



Mr Steve Barry
Planning Director
NSW Independent Planning Commission

By email: [REDACTED]

14 July 2022

Dear Mr Barry

**Mount Pleasant Optimisation Project (SSD 10418)
Response to Questions from the Panel 11 July 2022**

I refer to your letter dated 11 July 2022 in relation to the Mount Pleasant Optimisation Project (SSD 10418). The following responses are provided to the Panel's questions.

(1) Does DPE consider that Ms Sims' and Dr Pritchard's characterisation of DPE's approach to the assessment is correct – in that they assert that DPE has compared what has been approved (but either has not, or cannot be carried out before the existing consent lapses) with what is proposed under the present application?

The Department considers that the above characterisation of its "approach to the assessment" is not correct.

The Department has assessed the project in accordance with relevant legislation and government policy for the reasons given below. In particular, as stated in the 'Statutory context' section of the Department's assessment report, this includes an assessment against:

- the objects found in section 1.3 of the *Environmental Planning and Assessment Act 1979* (EP&A Act);
- the matters listed under section 4.15(1) of the EP&A Act, including applicable environmental planning instruments and regulations; and
- where relevant, the provisions relating to voluntary surrender of development consent under section 4.63 of the EP&A Act (see answer to [2] below for further details).

The Department also seeks to clarify that while there is a limit in the existing conditions of consent (DA 92/97) allowing mining activities to occur only until 22 December 2026, the development consent does not 'lapse' at this time.

(2) If the answer to [1] is "Yes", to what extent has DPE relied on section 4.63(3)(a) of the Environmental Planning and Assessment Act 1979 in so assessing the present application?

While the answer to question [1] is no, the Department can confirm that it has relied on section 4.63 of the EP&A Act for part of its assessment of SSD 10418 (new development consent), due to the proposed surrender of DA92/97 (existing development consent).

Section 4.63(3) of the EP&A Act (voluntary surrender of development consent) states:

If a development consent is to be surrendered as a condition of a new development consent and the development to be authorised by that new development consent includes the continuation of any of the development authorised by the consent to be surrendered –

- (a) the consent authority is not required to re-assess the likely impact of the continued development to the extent that it could have been carried out but for the surrender of the consent, and*
- (b) the consent authority is not required to re-determine whether to authorise that continued development under the new development consent (or the manner in which it is to be carried out), and*
- (c) the consent authority may modify the manner in which that continued development is to be carried out for the purpose of the consolidation of the development consents applying to the land concerned.*

If the Project (or new development consent) is approved with the currently recommended conditions, MACH will surrender its existing development consent and all mining operations on the site will be regulated by a new single consolidated development consent, which will include some land previously regulated under the existing development consent.

In accordance with section 4.63(3) of the EP&A Act, the consent authority is not required to re-assess the impacts of the previously approved project. However, in this case, both the EIS and the Department's assessment for the new development consent (which includes parts of the continued development) has gone over and above this requirement and has considered all potential cumulative impacts, applying contemporary policy and technical guidelines, on key issues such as:

- amenity (noise, air quality, blasting and visual assessments);
- water resources of the project's mining operations; and
- other relevant matters (including final void and landform, traffic, social, economic, land use impacts (e.g. agricultural land) and greenhouse gas emissions).

While under section 4.63(3) of the EP&A Act the Department is not required to re-assess the approved impacts for the continued development (approved under the existing development consent), technically it would be difficult to separate impacts of the approved project from those proposed, and therefore a contemporary assessment of the total impact of the Project was undertaken, including elements of the approved project.

However, impacts in relation to biodiversity and heritage have not been assessed in this way. These have been assessed on an incremental basis as is allowed for under section 4.63(3) – that is, the impacts for biodiversity and heritage under the existing development consent (for the continued development) will not be further assessed, however there has been a contemporary assessment for the impacts related to biodiversity and heritage in the additional and new areas.

This is because the approved biodiversity and heritage impacts for the continued development are related to a specific area of surface disturbance and technically the assessment methodology allows for these impacts to be assessed discretely on an incremental impact basis.

- (3) To the extent that DPE has assessed only the difference between what is currently approved and what is proposed in the application, how does DPE respond to what the Panel understands to be Ms Sims' submission that that approach is not apt in the present case given the extent to which what is currently approved has not been fully carried out?**

The Department respectfully disagrees with Ms Sims' submission for the following reasons:

1. The Department relies on section 4.63(3) of the EP&A Act in pursuing the approach set out in question (2) above – that is, there is no requirement to re-assess any of the likely impacts of the continued development.
2. While not all of the approved biodiversity and heritage impacts have occurred across the development site yet, it would remain open to the proponent to carry out and complete such works and everything approved under the existing consent until 22 December 2026 but for the surrender of the existing development consent.
3. In relation to the biodiversity assessment, clause 6.8A of the *Biodiversity Conservation Regulation 2017* supports the Department's incremental approach in relation to biodiversity assessment for State significant development applications that include continued development. Clause 6.8A states that a biodiversity development assessment report (BDAR) is not required to include content relating to continued development (meaning development authorised by an existing development consent) if:
 - (a) the report is prepared in relation to State significant development that includes continued development, and
 - (b) the existing development consent for the continued development is proposed to be surrendered under the EP&A Act.
4. Further, the case of *Wollar Progress Association Incorporated v Wilpinjong Coal Pty Ltd [2018] NSWLEC 92* indicates in a similar situation (that is, where existing consents are being surrendered and there is to be continuing and new development) the Court's support for the DPE approach taken in assessing the new development consent. We particularly draw your attention to Sheahan J's comments in paragraphs 170-174 at this link: <https://www.caselaw.nsw.gov.au/decision/5b284780e4b0b9ab4020d00b> “

Other Comments

Final Voids

The Department notes that while our assessment report contains references to three final voids for comparative purposes, such a comparison is not material to the Department's assessment of whether the proposed larger, single final void is acceptable. The impacts associated with the proposed final void were re-assessed in accordance with contemporary policy and technical guidelines, and subject to review by the Department's independent expert Mr Hugh Middlemis.

The Department also acknowledges that there are some inconsistencies in the conditions of the existing consent (DA 92/97) and the Department's assessment report:

- The conditions of the existing consent refer to “final voids” (in plural) on four occasions and include an “Approved Surface Disturbance Plan” for both the North Pit and South Pit (which would require three final voids). This is reflected in the Department's assessment report which notes there are three final voids in the approved project.

- However, there is also a “Conceptual Final Landform” figure for 2026 in the existing consent that shows only one final void, even though it remains open to MACH to advance mining and associated surface disturbance within the North Pit area for commercial and/or operational reasons (as shown on Figure 3 of DA 92/97).

Coal Extraction

Regarding the total run-of-mine (ROM) coal estimate for the Project, MACH’s response to the Department’s Climate and Atmospheric Science Branch (dated 31 March 2022) clarified that 444 million tonnes (Mt) is the estimated total ROM production over the life-of-mine of the Mount Pleasant Operation (i.e. total for what can be extracted prior to commencing SSD 10418 combined with the proposed operations), whereas the total approximate ROM coal production over the life of SSD 10418 (i.e. 2023-2048) would be 406 Mt.

If you have any questions, please contact Steve O’Donoghue, Director Resource Assessments on [REDACTED]

Yours sincerely



Clay Preshaw
Executive Director
Energy, Resources and Industry Assessments