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Australia Mongolia Extractives Program 2 (AMEP-2)

## **LEGAL GAP ANALYSIS REPORT**

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## ACRONYMS

|                       |   |
|-----------------------|---|
| <b>ASI</b>            | Adam Smith International  |
| <b>AMEP</b>           | Australia Mongolia Extractives Program  |
| <b>Council</b>        | Mineral resources professional council  |
| <b>Council's Rule</b> | Rule of the Minerals Professional Council approved by the Order A/46 (Approving Rule, Composition and Method) of the Minister of Mining and Heavy Industry on February 26, 2018                                       |
| <b>DFAT</b>           | Australian Government's Department of Foreign Affairs and Trade   |
| <b>FS</b>             | Feasibility study   |
| <b>FS Regulation</b>  | Basic Requirements for Scoping Study, Pre-Feasibility and Feasibility Study and Procedure for Receiving a Feasibility Study approved by Order # 074 of the Minister of Mineral Resources and Energy on April 17, 2012 |
| <b>MCUD</b>           | Ministry of Construction and Urban Development  |
| <b>MMHI</b>           | Ministry of Mining and Heavy Industry   |
| <b>MOJHA</b>          | Ministry of Justice and Home Affairs  |
| <b>MRPAM</b>          | Mineral Resources and Petroleum Authority of Mongolia   |
| <b>MOET</b>           | Ministry of Environment and Tourism   |
| <b>Working Group</b>  | Working group established by the Order #A/251 dated 23 December 2019, to review and update FS related regulations   |

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## **GENERAL INFORMATION:**

### **(i) Background**

*From the AMEP 2 Terms of References:*

The Government of Mongolia and the Government of Australia have partnered for the Australia Mongolia Extractives Program to assist Mongolia to sustainably manage its resource-led growth. After a successful first phase of the program between 2015-2019, the second phase of the program commenced on 1 April 2019 with an expanded scope and set of stakeholders.

AMEP 2 is funded by the Australian Government's Department of Foreign Affairs and Trade and implemented by ASI. The program will be implemented until 31 March 2023. One of AMEP 2's first year activities is to support the MMHI in reviewing and updating the regulation on preparing feasibility studies.

The regulation title is: "Basic Requirements for Scoping Study, Pre-Feasibility and Feasibility Study and Procedure for Accepting a Feasibility Study", 2012.

### **(ii) Scope of works**

Pursuant to the Letter of Engagement dated 4 November 2019, ELC LLP Advocates, headed by the Senior Partner Mr. Bayar, is to undertake a legal gap analysis of the current Regulation and how it relates to the Mongolian legal framework (in English and in Mongolian languages) among others.

This legal gap analysis report includes the review of regulations pertaining to feasibility study that are reflected in the current legislative framework (the relevant Mongolian legislation -primary, secondary, government or ministerial decree, regulation etc.) and identifies gaps between existing regulations of Mongolia and international best practice and provides recommendations.

## ONE. EXECUTIVE SUMMARY

From legal perspective, we have identified the following gap areas, where Mongolian regulations would need to be revised:

- The current FS regulation is not legally effective. If the Working group wishes to regulate matters related to FS by legally binding regulation, then the Minerals Law should be amended to include provision that authorizes the MMHI to issue regulation on such matter. Then the procedure prescribed under the General Administrative Law (explained in Part Four of this Legal Gap Analysis Report) should be adhered when drafting and approving the regulation. Registration of the regulation with the MOJHA is required as well. Otherwise, other approaches such as regulating the FS related issues with standards or guidelines or codes, which are non-binding, can be adopted.
- The FS regulation and Council's Rule, as well as Minerals Law have overlapping and contradicting provisions and the overall procedural rules on these regulations for FS are not determined systematically, clearly and continuously in terms of procedural timing. Therefore, in addition to updating FS regulation, the provisions of the Council's Rule would need to be revised.
- The regulation for the issue for granting special permit to legal entities preparing feasibility study in minerals sector is ambiguous. The previous MCUD approved regulation, which required the legal entity to apply for special permit (as part of the special permit for drafting design of construction stipulated in the Law on Licensing) is amended in December of 2018 and this issue was left unregulated. In case MMHI wishes to become a competent authority to grant special permit to the legal entities preparing the feasibility study, then the Law on Licensing (and Minerals Law as the case maybe) should be amended. Otherwise, as with other countries, there will be no requirement for the legal entity to have special permit, but to have professional specialists who will author the feasibility study and take responsibility for their actions under the professional rule of conduct.
- The major gap between Mongolian current regulation related to the feasibility study and how other countries regulate is the purpose of the feasibility study. While in Mongolia feasibility study is for regulatory purposes such as overseeing the activities of the license holder, inspections thereof and nation-level research and economic analysis, in western countries it is for the commercial use only, which is to encourage the project sponsors, lenders and investors to provide investment. Therefore, when updating the relevant regulations, the purpose should be clearly determined so that the requirements for feasibility study can be specified in line with such purposes.

In addition to the above, when updating the regulation, the matters listed in the Part Four (Recommendations) of this report should be considered and determined in order to regulate issues of the feasibility study as a whole and in compliance with other laws and regulation.

## TWO. MONGOLIAN LAWS AND REGULATIONS

In Mongolia, feasibility study in minerals sector is regulated by the following laws and regulations:

### 2.1. Laws:

#### The Minerals Law (2006):

With respect to the feasibility study, this law outlines the general provisions related to the establishment of the Council and its role (Clause 10.1.9), the license holders' rights and duties, such as submitting the feasibility study (Clause 48.6.1) which includes the detailed information regarding the transportation of mineral products, information on how the infrastructure is organized, and the fund that is required for the rehabilitation and closure of mines (Clause 27.1.12) and keeping the feasibility study at the mine (Clause 35.3.2) and the confidentiality of feasibility study (Clause 57.2).

In addition, this law has specified the role of specialized experts and authorized entity in relation to the development and evaluation of feasibility study (Clause 48.4, 48.6.1 and 48.12) and the timeframe for appointment of such experts and the evaluation period thereof (Clause 48.4).

#### Law on Environmental Impact Assessment /2012/

This law requires the project implementer to submit (among others) the feasibility study verified by the competent authority in order to have the general environmental impact assessment (one of the types of environmental impact assessment) made by the relevant authority in charge of environment authority (Clause 7.3). According to the Clause 25.1.7 of the Minerals Law, environmental impact assessment is required to be submitted (among others) for applying mining license.

#### The Law on Subsoil:

The Clause 2 of the Article 27 of this law states that “design for mining plants shall be prepared only after reserves of corresponding deposits have been confirmed and the deposits have been commissioned for commercial use and *technical and economic feasibility studies* of the mining have been approved.

### 2.2. Regulations:

#### Basic Requirements for Scoping Study, Pre-Feasibility and Feasibility Study and Procedure for Receiving a Feasibility Study

This regulation was approved by the Order # 074 of the Minister of Mineral Resources and Energy on April 17, 2012.

The purpose of this FS Regulation is to regulate all activities related to setting basic requirements on scoping study, pre-feasibility and feasibility study, and discussing and

receiving feasibility study. Moreover, this FS Regulation shall also apply to requirements to be imposed on project implementer, author and the relations between state administrative body in charge of geology and mining (i.e. MRPAM), which submits the project for discussion, and the state central administrative body which will oversee the implementation of this Regulation.

The definition of Feasibility study is provided in the FS Regulation as follows:

“Feasibility study for mining of minerals deposit is a technical document consisting of design, study and description parts in which comprehensive assessment is made on the choice of technique and technology, approximation, engineering solution, environmental, occupational safety and health, legal, human resource, managerial, operational, infrastructural, availability of supply, social and economic benefit estimation and other relevant factors of mining plant for implementing mining project (mining, processing and enrichment of minerals) based on the reserves registered with the state registration”.

In addition, the definitions of scoping study, pre-feasibility, as well as mining design for mineral deposits are included in this Regulation and the Sections 3-6 of this Regulation listed the contents to be included in such documents and their requirements.

Although this Regulation includes 4 types of documents, the later sections, which are Sections 7 and 8, are only related to the preparing, using and receiving the feasibility study.

#### Rule of the Minerals Professional Council

This Rule has been approved by the Order A/46 - Approving Rule, Composition and Method – of the Minister of Mining and Heavy Industry on February 26, 2018.

This Rule sets the organizational structure of the Council and determined its rights and obligations as well as its meeting procedure. In details, the Rule has 7 sections, which are (i) General terms, (ii) Rights and Obligations of the Council, (iii) arrangement of the Council’s activities, (iv) Matters to be discussed by the Thematic sessions of the Council (v) Order of the meeting (vi) Rights and obligations of expert and (vii) Liability.

### **2.3. Other rules and procedures:**

Other rules and procedures, which contains regulations related to the feasibility study, include the following:

- Regulation for prospecting, exploration and exploitation of minerals, approved by the Order #A/20 of the Minister of MMHI (2018);
- Guidelines for receiving mining works plan, report and information of mining of minerals, approved by the Decree # a/22 of MRPAM (2016);
- *Procedure for keeping information database of geology, mining and minerals*, approved by the Order #A/19 of the MMHI (2018); and

- *Procedure for receiving, registering, keeping and using geology report*, approved by the Decree # A/30 of MRPAM (2016).

#### 2.4. Validity of the regulation:

The regulation and procedure issued from administrative organization to be complied with by the public is called “**normative administrative act**” and according to the Clause 59.1 of the General Administrative Law of Mongolia, normative administrative act is defined as a binding decision, that is (i) outward (meaning “directed at public”) and (ii) with repetitive characteristics (meaning “applicable to all consequent events”), (iii) which is issued by an exclusively authorized administrative organization for public compliance.

In order to be effective, the normative administrative acts shall be registered with the state unified registration by the state central administrative party in charge of legal affairs (i.e. MOJHA) and published in the “normative administrative acts” gazette. If not, then such regulation is not legally valid and the citizen and legal entity shall not bear any obligation or responsibility for not complying with it.

The main regulations for feasibility study which is “Basic Requirements for Scoping Study, Pre-Feasibility and Feasibility Study and Procedure for Receiving a Feasibility Study” is issued to be complied with public. In other words, since this Regulation applies to the activities of the license holders and other participants in the process of developing and receiving feasibility studies, the decision approving this FS Regulation shall be considered as *outward*.

In addition, the fact that feasibility studies of all the mining projects shall be developed in accordance with this Regulation makes this Regulation as *with repetitive characteristics*.

The Minerals Law does not have provision that exclusively authorized any administrative organization to regulate the matter related to feasibility study for public compliance, therefore this FS regulation fails to be qualified as normative administrative act. Moreover, there is no registration at the MOJHA of this Regulation as the normative administrative act.

The consequence is that this Regulation may not be considered legally binding and the license holders may not be required to comply with it.

While FS Regulation is not registered and therefore seemingly has no binding effect, the Regulation for prospecting, exploration and exploitation of minerals is duly registered as normative administrative act since the Clause 10.1.7 of the Minerals Law authorizes the MMHI to issue such regulation.

### THREE. DETAILED GAP ANALYSIS

This part includes the review of the current Mongolian laws and regulations relating to the FS in details and identify the gaps by comparing with the international practice. The international practice is from Mr. Steve Gemmell's FS Report for the Working Group, which provides background information on various aspects, relating to the application and use of FS, the requirement and content of FS, its review process and regulation of authors, outside of Mongolia (Mr. Gemmell's Report).

#### 3.1. Purpose and use

According to the Clause 48.6.1 of the Minerals Law, the mining license holder shall have the feasibility study to use the deposit prepared by an authorized entity and shall deliver the document within 1 year upon obtaining the mining license.

The feasibility study shall include the detailed information regarding the transportation of mineral products, information on how the infrastructure is organized, and the fund that is required for the rehabilitation and closure of mines (Article 27 of the Minerals Law).

Feasibility study for mining of minerals deposit is defined in the FS Regulation as “a technical document consisting of design, study and description parts in which comprehensive assessment is made on the choice of technique and technology, approximation, engineering solution, environmental, occupational safety and health, legal, human resource, managemental, operational, infrastructural, availability of supply, social and economic benefit estimation and other relevant factors of mining plant for implementing mining project (mining, processing and enrichment of minerals) based on the reserves registered with the state registration”.

#### Use:

The FS Regulation specifies that three copies of feasibility study shall be made. The copies shall be kept with the (i) project implementor, (ii) archive of the Geology Research Department and (iii) the Mining and Research Department (if it is a coal project, then to Coal Research Department) of Mineral Resources Authority of Mongolia respectively. Mining and Research Department or Coal Research Department shall use the FS for purpose of overseeing the activities of mining the deposit. The Procedure for receiving, registering, keeping and using geology report, approved by the Decree # A/30 of MRPAM (2016), requires the legal entity that requested feasibility study to be made for mining of minerals deposit to submit copies of feasibility study along with other materials to Geology Central Archive of MRPAM and the Mining department.

The official name of the Mineral Resources Authority of Mongolia is now changed as MRPAM and the names of the departments thereof has been changed. Therefore, it is not practical to reference in the regulations (normative administrative acts) the exact names of the authority or departments and in practice it is advisable to reference the organization by describing its functions.

By the Order #A/20 of the Minister of MMHI /2018/ *the Regulation for prospecting, exploration and exploitation of minerals* is approved and according to Clause 8.2 of this Regulation, the license holder shall develop feasibility study to implement mining project (mineral exploitation and enrichment) based on the reserve registered with the state and shall have it discussed and approved by the Council. In addition, license holder shall build the mine and other constructions as described in the feasibility study ... (Clause 8.6) and shall make and submit plans and reports based on the feasibility study (Clause 9.5).

According to the *Guidelines for receiving mining works plan, report and information of mining of minerals*, approved by the Decree # a/22 of MRPAM (201.), the next year's core indications of the mine, processing and enrichment plants, mine work plans, their reports shall be made based on the currently effective feasibility studies thereof.

A license holder is obligated to keep the feasibility study at the mine (Clause 35.3.2 of the Minerals Law) and it implements the FS by confirming with each year's report and mining works plan and the inspection authority shall inspect thereof (Section 7.4 of the FS Rule).

The above provisions show that the FS is required for the license holder to use minerals deposit and the FS is the basis on which each year's mining works plan as well as the report shall be prepared. In addition, the state authority uses FS to oversee the activities of the license holder and the state inspector may inspect the activities of the license holder as per the FS and other documents based on it. Furthermore, one copy of the FS is delivered to Research related departments of MRPAM, hence enabling the state authority to make respective analysis and research.

In addition, although the state authority *receives or accepts* feasibility study after discussion by the Council, it should be noted that in several regulations, it is referred as *approval*.

*Amendment:*

The project implementer is required to amend, modify or renew the FS in following circumstances:

- if there is a change in capacity, technique and technology of the mining project;
- if more than 3 years have passed without any mining activity since FS is made;
- if mining license holder is changed; and
- every five years (when mine operates).

In addition, project implementer is obligated to determine minor economic changes made to core indications of FS (cut off, condition and reserve etc.) due to fluctuation of the world market price of the product and changes to the production costs at the end of each year and include it in the next year's mine works plan and inform the Mining research department or Coal research department. In case the reserve increased or decreased

due to the above changes, then reserve movement shall be changed and registered with the state unified reserve registration as proposed by Mining research department or Coal research department(Clause 7.5 and 7.6 of FS Regulation).

The FS regulation obligates the license holder (i.e. project implementer) to amend the FS even though it is not required by the law. The regulation cannot impose obligation that exceeds the provisions of the law.

*Confidentiality:*

Pursuant to the Clause 57.2 of the Minerals Law, upon the license holder's request, the State administrative body shall keep the feasibility studies as confidential during the valid term of the license. The State administrative body may enter into a confidentiality agreement upon receiving the reports and information.

In case of using reports and feasibility study of deposits which their reserves were determined based on the exploration made by private funds, consent of the relevant organization and legal entity that made such reports shall be required according to the *Procedure for keeping information database of geology, mining and minerals*, approved by the Order #A/19 of the MMHI /2018/.

According to the Report of the Research<sup>1</sup> on the gaps, errors and overlaps of 30 laws related to mineral resources and environment and their harmonization, this confidentiality regulation contradicts with the Law on Organizational Secrecy, which states that the environment related information is prohibited to be classified as confidential. However, it should be considered that FS not only incorporate environmental information, but sensitive information including financial information of companies is included as well.

As indicated in Mr. Gemmell's Report, the purpose of FS is to provide a quantitative and qualitative analysis of the mining project and the environment it occupies (and will occupy) and in western countries, it is for the project sponsors, potential investors and financiers ("Interested Parties") to make strategic decision confidently. Consequently, the context and content of FS has been most strongly influenced by the requirements of Interested parties. The use of commercial feasibility studies by regulatory authorities are rare and the regulator (in the case of State of Victoria in Australia) is prepared to accept other evidences.

Therefore, while FS in the Mongolian regulations is for regulatory purpose, it is for the Interested parties to make strategic decision with respect to the project in the other countries.

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<sup>1</sup> Research made with the cooperation of MMHI, MOJHA and MOET with the support of the Project "Reliable Legal Framework for Sustainable Economic Development" of GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit) in 2017.

With respect to confidentiality, some countries require public reporting in case of companies listed on stock exchanges (i.e. public companies).

### 3.2. Content and Requirements

The FS Regulation has Section 3 (Requirements for preparation of mineral resources scoping study), Section 4 (Requirements for preparation of mineral deposit mining prefeasibility study), Section 5 (Requirements for preparation of mineral deposit mining feasibility study) and Section 6 (Requirements for preparation of mineral deposit mining technical design and drawings) which lists the name of study segments and their requirements.

In other countries, the requirements of FS are derived from the expectation of the users which are the sponsors, investors and lenders and they are primarily concerned with project return and project risk. Feasibility studies prepared for investment purposes have similar components irrespective of the project parameters. Obviously, certain components may be omitted or reduced according to the nature of the proposed operation. Some countries approach is to regulate public reporting of FS as per the respective public reporting codes rather than regulate the studies themselves (while setting minimum standard)<sup>2</sup>.

Since this report is to analyze the legal gap, it does not include analysis on the difference of contents and study details of FS between Mongolia and other countries, however it should be noted that Mongolian regulations does not have different requirement for different type of projects and it is silent on whether certain requirements may be omitted depending on the type/scale of project.

### 3.3. Participants and reviewing process

#### ***Participants:***

According to the laws and regulations of Mongolia, following participants are involved with the following functions in the development, evaluation and acceptance of feasibility study:

*Project implementor:* As defined in the FS Regulation, project implementer is the holder of the exploration or mining license granted from the state administrative body in charge of geology and mining or a legal entity that operates minerals enrichment and processing plant.

*Author:* Feasibility study shall be developed and independently evaluated by professional specialist, authorized legal entities as per the Clause 48.6.1 and 48.12 of the Minerals Law. The FS Regulation defined the author as “geology and mining research or designing authorized entity which has Mongolian consultant engineers specialized in this field”.

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<sup>2</sup> Mr. Steve Gemmell's FS Report for the Working Group.

Professional specialist means a citizen who is authorized by nongovernmental organization of geology and mining sector and has been nationally and internationally recognized, who is a member of such nongovernmental organization (Clause 4.1.26 of Minerals Law and the Regulation for Professional Nongovernmental Organization to Authorize Professional Specialist and Expert in the Geology and Mining Sector).

Currently, the legal entities entitled to prepare FS for the mining companies are required to apply for a special permit (as part of the special permit for drafting design of construction) issued by the Mongolian National Construction Association, as delegated by the Ministry of Construction and Urban Development, based on the Regulation approved by the Order #11 of the MCUD dated January 19, 2018.

However, such regulation has been annulled as of December 31, 2018 by the Order #217 of the Minister of Construction and Urban Development and the newly adopted regulation does not include the permit to be granted to the legal entity that prepares FS. Therefore, it is uncertain whether this issue of granting special permit is regulated currently.

As described in Mr. Steve Gemmell's FS Report for the Working Group, in most other countries, feasibility studies are undertaken by the project sponsor or an independent, specialist, mineral project consulting or mineral project engineering company. Because of the required specialist skills, the trend is for a higher proportion commercial feasibility studies to be undertaken by the independent specialist company, except for the very largest project sponsors. The independent specialist company will retain sufficient, appropriately qualified, skilled and experienced individuals to author the study. These companies are not generally regulated, however may subscribe for voluntary certification for international standards. In case of individual study author, they are generally accredited. They hold appropriate tertiary education qualifications, and are registered members of an appropriate professional society. The professional society of which an author is a member is expected to have an enforceable code of ethics, and has the power to take disciplinary action against its members. In some jurisdictions, authors who are engineering professionals (mining, civil, electrical, mechanical, metallurgical, process, environmental etc.) are required to register with the state authority as a 'Professional Engineer' (or some similar nomenclature) before being allowed to undertake design, construction or reporting activities within that state. The award of this status may be by means of an examination or by a review of the applicant's qualifications and experience. The state may undertake the registration process itself, or delegate it to either a government-appointed board or an appropriate professional society.

While these practices with respect to professional specialist are similar to Mongolian regulation, the requirement of special permit for the legal entity is different.

The Article 7 of the Law on Licensing provides that the relevant state central administrative organization shall grant special permit stipulated in the Article 15 of the Law on Licensing except as provided otherwise in the law and detailed procedure related to special permit of particular type of activity shall be regulated by each respective law.

Some state central administrative organization, such as Ministry of Road and Transportation Development, regulate the special permits for their sectors' FS by their own laws and regulation and this special permit is listed in the Law on Licensing.

In case MMHI wishes to grant special permits to legal entities, the Law on Licensing should be amended to include such special permit and the detailed procedure should be explained in the Minerals Law.

Otherwise, the practice of other countries may apply, whereby the legal entity is not required to have special permit, but to have professional specialists who will author the feasibility study and take responsibility for their actions under the rule of conduct.

State administrative body in charge of geology and mining: FS Regulation refers the MRPAM as the authority which submits the project for discussion [by the Council] and according to the Council Rule, an official at the MRPAM who has reviewed the feasibility study shall submit the feasibility to the Council for its discussion with comments and conclusion.

Expert: Expert is defined in the FS Regulation as “an engineer, doctorate or the professor of the sector, professional specialist or Mongolian consulting engineer, that has experience of more than 10 years in the geology and mining sector”.

Once the FS is submitted by the MRPAM to the Council, the Chairman of the Council shall appoint the expert or experts' team to provide opinion and comments on the feasibility study of mining and enrichment plant of deposit (Council Rule).

Expert shall be responsible for the accuracy and validity of its own comments and opinion on the feasibility study. Expert shall have the right to make evaluation and issue opinion on the professional capacity, execution quality of the legal entity that drafted the feasibility study of the mining of deposit, and enrichment plant and provide its comments regarding liability (Council Rule).

The expert's role, its rights and duties, as well as remuneration is determined in details in the FS regulation and the Council Rule. However, some of the provisions of the regulations are overlapping and contradicted with each other.

In other countries, the review process of a commercial feasibility study has procedural steps which differ according to the identity of the report authors, and to the identity of their target audience. A commercial feasibility study report that has been project managed by the project sponsor will often (but not always) be reviewed by an independent expert. The expert will be an individual or a team provided by a reputable consulting firm<sup>3</sup>.

Mineral resources professional council: According to the Clause 10.1.9 of the Minerals Law, the MMHI has the power to establish the Council which consists of qualified

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<sup>3</sup> Mr. Steve Gemmell's FS Report for the Working Group

specialists who has the duty to evaluate and make recommendations the feasibility study for processing and enriching plants of mineral deposits and approve the Council's Rules.

In case the holder of the mining license conducted feasibility study of mining, enrichment and processing plant in compliance with relevant guideline, regulations and requirements with the assistance of a consultant and specialized professional and have the expert's opinion issued, then the Council's relevant Thematic session shall discuss and provide its conclusion and recommendation as proposed by an official in charge of such matter at the state administrative organization who has reviewed thereof. (Council' Rule)

The Council has 4 thematic sessions depending on the matters to be discussed. By the Thematic session for discussing the matters related to feasibility study for mineral deposits mining and operation plan of a petroleum deposit, following matters shall be discussed:

1. feasibility study for mineral deposits mining and enrichment plant;
2. operation plan of a petroleum deposit;
3. researches for improving mining technique and technology, reducing wastes during mining of minerals, eliminating negative environmental impact etc.;
4. requirements for feasibility study of mining projects, guidelines for acceptance thereof;

The Council shall issue conclusion and provide recommendation on whether the above documents are in compliance with relevant laws, survey methods and methodology, guidelines and regulations as well as whether to accept the Feasibility study based on the expert opinion on whether the feasibility study is conducted in compliance with conclusion and recommendation stated in Section 2.1.2 of this Rule (conclusion and recommendation with respect to registration of mineral reserves) and with optimal solution on method, methodology and technology and on the grounds of economic analysis (Council's Rule).

The overall procedure and order of the Council's meeting/session is provided by the Council's Rule. The FS Regulation (Section 8) has procedural provisions which overlaps with the Council's Rule.

*The state central administrative body:* The MMHI is stated that it has the function to oversee the implementation of FS Regulation.

***Timing:***

With respect to timeline of overall procedure, the Clause 48.4 of the Minerals Law provides that the state administrative body (i.e. MRPAM) shall have the specialized expert to be appointed from Council with regards to the feasibility study within 30 days and order it to make evaluations thereof within 90 days. Based on such evaluation, the MRPAM shall decide whether to register the feasibility study, along with the materials, with the state information database.

The FS Regulation states that the meeting of Council shall be convened on Thursdays of first and third week of each month and the matters to be discussed shall be classified. If necessary, meetings can be called to be convened earlier. However, these provisions regarding timing on the regulations are not implemented in practice.

## FOUR. RECOMMENDATION

### Validity of the regulation

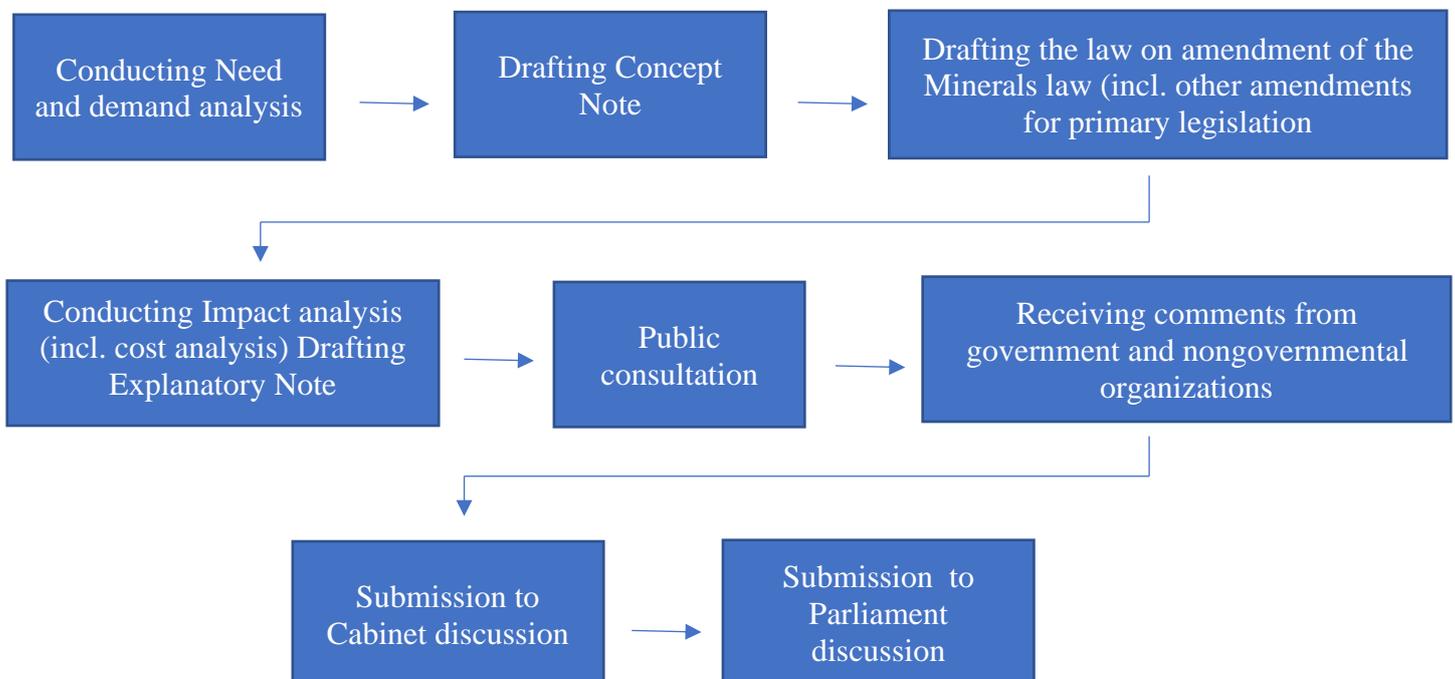
Since the Minerals Law does not include any specific and detailed regulations with respect to quality and requirements of feasibility study, the most important thing is to decide whether to regulate FS by issuing regulation that is in compliance with laws or regulate this matter through non-binding approach (standard, guidelines or code).

In case of issuing the specific regulation, as mentioned in this Legal Gap analysis, it should be qualified as normative administrative act in order to have legally binding effective. For this purpose, following actions should be taken:

- (i) Amend the Minerals Law to exclusively authorize MMHI to approve regulation relating to FS;
- (ii) Consider the requirements for normative administrative act as stated in the General Administrative Law;
- (iii) Follow the procedure specified in the General Administrative Law to draft normative administrative act; and
- (iv) Register with the MOJHA.

#### **(i) Amendment of the law:**

The procedure for the amendment of the law, prescribed under the Law on Legislation of 2015, shall be followed, which is briefly the following:



#### **(ii) Requirements for normative administrative act**

As required by the Article 60 of the General Administrative Law, following requirements shall be met when drafting the regulation:

- To be in compliance with the Constitution of Mongolia, General Administrative law and other legislation;
- Be consistent and compliant with the content, goal and scope of the law giving exclusive rights;
- The Notes section must state legal provisions upon which the act is grounded;
- Provisions of the decision must not conflict with each other or with provisions of decisions by other authorized entity;
- Provisions of the decision must not conflict with each other or with provisions of decisions by others;
- Must use terminologies as stated in the Constitution of Mongolia and other legislation in key and commonly accepted meanings;
- Must not apply prohibitive regulation of issues not prohibited by law;
- Must clearly state relevant provisions if the decision terminates or amends a previous decision;
- Must not repeat provisions of other laws, and use references where necessary;
- Must name the organization, officer approving the act, act name, date and reference number to be stated clearly; and
- Other requirements stated in the law (including requirements for drafting procedures of normative administrative act and requirement for receiving comments and feedback on the draft).

***(iii) Procedures for drafting and issuing normative administrative acts***

A normative administrative act shall be drafted by an authorized administrative organization if the matters for which the regulation is sought simultaneously applies to functions of another administrative organization, formal comment and feedback from the other administrative organization shall be obtained. If comment and feedback are not obtained, there shall be explanation of the grounds and requirements for not obtaining such comment and feedback. In drafting normative administrative act, impact assessment shall be made according to methodology as in Clause 61.6 of the General Administrative Law, which includes:

- Grounds, demands and goals for the act;
- General structure of the act, regulating affairs and scope;
- Determination of any rights and legal interests that may be affected in any way;
- Whether the draft contain or potentially contain regulations limiting freedom and competition, impeding economic, social and other activity and creating bureaucracy;
- whether there legally valid laws or normative administrative acts regulating the same issue;
- Study for the needs of human, technical and economic resources for implementation.

In addition, a briefing shall be prepared. Impact assessment refers to a comprehensive study and forecast of economic and social impacts and consequences of an administrative act. Regulation for impact assessment is approved by the Cabinet

member in charge of legal affairs.

A draft normative administrative act shall be posted on information boards and the website of the organization for at least 30 days, for comment and feedback. If the draft act affects the public interest, human rights or legal interests, discussion shall be organized to incorporate public opinions and feedback; every possibility for participation shall be ensured, especially for any group whose rights and legal interests may be affected. In addition, the following discussions may be organized:

- With any group which claims their rights and legal interests may be affected.
- With professionals such as scholars, researchers and experts.
- With those in any affected area or specific territory.
- With government and non-government organizations in the field.

Discussions may be in the following forms:

- Meetings and dialogues.
- Newspapers offering comments and feedback.
- Comments and feedback through websites and other communication forms or
- Other.

Minutes shall be kept on the progress and outcomes of all discussion and information briefing shall be prepared on how comments and feedback are incorporated in the normative administrative act.

An administrative organization shall submit impact assessment, draft normative administrative act and information on discussions for reviewing and revision by its law department or officer.

#### ***(iv) Registration with MOJHA***

In registering normative administrative act, the state central administrative body in charge of legal affairs shall verify whether the act complies with requirement of the General Administrative Law and shall register it with the state unified registration.

#### **Update of the regulation**

Based on the identified gaps, the following matters should be considered when drafting the content of the regulation:

- The FS regulation purports to regulate 4 types of documents which are scoping study, prefeasibility study, feasibility study and technical drawing for mining of mineral deposit, however, the sections of the regulation pertaining to keeping, using, updating and receiving is only related to feasibility study. The updated regulation shall determine whether such procedural requirements should extend to other three documents;
- It should be determined whether to have different requirement for different type of projects and whether certain requirements may be omitted depending on the type/scale of project. In addition, as with other countries, whether to provide indication of depth of study in order to achieve the accuracy should be considered;

- Requirements for author and granting of special permit for the legal entity should be clarified and in case of granting the permit from the MMHI, the relevant laws should be amended;
- In the updated regulation, it must be verified that the regulation does not include obligations that exceed the obligation of the participants as provided under the law
- Names of authorities and departments should not be mentioned, rather it shall state generally the organization with its function;
- Confidentiality of feasibility study shall be amended considering the Report of the Research on the gaps, errors and overlaps of 30 laws related to mineral resources and environment and their harmonization;
- The Council's Rule shall be reviewed simultaneously as well and amended (if necessary) in order to eliminate overlaps and contradictions; and
- The overall timing of the procedures to submit, review and accept (or approve, as appropriately) should be determined reasonably.

## ANNEX: MATRIX OF GAP ANALYSIS

| # | Issue                          | Regulation   | Gaps identified   | Recommendation  |
|---|--------------------------------|--|---|---|
| 1 | Legal validity                 | Regulation approved by Order # 074   | Not a legally valid regulation  | To amend Minerals Law and register as normative administrative act or opt to regulate by standards, guidelines or codes |
| 2 | Purpose                        | Regulatory purpose   | Commercial purpose in western countries   | To determine the purpose in case of updating the regulation   |
| 3 | Scope of Regulation            | In the FS Regulation, four documents were mentioned                            | Later 2 sections of the FS Regulation were only related to the feasibility study      | To determine whether to include procedural requirements for these documents.  |
| 4 | Special permit of author       | Regulation approved by MCUD  | Special permit is issued by MNCA but the regulation is annulled.                      | To determine the authority and if necessary, amend the Licensing Law and Minerals Law.                                  |
| 5 | Overlap and contradictions     | FS Regulation and Council's Rule   | Provisions related to Expert and receipt of FS etc were overlapped and contradicting. | To revise the FS regulation to be in line with Council's Rule or amend the Council's Rule                               |
| 6 | Flexibility and depth of study | FS Regulation requirements are related to FS regardless of project differences | No provision for flexibility and requirement of depth of study                        | To include specific regulations   |
| 7 | Reference to authority         | Regulation refers to the Archive of the Geology Research Department Mining     | The official name of the authority, as well department names changes                  | To refer to the organization by stating its functions   |

|    |                             |  |   |   |
|----|-----------------------------|--|---|---|
|    |                             | and Research Department or Coal Research Department Mineral Resources Authority of Mongolia  |   |   |
| 8  | Obligation exceeded the law | FS regulation has obligation for the license holder to amend the feasibility study   | The regulation shall not impose obligation that exceeds the provisions of the law           | To revise the amendment related provisions  |
| 9  | Confidentiality             | Minerals Law, FS Regulation and Procedure for keeping information database of geology, mining and minerals, approved by the Order #A/19 of the MMHI /2018/ | Environment related information is prohibited to be classified as confidential              | To consider the Report of the Research on the gaps, errors and overlaps of 30 laws related to mineral resources and environment and their harmonization |
| 10 | Timing                      | Minerals Law, FS Regulation and Council's Rule   | The procedural regulations shall be determined clearly and continuously in terms of timing. | To determine overall timing of the procedure to submit, review and accepting the feasibility study.   |