

SECTION 2

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2 PROJECT APPROVAL FRAMEWORK

2.1 Introduction

This section provides an assessment of the proposed development against relevant environmental planning controls applying to the lands the subject of this application. The EP&A Act 1979 is the principal form of legislation that governs, controls and guides land use (planning and development) within New South Wales. In August 2005 the EP&A Act was amended by the addition of the newly proclaimed provisions of Part 3A.

2.2 Development Approval Process

2.2.1 Environmental Planning and Assessment Act, 1979

The project involves the collection, transportation and rehabilitation of chitter, tailings and coal emplacements, collectively referred to as carbonaceous materials, from the Aberdare East tailings dam, the former Neath washery site and an area referred to as Richmond Main East. The collection of the carbonaceous materials and rehabilitation is defined as coal mining. Coal mining is identified within State Environmental Planning Policy (Major Projects) 2005 as a Schedule 1 development and accordingly the HEM project is classified as a “major project” under Part 3A (Section 75B) of the EP&A Act, 1979.

2.2.2 Permissible Development

The zoning of the Aberdare East and Neath sites is 1(a) Rural “A” and the zoning of the Richmond Main East site is 1(a) Rural “A” and part 5(b) Special Uses (Railways) zone pursuant to the provisions of the Cessnock Local Environment Plan 1989. It is noted that in relation to the Richmond Main East site, the 5 (b) Special Uses (Railway) zone has been incorrectly mapped and does not correspond with the true alignment of the former railway. The existing railway embankment is located immediately north of the Richmond Main East resource. Clause 55 of the Cessnock Local Environment Plan 1989 does permit the consent authority to consider the 5(b) Special Uses (Railway) zone as if it was zoned 1(a) Rural “A”.

Coal mining is a permissible form of development given the provisions Cessnock Local Environment Plan 1989 in 1(a) Rural “A” zone.

2.2.3 Major Projects Application – Environmental Assessment Requirements

A Major Projects Application and a Preliminary Assessment were lodged by the proponent under Section 75E of the EP&A Act, 1979 for the HEM coal project with DoP on 16 October 2006. On 22 October 2006 the DoP issued the requirements for the project pursuant to Section 75F of the EP&A Act, 1979 and are contained in **Appendix 2 of Volume 1**.

The major issues identified via the PFM process and confirmed in the DGRs are:

- Acoustics;
- Air quality;
- Cumulative impacts;
- Ecology;
- Proposed rehabilitation and final landform management;
- Socio-economic impacts;
- Soils;
- Surface and ground water; and
- Road infrastructure and traffic.

The Part 3A – Major Projects Application will be assessed in accordance with the provisions of the EP&A Act, 1979 and EP&A Regs, 2000 and determined by the Minister of Planning.

2.2.4 Legislation Which Does Not Apply

If the HEM coal project is granted approval under Part 3A of the EP&A Act 1979, the following approvals legislation, which might otherwise have been relevant, will not be required for the project, these being:

- Fisheries Management Act, 1994 – Permit for works or structures in a waterway;
- Heritage Act 1977 – Disturbance to an item listed on a State Heritage Register, Interim Heritage Order or Excavation Permit; and
- National Parks and Wildlife Act 1974 – Preliminary Research Permits - Consent to destroy relics; and
- The Rivers and Foreshores Improvement Act 1948.

2.2.5 Applicable Legislation Consistently Applied

If the HEM coal project is granted approval under Part 3A of the EP&A Act 1979, the following approvals required for the project must not be refused by the relevant approval authority and be consistent with the HEM coal project approval terms, these being:

- Mining Act 1992 – Mining Lease;
- Roads Act 1993 – Permit to impact public roads;
- Mine Subsidence Compensation Act 1961 – Development within Mine Subsidence District;
- Water Act 1912;
- Water Management Act 2000; and

- Protection of the Environment Operations Act 1997 – Environment Protection License.

2.3 Acts Relating to Water and Licensing

2.3.1 Water Act 1912

The *Water Act 1912* outlines provisions for the management of water resources throughout NSW. However, under the new *Water Management Act 2000*, most of the provisions of the *Water Act* have been repealed with the exception of some provisions relating to licensing and approvals.

To meet the legislative requirements of the *Water Management Act 2000*, all rivers and aquifers in New South Wales must be subject to a legal water sharing plan, Macro Water Plans are being prepared for the Hunter Valley (Wallis Creek, Swamp Creek and Black Creek included) and are expected to be released in July 2007. The water sharing plans acknowledge there needs to be a minimum level of flow to meet fundamental environmental needs.

Following implementation of the Macro Water Plans, the *Water Act* and its licensing provisions will be repealed. Until that time, the licensing requirements under the *Water Act 1912* still apply for those areas not covered by a Water Sharing Plan such as the Black, Swamp and Wallis Creek Catchments.

Licensing under the *Water Act* falls under Part 2 –Water Rights and Works or Part 5 – Artesian Wells.

All land owners and land tenures are entitled to capture up to 10% of the average regional rainfall runoff from their property without obtaining a licence referred to as the Maximum Harvestable Rights Capacity (MHRC). However dams for the capture, containment and recirculation of drainage and/or effluent are not considered to form a component of the MHRC (DNR 2006a).

Generally all water sourced for the project will be from the Hunter Water Corporation public water mains by licensed contractors. No harvesting of sedimentation dams constructed for the containment of dirty water will be undertaken other than for the suppression of dust or establishment of vegetation in the immediate vicinity. Licensing under Part 2 may be required for these dams.

No dams will be installed for the purpose of capturing clean water outside of the disturbance footprint.

No licensing under Part 5 is anticipated for the proposed project. A groundwater licence (20BL168264) was previously sort and obtained for the Hebburn No.3 operations that are operated under a separate consent. No changes to this licence are required.

2.3.2 Water Management Act 2000

The Water Management Act (WMA) provides for the sustainable and integrated management of the water sources of the New South Wales for the benefit of both present and future generations.

The proposed rehabilitation project will result in the improvement of water qualities in the Black, Swamp and Wallis Creek Catchments and is consistent with the objects of the WMA. The objects of the WMA are:

- “(a) to apply the principles of ecologically sustainable development, and*
- (b) to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biological diversity and their water quality, and*
- (c) to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water, including:*
 - (i) benefits to the environment, and*
 - (ii) benefits to urban communities, agriculture, fisheries, industry and recreation, and*
 - (iii) benefits to culture and heritage, and*
 - (iv) benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water,*
- (d) to recognise the role of the community, as a partner with government, in resolving issues relating to the management of water sources,*
- (e) to provide for the orderly, efficient and equitable sharing of water from water sources,*
- (f) to integrate the management of water sources with the management of other aspects of the environment, including the land, its soil, its native vegetation and its native fauna,*
- (g) to encourage the sharing of responsibility for the sustainable and efficient use of water between the Government and water users,*
- (h) to encourage best practice in the management and use of water.”*

The proposed rehabilitation is not only consistent, but also promotes many of the principles of the WMA, the most relevant principles applying to the project are listed below:

(2) Generally:

- (a) water sources, floodplains and dependent ecosystems (including groundwater and wetlands) should be protected and restored and, where possible, land should not be degraded, and*
- (b) habitats, animals and plants that benefit from water or are potentially affected by managed activities should be protected and (in the case of habitats) restored, and*
- (c) the water quality of all water sources should be protected and, wherever possible, enhanced, and*
- (d) the cumulative impacts of water management licences and approvals and other activities on water sources and their dependent ecosystems, should be considered and minimised, and*
- (g) the social and economic benefits to the community should be maximised, and*
- (h) the principles of adaptive management should be applied, which should be responsive to monitoring and improvements in understanding of ecological water requirements.*

(4) In relation to water use:

- (a) water use should avoid or minimise land degradation, including soil erosion, compaction, geomorphic instability, contamination, acidity, waterlogging, decline of native vegetation or, where appropriate, salinity and, where possible, land should be rehabilitated, and*

(b) water use should be consistent with the maintenance of productivity of land in the long term and should maximise the social and economic benefits to the community, and

(5) *In relation to drainage management:*

(a) drainage activities should avoid or minimise land degradation, including soil erosion, compaction, geomorphic instability, contamination, acidity, waterlogging, decline of native vegetation or, where appropriate, salinity and, where possible, land should be rehabilitated, and

(7) *In relation to controlled activities:*

(a) the carrying out of controlled activities must avoid or minimise land degradation, including soil erosion, compaction, geomorphic instability, contamination, acidity, waterlogging, decline of native vegetation or, where appropriate, salinity and, where possible, land must be rehabilitated, and

(b) the impacts of the carrying out of controlled activities on other water users must be avoided or minimised.

(8) *In relation to aquifer interference activities:*

(a) the carrying out of aquifer interference activities must avoid or minimise land degradation, including soil erosion, compaction, geomorphic instability, contamination, acidity, waterlogging, decline of native vegetation or, where appropriate, salinity and, where possible, land must be rehabilitated, and

(b) the impacts of the carrying out of aquifer interference activities on other water users must be avoided or minimised.

The Project also promotes and is consistent with the current State Water Management Operations Plan.

2.3.3 Protection of the Environment Operations Act 1999

The Protection of the Environment Operations Act 1999 (PoEO Act) provides for the administration and regulation of scheduled activities to minimise the impacts to land, air, noise or water and improve public access to information on the performance of developments. The regulation is enforced with an Environmental Protection Licence (EPL).

Each site will require an EPL before operations commence.

2.4 Haulage Permissibility through Werakata National Park

Some of the haulage routes identified in respect of the project are fire trails which are located within Werakata National Park. DEC has requested that the DoP require HEM to include, as part of this Environmental Assessment Report, *"confirmation that the preferred route options...are permissible under the National Parks and Wildlife Act 1974."*

Use of land within a national park is generally regulated by the *National Parks and Wildlife Act 1974* (NPW Act) and the *National Parks and Wildlife Regulation 2002* (NPW Regulation). The NPW Act contains a number of general requirements, such as that operations on land within a national park be in accordance with a plan of management (section 81(4)). In addition, section 30E of the NPW Act sets out the general principles for the management of national parks.

2.4.1 Legal basis of permissibility

DEC has indicated that HEM's proposed haulage of chitter will require a licence under the NPW Regulation. Section 151(1)(g) confers on the Minister the power to grant licences to use or occupy lands within a national park in ostensibly broad terms. Section 152 of the NPW Act allows the Minister to grant licences for commercial operations within a national park (and also allows the Minister to prohibit commercial uses).

HEM considers that its proposed haulage of chitter is part of, and incidental to, the conduct of commercial operations in a national park, and is therefore subject to section 152. The Minister may, therefore, grant a licence for such haulage.

To this extent, the haulage of chitter is permissible in that it is able to be carried out, provided that the Minister grants a licence.

The use of trails generally within national parks is regulated by the *National Parks and Wildlife Regulation* 2002 (NPW Regulation). Clause 7(1)(g) of the NPW Regulation prohibits a person from driving a vehicle otherwise than on a road, track, trail or way, or in an area, set aside for that purpose. *Prima facie*, the use of fire trails for the purposes of haulage would therefore be prohibited.

Clause 7(5) of the NPW Regulation provides a defence in respect of any such prohibition, if the action is done with (and in accordance with any conditions of) the consent of a park authority. For a national park, the park authority is the Director-General of National Parks and Wildlife. Clause 30 of the NPW Regulation states that consents may be given subject to conditions, and by means of various documents, including a licence. Clause 44 deals with the manner of application for a licence.

The grant of a licence to haul chitter would permit such haulage (subject to any conditions considered appropriate by the Minister) and would also, in certain circumstances, provide a defence pursuant to clause 7(5) of the NPW Regulation.

2.4.2 Consistency with the NPW Act

The broad power conferred on the Minister to grant a licence to haul chitter is circumscribed by an obligation to exercise such powers within the limits of the NPW Act.

Part 4 of the NPW Act deals with plans of management. Section 81(4) provides that no operations shall be undertaken on land to which a plan of management relates unless the operations are in accordance with that plan. Section 81A of the NPW Act provides that Part 4 applies in respect of land which is the subject of a licence (including a licence under section 152). No plan of management has been adopted in relation to Werakata National Park. Therefore, sections 81(4) and 81A have no function in respect of the proposed licence at this time. If a plan of management is adopted prior to the grant of the proposed licence, then the licence will need to be consistent with any such plan.

Section 30E of the NPW Act provides general principles for the management of land within a national park.

The haulage of chitter using fire trails in the Werakata National Park has the potential to confer a number of benefits on the national park:

- The project will involve the upgrade and improvement of a number of fire trails within the national park. This will assist emergency services in providing access to, and facilitating management of, a bush fire situation; and
- The presence of chitter increases bush fire risk. Bush fires in this area can travel 2 kilometres before being brought under control. The proximity of the proposed sites to the Werakata National Park means that the park is at risk of being damaged by any bush fire which starts at the mine sites. The proposed haulage of chitter in the Werakata National Park will facilitate the expeditious removal of chitter from the sites, and hence a reduction of a bush fire risk presented by those sites to the Park.

Bush fires present one of the major risks to the matters set out in section 30E of the NPW Act. By assisting in reducing the occurrence of, and the damage caused by, bush fires, the use of Werakata National Park for the haulage of chitter will assist in achieving the matters set out in section 30E.

The use of Werakata National Park for the purpose of hauling chitter is not inconsistent with any of the matters set out in section 30E.

HEM notes in this regard that it has received consent from DEC to use the Tomalpin Management Trail with Werakata National Park for the movement of chitter from the Abermain No 2 site to the processing plant at Hebburn No 3.

2.4.3 Chitter Haulage and the National Park

HEM considers that the haulage of chitter is "*permissible*" under the NPW Act subject to an appropriate licence being granted.

The DEC has advised that it has granted owners' consent, in principle, to the lodgement of an application under Part 3A of the EP&A Act 1979, subject to two conditions:

1. That the use of any roads and/or trails within Werakata National Park is to be compliant with the NPW Act; and
2. That the use of any roads and/or trails is to be consistent with the conditions of a Licence issued under the NPW Regulation.

In relation to the first condition, HEM considers that the use of fire trails for the haulage of chitter is consistent with the NPW Act.

In relation to the second condition, HEM proposes to apply to the Minister for a licence to use fire trails for haulage routes, prior to the use of those trails for such purposes. This would satisfy the requirements of DEC and the Director-General's (Planning) requirements.

2.5 State Environmental Planning Policies

The following State Environmental Planning Policies (SEPPs) apply in respect to the project and are considered below.

2.5.1 State Environmental Planning Policy No. 11 – Traffic Generating Developments

This SEPP ensures that the Roads and Traffic Authority (RTA) can make representations on development applications that impact traffic, prior to determination. Mining is listed in Schedule 1 of SEPP No. 11 and the consent authority must refer the development application to the RTA.

2.5.2 State Environmental Planning Policy No. 44 – Koala Habitat Protection

This SEPP encourages the conservation and management of koala habitats and their populations, which is defined by this SEPP as 'Potential' and 'Core' habitat. This SEPP applies to certain local government areas of New South Wales including lands located within Cessnock City Council local government area.

An assessment of potential and core koala habitat has been undertaken for the project. There are no impacts to core koala habitat.

2.5.3 State Environmental Planning Policy No. 45 – Permissibility of Mining

The object of this SEPP is to facilitate development for the purposes of mining throughout the state. The SEPP covers mining of land, where an environmental planning instrument requires the consent authority to make a value judgement as to whether such development is permissible by virtue of satisfying certain provisions of matters. The SEPP permits mining without such provisions or matters having to be satisfied.

Cessnock Local Environmental Plan, 1989 is the applicable planning instrument. Mining, including coal mining, is a permitted use within Zone 1(a) Rural "A", which is the zone applicable to each of the three (3) resource site.

2.5.4 State Environmental Planning Policy No. 55 – Remediation of Land

This SEPP was enacted to provide a statewide approach to the remediation of contaminated land for minimising the risk of harm to the health of humans and the environment.

This SEPP has been used to address the remediation of small emplaced carbonaceous materials throughout the locality to remediate localised contaminants thereby preventing ongoing entry into the surrounding environment. Due to the quantum of material being removed and the provisions of mining act SEPP No. 55 does not apply to the proposed development.

2.5.5 State Environmental Planning Policy (Major Projects) 2005

This SEPP identified development to which the development assessment and approval process under Part 3A of the EP&A Act, 1979 applies and establishes the Minister for Planning as the consent authority for development classified as a 'major project'. Mining is classified as a major project by the SEPP.

2.6 Voluntary Planning Agreement

Officers of the Cessnock City Council and the proponent's representatives have been consulting on the level and type of contribution(s) required for the provision, extension or augmentation of public amenities and services to satisfy the additional demand that may result from the project proceeding, the resulting agreement will be formalised under a Voluntary Planning Agreement.

2.7 Environment Protection and Biodiversity Conservation Act 1999

The Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act, 1999) defines projects that are likely to have a significant impact on matter(s) of national environmental significance (NES matters). The NES matters protected by the EPBC Act include, but are not restricted to:

- Declared World Heritage properties;
- Ramsar wetlands;
- Listed threatened species and communities;
- Listed migratory species;
- Nuclear actions; and
- Actions in a Commonwealth marine area.

The Commonwealth Minister for Environment and Heritage will determine as to whether the project is a "controlled action" (i.e. an action that requires the approval or an environmental assessment).

A referral to the Commonwealth for a determination on whether the proposed Project would constitute a controlled action will be made prior to the disturbance of identified threatened biodiversity.