

39

MEMORANDUM

Claims made by Paul Flynn, CEO Whitehaven Coal at its Annual General Meeting in Sydney on the 24th of October 2017

Reasons for Escalation to highest risk category– Maules Creek mine, July 2017

Re: Environmental Protection Licence 20221

At the Annual General Meeting, Whitehaven provided information to shareholders regarding the company's environmental performance and its escalation to environmental risk category 3.

The statements are so concerning, due to the suggestions of impropriety on the part of the NSW EPA, that they called for clarification from the regulator. The EPA has refuted the statements.

The EPA's risk-based licensing system aims to ensure that all environment protection licensees receive an appropriate level of regulation based on the level of risk they pose.

“Based on the results from the risk assessments licensees are allocated an overall environmental risk level (1, 2 or 3 - with 3 being the highest risk). Licensees with a higher risk level will receive an increased level of regulatory and compliance oversight, whereas licensees with a lower risk level will benefit from reduced red tape and reduced regulatory burden.”

Reference: <http://www.epa.nsw.gov.au/licensing-and-regulation/licensing/environment-protection-licences/risk-based-licensing>

At the AGM, the following question was asked by a Shareholder¹:

Questioner:

(54.00) “In July of this year the EPA of NSW responsible for issuing the licence EPL 20221 for the Maules Creek mine escalated the risk level of that mine from level 2 to level 3 which is the highest risk level classification. Of 49 coal mines in NSW, only 2 others share this serious risk classification and both of those mines have been prosecuted for waterway pollution. Why was the risk category of Maules Creek mine escalated this year? And how is this new state of affairs impact forecast liabilities especially regarding any facts disclosed for negotiation of new financing agreements in August”

In summary, the company's response to the question claimed that:

1. The reasons for escalation of Maules Creek coal's environmental risk category 3 were “administrative” and “not actually risk in terms of environmental outcomes”
2. The EPA “suggested” that the company perform a noise audit

¹ The recording of this transcript is available on request.

3. The audit was initiated to deal with the complaints of one neighbouring landholder who had “no other basis [for his complaints] than a commercial one”
4. The landholder was a “serial complainant” whose modus operandi was to ring the EPA up several times a day
5. The EPA had suggested to the Whitehaven that the audit would find that the noise levels were not as bad as the landowner was making out
6. That it is untidy when the compliance section of the EPA is not speaking to the risk assessment section of the EPA when making environmental risk assessments

This is verbatim Whitehaven Coal CEO’s response:

*(56.09) “The current assessment that you have described – that is true. We have certainly taken that up with the EPA. In fact we will challenge that and the substance of **our challenge will really be that the 2 matters on which that classification turned on were largely be administrative matters not actually risk in terms of environmental outcomes.** We were asked to perform an audit onsite for noise and dust. And they actually asked us to do that because they had a lot of complaints from a landowner nearby to the mine who is well, was in the acquisition zone and as many of you would know has been seeking to extract a very large price for his piece of land, ah, and so his modus operandi is to ring the EPA up several times a day and ah, and complain. **Now the EPA then suggested to us, ‘Why don’t we just do an audit and just prove to everybody that its actually not as bad as this gentleman seems to be making out.’** Our compliance record is a matter of record which is obviously the basis of our online compliance data.*

*(57.30) But unfortunately another part of the organisation uses that as one of the criteria for the elevation of that risk, the fact that an audit has been done. **Now our view is the motivation including the initiation of that audit was to get, to deal with a serial complainant who had no basis other than a commercial one,** and ah, so we are going to challenge that and, and re-assess the specifics. We do see that it is certainly not reflective of the way the site has been operating. Both the noise and dust audits that have been done has found that Maules Creek is generally in accordance with best practice.*

*(58.00) And we are encouraging the EPA to highlight these good outcomes to combat some of this noise .. that this particular person is generating. But that’s, we must defend ourselves, **but it’s untidy that not all pieces of the EPA do not speak to each other when when assessing that assessment of Maules Creek,** but through the the EPA’s own independent work they have assessed as being compliant with best practice”*

The company openly stated that the EPA had pre-judged the audit, that the landowner living next to an open cut coal mine had no other basis for complaint other than a commercial one and that the risk re-assignment of the mine to classification 3 was due only to administrative matters.

However, members of the Maules Creek community have made many submissions and written to the Department of Planning and the EPA on numerous occasions about noise, blasting violations and dust. Mr Flynn’s statement that the risk category was based on the complaints of one person is without substance.

The statements made by Mr Flynn have fostered serious concerns about the decision-making in the EPA concerning the EPL 20221.

NSW EPA's response to the statements made at the Whitehaven Coal AGM.

The EPA has now responded to Questions posed about Paul Flynn's statements at the Whitehaven Coal AGM last October. (in red)

1. 21-day time limit for appeal against Level 3 risk rating

The Risk-Based Licensing rerating occurred on 12 July 2017, and the time limit for appeals was 2nd August. It is to be assumed that Whitehaven Coal was aware of the time limit to appeal. Why, then, in October did Mr Flynn say the company was "taking it up with the EPA"? if not by appeal under the Protection of the Environment Operations Act, what did Mr Flynn mean by "taking it up"?

EPA response: Maules Creek Coal were sent a Risk-Based Licensing (RBL) Notification by EPA on 12 July 2017 informing them of the Environmental Management Category (EMC) applicable to their licence as a result of actions that occurred in the two years up until the end of their 2016-17 reporting period. While this document did not specifically detail the review and appeals processes that can be used by a licensee to raise any issues they might have with respect to this result, the notification letter did provide a web link to a page on the EPA's website where further information about the review and appeal processes can be accessed.

2. What are the "2 matters on which the classification turned on"?

EPA response: Again this isn't clear, as there are actually 4 matters that contributed to Maules Creek Coal's 2016-17 EMC rating, namely: An official caution issued on 21/11/16 by EPA; a \$15,000 Penalty Notice issued on 23/3/17 following an EPA observation of excessive dust emissions from the site, the application of the Mandatory Environmental Audit in 2015, which focussed on site performance relative to the licence noise limit conditions; and finally the application of a pollution reduction program in 2015 requiring the mine to trial additional dust control measures around overburden loading operations.

3. Are those 2 matters "largely administrative" and "not actually risk in environmental outcomes"?

EPA response: In my opinion the matters listed above relate directly to ensuring the noise and dust impacts of the site on surrounding sensitive receivers are consistent with the requirements of the licence and EPA/NSW Government Policy.

4. Is there any element of truth in Paul Flynn's statement that the EPA based this licence re-evaluation on the matters as described by the CEO, quoted verbatim above?

EPA response: Assume this question relates to Mr Flynn's comments about why the EPA applied the Mandatory Environmental Audit? The EPA did not ever present this initiative to

Whitehaven as a means of demonstrating that complaints it was receiving were vexatious. Rather we presented it as an opportunity for an independent and professional analysis of the issues to determine whether there were issues of non-compliance that they needed to address, or whether they were in fact compliant as they were suggesting prior to the audit. This is reflected in correspondence between the EPA and Whitehaven in the time leading up to the application of the audit conditions to the Maules Creek Coal Licence.

5. Apart from the obvious error in that “Blue Range” (for it can be clearly inferred that the landowner Flynn refers to is Mr Pat Murphy) was not in the Acquisition Zone, are there any inaccuracies that you would like to draw our attention to?

EPA response: The Katestone review of dust management at the site against best practice, was not carried out by Whitehaven and it was not an audit as Mr Flynn has suggested. It was commissioned and paid for by EPA and DPE. EPA/DPE did not ask Whitehaven to complete it, rather a contractor with appropriate skills and expertise was engaged completely independently to conduct this examination of practices at the site.

19th April, 2018