

Leader: A commitment too far?

While operational mines usually have the necessary environmental and social approvals and permits, many struggle to keep on top of accompanying compliance obligations, which can number in the hundreds, even thousands, and be impracticable. This is important to rectify as industry incidents lead to more scrutiny and as regulator enforcement potencies increase – regulatory authorities are improving their tracking of compliance and are more inclined to take actions such as revoke permits and/or suspend operations with a history of non-compliance.

The compliance challenge is rooted in the planning stage of development when approval documentation is prepared and the government approval decisions are made. It can be exacerbated in the operational stage if the obligations are not recognised and conformance with these is not checked as part of the environmental and social management system.

“Approvals received are celebrated by applicants often without careful study of the associated conditions imposed”

Approvals received are celebrated by applicants often without careful study of the associated conditions imposed. These conditions can be unreasonable. Several governments acknowledge the problem of excessive and onerous conditions and are taking action to address this, so conditions are both more executable and more enforceable. For example, the UK currently has a programme focused on ‘Improving the Use of Planning Conditions’ and the US EPA is tackling this as part of its ‘Next Generation Compliance Strategy’.

Adding to the obligations incurred in permitting processes, approval conditions can make sections of environmental and social impact assessments and the associated management plans legally binding. If applicants do not adequately sense check these documents before their submission to regulatory authorities,

they can find themselves burdened with extraneous or unworkable commitments.

“Those were heady days”, is a phrase a client recently and aptly used when referring to some ambitious commitments made in a management plan developed before one of their mines became operational. Overambitious commitments are particularly important to look out for.

Renegotiation of conditions of approval can require time-consuming consultation with regulatory authorities and may need to involve a number of other stakeholders. Consequently, this is often avoided by operators, even when there are opportunities to do this through permit renewal processes.

Stakeholder engagement is also a source of compliance obligations. Many mines recognise that commitments they make to stakeholders need to be carefully documented and fulfilled, even if they are not captured in approvals or formal agreements. However, some operators make unrealistic public promises not appreciating they could be exposed to law allowing a party to recover the benefit of a promise made even if a legal contract does not exist.

Some operators currently do not maintain compliance obligations databases and do not track conformance with their



obligations. Usually they meet requirements to report to regulatory authorities, on a quarterly or annual basis, but the reports submitted are silent on, or have limited reference to, compliance obligations.

Authors: Jane Joughin and Emily Harris are environmental and social management consultants with international mining expert SRK Consulting.

Regulatory authorities in many jurisdictions are increasing their monitoring capacity and are introducing advanced technologies that allow real-time monitoring. They also have visions for promoting more accurate and complete compliance reporting, including electronic reporting, and for making monitoring data and compliance records more accessible to the public. Transparency is seen to be a powerful tool for effecting compliance.

Cognisant of the above, SRK advises clients to:

- ✔ Aim for fewer and smarter commitments;
- ✔ Review conditions framed during the finalisation of permits to see if they are necessary, relevant, precise and reasonable
- ✔ Review commitments in environmental and social management plans that will become legally binding – minimise duplication and remove measures that are not essential
- ✔ Establish a well-designed obligation database that includes all binding obligations
- ✔ Monitor conformance with compliance obligations and report effectively on this to regulatory authorities, company management, shareholders and other stakeholders
- ✔ Renegotiate any conditions that no longer apply or are impractical to implement.

Such actions help to embed environmental and social compliance into corporate governance and aid all parties in managing incidents when they occur. These will also prepare mines for stronger compliance enforcement in the future and possible increased public inspection of compliance.

“Regulatory authorities in many jurisdictions are increasing their monitoring capacity and are introducing advanced technologies that allow real-time monitoring”