



Environmental Defenders Office

Submission on Vickery Mine Extension Modification 1 (SSD-7480-Mod-1)

19 September 2024

1. We are instructed by the Maules Creek Coal Community Council Inc in respect of the Vickery Mine Extension Modification 1 (**Mod 1**). Our client is a community group formed in 2010 to address the concerns of residents regarding the impacts of coal and gas developments on surrounding farmlands.
2. Our client has instructed us to prepare this submission on their behalf. Given the short exhibition period, this submission does not address all our client's concerns regarding the proposed modifications in Mod 1. This submission relates to three key aspects, being the permanent dumping of tyres in the overburden emplacement area, the construction and use of water pipelines and traffic safety concerns.
3. Based on the publicly available information on Mod 1, our client is deeply concerned that the environmental assessment for Mod 1, and as such the environmental risks posed, have not yet been considered by Department in the exercise of its functions, and submits that the Department should refuse Mod 1.

Waste tyre dumping

4. In Mod 1, the Applicant proposes to dump its end-of-life heavy mining plant tyres (**Waste Tyres**). However, the Modification Report (nor the previous environmental assessment for the Vickery Mine Extension SSD SSD-7480) provides **no** detail on:
 - a. the expected quantity of Waste Tyres;
 - b. the environmental impact of the disposal of Waste Tyres in the waste rock emplacement areas;
 - c. how the burial of Waste Tyres will impact long-term rehabilitation, in circumstances where a proposal by any other kind of industry to manage waste tyres by permanently burying them on site would be clearly rejected by the NSW Environment Protection Authority (**EPA**);
 - d. whether the extra weight of the emplacement area on top of the underground aquifers will cause impaction issues with the aquifer, a critical resource for agricultural production in the region; or
 - e. what audit system or Quality Assurance system is proposed to be implemented to ensure that only Waste Tyres from exclusively and permanently site-based vehicles

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will be permitted to be dumped, to avoid a circumstance where vehicles are brought on-site for the purpose of disposing of their Waste Tyres.

5. The proposal to dump Waste Tyres in the waste rock emplacement areas is likely to cause material harm to the environment, including (amongst other things) pollution of groundwater through leaching, landform instability due to mass and materials of Waste Tyres, and soil contamination.
6. It is for this reason that tyres are considered a special category of waste under the *Protection of the Environment Operations Act 1997* (**POEO Act**), along with asbestos, and clinical waste, due to their potential impacts. According to the EPA's *Waste Classification Guidelines*:
*'Special waste' is a class of waste that has unique regulatory requirements. The potential environmental impacts of special waste need to be managed to minimise the risk of harm to the environment and human health.'*¹
7. This absence of detail, on an aspect of the development that is otherwise unlawful under the POEO Act, clearly demonstrates that the Applicant has not provided sufficient information to enable the Department to evaluate the impacts on the environment in accordance with its statutory obligations under the *Environmental Planning Assessment Act 1979* (NSW) (**EP&A Act**).
8. Schedule 2, Part A Condition A1 of the development consent for SSD-7480 provides that "the Applicant must implement all reasonable and feasible measures to prevent, and if prevention is not reasonable and feasible, minimise, any material harm to the environment that may result from the construction and operation of the development, and any rehabilitation required under this consent." Condition B92 of the development consent provides that the Applicant must (a) take all reasonable steps to minimise the waste generated by the development (noting that "minimise" is defined to mean implementing all reasonable and feasible mitigation measures to reduce the impacts of the development) and (c) dispose of all waste at appropriately licensed waste facilities.
9. The burial of Waste Tyres in overburden is not in accordance with the implementation of reasonable and feasible measures to minimise waste, nor is it an appropriate method of disposal.
10. Allowing for the burial of Waste Tyres on-site at Whitehaven premises (or anywhere) without having adequately considered the potential environmental and other impacts would be an abrogation of the Department's responsibility as a consent authority and regulator, and undermines the purpose of the EP&A Act.²

¹ EPA, Nov 2014, *Waste Classification Guidelines*, p 1.

² In particular, the object "to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources", set out at s 1.3(a) of the EP&A Act.

11. For instance, on-site burial of Waste Tyres within the waste rock emplacement areas is not managing that waste in accordance with the *Waste Avoidance and Resource Recovery Act 2001* (**Waste Avoidance Act**). The waste hierarchy, one of the objects of the Waste Avoidance Act, provides that resource recovery, including recycling, is to be preferred over waste disposal. Waste disposal, where it does occur, is to minimise environmental harm. In circumstances where the recycling of Waste Tyres is available, and no assessment has been taken as to the environmental impacts of the on-site disposal of Waste Tyres, this practice is demonstrably not in accordance with the Waste Avoidance Act.

Disposal of Waste Tyres in emplacement areas is contrary to the principles of Ecologically Sustainable Development, specifically the Polluter Pays Principle

12. The EP&A Act requires that the consent authority consider principles of ecologically sustainable development in its prior environmental assessment of a development application.³ These include the precautionary principle, conservation of biological diversity and ecological integrity, and the polluter pays principle.⁴
13. Under the polluter pays principle, a polluter should bear the costs of preventing, controlling and mitigating damage to the environment,⁵ involving the ‘internalisation of negative externalities.’⁶ This process determines the burdens that a ‘reasonable person’ in the position of the developer would adopt, in properly assessing the costs and benefits of the development and in internalising negative externalities, to avoid a ‘foreseeable risk of harm’ to the environment.⁷
14. Section 6(2)(d)(i) of the *Protection of the Environment Administration Act 1991* states that **‘those who generate pollution and waste should bear the cost of containment, avoidance or abatement,’**⁸ further entrenching the polluter pays principle in legislation.⁹ The polluter can pay for the costs of its conduct by ‘cleaning up the pollution’ and ‘restoring the environment as far as practicable’ to its prior condition.¹⁰ This is one way of effectively internalising the negative externalities of the environmental costs of pollution.¹¹
15. The POEO Act requires that waste be transported to a place that can lawfully accept it, and this includes waste-tyres.¹² However, in Mod 1, Waste Tyre dumping on-site would amount to the Department providing concessions to the Applicant which other industries and

³ *Environmental Planning and Assessment Act 1979* (NSW), s 4.15

⁴ *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34, [71].

⁵ Justice Brian Preston, Sustainable Development Law in the Courts: The Polluter Pays Principle, The 16th Commonwealth Law Conference, Hong Kong (7 April 2009), Land and Environment Court of NSW, D6: Environmental Law, p 3.

⁶ *JK Williams Staff Pty Ltd v Sydney Water Corporation* [2021] NSWLEC 23 [235].

⁷ Ibid.

⁸ *Protection of the Environment Administration Act 1991*, s 6(2)(d)(i).

⁹ Justice Brian Preston (n 5) p 3.

¹⁰ *Environment Protection Authority v Waste Recycling and Processing Corporation* [2006] NSWLEC 430, [230].

¹¹ Ibid.

¹² *Protection of the Environment Operations Act 1997* (NSW), s 143.

individuals are not entitled to. Any developer proposing to dump its waste tyres should be required to pay at least the equivalent amount of waste levy that the EPA imposes upon other industries and individuals.¹³

16. A reasonable person in the position of the developer may well, in avoiding causing the ‘negative externality’ of environmental costs of waste-tyre disposal, adopt the option of recycling tyres at a nearby waste-tyre recycling facility.¹⁴ Adoption of this option would avoid the ‘foreseeable risk’ of material harm to the environment caused by the waste-tyres, as discussed above.¹⁵ This is consistent with the polluter pays principle of ecological sustainability.¹⁶

Waste tyre disposal on-site is providing concessions to the developer which other industries and individuals are not entitled to

17. The **National Waste Policy Action Plan**, prepared by Commonwealth, state and territory governments and the Australian Local Government Association in 2019, sets a target (Target 3 of the Action Plan) a goal of an 80% average recovery rate across all waste streams by 2030, including end-of-life tyres. Tyre Stewardship Australia Inc, adopted this target across the total of end-of-life tyres generated by 2030, including passenger car, truck and off-the-road (**OTR**) end-of-life tyres.
18. Our client refers the Department to the 2023 report, “*Tipping the Balance - The business case for a circular economy for Australia’s off-the-road tyres, conveyors, and tracks*” (**Tipping the balance report**), by Tyre Stewardship Australia Inc. This report identifies “**that without increasing the contribution from the OTR sector, the Scheme will not achieve the 80% recovery target set in the National Waste Policy Action Plan.**”¹⁷
19. In NSW, the mining sector accounts for over 85% of all OTR waste tyre generation.¹⁸ The mining industry has less than 2% of resource recovery of OTR waste tyres. Tyre Stewardship Australia Inc has identified “Hunter and North NSW”, which includes “coal mines around Narrabri in the North West region (i.e. 300km connected by the Kamilaroi and New England Highways)” as a **priority catchment of OTR tyres**, being one of the top

¹³ State of NSW and the NSW Environment Protection Authority, 2024. Waste Levy Guidelines, NSW Environment Protection Authority < <https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/wasteregulation/23p4486-waste-levy-guidelines.pdf> >

¹⁴ *JK Williams Staff Pty Ltd v Sydney Water Corporation* (n 9) [235].

¹⁵ *Ibid* [236].

¹⁶ *Environmental Planning and Assessment Act 1979* (NSW), s 4.15

¹⁷ Tyre Stewardship Australia Inc, *Tipping the Balance – the business case The business case for a circular economy for Australia’s off-the-road tyres, conveyors, and tracks* (2023) <https://www.tyrestewardship.org.au/reports-facts-figures/tipping-the-balance-research-report-into-off-the-road-tyres-conveyors-and-tracks/>

¹⁸ *Tipping the balance report*, p 22.

3 catchments across Australia for OTR waste tyre generation.¹⁹ The cluster of mines north of Gunnedah is identified on the map.²⁰

20. If this Modification to dispose of Waste Tyres is approved, the Department is effectively permitting a “no cost of burial”²¹ by lifting it out of the usual requirement for appropriate disposal that any other sector, including small businesses, are held accountable to. Our client considers this would be overwhelmingly contrary to community standards and expectations of the Department’s role in permitting such an exemption.
21. If approved, this development would effectively provide Whitehaven with a concession not available to any other individual or sector that uses tyres (i.e. Whitehaven would not have to manage the burial to the same rules as managed landfills and they would not have to pay a levy to dispose of the Waste Tyres). The “‘no cost’ on-site disposal”²² by way of burial is created by the Department by way of permitting Modifications such as Mod 1.
22. The Applicant arguably has the means to fund more appropriate measures of waste resource recovery with respect to Waste Tyres, given Whitehaven’s profit forecast to investors relating to the extraction and sale of coal from the Vickery mine.

Applicant’s dismissal of recycling alternatives should be rejected

23. The Applicant’s concern that transporting the Waste Tyres to appropriate recycling facilities “would result in additional heavy vehicles on public roads”, needs to be considered in the factual context that heavy vehicles have been used on public roads to transport the tyres to the mine in the first place. In circumstances where the development was granted on the basis that it was acceptable to use heavy vehicles on public roads to transport tyres to the mine and coal away from the mine, our client expects that the consent authority would have no such trouble acknowledging the use of heavy vehicles on public roads to transport the tyres *away* from the site to an appropriate recycling facility.
24. Whitehaven Coal owns four currently operational mine sites in the local area of the Vickery coal mine. The cumulative impact of such pollution from Waste Tyres, the quantity of which has not been provided as part of the environmental assessment, multiplied by the number of years for each of mine life at each of the four mines, has not been considered.
25. In circumstances where what our client expects would be an extraordinary number of Waste Tyres will be generated across the life of the mine (although noting the absence of any forecasting of quantity and attendant environmental impact assessment in the Modification Report), our client strongly urges the Department and the EPA to **require** Whitehaven to implement its own waste tyre recycling facility.

¹⁹ Tipping the balance report, pp 126, 136-143.

²⁰ Tipping the balance report, p 136.

²¹ Tipping the balance report, p 139.

²² Tipping the balance report, p 139.

26. The Tyre Stewardship Australia Inc has stated, in respect of the North NSW and Hunter catchment, that the large quantity of OTR tyres “may be sufficient material to attract new investment in tyre collection and processing infrastructure (as set out in Chapter 4), or expand an existing facility.”²³ This investment simply will not happen if the Department permits on-site burial, the most harmful option available to the Applicant.
27. Given the above, our client submits that the recycling of Waste Tyres *is* an appropriate and viable alternative and requests the Department to refuse the Modification.

Pipeline infrastructure pumping groundwater from private properties

28. Whitehaven Coal proposes that groundwater would be extracted by private landholders from the existing bores and stored within their existing dams before it would be pumped by the landholders to a transfer point near the dams. Whitehaven would construct transfer infrastructure (e.g. holding tanks, pumps and generators) at the transfer points to transfer the water into the proposed pipelines.²⁴
29. On the Ovenden property, WALs 20162 (128 ML), 12608 (416 ML) and 12688 (222 ML) are drawing from Upper Namoi Zone 4, Namoi Valley (Keepit Dam to Gin's Leap) Groundwater Source. On the Mirrabinda property, WAL 12696 is also drawing on the Upper Namoi Zone 4, Namoi Valley (Keepit Dam to Gin's Leap) Groundwater Source.
30. In 2021, WaterNSW listed this specific water source, Upper Namoi Zone 4, Namoi Valley (Keepit Dam to Gin's Leap) Groundwater Source, as an “at-risk” water source, **because they are overallocated or at risk of overallocation.**
31. It is incorrect for the Applicant to suggest that the environmental impacts of pumping water from the sites for use in a pipeline system servicing coal mines in the region, has “already been assessed “and “therefore the impact of extraction of the groundwater is already authorised.”²⁵ This is in circumstances where:
 - a. Each of the works approvals have been for the purpose of irrigation for agriculture and primary production. Purchasing the landholder’s entitlements which are for water use for irrigation – not mining – may amount to a breach of the works approval;
 - b. The works approvals have been issued for irrigation on specific locations identified by Lot and DP numbers. While little detail is given, it appears that the landowners will no longer be accessing and using the water. Where this use is proposed to change, the identified parcels of land will no longer be receiving the water and it will be pumped away from the relevant properties. This will result in an overall deficit to the existing agricultural properties, and the Mod 1 report provides no

²³ Tipping the balance, p 138.

²⁴ Whitehaven Coal, SSD-7480-Mod-1 Modification Report, 15.

²⁵ Whitehaven Coal, SSD-7480-Mod-1 Modification Report, 60.

consideration of the environmental impact this may eventually have on the aquifer through its interaction with the subsoil that is no longer being irrigated;

- c. The Mod 1 report provides no consideration of the loss of the use of land for agricultural production, or the environmental or social impacts of that loss of productive agricultural land;
- d. The mixing of water (groundwater, harvestable rights and overland flow) in the water storage dams , poses significant concern as to the monitoring of water take in circumstances where we are instructed that there is no bore extraction limit on the Mirrabinda property;
- e. The Applicant justifies the pipeline from private bores as a benefit by reducing *“reliance of water extraction from the Namoi River and sourcing water from the existing dams on the Mirrabinda and Ovenden properties. The Modification would improve water security for the Project in the event of adverse weather conditions (such as prolonged drought).”*²⁶ These are bare statements with no evidence supporting them and fail to address the impact of the use on other groundwater users in times of drought; and
- f. The cumulative impacts of taking from these water sources from this project and other projects, including historical mining, current mining, and ‘reasonably foreseeable’ mining, have not been assessed. There have been significant issues with the existing groundwater model for the mines in the area and groundwater pressures on both the environment and neighbouring water users.

Additional trucks should not be permitted without first mandating the Kamilaroi Highway overpass

- 32. Whitehaven Coal’s Tarrawonga coal mine was approved on the basis that they would construct an overpass at the Kamilaroi Highway Overpass. Our client refers the Department to the commitments made by Whitehaven Coal in the environmental assessment of Tarrawonga with respect to the overpass, and the subsequent modifications. The purpose of the overpass was to protect safety of road users on public roads. Yet Whitehaven Coal has failed to construct the overpass.
- 33. In Mod 1, Whitehaven Coal now seeks to extend traffic hours for trucking coal until rail infrastructure is constructed. Whitehaven Coal has so far failed to address existing safety issues with Tarrawonga and should not be permitted to have even more trucks as a result of Vickery Mod 1 without first constructing the required overpass. Our client submits that the construction of the overpass must be imposed as a pre-condition of this Modification.

²⁶ Whitehaven Coal, SSD-7480-Mod-1 Modification Report, 13.

34. The Department must consider these matters as part of discharging its statutory obligations to evaluate the proposal under the EP&A Act. In the absence of adequate environmental assessment of the above impacts of the Modification, the Department should require the Applicant to provide adequate environmental impact assessment to enable it to evaluate the proposal, or otherwise refuse the Modification application.

Yours sincerely

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