



Leard Forest Research Node

Vickery Extension SSD 7480 Public Hearing

Submission

"We acknowledge and honour the Gomeri traditional owners of this land, and offer our respects to the Gomeri Elders."

Introduction

We thank the Independent Planning Commissioners for the opportunity to once again present to you on behalf of the Leard Forest Research Node, further to our previous written and face-to-face submissions objecting to the Vickery project. Nothing has been said during the entire multi-stage hearing for the Vickery Extension project that refutes our estimation that Vickery mine and coal handling industrial complex would be tantamount to a second Maules Creek mine, maybe worse given the proximity to the Namoi River, Boggabri town and the concern about cumulative water impacts.

First up we would like to raise the subject of the inadequacy of the original Environmental Impact Statement. It is clear, as confirmed by the Commission's Issues Report dated 30th April that it was severely lacking in the scope and detail of matters which should have been made available to the IPC and DPIE for consideration. There are pages of these matters listed in the Issues Report.

Clearly there is something wrong with the Secretary's Environmental Assessment Requirements if an EIS lacking so much necessary detail gets as far as the IPC. While proponents like Whitehaven may moan and complain of red tape, green tape and bureaucracy, it seems to us that the problem lies with the Secretary's Environmental Assessment Requirements which did not adequately describe the requirements right from the start.

Inadequacy of the Vickery EIS is a serious concern to us, as it is essential that it contains the right scope of information and level of detail needed for consideration of a major coal mine and coal production hub proposed in a sensitive agricultural area nearby to the Namoi River.

The IPC has identified particular issues within the broad key issues which called for detailed consideration by the Department of Planning, and noted critical matters which were only briefly dealt with by the Applicant in the EIS and the Additional Material, and in some cases instances not dealt with adequately, including the Commission's view that the Project Justification was inadequate – politely expressed as “a more comprehensive explanation of the Applicant's justification for the Project would be useful for the Department's assessment”.

Additionally, the IPC's Issues Report lists a series of inadequacies including groundwater drawdown information, not provided in the EIS or the Preliminary Response to Submissions, which is unacceptable and constitutes a burden on the planning system.

Environmental assessment must be sufficiently specific. The well-known legal test for adequacy of an EIS is -

“the EIS must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of carrying out or not carrying out the activity”.¹

According to the test, the EIS must contain materials which would alert lay persons and specialists to problems inherent in carrying out the activity, and the Secretary's Environmental Assessment Requirements must in future reflect that test.

Today we wish to briefly address in the time allowed, the laxness and vagueness of the Recommended Conditions of Approval, which we urge the IPC to reject. We also address the subject of cumulative water impacts, which is a topic raised at the first hearing when the combined mines regional water strategy was criticised for the fact that Vickery mine is not deemed a part of the regional water strategy despite its close proximity.

Since then, new evidence came to light which supports our view that the groundwater of Namoi Zone 4 is at risk of cumulative impacts that are not well understood, and that regulatory and operational mechanisms are not in place to predict and forestall cumulative impacts as they arise. The Maules Creek coal mine has started taking water from Zone 4. The Modification that has been submitted for Tarrawonga coal mine, also plans to take water from Zone 4 in unspecified circumstances.

We refer to the 30 Recommendations of the Natural Resource Access Regulator to the Regional Water Strategy dated 5th November 2018 (attached).

Naturally, as an objector to the Vickery Extension project, we would give preference to a decision refusing planning consent. This is particularly so, given that Whitehaven already has an approval for a 4.5MTPA coal mine, which it regarded as viable but has steadfastly declined to construct.

¹ *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402, per Cripps J.

We would rather see the smaller, already approved mine proceed for longer thus spreading a smaller impact over a longer period.

However, in the unfortunate circumstance that the IPC were to approve this project, we call on the Commissioners to give consideration to certain matters which have habitually arisen in mining conditions broadly in NSW, and specifically the consent conditions of Namoi Valley mines such as Maules Creek, which provide us with examples of what we regard as regulatory failure and should not be repeated.

1. Strict conditions

We take exception to the use of the term “strict conditions” to describe the standard of regulation proposed in the Recommended Conditions.

In defiance of public concerns about lax conditions and poor environmental performance of Maules Creek mine, to use an example, Whitehaven and the Department regularly argue that it is subject to strict conditions.

e.g. The Department states it has recommended a range of conditions to manage amenity impacts, including requiring Whitehaven to:

- “comply with strict construction, operational and rail/road noise criteria;”
- “comply with strict blasting and air quality criteria;”

However, we draw upon the commonly used interpretation of the word “strict” to mean “rigidly enforced”, “exact in adherence”, “not allowing or admitting deviation or relaxation”, which cannot be said of the Recommended Conditions.

With our available resources, it is not possible to fully canvass all the reasons why the Recommended Conditions fail to deliver certainty and confidence to the public that Vickery would be a well-regulated mine.

Air quality, blasting and noise criteria certainly can’t be regarded as strict. The claim would be simply laughable, if it were not tragic.

If you want to talk about strict conditions, you might for example look at other industries and by comparison it is glaringly obvious that coal mining is weakly regulated, with:

- No onsite regulatory presence from any of the four regulatory agencies (DPIE, EPA, Resources Regulator, NRAR)
- Vague and uncertain conditions with subjective performance standards
- Resources Assessment branch of DPIE has policy of relying on proponent’s legal advice, even in the face of strong arguments against failing to obtain an independent legal opinion

An industry comparison is useful. Look at abattoirs, for example. There, an AQIS inspector is present on site at all times, paid for by the operator. That is what you might call strict.

In the case of the Namoi mines, the nearest regulator the EPA is based in Armidale, over 3 hours drive away. Even then, when the EPA visited the Maules Creek mine in August 2019 and found the explosives dump poorly secured, with expandable polystyrene balls – EPB’s – clearly escaping into the surrounding environment, all that happened was a verbal warning and no further action until February when it was discovered – by a mine neighbour – that a major spillage and Tier 1 pollution offence had occurred and a large number had escaped during the flooding rains into Back Creek a tributary of the Namoi River.

2. The Recommended Conditions lack measurable performance criteria

When conditions are expressed in subjective terms with no measurable performance criteria, they result in no punitive consequences for non-performance. Without consequences, or with minor consequences, this renders the conditions ineffective. This, we regard as regulatory failure.

Vague and uncertain phrases like “all reasonable and feasible measures,” “as soon as practicable” “to the greatest extent practicable” and “as soon as reasonably practicable”² should be replaced with measurable and quantifiable measures or methods. Similarly, we note having viewed the Recommended Conditions, there is a prevalence of conditions whose performance criterion is “the satisfaction of the Secretary”.

Case studies illustrate the problems that arise when there are one or more vague or subjective performance criteria in a condition. Recommended conditions B101 and B104 relate to rehabilitation, a major concern according to the Issues Report, which states that during public exhibition of the Vickery Project, the final void was raised as a significant concern in public submissions. The Commission also heard concerns from speakers at the initial public hearing and received written submissions regarding concerns with the Project’s rehabilitation, final void and final landform.

In the Final Assessment Report: “The Department has recommended a range of conditions to manage the rehabilitation of the Project, including requiring Whitehaven to:

- rehabilitate the site in accordance with strict rehabilitation objectives; ..”

This is the wording of the Vickery Recommended Conditions concerning rehabilitation:

REHABILITATION

² Condition B101, Table 12 “Establish the final landform and post-mining land use/s as soon as practicable after cessation of mining operations”

Progressive rehabilitation Condition B103 “The Applicant must rehabilitate the site progressively, that is, as soon as reasonably practicable following disturbance”

Notification of Exceedances Condition D6 “As soon as practicable and no longer than 7 days after obtaining monitoring results showing an exceedance of any noise, blasting or air quality criterion in PART B of this consent, the Applicant must provide the details of the exceedance to any affected landowners tenants and the CCC.

Rehabilitation Objectives B101. The Applicant must rehabilitate the site in accordance with the conditions imposed on the mining leases(s) associated with the development under the Mining Act 1992. The rehabilitation must be **generally consistent** with the **proposed rehabilitation objectives** described in the documents listed in condition A2(c) (and shown conceptually in the figure in Appendix 6), and **must comply with the objectives in Table 12.**

- The objectives are “proposed”, rather than required.
- Rehabilitation is only “generally consistent”.
- And upon looking at the objectives in Table 12, we find one of them is to “Establish the final landform and post-mining land use/s **as soon as practicable after cessation of mining operations**”

And,

B104. The Applicant must prepare a Rehabilitation Strategy for the **development to the satisfaction of the Planning Secretary.**

Our group grappled with the seeming lack of progression of rehabilitation at Maules Creek when in 2016 we approached the then Secretary Ms Carolyn McNally with our concerns, that included the offset rehabilitation plan and budget was overdue. When we met Ms McNally in company with senior Planning officials, we asked what considerations guided the Secretary in determining whether she was “satisfied”, and we were told in explicit terms at the meeting “that would be for the Court to decide”. This lack of guidelines as to the Secretary’s discretion is not in the public interest.

We need not point out to the Commissioners the difficulty of using third party legislative mechanisms against a multi-billion dollar corporation, with asymmetry of information and lack of financial resources working against the public who may attempt to take Whitehaven Coal to court.

We submit that the time has come to remove the high number of subjective performance criteria that, to quote “it is up to the Court to decide” and provide conditions that are more prescriptive as to timelines of delivery with a relevant appeal process in case of intervening events interrupting compliance.

Regulatory failure is underway in respect of the conditioning of Maules Creek mine, and this is likely to be replicated at Vickery, in fact there is no reason why this would not be the case.

2. Water Cumulative Impacts are not properly considered

When you consider the level of concern and gravity of risks to ground water in the coal mining area of the Namoi Valley, regulatory failure is evident in relation to cumulative water impacts of the Namoi valley mines.

This is illustrated by reference to these factors:

- The much-delayed BTM Regional Water Management Strategy (known in the Project Approvals as Leard Mine Precinct Regional Water Strategy and the fact that 3 other mines –

Boggabri, Tarrawonga and Maules Creek, are treated as separate from Vickery, even though all four are extracting water from Zone 4

- The NRAR Recommendations on regional cumulative water impacts, which were ignored by Planning and not implemented and
- The facts surrounding recent history of pipeline and water carting conducted without approval which included the Department relying solely on Whitehaven's legal advice, and failing to obtain its own legal advice, while the company unlawfully constructed a pipeline to harvest water from farms to supply Maules Creek mine
- The Tarrawonga MOD 7 which applies to pipe water from the northern borefield array at the Vickery mine to a location 30km far away, sharing the same water source with (if approved) Vickery mine

It is recommended that the IPC ascertain:

- What would be the triggers for using the pipeline to access water from Vickery
- How does this impact on the regional water strategy for Namoi region, formerly known as the Leard Mine Precinct Regional Water Strategy, now known as BTM (Boggabri-Tarrawonga-Maules Creek) water strategy?
- What Water Access Licences are already owned, or are being acquired to supply water to Tarrawonga mine, other than those already allocated to Vickery mine?
- What specific protection is there for the protection of water for the town of Boggabri?

These matters should reasonably be expected to be included in the EIS, especially given that the cumulative impacts of coal mines on groundwater (and surface water) are highly contentious, and the town of Boggabri is reliant on Zone 4 groundwater.

Considering the level of concern about cumulative groundwater impacts in the Namoi Valley due to mines, there has not been a corresponding level of timeliness, transparency or quality in the provision of water data nor compliance with the architecture of regulation, which includes:

- Conditions of Project Approval
- Regional strategy
- Water Management Plan
- Mining Operations Plan
- Trigger Action Response Plans
- Environmental Protection Licences

These are cascading and interrelated aspects of the mine regulation, under the responsibility of 3 different agencies.

The cumulative water impacts of the three mines, Boggabri Maules Creek, and Tarrawonga is the subject of the Leard Mine Precinct Regional Water Strategy. This changed name to be called the BTM Complex Water Management Strategy, which was confusing and unsearchable under its official name.

30 NRAR Recommendations were ignored

Not only were NRAR's 30 recommendations ignored, moreover they never saw the light of day until disclosed under Government Information Public Access procedures, thus demonstrating not only lack of consultation and transparency but the contents were extremely concerning to see ignored.

However, KEY COMMENTS included:

- An overall framework of a Water Management Strategy for the BTM Complex is presented, however, more detail is required on specific aspect of the implementation plan to assess whether it adequately addresses the monitoring and management of the cumulative impacts on surface water resources from the three mines operating within the BTM complex;
- ...the clear identification of roles and responsibilities (who does what, when and for how long) is critical to effective management...clear time frames for communication of events, reporting, investigation and mitigation actions should be provided.
- It is recognized the WMS is a high-level document and the individual operations will be managing impacts on site in accordance with their own Water Management Plans. **However, as the WMS currently stands there is low confidence in the capacity of all three operations to respond to cumulative impacts effectively.**
- The trigger levels established for water quality, level and quantity need to be selected with the intent to manage impacts within the approved limits. Hence the initial trigger needs to be set below the approved impact limit from being exceeded or to enable compensatory/make good measures to be applied as required.

And this was with only 3 – not the proposed 4 – mines operating in the region, and even in the same Zone.

We acknowledge that NRAR is an advisory, not approval, agency in relation to the mine's compliance with its conditions, nevertheless wish to point out:

- The NRAR Recommendations were kept secret from the public, including the Community Consultative Committee (CCC) throughout the entire period of so-called consultation.
- The recommendations have been almost entirely ignored
- It is a pattern of behavior of the Department of Planning to treat specialist advice with disregard, as in this astonishing example
- In the midst of this process, changes were made to the MCCM Water Management Plan to preclude consultation with the CCC.

The LFRN has examined relevant documents such as the regional water strategy and the Water Management Plan, to ascertain if they have incorporated NRAR's recommendations. As far as we can ascertain, the NRAR Recommendations have not been incorporated. We do not have access to Trigger Action Response Plans (TARPs) to see if they have incorporated the relevant Recommendations but from what we see of recommendations 27 and 28 concerning impact mitigation, we doubt it.

NRAR took issue with the liberal use of vague terminology such as (Rec 23) “as soon as practicable” and what constitutes an actionable “event” and (Rec 28) what constitutes “rectified where possible”.

We urge the IPC to examine each and every one of the NRAR Recommendations and the extent to which failure to absorb them into the regional water strategy diminishes confidence in the oversight of cumulative impacts.

Further matters

There are many assumptions in the Assessment Report which require the Commissioner’s scrutiny, matters which are disproved by experience, such as the expectation that Vickery mine will restore grassland to woodland. Strong criticism by the NSW Resources Regulator of Whitehaven’s failure to rehabilitate land at Tarrawonga and Rocglen speaks volumes of the lack of confidence that the regulator has in the company to restore grassland to woodland as promised.

The failing of Whitehaven Coal to acquire like-for-like biodiversity offsets in relation to Maules Creek mine is another example of the company’s inability or unwillingness to deliver on its promises. Documents obtained by GIPA that are now on the DPIE’s Disclosure Log show that Whitehaven and its consultants repeatedly provided the NSW Biodiversity Conservation Trust with inaccurate maps, draft maps, maps in insufficient detail, and several documents show the company’s mapping was incorrect and upon attempts to ground-truth the offsets were not as described. Whitehaven now has a third extension of time in which to fulfil its biodiversity offsets conditions.

Finally, a matter concerning air pollution is the failure of the Assessment Report to reflect the realities of dust pollution from the coal mines on the surrounding region.

A Namoi Region Air Quality Monitoring scheme similar to the Upper Hunter was promised for several years, opposed at every turn by Whitehaven (but supported by Boggabri Coal).

In following up via the Namoi Air Quality Community Consultative Committee, it was learned from the NSW EPA Armidale branch that the scheme has been blocked.

Everyone in the community finds it incomprehensible that (non-mine owned) monitoring stations are at Narrabri and Gunnedah but not at Boggabri, the town closest to the three existing mines and the proposed Vickery project.

That is not only a breach of trust, but an absence of good faith, by the industry, which seems to be actively avoiding its responsibilities under its approval.

**Leard Forest Research Node
July 2020**