

Mining Act - Suspension Notice

Reasons for decision



Planning,
Industry &
Environment

Authorisation	Exploration Licence 6243 (Act 1992)
Licence Holders	<ol style="list-style-type: none">1. Narrabri Coal Pty Ltd (ACN: 107 813 963)2. Posco International Narrabri Investment Pty Ltd (ACN: 139 088 967)3. EDF Trading Australia Pty Limited (ACN: 110 262 925)4. J-Power Australia Pty Ltd (ACN: 002 307 682)5. Kores Narrabri Pty Limited (ACN: 138 993 263)6. Upper Horn Investments (Australia) Pty Ltd (ACN: 129 190 281)
Legislation	Section 240AA of the <i>Mining Act 1992</i>
Decision maker	Anthony Keon Executive Director, NSW Resources Regulator Department of Planning, Industry and Environment

SECTION 240AA DIRECTION

As authorised by Section 240AA of the *Mining Act 1992* (**Act**), I Anthony Keon, having delegated authority from the Secretary of the Department of Planning, Industry and Environment (**Department**), direct the above licence holders to:

“Immediately suspend all operations on Exploration Licence 6243 (Act 1992), with the exception of those activities required to maintain a safe workplace or to undertake environmental rehabilitation of the exploration licence.”

This direction takes effect and is in force immediately upon the licence holders being notified of this decision. The direction remains in force until the suspension notice is revoked or varied by written notice of the Secretary or delegate.

REASONS FOR DECISION

Legislation

1. Section 240AA(1) of the Act provides that the Secretary may, by written notice (a **suspension notice**), direct a responsible person to suspend (for such period as is specified in the direction or until further notice) all, or any specified, operations under an authorisation or suspend any activity approval relating to the operations if the Secretary considers that:

- a. circumstances exist that could constitute a ground for cancellation of the authorisation under section 125(1)(b)-(g), 203(1)(b)-(e) or (h) or 233(1)(b)-(d), or
 - b. circumstances exist that could constitute a ground for cancellation of the authorisation under section 125(1)(h), 203(1)(i) or 233(1)(f), in relation to a breach of a direction under section 240 only.
2. Section 240AA(2) of the Act provides that before giving a suspension notice, the Secretary is to:
 - a. cause written notice of the proposed suspension notice and the grounds for it to be served on the holder of the authorisation;
 - b. give the holder a reasonable opportunity to make representations with respect to the proposed suspension notice; and
 - c. take any such representations into consideration.
 3. Section 125(1) of the Act sets out a number of grounds for cancellation which can be relied upon when issuing a suspension notice. These include if the decision-maker is satisfied that:
 - a. Section 125(1)(b) – the holder of the authority has contravened a provision of the Act or the regulations (whether or not the holder is prosecuted or convicted of any offence arising from the contravention), and
 - b. Section 125(1)(c) – a person has contravened a condition of the authority (whether or not the person is prosecuted or convicted of any offence arising from the contravention).
 4. Section 363(2) of the Act provides that the Secretary may delegate any function under the Act to any person, except this power of delegation or any function delegated to the Secretary by the Minister. The Secretary has delegated the functions to suspend all, or any specified, operations under an authorisation or suspend any activity approval relating to the operations under section 240AA of the Act to the Executive Director of the NSW Resources Regulator.

Background

5. Exploration Licence 6243 (Act 1992) (**EL 6243**) was first granted on 21 May 2004 for the purpose of prospecting for 'Group Nine' minerals.
6. EL 6243 is located about 24 km north-west of Boggabri.
7. The land is owned by the State of NSW (Crown Land) and is under the control and management of the Forestry Corporation of NSW.
8. On 18 January 2010, EL 6243 was transferred to the licence holders.
9. EL 6243 was last renewed on 18 February 2015 until 20 May 2019. A renewal application has been lodged with the Division of Resources and Geoscience and is

currently pending determination. Under section 117 of the Act the authority continues to have effect until the application for renewal is finally disposed of.

10. EL 6243 is currently subject to the Exploration Licence Conditions (Coal) 2012. Condition 2 and 3 (Prospecting operations requiring further approval) which state:
 - “2. *The licence holder must obtain the Minister’s written approval prior to carrying out any of the following prospecting operations on the exploration licence area:*
 - a) *Category 2 prospecting operations; and*
 - b) *Category 3 prospecting operations.”*
 - ...
 - “3. *The licence holder must comply with the conditions of an approval under condition 2 when carrying out those prospecting operations”.*
11. Section 23A of the Act states:
 - “(1) *An exploration licence is subject to a statutory condition that the holder of the licence must not carry out an assessable prospecting operation on land over which the licence is granted unless an activity approval has been obtained for the carrying out of the assessable prospecting operation in relation to that land and is in force” ...*
 - “(7) *For the purposes of this Act, it is a statutory condition of an exploration licence that the holder must comply with any activity approval granted to the holder and in force.”*
12. On 18 June 2019, Inspectors from the NSW Resources Regulator (**Regulator**) conducted an inspection of EL 6243.
13. This inspection identified that three access tracks had been constructed in contravention of the activity approval granted on 15 November 2018 and were not in accordance with the Narrabri South Exploration Program 2018-2019. This included the access track to the exploration bore site E307, the access track to the exploration bore site E309, and the access track between exploration bore sites E318 and E319.
14. On 20 August 2018, prior to granting this activity approval, the Regulator wrote to Narrabri Coal Pty Ltd advising that, amongst other things, the proposed access track between E318 and E319 was to be removed from the Review of Environmental Factors (**REF**) associated with the application to conduct exploration activities and this was done.
15. In addition, Inspectors also observed that where the tracks had been constructed there were several felled hollow-bearing trees. There was no evidence to suggest that attempts had been made to relocate the hollow-bearing trees outside of the construction zone. Further, the tracks were constructed in straight lines with seemingly

little attempt to avoid the hollow-bearing trees; despite there being non-hollow bearing trees and areas of lower density vegetation adjacent to the track.

16. The REF acknowledges the biodiversity impacts relating to the Narrabri South Exploration Project 2018-2019 and states that hollow-bearing trees should be avoided by re-routing access tracks where possible; should this not be possible, the impacted hollow-bearing tree should be placed outside of the disturbance footprint (mitigation measure) or a nest box erected for each hollow-bearing tree impacted (compensatory measure where the mitigation measure was unsuccessful). The REF also provides that the re-routing of access tracks will be undertaken to reduce biodiversity impacts on mature vegetation and existing hollow-bearing trees of habitat features.

Representations

17. On 24 July 2019, I wrote to the licence holders in accordance with section 240AA(2) of the Act, inviting them to provide a submission in response to my proposed decision to suspend EL 6243. Any submission was due by no later than 5.00pm on 15 August 2019.
18. At 1.17pm on 15 August 2019, the Regulator received a five-page submission on behalf of the licence holders.
19. On 16 August 2019, the Regulator received a hard copy of the submission and attached reference materials.
20. The licence holder's submission stated that:
 - a. Following the approval of the REF, a number of key staff left the business and the approved tracks were not adequately communicated to new staff. The tracks were cleared on the basis of the original plans without reference to the approved REF.
 - b. The licence holders accept that the circumstances leading to the clearing of the tracks are not acceptable.
 - c. The licence holders accept 13 hollow bearing trees were felled during the clearing of the tracks, however, 97 hollow bearing trees were avoided or diverted around. An ecological report was provided in support of this position.
 - d. The original planning of the tracks considered the shortest possible route between points to minimise disturbance. Ecologists then walked the proposed tracks and nearby surrounds to identify and mark hollow bearing trees. The final route was then adjusted to consider whether the identified hollow bearing trees and any other access restrictions could reasonably be avoided.
 - e. With respect to the hollow bearing trees, the licence holders avoided or diverted around approximately 90% of the hollow bearing trees in the vicinity of the tracks. A survey plan and photographs were provided in support of this position.

- f. The licence holders accept that the felled hollow bearing trees remained in the disturbance area, claiming that their movement would have resulted in further disturbance and damage to the environment.
- g. It is noted that the REF permits the installation of nesting boxes as a compensatory measure within three months after completing the drilling activities and will complete the nesting boxes in accordance with the REF.
- h. The licence holders have commenced an internal investigation and have engaged an independent third party to review its management systems applying to the approval of work.
- i. The licence holders have voluntarily suspended all drilling and clearing activities at EL 6243 until all of the following actions have been completed:
 - i. An independent third-party auditor endorsed by the Regulator has completed an audit into the licence holders' compliance with the conditions applying to EL 6243;
 - ii. All corrective actions identified from the independent third-party audit have been completed and closed out;
 - iii. All corrective actions arising from an internal investigation have been completed and closed out;
 - iv. An independent third-party review of the management systems has been completed; and
 - v. The licence holders demonstrate to the Regulator the completion of the above activities.

Considerations and findings

- 21. I am satisfied that the requirements of section 240AA(2) of the Act to notify the licence holders in writing of the proposed suspension notice have been adhered to. The licence holders were afforded reasonable opportunity to make representations and these representations have been fully considered in making my decision.
- 22. In doing so, I have carefully considered the evidence before me and I have given due regard to the following:
 - a. The activity approval granted on 15 November 2018 for the Narrabri South Exploration Program 2018-2019.
 - b. The results of the inspection conducted by the Regulator on 18 June 2019.
 - c. The full representations made by licence holders.
- 23. In making my decision I have also had regard to the objects of the Act, particularly the need to ensure the effective rehabilitation of disturbed land and water; and the need to

ensure mineral resources are identified and developed in ways that minimise impacts on the environment (section 3 A(f) and (g) of the Act).

24. I find the offending behaviour by the licence holders in constructing the three tracks to be significant and demonstrative of a comprehensive failure to observe fundamental regulatory obligations in relation to the approvals (and restrictions) obtained.
25. I am of the view that the behaviour resulted in not only a breach of the licence holders' legislative requirements, but also caused considerable adverse environmental outcomes.
26. I note that significant corrective action has been undertaken by the licence holders since the inspection on 18 June 2019, including the voluntary suspension of all drilling and clearing activities whilst independent audits and an internal investigation is being conducted and corrective actions completed.
27. However, despite these commitments, I strongly agree with the licence holders' own submission that the circumstances leading to the clearing of the tracks are not acceptable. This is clearly the case and such actions warrant a strong regulatory response.
28. The Government and community need to have a high level of satisfaction that the identified issues have been appropriately remediated and appropriate controls have been put in place to mitigate the risk of further occurrences before further exploration activities can be conducted. Having regard to the significance of the failures in question, it is not appropriate for that determination to be left to a voluntary suspension/decision by the licence holders.
29. Therefore, having carefully considered the regulatory options available to me, I am satisfied that the above considerations warrant the immediate (and mandatory) suspension of all operations under EL 6243, with the exception of those activities required to maintain a safe workplace or to undertake environmental rehabilitation of the exploration licence.
 - a. In this respect I am satisfied that the licence holders have failed to comply with the activity approval granted on 15 November 2018 relating to the Narrabri South Exploration Program 2018-2019, and that these actions constitute a breach of section 23A of the Act (a statutory condition) and condition 3 of the authorisation; offences under section 378D(1) of the Act 'Contravention of condition of authorisation – offence by holder'.
 - b. Contravening a provision of the Act or a condition of the authorisation constitutes grounds for the decision-maker to cancel an authorisation, pursuant to section 125(1)(b) and section 125(1)(c) of the Act.

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- c. Therefore, based on the material before me, I am satisfied that circumstances exist that constitute grounds for cancellation of EL 6243 under section 125(1)(b) and 125(1)(c) of the Act.
30. The suspension notice takes effect immediately upon the licence holders being notified of the decision and will remain in force until such time as the suspension notice is revoked or varied by written notice of the Secretary or delegate.
 31. Consideration will be given to revoking the suspension notice once the licence holders have:
 - a. Commissioned a suitably qualified independent person, to the satisfaction of the Resources Regulator, to conduct a review of the licence holders' systems and processes for meeting its compliance obligations under the Act for EL 6243.
 - b. Commissioned a suitably qualified independent person, to the satisfaction of the Resources Regulator, to conduct a review of the management systems applying to the approval of work to be undertaken at EL 6243 (activity approvals).
 - c. Submitted a detailed report, to the satisfaction of the Resources Regulator, that details the key findings, corrective actions and recommendations arising from both reviews undertaken at points 31.a. and 31.b. above (including copies of both reports).
 - d. Completed all corrective actions and recommendations arising from the reviews at points 31.a. and 31.b. to the satisfaction of the Resources Regulator.

Date of decision: **22 August 2019**

A handwritten signature in black ink, appearing to read 'Anthony Keon', written over a horizontal line.

Anthony Keon
Executive Director
NSW Resources Regulator

Note: In accordance with its Public Comment Policy, a copy of this decision will be published on the NSW Resources Regulator's website: www.resourcesregulator.nsw.gov.au

WARNING AND INFORMATION ABOUT THIS NOTICE

- It is an offence under section 240C of the *Mining Act 1992* to fail to comply with this direction.
- The maximum penalty for this offence is, for a corporation, \$1,100,000 and a further \$110,000 for each day the offence continues, and, for a natural person, \$220,000 and a further \$22,000 for each day the offence continues.
- An offence against section 240C may attract executive liability against a director of the corporation, or an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation – section 378F of the *Mining Act 1992*
- If you fail to take the measures specified above, the Minister may take any action necessary to give effect to the direction including authorising another person to take those measures and recover the costs and expenses so incurred from you, or applying to the Land and Environment Court for an injunction directing you to comply with this direction – section 241 of the *Mining Act 1992*.
- The serving of this direction and the matters required of you pursuant to this direction in no way preclude, hinder or otherwise restrain the Department of Planning, Industry and Environment from taking further action against you including by commencing legal proceedings.
- The words and expressions used in this direction have the same meaning as they have in the *Mining Act 1992*.