

Our Ref: ARB:BES:574

30 August 2022

BY EMAIL

Professor Alice Clark
Chair Mt Pleasant Optimisation
Independent Planning Commission
L 15, 135 King Street
Sydney NSW 2000

Dear Professor Clark and Commissioners

**Re: Mount Pleasant Optimisation Project (SSD 10418) – Legless Lizard, Hunter Valley
Delma**

We act for the Hunter Thoroughbred Breeders Association Inc.

We provide the following submissions on the implications of the information published on the Independent Planning Commission (**Commission**) website regarding the discovery of a new species of legless lizard on the site of the proposed Mt Pleasant optimisation project currently under assessment by the Commission.

Executive Summary

1. Based on the available information it will be difficult if not impossible for the Commission to carry out its assessment obligations under the *Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act)* and *State Environmental Planning Policy (Resources and Energy) 2021 (Resources SEPP)*.
2. The potential for a serious and irreversible threat to the new species and the scientific uncertainty regarding its status and the potential impacts of the mine enliven the precautionary principle. Application of that principle would weigh heavily against approval of the project.
3. No consideration has been paid in the assessment material to impacts on the new species consequent on works occurring in areas identified in the proponent's Biodiversity Development Assessment Report (**BDAR**) as "continuing development".
4. The failure to survey an area of undisturbed land that could not in practice be lawfully mined under the current consent create significant hurdles for the lawful assessment of this project. These legal issues are identified in previous submissions on behalf of our client to the Commission.

Background

5. On 12 August 2022, the Department of Planning and Environment (**Department**) advised the Commission that MACH Energy had recently brought to its attention that the legless lizard recorded on site was not in fact a striped legless lizard (*Delmar impar*) but is in fact a new species of legless lizard not previously identified. The new species, *Delmar vescolineata* (**Hunter Valley Delma**) was identified in a paper by Mahony, S. M., Cutajar, T., Rowley, J. J. L published in Zootaxa in July 2022 (**Mahony 2022**). The NSW Biodiversity and Conservation Division (**BCD**) has been advised that the Hunter Valley Delma has been nominated for listing as a threatened species under the *Commonwealth Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). It is unclear if emergency listing has been sought under the *Biodiversity Conservation Act 2016* (NSW) (**BC Act**).
6. Having regard to Mahony 2022 and the BDAR (Appendix E of the EIS) and its attachment B, the Mount Pleasant Optimisation Project Baseline Fauna Survey Report undertaken by Future Ecology (**Fauna Survey**) it is evident that:
 - a. The Hunter Valley Delma is similar to but distinguishable from *D. impar* by variations in markings. Prior recordings of *D. impar* in the Hunter region may in fact be recordings of Hunter Valley Delma.
 - b. *D. impar* is listed as vulnerable at the State and federal level. A species is listed as vulnerable under the BC Act if, in the opinion of the Scientific Committee it is facing a high risk of extinction in Australia in the medium-term future.
 - c. Whilst the geographical distribution and abundance of the Hunter Valley Delma is unknown, the core sightings and specimens are within the upper Hunter Valley within a triangle formed by Muswellbrook, Jerrys Plains and Ravensworth.
 - d. The project site comprises a significant portion of this "habitat triangle".
 - e. The Hunter Valley Delma are likely to have a highly restricted range and have to date been only identified within a geographically constrained area.
 - f. Significant further research is required to understand the conservation status of the Hunter Valley Delma.
 - g. The ecological survey documented in the Fauna Survey did not encompass large sections of the Project Site on the assumption that these areas were the subject of development authorised by an existing development consent ("continued development") which would be surrendered. Concerns with this approach are identified in the submission of Dr Pritchard to the Commission.

This information is set out in more detail in Annexure A.
7. Further, it is evident from the BCD response that it is anticipated that the Hunter Valley Delma will be listed under the EPBC Act and BC Act. The question is what category of listing ought to apply. At this point in time, it would be prudent to assume that:

- a. It would be listed at least as vulnerable (as this is the status of *D. impar*) which it has only recently been distinguished from – on the basis of morphology and DNA testing; and
- b. A higher listing is probable given current knowledge of the limited geographic area it has been identified to inhabit and the extent of approved or actual compatible land use within this constrained habitat.

Offsets and Irreversible Impacts

8. The Department has suggested that the, as yet unassessed, impact on this newly discovered species of the grant of approval for the project could be addressed by a condition of consent requiring the retirement of "applicable" biodiversity credits (such applicable credits to be determined within 2 years of the date of commencement of the mine). The BCD correspondence attached to the Department's letter further suggests that impacts to the Hunter Valley Delma could be minimised by the making of a financial contribution to the Saving our Species program. We note that:

- a. The conservation status of the Hunter Valley Delma has not yet been determined. It has been nominated for listing under the EPBC Act. It is unclear if emergency listing under the BC Act has been sought. A determination for provisional listing on an emergency basis can be made under the BC Act where a species:
 - i. *although not previously known to have existed in New South Wales, is believed on current knowledge to be native to New South Wales, or*
 - ii. *is subject to an immediate and significant threat of extinction, or*
 - iii. *was presumed to be extinct or extinct in the wild but has been rediscovered.* (s4.23)
- b. The NSW Biodiversity Offsets Policy for Major Projects 2014, which we understand to be BCD's current applicable policy, identifies 6 core principles. These include:
 - i. *Principle 2: Offset requirements should be based on a reliable and transparent assessment of losses and gains.*
 - ii. *Principle 3: Offsets must be targeted to the biodiversity values being lost or to higher conservation priorities. i.e. offsets must have a relationship to the biodiversity values being lost with "like for like" being the default position.*

Based on the available information:

- Biodiversity loss cannot reliably be estimated; and
 - The habitat requirement for any offset are unknown and given the geographical habitat restriction of the species, "like for like" offsets are currently unknown and may not be possible.
- c. Section 7.16 of the BC Act prohibits the grant of development consent (other than for state significant development) where a proposed development is likely to have

serious and irreversible impacts on biodiversity values. In the case of SSD, the Planning Minister is (a) required to take those impacts into consideration, and (b) is required to determine whether there are any additional and appropriate measures that will minimise those impacts if consent or approval is to be granted.

- d. Clause 6.7 of the *Biodiversity Conversation Regulation 2017* (NSW) provide the following principles for the determination of "serious and irreversible impacts on biodiversity values" (emphasis added):

(1) *This clause applies for the purposes of determining whether an impact on diversity values is a serious and irreversible impact for the purposes of the biodiversity offsets scheme.*

(2) *An impact is to be regarded as serious and irreversible if it is likely to contribute significantly to the risk of a threatened species or ecological community becoming extinct because—*

(a) *it will cause a further decline of the species or ecological community that is currently observed, estimated, inferred or reasonably suspected to be in a rapid rate of decline, or*

(b) *it will further reduce the population size of the species or ecological community that is currently observed, estimated, inferred or reasonably suspected to have a very small population size, or*

(c) *it is an impact on the habitat of the species or ecological community that is currently observed, estimated, inferred or reasonably suspected to have a very limited geographic distribution, or*

(d) *the impacted species or ecological community is unlikely to respond to measures to improve its habitat and vegetation integrity and therefore its members are not replaceable."*

While the population size of Hunter Valley Delma is not yet known, it is evident that it is currently observed, estimated, inferred or reasonably suspected to have a very limited geographic distribution.

- e. There is currently an inquiry into the Integrity of the NSW Biodiversity Offsets Scheme (Portfolio Committee No 7: Environment and Planning). Its terms of reference include an inquiry into "the use of offsets by the NSW Government for major projects and strategic approvals", specifically "the use of offsets for state significant development (SSD) and state significant infrastructure (SSI) major projects, including as part of strategic assessments (or biodiversity certifications) and the offsetting conditions that consent authorities apply to these types of projects". Multiple submissions to the Inquiry have identified that in instances of a species with a limited habitat, an offset cannot achieve biodiversity outcomes and a redline or avoid approach is necessary.
- f. The BC Act listing information for *D. impar* identifies that this species has been assigned to the "landscape species management stream" under the Saving our Species program on the basis that "This species is distributed across relatively large

areas and is subject to threatening processes that generally act at the landscape scale (e.g. habitat loss or degradation) rather than at distinct, definable locations". This classification may not be appropriate for the Hunter Valley Delma given its geographically restricted habitat. Similarly it is unclear how impacts to the Hunter Valley Delma could be minimised by a financial contribution to the program.

- g. The Australian Senate Committee on Environment and Communication is currently undertaking an inquiry into Australia's faunal extinction crisis.

Assessment of Biodiversity Impacts

9. Clause 2.20(1)(b) of Resources SEPP provides:

"(1) Before granting consent for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider whether or not the consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner, including conditions to ensure the following— ...

(b) that impacts on threatened species and biodiversity, are avoided, or are minimised to the greatest extent practicable,"

This establishes that (1) biodiversity impacts are critical to the Commission's consideration of whether or not to grant consent (2) the Commission's consideration should have regard to the hierarchy of avoid first then look to minimisation.

At this point in time, the impacts of the proposal on the Hunter Valley Delma are unassessed and minimisation measures cannot be identified

The Precautionary Principle

10. The objects of the EP&A Act include "to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment". The term "ecologically sustainable development" is defined by reference to s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW) as follows:

"ecologically sustainable development requires the effective integration of social, economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:

(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(emphasis added)

11. In the application of the precautionary principle, public and private decisions should be guided by:

- a. careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
 - b. an assessment of the risk-weighted consequences of various options,
12. This is an instance where, consistent with the precautionary principle, "a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent".¹
13. The precautionary principle mandates a cautious approach to decision making once two conditions are met:
- a. a threat of serious or irreversible environmental damage; and
 - b. scientific uncertainty as to the environmental damage.

"These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate".²

14. As identified in in *Telstra* "threats to the environment that should be addressed include direct and indirect threats, secondary and long-term threats and the incremental or cumulative impacts of multiple or repeated actions or decisions. Where threats may interact or be interrelated (for example where action against one threat may exacerbate another threat) they should not be addressed in isolation"³. *Telstra* also identifies the factors to be applied in assessing the seriousness or irreversibility of environmental damage. These factors include:
- (a) the spatial scale of the threat (eg local, regional, state wide, national, international);
 - (b) the magnitude of possible impacts, on both natural and human systems;
 - (c) the perceived value of the threatened environment;
 - (d) the temporal scale of possible impacts, in terms of both the timing and the longevity (or persistence) of the impacts;
 - (e) the complexity and connectivity of the possible impacts;
 - (f) the manageability of possible impacts, having regard to the availability of means and the acceptability of means;
 - (g) the level of public concern, and the rationality of and scientific or other evidentiary basis for the public concern; and
 - (h) the reversibility of the possible impacts and, if reversible, the time frame for reversing the impacts, and the difficulty and expense of reversing the impacts.

¹ *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council* (1994) 86 LGERA 143 [154] (Pearlman J).

² *Telstra Corporation Limited v Hornsby Shire Council* (2006) 146 LGERA 10 [128] ('*Telstra*').

³ *Ibid* [150].

15. In this instance there is:

- a. a threat of serious or irreversible environmental damage to a newly identified species with a restricted geographical habitat that may meet the threshold for serious and irreversible impacts on biodiversity values under the BC Act; and
- b. Scientific uncertainty as to the impacts of the proposed mine on that species

16. The precautionary principle mandates that where there is scientific uncertainty and there is a threat of serious or irreversible environmental damage, the proponent bears the burden of proving that the threat does not exist or is negligible. Absent that proof the decision-maker must assume that the threat of serious or irreversible environmental damage is no longer uncertain but is a reality.⁴ Once the two preconditions are established the precautionary principle requires that the Commission must assume that there will be serious or irreversible environmental damage.

Yours faithfully



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⁴ See *Telstra (n 2)* [130] and its application in *SHCAG Pty Ltd v Minister for Planning and Infrastructure and Boral Cement Limited* [2013] NSWLEC 1032.

Annexure A

Relevantly, Mahony 2022 and the Biodiversity Development Assessment Report (Appendix E of the EIS) (BDAR) and its attachment B, the Mount Pleasant Optimisation Project Baseline Fauna Survey Report undertaken by Future Ecology (**Fauna Survey**) identify the following:

1. *D. impar* is listed as "vulnerable" at both the NSW and commonwealth level. The BDAR identifies *D. impar* has low mobility, moving across short distances (20m in one day and up to 50m over several weeks). (BDAR p110 and p140)
2. Two living ("not collected") individuals, now identified as *Hunter Valley Delma*, were identified on or adjacent to the Project site in 2018 during survey. See *Figure 15: Striped Legless Lizard Species Polygon* BDAR page 62, *Figure 10: Threatened Species Listed Under the EPBC Act*, Fauna Survey, page 61 and discussion at page 56.
3. The Fauna Survey did not include survey of land identified as "Project Continuation Site. See *Figure 4a Fauna Survey Site*, Fauna Survey, p 20.
4. The identification *Hunter Valley Delma* as a separate species from *D. impar* was based on specimen and genetic sampling and the different species can be visually identified based on physical marking.
5. Mahony 2022 identifies:
 - a. "The range of *D. vescolineata* sp. nov. is restricted and heavily overlaps with major habitat modification including with major habitat modification including mining and grazing, with no parks or reserves in this distribution protecting the species' grassland habitat".
 - b. "The geographic distribution and population abundance of *D. vescolineata* sp. nov. is unknown, but the core sightings and specimens are within the upper Hunter Valley within a triangle formed by Muswellbrook, Jerrys Plains and Ravensworth.
 - c. "*Delma vescolineata* sp. nov. is known from four separate sites, three less than 25 km separate within the Hunter Valley, and a fourth from the Liverpool Plains. Two of these sites (Muswell- brook and Jerrys Plains) are represented by specimen and genetic data, while the third (Ravensworth) is represented by a genetic sample only".
6. The four sites are identified in Figure 5 of Mahoney 2022 extracted below.

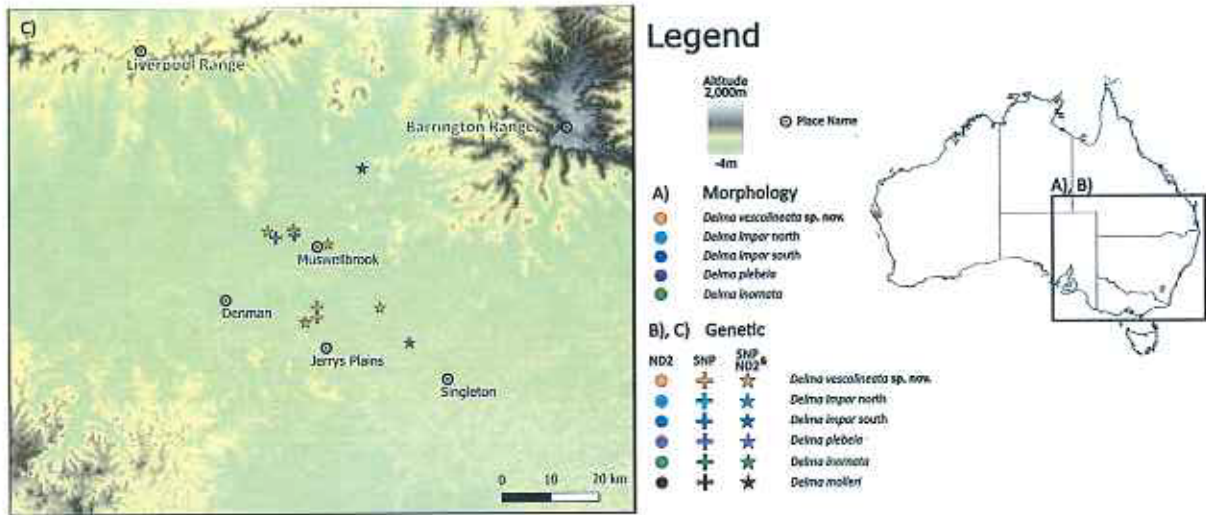


FIGURE 5. Distribution of samples analyzed for morphological (A) or molecular (B and C) comparisons.