



Department of Jobs, Precincts and Regions

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Mr Nicholas Wimbush
Inquiry and Advisory Committee, Chair
Planning
Department of Environment, Land, Water and Planning
Level 5, 1 Spring Street
Melbourne, Victoria 3000

Via email

Dear Mr Wimbush

Fingerboards Mineral Sands Mine EES Inquiry: Response

Thank you for your correspondence on 28 May 2021.

Please find attached Earth Resources Regulation's responses to the Inquiry and Advisory Committee's information request.

I trust that the information provided assists your committee's work.

If you have any queries, please contact myself via [REDACTED].

Yours sincerely

Anthony Hurst
Executive Director
Earth Resources Regulation

Procedural issues

1. The IAC has been advised that the Proponent has recently lodged an application for a mining licence (MIN007636) in respect of the Project. The IAC notes that the proposed mining area in the application is slightly larger than the area indicated in the EES documentation. Please advise how ERR will proceed to consider this application in light of the current EES process and provide particular advice on the operation of section 24 (objector rights) of the *Mineral Resources (Sustainable Development) Act 1990* in this instance.

Kalbar Operations Pty Ltd lodged an application for MIN007636 on 13 May 2021, which is pending Earth Resources Regulation's consideration for acceptance under the *Mineral Resources (Sustainable Development) Act 1990* (MRSDA) at this stage.

The application acceptance process involves considering whether the application is a valid application in accordance with the requirements under section 15 of the MRSDA, which includes (but is not limited to) whether the application:

- Describes a mineral resource in accordance with Ministerial Guidelines for description of a mineral resource
- Includes a mineralisation report on the economic viability of mining the mineral resource
- Contains all the details required by the regulations.

If accepted, licence applicants are required to advertise their applications for public submissions in a newspaper circulating in the local area and across Victoria, in accordance with the Advertising Requirements: Guideline for Minerals Exploration, Prospecting, Retention and Mining Licence Applications.

Objections and comments can be made and received for a 21-day period, in accordance with sections 24 and 24A of the MRSDA. Copies of any objections and comments received are made available to be inspected at the regulator's principal office by any person, on request and free of charge, during office hours until the application is granted or refused.

Subsequently, Earth Resources Regulation considers any objections and comments raised via the public submission process, amongst other factors, when assessing the application for the mining licence, in accordance with sections 15, 16 and 25 of the MRSDA. The regulator provides written advice on the decision to grant or refuse a licence application to anyone who lodged an objection or comment.

The licence application process can be progressed during an Environmental Effects Statement process, noting that the purpose of a licence is to assign an exclusive right to mine a Crown-owned mineral resource.

Mining cannot start until an approved Work Plan is in place, which in the Fingerboards case cannot be considered until the Minister for Planning Assessment is published under the *Environment Effects Act 1978*.

2. In assessing an application for a mining license, does ERR undertake an assessment of, or have regard to, the relative strategic merits of similar mines (in production or proposed) and if so, how is this done? For example, ERR's public engagement fact sheet [Mineral sands exploration in Victoria](#) identifies five mineral sands projects in Victoria at various stages of development. In assessing any mining application for one of these projects, are the relative merits of the other potential projects assessed and considered?

Earth Resources Regulation assesses applications for mining licences on their specific merit in accordance with the requirements under the MRSDA.

Further information about the requirements for mining work plans is available on the regulator's website:

<https://earthresources.vic.gov.au/legislation-and-regulations/guidelines-and-codes-of-practice/work-plan-guidelines-for-mining-licences>

3. Do Work Plan approvals include a requirement to commence operations by a certain date? If so, what is the process for extensions of time to commence operations?

No, however a Mining Licence may include conditions that relate to commencement of work under a licence.

4. What is the process for assessing changes proposed in the overall mining Work Plan, particularly in the context of core issues that may have been critical to any decision to grant a mining approval in the first instance and/or not included in the EES process?

A licensee can apply to vary their approved work plan under section 41 of the MRSDA.

The application to vary an approved work plan must contain the prescribed information set out in the *Mineral Resources (Sustainable Development) (Mineral Industries) Regulation 2019*. In addition, the licensee is required to consult with the responsible authority to determine if the changes proposed require planning permission. This will determine if the work plan variation requires statutory endorsement or consultation between the Minister for Resources and the Minister for Planning under s42A of the MRSDA.

Section 42A of the MRSDA provides a pathway to vary an approved work plan where:

- a licensee proposes to vary a work plan that was approved in respect of work for which an EES was prepared and assessed under section 42(7) of the MRSDA, and
- the proposed changes would ordinarily require a planning permit (i.e. the planning scheme requires planning permit for the activity and therefore the work plan variation requires statutory endorsement).

Section 42A applies for approval of a variation to an approved work plan, if the Minister for Resources, after consultation with the Minister administering the Environment Effects Act 1978 (Minister for Planning), is satisfied that the new work will not cause any significant additional environmental impacts. The Minister for Planning can direct a report be prepared on additional environmental impacts that the new work may have under section 42A(3).

Compliance and monitoring

5. How does ERR ensure the design, quality and sourcing of components of equipment used in mining projects (such as the components in the centrifuges now proposed for the Fingerboards Project) meet relevant standards?

The work plan must specify what the licensee will do to eliminate or minimise the identified risks as far as reasonably practicable. Where this includes control measures, that might include the use of specific equipment, the work plan must specify the performance standards to ensure the control measure is effective in managing the risk.

Earth Resources Regulation uses internal and external specialists to assess the technical aspects of work plans. The regulator also refers work plan applications to other agencies, such as the Environment Protection Authority and WorkSafe for input. Earth Resources Regulation expects that the design and operation of any equipment meets relevant standards.

6. Please provide information on how ERR monitors Work Plans to ensure operational compliance.

The MRSDA establishes a range of powers to ensure that licensees comply with their approved work plans, including powers to enter land, obtain information and issue notices, infringements or conduct court prosecutions.

Earth Resources Regulation prioritises sites for inspection based on the potential risk to public safety, the environment, land, property or infrastructure. Inspections may be announced or unannounced.

Earth Resources Regulation's Compliance Strategy is available on our website:

https://earthresources.vic.gov.au/_data/assets/pdf_file/0020/461315/Compliance-Strategy-final-published-190321.pdf

The regulator also prepares an Annual Compliance Plan for operational purposes.

7. In the event complaints are received by ERR in relation to dust, noise or other environmental breaches from the mining operation, how are these recorded, managed, and addressed?

Information on Earth Resources Regulation's complaints process is published on our website:

<https://earthresources.vic.gov.au/about-us/contact-us/complaints>

All complaints received are logged on the Resource Rights Allocation and Management (RRAM) portal, assessed for non-compliance and actioned if a non-compliance is identified. The person making the complaint is advised when the matter has been attended to but not necessarily of what action has been taken.

8. A submitter has expressed concern that Work Plans are written in such a way that they may be unenforceable. How does ERR enforce Work Plans in the context where conditions or performance targets in performance measures use language such as 'as far as practicable' or 'as far as reasonably practicable' such as have been proposed in this case?

The Mineral Resources (Sustainable Development) (Mineral Industries) Regulations 2019 state that a work plan must specify what the licensee will do to eliminate or minimise the identified risks as far as reasonably practicable. The work plan must include details of measures and performance standards, and the management systems, practices and procedures that will be applied to monitor and manage risks and compliance with their respective performance standards.

The MRSDA requires that work plans are designed to address risks posed by the proposed operation.

Alleged non-compliances where the Act or Regulations use language such as 'as far as practicable' or 'as far as reasonably practicable' are assessed on a case-by-case basis. Several avenues are used to assess if the operations observed by Earth Resources Regulation inspectors meet the approved work plan, including advice from the regulator's Technical Services staff, recognised industry standards, targeted audits and/or requiring authority holders to commission independent expert studies.

The MRSDA establishes a range of offences and penalties that are applicable to work plan breaches. Earth Resources Regulation's Inspectors can also issue notices to licensees, which if breached give rise to offences and penalties.

9. Does ERR have a regional enforcement presence in Gippsland or would it (or would it be increased if existing) if the mine was approved?

Earth Resources Regulation's Gippsland Region has a dedicated compliance team, complimented by a Complex Mines unit with more specialist mining knowledge. The team is currently moving from Traralgon to the new Govhub in Morwell.

Staffing levels are reviewed in response to regulatory requirements over time, noting that the demand for the full range of mine, quarry, petroleum and other earth resources activities also varies in the region and across the State.

10. A number of submitters have expressed concern about ERR as a regulator of the mining industry and drawn attention to the Victorian Auditor General's report of 2019¹. The IAC notes the ERR website [Site rehabilitation and VAGO response - Earth Resources](#). The web page appears to have been updated in late 2020. The IAC is not reviewing either the operation of ERR, or suggesting that the Proponent will not satisfactorily implement proposed environmental management measures. However, if the mine is approved it will likely need to operate under complex and detailed environmental management requirements, and the ability for these to be implemented and monitored successfully will require a highly functional and effective regulatory system. As lack of confidence in the regulatory framework has been expressed as a significant issue by some submitters, can ERR please provide a concise summary of improvements in earth resources regulation (if any) either undertaken in the past 12 months or that are planned in the next five years that are, or will be, relevant to this Project.

¹ For example specific alleged regulatory failures were identified at Carshalton, Woodvale and Costerfield.

Earth Resources Regulation is progressively modernising its regulatory practice, drawing on the framework established by the Australasian Environmental Law Enforcement and Regulators neTwork (AELERT): <https://www.aelert.net/>

Earth Resources Regulation's intent is to apply a consistent, outcomes-based and proportionate approach to regulation to address risks to people, land, infrastructure and the environment.

Over recent years, key improvements have been made in the areas of regulatory governance and assessment of work plans. Further work is underway to improve the regulator's compliance operating model, licensing administration and regulation of site rehabilitation. In parallel, substantial legislative reforms have been made, such as the introduction of risk-based work plans. Further information is available on the regulator's website.

At an operational level, the regulation of complex mines has been improved to operate under site-specific cross functional teams, to ensure that such sites are managed in a holistic manner with rigour proportionate to the complexity of each site. These teams comprise staff from the regulator's Complex Mines, Licensing, Assessment, Compliance, Technical Services, Rehabilitation Liabilities and Bonds, and Stakeholder Engagement teams. If approved, the Fingerboards project would be regulated under this operational regulatory model.

Earth Resources Regulation will continue to fulfil its responsibility to hold site operators accountable for their obligations. As a recent example, the regulator refused to renew the mining licences held by Kralcopic Pty Ltd at Woodvale and Bendigo because the company could not demonstrate that it could finance its mining activities and site rehabilitation obligations (including successfully defending this decision in the Victorian Supreme Court), successfully sought liquidation of the company in the Federal Court and took ownership of the abandoned mining plant and disclaimed freehold land. The regulator also stepped in to take control of site monitoring, maintenance and rehabilitation drawing on the rehabilitation bonds.

Rehabilitation bonds and insurance

11. How does ERR ensure the Proponent and/or the Joint Venture partners involved in a mining project provide the appropriate public liability insurance to cover unplanned events (for example in the case of the Project, the collapse of the Perry Gully tailings storage area and/or dam)? Are insurance requirements only imposed on the mining license holder or are all entities engaged in or acting on behalf of the mining license holder required to hold public liability insurance?

A licensee must not do work under a licence unless the licensee is insured under a policy of public liability insurance for an amount determined by the Department Head, in accordance with section 39 of the MRSDA.

12. What are the terms of any bank guarantee for the rehabilitation bond that may be required from the Proponent? For example, is the bank guarantee unconditional, will it have an expiry date or have exclusions?

A bank guarantee provided as surety for a site's rehabilitation liability must:

- a) be from a recognised bank (according to the current list of Individual Authorised Banks in Australia – Australian Prudential Regulation Authority, Reserve Bank of Australia), Building Society or Credit Union
- b) be in favour of the Minister for Resources
- c) state the name of the licence holder
- d) state the licence type and number
- e) relate to a single licence only (i.e. each licence must have a separate rehabilitation bond)
- f) be on Bank, Building Society or Credit Union letterhead or have a recognised stamp to indicate authenticity
- g) not have an expiry date and cannot be terminated by the bank without the prior approval of Earth Resources Regulation
- h) be an original document, and
- i) be signed and dated by an authorised officer of the financial institution

13. What level of rehabilitation of the land does the bond provide for in its calculation? For example, the IAC has heard submissions that the calculation allows for the rehabilitation to a safe and stable landform, however does the bond calculation allow for ongoing land revegetation and erosion management until the site is fully regenerated, which may be some decades?

Rehabilitation bonds are calculated based on the estimated cost for the State to rehabilitate a mine site in accordance with an approved work plan (rehabilitation plan), if a licensee defaults on their obligation.

Rehabilitation plans are required to include:

- details of the proposed rehabilitation of land disturbed by mining work under the licence including:
 - proposed land uses for the affected land after it has been rehabilitated, that considers community views expressed during consultation; and
 - a land form that will be achieved to complete rehabilitation, which must be safe, stable and sustainable, and be capable of supporting the proposed land uses:
- criteria for measuring whether the objectives have been met; and
- a description of, and schedule for, rehabilitation milestones; and
- an identification and assessment of relevant risks that the rehabilitated land may pose to the environment, to any member of the public or to land, property or infrastructure in the vicinity of the rehabilitated land, including:
 - the type, likelihood and consequence of the risks; and
 - the activities required to manage the risks; and
 - the projected costs to manage the risks; and
 - any other matter that may be relevant to risks arising from the rehabilitated land.
- concepts for the end utilisation of the mine site; and
- proposals for the progressive rehabilitation, stabilisation and revegetation of extraction areas, waste disposal areas, stockpile areas, dams and other land affected by the mining work; and
- proposals for landscaping to minimise the visual impact of the mine site; and
- proposals for the final rehabilitation and closure of the mine site, including the security of the site and the removal of plant and equipment, taking into account any potential long-term degradation of the environment.

Further details on the requirements for preparing mine rehabilitation plans are available on the Earth Resources Regulation website:

<https://earthresources.vic.gov.au/legislation-and-regulations/guidelines-and-codes-of-practice/rehabilitation-plans>

Earth Resources Regulation assesses the rehabilitation liability for a site using a standard bond calculator tool, which provides a consistent methodology for estimating rehabilitation costs for many mine sites.

The bond calculator provides for the following in relation to the question above:

- Maintenance of rehabilitated areas that are intended to be part of the ongoing closure of the site – examples include repairing banks / drains, application of fertiliser etc.
- Pest and weed management as sites are being rehabilitated
- Monitoring and maintenance costs during the rehabilitation works period
- Post-closure environmental monitoring requirements – this applies to any monitoring and measurement requirements that may be needed following the closure of the project. This includes aspects such as ensuring revegetation resilience, land stability etc.

In some cases, licensees need to prepare bespoke liability assessments for non standard rehabilitation tasks, wherein costs are identified from ‘first principles’.

Earth Resources Regulation updated the rehabilitation bond calculator in March 2021, which included engaging a specialist firm to compare costing rates used in bond calculators interstate, checking costing rates for key rehabilitation activities in the Victorian market and seeking feedback from local industry representatives. Improvements to the calculator now also include other common

rehabilitation activities, such as monitoring and maintenance (eg: dust control, water treatment and site security).

The bond calculator is available on the regulator's website:

<https://earthresources.vic.gov.au/legislation-and-regulations/guidelines-and-codes-of-practice/rehabilitation-bonds/bond-calculator>

14. During the Hearing, that Proponent made submissions that the bond/bank guarantee would be determined by reference to what the rehabilitation liability is *from time to time*. Please explain how this works where there is intended to be progressive rehabilitation of the mine site. Does this approach provide a strong financial incentive for the Proponent to undertake significant progressive rehabilitation?

Earth Resources Regulation requires bonds to cover 100 per cent of the estimated cost to rehabilitate a site, if a licensee defaults on their obligations.

The regulator's default requirement is for licensees to lodge a bond based on the maximum point of site disturbance over the life cycle of an earth resources site.

Licensees can also voluntarily request that their rehabilitation liabilities and bond amounts be reviewed and adjusted annually. This option is designed to encourage licensees to plan ahead and conduct progressive site rehabilitation, potentially at a lower overall cost. Bond amounts can be increased or decreased in line with the extent of site disturbance at a given time. For example:

- If an operator takes steps to progressively rehabilitate sections of a site as activities take place, the liability and therefore bond amount can be reduced to recognise the completed activities.
- If a site is in the early stages of development and activities are of lesser impact, bond amounts can be calculated on that basis and be adjusted as production activities increase over time.

More broadly, effective site rehabilitation underpins confidence in both the resources industry and the regulator – the commitments made upon approval of a project must be fulfilled when it is finished.

Earth Resources Regulation is progressively improving its regulatory practice for site rehabilitation, as described in its *Regulatory Practice Strategy for the Rehabilitation of Earth Resources Sites*.

https://earthresources.vic.gov.au/_data/assets/pdf_file/0018/511920/Earth-Resources-Regulation-Regulatory-Rehabilitation-Strategy.pdf

The regulatory practice strategy incorporates the Department of Jobs, Precincts and Region's response to the Victorian Auditor General's report on site rehabilitation. The department's full response is also available online:

<https://earthresources.vic.gov.au/community-and-land-use/rehabilitation/site-rehabilitation-vago-response>