Companies 2012-13, February 2013. Policy potential index ranking. A total of 96 global jurisdictions were assessed in 2012-13

Courts have made decisions contradicting the Department of Planning and Infrastructure's recommendations, departing from established government policy and practice.

Proposals under the Planning System Review have not addressed the minerals industry's concerns, representing a lost opportunity to provide much needed improvements to the efficiency and certainty of the approvals process.

### **The NSW Government must act to begin restoring confidence in the planning system**

It is critical that the NSW Government takes action to restore confidence in the planning framework and provide proponents with some certainty, particularly in the current economic environment.

NSWMC strongly supports the intent of the Mining SEPP amendments. The amendments aim to recognise the importance of mineral resources to the state, while ensuring that the government's existing environmental policy in relation to issues such as air quality and noise are applied consistently by decision makers.

However, NSWMC believes that changes are required to ensure the proposed amendments deliver on the government's intention to "improve investor confidence"<sup>8</sup>. The following section outlines constructive recommendations as to how the Mining SEPP amendments can be improved.

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<sup>8</sup> Minister Hartcher Media Release, "Improving certainty for community and investors in mine proposals", 29 July 2013

## Recommended improvements to the Mining SEPP amendments

### **Make the significance of the resource the principal consideration in respect of all matters the decision-maker considers**

NSWMC fully supports the concept of having the “significance of resource” the “principal consideration” for a decision maker. However, as currently drafted, the effect of the proposed provision on the overall decisions on mining projects is questionable, and may not deliver the government’s intended outcomes.

Under the proposed provision, the significance of the resource is the principal consideration only in relation to the matters listed under Part 3 of the Mining SEPP. There are several other factors that the decision maker considers that do not fall within Part 3 of the Mining SEPP, such as the matters outlined in other environmental planning instruments (s79C(1)(a)(i) of the EP&A Act).

If the proposed amendments are to have the government’s intended effect, changes to the drafting are required to ensure that the significance of the resource is the principal consideration in respect of all relevant matters for consideration by a decision-maker. Our recommended changes are outlined below.

#### **12AA Significance of resource**

...

(3) In determining whether to grant consent to an application for consent for development for the purposes of mining the proposed development, the consideration of the significance of the resource, as required by subclause (1), is to be the consent authority’s principal consideration ~~under this Part~~.

(4) Accordingly, the weight to be given by the consent authority to any other matter for consideration ~~under this Part~~ is to be proportionate to the importance of that other matter in comparison with the significance of the resource.

### **Extend the proposed amendments to apply to Part 3A applications and to modifications**

A consent authority will only be required to apply the proposed provisions in relation to development consent decisions under Part 4 of the EP&A Act (e.g. a new development application for a mining project that is State Significant Development).

However, the proposed provisions will not necessarily be applied to decisions made in relation to:

- (i) An application to modify a development consent under section 96.
- (ii) Project approval applications under Part 3A ‘still in the system’ because they were made but not finally determined before the repeal of Part 3A.
- (iii) Applications to modify a Part 3A approval (or a relevant Part 4 development consent) under section 75W.

These exceptions are because:

- The terms of the proposed provisions limit their application to Part 4 development applications, and have no role to play in the determination of section 96 modification applications.

- Under Part 3A the Minister (or PAC as his delegate) may (but is not obliged to) consider the provisions of any environmental planning instrument which, because of section 75R of the EP&A Act, do not apply to the project (section 75J(3)). For example, the Land and Environment Court has previously decided that clauses 12 and 14 of the Mining SEPP were not relevant considerations in the assessment of a project<sup>9</sup>.

This inconsistent application of the proposed changes adds to an already complex planning framework for mining projects, with varying assessment rules applying to different projects. To ensure consistent policy and decision making, NSWMC believes it is critical that amendments are made to broaden the application of the new provisions.

At the very least, NSWMC believes that changes should be made to ensure that the proposed provisions apply to Part 3A projects. This would require a combination of:

- Amending Schedule 6A of the EP&A Act (which deals with the transitional arrangements in relation to the repeal of Part 3A) to modify how SEPPs apply to the determination of Part 3A applications *only in respect of the Mining SEPP*.
- Inserting appropriate wording in clauses 12AA and 12AB of the Mining SEPP amendments so that they also apply to Part 3A applications.

Due to the combined operation of Part 1 in Schedule 6 and clause 10 in Schedule 6A of the EP&A Act, the amendments to Schedule 6A can be achieved through the making of regulations.

To ensure the provisions apply to section 96 modifications, the amendments that would need to be made to clause 12AA are outlined below.

#### **12AA Significance of resource**

(1) In determining an application for consent for development for the purposes of mining, or an application to modify a consent for development for the purposes of mining, the consent authority must consider the significance of the resource that is the subject of the application, having regard to:

...

(3) In determining whether to grant consent to the proposed development, or whether to modify a consent for development for the purposes of mining, the significance of the resource is to be the consent authority's principal consideration under this Part.

...

#### **Improve the drafting of the non-discretionary development standards**

NSWMC supports the intent of the non-discretionary development standards. The standards provide certainty that where projects meet existing government assessment criteria they cannot be refused on the grounds to which the criteria relate. This is a reasonable and logical approach that provides certainty to all parties and encourages proponents to meet the standards.

We believe the non-discretionary development standards can be improved to:

- Ensure consistency with the drafting style adopted in the other provisions of the Mining SEPP.

<sup>9</sup> *Ironstone Community Action Group Inc v NSW Minister for Planning and Duralie Coal Pty Ltd* [2011] NSWLEC 195 at [29]

- Ensure that proposed mitigation, management and compensation measures are considered when assessing the against the standard.
- Clarify the meaning of "specific grounds" to ensure it is the overarching "impact area" that could not form the basis for a refusal of consent if the related standard has been complied with. This drafting style has been used in other SEPPs that specify non-discretionary development standards.

Our recommended changes to the drafting are outlined below.

#### **12AC Non-discretionary development standards for mining**

(1) The development standards set out in subclauses (2) to (7) this clause are identified as non-discretionary development standards for the purposes of section 79C of the Act in relation to an application for consent for development for the purposes of mining ~~the carrying out of development for the purposes of mining.~~

(2) If proposed development for the purposes of mining satisfies a development standard set out in this clause, the consent authority must not refuse consent to the development on any of the following grounds: the specific grounds to which the standard relates.

~~(3)-(a)~~ **Cumulative noise level:** If the development, taking into account the proposed mitigation, management and compensation measures, does not result in a cumulative amenity noise level greater than the acceptable noise levels, as determined in accordance with Table 2.1 of the Industrial Noise Policy, for residences that are private dwellings.

~~(4)-(b)~~ **Cumulative air quality level:** If the development, taking into account the proposed mitigation, management and compensation measures, does not result in a cumulative annual average level greater than 30 µg/m<sup>3</sup> of PM<sub>10</sub> for private dwellings.

~~(5)-(c)~~ **Airblast overpressure:** If an airblast overpressure caused by the development, taking into account the proposed mitigation, management and compensation measures, does not exceed:

- (a) 120 dB (Lin Peak) at any time, and
- (b) 115 dB (Lin Peak) for more than 5% of the total number of blasts over any period of 12 months, measured at any private dwelling or sensitive receiver.

~~(6)-(d)~~ **Ground vibration:** If ground vibration caused by the development, taking into account the proposed mitigation, management and compensation measures, does not exceed:

- (a) 10 mm/sec (peak particle velocity) at any time, and
- (b) 5 mm/sec (peak particle velocity) for more than 5% of the total number of blasts over any period of 12 months, measured at any private dwelling or sensitive receiver.

~~(7)-(e)~~ **Aquifer interference:** If any interference with an aquifer caused by the development, taking into account the proposed mitigation, management and compensation measures, does not exceed the respective water table, water pressure and water quality requirements specified in item 1 in columns 2, 3 and 4 of Table 1 of the Aquifer Interference Policy for each relevant water source listed in column 1 of that Table.

#### **Add biodiversity offset certification to the non-discretionary development standards**

Given that the Office of Environment and Heritage is the main agency with responsibility for biodiversity and offsets, it is detrimental to investor confidence if an offsets package agreed to with the Office of Environment and Heritage can subsequently be overturned by the consent authority.

NSWMC believes that where the Office of Environment and Heritage has certified the adequacy of a package to mitigate and offset impacts on biodiversity, this certification should be made a non-discretionary development standard.

### **Clarify that the use of the BioBanking methodology is not a prerequisite for certification of offsets**

NSWMC is concerned about what may be required to obtain ‘certification’ by the Office of Environment and Heritage under the proposed clause 14.

The BioBanking methodology is being reviewed and there are problems with it that are widely recognised. The BioBanking methodology has significant issues calculating appropriate offsets for mining projects and is used infrequently as a result.

NSWMC believes the Mining SEPP amendment should specify that use of the BioBanking methodology is not a prerequisite for obtaining certification of offset arrangements under the proposed clause 14.

### **Add the words “and support” to the proposed new aim of the policy**

NSWMC believes the proposed new aim of the policy should have the words “and support” added to reinforce the importance of the minerals industry. Without the support of the NSW Government to simplify planning processes, the mining sector will continue to suffer and contract, which will result in a significant impact on the NSW and Australian economy. The suggested amendment is outlined below.

#### **Clause 2 Aims of Policy**

...

(b1) to promote and support the development of significant mineral resources, and

...

### **Modify the definition of “private dwelling”**

The definition of “private dwelling” should be modified to account for situations where private dwellings are owned by entities related to a company operating a mine, as well as exploration activities. Our recommended change to the drafting is outlined below.

**“private dwelling** means residential accommodation owned by a person other than a public authority or a company or related entity that owns or undertakes mining, petroleum production or prospecting activities operating a mine.”

### **Develop clear a policy framework to support mining project assessments**

While it cannot be directly addressed in the Mining SEPP amendments, there is a need for the government to develop a clear policy framework to guide the assessment of mining projects and provide further certainty. Some of the areas that require clear policy include:

- Biodiversity offsetting standards
- Noise impacts
- Air quality impacts
- Visual and social impacts
- Economic impacts.