

CMPA COMMENTS

DPI PROPOSAL FOR STATUTORY ENDORSEMENT OF MINING & EXTRACTIVE WORK PLANS

INTRODUCTION

The purpose of statutory endorsement of extractive work plans is to give statutory recognition to the current administrative practice of work plan endorsement. In the current endorsement process, DPI refers the draft work plan to other agencies for input and sign-off. The key agency involved is Department of Sustainability & Environment (DSE), though Environment Protection Authority (EPA), Aboriginal Affairs Victoria (AAV), Heritage Victoria (HV), Catchment Management Authorities (CMAs) and other agencies may be involved. When agreement is reached on the acceptability of the work plan, it is endorsed by DPI. The endorsed work plan is then attached to a planning permit application.

The duplication of referrals occurs when the Council refers the planning permit application to agencies, to which referrals have already been made and with which agreement has been reached in the endorsement process.

Note that the DPI currently has no legislative powers that require a work plan to be endorsed by DPI prior to applying for a planning permit application, it is just administrative practice determined by DPI and detailed in the VPP Practice Note, Extractive Industry Proposals, April 2006.

The proposal should in theory shorten timeframes to gain approvals but there are several issues as outlined below.

POSITIVES OF PROPOSAL

- Statutory timeframes in the approval process can be enforced to give a timely resolution of issues, however, these can always be circumvented by the referral agencies seeking more information, effectively stopping the clock.
- Provides potential to reduce approval times for simple, non contentious, proposals by avoiding the double referral process outlined above.
- A firm start date of the application will be established, helping to protect the application from subsequent changes in legislation.
- Proposal supports standing of DPI as the principle regulator of extractive industry, with a transparent and time restricted approvals process. It maintains the role of DPI with access to industry specific Minister.
- Will give Councils, particularly planning staff, a degree of comfort that the key authorities have carefully considered the proposal.

NEGATIVES OF PROPOSAL

- **Process subject to appeal to VCAT during endorsement AND during the planning process, potentially doubling costs & time of an already expensive VCAT process.**

It seems likely that under the DPI proposal, if DPI decides to refer the matter to an authority, the non-response of the authority will mean that DPI regards itself as unable to deal with the Work Plan, albeit triggering the right of the applicant to seek review at VCAT. The worst aspect of the proposal is the possibility that it could lead to an applicant making two hugely expensive and time consuming trips to VCAT.

An example if this scenario would be a situation where because of the response of an agency, or its failure to respond, DPI refuses to give agency endorsement or imposes conditions considered unacceptable by the

applicant. The matter goes to VCAT and it is likely to provide a forum for ventilation of a number of issues, particularly if the review results from a failure to make a decision. (This raises an interesting issue – is DPI going to be a party at VCAT defending its decision?) The applicant succeeds but when they apply for a planning permit either the council or objectors cause the matter to go back to VCAT on much the same issues, perhaps with the benefit of knowledge of the previous hearing, this time equipped with a bigger and better army of expert witnesses.

- **Potential for Referral Agency to let VCAT make the decision for them.**

There is the potential for the following scenario to develop – the proposal is appealed to VCAT by a local community group after Council has approved the planning permit, challenging the process and statement of one of the Referral Authorities. This appeal is upheld by VCAT. This may make the Referral Agency apprehensive in signing off responsibility for their comments in endorsing the work plan in the future. This may then require future proponents to take the Referral Agency to VCAT as the Referral Authority makes no decision on the endorsement of the work plan, doubling VCAT costs. This may then lead to planning approval by rule of VCAT as the standard, which is an undesirable outcome.

- **Early completion of a Cultural Heritage Management Plan**

If a Cultural Heritage Management Plan (CHMP) is required, it would need to be completed prior to the statutory endorsement of the work plan. This compares to the current regulations requiring an approved CHMP to be submitted before a Planning Permit application can be decided upon by Council. This brings forward significant costs in the process and increases sovereign risk for the project. Note that for administrative reasons, DPI currently suggests that approved CHMPs be submitted to DPI prior to work plan endorsement.

- **Increased time and costs due to Referral Agency demands**

As endorsement of the work plan is now a statutory process, this may drive the demand from agencies for more and more detailed work plans and supporting documentation from the proponent, increasing costs, especially for less complex or contentious regionally based proposals. Referral Agency may also take more time to consider their response, given the agency may only have ‘one shot’ at the proposal and the risk of a VCAT hearing.

Planning permit applications also tend to have a requirement for a greater level of information than Work Plans. This is because Work Plans deal more with the “on-site operational” issues while the planning system deals more with “off-site impacts”. If extractive proposals are referred only once to the referral agencies, there is potential for the level of information required in work plans would increase as a result of the agencies considering off-site impacts to a greater extent at the work plan stage.

- **Increased time due to DPI internal review body to make a decision**

The option of the applicant seeking review of a DPI decision by an internal DPI body is welcomed if this is completed in a timely manner, but if this is an extra hurdle to be overcome before appeal to VCAT is available, it will only add extra time and cost to the process. Note that there already is the opportunity within s77P of the *Mineral Resources(Sustainable Development) Act 1990* for the holder of a Work Authority to seek review of a decision of the Department Head to approve a work plan (or variation) with conditions or a condition on a Work Authority. So the opportunity for review of a DPI decision, albeit at the end of the approval process, already exists.

- **Simple proposals caught up in the new regime of increased demands**

Simple, non contentious proposals currently progress relatively easily through the approvals process, with the double referral not causing significant delays anyway. These “simple” proposals are however at risk of

being captured by the general requirement of a more detailed work plan being required for this new, statutory approval.

- **Power of veto by referral agencies**

At the present time DPI informally consults with DSE and possibly other agencies, and must take responsibility for at least a prima facie approval of the Work Plan, variations to it, or a refusal. The proposal seeks to formalise this process and the inference is that whatever a referral agency has to say will be determinative of DPI's response. This formalises the existing administrative arrangements and as DPI admits (last para of their proposal), effectively gives power of veto over work plan endorsements to other agencies.

- **No time limits for non-statutory referral authorities**

Responsible Authorities (Councils) in the planning permit process tend to refer applications to two groups of authorities. The first group is the statutory / formal referral authorities specified in the planning scheme (e.g. DPI, Heritage Victoria, DSE, CMA's, VicRoads). This group has statutory timelines within which to respond to the referral. The second group is those authorities that the Council sends the application to for their comment (e.g. EPA). These authorities do not have statutory time limits within which to respond. It is often the case that Councils will not progress the permit application until these latter authorities have responded and this often causes delays. The statutory endorsement of Work Plans may save time with the formal referral authorities but will probably have no impact on the non-statutory referral authorities and therefore little, if any, time savings will be made.

OTHER ISSUES

- Referral authorities can relook at the proposal if an issue is raised in the public notification process which is unknown at the time of endorsement. This avenue needs to be limited to the actual issue raised, and not a relook at the whole proposal by the referral authority. This could be used by objectors as a standard method to frustrate / delay the process. Will referral agencies then relook at proposals again and change the goal posts, similar to the current double referral process?
- DPI internal review body must be perceived to be independent as well as being credible, i.e., an industry expert reporting directly to the DPI Secretary, separate to the Earth Resources Division. Decisions will need to be made within stated time periods with annual public reporting.
- Uncertain why there is the need for the applicant to lodge a work plan to seek agency endorsement only with the approval of DPI?

CONCLUSION

The CMPA agrees with the aim of the proposal to streamline approvals by reducing the duplication of referrals to other agencies. However, this proposal creates more issues than it solves and does not achieve the aim of reducing cost and time to gain Work Authority approvals. On balance, as the proposal will not be of benefit to our members, the CMPA cannot support the proposal.