The Resource Management Amendment Act 2005 – the implications for the mining industry

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Abstract

The Resource Management Act 1991 has been amended on a number of separate occasions since its enactment in 1991, and has recently be subject to further amendment by way of the Resource Management Amendment Act 2005.

The amendments as proposed in the Resource Management and Electricity Legislation Bill would have had revolutionary and far-reaching consequences. However, as finally enacted, the amendments are a greatly watered down version of what was initially proposed.

Nonetheless, the Resource Management Amendment Act 2005 has provided for a number of amendments that will impact on the minerals industry to varying degrees. This paper discusses in particular the changes and impact of the changes to the definition of "contaminated land", clarification with respect to the duty to consult, amendments to the provisions relating to National Environmental Standards, and to the council and Environment Court hearing process.

Resource Management Amendment Act 2005

Introduction

The Resource Management Act 1991 ("RMA") has been subject to ten amendments (including the 2005 amendments) since it was passed into law in 1991. The most recent changes to the RMA were through the Resource Management Amendment Act 2005 ("RMAA 2005"), which came into force on 10 August 2005. While the majority of the RMAA 2005 has immediate effect, there are some exceptions, including the replacement of judicial review of notification decisions with a modified declaration proceeding in the Environment Court.

The RMAA 2005 is the result of a separation of the resource management and electricity components of the Resource Management and Electricity Legislation Bill ("the Bill"). The intention of the amendments enacted by the RMAA 2005 is to continue the trend of efficiency improvements in the resource management process. In the medium term, that may prove to be the case, but in the short term at least, the amendments will cause the usual turmoil and litigation as the new provisions are tested and clarified.

Nonetheless, the amendments, as enacted, do not provide the far reaching reforms proposed in the Bill. This being said, there are a number of amendments within the RMAA 2005 that have the potential to impact on the minerals industry. Details of some of the changes as enacted by the RMAA 2005, and their impact on the minerals industry, are set out in more detail below.

Contaminated land

The RMAA 2005 has inserted a new definition of "contaminated land" into section 2(1) of the RMA. This definition in turn informs the new provisions dealing with the regional and district responsibilities in regard to such land. The definition has two components, and covers:

- Contamination which is more than a national environmental standard allows; or
- If there is no applicable national environmental standard, land which has a hazardous substance in or on it which has a significant adverse effect on the environment, or which is reasonably likely to have such an effect.

At a broad level, regional councils now have responsibility for the investigation and monitoring of contaminated land, while district councils have the function of implementing controls aimed at the prevention or mitigation of adverse effects arising from the use, development, or subdivision of that land.

As yet there are no "national environmental standards" on contamination in New Zealand. The Ministry for the Environment is working in partnership with regional councils to develop a national approach to the management of contaminated land in New Zealand. The Ministry for the Environment considers that this work should provide consistency in contaminated site assessment and management throughout the country.

The Ministry for the Environment website also advises that a series of contaminated land management guidelines are being produced in collaboration with contaminated land practitioners from regional councils under the Regional Waste Officers Forum. Industry representatives and environmental consultancies are also being consulted.

Implications for the minerals industry

The definition of contaminated land as amended, presumably applies to contaminated land whether the contaminated occurred before or after the enactment of the RMA.

However, until a National Environmental Standards on contaminants in soil is established, the assessment of whether land is contaminated is still somewhat subjective.

Consultation

The RMAA 2005 inserts a new section 36A into the RMA. Section 36A of the Act as amended expressly states that there is no duty for consent authorities or applicants to consult in regard to resource consent applications. Although these changes may provide solace to those who see the Act as imposing onerous consultation duties, they will be unlikely to alter the present practices which are undertaken more for a smoothing of the consenting process, and as a goodwill gesture, than to comply with any statutory obligation.

Nonetheless, in some cases consultation may still be required, as section 36(1)(b) provides parties must still comply with a duty under any other enactment to consult any person about the application. Also, consultation, particularly by local authorities, will continue to be required to assess the effects of a proposal and address the matters set out in sections 6, 7, and 8 of the Act.

In this respect, we note that it is commonly accepted that consultation with iwi is the responsibility of Councils (as the "Treaty Partner") and not applicants. However, in practical terms applicants generally do consult with iwi.

Implications for the Minerals Industry –

We do not consider that this section has altered the position greatly for the minerals industry, as while this clarification is useful, in practice, it is unlikely to remove the need for consultation, particularly consultation with the local community when undertaking large projects. The amendment will however remove failure to consult as a ground for submission or appeal.

Council hearing process

The RMAA 2005 amends section 41 of the Resource Management Act 1991. This amendment gives increased powers to local authorities and other persons holding hearings. These powers include the ability to direct:

- an applicant and submitters to provide briefs of evidence to the local authority prior to the hearing;
- that evidence be taken as read or limited to matters in dispute;
- that a submission not be presented if it's subject matter is irrelevant or not in dispute; and
- that a submission be struck out as being vexatious, frivolous, or disclosing no reasonable or relevant case, or that it would be an abuse of process to allow it to be heard.

Implications for the minerals industry

The requirement for an applicant to provide briefs of evidence in advance and for evidence to be taken as read, or limited to matters in dispute would be difficult to put into practice without further amendments to the RMA. An applicant can only finalise evidence once an officer's report is available, which may be as late as 5 working days before a hearing (as no consequential amendment has been made to the provisions regarding the timing of the officer's report).

In our view, the ability to direct that submissions not be presented, or be struck out, could result in delays, rather than streamlining the process, as submitters could exhaust rights of objection and appeal. Instead, the issue of vexatious, frivolous or irrelevant submissions would be better dealt with by the reintroduction of "standing" as previously included in the Town and Country Planning Act 1977. In short, this means all submitters must prove that they have a greater interest in the matter than a general member of the public before they can make a submission.

National Environmental Standards

The RMAA 2005 introduces a new section 43B into the Resource Management Act 1991, setting out the relationship between National Environmental Standards, rules and consents. The content of National Environmental Standards, and their effect on and relationship with plans and proposed plans, consents and designations, has been substantially amended. The new section sets out that National Environmental Standards prevail over a rule or resource consent that is inconsistent with them, except where the National Environmental Standard expressly provides otherwise. Accordingly, as a local authority can apply a more stringent standard, all that is required is that a *reasonable* National Environmental Standard be set.

Implications for the minerals industry

There are no immediate impacts on the minerals industry as, with the exception of the Air Quality Standards (which members of the minerals industry may have already commented on), there are currently no other National Environmental Standards in force in New Zealand.

While National Environmental Standards could provide more consistency between decision makers and a better expression of the national interest, the potential risk is that unrealistic standards

are imposed without adequate consultation. The imposition of unreasonable standards may prevent mineral operations from being established, or result in operations closing down, as a consequence of being unable to meet the standard.

A further difficulty is that with the different local and regional environments within New Zealand, there will be difficulties in applying one national standard to all areas. This further reinforces the need to for the National Environmental Standards set to be reasonable, so that districts and regions can then provide for the specific needs of their own district or region in their own plans.

Requests for further information

The RMAA 2005 has made a series of changes regarding requests for further information. The essence of these changes is that when a council requests further information, the applicant has 15 working days to either provide the information, undertake to do so (a council may then fix a timeframe), or say no and demand that the application be dealt with on the information before the consent authority. Alternatively, an applicant could object under section 357 to the request. In the absence of an objection, if the applicant says no (or fails to comply with the set timeframes) the council may refuse the consent if it considers that is has insufficient information to decide the application. If the consent is declined for that reason the Environment Court on appeal must first ask itself whether the council had sufficient information. If it decides that the council did not, the Environment Court must also decline the appeal (regardless of whether that information had since been prepared).

The consequence of these amendments appears that it would be a brave applicant who refuses an information request, unless the request itself was clearly irrelevant.

Implications for the mineral industry

This new provision reinforces the need for the minerals industry to lodge full and detailed information when making applications pursuant to the RMA. Arguably, this was the case prior to the 2005 amendments, in that it has always been good practice to provide a complete and detailed application, to avoid section 92 (pre-RMAA 2005) requests for further information. However, this provision significantly increases the power of a council in determining resource consent applications, and could result in further litigation, as appeals to the Environment Court are not expressly excluded

Mediation

A new section 99A has been inserted into the RMA and provides that a consent authority may refer to mediation a person who has made an application for resource consent, and some or all of the persons who have made submissions on the application.

The referral may be made at the request of one of the persons, or on the authority's own initiative, but only with the consent of all the persons being referred, and only for the purpose of mediating between the persons on a matter or issue.

Implications for the minerals industry

This new section could have significant implications for the minerals industry, and assist in the same manner that Court-assisted mediation assists prior to Environment Court hearings (namely enabling parties to narrow the issues before hearing, and encouraging experts to caucus and determine common ground and areas in dispute). Although in stating this, there has always been scope for the parties to enter into mediation prior to a Council hearing, but the matter was never expressly provided for within the RMA.

It is important to note that the provision requires consent to the mediation – a necessary prerequisite to a successful mediation.

Priority for existing consent holders

The RMAA 2005 has inserted new sections 124A, 124B and 124C into the RMA. These new provisions give priority to existing consent holders in applying for new replacement resource consents if certain criteria are met. The criteria include the efficiency of the use of the resource and the use of industry good practice.

These provisions allow applications for replacement consents to be processed before any other applications relating to the same resource. If the other application is made more than 3 months prior to the expiry of an existing consent, it would be put on hold to allow the holder of the existing consent to make an application pursuant to section 124, and for that application to be determined in priority (including any appeals).

In addition, an amendment to section 104 by the RMAA 2005, now means that the value of investment made by the existing consent holder will be considered when considering the application for a new resource consent.

Implications for the Minerals Industry –

These amendments have positive implications for the minerals industry, as they recognise that an existing consent holder may have invested great sums of money in a development, which the consent holder has worked in an efficient manner and in accordance with good industry practice, and accordingly it would be in accordance with the purpose of the RMA to allow the "renewal" of consents in these circumstances. To an extent, the RMA now follows the principles of the Crown Minerals Act 1991 as to priority.

Existing use certificates

The RMAA 2005 inserted a new section 139A, which allows for the issue of "existing use certificates". The section provides that a request can be made of the consent authority to issue a certificate that

(a) describes a use of land in a particular location; and

(b) states that the use of land was a use of land allowed by section 10 on the date on which the authority issues the certificate; and

(c) specifies the character, intensity, and scale of the use on the date on which the authority issues the certificate.

This section provides that an existing use certificate is treated as an appropriate resource consent. This section remedies the situation in *Duncan v Dunedin City Council* (unreported, CIV2003-412-667) which declared that certificates of compliance under section 139 of the RMA could not be granted in respect of existing use rights.

Implications for the minerals industry

Existing activities permitted by way of existing use rights are now able to apply for existing use certificates pursuant to section 139A of the RMA.

Environment Court hearing process

The Bill proposed extensive changes to the Environment Court process, including that hearings be more inquisitorial in nature, and restricted to only the issues raised in the appeal. Evidence was also proposed to be restricted to that presented at the Council hearing. The amendments as enacted in the RMAA 2005 are however greatly watered down.

Section 290A, as amended, provides that in determining an appeal or inquiry, the Environment Court must have regard to the decision that is the subject of the appeal or inquiry.

Implications for the minerals industry

When considering an appeal, such as an appeal against a resource consent (or resource consents) for a minerals operation, the Environment Court must now have regard to the decision at the council level.

Despite this provision, the de novo nature of the process (which remains) means that the Environment Court will still be required to base its decision on evidence before it. There is no presumption that the council decision is right, and no shift of the evidential onus (as had been proposed by the Bill).

It is unlikely that there is to be a significant change following this section being introduced.

Conclusion

The Bill was intended to provide extensive reforms to the resource management process. However as enacted, the RMAA 2005 is a greatly watered down version of what was initially proposed, and will not have the far reaching implications intended.

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For four years, Rob was Vice-Chairman of the Environmental Law Committee for the International Bar Association and an inaugural committee member of the Resource Management Law Association in New Zealand.

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