

Fingerboards Mineral Sands Project Inquiry and Advisory Committee

Technical Note

TN No: TN 040

Date: 28 June 2021

Subject: Independent Technical Reviewer

I. CONTEXT

1. A substantial proportion of the case advanced by the Council and other objectors focuses on issues of uncertainty associated with the assessment of environmental impacts, particularly groundwater and surface water. In addition, concerns have been expressed about the capacity or willingness of statutory regulators to properly assess and manage the Project following this process.
2. In respect of the first matter, it is a matter for the IAC to assess how the extent and significance of the residual uncertainty remaining after this process and to determine how any uncertainties should be addressed. This is a matter that will be addressed further in Kalbar's Part C submission.
3. In respect of the second matter, it is a matter for the State government how it funds and manages its departments and their regulatory functions, and such matters are both wholly outside the control of the Proponent and outside the IAC's Terms of Reference. Submissions on the adequacy of a regulator – and in particular the implication that projects should not be approved because the regulator is inadequate – are, in the Proponent's respectful submission, entirely irrelevant to the IAC's task.
4. Having said that, and assuming the concerns expressed about uncertainty are *bona fide* rather than an exercise in curial tactics, the Proponent considers an appropriate way to provide additional certainty and confidence in relation to future approvals and oversights is by the establishment of an Independent Technical Reviewer (ITR) to be funded by the Proponent.¹ Draft Terms of Reference for the proposed ITR are included in Appendix 1.

II. ROLE AND FUNCTION

5. The proposed ITR would serve two broad functions:
 - a. The first is to review detailed design documents relating to dams and other water management infrastructure and to review and comment on material (including subplans and modelling) to be provided to statutory authorities for approval prior to submission, consistent with the role of the ITR Panel in the Stockman Base Metals Project; and
 - b. The second is to monitor and audit compliance with statutory approvals once granted and to provide reports to statutory authorities, the Environmental Review

¹ For the avoidance of doubt, while the ITR is described in singular terms, it is anticipated that – consistent with the practice in relation to Independent Reviewer and Environmental Auditors – it would either be a body corporate or an informal body consisting of a sufficient number of members to discharge the tasks committed to it.

Committee (**ERC**), and the Community Reference Group. This is similar to the role of the Independent Reviewer and Environmental Authority (**IREA**) found on many State government projects.

6. The purpose of having the ITR and conferring these functions on it, is to ensure that regulators and other accountability bodies (including the Environment Review Committee and the Community Reference Group) have adequate and independent technical advice to assist them in discharging their roles within the accountability framework established for the Project. In this context, it is intended that the ITR would consist of technical experts and as such would supplement, rather than replace, the work of other bodies.
7. The ITR could also be assigned specific functions under particular subplans. For example, in major government projects, it has typically been the role of the IREA to determine whether construction works outside of normal working hours are 'unavoidable' for the purposes of satisfying EPA Publication 1834. Equally, as part of its review of subplans, it could be asked to evaluate whether a further reduction in risk is 'reasonably practicable' for the purposes of Earth Resources and Regulation (**ERR**) and the Environment Protection Authority (**EPA**) decision-making.
8. Where the ITR is asked to comment on material for submission to a statutory authority for decision-making purposes, the comments of the ITR would be required to be provided to the relevant decision-maker. All comments would be retained in accordance with obligations on the Project to retain records.
9. Consistent with the position taken for the Stockman Base Metals Project, the ITR would be appointed by the Proponent subject to the approval of ERR.
10. Anticipating the obvious argument that the establishment of an ITR is a substitute for appropriate assessment and oversight at this stage, such an argument was rejected by the Inquiry considering the Stockman Base Metals Project which viewed the ITR Panel as supplementing the role of statutory regulators. The Inquiry stated:

The Inquiry acknowledges that the DSDBI have capabilities and powers to enable the review of all aspects of the mine operation, however we remain concerned that they may not have the necessary resources or specific expertise in some areas for close oversight of plans, operations and closure to ensure the long-term environmental risk of the mining operations and in particular the TSF, are resolved. We also note interests of other agencies, including DEPI as the land manager and the EPA as a regulator, takeover the management and regulation of the mine site after closure and rehabilitation.

The Inquiry accepts the desirability of appointing an ITR to inform the preparation of the application for a Work Plan. We do not agree with the GEG that the ITR framework would undermine the scrutiny, accountability or transparency of the regulatory framework. On the contrary, the responsibilities of relevant agencies to regulate the Project would be unchanged but would be informed by review by an independent expert. Further, ITR reports would be provided to the ERC which could then take action if required. ANCOLD recognises the value of independent review

and we do not see any conflict in that requirement being satisfied by the same person.²

11. It is apparent that the Minister also saw merit in the appointment of an ITR to inform subsequent regulatory decisions:

It is my assessment that, in order to ensure appropriate oversight of key technical matters, a 'panel' of Independent Technical Reviewers (the 'ITR Panel') be set up to advise on aspects of the project as required. The ITR Panel should be in place prior to the approval of the Work Plan to assist with further work required prior to the submission of the Work Plan, including the development of a robust monitoring program. It is anticipated that the role of the ITR Panel may conclude after the mine has been rehabilitated and the required closure standards are reached, such that hand back to the State is permitted. However, if at that time there is perceived merit in retaining the ITR Panel to assist the State (land manager) post-closure, then the ITR shall be appointed for a further period of time (e.g. 1 to 2 years) with annual reviews of the utility of this role by the State (land manager).

...

It is my assessment that the ITR Panel is to inform, as appropriate, approvals and conditions set under the MRSD Act as well as the dam licence required under the Water Act 1989. In all cases, reports of the ITR Panel should also be included as attachments to or available together with regulatory applications (e.g. final Work Plan). It is envisaged the ITR Panel can be used for both final peer review and provision of iterative advice, providing all correspondence between the ITR Panel, the proponent (and consultants) is documented. The ITR Panel shall set up its own procedures in consultation with DSDBI ERR, including the means of documenting advice.³

12. More broadly, IREAs have been appointed in all recent major government projects (including Metro Tunnel Project, West Gate Tunnel, and North East Link). In each case, their role has included reviewing those documents that are not subject to approval by an approval authority to assess their adequacy and compliance with relevant controls. For example,
- a. The approved North East Link Project environmental management framework (EMF) states:

The EPRs (Section 8) set out requirements for contractors to prepare relevant management plans to avoid, minimise and mitigate impacts.

All assessments and plans required under these EPRs must be prepared by suitably qualified and experienced personnel and verified as adequate and compliant with the EPRs by the Independent Environmental Auditor. Where appropriate, the management plans required by these EPRs may be included as part of the CEMP or OEMP rather than as stand-alone plans.⁴

² Stockman Base Metals Project (EES) [2014] PPV 120, pp. 145 – 146.

³ Stockman Base Metals Project – Assessment under Environment Effects Act (2014), pp. 41 – 42.

⁴ North East Link Project, *Environmental Management Framework* (January 2020), p. 19. Available at:

- b. An example of a plan of the kind referred to above is the Dust and Air Quality Management and Monitoring Plan. EPR AQ1 of the North East Link Project EMF requires the preparation of a plan:

Prepare and implement a Dust and Air Quality Management and Monitoring Plan(s), in consultation with EPA, which sets out best practice measures and controls to minimise and monitor impacts on air quality during construction.

The plan(s) must:

- *Set out how the project will monitor and control the emission of smoke, dust, fumes, odour and other pollution into the atmosphere during construction using best practice measures with reference to EPA Victoria Publication 480 Best Practice Environmental Management: Environmental Guidelines for Major Construction Sites*
 - *Identify the main sources of dust and airborne pollutants, and the location of sensitive land uses relevant to each construction area*
 - *Describe the monitoring requirements for each construction area including real-time particulate matter monitoring to manage dust control where deemed to be required, and with reference to sensitive receptors and utilising consistent and common monitoring equipment across the project*
 - *Describe the air quality triggers for investigation, the mitigation measures, and the processes for implementing appropriate controls⁵*
13. In this case, the ITR would go a step further than IREAs in that it would also be required to review material for adequacy prior to submission to statutory authorities for approval.

III. IMPLEMENTATION

14. In terms of implementation, the conditions imposed on the Mining Licence / Work Plan for the Stockman Base Metals Project provide a readily adaptable framework for the establishment of the ITR. Conditions 2 - 6 provide:⁶

The function of the Independent Technical Review (ITR) Panel is to provide independent review of critical project documents. The scope of the role is set out in the Stockman Base Metals Project Independent Technical Review Panel Terms of Reference 2018-2019 (ToR).

The ToR can be updated as required by the ITR. If changes are proposed, the Licensee must provide a copy to the Director, Statutory Authorisations for approval prior to any changes taking effect. The ToR must not be amended in a manner inconsistent with requirements set out in the Section 4.11 of the Minister for Planning's 2014

https://northeastlink.vic.gov.au/data/assets/pdf_file/0019/420157/NELP-Environmental-Management-Framework-23-January-2020.pdf

⁵ Ibid, p. 26.

⁶ There is some ambiguity as to whether the document available on the ERR website is the Mining Licence or the Work Plan.

Assessment of the Stockman Base Metals Project under the Environment Effects Act 1978 (the Minister's Assessment).

The Licensee is responsible for the appointment and remuneration of the ITR Panel. The Licensee must inform the Department within 14 days of the resignation of any member of the ITR. Prior to the appointment of new member/s, candidates must be endorsed by the Chief Inspector. The Licensee must ensure that ITR Panel includes at least one member who is an Auditor appointed under section 53S of the Environment Protection Act 1970.

The Licensee must direct the ITR Panel to provide its final review reports directly to the Department and must maintain records of its reviews and recommendations.

15. In the present case, the following conditions could be imposed on any Mining Licence,
 - a. Prior to submission of the draft Work Plan, any plan required by the Incorporated Document for approval or the granting of any application for a statutory authority, the Licensee must establish an Independent Technical Reviewer (ITR).
 - b. The function of the ITR is to provide independent advice on key project documents and decision-making. Its scope is set out in the *Fingerboards Mineral Project Independent Technical Reviewer Terms of Reference*. The Terms of Reference must be approved by Earth Resources Regulation (ERR) and must be consistent with the Minister for Planning's Assessment of the Project under the *Environment Effects Act 1978* (the Minister's Assessment).
 - c. The Terms of Reference may be amended from time to time at the ITR's request. If changes are proposed, the Licensee must provide a copy to the Director, Statutory Authorisations, ERR for approval prior to any changes taking effect. The Terms of Reference cannot be amended to be inconsistent with the Minister's Assessment without the Minister for Planning's prior written approval.
 - d. The Licensee is responsible for the appointment and remuneration of the ITR. Appointment(s) would be subject to the approval of ERR. The ITR must include persons with expertise, based on qualifications and experience, appropriate to allow the roles specified for the ITR in relation to the current stage of the Project to be properly carried out.
 - e. Any report or advice prepared by the ITR relating to the approval, or proposed approval, of a document must be provided to:
 - i. The Licensee;
 - ii. ERR;
 - iii. Any statutory authority having responsibility for an approval to which the document relates; and
 - iv. The Environmental Review Committee for the project, once established.
 - f. Any report or advice prepared by the ITR in relation to the compliance of the Project with applicable regulatory controls must be provided to the above parties and the Community Reference Group, once established.
16. In addition, the EMF for the Project would be updated to include references to the ITR and to define its responsibilities consistent with the approved ITR Terms of Reference.

Appendix 1

DRAFT TERMS OF REFERENCE FOR INDEPENDENT TECHNICAL REVIEWER

A. Role and Function

1. The Independent Technical Review ('ITR') is appointed to provide independent advice on specified technical matters defined in these Terms of Reference ('Terms') in accordance with the balance of the Terms.

B. Definitions

2. The following definitions are used in these Terms:
 - a. "Statutory authority" means any approval under an Act which confers on the Proponent a right to carry out an activity which, but for the approval, would be unlawful and, for the avoidance of doubt, includes the Incorporated Document and the Work Plan;
 - b. "Work Plan" means the Work Plan approved, or proposed to be approved, under the Mineral Resources (Sustainable Development) Act 1990 in relation to Mining Licence [xxx];
 - c. "Incorporated Document" means the Incorporate Document entitled 'XXXX' forming part of the East Gippsland Planning Scheme;
 - d. "The Proponent" means Kalbar Operations Pty Ltd (ACN xxx xxx xxx).
 - e. "Phase" means the Planning and approvals Phase, the Construction Phase, the Operations Phase, or the Post-Closure Phase.
 - f. "Planning and approvals Phase" means the period from the grant of Mining Licence [xxx] until all statutory authorities required for the carrying out of the Project have been obtained, whether those approvals are required in respect of the Project Area or the Infrastructure Area;
 - g. "Construction Phase" means the period from the commencement of construction in either the Project Area or the Infrastructure Area until the completion of all construction works required in either the Project Area or the Infrastructure Area;
 - h. "Operations Phase" means the period from the commencement of mining operations to the closure of the mine;
 - i. "Post-Closure Phase" means the period following the closure of the mine until all responsibilities under any rehabilitation or decommissioning plans have been discharged;
 - j. "Infrastructure Area" means the land subject to Schedule 1 of the Specific Controls Overlay under the East Gippsland Planning Scheme;
 - k. "Project" means the Fingerboards Mineral Sands Project;
 - l. "Project Area" means the land within Mining Licence [xxx];
 - m. "Specified Design Documents" has the meaning given in section 14 below; and
 - n. "Specified Statutory Documents" has the meaning given in section 13 below.

C. Appointment and Qualifications

3. The ITR must possess appropriate qualifications relevant to technical disciplines required to carry out its functions during each Phase of the Project.
4. During the Planning and approvals Phase, expertise will be required in:

- a. Surface and groundwater modelling;
 - b. Surface and groundwater chemistry;
 - c. Surface and groundwater management;
 - d. Civil engineering with specific expertise in the design of mining infrastructure, dams, and other water management infrastructure; and
 - e. Impact assessment and monitoring design.
5. Immediately upon appointment, the ITR shall consider whether any further expertise is necessary to discharge its functions during the Planning and approvals Phase, and shall advise the Proponent as soon as possible if any additional expertise is required.
 6. Prior to the conclusion of each Phase of the Project, the ITR shall consider the expertise required for the next Phase of the Project and advise the Proponent on any changes or additions required to be made to the Terms in order to ensure the ITR has appropriate expertise to discharge its functions as they relate to the next Phase.
 7. In the event that two Project Phases overlap, the ITR shall ensure that it has sufficient expertise to carry out its functions in relation to both phases.
 8. The ITR shall be remunerated in accordance with a contract entered into between the Proponent and the ITR members. The contract shall be reviewed by Kalbar and the ITR members at the beginning of each phase of the Project to ensure the ITR is adequately funded to carry out its functions.

D. Independence

9. In carrying out its function, the ITR is to act independently of the Proponent and must not enter into any relationship or engage in any conduct which gives rise to a conflict of interest.
10. The ITR shall prepare, or adopt, a code of conduct which defines the circumstances in which it will be deemed to have a conflict of interest and that code of conduct shall be made publicly available.
11. For the avoidance of doubt, no conflict arises merely as a result of the fact that the ITR is remunerated by the Proponent.

E. Review functions

12. Prior to submission to a statutory authority or adoption by the Proponent, as relevant, the ITR must review:
 - a. The Specified Statutory Documents; and
 - b. The Specified Design Documents.
13. The Specified Statutory Documents are:
 - a. The Work Plan;
 - b. Any subplan required by the Incorporated Document;
 - c. Any modelling to be included with an application for a water licence; and
 - d. [Other documents in accordance with recommendations of the IAC /Minister]
14. The Specified Design Documents:
 - a. Any design documents relating to a dam to be constructed as part of the Project; and
 - b. [Other documents in accordance with recommendations of the IAC /Minister]
15. In reviewing a document and commenting on its adequacy, the ITR must consider, as relevant:

- a. Whether the document adequately identifies the risks of harm that are intended to be addressed by the document;
 - b. Whether the document adequately identifies the mechanisms to be used to address the identified risks of harm;
 - c. Where adaptive management measures are proposed to address risks of harm, whether the document adequately specifies appropriate trigger levels and responses;
 - d. Where a document establishes monitoring requirements, whether the proposed regime identifies:
 - i. appropriate indicators to be monitored to detect potential or actual harm to environmental values;
 - ii. appropriate locations for monitoring sites to detect potential or actual harm to environmental values; and
 - iii. an appropriate frequency for monitoring to detect potential or actual harm to environmental values.
 - e. Any relevant statutory guidance on the content or adequacy of the document, including any requirements specified in a relevant statutory authority;
 - f. Any applicable policy guidance on the content or adequacy of the documents; and
 - g. Any features of the Project Area, Infrastructure Area, or locality which may justify a higher standard of risk management or design than would ordinarily be required.
16. Where a Specified Statutory Document or a Specified Design Document is proposed to be amended, the proposed amendments must be reviewed by the ITR prior to being adopted or submitted to a decision-maker, as relevant.

F. Review and monitoring functions

17. The ITR is to monitor, review and report on compliance with statutory authorities, including plans created under those authorities.
18. Following appointment, the ITR is to develop a review plan for the Planning and approvals phase of the Project. The review plan must include a schedule for the carrying out of compliance reviews.
19. Compliance reviews must be conducted:
 - a. using a risk based approach where compliance with all approval conditions is reviewed at least once every 24 months and higher risk activities are audited more frequently. At least one review must be carried out prior to the commencement of the Construction phase and after the conclusion of the Post-Closure Phase; and
 - b. in accordance with AS/NZS ISO 19011 Guidelines for auditing management systems.
20. Compliance must be assessed through site-based observation of Project activities, interviews and review of documents and records. Records to be reviewed must include:
 - a. Environmental monitoring, process monitoring and management performance monitoring results;
 - b. Work method statements, site plans, and operating procedures;
 - c. Incidents and complaints;
 - d. Inspection and compliance review reports;
 - e. Soil and waste management records;
 - f. Surveys;

- g. Meeting minutes;
 - h. Other documents relevant to assessing compliance and the technical adequacy and effectiveness of actions taken to comply with the statutory authorities.
21. The ITR must prepare a compliance report for each compliance review and the report must be provided to:
- a. The Proponent;
 - b. ERR;
 - c. Where the audit has identified non-compliance with a statutory authority other than an authority issued under the MRSD Act, the statutory body responsible for administering the authority; and
 - d. The Environment Review Committee, once established;
22. Prior to the conclusion of each phase of the Project, the ITR shall develop a review plan for the next phase of the Project.
23. In addition to carrying out compliance reviews, the ITR must provide an annual report to:
- a. ERR;
 - b. The Environmental Review Committee; and
 - c. The Community Reference Groups.
24. Each annual report must summarise, in respect of the previous six-month period:
- a. compliance review activities undertaken by the ITR;
 - b. compliance review findings;
 - c. the status of actions taken by the Proponent (or any other person) to address previous audit findings; and
 - d. general compliance with statutory authorities.

G. Other Functions

25. In addition to the functions conferred on it by these Terms, the ITR has any function conferred on it by an approved subplan.
26. Where a subplan proposes to confer a function on the ITR, the ITR must consider whether it is appropriate for that function to be conferred on the ITR and any changes which may be required to these Terms in order to allow it to effectively discharge that function.

H. Termination

27. At the completion of the Post-Closure Phase, the ITR shall undertake a final review of relevant statutory authorities and compliance issues and provide a report to ERR and the Proponent which assesses whether any further work is required prior to final closure. Upon completion of the final review and any further work required by it, the ITR shall cease to exist.