

Environmental Protection (Rehabilitation Reform) Amendment Regulation 2019

Explanatory notes for SL No. 198

made under the

Environmental Protection Act 1994

General Outline

Short title

Environmental Protection (Rehabilitation Reform) Amendment Regulation 2019

Authorising law

Sections 49, 126D, 136A, 176A, 194B, 316PC, 580 and 754 of the *Environmental Protection Act 1994*.

Policy objectives and the reasons for them

The *Environmental Protection (Rehabilitation Reform) Amendment Regulation 2019* (the Amendment Regulation) amends the *Environmental Protection Regulation 2019* (EP Regulation) to implement the rehabilitation reforms under the *Environmental Protection Act 1994* (EP Act) as amended by the *Mineral and Energy Resources (Financial Provisioning) Act 2018* (MERFP Act).

The policy objectives of the Amendment Regulation are to:

- support decisions under the EP Act in relation to Progressive Rehabilitation and Closure Plan (PRCP) schedules with relevant regulatory requirements
- support implementation of Public Interest Evaluations (PIE)
- set the date for commencement of the PRCP framework (PRCP start date) as 1 November 2019
- make a number of transitional provisions.

Support decisions under the EP Act in relation to PRCP schedules with relevant regulatory requirements

Section 176A of the EP Act lists the criteria for deciding a PRCP schedule and requires the administering authority to comply with any relevant regulatory requirement. The Amendment Regulation prescribes the regulatory requirements under that section and other sections

relevant to a PRCP schedule decision, and the regulatory requirements definition as they are necessary for the appropriate assessment of PRCPs.

Support implementation of Public Interest Evaluations

To support the PIE under the EP Act, the Amendment Regulation prescribes the experience and qualifications for a qualified entity to carry out the evaluation. The PIE process is integrated with the environmental authority, PRCP assessment, and the Environmental Impact Statement processes under the EP Act to evaluate whether a non-use management area is in the public interest.

PRCP start date

The EP Act includes provisions introduced by the MERFP Act that are triggered by a PRCP Start date. The Amendment Regulation includes a section which sets the PRCP start date as 1 November 2019.

Transitional provisions

The Amendment Regulation also has transitional provisions that:

- prescribe exceptional circumstances in which some areas will be considered to not be available for rehabilitation immediately on transition
- recognise existing approvals transitioning into the framework, with PRCP schedules assessed to avoid reconsideration of approved matters.

Achievement of policy objectives

Regulatory requirements for PRCP schedule decisions

For prescribing the regulatory requirements for PRCP decisions, some sections of the EP Regulation are amended and a number of others included.

Chapter 4 - Regulatory Requirements of the EP Regulation provides the regulatory requirements, processes and considerations for making *environmental management decisions* (i.e. decisions on certain environmental authority processes).

To prescribe regulatory requirements, including for carrying out a PRCP objective assessment, the Amendment Regulation:

- ensures Chapter 4 applies to decisions relating to PRCP schedules, including inserting a new definition in section 31 for *PRCP Schedule decisions* (clauses 4 to 7)
- inserts a new part (part 4) under Chapter 4 with the regulatory requirements for PRCP schedule decisions, including the requirement for the administering authority to carry out an objective assessment of a PRCP schedule (clause 8)
- inserts a new Schedule 8A for a PRCP objective assessment that includes the PRCP objectives and PRCP performance outcomes (clause 14)
- includes flood plain modelling requirements to ensure the administering authority is able to consistently and transparently determine whether a void is proposed as a non-use management area wholly or partially in a flood plain and, if it is in the flood plain,

approve or amend the PRCP schedule only if it provides for rehabilitation of the void to a stable condition (clause 8, section 41C)

New section 41B prescribes the requirements for PRCP schedule decisions and requires that the administering authority:

- carries out a PRCP objective assessment
- considers environmental values and relevant environmental protection policies (in assessing the PRCP schedule (including all post-mining land uses and non-use management areas) for the site.

Assessment of impacts from the operation of a project to environmental values will continue to be assessed under the regulatory requirements relevant to the environmental authority application. The administering authority may approve or amend the PRCP schedule only if each PRCP objective for the PRCP schedule is achieved under PRCP objective assessment.

PRCP Objective Assessment

PRCP objective assessment is detailed in new Schedule 8A (clause 14) and includes PRCP objectives and PRCP performance outcomes. These are designed to ensure that the final site design provides the best outcomes for the site, that the milestones and milestone criteria will deliver the post-mining land use or sufficient improvement of a non-use management area and that the sites will be rehabilitated or improved progressively over the life of the mine.

The PRCP objective assessment is to be carried out for making a PRCP schedule decision.

Part 1 defines terms used in the Schedule and Part 2 sets out requirements for carrying out PRCP objective assessments. Part 3 includes the PRCP objectives and PRCP outcomes that must be considered by the administering authority in making a PRCP schedule decision. The PRCP outcomes provide criteria on what the PRCP schedule must achieve in order to meet the PRCP objective. They are organised into tables and all tables must be considered in making a PRCP schedule decision.

The final site design assessment (table 1) requires the administering authority to consider the site as a whole, having regard to the post-mining land uses nominated by the applicant, and the number and size of non-use management areas proposed.

The intent of the PRCP objective for final site design is to ensure that all areas of land the subject of a PRCP schedule are included in the PRCP schedule as either a post-mining land use or a non-use management area.

For post-mining land uses, the outcome required is that the post-mining land use is firstly viable and secondly appropriate for the region based on whether there is a planning instrument which authorises the use, the use is permitted under relevant schemes by the planning authorities, the use is consistent with previous permitted use or it delivers better environmental outcomes (i.e. natural vegetation, conservation corridors). To clarify, a post-mining land use must be a use that is unrelated to mining. The intention of a post-mining land use is that mined land must be rehabilitated to a stable condition so it is able to support another use, for example water storage facility or native ecosystem habitat. Additionally, it is expected that where an area of land, the subject of a PRCP schedule, will not be disturbed, the post-mining land use for that area will be the current (existing) use or a better environmental outcome.

For non-use management areas, the intent is the areas are minimised to the extent possible, which includes, for example, minimising area, volume of materials and level and number or distinct areas. Each non-use management area is expected to be located to prevent or minimise environmental harm.

The post-mining land use assessment (table 2) is composed of two entries. The purpose of the first entry – Rehabilitation Milestones – is to ensure that rehabilitation milestones are suitable for achieving the post-mining land use and are supported by milestone criteria to deliver land back to a stable condition. One criterion requires the applicant to demonstrate the post-mining land use will be sustainable in the long-term. The purpose of the second entry – Progressive Rehabilitation – is to ensure that milestones are planned to be completed in a timeframe that maximises progressive rehabilitation throughout the life of the mine.

The non-use management area assessment (table 3) is broken up into two entries. The purpose of the first consideration – Management Milestones – is to ensure that management milestones are suitable for improvement of the non-use management area and are supported by milestone criteria. The intent is that the non-use management area is able to achieve sufficient improvement, having regard to the technical knowledge available when the PRCP objective assessment is carried out. The purpose of the second consideration – Progressive Improvement – is to ensure that management milestones are timed to maximise progressive improvement of the non-use management area.

Void situated wholly or partially in flood plain

New section 41C includes the regulatory requirement to decide whether a void is situated wholly or partially in a flood plain. This section is necessary to support the implementation of the Government's Mined Land Rehabilitation Policy not to approve residual voids in flood plains that are not rehabilitated to a stable post-mining land use.

Section 126D(3) of the EP Act states that if land subject of the proposed PRCP schedule will contain a void situated wholly or partly in a flood plain, the schedule must provide for rehabilitation of that land to a stable condition (post-mining land use).

In deciding whether land subject of a PRCP schedule will contain a void situated wholly or partly in a flood plain, section 41C states that the administering authority must consider the results of the flood plain modelling carried out for the land.

The section also states that a PRCP schedule that contains a void situated wholly or partly in a flood plain may only be amended or approved if it provides for rehabilitation of the land comprising the void to a stable condition. This requirement is necessary to support PRCP decisions under the EP Act.

Flood plain modelling sets parameters which must be used for mapping out the extent of a flood plain. The modelling results will be included in the PRCP schedule maps, ensuring that the administering authority and the community can clearly identify how excavated areas in a flood plain during operations will be rehabilitated to post mining land uses.

Section 41C sets out the modelling methodology, the streams and the features that must be included and excluded in modelling, and the applicable flood probability. The results of the flood plain modelling may be provided in a map or other forms accepted by the administering authority (i.e. report).

The modelling methodology to be carried out is that under the Australian Rainfall and Runoff (ARR) guideline published by the Commonwealth. The applicable probability is a 0.1% Annual Exceedance Probability (AEP).

The modelling must be carried out considering a relevant watercourse. Relevant watercourse is defined under section 41C and includes a stream, under the Strahler method, of a fourth-order or higher that is, if the watercourse will be permanently diverted, the location of the watercourse after the diversion.

The selection of fourth-order streams and above focuses on where most of the impact of a flood event is incurred as streams located at the top of a catchment are likely to only retain water from a flood event for a short amount of time. It is the intent that the modelling includes diversions that have been permanently approved to be in the land and will remain on the relevant land upon surrender.

The modelling using the ARR must exclude any artificial features. The definition of artificial feature is intended to cover features that will not be included for the flood plain modelling. The features include temporary structures, permanent structures that will require ongoing maintenance, and landform features and structures that are not natural and interfere with the relevant watercourse or alter the natural flow of water on the land.

The landform features that interfere with the natural flow of water have the potential to alter the extent of the flood plain. Excluding these features is considered necessary to deliver the intent of the Government's Mined Land Rehabilitation Policy that, where a void is created in a flood plain during operations, a residual void must not be approved that is not rehabilitated to a stable post-mining land use.

The results will outline the extent of the flood plain. If the results show that at a 0.1% AEP, then that land must be treated as flood plain. Voids in that area will be required to be rehabilitated to a stable condition (and will not be allowed to be proposed as a non-use management area).

PRCPs transitioning into the framework (those who have existing environmental authorities) will also be required to include the modelling and spatial data to show the flood plain extent on the existing site. If modelling already exists to the specifications in the flood plain definition, applicants are able to use this when developing the flood plain spatial data.

For these transitioning operations, where a land outcome document identifies a residual void in a flood plain, as a non-use management area, that non-use management area will still be able to be transitioned into the PRCP schedule. The PRCP schedule will be required to include management milestones for that area. If there are no Land Outcome Documents that identify a residual void in a flood plain, the EA holder does not have the option of leaving the non-use management area, and must propose for rehabilitation of that void to a stable condition.

Support implementation of Public Interest Evaluations

Clause 9 inserts a new section 184A which prescribes the areas of experience and qualifications a qualified entity must have to carry out a PIE. Sections 49 and 136A of the EP Act define qualified entity as an entity, other than the proponent, that has the experience

and qualifications, prescribed by regulation, necessary to carry out a PIE. Section 316PC of the EP Act allows for the experience and qualifications of a reviewing entity for a PIE to be prescribed in a regulation.

The entity must be able to demonstrate experience and qualifications in all of the following relevant fields:

- environmental risk assessment
- financial impact assessment
- regional and State macro-economic assessment
- rehabilitation planning and management
- resource project planning and management
- social impact assessment.

The entity may be one or more persons and considering the extensive amount of demonstrated qualification and experience required, it is likely more than one individual will be the case for most of the time. The entity may be a consortium formed by more than one company. When a company or consortium is proposed as a qualified entity, the qualifications and experience demonstrated have to relate to the staff conducting the work. It is not intended that companies with extensive years of experience will use staff with very limited experience to carry out the work on their behalf.

The experience must be a minimum of 10 years in each relevant field. Experience is taken to be practical, post study experience. It also must be in the mining sector and for rehabilitation planning and management and resource project planning and management, be relevant for the nature and impacts of the mineral being mined.

PRCP start date

The amendment Regulation prescribes the PRCP start date as 1 November 2019 (Clause 10), in accordance with section 750 of the EP Act. The effect of prescribing a PRCP start date is that it delays the requirement for environmental authority applications to include a PRC plan as part of the application, and the commencement of transitioning existing sites into the PRC plan framework. This ensures a smoother transition process into the new PRC plan framework.

Transitional provisions

A transitional issue recognised during consultation with the mining industry in the finalisation of the MERFP Act also needs to be reflected in the regulation.

New section 187B prescribes the special circumstance where land that is not being mined is taken to not be available for rehabilitation. This section is authorised under section 754(9) of the EP Act and will apply to transitioning PRC plans only. The section cannot be used once a site has transitioned into the framework.

The exceptional circumstance is aimed to deliver better outcomes for areas that have been approved as non-use management areas under 'Land Outcome Documents'. A transitioning site can only use this section if it is proposing to rehabilitate a previously approved non-use

management area into a post-mining land use (given effect by the definition of ‘relevant rehabilitation area’) and it needs another area of the site to achieve this outcome. Under the EP Act, land that is not being mined is available for rehabilitation if it does not contain a probable or proved ore reserve that is to be mined within 10 years. With the exceptional circumstance, the PRCP will be able to nominate an alternative date for when land is available for rehabilitation.

The proponent will need to demonstrate that proposing an alternative date that is later than the ‘available for rehabilitation’ timeframe under the EP Act is necessary for achieving better outcomes for the non-use management area that is being proposed to be rehabilitated to a post-mining land use.

The proponent also needs to demonstrate that the mining of that land is necessary for achieving the improved outcome (for example material to be excavated will be used to backfill the new post-mining land use). The area must not be larger than necessary to provide the improved outcome.

This section does not alter the PRC plan requirements or impact the assessment process for the PRCP schedule. The PRCP schedule must provide for rehabilitation of the site to be achieved progressively. The operator will need to demonstrate that other areas have been prioritised for rehabilitation. In the PRC plan, the operator will need to explain the rationale of why ‘area A’ is required to achieve the better outcome for ‘area B’, for example, the spoil in area A will be needed to backfill area B.

With the introduction of the amendments proposed by this amendment regulation, a transitional provision seeks to respect existing mining approvals and rights by recognising rehabilitation completion criteria in previously approved land outcome documents while carrying out a PRCP objective assessment.

This provision is included in section 213 and has the effect that some parts of Schedule 8A, Part 3 do not apply to transitional PRCPs. The section only applies when a notice under section 754 of the EP Act is given. The intent is to recognise existing proposals under a land outcome document when assessing transitional PRCPs and considering the PRCP objectives and outcomes on Schedule 8A

Consistency with policy objectives of authorising law

The Amendment Regulation is consistent with the object of the EP Act 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).

All of the amendments proposed in the Amendment Regulation support the implementation of amendments made by the MERFP Act to the EP Act and are considered consequential in nature. Thus, consistency with the policy objectives of the authorising laws are inherent.

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

The EP Act currently includes provisions for the implementation of the Mine Rehabilitation reforms. This Amendment Regulation aims to support the implementation of the recently included provisions in the EP Act, delivering a robust decision making framework. A regulatory response in the form of a subordinate regulation is required, as there are no alternative non-regulatory options available to achieve the objectives of the Amendment Regulation.

Benefits and costs of implementation

There are no costs associated with the implementation of this Amendment Regulation. The amendments will not result in any additional burden to the community, business, government or industry as they directly support implementation of the EP Act as amended by the MERFP Act.

The amendments implement the provisions of the EP Act as amended by the MERFP Act and are consequential in nature.

Consistency with fundamental legislative principles

The Amendment Regulation is considered to be consistent with fundamental legislative principles.

Consultation

Consultation for the Amendment Regulation took place between March and July 2019.

The consultation arrangements built on reference groups established for key mining industry and community stakeholders established in the development of the MERFP Act by the Financial Assurance Project Management Office (PMO). Consultation with these PMO groups continued with the drafting of this Amendment Regulation.

The PMO industry group comprised of industry stakeholders including Queensland Resources Council (QRC), Australian Petroleum Production & Exploration Association (APPEA), Association of Mining and Exploration Companies (AMEC) and individual resource companies. Consultation occurred with this group as well as further meetings with QRC, AMEC and member representatives.

Consultation was conducted in the form of workshops and regular meetings. This supported the drafting of provisions, particularly the PRCP objective assessment tables.

In addition to consultation on the Amendment Regulation generally, industry representatives were included in a Flood Plain Advisory Group. The Advisory Group was able to provide a recommendation on how to establish the extent of the flood plain so that consistent decisions may be made on whether a void created during operations was in flood plain to deliver the intent of the amendments in the MERFP Act that related specifically to flood plains. This resulted in setting additional requirements for a PRCP schedule decision on voids situated wholly or partially in flood plain.

A draft of the Amendment Regulation was provided to the key mining industry groups. The Amendment Regulation was generally accepted by key industry stakeholders. Given the PRCP Guidelines were also released for consultation at the same time, industry was able to review both documents concurrently and see how they interact. All feedback has been considered and, where appropriate, the Amendment Regulation reflects these comments.

A key outcome of industry consultation was the prescription of an exceptional circumstance where land is unavailable for rehabilitation within 10 years and subsequent mining is necessary to achieve an improved outcome (e.g. supplying materials for adjoining rehabilitation).

Many of the comments received were able to be actioned through the refinement of the final drafting. Some comments will be incorporated into supporting materials such as guidelines.

The PMO community group comprised of community and environmental stakeholders including Lock the Gate, Work Wildlife Fund and Environmental Defenders Office. Consultation occurred with this group through provision of information and meetings.

A draft of the Amendment Regulation was provided to the PMO Community group and a meeting held. All feedback has been considered and, where appropriate, the Amendment Regulation reflects these comments.

Community groups strongly support the financial assurance rehabilitation reforms package and were keenly tracking the transition of existing sites to PRCPs and how the PIE process for non-use management areas will operate. Concerns raised by community groups included the flood plain modelling parameters.

In relation to concerns on the use fourth order and above streams, it is noted that if a residual void is proposed in the top of the catchment outside of the floodplain modelling but still has the potential to cause environmental harm, it will be assessed against the regulatory requirements within the EP Regulation and may not be approved.

Other feedback provided by community groups was largely out of scope for inclusion in the Amendment Regulation, and pertained to strengthening of existing approvals and processes surrounding acceptable risk, retrospectivity and best practice more broadly.

The Office of Best Practice Regulation was consulted in relation to the Amendment Regulation and concluded the amendments were excluded from further regulatory impact assessment as they are consequential in nature; do not appear to result in significant adverse impacts; and would not benefit from further regulatory impact assessment given the analysis and consultation undertaken in the development of the proposal to date.

©The State of Queensland 2019