

## APPENDIX J: STATUTORY CONSIDERATIONS

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In line with the requirements of Section 79C of the Environmental Planning & Assessment Act 1979 (EP&A Act), the Department's assessment of the project has given detailed consideration to a number of statutory requirements. These include:

- the objects found in Section 5 of the EP&A Act;
- matters relating to threatened species found in Sections 5A to 5D of the EP&A Act; and
- the matters listed under Section 79C of the EP&A Act, including applicable environmental planning instruments and regulations.

The Department has considered all of these matters in its preliminary merit assessment of the project and has provided a summary of this assessment below.

Reference should also be made to Sections 4 and 9 of the EIS where KEPCO has also considered applicable legislation and environmental planning instruments in detail.

### **Objects of the EP&A Act**

The Minister must consider the objects of the EP&A Act when making decisions under the Act. The objects of most relevance to the Minister's decision on whether or not to approve the project are found in Section 5(a)(i),(ii),(vi) and (vii). They are:

*To encourage:*

- (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment;*
- (ii) *the promotion and co-ordination of the orderly and economic use and development of land*
- (vi) *the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats; and*
- (vii) *ecologically sustainable development.*

The Department is satisfied that the project encourages the proper development of resources (Object 5(a)(i)) and the promotion of orderly and economic use of land (Object 5(a)(ii)), particularly as:

- the project is a permissible land use on the subject land;
- the Division of Resources and Energy confirmed the size and quality of the coal reserve and that the mine would be a mid-sized operation providing substantial royalties of up to \$266 million (present value); and
- the project would provide considerable economic benefits to the region and to NSW as a whole.

Consideration of environmental protection (Object 5(a)(vi)) is provided in Section 6 of this report. Following its assessment, the Department considers that the project is able to be undertaken in a manner that would maintain or improve the biodiversity values of the region in the medium to long term. The Department is also satisfied that the impacts to threatened species and habitats can be managed and/or mitigated by imposing appropriate conditions, including a detailed biodiversity offset strategy and rehabilitation strategy.

The Department has considered the principles of ecologically sustainable development (ESD) (Object 5(a)(vii)) in its assessment of the project. It has also considered KEPCO's consideration of these principles (see Section 9.5 of the EIS). Following its consideration, the Department considers that the project is able to be carried out in a manner that is consistent with the principles of ESD.

### **Threatened Species**

Sections 5A to 5D of the EP&A Act relate to threatened species assessment and management. The Department confirms that its assessment of the project has taken into account the matters listed in these sections in assessing whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats.

These matters include the:

- factors in Section 5A(2), known as the '7 part test of significance';

- threatened species assessment guidelines<sup>26</sup> identified in Section 5A(1); and
- register of critical habitat as identified in Section 5B.

The Department's consideration has had regard to KEPCO's ecological assessment and the 7 part tests of significance included the EIS, along with the threatened species assessment guidelines which assist in the interpretation and application of the 7 factors (or tests) of significance. This assessment has considered the direct and indirect impacts of the project on threatened species, populations or ecological communities, or their habitats – both on the site and the broader study area, as defined under the threatened species assessment guidelines.

As outlined in the Department's assessment report, the project would generate a range of impacts on several listed threatened species and communities (including habitat and foraging resources for a number of threatened species), that would be deemed to be significant in the absence of avoidance, mitigation or offsetting measures. The Department's assessment concludes that these impacts are able to be mitigated or compensated to an acceptable standard through a mix of avoidance, mitigation and offsetting measures.

The Department also notes that surveys for the project did not record any threatened aquatic species in Bylong River or associated tributaries and that the biodiversity assessments undertaken for the project found that there is no suitable habitat for threatened species and communities listed under the *Fisheries Management Act 1994* or EPBC Act.

### **Environmental Planning Instruments**

Under Section 79C of the EP&A Act, the consent authority is required to consider amongst other things the provisions of relevant environmental planning instruments (EPIs), including any exhibited draft EPI's and development control plans.

The Department has considered the project against relevant provisions of several EPI's, as well as KEPCO's consideration of these instruments (see Sections 5 and 9 of the EIS).

The key instruments include:

- *Mid-Western Regional LEP 2012*;
- *SEPP No.33 – Hazardous and Offensive Development*;
- *SEPP No.44 – Koala Habitat Protection*;
- *SEPP No.55 – Remediation of Land*;
- *SEPP (State and Regional Development) 2011*;
- *SEPP (Infrastructure) 2007 (Infrastructure SEPP)*; and
- *SEPP (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)*.

### ***Mid-Western Regional Local Environmental Plan (LEP) 2009***

The site is located in the Mid-Western local government area. Under the *Mid-Western Regional Local Environmental Plan 2012* (Mid-Western Regional LEP) the development application area includes land zoned as:

- RU1 – Primary Production; and
- SP2 – Infrastructure.

Open cut mining is permissible with consent in zone RU1, however it is prohibited in the SP2 zone.

Under clause 7(1)(b)(i) of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, development for the purpose of mining may be carried out on land where agriculture is a permissible land use. Extensive agriculture may be carried out in both the R5 and SP2 zones without development consent, consequently mining is permissible on the site.

A public utility undertaking in the form of an Electricity Transmission Line is permissible with consent in zones RU1 and R5, however it is prohibited in the E3 and SP2 zones.

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<sup>26</sup> Assessment guidelines means assessment guidelines issued and in force under Section 94A of the Threatened Species Conservation Act 1995 or, subject to Section 5C, Section 220ZZA of the Fisheries Management Act 1994, including the Threatened Species Assessment Guidelines – The Assessment of Significance, prepared by the then Department of Environment and Climate Change, dated August 2007.

Under clause 41(1) of *State Environmental Planning Policy (Infrastructure) 2007*, development for the purpose of an electricity transmission or distribution network may be carried out on or behalf of an electricity supply authority or public authority on any land.

Consequently, the project is permissible with development consent and the Commission may determine the application.

**SEPP No. 33 – Hazardous and Offensive Development**

The project does not meet the definition of potentially hazardous industry, and the Department is satisfied that the proposal is consistent with the aims, objectives and requirements of SEPP 33.

**SEPP No. 44 – Koala Habitat Protection**

The ecological assessment accompanying the EIS identified approximately 229 ha of habitat for the Koala would be cleared for the project, including 124 ha of the primary SEPP feed tree, White-Box.

No Koalas were recorded during surveys undertaken for the project and there have been only two recorded sightings within the project boundary in 1957 and 1980. The EIS concluded that the project site does not contain any areas of 'core koala habitat', as defined by SEPP 44. However, as there are preferred feed tree species listed in Schedule 2 of SEPP 44, the project would clear 'potential koala habitat'. The ecological assessment concluded that the project was unlikely to have a significant impact on the Koala

SEPP 44 aims to conserve and manage koala habitat to reverse the current trend of koala population decline. In this respect, the Department is satisfied that the project would not significantly impact koala populations and would eventually lead to improved long term habitat outcomes through the establishment and enhancement of local offsets that would link with existing areas of vegetation.

Overall, the Department is satisfied that the project is generally consistent with the aims, objectives and requirements of SEPP 44.

**SEPP No. 55 – Remediation of Land**

The Department is satisfied that there is limited risk of any material contamination of the land subject to the application and that the project is generally consistent with the aims, objectives, and provisions of SEPP 55.

**SEPP (State and Regional Development) 2011**

The proposed development is declared to be State Significant Development under Section 89C of the EP&A Act as it is 'development for the purposes of coal mining', which is specified in clause 5 of schedule 1 to *State Environmental Planning Policy (State and Regional Development) 2011*.

Consequently, the Minister for Planning is the consent authority for the development. However, the development application falls within the Minister's delegation to the NSW Planning Assessment Commission (Commission) dated 14 September 2011, because there were more than 25 public submissions in the nature of objections. Consequently, the Commission must determine the application.

**SEPP (Infrastructure) 2007**

The Infrastructure SEPP requires the consent authority to notify relevant public authorities about developments that may affect public infrastructure or public land. To this end, the Department notified Mid-Western Regional Council, Muswellbrook Shire Council, the RMS, Transport NSW, the ARTC, Crown Lands, Telstra, John Holland Rail and Endeavour Energy about the proposed project.

While none of these public authorities objected to the project, several made comments on the potential interactions of the proposed development with their nearby infrastructure assets and recommended conditions surrounding the management of these interactions should the project be approved.

The Department has extensively considered the matters raised by public authorities in its assessment of the project (see Section 6 above). Where appropriate, the Department has incorporated the recommendations made by these public authorities into the recommended project approval (see Appendix M). The Department is satisfied that the recommended conditions provide appropriate protection for public infrastructure. Consequently, the Department is satisfied that the requirements of the Infrastructure SEPP have been satisfied.

***SEPP (Mining, Petroleum Production and Extractive Industries) 2007***

Part 3 of the Mining SEPP lists a number of matters that a consent authority must consider before determining an application for consent for development for the purposes of mining, including:

- certain non-discretionary development standards in relation to noise, air quality, blasting and aquifer interference;
- compatibility with other land uses;
- the *NSW Voluntary Land Acquisition and Mitigation Policy*;
- natural resource management and environmental management;
- resource recovery;
- transport; and
- rehabilitation.

***Non-discretionary Development Standards for Mining (Clause 12AB)***

The Department has considered the potential noise, air quality, air blast, ground vibration and aquifer interference impacts of the project. The Department is satisfied that the project could be managed to comply with all relevant development standards.

***Compatibility with other land uses (Clause 12)***

The Department's assessment has considered the potential impacts of the project on other land uses in the area, including the residential land uses associated with Bylong village, agricultural activity in the Bylong Valley and surrounds, forestry within Bylong State Forest, quarrying operations at the Bylong Quarry and National Park estate. This assessment has been undertaken in consideration of the public benefits of the project.

The Department undertook a detailed assessment of the potential impacts of the project on all nearby land uses (see Section 6) and found that the project could be managed to meet acceptable criteria for dust and blasting impacts established by the EPA. However, one landowner has been afforded acquisition rights due to significant noise impacts at the residence, with a number of other landowners being afforded mitigation rights at the residence to minimise noise impacts.

Further, the Department is satisfied that other indirect impacts of the project on surrounding land uses and are able to be minimised, mitigated or managed to achieve acceptable environmental and amenity outcomes.

***Consideration of Voluntary Land Acquisition and Mitigation Policy (Clause 12A)***

The Department's assessment has considered the NSW Government's Voluntary Land Acquisition and Mitigation Policy (December 2014). This assessment concluded that one receiver should be afforded acquisition rights to account for noise impacts from the project. A further 5 receivers have been afforded mitigation rights for operational noise impacts.

***Compatibility with Mining, Petroleum Production or Extractive Industry (Clause 13)***

The Department is satisfied that the project has been designed in a manner that is compatible with, and would not adversely affect, adjacent current or future mining-related activities.

***Natural Resource Management and Environmental Management (Clause 14)***

The Department has recommended a number of conditions aimed at ensuring that the project is undertaken in an environmentally responsible manner, including but not limited to, conditions in relation to soils, water resources, threatened species and biodiversity, and greenhouse gas emissions.

***Resource Recovery (Clause 15)***

The Department and DRE are satisfied that the project can be carried out in an efficient manner that optimises resource recovery within environmental constraints. The Department has also recommended conditions requiring KEPCO to implement reasonable and feasible measures to minimise waste.

***Transport (Clause 16)***

The Department notes that the project would transport all product coal off-site via the Gulgong to Sandy Hollow Railway. The Department has consulted with the applicable roads authorities and the ARTC in relation to the project, and taken these submissions into consideration in its assessment of the project.

***Rehabilitation (Clause 17)***

The Department is satisfied that the proposed final landforms and rehabilitation plans could be achieved to meet contemporary best practice in the NSW mining industry, and has recommended a number of conditions to ensure the appropriate rehabilitation of land that would be affected by the project. The recommended conditions require KEPCO to prepare and implement a Rehabilitation Management Plan, to effectively manage waste and to meet a number of rehabilitation objectives, including ensuring public safety and that the mine site as a whole is safe, stable and non-polluting.

Based on its assessment of the development, the Department is satisfied that the project can be managed in a manner that is generally consistent with the aims, objectives and provisions of the SEPP.