Seabed Minerals Authority
Runanga Takere Moana
COOK ISLANDS

SEABED MINERALS AMENDMENT BILL POLICY AND RATIONALE

Details:

Name:	Te-Ara Henderson
Contact details:	sbmlicence@cookislands.gov.ck
Agency:	Seabed Minerals Authority
Responsible Minister:	Hon. Mark Brown

Document Outline:

This document outlines the policy rationale for the Seabed Minerals Amendment Bill 2024.

POLICY DESCRIPTION

The Seabed Minerals Act 2019 (**the Act**) was passed on 17 June 2019. Its main purpose is to enable the effective and responsible management of the seabed minerals of the Cook Islands. The Act provides a legal and governance framework for exploration and potential future mining /minerals harvesting operations.

On 1 July 2020, the Seabed Minerals Amendment Act 2020 came into force. This amendment provided greater certainty and clarity regarding processes under the Act and to make minor and technical corrections to that Act and the Environment Act 2003.

On 25 March 2021, the Seabed Minerals Amendment Act 2021 came into force. This amendment made clear the original intention under the Act that applicants must be limited companies established within the Cook Islands to ensure that the control and supervision of future Licence Holders remains under Cook Islands jurisdiction.

On 23 February 2022, after the completion of the Cook Islands first ever licensing process spanning over 16 months, three exploration licences were issued to CIC Ltd, Moana Minerals Ltd and Cobalt Seabed Resources Ltd. Following this licensing process, the first year of exploration activities being conducted, and the development of standards and guidelines, the Seabed Minerals Authority (**Authority**) identified amendments that could be made to improve the Act's effectiveness and administrative efficiency. Some of these amendments will have flow on effects to the Seabed Minerals (Exploration) Regulations 2020 (**Exploration Regulations**) and the draft Seabed Minerals (Mining and Minerals Harvesting) Regulations (**MMH Regulations**).

The proposed amendments include both substantive and minor proposed amendments. The substantive amendments seek to address gaps and inconsistencies that may prevent the effective implementation of the Authority's Monitoring, Compliance and Enforcement Framework, as well as improve the Authority's administrative functions and processes.

The proposed amendments are broken down into two sections:

1. Substantive amendments
    - Adjustments to provisions to provide for greater clarity, certainty, predictability, and mechanisms to enable the Authority to effectively fulfil its functions under the Act.
    - Outlines the process for the development of Standards and Guidelines under the Act
2. Minor amendments
    - Corrects minor typographical errors, inconsistent use of terms and incorrect referencing.

SUBSTANTIVE AMENDMENTS

1. Inclusion of a new definition for Minerals Harvesting

Context

Numerous stakeholders, including the responsible Minister for Seabed Minerals, the Advisory Committee, and the public have raised an issue with the term "mining". "Mining" is a very broad term, and includes activities such as digging, cutting, collecting, harvesting etc. Stakeholders have since adopted the term "Minerals Harvesting" to specifically refer to the extraction of polymetallic nodules.

Minerals Harvesting is a term that more specifically refers to the process of collecting nodules off the surface of the seabed as opposed to cutting of rock and sediment.

To be clear, Minerals Harvesting will not replace the term mining, which is the current term used in the Seabed Minerals Act 2019. Minerals Harvesting is a sub-type of mining, specifically nodule extraction. In comparison, the collection of other deep-sea minerals such as seafloor massive sulphides, cobalt rich crusts, or rare earth elements, are accurately described as mining since the process can be similar to terrestrial mining where there is cutting of rock or sediment.

Amendment

The amendment includes a new definition for the term minerals harvesting and makes clear it is a subset of mining that relates to the commercial recovery of polymetallic nodules.

2. Information disclosure with respect to third-party information

Context

Section 18A of the Act requires the Authority to establish guidelines governing the classification of confidential information consistent with sections 17 and 18 of the Act.

Section 18 of the Act sets out the parameters regarding the Authority's ability to disclose information it receives. The section specifically references the submission of third-party information.

It is unclear what is meant by 'third party information' and whether this places a limit on when section 18 is applied. For instance, does this cover information generated and submitted by a Licence Holder to the Authority?

Amendment

Section 18 is being amended to delete the reference to 'third party information'. This makes it clear that section 18 applies the provision to all information received by the Authority.

3. Information management

Context

Section 18A of the Act requires the Authority to establish guidelines governing the classification of confidential information to assist in the application of section 18.

There is no provision under the Act that clearly sets out what confidential information is, which gives rise to ambiguity. Sections 17 and 18 do not refer to confidential information, rather section 18(1)(b) refers to information that is a trade secret or commercially sensitive. For this reason, the term confidential information does not currently align with section 18. After seeking advice, the Authority prefers to delete the term 'confidential'.

Amendment

Section 18A has been amended to delete the term 'confidential'.

4. Cost recovery for undertaking due diligence

Context

One of the key functions of the Authority under section 11(c) of the Act is to undertake due diligence with respect to applications for licences and to ensure that they meet the qualification criteria set out in sections 64 and 65 of the Act.

The Authority undertakes due diligence, on an as needed basis, to ensure Licence Holders maintain ongoing compliance with sections 64 and 65. For example, the Authority is required to undertake due diligence when a licence holder intends to make management or governance changes. The Authority incurs costs undertaking its due diligence functions which it currently does not fully cost recover.

This places a strain on Authority resources and the Authority should, in line with best regulatory practice have the power to recover the actual costs it incurs from Licence Holders for any due diligence it undertakes in relation to that Licence Holder.

The Seabed Minerals (Exploration Fees) Regulations 2020 allow for fees to be charged to recover direct and indirect costs incurred by the Authority in performing its functions. A review of the Act suggests the Authority may already have this ability to charge a fee for due diligence under s.178(2)(y) of the Act, but the Authority would like this to be made clearer.

Amendment

Section 178(2)(y) is being replaced to make it clearer the authority can prescribe fees or charges, or a method for determining fees or charges, for the performance of the Authority's functions or any other matters under the Act or Regulations.

5. Standards and Guidelines

Context

The need for standards is contemplated by section 11(e) of the Act. Standards are intended to supplement the legal requirements set out in the Act, Regulations, and licence conditions, and to ensure consistency across the Licence Holder base on matters such as reporting. As the industry develops so will our collective knowledge base which will allow for the modification of existing standards or development of new standards. Standards are legally binding on Licence Holders.

Standards and guidelines are issued by the Authority. Standards are legally binding on Licence Holders, and they can be held to account for not adhering to them, they can also be incorporated by reference into regulations. Guidelines assist Licence Holders with meeting their legal obligations. Guidelines are recommendatory in nature.

Determining whether a document is issued as a standard or a guideline depends on state of knowledge at the time, and the relative importance of the particular issue and proposed content.

Currently, the parameters for standards and guidelines are set out by regulation 50 of the Exploration Regulations. This limits the Authority's ability to apply them to other regulations still in development e.g. the MMH Regulations, which will also require their own standards and guidelines. Moving the parameters set out in regulation 50 of the Exploration Regulations into the Act will allow for standards and guidelines to be developed for all regulations.

The current focus of standards is on technical requirements for gathering and reporting information. Under the current framing of regulation 50, it is not clear that the Authority can develop standards that cover the processes for undertaking a regulated activity. The Authority needs to be able to set standards for processes to ensure alignment with industry best practice.

Standards are legally binding on licence holders which can be issued by the Authority with or without incorporation into Regulations. The Authority considers that Standards should require Cabinet approval before adoption to ensure sufficient legislative oversight.

Amendments

This amendment removes the provisions regarding standards and guidelines as set out in regulation 50 of the Exploration Regulations, to instead be set out in the Act as a new section 13A so that standards and guidelines can be applied to all seabed minerals activities generally. It has also been made clear that standards can include methods, processes, or technology that may be used to carry out a regulated activity.

Moreover, a requirement has been added that all standards may be incorporated by reference into the appropriate regulations with Cabinet approval to ensure sufficient legislative oversight over their adoption and future amendments.

An additional minor change is regulation 42(2) has been moved from the Exploration Regulations and incorporated into the new section 13A as subclause (2)(b).

6. Annual Reporting Period

Context

The submission of annual reports is a key reporting requirement for Licence Holders, and is a tool used by the Authority to track a Licence Holder's compliance with their approved work plans. Licence Holders are required to submit Annual reports, covering the previous year's exploration activities, within 3 months of the calendar year end.

The current timing for submission of annual reports does not align with the commencement of Licence Holders' 5-year approved work plans, which start from the date their licence is granted (current exploration licences were issued on February 23rd 2022).

This means that some year 1 approved work plan exploration activities (those undertaken between 1 Jan and 22 Feb) won't be reported on until the year 2 Annual Report.

This is an unnecessarily large gap that hinders the Authority's ability to accurately monitor and assess a Licence Holder's performance against their approved work plan in a timely manner.

Amendment

To ensure alignment between annual reports and a Licence Holders approved work plan, clause 15(5) of Schedule 2 of the Act will be amended to synchronize annual reporting with the date that the licence was issued (and its subsequent anniversaries) and therefore the start date of a Licence Holders approved workplan. This would mean that Annual reports are due to be submitted to the Authority 3 months after the date of the anniversary of a Licence Holder's licence being issued.

For the case of the Cook Island's three current licence holders Annual Reports would be due to be submitted three months after 23 February (the date their licences were issued). The transitional period is outlined in the new section 181C of the Amendment Bill.

7. Register of Titles

Context

Sections 48-50 of the Act require the Authority to maintain a register of titles containing up-to-date and accurate records of applications received and titles granted.

There is ambiguity within sections 48 – 50 of the Act regarding whether the term 'application' encompasses (1) all applications received or (2) applications that are complete and have met the qualifying criteria or (3) is limited to only successful applications of title holders.

In accordance with section 66(1)(b), the Authority is required to notify the public of the Cook Islands of an application as soon as practicable after the Authority has considered the application is complete and meets the qualifying criteria. Regulation 15 of the Exploration Regulations sets out the requirements of what is to be published on the Authority's website as part of this public notification.

It seems inconsistent with section 66 that an application that does not reach the public notification stage should be uploaded to the register of titles.

Amendment

Section 48 has been amended to make it clear that only applications that have been notified to the public under section 66(1)(b) or is an application belonging to a title holder, is required to be uploaded and maintained in the Register of Titles.

8. Inspector vs observer

Context

The term inspector has been implemented as part of the Authority's Monitoring, Compliance and Enforcement Framework. Inspectors are assigned to Expedition Legs and have monitoring and enforcement powers to ensure Licence Holders remain compliant with the terms and conditions of their licence.

A similar undefined term "observer" is already used within the Act that is not consistent with the Cook Islands or ISA's Inspectorate programmes. Observers are frequently used in the fisheries industry and are limited to monitoring functions. An Inspector under the Authority's Inspectorate programme has monitoring and enforcement powers that go beyond the powers and duties of fisheries observers.

Amendment

The term 'observer' has been replaced with 'inspector' in sections 144(2)(a) and 144(3) of the Act.

9. Change to title holder name

Context

Recently, a title holder notified the Authority that they were changing their legal name. Section 49(3)(a) states that the title holder is the person whose name is given as the title holder on the register. The Act does not provide for a process for when a title holder changes their name.

There is no specific reference in the Act or Regulations that deals with this scenario. The closest requirement the Authority could find in the Act is section 169 (1) which requires that a title holder must, as soon as possible, notify the Authority of any actual, proposed, or likely change in the constitution, ownership, control, or corporate organisation of the title holder, if that change is significant. This section does not seem to contemplate a change of name as something to be considered. Section 169(1A) then requires the Authority, upon receiving a notification, to assess and notify the title holder whether or not the change constitutes a transfer of title for the purposes of section 102 (Transfer of title). A change of name by itself should not trigger Section 102.

The Authority considers that a change in name only, does not have any serious implications for the title and should only require the Authority to update the register of titles by amending the name of the title holder in the register and posting the certificate of incorporation certifying the name change.

Amendment

A new section 168A has been inserted to outline a process for the Authority to follow when a title holder changes their name.

MINOR AMENDMENTS

Section of the Act	Current text	Policy rationale or comment
King's Representative	Queen's Representative	Replace 'Queen' with 'King' throughout the Act.
Schedule 2 clause 15(1)	The title holder must advise the Authority in writing at least 30 days before the date of departure of a vessel from port of the schedule of each voyage planned	"Expedition leg" will replace "voyage" in schedule 2 clause 15(1)