Environmental Protection Amendment Regulation (No. 2) 2014

Explanatory Notes for SL 2014 No. 134

made under the

Environmental Protection Act 1994

General Outline

Short title

Environmental Protection Amendment Regulation (No. 2) 2014

Authorising law

Section 580 of the *Environmental Protection Act 1994*

Policy objectives and the reasons for them

The objective of the *Environmental Protection Amendment Regulation (No. 2) 2014* (the Amendment Regulation) is to amend the *Environmental Protection Regulation 2008* to:

- avoid duplication of process following the introduction of Part 4A of the *State Development and Public Works Organisation Act 1971*;
- better enable the Department of Environment and Heritage Protection (the department) to fulfil its obligations to assess and approve projects under an *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* approval bilateral agreement;
- index fees by the approved Government indexation factor, which Queensland Treasury and Trade has advised to be 3.5% for 2014-15;
- improve levels of cost recovery in assessing and managing environmental authorities;
- encourage active rehabilitation to be undertaken by environmental authority holders;
- better align aggregate environmental scores (AESs) for dimension stone mining, clay pit mining and gemstone mining with their level of environmental risk;
- avoid duplication of fees following amendments to the *Sustainable Planning Regulation 2009*; and
- reduce red tape for development in particular areas of Queensland Heritage Places.

Achievement of policy objectives

The policy is to be achieved by:

- removing requirements to consider matters of national environmental significance (MNES) when making an environmental management decision where an environmental approval has been issued under the *State Development and Public Works Organisation Act 1971*;
- providing that MNES does not need to be considered at a State level unless it is required by an approval bilateral;
- increasing fees by applying the government indexation factor of 3.5% and rounding the indexed fees in accordance with the department's current rounding policy;
- increasing fees for certain environmental authority functions;
- providing for reduced annual fees for environmental authority holders for higher risk resource activities where the site is no longer active but in active rehabilitation;
- prescribing a lower AES for dimension stone mining, clay pit mining and gemstone mining;
- removing now redundant fees that apply for development approvals;
- increasing the fee for submitting an environmental impact statement (EIS) to provide for additional resources to cover the cost of assessing projects on behalf of the Australian Government; and
- amending the definition of 'category B environmentally sensitive area' so that it does not apply to development carried out in accordance with an exemption certificate under the *Queensland Heritage Act 1992*.

Consistency with policy objectives of authorising law

The Amendment Regulation is consistent with the object of the *Environmental Protection Act 1994*, which is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends *(ecologically sustainable development)*.

Inconsistency with policy objectives of other legislation

The Amendment Regulation is consistent with the policy objectives of other legislation.

Alternative ways of achieving policy objectives

There are no other viable alternatives that would achieve the policy objectives other than the Amendment Regulation.

Benefits and costs of implementation

These amendments will not add to the administrative cost of the Queensland Government.

The amendment to the *Environmental Protection Regulation 2008* to increase fees for certain environmental authority functions will increase costs for affected stakeholders. However, the

increased fees are necessary to achieve improved levels of cost recovery in relation to assessing environmental authority applications and managing environmental authorities once they are issued, while reducing the ongoing need to redirect departmental funds from other core business priorities. The immediate impact on stakeholders from the increase in the annual fee unit will be minimised by implementing it through a four year staged increase. Furthermore, by restricting the annual fee unit increase to higher risk resource activities, impacts on local governments and the community will be avoided for this component of the fee increase.

The amendment to the *Environmental Protection Regulation 2008* to increase the fee for submitting an EIS, when viewed in isolation, may be considered to have significant cost on affected stakeholders. However the change to a single assessment and approval process for projects subject to both State and Commonwealth environmental legislation will create significant benefits for project proponents. Project proponents will not need to obtain approval under two separate EIS processes and this is likely to result in cost savings and shorter project approval timeframes.

Consistency with fundamental legislative principles

Section 24(1)(i) of the *Legislative Standards Act 1992* was considered during the drafting of this regulation and this regulation is consistent with fundamental legislative principles (FLPs).

The insertion of the provision stating that MNES does not need to be considered at a State level unless it is required by an approval bilateral raises the FLP that legislation should not be retrospective if it adversely affects rights and liberties or imposes obligations, since it is taken to have commenced on 9 May 2014. However this retrospective provision does not adversely affect rights and liberties or impose obligations. It merely ensures that there is no duplication and overlap between the Federal approval of MNES and the State approval. The requirement to consider MNES was only inserted on 9 May 2014, so the period of retrospectivity is also small.

The provision that removes the requirement for the administering authority to consider MNES when making an environmental management decision where an environmental approval has been issued under the new Part 4A of the *State Development and Public Works Organisation Act 1971* also potentially raises the FLP that legislation should not be retrospective if it adversely affects rights and liberties or imposes obligations, since this provision commences on the commencement of the *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Act 2014*, part 3, division 2 which could potentially commence prior to 1 July 2014. However this retrospective provision does not adversely affect rights and liberties or impose obligations. It merely ensures that there is no duplication caused by the introduction of Part 4A of the *State Development and Public Works Organisation Act 1971*.

Consultation

Consultation has been undertaken with the Office of Best Practice Regulation in determining that the amendments were excluded from the requirement to undertake a Regulatory Impact Statement.

Notes on Provisions

Clause 1 Short title

This clause states that the short title of this regulation is the *Environmental Protection Amendment Regulation (No. 2) 2014*.

Clause 2 Commencement

This clause states that the regulation commences on 1 July 2014. Clause 4(1), however, is taken to have commenced on 9 May 2014 and clause 4(2) commences on the commencement of the *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Act 2013*, part 3, division 2.

Clause 3 Regulation amended

This clause states that this regulation amends the *Environmental Protection Regulation 2008*.

Clause 4 Amendment of s 51 (Matters to be complied with for environmental management decisions)

This clause amends section 51(1)(d) of the *Environmental Protection Regulation 2008* so that MNES does not need to be considered at a State level unless it is required by an approval bilateral agreement. The amendment will operate retrospectively, however it does not adversely affect rights and liberties or impose obligations. It merely ensures that there is no duplication and overlap between the Federal approval of MNES and the State approval. In addition, the requirement to consider MNES was only inserted on 9 May 2014, so the period of retrospectivity is also small. The amendment will better enable the department to fulfil its obligations to assess and approve projects under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

This clause also amends section 51 to remove the requirement for the administering authority to consider MNES when making an environmental management decision where an environmental approval has been issued under the new Part 4A of the *State Development and Public Works Organisation Act 1971*. Currently, the administering authority must consider MNES when making a decision about an environmental authority regardless of whether an environmental approval has been issued under the *State Development and Public Works Organisation Act 1971*.

The amendment avoids duplication of process caused by the introduction of Part 4A of the *State Development and Public Works Organisation Act 1971*. Since the *State Development and Public Works Organisation Act 1971* states that an environmental approval approving the undertaking of a coordinated project may only be issued under the new Part 4A if the Coordinator-General is satisfied the coordinated project is not likely to have a significant impact on an environmental matter protected by a provision of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), it is unnecessary for the administering authority under the *Environmental Protection Regulation 2008* to consider the MNES where an environmental approval has already been issued under the *State Development and Public*

Works Organisation Act 1971 for the same activity or activities the subject of the environmental authority application.

Clause 5 Amendment of s 120 (Annual fee for environmental authority)

This clause amends the fees in section 120 of the *Environmental Protection Regulation 2008* in order to index the fees by the approved Government indexation factor of 3.5% for 2014-15. The indexed fees are rounded in accordance with the department's current rounding policy.

This clause also amends the definition of *M* in section 120(3) of the *Environmental Protection Regulation 2008* to add a new paragraph that has the effect of increasing the annual fee unit payable by higher risk resource activities by 200%. Higher risk resource activities are considered to be those with an AES of 120 or greater. This will more adequately reflect the compliance effort involved in managing these higher risk activities but avoids impacts on local governments and the community as it will not increase the annual fee for 'prescribed ERAs' (which covers activities such as sewage treatment services, quarries and metal smelters). By excluding prescribed ERAs, the fee increase is proportionate to risk and effort and affects companies with a higher capacity to absorb the cost.

To minimise the immediate impact on business, the increase in annual fees for higher risk resource activities is provided for through a four year staged fee increase, with an increase of 50% of the 2014-15 fee per year. Since regulatory fees are subject to indexation annually, it is likely that each of the staged fee units will continue to increase each year in line with the approved Government indexation factor (as applicable). This means that the annual fee prescribed as payable during the 2015-16 period would be increased to reflect the 2015-16 indexation factor, the annual fee prescribed as payable during the 2016-17 period would be increased to reflect the 2015-16 and the 2016-17 indexation factor, and the annual fee payable for the 2017-18 period would be increased to reflect the 2015-16, 2016-17 and the 2017-18 indexation factor. This will ensure that indexation has its intended compounding effect. However, it should be noted that any indexation changes to the fees would occur through later Amendment Regulations and be subject to government approval at that time. The indexation rate for future years is not yet known.

The amendment to the definition of *M* in the new paragraph (b) of section 120(3) applies only to resource activities. Resource activities are listed in schedule 2A. Schedule 2 is however relevant to the new paragraph due to the operation of section 14(3)-(4) of the *Environmental Protection Regulation 2008*. Schedule 2 will only be relevant to the calculation of the annual fee under section 120 if section 14(3)-(4) applies. Section 14(3)-(4) operates so that a resource activity may have an AES of 120 or more because of an included schedule 2 activity. If the AES prescribed in schedule 2A for the resource activity is less than 120, but there is an included schedule 2 activity with an AES of 120 or more, the AES for the resource activity is the AES for the included schedule 2 activity, and the new paragraph (b) of section 120(3) will be used to calculate the annual fee payable.

Clause 6 Amendment of s 126 (Eligibility for payment of a reduced annual fee)

This clause amends section 126 of the *Environmental Protection Regulation 2008* in order to extend the provision to holders of environmental authorities for higher risk resource activities relating to a mining lease or petroleum lease that are actively undertaking activities to

rehabilitate or remediate the land the subject of the environmental authority. The amendment makes such holders eligible for a reduced annual fee provided that all extractive activities have ceased, there is no intention to resume extractive activities in the future and rehabilitation works have already commenced. This provides an incentive to holders of an environmental authority for higher risk resource activities relating to a mining lease or petroleum lease to rehabilitate or remediate environmental harm. By requiring the holder to provide a statutory declaration certifying that they have no intention to recommence extraction, the amendment is intended to exclude activities in a 'care and maintenance' phase. The reduced annual fee does not apply to environmental authority holders that have not commenced extractive activities. It also does not apply to holders that have not yet started extraction for commercial purposes and are only conducting minimal extraction for activities such as testing.

The reduced annual fee applies only to holders of an environmental authority for a resource activity for which the AES stated for the activity in the section under schedule 2 or 2A applying to the activity is 120 or more. As a result of amendments to section 120 of the *Environmental Protection Regulation 2008*, such holders are required to pay higher annual fees. The amendment to section 126 is consequential to the section 120 amendment and reduces the impact of these higher annual fees where only rehabilitation works are being carried out by the holder. As above, schedule 2 will only be relevant to the eligibility for payment of a reduced annual fee under section 126 if section 14(3)-(4) applies.

The definition of *disqualifying event* in section 126 is also amended to include the circumstances applicable for the new reduced annual fee. If the holder recommences extraction activities or the holder ceases rehabilitation, without completing the required rehabilitation, the holder will not be eligible for the reduced annual fee.

Clause 7 Amendment of s 127 (What is the reduced annual fee)

This clause amends section 127 of the *Environmental Protection Regulation 2008* to define the reduced annual fee where the holder of an environmental authority is eligible under section 126 as the holder of an environmental authority for a higher risk resource activity that is engaged in active rehabilitation. This amendment is necessary as a result of the amendment to section 126 that makes such holders eligible for a reduced annual fee. The reduced annual fee for this new category of eligibility is prescribed as a 50% reduction. Section 127 provides for a maximum reduction of 50% and a holder will be eligible for this maximum reduction either by meeting the criteria for the new category or meeting the criteria for all three of the existing categories.

Clause 8 Insertion of new ss 135 and 136

This clause inserts two new sections in the *Environmental Protection Regulation 2008* which are required as a result of changes to the major amendment application fee in schedule 10. Schedule 10 now prescribes the major amendment application fee as a set fee plus 30% of the annual fee for the environmental authority. Where an existing environmental authority holder makes a major amendment application for the environmental authority, the amendment applied for may result in the activity the subject of the environmental authority having an AES that is higher or lower than the AES the activity had before the amendment was approved. When making the major amendment application however the fee payable for the

application is calculated by reference to the AES for the environmental authority the subject of the application (i.e. without the amendment). Under section 120(3), when the AES is 120 or more, a higher annual fee is payable for particular resource activities. Thus, where the amendment results in an AES change that means that under section 120(3), either a higher or lower annual fee would be payable, a shortfall or refund will be payable. For example, if a person with an environmental authority for a resource activity that has an AES of 97 applies for a major amendment that, once approved, would result in an AES that is 120 or more, schedule 10 requires the amendment application fee to be calculated by reference to the definition of *M* in section 120(3)(c). Yet if the amendment application fee was calculated on the basis that the amendment had been approved, the fee would be higher because section 120(3)(b) would apply. Section 135 therefore requires the applicant to make an extra payment if the amendment is approved. Similarly, if a person with an environmental authority for a resource activity that has an AES of 160 applies for a major amendment that once approved would result in an AES that is lower than 120, schedule 10 requires the amendment application fee to be calculated by reference to section 120(3)(b). If the amendment application fee was calculated on the basis that the environmental authority had been approved however the fee would be less because it would be calculated by reference to section 120(3)(c). Section 136 therefore provides that the administering authority must refund this overpayment if the amendment is approved.

Clause 9 Amendment of s 138 (Fee for anniversary changeover application)

This clause amends the fee in section 138 of the *Environmental Protection Regulation 2008* in order to index the fee by the approved Government indexation factor of 3.5% for 2014-15. The indexed fees are rounded in accordance with the department's current rounding policy.

Clause 10 Amendment of sch 2A (Aggregate environmental scores for particular resource activities)

This clause adds an item to schedule 2A of the *Environmental Protection Regulation 2008* in order to prescribe a lower AES for dimension stone mining, clay pit mining and gemstone mining to make the AES more consistent with the level of environmental risk associated with such mining activities. Dimension stone mining, clay pit mining and gemstone mining currently fall into the 'other mines' category with an AES of 136. This is not an accurate reflection of the environmental risk associated with such mining activities. Operational experience indicates that such mining activities have a lower impact than those in items 11 to 18 of schedule 2A.

Clause 11 Replacement of sch 10 (Fees)

This clause removes the fees in schedule 10 of the *Environmental Protection Regulation 2008* that apply for development approvals. Due to amendments to the *Sustainable Planning Regulation 2009*, these fees are now redundant.

This clause also amends the fees in schedule 10 in order to index the fees by the approved Government indexation factor of 3.5% for 2014-15. The indexed fees are rounded in accordance with the department's current rounding policy. Due to administrative reasons, the fees prescribed in schedule 10, part 1, item 2 (submitting an EIS) and schedule 10, part 2, item 5 (environmental authority application) and item 7 (environmental authority amendment application) are excluded from indexation for the 2014-15 financial year.

The fee for submitting an EIS in schedule 10, part 1, item 2 has been increased by $70,000. This fee increase is required as a result of the commitment between the Queensland and Australian Governments to secure an Approval Bilateral Agreement. Due to this agreement, the department will incur additional costs, since it will assume the responsibility to assess and approve projects under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth). Furthermore, without additional resources to cover the cost of assessing projects on behalf of the Australian Government, the department will take considerably more time to assess and approve environmentally sensitive projects. The fee increase will allow the department to obtain additional resources and expertise to ensure that it can fulfil its obligations under the Approval Bilateral Agreement whilst minimising project approval timeframes.

The fee for an application for an environmental authority in schedule 10, part 2, item 5 has been amended to provide for an increase for variation and site specific applications. The new fee of $570 plus 30% of the annual fee (as prescribed under section 120 of the *Environmental Protection Regulation 2008*) better reflects the increased complexity and time taken to assess applications by linking the application fee to the AES of an ERA. It moves the fee closer to cost recovery and better reflects the assessment effort required by the administering authority. The fee for a standard application remains unchanged.

The fee for an amendment application for an environmental authority in schedule 10, part 2, item 7 has been amended to increase the fee for a major amendment application. The new fee of $285.60 plus 30% of the annual fee (as prescribed under section 120 of the *Environmental Protection Regulation 2008*) better reflects the increased complexity and time taken to assess major amendment applications by linking the application fee to the AES of an ERA. It moves the fee closer to cost recovery and better reflects the assessment effort required by the administering authority. The fee for a minor amendment application remains unchanged.

Item 7(b) states that the '30% of the annual fee' component of the major amendment application fee is the annual fee for the environmental authority that is the subject of the application (i.e. the authority as it is currently, without the applied for amendment). Sections 135 and 136 however may require the applicant to make an additional payment for the amendment application, or the administering authority or refund an overpayment for the amendment application, if and when the amendment is approved.

Clause 11 Amendment of sch 12 (Dictionary)

This clause amends the definition of 'category B environmentally sensitive area' in schedule 12 of the *Environmental Protection Regulation 2008* in order to replace the words 'registered place' with 'Queensland Heritage Place'. This amendment aligns the language of the *Environmental Protection Regulation 2008* with the language used in the *Queensland Heritage Act 1992* which, following amendments passed under the *Environmental Protection and Other Legislation Amendment Act 2011*, now uses the words 'Queensland Heritage Place'.

The definition of 'category B environmentally sensitive area' is also amended to reduce red tape for miners operating in particular areas of a Queensland Heritage Place. Some of the declared boundaries for Queensland Heritage Places have been so broadly defined so as to include areas which do not have heritage values. Thus, mining operations in these areas

require a site-specific application for an environmental authority. The environmental risks posed by the operations, however, only support a standard or variation application. In order to allow for standard or variation applications, the amendment ensures that the definition of 'category B environmentally sensitive area' does not apply to development carried out in accordance with an exemption certificate under the *Queensland Heritage Act 1992*. Exemption certificates can be prepared under the *Queensland Heritage Act 1992* for areas that have no heritage values but are inside Queensland Heritage Place boundaries.