Seabed Minerals Authority
Runanga Takere Moana
COOK ISLANDS

INFORMATION NOTE ON RESPONSES RECEIVED TO THE SEABED MINERALS AMENDMENT BILL 2020

Prepared by the Seabed Minerals Authority
3 July 2020

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Document Outline

This information note provides a summary of the key issues raised in submissions to the Seabed Minerals Amendment Bill 2020, and the Seabed Minerals Authority's responses to those submissions.

1. INTRODUCTION

This information note provides a summary of stakeholder comments to key issues received by the Seabed Minerals Authority (**the Authority**) in response to a call for comments on the proposed amendments to the Seabed Minerals Act 2019 (**the Act)** by 25 June 2020.

The note also provides the Authority's response to the comments and, where applicable, proposed amendments to the Seabed Minerals (Amendment) Bill 2020 (**the Bill**) after due consideration of stakeholder feedback.

Information documents relating to the Bill, including a policy paper setting out the rationale for proposed amendments, are available here.

The Authority also held a public consultation on the Bill at the New Hope Church on Tuesday 23 June 2020. A copy of the presentation made at the consultation is available here.

The Authority expresses its appreciation to those individuals who attended the public meeting on Tuesday, 23 June 2020 and to those stakeholders who submitted written comments.

2. OVERVIEW OF STAKEHOLDER SUBMISSIONS

The Authority received 11 written submissions to the Bill. These can be broken down as follows, by stakeholder category:

- Civil society: 6 submissions (includes joint submission)
- Individual citizens: 2 submission
- Private sector (industry): 2 submissions
  Government: 1 submission

3. SUMMARY AND RESPONSE TO SUBMISSIONS

This section provides an overview of the key issues raised by stakeholders, and the Authority's response to each issue.

	Issue	Summary of submissions	Response to submissions
1	**Information management** (Clause 6 of the Bill)	Some stakeholders expressed concern over an amendment to section 17(2)(d) of the Act as well as a need to place safeguards around the definition of "commercially sensitive". There was also a call for adding a specific category of information for disclosure under section 17(2) relating to the protection of the environment. A request was also made that the use of discretionary language in regulation 75(1) & (2) of the draft Seabed Minerals (Exploration) Regulations 2020 relating to the release of specific categories of information, including environmental information, be changed to provide for its mandatory release.	The Authority acknowledges the concerns arising from the amendment to section 17(2)(d) but would note the addition of new section 18A to ensure a fair and transparent mechanism in determining what information must be treated as confidential. A list of confidential information categories and the procedures contemplated by section 18A will be made available for public input in due course. Section 17(3) of the Act permits the Authority to disclose or publish information of any prescribed kind or purpose. To this end regulation 75(1) and (2) of the draft Seabed Minerals (Exploration) Regulations 2020 was drafted to ensure that certain categories of information would be made publicly available, including environmental information and information connected with the protection the marine environment. In light of comments received the Authority agrees that the language of regulation 75(1) and (2) should provide for the mandatory release of the information categories listed, and the regulation will be re-drafted accordingly.

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2	**Further provisions about information disclosure** (Clause 7 of the Bill)	Comments by stakeholders to this amendment included: concerns over transparency in that a future operator or other third party would determine what is confidential information without adequate review (procedural safeguards) and that a mechanism for representation from "affected persons" has been removed. A comment was also made that given what will constitute confidential information is to be determined by reference to guidelines prepared by the Authority, and not determined by the courts, that new section 18A will not offer much confidence to investors.	The Authority has re-examined clause 7 of the Bill and considers the proposed amendments to be in the interests of all stakeholders. It provides a mechanism to, on the one hand allow for the designation of certain information as confidential, and on the other a mechanism to review any such designation. The Authority notes that the term "affected persons" in section 18(1)(b)(i) contemplates the owners or suppliers of the information and is no wider than this. The proposed legislative text does not exclude the possibility for judicial review. The amended text makes for a fairer procedure and that there is a proper process to ensure that confidential information is protected while at the same time providing for the necessary flow of information to government agencies, the licensing panel and the public. The Authority is following closely the approach taken by the International Seabed Authority (ISA) in this matter, which similarly provides for a categorised list and review procedure.
3	**Qualification for appointment as member** (Clause 9 of the Bill)	Some stakeholders advanced concerns over the replacement of "governance" by "engineering" in respect of the composition of the licensing panel. One stakeholder suggested that that the person to be appointed under the engineering category	The Authority acknowledges that "governance" is a key component to the overall implementation of the Act and other enactments. As regards licensing panel membership key technical skills will be required to assess the merits of future applications. Technology is at core of seabed mineral activities from the

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		should have marine expertise rather than a terrestrial background.	recovery of the nodules to the protection of the marine environment, including the delivery of best available technology and techniques. An engineer with marine experience is a prerequisite to assess the viability of the technology to be deployed. The composition of a similar review body (the Legal and Technical Commission of the ISA) has also undergone a detailed review and discussion as to its composition, including a requirement for engineering expertise. Governance is a very broad concept and is addressed through the checks and balances under the legal framework (due diligence, multi-agency approach, public consultation). Equally, given the panel will be made up of experienced professionals, each member is likely to have governance experience at an international level and an understanding of regulatory processes.
4	**National interest v. Public interest** (Clauses 11, 21 and 25 of the Bill)	Some stakeholders do not consider the substitution of a public interest test by a national interest test as acceptable, and that national interest is narrower in its approach. A recommendation was also made that other references in the Act to national interest be replaced by public interest, or that a definition of national interest be included.	The Authority does not consider in the context of the Act and its objectives, that the use of national interest is problematic. Indeed, the concept is not an arbitrary one, and unlike many pieces of legislation overseas, national interest under the Act must be applied by reference to objective factors (section 69(2)) or circumstances (section 117(1)(d). Consistency and certainty in the application of the Act are important considerations and having two concepts serves to undermine these considerations.

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			The national interest is also one of the evaluation criteria that the licensing panel must address as part of the licensing process (see Schedule 7 to the draft Seabed Minerals (Exploration) Regulations 2020). It is important to note that the national interest does not override public consultation under the Act or as part of the environment permitting process, where public comments will be taken into consideration.
5	**Renewal of licence** (Clause 16 of the Bill)	Two stakeholders commented on the proposed removal of section 86(6) of the Act and that this potentially introduces tension between processes under the Act and the Environment Act 2003. A stakeholder noted the disparity between the mandatory language for the renewal of an exploration licence (where certain conditions are fulfilled) with the discretionary renewal of a mining licence. They considered that this may create significant concerns for investors if the circumstances around any renewal are not clarified. Concern was also expressed over the text "any other prescribed criteria" and that this contributes to regulatory uncertainty.	The Authority acknowledges the concerns raised. However, it considers the regulatory text under this subsection relatively weak in comparison to the provision under section 90(2). In the case of any mining licence renewal, the licence holder will be subject to the requirement for a current project permit issued by the permitting authority, the National Environment Council in order to continue any renewed activities. This is a stronger regulatory mechanism than "written advice". The Authority also acknowledges the concern as to the use of discretionary versus mandatory language in the renewals process. Creating a stable investment platform while ensuring that operations are conducted responsibly with a view to the protection of the marine environment and human health and safety are key considerations.

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			The Authority considers that a mining licence of up to 30 years in duration is adequate from a commercial perspective, with proposed subsection (6) providing for the possibility of a renewal. However, there are currently no commercial recovery operations in place in the Cook Islands EEZ or the international seabed area. At this stage, the Authority considers it prudent that the renewal of a mining licence under the Act is discretionary until such time that economic behaviors and the potential impact of activities is better understood through the exploration process initially. Consequently, the Authority considers, and places great emphasis on the need for comprehensive exploration activities to be undertaken first and the ability for an investor to renew an exploration licence by reference to pre-determined criteria.
6	**Schedule 2 – General.** (Clause 30 of the Bill)	A number of comments were made in relation to changes to the general duties of title holders under Schedule 2, ranging from concerns that the proposed amendments to the text potentially weakens some of the requirements under Schedule 2 to the vague language of certain requirements, particularly where these attract penalties under section 93 of the Act.	In reviewing this Schedule 2, the Authority considered a number of matters, including: where content is more appropriately provided for in regulations, including environment regulations under the Environment Act 2003, obligations already existing under other Cook Islands enactments as well as obligations under section 7 to the Act.

7	**Schedule 2, Clause 2**	Comments on this clause 2 included concerns over the replacement of best available technology with best available techniques (with the latter seen as a narrower concept), the removal of a benchmark reference to "prevailing international standards" and its substitution by reference to standards or guidelines issued by the Cook Islands Government.	In order to implement the requirements of this clause, relevant standards or guidelines issued by the National Environment Service or the Authority will be needed. The Authority acknowledges that these should reflect minimum international standards, while at the same time allowing flexibility for higher standards to be imposed. The original wording in the Bill has been amended and now provides that any standards or guidelines issued must be no less effective than prevailing international standards. Additionally, revised wording now captures "best technology **and** techniques", the content of which will be defined in the environment regulations.
8	**Schedule 2, Clause 3**	Similar to clause 2 above, some comments raised concern over the inclusion of "in line with any Cook Islands standards or guidelines" which was seen as having the potential to weaken the content of the obligation.	Again, the Authority notes that to implement practically the requirements under this clause 2, particularly as regards the disposal or discharge of waste material from seabed mineral activities, requires appropriate standards or guidelines. To accommodate stakeholder concerns, the original wording in the Bill has also been amended and now provides that any such standards or guidelines issued must be no less effective than prevailing international standards.
9	**Schedule 2, Clause 6**	Some stakeholders suggested that clause 6 should not be amended, and that the wording added weakens the requirement for rehabilitation.	The Authority considers the addition of an approved closure plan serves to strengthen the requirements of this clause, as the plan will set-out the obligations relating to site closure. The Authority considers the removal of the words "where applicable" from the original wording in

			the Bill appropriate; this wording was not intended to weaken a requirement to rehabilitate, but to recognise that rehabilitation is not considered technically feasible at this time.
10	**Schedule 2, Clause 9**	Concern was expressed by some stakeholders at the removal of the requirement for an independent audit, while others found the amendment acceptable.	The Authority considers that Clause 9 as originally drafted contained a multiple number of requirements that are more appropriately dealt with in regulations under the Act or under other Cook Islands acts or regulations, including the requirement for the independent audit of books and records.
11	**Schedule 2, Clause 12 (removed)**	Concern was expressed by the removal of this clause, and in particular the requirement for an environmental monitoring and management plan.	The Authority notes that the requirement for a work plan and the practices under a work plan are adequately reflected in the draft Seabed Minerals (Exploration) Regulations 2020 (see regulations 4(2)(d)(ii) and 36). As to an environmental monitoring and management plan, the content of and review mechanism for this plan will be developed under the environment regulations and be based on the results of an environmental impact assessment.
12	**Schedule 2, Clause 14 (removed)**	Concern was expressed by the removal of this clause.	The content of this clause has been taken to regulation 71 of the draft Seabed Minerals (Exploration) Regulations 2020.
13	**Schedule 2, Clause 15**	Concern was expressed over the new language inserted, in particular the requirement of a title holder to satisfy the Authority of its financial and technical capability to perform title obligations and respond to potential incidents.	The Authority considers the new text (clause 13 of the Bill) is much improved compared to the previously vague requirements of clause 15. The new text also captures the possibility of an insurance requirement after the licence term.

			Additionally, under the draft Seabed Minerals (Exploration) Regulations 2020 the specific conditions of a licence may include a requirement to take out a certain category of insurance (see regulation 30(3)(a)). Regulation 44(2)(l) also provides for an annual reporting requirement in respect of insurance. As to capability, and pursuant to section 117(1)(b) of the Act, a title holder must satisfy the qualification and evaluation criteria on a continuous basis for the term of the licence; this includes financial and technical capability. As part of its evaluation process, the licensing panel will also consider the financial and technical capability of an applicant, including its capability of responding to an incident (see Schedule 7 to the draft Seabed Minerals (Exploration) Regulations 2020). Consequently, the Authority considers that matters relating to insurance and to financial and technical capability are adequately addressed under the legal framework.