SUBMISSION

Submission from Straterra to the Environment Committee Fast-track Approvals Bill

April 2024

Introduction

1. Straterra is the industry association representing the New Zealand minerals and mining sector. Our membership is comprised of mining companies, explorers, researchers, service providers, and support companies.

2. We welcome the opportunity to make this submission on the Fast-track Approvals Bill. We wish to also take the opportunity to make an oral submission to the select committee.

Summary

3. We support the intent of the Fast-track Approvals Bill (the bill). It is a necessary disrupter after years of stalling and delays in the resource management system and associated consenting processes.

4. The bill seeks to provide a sensible balance between environmental and economic considerations which we believe will lead to better outcomes overall for both the environment and communities.

5. The mining sector supports New Zealand's high environmental standards and neither wants nor sees this bill as undermining these. The bill contains responsible environmental checks and balances which we fully support.

6. We are not seeking to mine on National Parks, which is what some commentators are claiming the bill enables. When it comes to mining on conservation land, we fully support the status quo which allows applications to be considered on a case-by case basis on certain conservation land only (excluding national parks and other land listed on Schedule 4 of the Crown Minerals Act).

7. The bill needs to address the current litigious nature of consenting processes and to pursue instead a solutions-oriented approach to consenting significant projects.

List of recommendations

Purpose statement

8. The purpose statement in Clause 3 needs to be amended with the following additional wording (as shown in italics):

> The purpose of this Act is to provide a fast-track decision-making process that facilitates the delivery *(including ongoing delivery)* of infrastructure and development projects *including the development of natural and physical resources* with significant regional or national benefits.

Reconsenting

9. It should be unambiguous that the scope of the bill includes the reconsenting of existing projects and will not just apply to new infrastructure and development projects.

One-stop shop

10. Allocation of crown mineral permits under the Crown Minerals Act should also be part of the one-stop shop process. The application lodgement/receipt should remain under the Crown Minerals Act with the processing of the application transferred to the fast-track process.

Joint ministers

11. We recommend the Joint ministers should include the relevant minister on a case-by-case basis depending on the project. Accordingly, the Minister of Resources should be one of the joint ministers where a mining project is involved.

Decisions to refer to panel

12. Clause 21(2)(c) should be amended to read as follows:

> the project may have significant adverse effects on the environment *that cannot be avoided, remedied, mitigated, offset, or compensated for*.

Timeframes

13. Specified timeframes are required to achieve the fast-track objective, however, many of the timeframes in the bill are too short and need to be carefully considered for practicality and workability.

Resourcing of panels

14. There needs to be appropriate remuneration provided to the panelists to attract good people, and to ensure sufficient panelists exist so that a bottleneck can be avoided and that quality decisions are made.

Appeal rights

15. Clause 26 (1) (e) should be **deleted**:

> any person who has an interest in the decision appealed against that is greater than that of the general public.

16. A time limit should be placed on any applications for judicial review.

Conditions

17. Conditions represent significant environmental safeguards and are an important part of the legislation. To strengthen the rigour of the process whereby the expert panel assesses conditions, we recommend the development of guiding principles to assist the panel.

Exchanges of conservation areas

18. Schedule 5, Clause 18 requires that swaps and compensation are subject to a requirement that the conservation values of land managed by the Department of Conservation are enhanced. We support this but the bill needs to be clearer that land exchanges are included as part of this.

Partial approvals

19. Being able to approve one part of a project and decline another (e.g. Clause 21(6)) is problematic where different activities are interrelated. Such split or divided decisions should come only with the applicant's agreement.

Preamble

20. We support the intent of the Fast-track Approvals Bill (the bill). It is a necessary disrupter after years of stalling and delays in the resource management system and associated consenting processes. In the existing regime, projects that are ultimately approved (or declined) are taking too long, resulting in excessive costs both in terms of time and money and many investors have been scared away by the process. We welcome this bill which aims to fast-track the process for approved projects.

21. The bill will reduce and remove unnecessary duplication in the consent application process, and it allows the suite of approvals under different legislation to be considered in one place (a one-stop shop). At the same time, the bill continues to provide significant environmental safeguards through the conditions that will be imposed on any approvals. We agree these environmental safeguards are important.

Resource management reform

22. We support the intent of the Government's wider resource management reforms of which the bill is a part. We are hopeful that many of the features of this bill will find their way into further reforms so that all consent applications can be streamlined, not just those selected for fast-track.

23. Removal of regulatory duplication (the one-stop shop) should be continued in the further planned resource management reform along with complementary reforms to the Wildlife Act, Conservation Act, Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act and others. But our focus here is on the Fast-track Approvals Bill.

Environmental standards

24. Contrary to what many critics are saying, the bill is not likely to lead to a lowering of environmental standards. It seeks to provide a sensible balance between environmental and economic considerations which we believe will lead to better outcomes overall for both the environment and communities. We would not support it if it did not.

25. We emphasise here, the mining sector supports New Zealand's high environmental standards and responsible mining and does not want to use this bill to undermine these. The bill contains responsible environmental checks and balances which we support.

26. High environmental standards can be more easily achieved under legislation that provides flexibility to achieve it by allowing for offsets and compensation, leading to an overall net benefit to the environment.

27. Environmental impacts can be (and are) managed by an effects-based approach, as opposed to a simplistic protectionist/preservationist approach. This starts with avoiding adverse effects where possible, and extends through remedying, mitigating, offsetting and finally for more than minor residual effects, to compensation.

28. All of the terms we have used have a technical and practical meaning. For example, to remedy, is to repair harm, while to mitigate is to lessen its impact. As well, to offset is to provide a positive benefit as a counterweight to effects in a measurable way, whereas compensation provides for the same

approach, to a less measurable standard. This is in the interest of feasibility and practicality of actions to manage effects on the environment.

29. The bill needs to address the current litigious nature of consenting processes (also sometimes known as lawfare), and to pursue instead a solutions-oriented approach to consenting significant projects. Time spent in the courts is costly and the cases brought against mining companies are sometimes frivolous or vexatious.

The courts have proven too slow and expensive

30. Ministers have acknowledged the bill takes powers from the courts and hands them to ministers.

31. The clear and evident problems with the status quo justifies this, noting the checks and balances that the bill puts in place.

32. Resource management law is littered with examples of infrastructure and development projects that have been delayed due to expensive and time-consuming processes, costing millions of dollars, and taking years to gain approvals, or ultimately, be declined.

33. Consenting the Escarpment mine in Buller is an example. From the lodging of the original resource consent applications (2010) to the final grant of resource consents by the Environment Court in late 2013, there were 14 hearings. In addition, an access arrangement had to be obtained from the Department of Conservation (DOC) and this, together with the authority to enter and operate required under the access arrangement, was not fully granted until June 2014. Mine construction commenced in mid-2014 but with falling coal prices further development of the mine had become uneconomic. Accordingly, the mine was put on care and maintenance in March 2016 where the site remains today.

34. Currently, applications for access arrangements, wildlife permits etc. occur without transparency as to the decision-making processes of various government departments and certainly without the rigour of a timeframe within which decisions have to be made.

35. The fast-track approvals process brings decisions on access arrangements, concessions, wildlife authorities, and archaeological authorities into the light, and into a single process. This provides procedural certainty for project applicants, as well as reducing the timeframes for decisions made under the applicable legislation.

36. There is scope for increased transparency in decision making. For example, requiring ministers to declare meetings with applicants, political donations etc.

37. Note that hearings presided over by council-appointed commissioners, and court processes, are by their nature adversarial. The new process is more collaborative; it provides a constructive path for project applicants, those who provide scrutiny of those projects, and those who make decisions to work more constructively towards solutions.

38. It is also important to balance environmental measures – impacts and mitigation – with the broader economic (regional and national) benefits, which the current system does not do.

The bill is not unusual in reserving final decision making to ministers

39. Powers for ministerial decision making are the norm in other areas of legislation impacting on the environment – it is the RMA which is the outlier. Under the Crown Minerals Act, Conservation Act, and the Overseas Investment Act, for example, ministers receive a recommendation report and have the power to make the decision that can only be challenged subsequently in a court or via judicial review.

40. The Minister of Conservation, for example, already has the power to prevent projects proceeding – whether on conservation land, via the Conservation Act and the Crown Minerals Act, or on private land, via the Wildlife Act. The Fast-track Approvals Bill ensures that a balance will be brought to decision making for these types of approvals.

41. There are no calls from the public to put those regimes into the hands of judges.

42. There are many examples outside the minerals sector where Parliament has legislated in areas where the courts have allowed case law to develop and so what the bill is doing here is not new. Thirty years of case law have over-ridden the original intent of the RMA system, i.e. protectionist planning that prevents or stymies the case-by-case, effects-based assessment of projects in many parts of New Zealand.

Ministerial decisions do not always favour development

43. There are plenty of examples of ministerial decisions that have not favoured development projects under these acts including the following:

    - In 2018, the Minister of Conservation used her powers to deny the Te Kuha mine access to conservation land.
    - In 2020, the Minister for Land Information (responsible for the Overseas Investment Act) blocked a land acquisition application by OceanaGold. (Subsequently, in a matter of weeks, this was overturned by senior ministers of the same government.)

44. It should also be noted in both these examples the minister had been, in a former role, an advocate opposing these/such projects and in both cases she did not step aside despite her predetermined views.

45. As an aside, we note that the current Minister of Regional Development has said he may step aside from decision making where his other portfolios present a conflict of interest, as we presume other ministers will too. This is how we see the bill working when it is passed with the joint ministers recognising such conflicts and stepping aside[1].

Comments on the Fast-track Approvals Bill

Purpose

46. The purpose of the bill (Clause 3) would be to "provide a fast-track decision-making process that facilitates the delivery of infrastructure and development projects with significant regional or national benefits".

47. We support this. However, to avoid confusion and to be consistent with the Government communications on the bill, there needs to be more clarity that both the primary sector and mining are intended to be covered.

48. We note Clause 17(3)(f) refers to "development of natural resources, including minerals" as part of the eligibility criteria for projects that may be referred to panel, which is consistent with ministerial statements in the media about the bill.

[1] There is guidance set out in the Cabinet Manual on this. It includes managing conflicts of interest, where the general rule is for a minister with a conflict to excuse themselves from decision-making and delegate that to a minister without a conflict of interest.

49. To be clear, the purpose statement in Clause 3 should specify the primary sector and mining and we suggest the following additional wording (as shown in italics):

> The purpose of this Act is to provide a fast-track decision-making process that facilitates the delivery *(including ongoing delivery)* of infrastructure and development projects *including the development of natural and physical resources* with significant regional or national benefits.

Reconsenting existing projects

50. It should be unambiguous that the scope of the bill includes the reconsenting of existing projects and will not just apply to new infrastructure and development projects. The rewording we have suggested for Clause 3 above puts this issue beyond any doubt.

One-stop shop

51. The new regime will allow the fast-tracking of a number of consents and approvals (known as the one-stop shop).

52. This should provide for a single assessment of environmental effects to cover the requirements under the RMA, Crown Minerals Act (access arrangements), Conservation Act (concessions), Reserves Act (concessions), Wildlife Act (wildlife authorities), and the Heritage NZ Pouhere Taonga Act (archaeological authorities).

53. However, any mining project will also require a mining permit under the Crown Minerals Act and we consider the allocation of crown mineral permits under the Crown Minerals Act should be part of the one-stop shop process.

54. To protect priority for applications under the provisions of the Crown Minerals Act it will be necessary that permit application be made under that Act but with the processing to be transferred into the fast-track process.[2]

55. The lodgement/receipt of applications is time critical to ensure the "place" of the application is secured for acceptable work programme offer applications or the deadline is met for newly available acreage, competitive tender and permit change applications.

56. The information submitted with permit applications is commercially sensitive and provision should be made to retain the confidentiality of this in the fast-track process.

57. A recent report from Development West Coast said that miners on the West Coast are waiting an average of 382 days to have their permits processed. But there are some cases where applications (which have contained all the required information and progressed to the point of agreed conditions and awaiting a decision) have taken a number of years to be granted, in some instances more than six years. This is too long and is acting as a disincentive to invest in the sector. To proceed through the fast-track process and obtain all approvals other than a mining permit would stop immediate implementation of the project and add to the possibility that a permit might not be granted at all.

58. To the extent that specialist input is required in assessing a minerals permit application, this can be provided either by appointing a panel member with that expertise, commissioning a review of that

[2] Note similar issues will arise under RMA where a consent is expiring. Currently an applicant can use s.124 to *preserve* the consent while the application for renewal is heard. Under the bill (Schedule 4 cl31(3)) an applicant must withdraw all applications under RMA before applying for the fast-track process. This may mean that expiring consents expire during the hearings process unless the transitional provisions of s.124 RMA are carried over in some way into the bill.

part of an application from a technical expert, and/or from the input from New Zealand Petroleum and Minerals on any such application.

Fast-track Advisory Group process

59. Projects that get listed in Schedule 2A of the bill will be automatically referred into the fast-track process. Schedule 2B will be for projects to be considered by ministers for referral into the fast-track process.

60. We support the use of an independent Fast-track Advisory Group created to consider applications and recommend projects for inclusion in Schedule 2 of the bill.

61. This screening is important and needs to be robust. If too many projects are selected, the fast-track process will be slowed down for those that are referred.

Joint ministers

62. Applications to use the fast-track approval process are to be considered by the "joint ministers".

63. The "joint ministers" are the Infrastructure, Transport, and Regional Development Ministers. We support this approach with decision making by a group of ministers jointly as opposed to a single minister.

64. Joint ministers should include the relevant minister on a case-by-case basis depending on the project. Accordingly, the Minister of Resources[3] should be one of the joint ministers where a mining project is involved.

Eligibility criteria for projects

65. The criteria for referral as set out in Clause 17 are robust and we support this clause.

66. Many of the terms including "significant regional or national benefits" and "significant economic benefits" (Clause 17(d)(3)) are not defined. This is appropriate as significance will need to be ascertained for each respective application in its particular regional context or in the national context.

67. Clause 17(3) (e) says: "will support primary industries, including aquaculture". Mining (and aquaculture) are both considered primary industries, so this clause perhaps assumes a narrower definition of primary industries of just farming and horticulture. We recommend that mining be specifically referred to in the clause, or that the National Planning Standards definition of primary production be used as this includes both mining and aquaculture, as well as agriculture and horticulture.

Decisions to refer to panel

68. Clause 21(2) sets out the conditions upon which the ministers may decline an application for referral. Clause 21(2)(c) specifies ministers may decline an application if the project has significant adverse effects on the environment.

69. This of itself should not be a reason to decline a project, because it is likely that most big infrastructure and development projects will (without taking into account proposed avoidance, remediation, mitigation, offsetting or compensation) have significant adverse effects. What should be

[3] The current Minister of Resources, Hon Shane Jones, is to be a joint minister but this is under a different portfolio. The joint ministers should be determined by portfolio.

assessed is whether there will be significant adverse effects on the environment after proposed avoidance, remediation, mitigation, offsetting and compensation have been taken into account.

70. Clause 21(2)(c) should be amended to read as follows:

> The project may have significant adverse effects on the environment *that cannot be avoided, remedied, mitigated, offset, or compensated for*.

Panel composition

71. Clause 7 of Schedule 3 relates to the purpose and functions of the expert panels. Panels are not appointed directly by ministers. They are convened by a panel convenor, who must be a current or former judge of the Environment Court or High Court. This provides for independent panels.

72. The panels will be comprised of up to four people with relevant expertise. This includes knowledge, skills, and expertise relevant to the purpose of this Act (Clause 7 (1)(a)) which, given the Purpose, implies infrastructure and development expertise. We support this inclusion.

73. Care should be taken that panel members are not only resource management specialists given the much wider scope of approvals that they will be assessing under the proposed Act.

74. We query Clause 3 (2) that requires local authorities and iwi to nominate one person each. We do not think this is necessary for a panel of its size as there is no guarantee that those people will have the right skills or will have skills relevant to the particular project being considered. Further, this places a heavy burden on local authorities and iwi to find enough people who have the time to commit to a fast-track hearings process. Given that the panel collectively must embody certain, specified expertise, it is immaterial how this balance is achieved.

Timeframes

75. The expert panels must make their recommendations within specified timeframes (a maximum of six months).

76. It is important there is enough time for the panels to be able to do their job well but at the same time a specified time is required to achieve the fast-track objective.

77. There are a few challenges in some of the timeframes proposed. For example, the timeframe for a panel's decision is 25 working days, with an ability to extend another 25 workings days (Schedule 4, Clause 39). This is likely to be insufficient. Panels need enough time to grapple with the technical information and a lack of understanding of the application could lead to bad decisions or unnecessarily conservative conditions.

78. Unworkable deadlines will also put off people holding desirable expertise from sitting on panels.

79. We think the timeframes need to be carefully considered for practicality and workability and this is an area that needs further consideration before finalisation.

Resourcing of panels/remuneration

80. The bill will not be a total panacea in terms of speeding up all applications. The work still needs to be done by the applicant before presentation to the ministers and the panel will need sufficient time (as mentioned above). There will be other bottlenecks that arise, including finding the right and available expertise to make up a panel.

81. There are potential constraints in terms of available expertise for expert panels which may create a choke point for fast-tracked applications and quality decisions. There needs to be appropriate

remuneration provided to the panelists to attract good people, and to ensure sufficient panelists exist so that a bottleneck can be avoided and that quality decisions are made.

82. The same concern may also apply to the Environmental Protection Authority and other government agency resources.

Appeals

83. Appeals to the High Court on a question of law will only be permitted from the applicant, any relevant local authority, any invited submitters, the Attorney General, or 'any person who has an interest in the decision greater than that of the general public' (Clause 26(1)(e)).

84. We strongly support limited appeal rights because it limits the opportunities for ideological opponents with no direct stake in a project to achieve years of delay without consequences to them. This is a regular occurrence and ongoing appeals, often frivolous or vexatious, have been responsible for years of delays in consenting processes. While the RMA provides powers to strike out frivolous or vexatious claims, they are rarely or ever exercised.

85. The interests of the public generally are represented in the fast-track consenting process by the relevant government departments and ministers of various portfolios and local authorities who have the opportunity to comment on the proposed project.

86. Iwi authorities also have a right to comment on a proposal as do the owners and occupiers of the affected land and land adjacent. Further, panels have the power to seek comment from any other person they consider appropriate. (See Schedule 4, Clause 20). And finally, the ministers who make the decisions on the project do so as the elected representatives of all New Zealanders.

87. Providing for rights for appeal by the relevant local authority and the Attorney-General also safeguards the general public's rights.

88. Given these protections and the rationale for a fast-track consenting process we think Clause 26(1)(e) giving appeal rights to *any person who has an interest in the decision appealed against that is greater than that of the general public* undermines the whole bill and should be deleted.

89. As presently drafted, this will open up appeal rights to a range of self-appointed groups who will claim they fall into this category and who will bring appeals in the hopes of delaying or derailing approved projects.

90. The right remains for anyone to bring judicial review proceedings in relation to any part of the decision-making processes under the bill. We do not suggest that this right be taken away but there should be a time limit placed on the lodging of any such applications for review. We suggest that any appeals or judicial reviews of any part of the decision-making process must be brought no later than 20 working days after the ministers' final decision on the project.

Conditions

91. The provision of conditions, to be proposed by the applicant and imposed by the expert panel (Clause 25 (4) and Schedule 4, Clause 37), is an important part of the bill. Conditions represent significant environmental safeguards for projects that might not otherwise be approved because of their environmental impact.

92. The bill includes tests for how the conditions should be assessed and applied. Effectively, if the conditions cannot be met, the project won't proceed. If the conditions aren't strong enough to offset "bad projects" the panel or ministers can impose tighter conditions.

93. The ability for ministers to deviate from recommended conditions (Clause 25 (4)) needs to be placed in context. For decision makers, standard legal tests still apply. A failure to apply them rigorously opens up a decision to subsequent legal challenge through the courts through judicial review proceedings.

94. New Zealand law is already peppered with decision making processes where ministers have the final say and have the ability to overturn the advice. These include Overseas Investment Act decision making, and provision of access arrangements under the Crown Minerals Act.

95. Joint Ministers must not decide to deviate from a panel's recommendations unless they have undertaken analysis of the recommendations and any conditions included in accordance with the relevant assessment criteria, Clause 25(4). We support this. It is one of many checks and balances to counter criticism that the legislation gives joint ministers too much power.

96. The challenge for the expert panel considering the application is to ensure a robust assessment of proposed conditions on the project. We propose the development of guiding principles to strengthen the rigour of this process.

Conservation land

Schedule 4 land

97. Some commentators have interpreted the bill as bypassing existing legislation which precludes mining on National Parks and other land listed on Schedule 4 of the Crown Minerals Act. We assume this is not the intention of the bill and do not read it that way.

98. For the record, we are not asking for a law change that would allow mining on National Parks and other Schedule 4 land.

99. When it comes to mining on conservation land, we fully support the status quo which allows applications to be made on conservation land excluding National Parks and other land listed on Schedule 4 of the Crown Minerals Act[4].

Exchanges of conservation areas

100. Schedule 5, Clause 18 requires that swaps and compensation are subject to a requirement that the land exchange enhance the conservation values of land managed by the Department of Conservation. That is consistent with section 16A of the Conservation Act and we support it.

101. However, the interpretation of this clause by the Supreme Court in the Ruataniwha dam case is such that land exchanges could only take place if the conservation values in the affected conservation land are negligible or of no value. Drafting changes are needed to override this unworkable case law, which goes against what Parliament would have logically intended when section 16A was introduced into the Conservation Act.

102. The bill needs to be clearer that land exchanges are included as part of the regime set out in Schedule 5, Clause 18.

[4] In light of recent public discussion regarding stewardship land, we point out here that applications should not be confined to stewardship land only. All conservation land other than Schedule 4 Land should be open to application for mining access arrangements.

Partial approvals

103. Eliminate partial approvals. Being able to approve one part of a project and decline another (e.g. Clause 21(6)) is problematic for mining because different activities are inter-related. For example, excavation of overburden and waste rock is closely linked to transporting and storing this material, for eventual recontouring into a final landform and site rehabilitation. Such split or divided decisions should come only with the applicant's agreement.