

Senate Standing Committee on Environment and Communications
Legislation Committee
Answers to questions on notice
Environment portfolio

Question No: 211
Hearing: Additional Budget Estimates
Outcome: Agency
Programme: Great Barrier Reef Marine Park Authority
Topic: Yabulu Nickel Refinery
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Question Date: 7 March 2014
Question Type: Written

Senator Waters asked:

I refer to the article in *The Australian* newspaper on 12 February 2014 referring the Yabulu nickel refinery. It seems that Mr Palmer's company Queensland Nickel Pty Ltd (QNPL) discharged toxic waste onto the reef on two occasions without permission. Their applications to dump the waste had actually been refused back by GBRMPA. Mr Palmer's company was not prosecuted on either occasion.

1. Why wasn't QNPL prosecuted for the two instances where his company reportedly discharged toxic waste onto the reef without permission in 2009 and 2011?
2. Has any Minister or a Ministerial adviser, at any time either verbally or in writing, discussed this issue with GBRMPA staff?
3. Has any Minister or ministerial adviser, at any time either verbally or in writing, encouraged GBRMPA to take a certain approach to this issue?
4. Has inadequate staffing or resourcing contributed to the lack of action on this issue by GBRMPA?
5. Given that GBRMPA reserved its right to take action against QNPL for the discharges in 2011, and that QNPL remains non-compliant with the terms of its permit in relation to risk, will GBRMPA now take action?
6. Given these discharges, and given that GBRMPA has acknowledged that 'Queensland Nickel has a history of poor water management', would it be appropriate for GBRMPA to now consider whether Mr Palmer is suitable to hold an authority under the Act?
7. Are there any formal processes in place that allow consideration of questions of suitability of current permit holders under the Act?
8. What are the criteria for such assessments?
9. Have those criteria changed since the election in 2013?
10. How many staff are dedicated to that kind of assessment?
11. Reports indicate there are serious levels of risk in the Yabulu tailings ponds such as more than 5,000 million litres of "hazardous waste" in the ponds, with a nitrogen concentration of 150 times the maximum allowed for discharge in the GBRMP. Is it true that there is a risk tailings pond dam wall could collapse? Please provide details of this risk, and please also outline the risks this poses to the Reef should the dam wall collapse?

Answer:

1. The 2009 discharge occurred when the refinery was owned by BHP Billiton. At the time, the Great Barrier Reef Marine Park Authority (GBRMPA) decided that prosecution would not be a wise use of public funds, as legal advice indicated the prosecution was unlikely to succeed.

The 2011 discharge occurred when the refinery was owned by Mr Clive Palmer. Shortly after this discharge, the Authority issued a new permit to Queensland Nickel Pty Ltd which required the discharge pipeline to be removed from the Marine Park by June 2013. As such, the Authority believed that a solution was in place to neutralise any future risk of ocean discharge. However, Queensland Nickel Pty Ltd requested a reconsideration of this permit condition. Based on legal advice, the Authority deleted the permit condition requiring Queensland Nickel Pty Ltd to remove the discharge pipeline from the Marine Park. By the time the permit was re-issued (without the requirement to remove the discharge pipeline), the 2012-13 wet season was approaching with a very high risk of overflow or discharge. As a result, the Authority decided to focus its resources on dealing with the immediate risk rather than pursuing prosecution for a past offence. The Authority still reserves its right to prosecute the 2011 breach in future.

2. The GBRMPA has briefed previous Ministers on this issue. The office of the current Minister was not briefed with respect to Queensland Nickel Pty Ltd until these issues were raised in the media. Since then, the Minister's Office has been briefed as to what actions GBRMPA took in 2009 and 2011.
3. The Minister or Ministers Advisors have not provided any direction, guidance or encouragement to GBRMPA officials on how the Authority might respond to enforcement actions against Queensland Nickel.
4. The GBRMPA view Queensland Nickel Pty Ltd as a priority and continue to dedicate significant resources to achieving both short- and long-term solutions to risks.
5.
 - The GBRMPA, jointly with the Queensland Department of National Parks, Recreation, Sport and Racing (Queensland Parks and Wildlife Service), regularly reviews the status of Queensland Nickel Pty Ltd with regards to the pipeline which is permitted within the Commonwealth Great Barrier Reef Marine Park and the Queensland Great Barrier Reef Coast Marine Park.
 - The GBRMPA also provides advice to the Queensland Department of Environment and Heritage Protection on land-based risk management of refinery operations, which are entirely under Queensland jurisdiction.
 - We are advised that the State of Queensland issued a Penalty Infringement Notice to Queensland Nickel Pty Ltd in January 2014 for non-compliance with Transitional Environmental Program MAN16200, specifically for failing to reduce the spill risk to the level required by the specified date. This Penalty Infringement Notice will be considered by the GBRMPA when making decisions on permit applications (for more detail, see Answer 6).
 - The GBRMPA will continue to evaluate the most effective means of reducing the risks of discharge from the Queensland Nickel refinery. A range of administrative and enforcement actions remain available to the GBRMPA.

6. In assessing a permit application, the GBRMPA must consider the mandatory criteria specified in the *Great Barrier Reef Marine Park Regulations 1983* and may also consider discretionary criteria. GBRMPA internal business procedures specify that the following discretionary criterium always be considered for permit applications involving a structure:

88Q(j) *Whether the applicant for the permission is a suitable person to hold such a permission, having regard to:*

- i. *The applicant's history in relation to environmental matters; and*
- ii. *If the applicant is a body corporate – the history of its executive officers in relation to environmental matters; and*
- iii. *If the applicant is a company that is a subsidiary of another company (the **parent body**) – the history of the parent body and its executive officers in relation to environmental matters; and*
- iv. *Any charge, collected amount or penalty amount that is overdue for payment by the applicant as the holder of a chargeable permission (whether or not the permission is in force); and*
- v. *Any late payment penalty that is payable by the applicant as the holder of a chargeable permission (whether or not the permission is in force); and*
- vi. *Any unpaid fines or civil penalties required to be paid by the applicant in relation to a contravention of the Act or of these Regulations.*

The permission issued by the GBRMPA to allow Queensland Nickel Pty Ltd to maintain a pipeline in the Marine Park is currently undergoing a new assessment to determine whether the use will be allowed to continue. The previous permit expired on 30 June 2013, however this permission remains in force because Queensland Nickel Pty Ltd applied before the expiry date for a new permission to continue the same use. The permission therefore remains in force in accordance with Regulation 88ZC of the *Great Barrier Reef Marine Park Regulations 2006* until the first of the following events occur:

- the new application is taken to have been withdrawn under regulation 88D or 88E;
- the Authority makes a decision on the new application under regulation 88X;
- the original permission is suspended or revoked under Division 2A.8; or
- the new application lapses under regulation 132.

GBRMPA business procedures specify that discretionary criterium 88R(j) be assessed for this application. Previous permit breaches and other matters relevant to the applicant's history in relation to environmental matters will therefore be considered in accordance with legislation and internal business procedures.

7. Division 2A.8 of the *Great Barrier Reef Marine Park Regulations 2006* specifies situations in which the GBRMPA may modify, suspend or revoke a current permission. The relevant Regulations for determining whether the GBRMPA may modify, suspend or revoke a permit are attached as **Appendix 1**.
8. The criteria for determining a "suitable person" when assessing a new permit application are listed under Answer 6. The relevant Regulations for determining whether the GBRMPA may modify, suspend or revoke a permit are attached as **Appendix 1**.
9. No. The criteria are established in legislation, and the legislation has not changed.
10. At the moment, there is approximately 0.5 FTE assigned to Queensland Nickel matters. When managing the risk of discharge during the 2012-13 wet season, approximately 2.5 FTEs were assigned.

11.

- Management of refinery operations and related environmental risks is first and foremost the responsibility of Queensland Nickel Pty Ltd.
- The tailings dam is classified under Queensland legislation as a “regulated structure” containing “hazardous waste.” The amount of wastewater in the dam and its chemical properties vary over the months and years.
- Because the tailings dam is not located within the Great Barrier Reef Marine Park, its regulation is the responsibility of the Queensland Department of Environment and Heritage Protection together with the Australian Department of the Environment.
- The GBRMPA has not independently assessed the structural integrity of the tailings dam and relies on advice from the State of Queensland in relation to these matters.
- Were the dam to suffer a catastrophic failure, contaminated wastewater would likely enter nearby coastal wetlands which flow directly into the Great Barrier Reef Marine Park. The impacts on the Marine Park would depend on the volume released, the exact chemical properties of the wastewater and local weather conditions.

APPENDIX 1 – Modifying, suspending or revoking a permission
Excerpts from the *Great Barrier Reef Marine Park Regulations 2006*

Division 2A.8—Modification, suspension and revocation

88ZP Modification of permission conditions

- (1) The Authority may, by written notice given to a permission holder, modify the conditions of the permission in order to ensure the permission, and the conditions of the permission, remain appropriate to the attainment of the objects of the Act.
- (2) The Authority may modify the conditions:
- (a) with the consent of the permission holder; or
 - (b) without the consent of the permission holder:
 - (i) if the holder has been convicted or found guilty of an offence against the Act or these Regulations; or
 - (ii) if the holder has been convicted or found guilty of an offence against section 136.1 or 137.1 of the *Criminal Code* in relation to the person's application for the permission; or
 - (iii) if the Federal Court has made a declaration under section 61AIA of the Act that the holder has contravened a civil penalty provision in the Act; or
 - (iv) if the activity or conduct that is the subject of the permission is also the subject of an approval under Part 9 of the *Environment Protection and Biodiversity Conservation Act 1999* and that approval has been varied under section 143 of that Act; or
 - (v) if the Authority believes, on reasonable grounds, that it is necessary to do so to protect the environment, or the living resources, of the Marine Park.
- (3) Before taking action to modify a condition on a ground mentioned in paragraph (2)(b), the Authority must:
- (a) give written notice to the holder of the facts and circumstances that, in the opinion of the Authority, justify modifying the condition; and
 - (b) include in the notice a statement that the holder may, within 20 business days after the date of the notice (or such longer period as is specified in the notice), provide reasons to the Authority why the condition should not be modified.
- (4) In deciding whether to modify the conditions of the permission, the Authority must consider any reasons provided by the permission holder in response to a notice under subregulation (3).
- (5) In this regulation, **permission** includes an authorisation attached to the permission.

88ZQ Modification of conditions or suspension of permission—pending investigation

- (1) The Authority may, by written notice to the permission holder, modify the conditions of the permission, or suspend the permission, for the purpose of conducting an investigation, if the Authority has reason to believe that:
- (a) the holder has contravened, or is likely to contravene, the conditions of the permission; or
 - (b) unacceptable impacts have occurred, are occurring or are likely to occur, to the Marine Park or to users of the Marine Park which were not foreseen at the time of granting the permission; or
 - (c) if the application for the permission was being considered again, the permission would not have been granted because of circumstances that were not foreseen at the time the permission was first granted; or
 - (d) the holder's history in environmental matters is such that the holder may no longer be an appropriate person to hold the permission.
- (2) The notice must also:
- (a) set out the Authority's reasons for the modification or suspension; and
 - (b) specify a period (being a period of not less than 10 business days) within which the permission holder may provide reasons to the Authority as to why the Authority should remove the modification or suspension.
- (3) The modification or the suspension, as appropriate, commences:
- (a) on the day the Authority notifies the permission holder under subregulation (1); or
 - (b) if a later day is specified in the notice, on that later day.
- (4) The Authority must, as soon as practicable after notifying the permission holder:
- (a) investigate the matter in respect of which the condition was modified or the permission was suspended; and

- (b) consider any reasons provided by the permission holder in response to the notice.
- (5) The Authority must complete its investigation within:
 - (a) 20 business days after the day on which the modification or suspension commenced; or
 - (b) 20 business days after the day the permission holder provides reasons to the Authority in response to the notice;whichever occurs later.

(6) In this regulation, **permission** includes an authorisation attached to the permission.

88ZR Action following investigation

(1) If, as a result of its investigation, the Authority does not find reasonable grounds for modifying the condition or suspending the permission, it must:

- (a) immediately remove the modification or suspension; and
- (b) as soon as practicable after doing so, notify the permission holder in writing that it has removed the modification or suspension, as the case may be.

(2) If, as a result of its investigation, the Authority finds reasonable grounds for modifying the condition or suspending the permission, it may, by written notice given to the permission holder, take the following action:

- (a) continue the modification;
- (b) continue the suspension;
- (c) revoke the permission.

(3) The Authority must take the action no later than 10 business days after the day it completes its investigation.

(4) The notice must include the reasons for continuing the modification or suspension, or revoking the permission, as the case may be.

(5) If the Authority continues the modification or suspension by notice under subregulation (2), the following provisions apply:

- (a) in the case of a modification of a condition—the permission that is subject to the condition has effect as if it had been granted with the modified condition;
- (b) in the case of a suspension—the permission remains suspended for the period specified in the notice.

(6) If the Authority revokes the permission under subregulation (2), the revocation takes effect on the day the Authority gives the notice to the permission holder.

(7) If the Authority does not continue the modification or suspension, or revoke the permission, within a period of 10 business days after completing its investigation, the modification or suspension, as the case may be, ceases to have effect at the end of that period.

(8) In this regulation, **permission** includes an authorisation attached to the permission.

88ZS Suspension or revocation of permission—bareboat operations

(1) The Authority may, by notice in writing given to a permission holder, suspend the permission granted to the holder for the purposes of a zoning plan to conduct a tourist program involving a bareboat operation in the Whitsunday Planning Area if:

- (a) the holder's senior staff, persons responsible for briefing clients and persons operating radio facilities are not registered with the Authority under regulation 124; or
- (b) the holder's bareboats do not have protection and public liability indemnity insurance for at least \$10 000 000; or
- (c) the holder does not have facilities available on board the bareboats and on shore for the disposal of garbage resulting from the bareboat operation; or
- (d) the holder's bareboats do not display a valid and unique identification number, issued by the Authority, when the holder conducts the bareboat operation in the Marine Park.

(2) The suspension commences:

- (a) on the day the Authority notifies the permission holder under subregulation (1); or
- (b) if a later day is specified in the notice, on that later day.

(3) Before suspending a permission under subregulation (1), the Authority must:

- (a) give written notice to the holder of the facts and circumstances that, in the opinion of the Authority, justify suspending the permission; and
- (b) include in the notice a statement that the holder may, within 10 business days after the date of the notice, provide reasons to the Authority why the permission should not be suspended.

(4) In deciding whether to suspend the permission, the Authority must consider any reasons provided by the permission holder in response to a notice under subregulation (3).

(5) If the permission holder does not comply, or ensure compliance, with the requirements in paragraphs (1)(a) to (d), within the period of 40 business days after the suspension, the Authority may revoke the permission after the end of the period by giving the holder written notice.

(6) The revocation commences:

- (a) on the day the Authority gives notice to the permission holder under subregulation (5); or
- (b) if a later day is specified in the notice, on that later day.

88ZT Suspension of permission—environmental management charge

(1) The Authority may, by notice in writing given to the holder of a chargeable permission, suspend the permission if any of the following apply:

- (a) at the end of the month in which charge is payable in relation to the permission by the holder of the permission, the charge has not been fully paid;
- (b) charge that is payable in relation to the permission by a visitor has not been collected by the holder of the permission;
- (c) at the end of the month in which a collected amount is payable in relation to the permission, the collected amount has not been fully paid;
- (d) a penalty amount that is payable in relation to the permission has not been paid in accordance with subsection 39FA(3) of the Act;
- (e) an amount of late payment penalty that is payable in relation to the permission has not been paid;
- (f) at the end of the month in which a return in relation to the permission is to be given to the Authority under subregulation 167(1) or (3), the return has not been given to the Authority.

(2) The suspension commences:

- (a) on the day the Authority gives notice to the permission holder under subregulation (1); or
- (b) if a later day is specified in the notice, on that later day.

(3) The suspension remains in force until the Authority is satisfied:

- (a) that:
 - (i) if paragraph (1)(a), (b), (c), (d) or (e) applies—the charge, amount or penalty, as appropriate, is paid; or
 - (ii) if paragraph (1)(f) applies—a properly completed return has been given to the Authority; and
- (b) that the reinstatement fee under regulation 133B is paid to the Authority.

(4) Before taking action to suspend a permission under subregulation (1), the Authority must:

- (a) give written notice to the holder of the facts and circumstances that, in the opinion of the Authority, justify consideration being given to suspending the permission; and
- (b) include in the notice a statement that the holder may, within 10 business days after the date of the notice, provide reasons to the Authority why the permission should not be suspended.

(5) In deciding whether or not to suspend the permission, the Authority must consider any reasons provided by the holder in response to a notice under subregulation (4).

88ZU Revocation of permission—general

(1) The Authority may, by written notice given to the permission holder, revoke the permission if the Authority is satisfied that any of the following apply:

- (a) the holder consents to the revocation;
- (b) the holder has been convicted or found guilty of an offence against the Act or these Regulations;
- (c) the holder has been convicted or found guilty of an offence against section 136.1 or 137.1 of the *Criminal Code* in relation to the holder's application for the permission;
- (d) the Federal Court has made a declaration under section 61AIA of the Act that the holder has contravened a civil penalty provision in the Act;
- (e) if the permission has been suspended under regulation 88ZT—the holder has not, within 10 business days of the suspension, taken the action that would enable the Authority to reinstate the permission;
- (f) the conduct that is the subject of the permission is also the subject of an approval under Part 9 of the *Environment Protection and Biodiversity Conservation Act 1999* and that approval has been revoked under section 145 of that Act;
- (g) the holder did not begin to engage in the conduct that is permitted by the permission in the Marine Park within 120 days after the date on which the permission was granted, or transferred, under these Regulations, unless the permission states otherwise.

(2) A revocation takes effect:

- (a) on the day the Authority gives the holder notice of the revocation under subregulation (1); or
 - (b) if a later day is specified in the notice, on that later day.
- (3) Before taking action to revoke a permission on a ground mentioned in paragraphs (1)(b) to (g), the Authority must:
- (a) give to the holder a written notice of the facts and circumstances that, in the opinion of the Authority, justify consideration being given to revoking the permission; and
 - (b) include in the notice a statement that the holder may, within 10 business days after the date of the notice, provide reasons to the Authority why the permission should not be revoked.
- (4) In deciding whether to revoke the permission, the Authority must consider any reasons provided by the holder in response to a notice under subregulation (3).
- (5) In spite of subregulation (3), the Authority may, by notice in writing given to the holder, suspend the permission while it considers whether or not to revoke the permission.
- (6) The suspension:
- (a) commences:
 - (i) on the day the Authority notifies the permission holder under subregulation (3); or
 - (ii) if a later day is specified in the notice, on that later day; and
 - (b) ends on the earlier of:
 - (i) the day the Authority makes a decision on whether or not to revoke the permission; and
 - (ii) the day that is 20 business days after the date of the notice mentioned in subregulation (3).
- (7) In this regulation, **permission** includes an authorisation attached to the permission.

88ZV Revoked permission to be reinstated in particular circumstances

- (1) This regulation applies if:
- (a) the Authority has revoked a permission (the **revoked permission**) because the conduct that is the subject of the permission is also the subject of an approval under Part 9 of the *Environment Protection and Biodiversity Conservation Act 1999* and that approval (the **revoked approval**) has been revoked under section 145 of that Act; and
 - (b) the revoked approval has been reinstated under section 145A of that Act.
- (2) The Authority must:
- (a) reinstate the revoked permission as soon as practicable after the revoked approval has been reinstated; and
 - (b) notify the permission holder in writing that the permission has been reinstated.