



Mr Stephen Barry  
Director  
Independent Planning Commission  
GPO Box 3415  
Sydney NSW 2001

By email to: [Casey.Joshua@ipcn.nsw.gov.au](mailto:Casey.Joshua@ipcn.nsw.gov.au)

18 December 2020

Dear Mr Barry

**Maxwell Underground Coal Mine Project (SSD 9526)  
Request for Department comments on conditions**

I refer to the Independent Planning Commission's correspondence of 16 December 2020, regarding the proposed Maxwell Underground Coal Mine Project (SSD 9526). I note that this development application is before the Commission for determination, as the consent authority.

I understand that the Commission is seeking comments from the Department of Planning, Industry & Environment (the Department) on the workability, enforceability and appropriateness of a number of amendments that the Commission is seeking to make to Department's recommended conditions as they relate to the proposed development.

The Department appreciates this opportunity to engage with the Commission and provides the following comments for the Commission's consideration in determining this proposal.

- 1) The Department supports with the Commission's view that the ethnographic and anthropological impacts of the Project on Aboriginal Cultural Heritage should be afforded appropriate consideration and believes that the NSW planning process has allowed for these impacts to be considered and addressed during the assessment process.

With respect to the Commission's proposed changes to the recommended conditions, the Department wishes to confirm that the proposed definition for "Aboriginal Affairs NSW" and proposed changes to condition B57 are workable and enforceable.

- 2) The Department appreciates and agrees with the Commission's desire to impose as early a timeframe as realistically possible for the establishment of a Planning Agreement under Condition A17, but has reservations about the enforceability of the proposed wording.

As the obligations imposed under a development consent take effect from the date that the consent is acted upon, the Department has sought to impose the earliest possible timeframe it considers to be achievable for the Applicant to proceed through the regulatory steps required to establish a Planning Agreement, being 6 months from the date of commencement of development under that consent.

Should the Commission wish to amend the recommended conditions, the Commission may wish to consider the following alternative wording for condition A17:

A17. *Within six months of the date of commencement of development under this consent, or other timeframe agreed by the Planning Secretary, the Applicant must enter into a PA with Council in accordance with:*

- (a) *Division 7.1 of Part 7 of the EP&A Act; and*
- (b) *the terms of the Applicant's offer to Council in Appendix 6.*

- 3) The Department understands the Commission's desire to ensure the timely retirement of biodiversity credits, but wishes to advise that the proposed changes to conditions B47 and B48 could have unintended consequences for the Project and the nature of biodiversity outcomes that may be achieved.

In the Department's experience, the retirement of biodiversity credits can be a prolonged process, particularly where offsets are proposed to be secured under land-based Biodiversity Stewardship Agreements. Therefore, the Department sought to draft the recommended conditions in a manner that still requires all offset obligations to be fulfilled, but would provide the Secretary with the discretion to allow certain limited activities to occur over a series of stages, prior to the retirement of all credits for the Project.

The Department notes that Malabar has proposed the creation of a local land-based offset area to be secured under a Biodiversity Stewardship Agreement, in response to requests by Muswellbrook Shire Council for local land-based biodiversity outcomes. Without the flexibility inherent in the recommended wording of condition B47, all offsets for the Project would need to be secured before any works could commence. This requirement could result in substantial delays to the commencement date for the Project and as such, Malabar may reconsider its proposed approach to biodiversity offsets and potentially pay into the Biodiversity Conservation Fund, to avoid delaying Project commencement.

While this alternative would remain permissible under relevant NSW legislation, the Department considers that it would represent a lost opportunity to secure a local land-based offset area and requests that the Commission reconsider the proposed changes.

- 4) In relation to biodiversity impacts, the Department supports the Commission's inclusion of Council as a relevant party to be consulted with in relation the Biodiversity Management Plan required under condition B51.

However, the Department notes that Muswellbrook Shire Council has no statutory role in the administration of the *Biodiversity Conservation Act 2016* (BC Act) or the determination of appropriate biodiversity credit obligations under NSW legislation. Consequently, the Department does not consider the proposed changes to condition B49 to be workable and notes that they could introduce unintended duplication of the regulatory responsibilities held by BCD in relation to the BC Act.

- 5) The Department raises substantial concerns with the enforceability and appropriateness of the proposed changes to the Rehabilitation Obligations in Table 8 of Condition B76, particularly as they relate to the rows entitled "All areas of the site affected by the development" and "Surface infrastructure of the development".

The Department's recommended wording for condition B76 has been informed by the Department and Resources Regulator's experience in this area over many decades and is based on contemporary standards for mining proposals throughout NSW, thereby allowing for consistent regulation and compliance enforcement across the State.

The Department appreciates that the Commission is seeking to ensure that Muswellbrook Shire Council is provided with an opportunity to be involved in discussions regarding the final rehabilitation and land use outcomes for the site, following mine closure.

The Department fully supports this and agrees that Council should be consulted on these matters and has worded the proposed conditions to emphasise the importance of consultation with Council during the development of the life of mine Rehabilitation Strategy, and as part detailed mine closure planning processes.

However, Council does not have a statutory role in the determination of appropriate rehabilitation reference sites or decommissioning requirements for mine sites under

relevant NSW policies or guidelines, the *Environmental Planning and Assessment Act 1979* (EP&A Act) or the *Mining Act 1992* (Mining Act). As the rehabilitation objectives in condition B76 must be met in accordance with the conditions imposed on a mining lease under the Mining Act, any requirement for Council's agreement to the achievement of the rehabilitation objectives listed in Table 8 could introduce unintended duplication of the regulatory responsibilities held by the Resources Regulator in relation to the Mining Act.

The Commission's proposed changes also place substantial weight on a Rehabilitation and Offset Management Plan prepared in 2013 for the Drayton Mine. The Department notes that Malabar has not committed to implement this plan, principally because the Project would result in amendments to several aspects of the Maxwell Infrastructure site, such that the existing plan would be inconsistent with the SSD consent.

To address this, the project description in the EIS and recommended development consent conditions ensure that all areas requiring rehabilitation under the former Drayton Mine approval are reflected in the current consent and would need to be rehabilitated to achieve appropriate and contemporary standards and rehabilitation objectives.

The Department understands that Council in particular, has expressed concerns about the appropriate rehabilitation of the former Drayton Mine and the relocation of a woodland corridor that runs northeast to the southwest across the site. As discussed in section 6.12 of the Department's Assessment Report, Malabar has proposed to progressively rehabilitate the historical mining and infrastructure areas at the Maxwell Infrastructure site over the Project life. Malabar would also progressively emplace CHPP reject material within existing approved voids, reshape emplacement areas where possible to integrate with the undulating landscape in the surrounding locality and retain the woodland biodiversity corridor. However, the woodland corridor would shift slightly eastward along the sides of the overburden emplacement that would have previously been rehabilitated back to pasture, to accommodate the approved Maxwell Solar Project.

Overall, the Department considers that the Project would deliver substantially improved rehabilitation, landform and land use outcomes for the Maxwell Infrastructure site and notes that these outcomes (including the timing of tree planting at the site) are identified in the recommended conditions and clearly depicted in Appendix 5. Further to this, the conditions also ensure that Council is consulted in the development of the Rehabilitation Strategy for the site and has the opportunity to contribute to the update of relevant management strategies and rehabilitation outcomes as part of this process.

Finally, the Department considers that the proposed changes in Table 8 could be open to misinterpretation and legal challenge. In particular, we note that the Secretary of the then NSW Department of Planning and Environment has been party to a court case and appeal in recent years over the interpretation of Rehabilitation Objectives imposed by the Planning Assessment Commission in 2014, in relation to another nearby coal mine.

In order to avoid the potential for misinterpretation of this condition, the Department's recommended wording for condition B79 seeks to recognise and reflect the principles elucidated in *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd (No 3) [2018] NSWLEC 193* and *Muswellbrook Shire Council v Hunter Valley Energy Pty Ltd [2019] NSWCA 216*.

In view of this case law, the Department encourages the Commission to reconsider the proposed changes to the rehabilitation obligations in the row entitled "All areas of the site affected by the development".

Notwithstanding the above, the Department is supportive of the additional clarity proposed by the Commission in relation to the rehabilitation objectives for Edderton Road, which have been inserted as a new row entitled "Existing Edderton Road alignment".

- 6) The Department acknowledges that the Commission's changes to condition B77 vary slightly from the standard wording imposed on other mining operations throughout NSW.

The Department notes that the intention of this condition is to provide clarity around the application of contemporary rehabilitation objectives as they relate to earthworks and landforms that have already been constructed under previous consents. Accordingly, the Department wishes to advise that the proposed changes are workable and enforceable.

- 7) The Department supports the Commission's intentions to ensure Malabar continues to regularly engage with the local community and Council about its proposed post-mining land uses and has sought to reflect this in the recommended conditions. However, it does not consider the proposed changes to condition B79 to be workable or enforceable.

Given the ongoing operation of the Council's Standing Committee on Industrial Closures is outside of the Applicant's control, the Department does not consider that the conditions can impose obligations that require the Applicant to participate in a land use planning process that Council may or may not choose to operate separately to the Project.

While the Applicant may choose to participate in Council's Standing Committee on Industrial Closures, this committee has no regulatory role in enforcing the terms of any development consent granted under the EP&A Act. As the terms of reference, objectives and obligations on participants in this committee are not regulated under any relevant State Government legislation, policies or guidelines, the Department does not believe that it would be able to enforce this condition, or ensure that Council's committee includes appropriate representation of the community or stakeholders affected by the Project.

Should the Commission wish to amend the recommended conditions, the Commission may wish to consider the following alternative wording and footnote for condition B79:

*B79(l). include a stakeholder engagement plan to guide rehabilitation and mine closure planning processes and outcomes, including the establishment of a post-mining working group generally as described in the EIS<sup>a</sup>*

**Note:** <sup>a</sup> *If adequately justified in the Rehabilitation Strategy, the Applicant may satisfy the requirement to establish a post-mining working group by joining and participating in another similar working group in the area, such as Council's Standing Committee on Industrial Closures.*

- 8) The Department appreciates the basis for the Commission's proposed changes to condition B88, but wishes to advise that these additional obligations are not required. The Thomas Mitchell Drive Contributions Study is a State Government led study that has been commissioned, and is enforced, by the Department.

Given that Council has no role in commissioning updates to this study, it would not incur any costs requiring reimbursement by the Applicant. The Department therefore recommends that the proposed changes to condition B88 be removed.

I trust the above comments are of assistance. If you have any questions, please feel free to contact me on 8217 2054 or by email at [matthew.sprott@planning.nsw.gov.au](mailto:matthew.sprott@planning.nsw.gov.au)

Yours sincerely



Matthew Sprott  
**Director**  
**Resource Assessments**