



Environmental Defenders Office

Our Ref: S493

17 February 2023

Dr Peter Williams
Chair of McPhillamys Gold Project IPC Panel
Independent Planning Commission

By email only: ipcn@ipcn.nsw.gov.au

Copy to: submissions@ipcn.nsw.gov.au; [REDACTED]

Dear Dr Williams

McPhillamys Gold Project: Special Purpose Access Licence submission

1. We act for the Belubula Headwater Protection Group in the above matter. We have acted for the BHPG since 2019 and have a long background in relation to the water licencing barriers which have held up the assessment of this project. EDO also has extensive experience with respect to water resources law in New South Wales, and more broadly in the Murray Darling Basin.
2. Our client is concerned about water availability in the unregulated Belubula River above Carcoar Dam Water Source and downstream from that water source. We are instructed to make the following submission in response to the Project's proposed reliance on cl 10(p) of the *Water Management (General) Regulation 2018* (NSW) (**WM Regulation**). Clause 10(p) paves the way for a Special Purpose Access Licence (**SPAL**) to be issued for the purpose of the Project. It is our submission that cl 10(p) amounts to the proponent being written a 'blank cheque' for the take of water so as to get around the long history of water licencing issues. This is inconsistent with the *Water Management Act 2000* (NSW) (**WM Act**). It also risks water take, the environmental, social and economic impacts of which have not been assessed. It is our client's submission that the proposed water take carries with it an unacceptable impact and for this reason alone warrants the IPC to refuse development consent for the Project.

The Project's incidental water take

3. Water take in NSW must be accounted for by water access licences (**WALs**). This is regulated by the WM Act and the WM Regulation, which provide for water sharing plans that limit the volume of water that can be licenced from an identified catchment for consumptive uses such as irrigation and mining.
4. As the Commission is aware, the Department's assessment of the Project was significantly delayed because the catchment where the Project is proposed, the unregulated Belubula water source, has 264 megalitres (**ML**) of entitlement available for consumptive use, which

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is insufficient to account for the Project's incidental take of water.¹ The rest of the water in the unregulated part of the Belubula River acts as environmental water and fulfills the stock and domestic water needs of the local community.

5. According to the Department's estimations, the Project requires up to 2082.6ML of ongoing entitlement depending on the applicability of certain exemptions.² This is nearly ten times more water than the total entitlement that is available in the Belubula River (which is 264ML).

Water catchment context

6. The Lachlan catchment is the fourth largest river catchment in NSW, sourcing its water from the regulated Lachlan and Belubula Rivers and unregulated rivers and creeks, and groundwater.³ The unregulated Belubula River above Carcoar Dam Water Source is a sub catchment within the broader Lachlan catchment. The region has a very variable climate, and is extremely vulnerable to the interaction between over-extraction and climate change, and rainfall patterns that can lead to extreme droughts and severe floods.⁴
7. In September 2020 the then Department of Planning, Industry and Environment released its draft regional water strategy (**Lachlan Strategy**).⁵ The Lachlan Strategy noted that according to its updated climate data and hydrological modelling, times between droughts could shorten in the catchment.⁶ Further, that general security licence holders in the catchment may experience up to a 60% decrease in average water availability under long-term climate change projections.⁷
8. Before the project was proposed a 192ML water access licence (**WAL**) had been unutilised, and was thereby acting as de facto environmental water ensuring a base flow for the unregulated Belubula River above Carcoar Dam water source. That is because the licence was held by the Water Administration Ministerial Corporation. In our experience, water held by the Water Administration Ministerial Corporation is normally held for environmental purposes however, this WAL was surrendered to the Minister and subsequently purchased by the proponent.⁸
9. Our client considers that the use of water with respect to this WAL is likely to have a detrimental impact on the environment. The vulnerability of the catchment with respect to climate change, and specifically the vulnerability of the Belubula River, was acutely felt as

¹ See NSW Water Register <https://waterregister.watarnsw.com.au/water-register-frame>.

² Department of Industry and Environment, Letter to the Planning and Assessment Group dated 10 February 2021 Attachment A [1.1], <https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=PAE-9196073%2120210210T082338.765%20GMT>.

³ Department of Planning, Industry and Environment, Draft Lachlan Regional Water Strategy 2020, (Report, Sept 2020) https://www.dpie.nsw.gov.au/data/assets/pdf_file/0019/324514/lachlan-strategy.pdf, p 12.

⁴ Ibid, p 12.

⁵ Ibid.

⁶ Ibid p 14.

⁷ Ibid p 80.

⁸ This was reported on by the Sydney Morning Herald in May 2021

(<https://www.smh.com.au/environment/sustainability/goldminer-in-talks-to-convert-192-megalitre-water-licence-for-new-pit-20210509-p57q7n.html>).

recently as between 4 July 2019 and 20 June 2020 when the environmental flow provision, contained in the *Water Sharing Plan for the Belubula Rivers Water Sources 2012*, was suspended.⁹ This is the water source directly downstream of the water source where the Project is situated.

10. Specifically, clause 26 of the water sharing plan provided for an end of system flow target of 10MLs, for the environment. The purpose of these flow targets is to ensure that base flows, and thereby the health of rivers, are maintained in times of water scarcity.
11. The reasons for the suspension were to ensure that water is available for high priority water users and so that the nearby Newcrest Cadia gold mine would be able to continue operations. The Minister formed the view that attempting to fulfil environmental water provisions could potentially consume all of the water in the Carcoar Dam and that in order to preserve water for 'higher priority' users it was necessary to suspend the end of system flow provisions until water availability improved.¹⁰ We think the Minister's decision was inconsistent with the priority of water use stipulated in the Water Sharing Principles in the WM Act (discussed at [1616]). The WM Act clearly states that protection of the water source and its dependant ecosystems is the highest priority, in the context of water sharing.
12. We think this context highlights the vulnerability of water users and the environment in this catchment, which will be exacerbated by the Project. Particularly, given that the proposed Tailings Storage Facility (TSF) will be present in the landscape in perpetuity.

Special Purpose Access Licence

13. At the public hearing of the Project, the Department made a submission that "*when you talk about water impacts, there's, there's no exceedances, um, that don't comply with the applicant [sic] policy*" and "*so, I guess, in terms of the environmental impacts, the conclusion withdrawal for each step along the way is, is yes, this adequately complies with the relevant policy and the relevant criteria that's been set by government*".¹¹ We say these statements are incorrect because in order for the Project to go ahead the WM Regulation was amended on 1 April 2022¹² to clear any water licencing barriers for the Project.
14. EDO is not aware of any precedent for a mining company obtaining a SPAL. Upon review of current provisions enabling the grant of different types of SPALs, excluding the provision for the grant of the SPAL for the Project, it is notable that most are temporary measures for critical water needs.¹³ Whereas any SPAL obtained by the proponent for the Project would be required to account for take for the life of the TSF, being in perpetuity.

⁹ https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2019_2019-69.pdf.

¹⁰ <https://www.industry.nsw.gov.au/water/plans-programs/water-sharing-plans/suspensions/expired-or-repealed/belubula-regulated-rivers>.

¹¹ Public Hearing Day 3 Transcript (<https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/transcripts-and-material/2022/mcphillamys/230208--mcphillamys-gold-project--public-hearing-day-3-transcript.pdf>), p 84.

¹² <https://legislation.nsw.gov.au/view/pdf/asmade/sl-2022-126>.

¹³ *Water Management (General) Regulation 2018* (NSW), cl 10.

15. The proponent has provided vague assurances as to mitigation measures, which are to divert water back into the Belubula River through the use of pumps and pipelines¹⁴ and to purchase and retire water entitlements below Carcoar dam.¹⁵ Our client is of the view that these mitigation measures do not address the long term impacts, on the environment and other water users, of the Project's incidental water take. For example, the proponent has not explained how it could ensure that water is diverted into the Belubula River for the life of the TSF, being in perpetuity. Another critical flaw with the proponent's proposal is that entitlements that are purchased and retired in the water source below Carcoar dam would not have a positive effect on water availability in the unregulated Belubula River above Carcoar Dam water source because those entitlements are located downstream from Project.
16. On behalf of our client we submit that granting of a SPAL for the proponent's incidental water take, and thereby providing a 'pathway' for an unsustainable mine, is entirely inconsistent with the hydrological reality of the catchment and in any event inconsistent with the water management principles in the WM Act, including the principles in relation to water sharing at section 5(3) of the WM Act (**Water Sharing Principles**), that:
- a. sharing of water from a water source must protect the water source and its dependent ecosystems (WM Act, s 5(3)(a));
 - b. sharing of water from a water source must protect basic landholder rights (WM Act, s 5(3)(b)); and
 - c. sharing or extraction of water under any other right must not prejudice the principles set out in paragraphs (a) and (b) (WM Act, s 5(3)(c)).
17. It is the duty of all persons exercising functions under the WM Act to give priority to the Water Sharing Principles in the order that they are set out in that subsection, the order which is reflected in [15] (WM Act, s 9). Inconsistency with the WM Act is not in the public interest and the public interest is a relevant consideration, to the Commission's assessment task (discussed at [18.c]).

Commission's Assessment Task

18. As the Commission is aware, as the consent authority for the Project, your task is to evaluate the Project pursuant to section 4.15 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). On the basis of the above, our client submits that:
- a. The environmental, social and economic impacts of the Project, pertaining to water availability in the locality, are unacceptable because the Project's incidental take will be up to more than 10 times the total volume of entitlement available in the catchment (EP&A Act, s 4.15(1)(b)). This is particularly significant where:
 - i. the catchment is vulnerable to the impacts of climate change;
 - ii. the proposed mitigation fails to return the water to the relevant source;

¹⁴ Regis 1st Amendment Report, Appendix G - Surface Water, page 61 of the PDF format
<https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-9505%2120200908T223235.565%20GMT>.

¹⁵ See for example, DPE Water & NRAR Advice & Regis Responses (pp 22-23 of the PDF format)
<https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-9505%2120221114T221311.440%20GMT>.

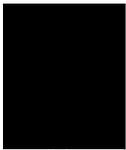
- iii. the incidental take will carry on indefinitely and at a time when we know that, however fast the world manages to ultimately reduce its greenhouse gas emissions, the climate will continue to warm for some time after that; and
 - iv. feedback loops may exacerbate the warming impacts that result directly from anthropogenic greenhouse gas emissions.
- b. For the same reason the site where the Project is proposed is not a suitable site for the development because, without the provision of a SPAL, there is insufficient water entitlement available in the catchment to account for the Project's incidental water take, which will continue in perpetuity (EP&A Act, s 4.15(1)(c)); and
 - c. The Project is not in the public interest because the Project's predicted water take is inconsistent with the Water Sharing Principles set out in the WM Act (EP&A Act, s 4.15(1)(e)).

19. If the Commission has any questions in relation to this letter, please contact the writer:

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Yours faithfully

Environmental Defenders Office



Nadja Zimmermann
Solicitor