

10 April 2017

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

RE: Submission to Inquiry into Rehabilitation of Mining and Resources Projects as it relates to Commonwealth Responsibilities

Thank you for the opportunity to make a submission to the Senate Standing Committee on Environment and Communication's Inquiry into the rehabilitation of mining and resource projects as it relates to Commonwealth responsibilities.

About Environment Victoria

Environment Victoria is one of Australia's leading independent environment groups. With over 40 member groups and tens of thousands of individual supporters, we've been representing Victorian communities on environmental matters for over 40 years. Following the Hazelwood mine fire in 2014, mine rehabilitation has become one of our focus areas, with Environment Victoria having played an essential role during the resulting Hazelwood Mine Fire Inquiry (HMFI) undertaken by the Victorian state government and the significant reforms that have emerged from it.

Environment Victoria's analysis of the general challenges of mine rehabilitation, as well as recommendations to address these, are outlined in detail in our submission to the HMFI, which is attached to this submission. We submit that the arguments contained in that submission apply equally to the scope of this inquiry. This submission specifically refers to points a) to d), g) and j) of the Terms of Reference (ToR) provided by the Committee.

Learning from the Hazelwood Mine Fire Inquiry

The 2014 Hazelwood mine fire sparked questions around points a) to d) outlined in the Inquiry's ToR, on a state level in Victoria. The *HMFI report 2015/ 2016 Volume IV – Mine Rehabilitation* provides an excellent summary of the situation of coal mine rehabilitation in Victoria. The challenges identified, however, extend far beyond Victoria and will have relevance to mines across the country.

Rehabilitation liabilities

The Victorian experience demonstrates that the cost of outstanding rehabilitation obligations of currently operating projects (ToR point a) are often significantly underestimated. The HMFI identified a large gap between the rehabilitation bonds held by the Victorian government and the independently assessed rehabilitation liabilities for the Latrobe Valley coal mines. The HMFI report ultimately recommended an initial increase in mine rehabilitation bonds, followed by a more detailed assessment by the state government of more realistic rehabilitation costs. As a result, Hazelwood's bond went from just \$15 million to \$73 million in 2016. Earlier this year, however, it was revealed that Engie has increased their rehabilitation provision for Hazelwood mine alone to an anticipated



cost of \$439 million¹, clearly demonstrating the previous lack of thorough analysis of the rehabilitation task. It is likely that many other mine operators across Australia are making similar underestimates.

Under the current financial mechanisms (ToR point c) mine operators are incentivized to underestimate their rehabilitation liabilities to reduce opportunity cost of capital e.g. through servicing a bank guarantee for rehabilitation bonds. Leaving the determination of rehabilitation liabilities to the mine operators therefore carries the high risk of financially inadequate provision for full mine rehabilitation. We therefore strongly recommended that rehabilitation obligations should be assessed by regulators and independent auditors.

Financial mechanisms

Rehabilitation bonds in the form of unconditional bank guarantees can be an appropriate mechanism in ensuring coal mining projects are rehabilitated with minimum risk to public finances. As is the case in Victoria, the quantum of the bond should be the cost that would arise *to the state* of ensuring the rehabilitation works are carried out. If the bond is required, it is because the company has defaulted on its obligations, and rehabilitation works are therefore being carried out by a third party. Correct estimation of the rehabilitation costs and the provision of bonds to cover 100% of these costs are therefore essential to protect the public from the unacceptable financial risk that is currently imposed through inadequate bonds. Higher bonds also create an appropriate incentive for progressive rehabilitation to take place as well as to ensure adequate full rehabilitation after mine closure.

One alternative that could be considered is for governments to hold the bonds as cash bonds (i.e. money in a government bank account), rather than bank guarantees. These accounts would create a steady stream of interest that could be used to fund economic diversification initiatives in mining regions, in preparation for when mining operations cease.

Different approaches to ensuring rehabilitation is completed are in place in Western Australia and the USA, but neither presents a viable alternative to rehabilitation bonds. Please see section 1.4 of our attached submission to the HMFI on mine rehabilitation further outlining the arguments behind this assessment.

An issue rarely discussed in relation to financial liabilities is the need for ongoing monitoring after rehabilitation works have been completed. Environmental impacts on biodiversity, water quality of nearby water sources or newly established pit-lakes and other possible impacts need to be monitored long-term and there is currently no clarity on who will carry the costs. We argue that, as the impacts have been caused through the mining company's operations, the company should be required to make provisions for such monitoring into a separate fund to avoid taxpayers carrying the burden.

Impacts of inadequate rehabilitation

The potential social, economic and environmental impacts of inadequate rehabilitation (as regarding ToR point g) can be substantial. Unrehabilitated exposed coal faces were a contributing factor to the 2014 Hazelwood mine fire, which burned for 45 days. The fire was one of Victoria's worst

¹ <http://www.smh.com.au/business/mining-and-resources/hazelwood-owners-facing-unprecedented-743-million-rehab-bill-20170119-gtun85.html>



environmental and public health disasters. The resulting smoke was found to have detrimental health effects on the local community, with the inquiry attributing several deaths to it.²

Besides the fire risk of exposed coal faces, inadequate rehabilitation also does not ensure the restoration of ecosystem that was present at the site before mining took place and leaves the risk of on-going mine instability, likely denying the local community of the opportunity to access and use the land in the future. Inadequate rehabilitation also puts a potential burden on the taxpayers if the state has to cover the costs of completing rehabilitation and financial securities for this purpose are inadequate, as outlined above.

Water sources in the area might also be impacted in various ways, such as through diversions, changes in water flow and groundwater availability or water quality such as salinity or the presence of heavy metals.

Rehabilitation within Federal legislation

Financial reporting

Outstanding rehabilitation costs are currently financially reported as contingent liabilities, and are mostly disclosed in footnotes of financial statements only, not as part of the balance sheet. They are therefore not subject to independent auditing. A general rule for contingent liabilities is that they should be part of the balance sheet if the contingency is probable and the amount of the liability can be reasonably estimated.

We submit that outstanding mine rehabilitation is both a probable contingency – as mines have to be rehabilitated when mining activities cease, and all mines will ultimately close – and that costs can be reasonably estimated through consultation with the regulators. We therefore recommend that rehabilitation liabilities should be required to appear in the accounting records and reported publicly through documents lodged with the Australian Securities and Investments Commission (ASIC). This would subject mining companies to proper auditing of these liabilities, requiring them to be transparent about how they arrived at the estimated rehabilitation costs and enabling independent assessment of the adequacy of these estimates.

The Commonwealth should ensure that ASIC prioritises accurate reporting of mine rehabilitation obligations. Regulatory guidelines for financial disclosure and the lodging of accounts for public companies exist to ensure the public can make informed decisions about their investments in particular companies. If these companies are able to lodge documents that dramatically underestimate their real rehabilitation obligations, a fundamental element of corporate regulation is failing.

ASIC should further ensure that directors of mining companies fully comply with their duties laid out in the Corporations Act. Directors are obliged to declare whether the company will be able to pay its debts when they become due and to scrutinize how obligations influence the future financial health of the company. They are also obliged to exercise diligence and examine if any matters of relevance may not have been disclosed or disclosed fully. Directors should also review cash flows and assumptions made by experts or management, and cannot rely on auditors to do so. These points

² Victorian Government (2015): Hazelwood Mine Fire Inquiry Report 2015/2016 Volume ii – Investigations into 2009-2014 Deaths



encompass the responsibility of directors to assess the adequacy of rehabilitation liabilities presented in the financial report and take the necessary action if it is deemed inadequate. Through thoroughly testing the company's directors' diligence in reviewing the financial reports, and holding them to account, ASIC would further encourage transparency on rehabilitation liabilities and increase the pressure of assessing and reporting liabilities as correctly as possible.

Defining successful rehabilitation

Mine operators are often held to account by their work plans or rehabilitation plans which often refer only to actions that will be taken rather than specific outcomes that will be achieved. This shifts the risk from the mine operator to the public: if the activities as proposed or as performed do not yield a satisfactory result, the operator can stand behind the plan and say that they've discharged their obligations.

Clear criteria for success for rehabilitation should be developed and embedded in the work plans and rehabilitation plans of each mine. Possible success criteria could include:

- No on-going detrimental effect on the water-table – the presence of an unremediated pit could be affecting the water table in surrounding areas and causing destabilisation of land
- A stable landform
- No on-going pollution of groundwater
- No on-going effect on biodiversity
- The fire risk of the rehabilitated site should be no greater than that of the surrounding area

The NSW Department of Industry has published a code of practice for rehabilitation of exploration works. While exploration works are vastly less significant than the scale of Australia's mines, the code of practice includes a list of possible rehabilitation objectives and completion criteria that would still be relevant to mining activity.³

It is also important to ensure the local community is closely involved in decisions about what success criteria should be applied. Local residents are the people who will live with the legacy of the former mines, therefore their priorities and expectations must be central to setting outcomes. The agreed-upon criteria should be made publicly available, so the community can have confidence that an acceptable standard of rehabilitation will be required. Further, since full site remediation will cover more than just rehabilitation of the mine pits, each mine operator should be required to complete and publish a detailed closure plan.

The EPBC Act

According to the EPBC Act 1999, the approval by the Federal Environment Minister is required for an activity which is a 'controlled action', meaning it will or is likely to have a significant impact on matters of 'national environmental significance' under Chapter 2, Part 3 of the Act.

The Minister can approve a controlled action with conditions, however, it is not always the case that conditions of approval specifically address mine rehabilitation. It can therefore not be guaranteed that rehabilitation efforts achieve EPBC Act objectives and the principles of ecologically sustainable

³ NSW Department of Industry, Exploration Code of Practice: Rehabilitation (2015). See Appendix 2. www.resourcesandenergy.nsw.gov.au/_data/assets/pdf_file/0008/565955/Exploration-Code-of-PracticeRehabilitation.pdf



development. We submit that the federal government should review the Act to ensure that rehabilitation plans of mines are always considered under the Act to ensure its objectives and principles are upheld. Furthermore, the Act should ensure acceptable environmental standards for rehabilitation are set, especially where rehabilitation will or may impact on matters of national significance. This includes setting clear criteria for success, such as those outlined in the *'Defining successful rehabilitation within Federal environmental legislation'* section of this submission.

Large coalmining developments likely to have a significant impact on a water source are already characterised as matters of environmental significance. Although options for rehabilitation vary from mine to mine, a lot of rehabilitation options for mines, not just coal mines, have an expected impact on water sources, especially if a pit lake option is considered.

Generally, significant impact on matters of national environmental significance cannot be properly judged without thorough assessment. Consideration of the final land use of all mines under the EPBC Act would allow for more extensive assessment of the impacts as well as a more coordinated approach to rehabilitation efforts, especially in areas with significant amounts of mining activity, where the rehabilitation works of one project could influence that of another nearby mine, such as in the Latrobe Valley or the Hunter Valley.

In the case of the Latrobe Valley coal mines, the proposed pit lake rehabilitation options would not only trigger the EPBC Act in terms of their general significant impact on water resources in the area but also on their potential negative impact on the down-stream Gippsland Lakes, which are Ramsar-listed wetlands.

Conclusion

The Victorian government, as a result of the 2015/2016 report of the HMTI on mine rehabilitation, is currently implementing a comprehensive reform package to address many of the issues raised above, specifically in the context of the Latrobe Valley's coal mines. This provides a leading example of how to deal with the challenges of mine rehabilitation.

We strongly recommend that the federal government work closely with the states and territories to implement reforms of operational and financial mining rehabilitation requirements similar to those currently being addressed in Victoria:

- Rehabilitation bonds to provide financial assurance that taxpayers will not be left with the costs of mine clean-up. We submit that these bonds should be set at 100% of the cost to a third party of carrying out the rehabilitation works.
- Regular independent assessment of rehabilitation liabilities
- Reform of the regulatory framework requiring the operators of mines to manage risks to the environment and public safety e.g. through sanctions to deter and address non-compliance commensurate with the risks
- Acquiring expertise to monitor and enforce compliance by the mine operators with the regulatory framework as it relates to risk and assessment of rehabilitation liabilities through the establishment of an independent Rehabilitation Commissioner and Statutory Authority
- Rehabilitation and closure requirements that drive progressive rehabilitation, including milestones, underpinned by financial assurance for the state



- Require work and rehabilitation plans to specifically address fire prevention, mitigation and suppression
- Post closure arrangements that provide for ongoing monitoring and maintenance of safe and stable landforms
- Ensuring community involvement in rehabilitation planning

While states will retain the primary role for regulating mining operations, we believe the Commonwealth needs to play a role in ensuring that reforms such as these are implemented at the state level.

More specific measures that the Commonwealth is directly responsible for include:

- Requiring for all mine rehabilitation plans to be assessed under the EPBC Act;
- Ensuring the EPBC Act helps to set clear environmental criteria for assessing the success of mine rehabilitation works;
- Requiring ASIC to be more proactive in ensuring accurate reporting of rehabilitation obligations and requiring companies to re-state their accounts where necessary;
- For local subsidiaries of international companies that have no domestic reporting requirements, the Commonwealth should consider establishing a requirement for public disclosure of mine rehabilitation liabilities.

As Hazelwood has shown us, closures sometimes come unexpectedly and rapidly, and necessary provisions might not be in place, posing a risk to the public, the state and the mining company itself.

If we recognise the importance of mine rehabilitation, this is an opportunity to get regulations that will facilitate effective rehabilitation to be in place before the closure of currently operational mines. Successful rehabilitation of the landscape is a fundamental part of the mining process, and it is essential for providing a safer future for communities and the environment.

We encourage the Committee to take this opportunity. Thank you for receiving this submission, and we would be happy to provide any further information to assist with the next steps of the Review.

Regards,



Dr Nicholas Aberle
Campaigns Manager
Environment Victoria
n.aberle@environmentvictoria.org.au
03 9341 8112

