Appeals Convenor

Environmental Protection Act 1986

REPORT TO THE MINISTER FOR ENVIRONMENT

APPEAL IN OBJECTION TO THE AMENDMENT OF A LICENCE

LICENCE L6363/1995/14: EWINGTON I AND II COAL MINES, COALFIELDS HIGHWAY, COLLIE

PROPONENT: THE GRIFFIN COAL MINING COMPANY PTY LTD

Appeal Number 22 of 2017

June 2018

Appeal Summary

This is a report on an appeal against the amendment by the Department of Water and Environmental Regulation (DWER) of a licence applying to a coal mine east of Collie.

The appellant raised a number of objections to the amendments, with the primary concerns relating to:

- On-site disposal of tyres
- Changes to ambient monitoring of dust
- Deletion of requirements to prevent visible dust crossing the boundary etc

In response to the appeal, DWER advised that on-site disposal of tyres posed little environmental risk, and that monitoring of 2.5 micron particulate matter ($PM_{2.5}$) was intended to occur for a limited campaign, and that the deletion of this condition merely reflected the fact that the campaign had been completed. DWER advised that the results of the monitoring (which are now with the department) would be considered as part of the next regulatory review of the licence.

DWER recommended that conditions relating to dust control and prohibition on visible dust crossing the premises boundary (i.e. conditions 2.3.1 and 2.3.2) should be reinstated. It also advised that ambient monitoring of PM_{10} and total suspended particulates (TSP) should be extended to 12 months per annum, rather than the current requirement that the monitoring is only required between September and May (i.e. excluding winter).

The licence holder was of the view that none of the conditions should be amended, and disagreed with DWER's recommended changes to control and monitoring of dust emissions.

Recommendations

Taking into account the information presented in the appeal, and advice from both DWER and the licence holder, it is recommended that the appeal be allowed to the extent that conditions 2.3.1 and 2.3.2 of the licence be reinstated.

It is otherwise recommended the appeal be dismissed.

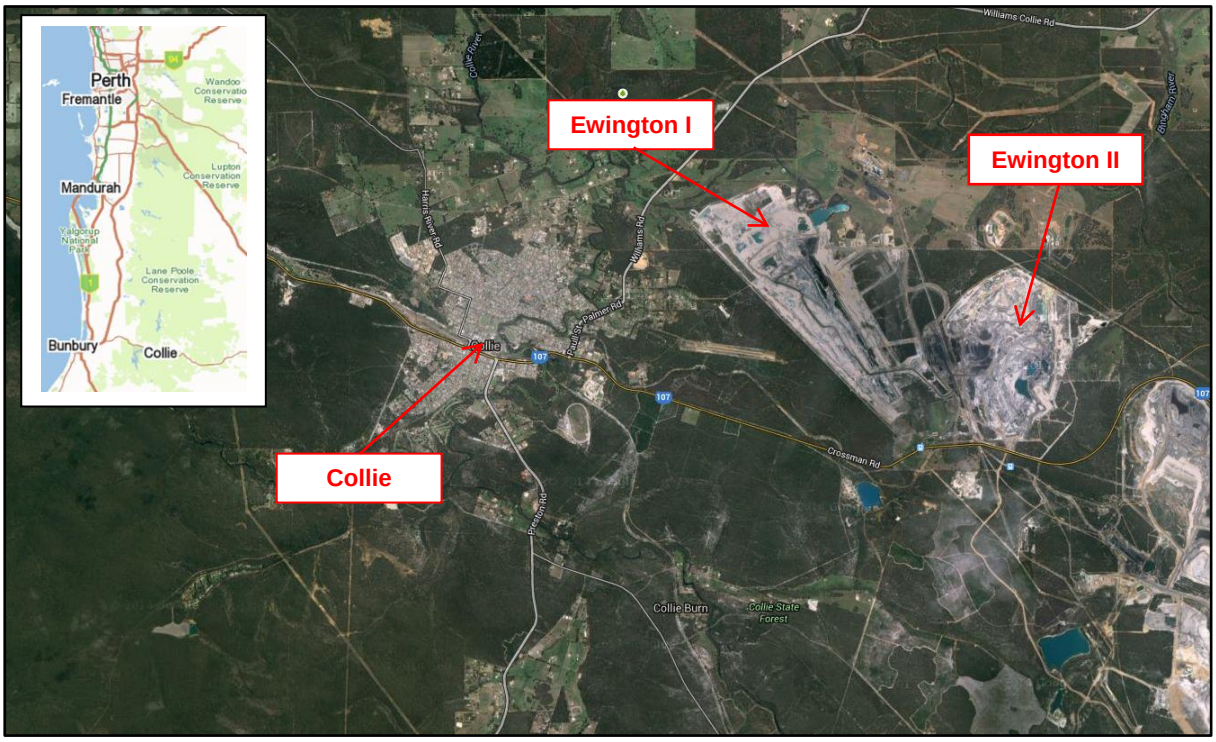
INTRODUCTION

This is a report on an appeal by the Conservation Council of Western Australia Inc (the appellant) in objection to amendments made by the Department of Water and Environmental Regulation (DWER) to a licence issued to The Griffin Coal Mining Company Pty Ltd (the licence holder) in respect to the Ewington I and II coal mines east of Collie.

Background

The licence holder is the operator of the Ewington I and II coal mines, located on Coalfields Highway, east of the town of Collie (see Figure 1).

Figure 1 – Location of premises *(Source: whereis.com and Google Maps 2014)*



DWER advised that prior to the amendment the subject of this appeal, the premises were licenced as Category 9 (coal mining) and 53 (flyash) within the meaning of Schedule 1 of the *Environmental Protection Regulations 1987* (the Regulations).

In September 2016, the licence holder applied for an amendment to the licence to include prescribed premises Category 63 to allow for the disposal of used tyres on the premises, as well as other changes.

Category 63 is defined as a Class I inert landfill site, being premises on which waste (as determined by reference to the *Landfill Waste Classification and Waste Definitions 1996*) is accepted for burial.

After considering the licence holder's request, DWER agreed to amend the licence by adding Category 63 to authorise the disposal of up to 500 tonnes of tyres per annum.

Other amendments were also made to the licence, which are characterised in the Amendment Notice as including conditions that were deemed to be redundant under DWER's operational procedure IR-OP-02 *Redundant Conditions*.

It was in respect to these amendments that the appeal was received.

This document is the Appeals Convenor's formal report to the Minister for Environment under section 109(3) of the *Environmental Protection Act 1986* (EP Act).

OVERVIEW OF APPEAL PROCESS

In accordance with section 106 of the EP Act, a report was obtained from DWER in relation to the issues raised in the appeal. The licence holder was also given the opportunity to address the matters raised in the appeal.

During the appeal investigation the Appeals Convenor consulted the appellant and representatives of the licence holder. The licence holder was further consulted on changes to the conditions proposed by DWER in response to the appeal.

The environmental appeals process is a merits-based process. Appeal rights in relation to an amendment to a licence relate only to the amendment, and not to elements of the licence that are not amended. The Appeals Convenor normally considers consistency with any conditions set under Part IV of the EP Act and previous Ministerial appeal determinations, as well as new information or evidence being presented that was not previously considered. Enforcement and compliance with the conditions of a licence is a matter for DWER as the regulator and issues of this nature are considered to be outside the scope of an appeal against an amendment to a licence.

OUTCOMES SOUGHT BY APPELLANT

The appellant sought for a number of changes to the content of the licence, which are considered under each ground of appeal.

GROUNDS OF APPEAL

The appellant's appeal grounds related to the following amendments:

1. inclusion of category 63 (tyre disposal)
2. deletion of ambient monitoring of particulate matter ($PM_{2.5}$)
3. deletion of requirement to control visible dust crossing the boundary
4. deletion of conditions 1.1.5, 1.2.1, 1.2.2 and 1.2.3.

The appellant also raised concern about the following matters:

- extension to the licence term by an amendment made in April 2016
- control of emissions of greenhouse gases, including methane
- regulation and control of emissions to surface water and groundwater
- impact of dewatering.

As these other matters do not relate (directly or indirectly) to the amendment of the licence, they are not considered to be valid grounds of appeal. They are considered briefly in Other Matters at the conclusion of this report.

GROUND 1: INCLUSION OF CATEGORY 63 (TYRE DISPOSAL)

By this ground of appeal, the appellant submitted that that under the *Landfill Waste Classification and Waste Definitions 1996*, the disposal of used tyres requires special management to reduce the potential for fires. The appellant submitted that more robust licence conditions are required to manage the specific risks of storing a potentially large number of tyres in this location.

The appellant recommended that licence conditions should include specific management actions relating to the storage of used tyres, or require the licence holder to investigate measures to recycle used tyres through Tyre Stewardship Australia.

The appellant also submitted a number of statements and alternative options to onsite tyre disposal, including:

- adopting resource management strategies as outlined in the *Waste Avoidance and Resource Recovery Act 2007* (WARR Act)
- stating that the licence holder has been able to dispose of tyres through other means since the mid-1990s and that such methods should continue
- adding Category 57: Used tyre storage to the list of prescribed activities included on the licence.

Consideration

In response to this ground of appeal, DWER advised that the decision to amend the licence to allow tyre disposal was based on its conclusion that the activity poses a low to moderate overall risk due to the small volume of inert material and the receiving environment into which the tyres are to be disposed:

> In determining the overall risk, the Delegated Officer considered that the risks of dust and noise emissions were low. The Delegated Officer considered that the consequence rating of smoke emissions from burning tyres was moderate and the likelihood was rare. Therefore, the resulting risk was described as 'moderate' ...
>
> The Delegated Officer also considered that there is a reduced risk of ignition of tyres and an increased availability of fire suppression equipment inherent in the prescribed premises being a coal mine, where the risk of spontaneous combustion of coal leads to stringent fire prevention and response requirements under other legislation such as the *Mines Safety and Inspection Act 1994* ...
>
> The decision to allow waste tyre disposal in the Licence, as described above, with no additional management conditions, is considered an adequate reflection of the risk of this activity.
>
> The Licensee did not apply for Category 57: Used tyre storage to be included on the Licence. The Licensee is obliged under the EP Regulations to ensure that the number of used tyres stored at the premises does not exceed 100 at any given time, while also ensuring that the total mass of tyres disposed of by landfilling within the waste rock dump, does not exceed 500 tonnes in any annual period. As a result, Category 57 is not applicable to the premises.[1]

In discussions with representatives of the licence holder, it is understood that the amendment was requested as its current method of disposing of used tyres (being to a motocross club) was expiring, and an alternative method was required. In response to a question as to whether other options (like recycling) had not been considered, the licence holder advised that this had been considered, but was cost-prohibitive. The licence holder's representatives confirmed that the only tyres to be disposed of at the site are those generated by its own operations, similar to practices adopted at other mine sites in Western Australia.[2]

Conclusion

From the information provided in respect to this ground of appeal, including DWER's advice that the premises does not fall within the definition of category 57 of the Regulations, it is considered that DWER's assessment of the risks posed to the environment from the addition of tyre disposal within the licence was justified.

[1] DWER, Response to Appeal, 27 November 2017, pages 3 to 4.
[2] Pers com, licence holder,

It is noted that the *Landfill Waste Classification and Waste Definitions 1996* were amended in April 2018. While it appears the definitions applicable to tyres (inert type 2 waste) has not changed, DWER should review the licence and update if required for consistency with the amended definitions.

GROUND 2: AMBIENT MONITORING OF PARTICULATE MATTER

By this ground of appeal, the appellant requested that the (expired) requirement for the licence holder to undertake nine months ambient monitoring of $PM_{2.5}$ be reinstated into the licence, and require this monitoring to be conducted over 12 months.

In support of this proposition, the appellant noted that the stipulated monitoring period (October to May) excluded winter months, which past monitoring has indicated can have elevated particulate levels.

The appellant also cited information published by the former Department of Environment Regulation (DER) about accuracy of reporting of $PM_{2.5}$ emissions elsewhere in the Collie airshed, with particular reference to emissions from Bluewaters power station. In that case, DER published advice that it identified an error in claimed emissions from the power station under the National Pollutant Inventory (NPI). For example, for 2011/12, DER found that the claimed emissions for $PM_{2.5}$ of 590 kg were incorrect, and should be amended to 240,000 kg.[3]

In addition to $PM_{2.5}$, the appellant also questioned why PM_{10} and total suspended particulates (TSP) monitoring requirements were similarly limited to the nine month period between October and May, and requested that this monitoring be extended to annual periods.

Consideration

This ground of appeal relates to two separate conditions: 3.4.1 and 4.1.1.

Prior to the amendment, condition 3.4.1 required:

> 3.4.1 The Licensee shall undertake the monitoring specified in Table 3.4.1 according to the specifications in that table and record and investigate results that do not meet any target specified.

Table 3.4.1: Monitoring of ambient air quality

Monitoring point reference & location	Parameter	Target	Units	Averaging period	Frequency	Method
AAQ1 (Palmer Road Dust Monitor)	Particulates as PM_{10}	50	$\mu g/m^3$	24 hours	Continuous (Oct to May)	AS 3580.9.6 or AS 3580.9.8
	Particulates as TSP	90	$\mu g/m^3$	24 hours	Continuous (Oct to May)	AS 3580.9.8

The only amendment to this condition was the insertion of "AS 3580.9.6 or" in the last row of the 'Method' column (consistent with the second row (i.e. PM_{10})).

Prior to the amendment, condition 4.1.1 required:

[3] https://www.der.wa.gov.au/images/documents/about/news/collie_air_quality_presentation_july_2014.pdf

4.1.1 The Licensee shall complete the improvements in Table 4.1.1 by the date of completion in Table 4.1.1.

Table 4.1.1: Improvement program

Improvement reference	Improvement	Date of completion
IR1	Undertake the following additional ambient environmental quality monitoring at the Palmer Road Dust Monitor (AAQ1): • Particulates as $PM_{2.5}$, using AS 3580.9.6 or AS 3580.9.8 methodology and averaging over a 24 hour period. The monitoring shall be for a continuous period between October to May and be presented in $\mu g/m^3$ units.	31/05/2016

Condition 4.1.1 was deleted from the licence as part of the amendment.

In response to the appellant's request for condition 4.1.1. to be reinstated, DWER stated:

> Amendment Notice 1 removed the requirement for $PM_{2.5}$ monitoring, which was imposed following a previous appeal decision as a requirement to undertake a single campaign in order to inform future assessment. At the time of granting Amendment Notice 1, the single monitoring campaign was complete and therefore the condition was no longer required. Consequently, the condition requiring $PM_{2.5}$ monitoring was removed from the Licence.
>
> The removal of $PM_{2.5}$ monitoring is considered to be an administrative amendment, as the single monitoring campaign had been completed and the Licence condition therefore no longer imposed a requirement.
>
> The DWER notes that since the receipt of this appeal, the results of that monitoring campaign have been provided in the Licensee's Annual Environmental Report (AER). This data will be assessed as part of a future full risk review of the Licence and premises. The DWER may impose conditions addressing $PM_{2.5}$ emissions (including monitoring) subject to the findings of the risk based review.[4]

The effect of the amendment to condition 4.1.1 was to delete a condition that had, in effect, expired. DWER advised that the action required under the former condition was fulfilled by the licence holder, and the information obtained through that process is now with DWER.

It is considered to be appropriate for DWER to analyse the data gathered through the former condition and determine what (if any) changes are required to the licence to control and manage $PM_{2.5}$ emissions from the premises. As such, it is recommended that this ground of appeal be dismissed. The appellant is encouraged to liaise directly with DWER to ascertain the current status of the review.

In response to the amendment of condition 3.4.1 DWER advised:

> … DWER has in practice required monitoring for nine months out of 12, i.e. to allow the licence holder to cease monitoring during the wetter months when dust emissions are unlikely, at many prescribed premises throughout the south of the State including the Ewington coal mines. This practice is not described in the Australian Standards for air quality monitoring or any other relevant reference documents and may not be appropriate in the context of an activity that operates year round, and in a drying climate. Monitoring year round would provide more robust data for assessment of ongoing environmental risk .[5]

On this basis, DWER recommended that this ground of appeal be allowed and that the monitoring requirement be extended to year round.

[4] DWER, Response to Appeal, 27 November 2017, page 5.
[5] DWER, additional advice, 30 April 2018, page 1.

The licence holder was provided the opportunity to respond to DWER's recommendations. It advised that it:

> … strongly opposes the imposition of dust monitoring during winter months [as the requirement] is not risk based. Whilst the SW region may be experiencing a long term trend of reduced rainfall, it is still evident that just over 50% of annual rainfall falls within the 3 winter months (Bureau of Meteorology website, Collie Weather Station 1981-2010 data). Predominate wind direction during this period is also from the West to North West which is blowing away from the Collie township. It is also only winds from this direction that record average strengths above 20km/hr, typically associated with the cold fronts that bring the majority of winter rainfall.
>
> Griffin has never recorded a public complaint for excessive dust in the history of the minesite during the winter months. What is evident however is that prescribed burns and wood heaters can have a significant impact on dust levels during this period which will skew any dust monitoring results. For example in the past 4 weeks, Griffin has recorded 6 results where the High Volume Air Sampler located at the nearest resident has recorded a TSP level above the 24hr prescribed limit of 90 ug/m3. All results were investigated and found to be a result of prescribed burns.[6]

The only amendment to condition 3.4.1 was the insertion of an additional Australian Standard in respect to monitoring of TSP. No changes were made to monitoring related to PM_{10}. On the advice of the licence holder, the Australian Standard does not specify the frequency of monitoring of TSP in the manner contemplated by DWER's advice.[7]

Given the above, it appears that this ground of appeal is unconnected with the amendment. However, to the extent that DWER is of the view that climatic conditions are such that amendments to this condition are warranted, this can be given effect through a separate amendment, which should include a review of similar conditions such that a consistent approach is adopted that is commensurate with the level of risk.

Conclusion

Having regard to the foregoing, it is recommended that this ground of appeal be dismissed.

In coming to this recommendation, it is noted that monitoring data for the $PM_{2.5}$ campaign conducted under the terms of the former condition 4.1.1 is now with DWER for consideration.

GROUND 3: DELETION OF REQUIREMENT TO CONTROL VISIBLE DUST CROSSING THE BOUNDARY ETC

By this ground of appeal, the appellant submitted that conditions relating to management of dust at the premises should be reinstated, noting DER had previously argued that they should be retained.

The appellant submits that the visible dust condition should remain given the close proximity of the premises to sensitive receptors and land uses, and that there is no basis to remove the requirement for the licence holder to use all reasonable and practical measures to prevent and/or minimise dust emissions from the premises.

Consideration

This ground of appeal relates to DWER's decision to delete the following conditions from the licence:

[6] Griffin, Letter to Appeals Convenor, 21 May 2018, page 2.
[7] Griffin, email to Appeals Convenor, 15 June 2018.

2.3.1 The Licensee shall use all reasonable and practical measures to prevent and where that is not practicable to minimise dust emissions from the Premises.

2.3.2 The Licensee shall ensure that no visible dust generated by the activities on the Premises crosses the boundary of the Premises.

By the Amendment Notice dated 11 August 2017, the Delegated Officer summarised the changes to the licence as being:

> … limited to an amendment to include category 63 and to remove any conditions that have been deemed redundant under DWER's *Operational Procedure IR-OP-02 Redundant Conditions*.[8]

The Operational Procedure cited in the Amendment Notice relevantly state that a 'generic fugitive dust condition' requiring an occupier to control visible dust was redundant because:

> This condition is not risk-based.
>
> Moreover, the substantive offences of the EP Act provide enforceable prohibitions for dust emissions that result in pollution or environmental harm.[9]

Consistent with the Operational Procedure, the Amendment Notice deleted conditions 2.3.1 and 2.3.2 from the licence.

In response to the current appeal, DWER advised that the:

> … removal of the two dust conditions was considered to be an administrative matter to give effect to the former DER's position on redundant conditions. This has been reconsidered and the DWER has determined that such conditions may be appropriately employed where a risk assessment demonstrates both the risk and the effectiveness of the condition as a control. The DWER considers that the risk assessment published in the former EAR from September 2014 … remains valid and that the data provided in the Licensee's most recent AER demonstrates that continued management controls of fugitive dust are warranted. It is also considered that a requirement to ensure that visible dust does not cross the boundary of the premises as a result of the primary activity of coal mining and processing, is reasonable and achievable. Similarly, a requirement to take all reasonable and practical measures to prevent dust emissions is reasonable, and it is also reasonable to accept that in circumstances where a licence holder cannot prevent dust emissions that they take measures to minimise those emissions.[10]

The licence holder was given an opportunity to consider and respond to DWER's advice in respect to these conditions. In its reply, it submitted:

> Griffin has long held a view … that such conditions are not enforceable, auditable or can be practically managed at an operational level. Griffin already has dedicated and extensive dust monitoring systems and management measures in place (including the DWER approved Dust Management Plan). These provide objectively based criteria for monitoring dust emissions, and enable Griffin to accurately monitor, record, and report compliance. It should also be noted that these requirements were increased under the 2014 Licence amendment to include monitoring of Total Suspended Particulates (TSP) over a 24hr period to bring monitoring in line with current industry standards. The Dust Management Plan also imposes a TSP limit over a 15 minute average period.
>
> In proposing to re-instate these conditions, DWER has not addressed the apparent limitations of such conditions which were previously identified by them. Furthermore, it is not clear to Griffin how the risk assessment process that is referred to in the latest correspondence "demonstrates … the effectiveness of the condition as a control" which is part of DWER's justification for the proposed reinstatement.

[8] DWER, Amendment Notice 1, Ewington I & II Open Cut Mines, 11 August 2017, page 3.
[9] DER, Operational Procedure IR-OP-02 Redundant Conditions, May 2016, item 11 of Schedule 1.
[10] DWER, Response to Appeal, 27 November 2017, page 6.

> Griffin accepts that the risk of dust generation warrants specific management controls and monitoring and believes this is adequately provided for in the current Management Plan and Licence. There is no evidence to suggest that the risk profile has increased in recent times to justify additional dust controls including re-instatement of such conditions.[11]

On the basis of this submission, the licence holder reiterated its position that conditions 2.3.1 and 2.3.2 should be deleted from the licence.

Additional advice was sought from DWER in response to the licence holder's submissions. In this advice, DWER stated:

> Conditions 2.3.1 and 2.3.2 were removed from the Licence in Amendment Notice 1 in accordance with IR-OP-02. At the time IR-OP-02 was developed, the decision was made within DER that the imposition of the fugitive dust conditions was not risk-based in all circumstances, and therefore, the conditions should not be used in any licence. This decision has since been reviewed and superseded by other more detailed operational procedures and the library of conditions currently under development.
>
> In the case of Licence L6362/1995/15, the DWER considers that the conditions were imposed on the basis of risk and therefore, they should not be considered as redundant.
>
> …
>
> The DER's Regulatory Reform Program did not identify that these conditions were invalid, not sufficiently certain or not enforceable and, as the Licence Holder has previously advised, the condition regarding visible dust has been the subject of successful prosecution action by the DWER's predecessor departments.[12]

DWER reiterated its previous advice that the risk assessment undertaken in September 2014 remains factually correct and appropriate, and that conditions to manage fugitive dust emissions from the premises are warranted.[13] Relevant to fugitive dust, the 2014 risk assessment stated:

> … there is currently a large expanse of exposed areas, comprised of open pit faces and overburden stockpiles that are likely to be dust generating when meteorological conditions are favourable. Recent annual environmental reports also illustrate that the area of disturbance at Ewington is increasing in comparison to the area of rehabilitation. Increased production from the operation is likely to continue this trend. Continued management and monitoring of dust emissions is therefore required to ensure dust emissions do not adversely affect the Collie community or the surrounding environment …
>
> The DER is … of the opinion that there is a reasonable risk of increased dust emissions attributed to increased material movement/handling, increased vehicular movement, potentially expanded or additional coal stockpiles, and an increasing disturbance footprint (unrehabilitated overburden stockpiles and open pit faces). It is therefore necessary that conditions relating to minimising fugitive dust emissions and monitoring of these emissions are included in the amended licence. [Conditions 2.3.1 and 2.3.2] have been included in the licence to ensure Griffin Coal implement effective dust control measures to minimise dust emissions from the Premises which could impact on nearby receptors.[14]

The licence holder was given an opportunity to respond to DWER's further advice. In reply, the licence holder advised that the original decision to delete conditions 2.3.1 and 2.3.2 was made:

> … following considerable consultation with a number of mining Companies in WA, primarily through the Chamber of Minerals and Energy (CME). CME members had also long argued that it was almost impossible to demonstrate compliance with such conditions and that an exceedance would not necessarily have any impact on the environment or human health and are therefore not risk based.

[11] Griffin, Response to Appeal, 14 February 2018, page 2.
[12] DWER, additional advice, 30 April 2018, page 2.
[13] DWER, additional advice, 30 April 2018, page 3.
[14] DER, Decision Document for L6363/1195/14, 11 September 2014, page 26.

The licence holder also submitted that while the risk assessment process may have determined an overall dust risk of 'moderate', that in itself does not justify the re-instatement of these conditions when other dust monitoring, management and reporting measures are already in place.

In relation to DWER's identification of a successful prosecution of an occupier for a similar condition, the licence holder submitted:

> Griffin has previously (2013) provided DER a detailed submission on this enforcement case as it relates to the Griffin situation [including that] the defendant [in that case] offered an early guilty plea so the Courts were not required to fully consider the validity of the visible dust condition or mitigating factors.[15]

As previously stated, the licence holder accepts that the risk of dust generation warrants specific management controls and monitoring and believes this is adequately provided for in the current Management Plan and licence. The licence holder maintained that these provide objectively based criteria for monitoring dust emissions, and enable it to accurately monitor, record, and report on dust control.

Conclusion

Taking into account DWER's advice that the risks posed by fugitive dust from the premises were properly characterised in the 2014 risk assessment, and that as a result, conditions 2.3.1 and 2.3.2 are appropriate, it is recommended this ground of appeal be allowed in full, and that the conditions are reinstated into the licence.

As this outcome reflects a revised position on a policy developed by the former DER, it may be appropriate for DWER to liaise with relevant stakeholders on the rationale for the change, with a view to ensuring a consistent approach to risk assessment.

GROUND 4: MISCELLANEOUS CHANGES TO OTHER CONDITIONS

The appellant objected to DWER's decision to remove the following conditions from the licence:

<u>Condition 1.1.5</u>

The appellant noted that this condition prohibited emissions that were not otherwise mentioned in the licence, which amount to pollution, unreasonable emissions, discharge of waste in circumstances likely to cause pollution, or being contrary to any written law.

The appellant questioned DWER's decision to delete the condition, submitting that is not acceptable for a licence to contemplate (either expressly or impliedly) an emission that would otherwise breach a provision of the EP Act, without a control or condition being imposed to manage the risk of such an emission occurring. The appellant stated that this is particularly the case for ageing premises such as this which has significant environmental risks due to its age and nature of its operations and proximity to sensitive environmental receptors.

[15] Griffin, Letter to Appeals Convenor, 21 May 2018, page 1.

Conditions 1.2.1 to 1.2.3

The appellant stated that these conditions, which require the licence holder to (among other things) operate and maintain all pollution control and monitoring equipment to the manufacturer's specification and immediately clean up and dispose of any spills of hazardous materials, were removed without any apparent justification.

The appellant submitted these conditions should remain on the licence, otherwise the licence is effectively authorising pollution or other emissions offences to occur for activities not otherwise referred to in the licence.

Consideration

Condition 1.1.5 of the licence provided:

> Nothing in the Licence shall be taken to authorise any emission that is not mentioned in the Licence, where the emission amounts to:
>
> (a) pollution;
>
> (b) unreasonable emission;
>
> (c) discharge of waste in circumstances likely to cause pollution; or
>
> (d) being contrary to any written law.

This condition was deleted by DWER, though it provided no rationale for the deletion in its initial response to the appeal. Additional advice was requested from DWER, and it subsequently advised:

> Condition 1.1.5 (General condition) was removed from the Licence as it was not considered to be a condition, but rather an explanatory statement that attempted to provide clarification of the operation of a licence. The provision was identified as not valid, enforceable or risk-based.[16]

This advice is consistent with DER's Operational Procedure *Redundant Conditions,* which includes the following content relevant to condition 1.1.5:

> This condition is not valid, enforceable or risk based.
>
> This provision is not a condition. It is an explanatory statement that attempted to provide clarification of the operation of a licence.[17]

In its response to the appeal, the licence holder expressed the view that this condition was correctly deleted under the Operational Procedures.

In relation to former conditions 1.2.1 to 1.2.3 of the licence, it stated:

> 1.2.1 The Licensee shall operate and maintain all pollution control and monitoring equipment to the manufacturer's specification or any relevant and effective internal management system.
>
> 1.2.2 The Licensee shall immediately recover, or remove and dispose of spills of environmentally hazardous materials outside an engineered containment system.
>
> 1.2.3 The Licensee shall:
>
> (a) implement all practical measures to prevent stormwater run-off becoming contaminated by the activities on the Premises; and
>
> (b) treat contaminated or potentially contaminated stormwater as necessary prior to being discharged from the Premises.[1]

[16] DWER, additional advice, 30 April 2018, page 1.
[17] DER, Operational Procedure IR-OP-02 Redundant Conditions, May 2016, item 2 of Schedule 1.

> Note 1: The *Environmental Protection (Unauthorised Discharges) Regulations 2004* make it an offence to discharge certain materials into the environment.

In its additional advice, DWER advised:

> Condition 1.2.1 (Pollution control and monitoring equipment) was removed from the Licence as it was identified as not enforceable as it was not sufficiently clear or certain.
>
> Condition 1.2.2 (Environmentally hazardous material) was removed from the Licence as it was not considered to be valid as it inconsistently regulates activities below prescribed category thresholds for … licences, between premises that are prescribed for other purposes and those which are not.

Condition 1.2.3 (Stormwater) was removed from the Licence as it was identified as not enforceable as it was not sufficiently clear or certain.[18] In its response to this ground of appeal, the licence holder stated:

> The above Conditions were removed by DWER during the licence amendment process as they were considered redundant in accordance with the policy document "IR-OP-02 Redundant Conditions. DWER, May 2016". Griffin supports the removal of such conditions as they are process based rather than outcome based conditions which are difficult to quantify, implement, audit and enforce. The use of terminology such as "immediately" and "all practical measures" is subjective and not linked to the risk of environmental harm. Griffin has in place approved Management Plans and outcome based license limits which define agreed management response and environmental outcomes which adequately address's the risks.[19]

Overall, DWER advised that:

> The Appellant submitted that the deletion of these conditions from the Licence means that the Licence is effectively authorising pollution or other emission offences to occur from the Premises for activities not otherwise referred to in the Licence. This is not correct; in the absence of these conditions, the other conditions of the Licence remain in force and control the emissions from the Premises.[20]

Conclusion

Taking into account the information submitted in respect to this ground of the appeal, in particular DWER's advice that the removal of the conditions does not have the effect of authorising pollution from activities not specifically referenced in the licence, it is considered that the deletion of the identified conditions by DWER was justified.

OTHER MATTERS

The appellant raised the following issues, which are considered to be outside the scope of the appeal for the reason that they relate to conditions or matters that are not the subject of the current amendment. For completeness, these issues are summarised as follows.

Extension to licence term

The appellant submitted that DER's decision to extend the expiry date of the licence in September 2016 was not valid. The appellant stated that the extension of expiry date was invalid due to a number of mandatory administrative steps not being undertaken, namely notifying the licence holder of the amendment before issue, inviting the licence holder to comment on the proposal and offering a 21 day representation period.

In response to this issue, DWER advised that the amendment referred to by the appellant occurred on 29 April 2016 and is therefore outside of the scope of this appeal.

[18] DWER, additional advice, 30 April 2018, pages 1-2.
[19] Griffin, Response to Appeal, 14 February 2018, page 2.
[20] DWER, additional advice, 30 April 2018, page 2.

DWER stated that the licence was amended to extend the date as part of omnibus of amendments by an administrative notice on 29 April 2016 to almost all of the licensed prescribed premises to extend the expiry date and is in accordance with the *Guidance Statement: Licence Duration*.

Carbon pollution (including methane)

The appellant submitted that the mining of coal contributes both directly and indirectly to the increase in greenhouse gasses emitted to the environment, and that as a result, it is both necessary and convenient to impose a condition on the licence for the purpose of controlling, abating and/or mitigating the pollution that will be caused by the mining and processing of the coal from this premises, including from methane.

In response to this issue, DWER advised that the amendment of the licence did not relate to greenhouse gas emissions from the mining of coal, which were the subject of previous consideration in appeal 155 of 2014.

DWER additionally advised that while the emission of greenhouse gases from a source meets the definition of an emission, an emission from a single facility is, in itself, unlikely to constitute pollution or environmental harm considering the global scale greenhouse gas emissions and the incremental increase any emission would cause. Consequently, DWER is of the view that the regulation of greenhouse gas emissions under a licence would likely be unreasonable and potentially ultra vires.

DWER further advised that emissions of greenhouse gases are not regulated in any instrument issued under Part V of the EP Act, which it stated is consistent with the outcomes of the Council of Australian Governments (COAG) *Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment* (the Agreement) is also relevant. DWER advised that the Agreement details that the Commonwealth Government has both the responsibility and the interest to develop and implement national strategies to reduce emissions of greenhouse gases, in relation to meeting Australia's obligations under the *United Nations Framework Convention on Climate Change.*

In relation to methane emissions specifically, DWER advised that the revised National Greenhouse and Energy Reporting Scheme (NGERS) calculation methods, which were referred to in the former DER's response to Appeals 153-155 of 2014, have been released. The data provided by the licence holder in response to that appeal indicates that methane emissions from the Ewington coal mines are consistent with the revised NGERS calculation methodology (when methane emissions are converted to CO_2-e) and relatively low in comparison both globally and within Australia. In addition, DWER reconfirmed its view that methane, as a greenhouse gas, is not regulated under Part V of the EP Act.

Surface water

The appellant requested that the licence be amended to include the following requirements relating to surface water:

- include sampling points W2 and W3 on the list of emissions reference points;
- include alkalinity, aluminium, arsenic, cadmium, chromium, copper, iron, lead, manganese, mercury, nickel and zinc to the parameters column; and
- change or add limits to the table that reflect the limits found in the document *ANZECC, 2000 – Livestock drinking water quality guidelines*.

In response to this issue, DWER advised that the amendment to the licence did not relate to surface water emissions other than a minor administrative correction to a Table number cross-referenced within Table 2.2.4.

DWER stated that conditions relating to surface water have been risk assessed and have been previously modified as a result of appeal 153-155 of 2014.

Groundwater

The appellant recommended that a groundwater monitoring regime is imposed on the licence to ensure that the licence holder is meeting its general obligations under the EP Act, specifically in respect to areas surrounding the tailings dam, mine pits and landfill.

DWER advised that the amendment of the licence did not relate to groundwater monitoring. It further noted that comprehensive groundwater management and monitoring requirements are included in Ministerial Statement 380 and the groundwater licence for the premises.

DWER also noted that while the appellant referenced tailings dams, there are no tailings storage facilities on the premises as the coal handling and preparation plant in use on the premises does not produce tailings.

CONCLUSION AND RECOMMENDATIONS

For the reasons stated in this report, it is recommended the appeal be allowed to the extent that conditions 2.3.1 and 2.3.2 of the licence be reinstated. It is otherwise recommended the appeal be dismissed.

If the Minister agrees with these recommendations, DWER will give effect to the changes to the licence conditions under section 110 of the EP Act as soon as practicable.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Jean-Pierre Clement, Deputy Appeals Convenor