

ADMINISTRATION OF MINERAL & COAL MINING PRIVILEGES UNDER THE TRANSITIONAL PROVISIONS OF THE CROWN MINERALS ACT 1991

GENERAL GUIDELINES FOR CONSENT AUTHORITIES

Background

In 1991 the government completed a major law reform exercise comprising a comprehensive review of the laws governing New Zealand's natural resources. This reform resulted in the passing of the Resource Management Act 1991 (RMA) and the Crown Minerals Act 1991 (CMA).

As a result, the responsibility for controlling the external impacts of exploration and mining, which includes the administration of environmental and social conditions attached to existing privileges, was devolved to local authorities. The government though has retained its role in respect of the allocation and pricing of mineral rights.

Existing privileges

The transitional provisions of the CMA relate to the administration of existing privileges. Existing privileges are authorisations granted under mining related statutes (such as the Mining Act 1971 and the Coal Mines Act 1979) that were in force prior to 1 October 1991. A specific list of existing privileges can be found in section 106 of the CMA.

The existing privileges that remain current are primarily mining licences (as all prospecting and exploration licences have now expired). However, some ancillary licences for mining related activities, including roading, buildings, aerial ropeways etc. also remain current.

A local authority should ascertain the number and extent of the current existing privileges within its boundaries.

The intent of the transitional provisions is that existing privileges continue until the authorisation expires or is otherwise terminated. These privileges have the same effect as if the CMA and RMA had not been enacted, subject to some specific exemptions. Two important exemptions are; that there is no right to a new licence, and that it is not possible to obtain an extension of duration of the authorisation (refer section 107(2)). Instead, permits under the CMA should be sought if the person wants to continue to mine a Crown owned mineral.

Existing privilege holders and the functions and powers of other persons

Section 107 of the CMA provides for the holder of an existing privilege to continue to have the same statutory rights and obligations as he/she had prior to the changes in 1991. However, the continuation of these rights and obligations is subject to section 107(3). This provision recognises that conditions on existing privileges, in some cases, require the privilege holder to obtain approvals under other Acts. Where that approval would now need to be sought under the RMA then the RMA applies.

By way of example, if there was a stipulation in an existing privilege that authorisation was required under environmental legislation (e.g. a water right under the now repealed Water and Soil Conservation Act 1967), and that authorisation had not been obtained, consent would need to be sought under the RMA.

A local authority should therefore ascertain what other authorisations required under the conditions of an existing privilege for the mining activity were not obtained by 1 October 1991, and decide if resource consents are required for particular activities, e.g. to take or discharge to water. However, land use consents under the RMA are not required, as such consents were not necessary under the Town and Country Planning Act 1977.

In situations where there is any need to determine any dispute relating to an existing privilege, the Environment Court (or any other body having those functions prior to the CMA) continues to have those functions, powers and duties.

The same applies to other persons exercising functions, powers or duties relating to the administration of existing privileges, however, this is subject to the changes in administration set out in section 108. If a local authority has responsibilities under the conditions of an existing privilege, those responsibilities continue. Likewise, if another person (such as the Minister of Conservation) has specific powers or functions set out in the conditions imposed on an existing privilege then that person continues to have responsibility for the exercise of those powers and functions.

Administration of existing privileges and RMA

Under section 108(1) of the CMA, where the Minister of Energy¹ had responsibility under the previous mining legislation for the exercise of any functions, powers or duties under an existing privilege (or conditions imposed by either the privilege or its establishing Act) and those matters relate to functions of local authorities under sections 30 and 31 of the RMA, then those functions, powers and duties will be exercised by the appropriate consent authority.

If, however, the function was exercised by a person other than the Minister of Energy then, as noted above, that person will continue to exercise that function as a result of section 107(1)(c) of the CMA.

In most cases the RMA functions will be exercised by a regional council in relation to;

- the control of discharge to air, water or soil;
- the taking, damming, or diverting of water, or
- the removal of vegetation and soil;

District councils will have control over matters such as land use and noise.

¹ Note that although section 108(1) refers to the Minister of Energy, section 108(6) provides that this term includes the Secretary of Energy, any inspector or other statutory officer appointed under the Act under which the existing privilege was granted.

A local authority should clarify whether a condition (either specified in an existing privilege or in its establishing Act) relates to a function under the RMA or not and who under the condition is responsible for exercising it.

Ministerial consent conditions

Some existing privileges granted in respect of certain classes of Crown land include conditions imposed as a result of the written consent of 'an appropriate Minister' (such as the Minister of Conservation) under section 26 of the Mining Act 1971 or section 21 of the Coal Mines Act 1979. These consent conditions, are generally contained within a separate schedule to the existing privilege. Such conditions, to the extent they relate to matters that fall within the functions of a local authority, are to be administered by the relevant consent authority.

Requirements in a minister's consent conditions to consult with or obtain the consent of a person other than the Minister of Energy (e.g. a Regional Conservator of the Department of Conservation) are unaffected, and that person will continue to exercise that function as a result of section 107(1)(c) of the CMA.

Health and safety administration

All health and safety in employment functions in respect of an existing privilege or related mining legislation, regardless of who exercised them pre 1991, are now exercised by Inspectors under the Health and Safety in Employment Act 1992 (refer section 108(6) of the CMA).

Other functions of a mining inspector

Any remaining functions, powers and duties that were exercisable by a mining inspector under the conditions of an existing privilege or the previous mining legislation that are not RMA or health and safety related are now exercisable by the Secretary (Chief Executive of the Ministry of Economic Development), and the provisions of the previous Acts apply, (refer section 108(9) of the CMA).

Doubt over Responsibility

Where there is doubt over who exercises what function, power, or duty, and this cannot be resolved between the parties, then clarification can be sought from the Environment Court. Refer section 108(2) of the CMA. Given this provision, none of the functions, powers and duties of the previous mining legislation should be left undetermined.

Variation of conditions of existing privileges

The ability to vary or change an existing privilege exists within the privilege and its establishing Act and continues as a result of section 107 of the CMA. Who can make a variation depends on the subject matter of the condition. If the condition fits within the provisions of section 108(1) it will be a matter for the relevant consent authority exercising

the provisions of the establishing Act. If it is a health and safety issue then it will be a matter for the Inspector exercising the provisions of the Health and Safety in Employment Act. In other cases variations will generally be a matter for the Minister of Energy.

When varying terms and conditions of an existing privilege (or taking enforcement action) both the Minister of Energy and a consent authority have to advise each other of any such action, although failure to comply with this requirement does not render any variation or enforcement action invalid (see sections 108(3) and (4) of the CMA.)

The establishing Acts do not have identical provisions so care needs to be taken about their application. If the condition is an RMA related one (such as one relating to water quality) then it would be possible for the regional council to vary that condition following the Mining Act variation process as set out in section 103D of that Act. If the condition is one imposed as a result of the written consent of 'an appropriate Minister' under section 26 of the Mining Act, then the condition should relate to concerns of that Minister as the land owner's representative and that Minister will need to participate under section 103D(3) of the Mining Act. The issue of whether the variation is a matter for the consent authority or the Minister of Energy will depend on the nature of the condition and, in some instances, may need to be resolved by the Environment Court under section 108(2) of the CMA.

Under the Coal Mines Act 1979 there is not the same power to vary conditions. Section 70 of that Act relates only to the Minister correcting errors or supplying omissions.

Section 51 of the Coal Mines Act specifically enables the imposition and variation of conditions for the purpose of preventing, or reducing, or making good, damage to the surface of the land to which the licence relates or damage to anything on the surface of the land, or preventing any conflict with the provisions of the Soil Conservation and Rivers Control Act 1941.

Section 52(3) of the Coal Mines Act (on the other hand) provides that the Minister may, on the application of the licensee, suspend, alter or amend conditions relating to the programme of work or the obligation to carry out coal mining operations.

Forfeiture of existing privileges

In appropriate circumstances a consent authority could exercise the initial forfeiture provisions of the mining legislation, although the final decision is made by the Minister of Energy. The same powers can also be exercised by the Secretary with the Minister of Energy. Consent authorities will need to give consideration to whether the reason for the forfeiture is RMA related or not.

Bonds and monetary deposits

The administration of bonds and monetary deposits has not been transferred to consent authorities. Under section 109 of the CMA, the Secretary continues to hold such deposits, although the appropriate consent authority is entitled to a first priority on half of the amount held for the purpose of restoration.

Under section 109(2) to (8) of the CMA a regional council has the ability to check whether the amount of any deposit or bond lodged in respect of a coal mining right is sufficient and to seek an increase if the amount is insufficient. The regional council is entitled to the full amount of any such increase.

Conclusion

The question of who is responsible for the administration of an existing privilege can be a complicated one and the answer will depend on the nature of the privilege, the conditions that have been imposed on its use and how the privilege is being used.

Consent authorities, in administering existing privileges, are therefore encouraged to apply a careful case by case consideration of the actual wording of each privilege and the establishing Act.

Guidelines are not legal advice

While these guidelines summarise the main aspects of the provisions they are for information only and are not to be treated as legal advice. It is strongly recommended that consent authorities obtain their own legal advice on specific transitional issues as they arise from time to time.

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