Minerals West Coast submission to the Environment Committee on the Natural and Built Environment Bill, and the Spatial Planning Bill

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Natural and Built Environment Bill 186-1 (2022), Government Bill – New Zealand Legislation

INTRODUCTION

[1] Minerals West Coast represents the shared and collective interests of the West Coast region's miners and wider minerals sector. Minerals West Coast's membership ranges from individual members, through to small-medium sized family/privately owned businesses, through to publicly listed and internationally financed companies.

[2] Miners on the West Coast produce coal as a source of energy for food production and space heating, coal for steelmaking, alluvial and hard rock gold, aggregates and gravels for roading and construction, limestone for fertiliser, pounamu (often as a by-product of gold mining), and mineral sands producing industrial minerals and rare earth elements.

[3] Minerals West Coast's membership also includes geologists, engineering firms, ecological consultants, and research groups, among others.

[4] In total the mining sector on the West Coast in 2021 accounted for 8.4% of GDP (third highest after dairy cattle farming at 10.6%, and electricity and gas supply at 9.1%)[1]. The sector also directly employs about 600 people, or 3.5% of the total West Coast population[2].

Approach to this submission

Minerals West Coast considers the resource management reform (RM reform) from the following perspective:

- Are minerals exploration and mining adequately and appropriately enabled?
- Are existing-use rights adequately respected to allow businesses to manage risk?
- Are the environment and people protected from irreversible harm from mining?
- Is the new system more effective and efficient, in respect of minerals activities?

The structure of this submission is:

- Synopsis of the RM reform
- Key issues for Minerals West Coast
- Submission
- Recommendations

[1] Based on Infometric figures for the West Coast region, **available online here**.
[2] Based on Infometric figures for the West Coast region, **available online here**.

MINERALSWESTCOAST

SYNOPSIS OF THE RESOURCE MANAGEMENT REFORM

The premise of the RM reform is that the Resource Management Act 1991 system is "broken" – it has become litigious, expensive and time consuming to gain resource consents, and to develop and review planning instruments, and it has not prevented environmental degradation.

To fix the system requires repeal of the RMA, in the Government's view, and replacement with three new statutes - the Natural and Built Environment Bill, the Spatial Planning Bill, and a climate action bill (still under development).

The main event for the RM reform is the NBE Bill, and is the focus for the Minerals West Coast submission. This Bill sets out five objectives for RM reform:

- Protecting the environment
- Enabling infrastructure and other development
- "Giving effect" to the Principles of te Tiriti o Waitangi
- An efficient and effective system
- Climate change action

Note that achieving all reform objectives at the same time could entail trade-offs. For example: giving effect to the Treaty could adversely affect system efficiency; an emphasis on environmental protection could prevent or stymie some appropriate land and resource use / development.

The new system focuses on achieving "outcomes", in contrast to the RMA focus on managing "effects". For resource consent applications and holders, there is little or no distinction between to two.

The new system's purpose is basically sustainable development, while also upholding a novel concept of "te Oranga o te Taiao", which in practice will be for local Māori to define, locally.

A key tool for environmental protection under the NBE Bill is to set "limits" and "targets" for a range of environmental values, ie air, indigenous biodiversity, coastal water, estuaries, freshwater, soil.

A limit refers to either a minimum acceptable environmental state, or a maximum level of pressure on an environmental value. It is possible that most if not all indigenous biodiversity in New Zealand is at or near a limit.

Limits provide for environmental "bottom lines" – to use terminology from the RMA context - that would have mandatory protection, and, it is hoped, in an overall or net sense.

Minerals companies need to be able to do the following:

- Breach a limit, locally
- Access a pathway for managing effects
- Restore the state of the environment at the affected location to the limit, over time, in an overall "no net loss" or "net gain" sense

The NBE Bill provides an "effects management framework", ostensibly to do just that.

The effects management framework provides a hierarchy of environmental management actions – avoid, then minimise, then remedy, then offset, then apply redress. Note the removal of "mitigation" from the RMA hierarchy, and the replacement of the term "compensation" with "redress".

The new system envisages no net loss to environmental values, with few exceptions (eg public good infrastructure). This stands in contrast to the RMA, which admits the possibility of loss, and which has, arguably, led to cumulative adverse environmental effects, eg draining lowland wetlands.

The new system has fewer categories of activities than under the RMA – permitted, controlled, discretionary, and prohibited. It provides, where appropriate, for notification of resource consent applications, for limited notification, and no notification.

Exemptions to having to comply with limits are aimed at public good infrastructure (so, do not apply to minerals exploration and mining). That caveat also applies for nationally significant projects, designations, and fast-tracking of resource consent applications.

National direction for achieving reform objectives, including economic development, will be specified in a "national planning framework", which is being developed. The NPF will bring together existing national direction under the RMA for matters of national importance, eg national policy statements, national environmental standards, and add new topics, eg infrastructure.

The NPF will also provide direction on how to resolve conflicts between achieving RM reform objectives. It is unknown at this time how the NPF will achieve this aim.

The new system will see reviews of existing resource consents, with some protection of existing use rights, in particular, for significant infrastructure, while placing other existing activities at risk.

Shorter consent durations for some new activities, eg damming rivers, would prevent new hydroelectric schemes.

As for RMA regional and district planning, the new system details a process to develop and review "regional spatial strategies", and sitting underneath the RSSs, "natural and built environment plans".

There will be fewer planning instruments in the new system, 14 RSSs and 14 NBE plans. This stands in contrast to the more than 100 plans existing under the RMA.

The planning system has a 30-year vision, while RSSs and NBE plans are reviewed every 9 years, with provision for out-of-cycle partial reviews.

The RM reform provides an enhanced role for Māori, primarily iwi and hapū, in providing advice to government, decision-making on planning instruments and resource consent applications, supporting that decision-making, and in resource consent and system monitoring and compliance.

The NBE and SP Bills introduce a range of terms and concepts in te reo Māori, mostly with little or no definition, eg te Oranga o te Taiao, mātauranga Māori, mana, mauri, tikanga Māori.

KEY ISSUES

Minerals West Coast has identified the following key issues with the NBE Bill, which will require drafting changes to address:

- Lack of clarity around limits and the effects management framework
- Inadequate protection of existing-use rights
- Novel terms that are not defined, raising litigation risk
- Erroneous treatment of contaminated land
- A risk of the new system being less efficient than the RMA system

- Transitional arrangements – it could take 10 years for the new system to be operational, during which time the RMA still applies
- Inability to submit on key aspects of the new system, eg the national planning framework, because these are still in development

SUBMISSION

Lack of clarity around limits and the effects management framework

At issue for minerals companies are the clauses of the NBE Bill that cover environmental limits, and the "effects management framework". This should provide for breaching a limit, locally and temporarily, and for the project proponent to achieve overall "no net loss", or a "net gain" in, say, biodiversity values. Otherwise, the effects management framework would serve little purpose.

Clause 3 states among other things that "The purpose of this Act is to enable the use, development, and protection of the environment in a way that … **complies with** environmental limits and their associated targets" (emphasis added).

Does "complies with" include applying the effects management framework to breach a limit, locally, and then return the affected environment to the limit, over time? This needs to be provided for, explicitly. We return to this issue below.

Clause 14 states: "Every person has a duty to avoid, minimise, remedy, offset, or take steps to provide redress for any adverse effect **on the environment** arising from an activity carried on by or on behalf of the person, whether or not the activity is carried on in accordance with … **any applicable limits or targets**:" (emphasis added)

The text is unclear. It should provide explicitly for the use of the effects management framework to breach a limit, locally, and then take steps to reverse the breach in a "no net loss" sense, over time.

Contrast cl 14's application of the effects management framework to "the environment" with cl 62, which limits its application to "significant biodiversity areas" and to "specified cultural heritage".

This raises the question of what happens in an area that is not a significant biodiversity area. Are resource consent applicants and holders exempt from having to apply an effects management framework in any situation where biodiversity is not significant? The Bill is unclear on this point.

Note cl 7 Interpretation: "significant biodiversity area means a place that meets the criteria for significant biodiversity set out in the national planning framework." At this stage it is unknown what the criteria are, so it is challenging for Minerals West Coast to submit on this aspect.

Cl 223 Consideration of resource consent application is analogous to section 104 of the RMA. Note that a resource consent cannot be granted if it is "contrary to an environmental limit or target" (cl 223 (11) (a) (i)).

This provision needs interpretation, and more clarity, as argued above in respect of cl 3. We argue that a project proponent should be able to use the effects management framework to breach a limit, locally, and manage the affected values to restore them to the limit, over time, in which case the activity would not be contrary to a limit or target. This vital concept needs to be made explicit.

Schedule 3 Principles for biodiversity offsetting resembles earlier work on the draft National Policy Statement for Indigenous Biodiversity, and is a good start. That said, the principles discussed below need amendment for workability:

> *Principle 2* on limits to offsetting includes no offsets in situations where "effects on indigenous biodiversity are uncertain, unknown or little understood, but potential effects are significantly adverse". An area where a new species of butterfly or moth is discovered, for example, would be automatically off-limits for offsetting, which would be unworkable.
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> *Principle 5:* Like for Like – "The ecological values being gained at the offset site are the same as those being lost at the impact site across types of indigenous biodiversity, amount of indigenous biodiversity (including condition), over time and spatial context." This is a very high bar, and will be all but impossible to achieve in much of New Zealand, except, perhaps in areas of grassland or mānuka / kānuka scrub.
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> *Principle 8* on time lags requires the offset to be achieved during the timeframe of the consent. For some ecosystems, this would be achievable; however, for other biodiversity, eg in respect of podocarp forest, it would not.
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> *Principle 9* on "trading up" allows for offsetting one ecological setting with another of higher value, thereby contradicting Principle 5. This needs clarification.
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> *Principle 12* Science and mātauranga Māori. The wording of the accompanying text implies that mātauranga Māori is a subset of science, and, therefore, is science, ie that mātauranga Māori is conducted in a spirit of open enquiry, and is open to peer review, testing and debate. If so, that is supported.

Schedule 4 Principles for biodiversity redress introduce similar considerations as for Schedule 3, discussed above.

Inadequate protection of existing use rights

Minerals West Coast acknowledges the tension between the need to allow existing uses of land and the environment to continue unimpeded, to respect property rights and investments, and the need to align existing activities with the new system.

That said, we do not consider that an effective balance has been struck in the NBE Bill.

Cl 26 states that "a person may use land in a way that contravenes a plan rule within the jurisdiction of a territorial authority" if earlier lawfully established, and if the effects are much the same as before. But an existing use "must comply with the plan rules that give effect to the national planning framework" as it relates to, for example, "the natural environment".

This creates significant uncertainty for minerals investors because the content of the NPF is unknown at this time. The NPF could contain provisions regarding the environment that could shut down existing mining activities. This is a serious concern, and needs to be addressed.

Cl 277 details the circumstances when a review of resource consent conditions can be required, e.g. in light of new information about the environment. While logical at face value, this clause introduces significant uncertainty for resource consent holders, as per cl 26. This clause alone is a disincentive to invest in land and resource-use activities in New Zealand.

Novel terms that are not defined, raising litigation risk

All participants in the new system need to have a shared understanding of terms and concepts for the system to be workable, and to provide natural justice to all.

Cl 7 Interpretation is deficient in this respect in failing to contain definitions for: “mining”, “minimise”, “trivial”, “favour caution”, “redress”, “mana”, “mauri”, and “mātauranga Māori”.

This will require litigation to resolve, and reflects poor law-making practice.

For example: does “minimise” mean minimise to zero, or minimise to what is reasonably practicable?

“Mining” could simply be defined as under the Crown Minerals Act 1991, as currently provided for under the RMA.

Mātauranga Māori would refer ordinarily to traditional Māori knowledge. Schedule 3 of the NBE Bill implies mātauranga Māori is a subset of science, in which case it is science done by Māori, as opposed to science done by anyone else.

“Redress” is a novel term in the resource management context, noting it resembles “compensation” (refer to Schedule 4 of the NBE Bill).

“Te Oranga o te Taiao” is a novel concept and is defined as follows in cl 3:

> “Te Oranga o te Taiao means—
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> (a) the health of the natural environment; and
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> (b) the essential relationship between the health of the natural environment and its capacity to sustain life; and
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> (c) the interconnectedness of all parts of the environment; and
>
> (d) the intrinsic relationship between iwi and hapū and te Taiao”

Only Māori can determine the meaning of cl 3, in practice, and its meaning could vary around the country among iwi and hapū, a source of uncertainty for resource consent applicants and holders.

To press this last point, it would be like having a different definition for “environment” or “mining” for each region of New Zealand, which would be obviously highly unsatisfactory.

Erroneous treatment of contaminated land

Cl 7 Interpretation defines contaminated land as “land where a contaminant is present—(a) in any physical state in, on, or under the land; and (b) in concentrations that—(i) **exceed an environmental limit**; or (ii) pose an unacceptable risk to human health or the environment” (emphasis added).

This is a narrow definition that could cause significant issues for land owners and land users.

For example, the geology at any location can strongly influence the ecosystem types than can thrive in that location, and prevent other types of ecosystem thriving, thereby breaching a limit. The Wairau valley in the northern South Island is flanked with indigenous beech forest in the main, except at the Red Hills, where magnesium-rich rock formations prevent the growth of these beech forests. Is this contaminated land, as far as the predominant ecosystem is concerned? Surely not.

We advise a return to the RMA definition of contaminated land. Cls 418 and 419 on land owner obligations in respect of contaminated land would then make more sense.

A risk of the new system being less efficient than the RMA system

The enhanced opportunities for Māori participation are supported, in principle. We note that in practice, however, this could make the new system more costly and time consuming for resource consent applicants than the already unsatisfactory situation under the RMA.

It is not clear to Minerals West Coast how this possible or probable adverse outcome of the new system can be resolved, other than to rescind the Bills, and retain the existing RMA system with amendments.

Transitional arrangements

Minerals West Coast understands that it could take 10 years for the new system to be operational, during which time the RMA still applies. Given the evolving structure of the new system, this time frame is understandable, however, challenging for people beset with the RMA system.

This consideration alone is a strong argument for not proceeding with the NBE and SP Bills, and, instead, incrementally amend the RMA to achieve the Government's or any future government's RM reform objectives.

Inability to submit on key aspects of the new system

The implementation of the NBE Bill, once enacted, depends crucially on the content of the national planning framework. At issue, as already noted above, is that the NPF is being developed, and that this could take until 2025 to complete. This puts submitters on the Bills into an invidious position. How can Minerals West Coast understand how the new system will work in practice, if the detail of the NPF is unknown at this time? This situation is obviously unsatisfactory, and, once more, amounts to poor law-making practice, and an argument against proceeding with the Bills.

RECOMMENDATIONS

Minerals West Coast recommends the Environment Committee to:

(1) Rescind the NBE and SP Bills, and, instead, make incremental amendments to the RMA in pursuit of resource management reform objectives, *or*, implement the following:

(2) Add to the end of cl 3 (a) (iii) "complies with environmental limits and their associated targets" the text ", including by applying the effects management framework"

(3) Add to the end of cl 14 (1) (b) the following text: ", including in the event of breaches to any applicable limits and targets"

(4) Amend the first sentence of cl 61 to read (insertion in bold): "The effects management framework is a means of managing adverse effects**, including in the event of breaching a limit or target,** as follows"

(5) Limit the scope of cl 14 to significant biodiversity areas, and specified cultural heritage, for consistency with cl 62

(6) In respect of cl 223 (11) (a) (i), add to the end of "contrary to an environmental limit or target" the following text: "for the avoidance of doubt, contrary to an environmental limit or target means situations in which there is an inability to apply the effects management

framework to breach, and then restore significant biodiversity areas or specified cultural heritage to a limit or target"

(7) Schedule 3 on offsets, Principle 2, should include an exemption from limits to offsetting where adaptive management can be applied

(8) Schedule 3, Principle 5, insert the text in bold into: "The ecological values being gained at the offset site are the same as, **or similar to** those being lost at the impact site" for workability

(9) Schedule 3, Principle 5, insert to the end of the text, "subject to providing for Principle 9" (noting this principle concerns "trade-ups" in biodiversity)

(10) Schedule 3, Principle 8 on time lags, amend "within the consent timeframe" to "within a reasonably practicable timeframe", for workability

(11) Amend Schedule 4 on redress for consistency with Schedule 3

(12) Delete cl 26 (2) and cl 277 to provide certainty for the continuation of existing uses of land and/or resources

(13) Provide definitions in cl 7 for "mining", "minimise", "redress", "trivial", "favour caution", "mana", "mauri", and "mātauranga Māori"

(14) Either provide a clear definition of te Oranga o te Taiao that applies universally everywhere in New Zealand (cl 3), or delete the novel concept of te Oranga o te Taiao

(15) Replace the definition of "contaminated land" in cl 7 with the existing RMA definition, for workability