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NSWMC Submission on the EPA Draft Financial Assurance Policy

Introduction

NSWMC represents the State's mining and minerals processing industry and suppliers to the industry. We welcome the opportunity to contribute to the drafting of the EPA Financial Assurance Policy (the draft policy) and accompanying Guideline on Independent Assessment of Costs (draft guideline).

Responsibility to the environment, along with our care for the health and safety of our people, are our industry's highest priorities. The mining industry is one of the most highly regulated in NSW and there is already a unique scheme in place to provide financial assurance for the protection of the environment.

In determining how the final policy should apply to mining, if at all, the EPA should consider the thoroughness of environmental management of the sector including:

- The rigorous planning and approvals processes for operation, rehabilitation and closure of sites.
- The detailed calculations required by the Rehabilitation Cost Estimate to inform the rehabilitation security deposit obligations.
- Ongoing regulation of environmental management and compliance by numerous State and Commonwealth government agencies.
- Comprehensive post mining management, monitoring and reporting obligations that continue following execution of rehabilitation until all obligations related to the approved final land use are demonstrated to have been met and mining lease relinquishment is achieved.
- The strict processes relating to return of the rehabilitation security deposit.

It is important that the draft policy does not cause confusion among operators and regulators. On reading this draft policy and guidelines, NSWMC, our consultants and members have significant concerns that it could be used to require a form of post mining financial assurance. While the EPA have advised that this is not the Government's intention, it is concerning that this is not explicit within the draft policy.

This submission highlights issues with the draft policy and draft guidelines. The final policy must be clear on where it does and does not apply in relation to mining. This is necessary to avoid the Government's policy intention being misunderstood. The draft policy attempts to apply too widely. The EPA would be better to focus the policy on industries where there is a significant risk that environmental liabilities will not be met and that are not already required to provide financial assurance.

Draft Policy - Issue and Recommendations

Residual post mining risk

At a recent information session on the draft policy, EPA officials advised that the draft policy does not aim to provide financial assurance for environmental risks post mining. However, this is not clear from the draft policy. The EPA also advised that together with the Department of Planning, Industry and Environment (DPIE) they are considering how to address a 2017 Auditor General's report recommendation that post mining financial assurance be considered. This cross-industry policy is not the place to consider a highly specific industry issue.

There is no need for the Government to impose an additional system of post-mining financial assurance. The current system, which has been extensively overhauled since the Auditor General's investigations, is sufficiently robust to minimise risks to the environment post mining.

Under part 12A of the *Mining Act 1992* (the Mining Act) holders of mining authorities such as a mining lease can be required to provide a security deposit. In practice the Resources Regulator requires all mining operations to provide a security deposit equivalent to the costs of the rehabilitation of the operation. This financial assurance is regularly reviewed. The rehabilitation security is only fully discharged after the rehabilitation has been completed to a very high standard and the land and water are safe and stable.

The process of closure of a mine and relinquishment of a mining authority is extremely thorough. If there are ongoing environmental issues, the rehabilitation security will not be returned. In addition the mining industry is unique as section 240 of the Mining Act provides that the Minister can impose a direction requiring a previous holder of a mining authority to undertake rehabilitation, conserve the environment or address the risk of adverse impacts after the authorisation has ceased to be in force.

Recommendation 1

The final policy should explicitly state that it is not to be applied as a means of imposing financial assurance for any residual risk after the relinquishment of a mining authority.

If there is to be further consideration of the 2017 Auditor General's recommendations regarding mining rehabilitation, this should be done in consultation with the industry and not within this financial assurance framework.

Clarity on when the draft policy applies to mining operations

The draft policy states that the requirement for financial assurance should not duplicate the requirement to provide a rehabilitation security deposit under the Mining Act. However, it is unclear what activities would not be covered by the rehabilitation security bond.

The rehabilitation costs estimate that mining operations are required to prepare to calculate the rehabilitation security bond is detailed and thorough and includes detailed cost breakdowns for:

- Termination of services and demolition works
- Treatment and removal of contaminated materials
- Removal of infrastructure
- Landform establishment
- Land preparation and revegetation
- Water management
- Maintenance of rehabilitated areas

- Removal and disposal of radiation sources.

Table 2 in the draft policy sets out actions that might require financial assurance. Appendix 2 of the draft guideline sets out actions in each phase, the costs of which may need to be estimated. These actions should be covered with by the rehabilitation security bond.

The EPA should state explicitly what actions in relation to mining operations are not captured by the rehabilitation bond. NSWMC requested examples of actions during the operational phase of mining that would require financial assurance. The EPA staff NSWMC spoke to could not provide examples.

The EPA, with the Resources Regulator, should identify any actions that mining operations might undertake that could require financial assurance under the policy and would not be covered by the rehabilitation security bond. These actions should be explicitly stated in the policy to prevent confusion for operators and regulators. The industry should be consulted on the actions identified.

Where these actions are part of the day to day operation of the mine, there should not be a requirement for financial assurance as there is almost no risk that the mine will not meet those obligations, and the EPA already has wide ranging powers to compel compliance.

Recommendation 2

Given the unique position of the mining industry, the final policy should identify actions that are not covered by the rehabilitation security bond and would require financial assurance under the policy. The Resources Regulator and the mining industry should be consulted on the actions that are identified. Financial assurance should not be required in relation to actions that are part of the day to day operation of the mine.

Timing of financial assurance

The timing of a condition which requires financial assurance makes a significant difference to the eventual cost to the licensee of the financial assurance. Where this condition is anticipated but is not required at the time of an initial licence being granted, or even on later reviews, it should not be imposed until it becomes necessary.

For instance, if there are conditions for monitoring post closure that might be anticipated, which would require financial assurance, but closure is not for another twenty years, those conditions should be imposed, and financial assurance required at the surrender of the licence.

The draft policy is currently silent on the issue of timing.

Recommendation 3

The final policy should include information on when conditions requiring financial assurance should be imposed to ensure that resources are not unnecessarily tied up in financial assurance.

When financial assurance is required

The relevant legislation sets out when financial assurance can be required: the risk of environmental harm, the remediation work that may need to be carried out, the environmental record of the licence holder. There is no consideration of the capacity of the licence holder to meet future costs or any past record of having met the costs of remediation.

The legislation provides that the regulations may prescribe other considerations. The EPA should provide for a fuller assessment of the requirement to provide financial assurance. The current

assessment is a blunt instrument which will result in licensees who have the capacity to meet any costs, when and if they arise, unnecessarily committing resources to financial assurance.

Recommendation 4

The EPA should consider a fuller assessment of the need to impose financial assurance, which would include consideration of the capacity of the licensee to pay and the record of the licensee in meeting any obligations.

Risk assessment

The description of the low, medium and high levels of risk set out in Appendix 1 to the draft policy would result in most, if not all, mining operations being categorised as 'medium' or 'high' risk, despite the fact that the actions described in Appendix 1 would all be covered by the rehabilitation security bond.

Category B of Appendix 1 provides parameters relating to remediation to determine risk. The extent of remediation for mining projects will place most mining projects in the high-risk category on this analysis. This is despite the rehabilitation security bond already being in place.

Category C of Appendix 1 provides parameters relating to environmental performance. Long term non-compliance results in a high-risk rating. There is no consideration of whether long-term non-compliances are within the control of the licensee and whether there is any environmental impact.

One or more show cause notices in a period of 5 years will place an operator in the high-risk category. If a show cause notice has not led to further action by the EPA, then this should not be a measure of environmental risk.

Category C also provides that where a regulated party or its director have previously been convicted of an environmental offence that this will attract the high-risk rating. The lack of any timeframe means that there is no possibility of restoring your record. This example should be given an upper limit of within the last three years.

The mining industry is highly regulated. There should be a consideration in the risk assessment of the types of environmental management systems that the licensee has in place to manage and reduce risk to the environment.

Recommendation 5

The EPA should modify the draft policy to include a more robust decision-making framework/matrix to determine when financial assurance is required, including consideration of:

- Whether aspects of mining operations that may result in a site being categorised as "medium" or "high" risk are already addressed in the rehabilitation security deposit.
- The environmental management systems and practices that are in place.

The examples in Category C, Appendix 1 should be amended as follows:

- Show cause actions without further action by the EPA should not lead to a high-risk rating
- Long term non-compliance which is not within the control of the licensee and does not have any environmental impact should not result in a high-risk rating
- Environmental offences of the regulated party of its directors should only result in a high-risk rating where they have occurred in the last 3 years.

EPA should provide mining examples in Appendix 1, that articulate the nature of actions to be considered in decision making that are separate from obligations under the *Mining Act 1992* and already considered in the rehabilitation security bond calculation.

Procedural fairness

The draft policy contains wording and guidance that permits a high level of discretion by the EPA. For instance, although the draft policy sets out a risk-based criteria, the EPA still have an unfettered discretion to require financial assurance.

In accordance with s300 (1) of the *Protection of the Environment Act 1997* (POEO Act) the amount of a financial assurance is determined by the regulator. Unlike the provisions of the *Mining Act 1992* that grants lease holders the right to seek a Minister's Review of security deposit determinations, the POEO Act does not make provision for an appeals process other than to seek a decision from the NSW Land and Environment Court.

In addition, there is limited process provided in relation to the return of a financial assurance. The final policy should provide information on the process, documentation, timeframes and responsibilities involved in returning all or part of a financial assurance.

Recommendation 6

The final policy should include:

- The process that the EPA will follow to determine the requirement to impose a financial assurance
- The process that the EPA will follow to return all, or part of financial assurance provided
- A simple process for the review of EPA officer's decision to require financial assurance, or the amount of the assurance, which would be available before seeking redress from the Land and Environment Court.

Environmental insurance

The draft policy states that where there are unknown environmental liabilities that the EPA may require licence holders to obtain environmental insurance. This is not a current requirement with regard to the NSW mining industry. It would not be possible to insure against the unknown environmental risks. Section 240 of the Mining Act provides that directions can be made to ensure that environmental liabilities do not become the responsibility of the NSW Government.

Recommendation 7

The final policy should either remove reference to obtaining environmental insurance against unknown environmental liabilities, or exempt mining operations from this potential requirement.

Draft Guideline – Issues and Recommendations

Independent assessment by an auditor

The draft policy and draft guideline require licence holders to prepare an estimate of the financial assurance required and to have that assessment independently assessed by a registered auditor. Mining operators have substantial experience in preparing estimates of costs for rehabilitation security deposits.

The process proposed is unnecessarily duplicative and not likely to lead to better outcomes. In fact, the use of registered auditors is likely to lead to a range of different costs for similar activities, and to be more complex and expensive. In addition, there is no process in place for the licence holder to dispute the findings of the independent assessment.

The Government's own Rehabilitation Cost Estimate process for mining does not require any technical expert input and is not independently audited. The Rehabilitation Cost Estimates Tool (RCE Tool) provided by the Resources Regulator has been found to be a reliable and consistent way of estimating costs across the industry.

Most mining operations will have a cost estimate prepared by the appropriate technical experts using the RCE Tool and providing additional information where necessary.

The more appropriate, streamlined and consistent way for the EPA to manage financial assurance estimations would be to provide greater guidance on the costs of activities. While this will require a greater level of upfront work by government and input from industry, it will lead to a less onerous and more consistent approach in the long term. There will many activities and costs that will be consistent within and across industries. This is the approach that has been taken by the Resources Regulator to the calculation of the rehabilitation security bond.

Recommendation 8

The EPA should remove the requirement for independent assessment and instead:

- Provide greater guidance on the costs of the types of activities that would most frequently require financial assurance for licensees to apply
- Require licensees to use an appropriate expert(s) to prepare the estimate
- Provide for review of the estimates by appropriate EPA officers, who have expertise in the area of environmental liability/industry.

If the policy retains the requirement for independent assessment, the categories of appropriate expert should be widened to include independent auditors recognised by other professional certification bodies.

Trigger for the independent assessment of a revised cost estimate

The draft Guideline provides that a major change in the costs estimate will trigger the requirement for an independent assessment of costs. A major change occurs where there is an increase in costs of +/- 10% of more than $1 million.

It is common for changes to rehabilitation cost estimates for mining projects to exceed $1 million. There is no reason given for the upper limit of $1 million. A change in percentage terms would better reflect the scale of different operations in different industries covered by the policy.

Recommendation 9

Remove the upper limit of $1 million as a trigger for the requirement of independent assessment of revised costs.

Estimating costs

Appendix 1 sets out the different phases of an operation and the types of actions that may require costing as part of the requirement for financial assurance. Those actions identified are already captured for mining projects as part of the rehabilitation security bond.

Where actions in the operation phase are not covered by the rehabilitation security bond, financial assurance should not be required where they are part of the ongoing operation of the mine as these costs will be met by the licensee as and when they are required. The EPA has in place several options to enforce compliance with the EPL for ongoing operations.

Recommendation 10

The EPA should identify actions in Appendix 1 relevant to mining that are not captured by the rehabilitation security bond. This should be done in consultation with the Resources Regulator and the mining industry.