

31st May 2021

Department of Jobs, Precincts and Regions
Earth Resources Regulation
Level 15, 1 Spring St
Melbourne, Victoria 3001

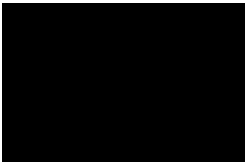
Dear Laura Helm,

BULK EXCAVATION WORKPLAN APPLICATION PLN001521

Kalbar Operations Pty Ltd (Kalbar) has obtained legal advice from Stuart Morris QC (Kalbar demo pit advice 210526) regarding the assessment of PLN001521 by Earth Resources Regulation.

The workplan has been updated to capture previous feedback received from ERR, and has been lodged within RRAM.

Regards,



Jozsef Patarica
CEO
Kalbar Operations Pty Ltd

Kalbar work plan for demonstration pit

Memorandum of Advice

1 Kalbar Operations Pty Ltd (**Kalbar**) hold Retention Licence RL2026 (**licence**) pursuant to the *Mineral Resources (Sustainable Development) Act 1990 (MRSD Act)*.

2 On 16 November 2020 Kalbar applied for the approval of a work plan (**application**) pursuant to the s 40A of the MRSD Act. The proposed work plan was for a demonstration pit. Kalbar described the proposal thus:

The planned Fingerboards process plant design creates both magnetic and non-magnetic concentrate products. The two separate concentrates are planned to be shipped internationally for further upgrading into their final products. To better understand the potential downstream processing method and subsequent marketing of the concentrates, a bulk sample of ore is required for offsite processing.

To obtain a representative bulk sample, a small open pit is required to get access to the ore grade sands. By default, the works provide an opportunity to obtain additional information to support the detailed design of the proposed Fingerboards Project, in particular, geotechnical and geological properties of the deposit and the mining methods best suited to accessing and recovering ore.

This exploration work plan outlines proposed work to establish an excavation approximately 90 m long x 40 m wide x 12 m deep. The demonstration pit plan is to remove approximately 1,948 bank cubic metres (BCM) of ore, 12,813 BCM of overburden and 1,140 BCM of topsoil.

The open pit would be backfilled within a relatively short timeframe following the completion of mining and would be immediately followed by rehabilitation with pasture. As such, this “demonstration pit” provides an opportunity for the community and stakeholders to see mining, processing and rehabilitation all within a short time frame.

3 On 11 February 2021 the Executive Director of Earth Resources Regulation determined that he could not make a decision on the application by reason of s 8C of the *Environment Effects Act 1978 (EE Act)*. In his letter, the Executive Director said:

In this case, the work plan application includes work currently being assessed under the EE Act including the extraction of ore and overburden within the proposed mine footprint.

- 4 Kalbar proposes to resubmit the application.
- 5 I am asked to advise whether s 8C of the EE Act is a legal bar to the Executive Director making a decision on the application.
- 6 For the reasons set out below, in my opinion, s 8C of the EE Act is a *not* a legal bar to the Executive Director making a decision on the application.

Statutory context

MRSD Act

- 7 Under s 40 of the MRSD Act a licensee who proposes to do work under the licence must lodge a work plan with the Department Head.
- 8 A work plan must be appropriate in relation to the nature and scale of the work proposed to be carried out. In this case the work plan only relates to a demonstration pit, and not mining as such. Accordingly, it is appropriate in relation to the nature and scale of the work proposed to be carried out
- 9 Under s 41 of the MRSD Act the Department Head must make a decision on the work plan.

EE Act

- 10 The EE Act makes provision for environmental assessment of works.
- 11 Under s 8(3) of the EE Act, a proponent of works that could have a significant effect on the environment may seek the advice of the Minister as to whether a statement should be prepared for the works.
- 12 Kalbar proposes to establish a mineral sand mine which would extract and treat ore near Bairnsdale and then sell heavy mineral concentrate. It sought the Minister's advice as to whether a statement should be prepared for the works.
- 13 Under s 8B(3) of the EE Act, the Minister decided that a statement should be prepared for the works. The Minister published reasons for his decision, dated 18 December 2016. In his reasons the Minister described the project as follows:

The proposed Fingerboards Mineral Sands Project has an approximate area of 1,400 hectares (ha) and is located in the eastern part of the Glenaladale mineral sands deposit, in East Gippsland, Victoria.

The proposal includes the development of a mineral sands mine, mining unit plant, wet concentrator plant (comprising mineral separation processing and tailings thickening and disposal plant), water supply infrastructure, tailings storage facility and additional site facilities, such as a site office, warehouse, workshop, loading facilities and fuel storage. Proposed mining methods involve open pit mining to extract approximately 200 million tonnes of ore over a projected mine life of 20 years. Mine products are proposed to be transported via road or by rail for export overseas.

The mining project would require up to 3000 kilowatt hours of power likely to be supplied from the electricity grid and annual water requirements of between 3 to 4 gegalitres.

- 14 Upon making that decision, the Minister advised relevant decision-makers (including the Executive Director of Earth Resources Regulation) that a statement should be prepared for the works.
- 15 Kalbar has prepared a very detailed environmental effects statement, including many attachments and appendices. This has been placed on public exhibition; submissions have been lodged; and an inquiry is currently being held by an independent committee.
- 16 Under s 8C(1) of the EE Act, the Minister having given notice that a statement should be prepared for the works, no decision can be made under an Act or law by the person given that notice (in this case the Executive Director of Earth Resources Regulation) in relation to the works until the EES process is complete, the Minister has made his assessment, and the assessment has been considered by the person given that notice (in this case the Executive Director of Earth Resources Regulation).

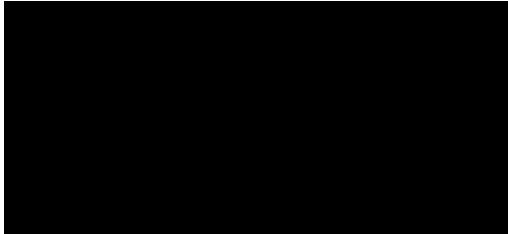
Key issue

- 17 Thus, the key issue is whether a decision on the work plan for the demonstration pit would be a decision in relation to the works the subject of the environmental effects statement. This requires consideration of the works the subject of the decision at hand (that is, the work plan for the demonstration pit) and consideration of the works the subject of the environmental effects statement.

Advice

- 18 The works the subject of the environmental effects statement is a mine having an approximate area of 1,400 hectares. Proposed mining methods involve open pit mining to extract approximately 200 million tonnes of ore over a projected mine life of 20 years. Mine products are proposed to be transported via road or by rail for export overseas. That is, minerals are proposed to be extracted and sold.
- 19 The works the subject of the work plan application, under the retention licence (not a mining licence), involves an excavation approximately 90 m long x 40 m wide (0.36 hectares or 0.0257% of the proposed mine site). The ore is to be removed for testing purposes; and it is not intended to sell any minerals that are extracted from the pit. One of the purposes of the exercise is to obtain information that may be used in making an assessment of the environmental impact of mining.
- 20 Clearly, the works the subject of the work plan for the demonstration pit are fundamentally different than the works the subject of the environmental effects statement.

- 21 Importantly, a decision to approve (or refuse) the work plan for the demonstration pit would not be a decision in relation to the works the subject of the environmental effects statement. Rather, it would be a decision in relation to different works; indeed, works of a fundamentally different nature (area, purpose, consequences).
- 22 The reason why the statute uses the expression “in relation to” the works the subject of the environmental effects statement (rather than “on”) is to acknowledge that a statutory decision might only apply to an aspect of the works the subject of the environmental effects statement (for example, a water licence or a planning approval or an EPA works approval). However, the expression “in relation to” does not apply to works that merely have a connection with the works the subject of the environmental effects statement. Rather it is confined to a decision about the works, or part of the works, the subject of the environmental effects statement.
- 23 The works the subject of the environmental effects statement do not include the works proposed in the work plan for the demonstration pit. The fact that the test pit will involve the extraction of ore and overburden within the proposed mine footprint is beside the point. The purpose of the extraction is fundamentally different. It is not mining. Rather it consists of works to assist in making decisions about future mining.



Stuart Morris

26 May 2021