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Conservation Council of Western Australia

Look forward

Hon Brian Ellis MLC
Chair
Standing Committee on Environment & Public Affairs
Parliament House
Perth, Western Australia 6000

22 January 2013

Dear Sir

RE: OUTCOMES OF THE 'REFORMING ENVIRONMENTAL REGULATION' PROCESS IN RELATION TO PETITION No. 143 – ENVIRONMENTAL LEGACY OF MINING

Thank you for the opportunity to comment on the Ministerial response to petition 143 and the adequacy of the environmental reform process being conducted for the Minister by the Department of Mines & Petroleum. Apologies for the delay but we have been waiting for the Ministerial Advisory Panel process to conclude.

Over the last 4 months the Conservation Council has been participating in the four working groups established to support the Ministerial Advisory Panel (MAP) on the reforms to the environmental regulation of mining. It is now clear that the recommendations from the working the MAP do not allay CCWA's concerns about the effectiveness of mining environmental regulation in this State. A summary of probable outcomes of the Minister's reform process from a CCWA perspective is attached. This was sent as a submission to the Mines Minister on 16 January 2013.

IMPACT OF PROPOSED REFORMS IN RELATION TO THE POINTS RAISED IN THE PETITION ON THE ENVIRONMENTAL LEGACY OF MINING

The impacts of the 'Reforming Environmental Regulation' and MAP recommendations on the points raised in petition No. 143 (and the associated submission) are reviewed below.

Point 1: The level of transparency with respect to the environmental outcomes of mining on public lands.

There have been some concessions to the need for improved transparency arrangements but no clarity on how or when certain key approvals (Program of Works, Mining Plans, Mine - Closure Plans) and compliance documents (Annual Environmental Reports) would be made available. The MAP recommendations with respect to the availability of key information are weak and ambiguous.

Point 2: The adequacy of the environmental standards being set for mine rehabilitation and remediation.

There were no recommendations from the MAP about processes to determine technically defensible completion criteria or to engage the community on mine-closure expectations. At this stage no clear way forward on this issue has been identified.

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Point 3: The environmental outcomes of mine closure to date.

Currently there are no plans in the RER process for a systematic analysis of the outcomes of mine closure to date. Greater transparency may allow 3rd parties (e.g. researchers) to carry out such a review but at this stage the proposed transparency improvements would not be sufficient to provide for this. There are no programs within the mining industry itself to share data and arrive at any kind of synthesis.

Point 4: The adequacy of the regulatory framework for protecting the public interest with respect to the environmental legacy of mining including the bond system.

CCWA is of the view that replacing the bond system with MRF levy is an open invitation for defaulting operations or defaulted companies to cut and run from their closure obligations. To work the MRF must be supported by robust legislated (criminal and civil) punitive provisions against operators or company directors who fail to comply with their adopted mine closure plans. There has so far been little activity in providing appropriate legislation to underpin the environmental regulation of mining. CCWA believes the environment and the taxpayer will be severely exposed when the current mining boom declines, as it inevitably will.

Point 5: Current community perceptions and expectations with respect to mine closure expectations

Contrary to the Minister's assertions the Mine Closure Guidelines leave the questions of post-mining land use on public lands and the related mine-closure objectives to the mining operators. There is little or no community engagement at the local level and certainly none at strategic level – e.g. the outcomes of mine closure at the regional and state levels.

To the best of our knowledge little work has been done about public perceptions or awareness of mine closure outcomes or where community preferences lie in a range of regional contexts. The Minister equates public interest with the opinions of the mining industry and its representative bodies. Other stakeholders are usually excluded from DMP consultation until after proposals have been formulated with the mining industry.

Conclusion

As the previous analysis would indicate, CCWA is not of the opinion that the Mine's Ministers 'Reforming Environmental Regulation' initiatives have made significant advances in dealing with the concerns raised in petition No. 143. CCWA therefore intends to reactivate its petition calling for an inquiry into mining legacy issues at the opening of the next parliament.

Yours faithfully



Piers Verstegen
Director

OUTCOMES OF THE 'REFORMING ENVIRONMENTAL REGULATION' PROCESS FROM A CONSERVATION SECTOR PERSPECTIVE

Background

The Conservation Council of Western Australia (CCWA) has long-held concerns relating to the effectiveness and transparency of environmental regulation for mining in Western Australia.

Following an investigation by the WA Auditor General into environmental regulation in mining, the WA Minister for Mines and Petroleum announced a *Reforming Environmental Regulation* (RER) process. CCWA represented the Community conservation sector on a Ministerial Advisory Group (MAP) which was established to provide advice to the Minister on this reform process.

The MAP has provided a report to the Minister addressing its initial terms of reference, however MAP members agreed that the panel should continue to operate in order to facilitate continued input into the reform process.

The following comments provide an assessment of the success of the MAP / RER process to date from a conservation sector perspective.

In general, the MAP placed significant focus on the implementation of new regulations to give effect to the Mine Rehabilitation Fund Bill and a consultant's report on 'Environmental Compliance & Enforcement'. A number of other significant matters related to the environmental regulation of mining in Western Australia were not considered in detail, and/or deferred to subsequent activities by the DMP.

The MAP consultation process involved the establishment of Working Groups focusing on Approvals, Compliance and Governance issues. However the final MAP advice departed from this structure. As a result the following submission is in two parts. The first looks at the issues in relation to Approvals, Compliance and Governance from the CCWA perspective. The second part comments specifically on the MAP advice.

PART 1: CONSERVATION SECTOR PERSPECTIVE ON THE ISSUES COVERED IN THE WORKING GROUPS

Approvals

The DMP has operated without any identifiable policy that articulates the required environmental outcomes from mining / exploration operations or mine closure. Policy outcomes need to be framed in measurable objectives based on pre-determined bio-physical indicators of environmental performance. The absence of environmental policy and objectives has underpinned problems with justifying approvals, providing consistent and transparent governance and delivering effective compliance. Specific problems at the approvals stage include:

1. The risk-based approach said to underpin DMP environmental assessment cannot be applied unless the objectives (based on Government policy) can be identified. (i.e. risk is the probability of not meeting the environmental objectives).
2. Without clearly articulated objectives it is not possible to determine the standards of environmental management required.
3. The questions of post-mining land-use and post-closure land management responsibility are not resolved during the approvals phase but this is necessary to facilitate effective monitoring and compliance.
4. Issues around the conduct, standards and transparency arrangements with respect to risk assessments have not been sufficiently resolved to engender confidence in the so-called risk-based approach.
5. It is still not clear whether Mine Plans will be made public or advertised to enable 3rd parties to exercise their right to refer projects to the EPA under Section 38 of the Environmental Protection Act.
6. It is still not clear at what point Mine Closure Plans would be made available or how public engagement with issues such as post-mining land use and closure standards would be instituted. (N.B. Mine Closure Plans are now required at the approvals stage).
7. Mine closure requirements for mines that have been subject to EPA assessment are likely to have more rigorous requirements than those assessed by DMP. However the regulation of mine closure has now be handed to the DMP (except for those on State Agreement Acts). An MOU may be required to ensure the EPA's requirements are met in these circumstances or preferably EPA requirements should be part of a formal legislated delegation.

Compliance

In the absence of pre-determined measurable objectives there is no unambiguous way of determining compliance in terms of environmental performance. The development of outcomes-based objectives and performance measures that are both technically defensible and reflect community expectations is a priority.

The Mining Act was designed to allocate tenements and provide for the orderly extraction of mineral resources. As a vehicle to regulate the environmental impact of mining it is totally inadequate. In particular

1. It relies on secondary (likely unenforceable) approvals based on Conditions on granted tenements (where the right to mine has already been conferred).
2. The only sanction available for non-compliance with the Conditions is tenement forfeiture. Generally not an effective sanction against non-profitable defaulting or defaulted mining operations.
3. Conditions can only be set to 'prevent or make good injury to the surface of the land'. Therefore impacts on ground and surface water, soils, dust, subterranean environments, fauna or ecological processes cannot be regulated under the Mining Act. If a mining operation is not assessed by the EPA then impacts on most environmental systems fall through the cracks.
4. Only activities and impacts that occur on the mining tenements owned by the operator can be regulated under the Mining Act. Many impacts, dust, water, salinity, weeds, pests, human disturbances, increased total grazing pressure and wildlife interactions resulting from mining activities impinge outside tenement boundaries.

The Consultant indicates a preference for establishing an improved regulatory basis for the environmental regulation of mining through amendments to the Mining Act and to continue relying on secondary approvals through improved 'outcomes based' condition setting. For the reasons set out above CCWA believes the Mining Act is an inappropriate vehicle for this.

The Environment Minister (on advice from the EPA) is responsible for setting the environmental policy of the State and for assessing all projects that could have a significant impact. Where environmental regulation is conducted by the Decision Making Authorities it should operate within this broader policy framework. It would make more sense to amend the Environmental Protection Act with the provision of special section for the environmental regulation of mining. This section might;

- Formally delegate head powers for environmental protection to the environmental branch of the DMP.
- Codify the extent of the regulatory functions that are subject to the delegation.
- Provide the powers to regulate the total environment both on and off the tenements associated with a project.
- Establish minimum standards for transparency in the environmental assessment and monitoring processes of the DMP.
- Provide 3rd party access to an appeals process on environmental approvals and compliance regulation.
- Provide for environmental regulations to remove the reliance on unenforceable, condition-based secondary approvals. This might best be achieved by connecting the environmental assessment and approval with the granting of a Mining Lease.
- Provide for the investigatory powers of environmental inspectors.
- Provide for civil and criminal environmental penalties in line with those prescribed under the EP Act including the provisions related to environmental harm.
- Provide for a reporting framework to allow the EPA to evaluate the effectiveness of DMP regulation against the State's environmental objectives (e.g. to support State of the Environment reporting).

The Mine Rehabilitation Fund (as it stands) will just be an open invitation for failing operations to cut and run from their mine closure obligations unless it is supported with strong punitive provisions against company directors / owners for defaulting on mine-closure obligations. In a meeting with CCWA the Director General of Mines & Petroleum indicated that the MRF would not become operational until appropriate environmental offenses were legislated. However little action appears to be taken with respect to legislating environmental offences in contrast the urgency applied to getting the MRF Bill through the parliament. CCWA is concerned that the approaching end of the current mining boom may see the environment and taxpayer even more exposed to new legacy mines.

Currently it is not clear how the MRF will apply to mining operations assessed by the EPA with completion standards exceeding those applied by the DMP (as these mines are theoretically in more environmentally significant areas).

Governance

The consequences of an inadequate policy foundation for all aspects of environmental regulation, including governance, have already been discussed.

The other major governance issue is the lack of public-interest transparency in the environmental regulation managed by the DMP. Some progress may have been made on this through RER process but considerable doubt remains. Two kinds of information are required in the public interest; these are documents forming the basis for decisions and the records of environmental outcomes of those decisions. At present we may have recommendations to provide Mining Plans (but possibly not pre-decision), Mine Closure Plans (post-approval) and Annual Environmental Reports (timeliness uncertain). The availability of Program of Works applications and subsequent district approvals was not supported because of the number of documents generated and the potential commercial confidentiality of exploration programs.

The CCWA is of the view that a minimum level of transparency requires all key documents in the approvals process (e.g. Program of Works, Mining Plans & Mine Closure Plans) should be publically available for a sufficient period for stakeholders to influence the decision, should they need to. Environmental accountability requires that the statutory documentation of performance and outcomes against the objectives (e.g. in Annual Environmental Reports) should be available to the public at the due date.

PART 2: THE MINISTERIAL ADVISORY PANEL (MAP) RECOMMENDATIONS ON REFORMING ENVIRONMENTAL REGULATION IN THE WA RESOURCES SECTOR

The MAP recommendations are organized into four categories: Clear Environmental Objectives, Efficient Environmental Regulation, Improved Transparency and Communication and an Effective Compliance Framework.

Clear Environmental Objectives

Recommendation 1: Establish clear and appropriate environmental objectives.

All stakeholders agreed that this was a fundamental under-pinning of effective environmental regulation however there was no agreement on how the environmental objectives (and their measurable indicators) were to be discovered or determined. The Recommendation states that this will be done internally by the DMP. The Conservation Sector believes that to be transparent and legitimate these objectives need to be set in an open public process involving all the natural resource management agencies and the community. The proposed audit process to establish the current baseline should also be open and transparent and will probably take some years given the current paucity of performance data.

Recommendation 2: Develop meaningful outcomes-based performance indicators

In terms of measuring 'effectiveness' as opposed to 'efficiency' the DMP's outcomes need to be assessed using headline indicators based on industry environmental performance. Once the environmental objectives and performance measure have been determined, DMP will need to focus on mining industry monitoring and reporting of environmental outcomes. Monitoring and reporting arrangements would appear at present to be inadequate for the purpose if not technically flawed.

Recommendation 3: Establish clear enforceable environmental obligations for mining activities

The recommendation focuses on the re-drafting and standardizing of tenement Conditions. Secondary approvals (i.e. Ministerial Conditions imposed under the Mining Act or the Part iv of the EP Act) are not legally enforceable because a primary right to mine or develop has already been given). No *Environmental Protection Act* Part IV conditions have ever been legally enforced. The problem with the enforcing conditions was investigated following the Geraldton Point dredging fiasco but has never been resolved. At the present time the only Mining Act

sanction for 'breach of conditions' is tenement forfeiture which in most situations on non-compliant operators is not material.

The Conservation Sector has been arguing for legislative reform of mining regulation through a new section in the EP Act which provides for civil and criminal penalties for environmental non-compliance linked to the environmental harm provisions in the over-arching environmental legislation.

Another measure to remove the problem of secondary approvals is to require the Mining Plan and Mine Closure Plan prior to the grant of a Mining Lease. This would also provide a point where the public can contest a project on environmental grounds in the absence of any Mining Act environmental appeal rights.

Recommendation 4: Implement a robust and transparent relinquishment and abandonment process

One thing that is missing from this process is explicit consent from the post-mining land owner / manager to accept responsibility for the subsequent use and condition of the affected land. This should be a formal, legislated step in the relinquishment process. In the absence of an agreement to accept the mined land no mining tenement should be relinquished, remaining the financial responsibility of the miner in perpetuity.

Efficient Environmental Regulation

Recommendation 5: Implement a full risk-based assessment and compliance methodology for environmental regulation.

The Conservation Sector has observed previous attempts at using the so-called 'risk-based' approach by the EPA and Department of Fisheries has been far from satisfied about both rigor and transparency of these processes.

The assessment of likelihood and consequence in risk assessment processes is strongly influenced by expertise, attitudes and values of the participants. History is littered with examples of risk assessments getting it horribly wrong. If DMP and the mining industry want to pursue risk-based approaches they will need to ensure that they are technically rigorous, transparent and have the right people around the table. Risk assessment conducted only by mining operators and their consultants (the likely outcome) will be neither rigorous nor transparent.

The difficulty will be effectively engaging non-mining interests and local expertise in carrying out risk assessments. One suggestion is that the State Government employs at least one mining liaison officer in each of the six WA NRM Councils. These officers would have to work as a conduit to all other natural resource management sectors in the region and be well trained in risk-assessment protocols.

The outcomes of the risk-assessment process should underpin the documented decision on referral / or not to the EPA. Documentation of the risk assessment for any decision should be publically available in a way that provides an opportunity for 3rd party referral under Section 38 of the EP Act.

Recommendation 6: Revise timelines and efficiency performance indicators, in line with risk-based regulation.

This recommendation is predicated on the adoption of a risk-based credible and transparent risk-assessment process.

We note that the recommendation about outsourcing regulatory activities has re-surfaced after being rejected by the combined Governance / Compliance working groups because of the inevitable issues with conflicts of interest. CCWA is strongly opposed to this recommendation.

Recommendation 7: DMP will work with agencies to improve efficiency and eliminate duplication

This should be core business and doesn't really require a recommendation at all. These inter-departmental reviews should also consider the important gaps in agency interactions (e.g. mine closure planning and contaminated sites, mining and water allocation issues).

The Conservation Sector believes the issues around roles and responsibilities in the environmental regulation of mining would be best dealt with through a new mining regulation section in the over-arching EP Act.

Recommendation 8: Improvements in cross-agency policies, such as a Lead Agency Framework, will be addressed in appropriate inter-government forums

Another recommendation that is too vague to be useful. How will DMP undertake this?

We recommend the development KPIs that measure, amongst other things, the ability of the Lead Agency to meet the requirements of all relevant agencies and legislative requirements. It might also include KPIs on the cost to the other agencies and impacts on their functionality.

Improved Transparency and Communication

Recommendation 9: Implement a formal Transparency Strategy for DMP

The actual recommendation is to 'evaluate feasibility' (from a DMP perspective) with no actual commitment to making the relevant public interest documents available in a timely fashion.

Information on DMPs 'audit activity' may constitute headline indicators for DMP effectiveness but 3rd parties will be looking for actual environmental performance data for the mining industry.

Recommendation 10: Implement improved stakeholder consultation and communication

Any multi-stakeholder liaison or advisory committee structure needs to provide public advice to the Minister for Mines & Petroleum. Membership needs to be balanced between industry and public interest stakeholders and the culture needs to be around genuine consultation rather than issue management.

Effective Compliance Framework

Recommendation 11: Establish an appropriate legislative framework for the environmental regulation of mining.

The Conservation sector is of the view that the Mining Act is not the appropriate instrument to install a legislated framework for the environmental regulation of mining. Our recommended approach was outlined in the previous section.

Recommendation 12: Examine the feasibility of implementing an external review mechanism for environmental decisions of environmental compliance matters (other than Environmental Protection Act processes)

It is not clear whether this review process is only intended to be open to mining companies or whether 3rd party public interest stakeholders would also have standing.

Recommendation 13: Identify and articulate DMPs administrative framework for activities to promote compliance in whole of government context.

This would be best done, in our opinion, through the proposed new 'environmental regulation of mining' section in the EP Act.

Recommendation 14: Establish clear operational procedures to improve efficiency, effectiveness and accountability of compliance delivery

Obviously some environmental 'offenses' are required before designing training programs to develop investigation skills.

Many of the compliance questions facing officers with respect to mine closure revolve around technical questions around complex questions such as landform evolution, ecological trajectories and resilience in rehabilitated or restored landscapes. Having officers with appropriate scientific knowledge in these areas is a major challenge both for the EPA and DMP.