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4 September 2024

Response to questions regarding the Eagleton Quarry Project (SSD-7332)

Dear Mr Barry

I refer to your request seeking a response to questions raised by the Commission Panel following our briefing meeting on Tuesday 20 August 2024 regarding the Sancrox Quarry Expansion Project (SSD-7293; the project). The Department's responses to each of the Commission Panel's questions are set out below.

Question 1: *We note that there are differences in what's before us compared to the application as made. Can the Department advise whether an amendment is required in order for the Panel to determine this matter – and if so, whether that can be communicated to the Applicant for its consideration?*

The Department considers that an amendment to the Application would be appropriate to formalise the proposed changes to the project that have occurred throughout the assessment process.

The Department notes that the Commission has delegated its functions of determining whether to approve or reject amendments under section 38 of the *Environmental Planning and Assessment Regulation 2021* (the Regulation) to officers of the Department of Planning, Housing and Infrastructure.

Accordingly, the Department will advise the Applicant that a formal request to amend the Application will need to be made to the Department in accordance with sections 37 and 38 of the Regulation before the Commission can proceed to determine the Application.

Question 2: *Please demonstrate how the Application meets each of the relevant requirements of SEPP 44, particularly:*

a) Clause 7 – Is the land potential koala habitat?

b) Clause 8 – Is the land core koala habitat?

The Department notes that SEPP 44 was in effect at the time that the Application was made and that, despite its replacement since 2019 by a series of SEPPs directed towards koala habitat protection, it remains the applicable koala habitat protection SEPP for the Application. As such, the Department has considered the relevant provisions of SEPP 44 in its assessment of the Application.

Regarding whether the site is potential koala habitat or core koala habitat, a number of koala studies have been undertaken on the site, which have been summarised in the various revisions to the Biodiversity Assessment Report for the project. All of these studies agree that the site, at minimum, meets the definition of potential koala habitat, containing native vegetation with at least fifteen percent of the canopy comprising koala feed trees.

There is however discrepancy between the conclusions of these studies as to whether or not the site meets the definition of core koala habitat; that is, having a resident breeding population of koalas. These studies and their findings in this regard are outlined in **Table 1**.

Table 1: Summary of koala studies at the Sancrox Quarry site

Study	Potential or core koala habitat
Greater Sancrox Ecological Assessment (Biolink 2011)	Core koala habitat
Preliminary Koala assessment for the proposed expansion of the Sancrox gravel quarry near Port Macquarie (Ecotone 2013)	Core koala habitat
Sancrox Quarry Expansion Project Biodiversity Assessment Report v2.1 (SLR 2019)	Potential koala habitat
Sancrox Quarry Expansion Project Koala Survey and Assessment (Biolink/SLR 2020)	Core koala habitat
Koala Management Issues Report (Biolink 2023)	Not specified

Given this inconsistency in conclusions regarding whether or not the site constitutes core koala habitat and the clear evidence across these studies that the site does contain resident koalas, the Department considers it appropriate to adopt the conservative and precautionary view that the site constitutes core koala habitat within the definition of SEPP 44. Given this view, the Department has recommended conditions requiring the Applicant to include appropriate koala population management measures in the Biodiversity and Rehabilitation Management Plan for the project.

c) Clause 9 – Can development consent be granted in relation to core koala habitat?

Question 3: *If the Department is of the view that clause 9 of SEPP 44 applies to the Application, has a plan of management in accordance with Part 3 of SEPP 44 been prepared? If not, how can the Commission grant consent to the Application without satisfaction of the precondition in clause 9 of SEPP 44?*

Clause 9 of SEPP 44 provides that before a *council* may grant consent to a development application on land that is core koala habitat, a koala plan of management must be prepared and the development must be consistent with that plan.

The Department considers that this jurisdictional pre-requisite only applies to a *council* before it can grant consent for development on land that is core koala habitat.

This is the Department's view as:

- clause 9 of SEPP 44 expressly refers to a 'council' rather than a 'consent authority' more broadly, and
- in the Department's view, a literal approach can be taken to the interpretation of 'council' in clause 9 of SEPP 44, as there is no ambiguity that must be resolved in this context, and
- the definition of 'council' is relevantly confined to "the council of an area and includes an administrator..." (see section 1.4 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and the Dictionary of the *Local Government Act 1993*). Therefore, it does not extend to the Commission for the purposes of clause 9 of SEPP 44.

It is therefore the Department's view that the Commission is not bound by the jurisdictional pre-requisite in clause 9 of SEPP 44 before determining the Application.

The Department further considers that it is open to the Commission to impose a post-approval condition or set of conditions which seek to mitigate the impacts of the development on koalas on the site, and that the Commission is not required to ensure that a koala plan of management is prepared prior to consent being granted on land that is 'core koala habitat'.

The Department has formed this view as a similar approach was contemplated in the case of *Upper Mooki Landcare Inc v Shenhua Watermark Coal Pty Ltd and Minister for Planning* [2016] NSWLEC 6 (Mooki) where the former Planning Assessment Commission was the consent authority considering a DA to which SEPP 44 applied. In Mooki, the Court found that a post-approval condition which required a plan of management (amongst other things) was valid to deal with the uncertainty and risk concerning the impacts on koalas and the measures to mitigate them.

The Department has also recommended a number of conditions to mitigate the project's impacts on koalas, including the preparation of a Biodiversity and Rehabilitation Management Plan that includes appropriate koala population management measures. As an alternative, if the Commission considers it appropriate, a condition could potentially be imposed to require the approval of a separate koala plan of management.

Question 4: *Are there any relevant standards to guide progressive rehabilitation as proposed by recommended condition B51?*

While the proposed development is defined as an extractive industry rather than a mine, the general principles and guidelines for mine rehabilitation are also relevant to extractive industry

developments. The key guidance material relating to mine (and quarry) closure and rehabilitation include:

- Mine Rehabilitation – Leading Practice Sustainable Development Program for the Mining Industry (Commonwealth, 2016)
- Mine Closure– Leading Practice Sustainable Development Program for the Mining Industry (Commonwealth, 2016)
- Strategic Framework for Mine Closure (ANZMEC/MCA, 2000)

The Department notes that these guidelines are referenced in the Secretary’s Environmental Assessment Requirements for the project and that the closure and rehabilitation strategy included in the EIS was prepared with regard to these guidelines.

The Department’s recommended conditions require the Biodiversity and Rehabilitation Management Plan to include a detailed description of the measures to be implemented to progressively rehabilitate the site. In approving this plan the Department would consider the appropriateness of the proposed progressive rehabilitation measures against the above-mentioned guidelines.

Question 5: *What, if any, specific measures does the Department propose for the protection of the potentially culturally modified tree referenced on pg 67 of the Department’s Assessment Report?*

The Applicant has committed to avoiding impacts to the potentially culturally modified tree in addition to implementing the following protection measures:

- identifying the location of the tree on all construction and extraction plans;
- erecting temporary fencing to protect the tree during extraction;
- implementing cultural awareness training for employees, including legal obligations regarding Aboriginal cultural heritage items, the location of any archaeological sites (including the potentially culturally modified tree) and instructions that these sites must not be disturbed.

The Department’s recommended conditions require the Applicant to implement these commitments.

The Department has also recommended a condition that requires the Applicant to ensure that the development does not cause any direct or indirect impact to any identified Aboriginal object located outside the approved disturbance areas.

Question 6: *Has specific Aboriginal cultural heritage advice informed the Department’s assessment of the potentially culturally modified tree?*

The Environmental Impact Statement (EIS) for the application included an Aboriginal Cultural Heritage Assessment prepared in accordance with the Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW (DECCW, 2011). This assessment indicated that the

potentially culturally modified tree would be within the originally proposed disturbance area and therefore would be impacted by the development.

The Department requested advice on this matter from the (then) Biodiversity and Conservation Division (BCD) within the Department of Planning, Industry and Environment. BCD provided advice on 11 December 2019, which recommended that the development footprint be revised to avoid impacts to the potentially culturally modified tree such that it could be preserved *in-situ*.

In the Response to Submissions Report the Applicant revised the proposed disturbance footprint to avoid impacts to the potentially culturally modified tree and committed to implementing the above-mentioned measures to protect the tree.

The Department requested advice on the revised proposal from Heritage NSW (to which the regulation of Aboriginal Cultural Heritage had been transferred from BCD since submission of the EIS). Heritage NSW provided advice to the Department on 9 June 2021, which stated that the Applicant's proposed mitigation measures were considered to provide adequate management of Aboriginal Cultural Heritage values and that previous recommendations made by BCD had been satisfactorily addressed.

The Department has relied on this advice from BCD and Heritage NSW to inform its assessment of the potentially culturally modified tree.

Conclusion

Thank you for the opportunity to provide this additional information to support the Commission Panel's deliberations regarding the project.

If you wish to discuss the matter further, please contact Jessie Evans on [REDACTED] or [REDACTED]

Yours sincerely

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Jessie Evans
Director
Energy and Resource Assessments