

Our ref: DOC21/985542

Your ref: SSD-6084-Mod-3

Nagindar Singh
Senior Environmental Assessment Officer
Energy Resource Assessment
Department of Planning, Industry & Environment
nagindar.singh@planning.nsw.gov.au

Dear Ms Singh

Austen Quarry – Modification 3 – Biodiversity offsetting

Thank you for your request dated 4 November 2021 to the Biodiversity, Conservation and Science Directorate (BCS) requesting advice on Austen Quarry modification 3.

BCS understands that the modification seeks to:

1. Modify Condition 25 of Schedule 3 of SSD 6084 to remove the species credit obligations associated with planted individual Silver-Leaved Mountain Gum - *Eucalyptus pulverulenta* (SLMG). That is, a reduction of 87% of credits generated as a result of planned removal of the 611 plants planted by Hy-Tec in the Stage 2 expansion area (as modified).
2. Modify Condition 25 of Schedule 3 of SSD 6084 to permit the staging of offsetting obligations to align with the progressive schedule of native vegetation clearing.
3. Allow for the installation and operation of a pre-coat plant and pugmill within the existing Secondary Processing Area.

As there will be no change to the footprint of the mine, BCS has no comment to make regarding the pre-coat plant and pugmill.

The proponent is also proposing to change the mechanism used to satisfy the biodiversity offset requirements; from securing a land-based offset to paying into the biodiversity conservation trust fund or buying credits from the market. This will increase the ecosystem credit liability for the project. However, there will be no change in status to Conservation Area H which was established under the original development consent.

BCS's biodiversity recommendations are provided in **Attachment A** and detailed comments are provided in **Attachment B**. If you require any further information regarding this matter, please contact Liz Mazzer, Conservation Planning Officer, via liz.mazzer@environment.nsw.gov.au or (02) 6883 5325.

Yours sincerely



Sarah Carr
Director North West
Biodiversity, Conservation and Science Directorate

24 November 2021

CC: Ali Strous, Department of Agriculture, Water and the Environment

Attachment A – BCD's Recommendations

Attachment B – BCD's Detailed Comments

BCS recommendations

Austen Quarry modification 3 – Biodiversity offsets

- 1.1. Planning and Assessment obtain legal advice about whether Clause 17(1) of Schedule 5A of the *Local Land Services Act 2013* applies to the clearing of planted native vegetation.
- 2.1. Planning and Assessment seek legal advice about how Section 7.14 (3) of the *Biodiversity Conservation Act 2016* applies to Austen Quarry modification 3.
- 3.1. Evidence be provided showing that the future planting area is suitable for successful long-term growth of Silver-leafed Mountain Gum.
- 3.2. The future planting area be secured in perpetuity to ensure that the planted vegetation is protected.
- 3.3. Other native species and habitat components found in a PCT locally associated with Silver-leafed Mountain Gum should also be established in the future planting area to maximise conservation outcomes.
- 4.1. The proposal be discussed with the Commonwealth Department of Agriculture, Water and the Environment as soon as possible.
- 5.1. If the modification is approved, the consent should reflect the higher ecosystem credits required by the statement of reasonable equivalence dated 30 October 2019.
- 5.2. The statement of reasonable equivalence should be then varied to match the change in biodiversity offset liability.
- 6.1. The proponent details the proposed changes that would be made to management plans and the statement of commitments if consent were granted for modification 3.
- 6.2. If the modification is approved, all documents associated with biodiversity offsets will need to be updated.
- 7.1. The ecosystem credits to be retired for each stage be recalculated using the higher credit liability for PCTs 840 and 649.
- 7.2. Staged retirement of biodiversity credits can occur provided the total credits retired match the requirement in the statement of reasonable equivalence.

BCS detailed comments

Austen Quarry modification 3 – Biodiversity offsets

- 1 Planning and Assessment should seek legal advice about whether allowable activities under the *Local Land Services Act 2013* applies.

The proponent is proposing to remove the species credit obligation for planted Silver-leaved Mountain Gum (SLMG). They have obtained legal advice that the planted native vegetation could have been legally cleared without consent under Clause 17(1) of Schedule 5A of the *Local Land Services Act 2013*.

This would reduce the species credit obligation for SLMG from 1,402 credits to 182 credits.

BCS has not sought legal advice regarding whether clearing of the planted native vegetation would have been an allowable activity under the *Local Land Services Act 2013* at the time the original development application was lodged.

However, as the development application was lodged in 2014, and Clause 17(1) came into effect in 2017 (i.e. three years after the lodgement of the application) Planning and Assessment should obtain their own legal advice regarding this matter.

Recommendation

- 1.2. Planning and Assessment obtain legal advice about whether Clause 17(1) of Schedule 5A of the *Local Land Services Act 2013* applies to the clearing of planted native vegetation.

- 2 Section 7.14 (3) of the *Biodiversity Conservation Act 2016* may apply to the modification

The Austen Quarry project was assessed under the Framework for Biodiversity Assessment, which required species credits to be calculated for planted SLMG.

Section 7.14 (3) of the *Biodiversity Conservation Act 2016* may apply to the modification:

*If the Minister for Planning decides to grant consent or approval and the biodiversity offsets scheme applies to the proposed development, the conditions of the consent or approval may require the applicant to retire biodiversity credits to offset the residual impact on biodiversity values (whether of the number and class specified in the report **or other number and class**). The residual impact is the impact after the measures that are required to be carried out by the terms or conditions of the consent or approval to avoid or minimise the impact on biodiversity values of the proposed development.*

This may allow some discretion in deciding whether the species credits for planted SLMG can be discounted in the modified consent for the project.

Recommendation

- 2.1 Planning and Assessment seek legal advice about how Section 7.14 (3) of the *Biodiversity Conservation Act 2016* applies to Austen Quarry modification 3.

- 3 The replanted Silver-leaved Mountain Gum plants require protection

The area identified for future planting of SLMG must be proven to be suitable for successful growth of the species.

BCS notes that section 1.6 of the modification report states that,

Hy-Tec has investigated the feasibility of securing all historic planting areas as a Stewardship Site, however the patchy and disjointed nature of the planted areas is not possible to efficiently secure under the current Biodiversity Offset Scheme.

All options to secure the future planting area shown in figure 3 of the modification report should be considered. The area needs to be secured to ensure that the planted SLMG is protected.

In addition, the proponent should endeavour to improve the biodiversity values at the future planting area by planting other native species that are found in a PCT locally associated with SLMG. The proponent should consider placing logs and other habitat components in the area to recreate the chosen PCT.

Recommendations

- 3.1 Evidence be provided showing that the future planting area is suitable for successful long-term growth of Silver-leafed Mountain Gum.
- 3.2 The future planting area be secured in perpetuity to ensure that the planted vegetation is protected.
- 3.3 Other native species and habitat components found in a PCT locally associated with Silver-leafed Mountain Gum should also be established in the future planting area to maximise conservation outcomes.

4 Consultation is needed with the Commonwealth Department of Agriculture, Water and the Environment

The Austen Quarry project is a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). An approval (EPBC 2013/6967) was granted on 19 October 2015.

Condition 4 of the EPBC Act approval requires the land identified as the offset area to be secured under a legal instrument in perpetuity within 18 months of the approval (i.e. by 19 April 2017).

The offset area has not been secured. The modification report states (section 4.3.4.2),

Following an approval of the proposed modifications, Hy-Tec would seek a variation to EPBC 2013/6967 to ensure consistency with the offsetting outcomes of the NSW Government approval (SSD 6084).

BCS considers that consultation with the Commonwealth Department of Agriculture, Water and the Environment (DAWE) should have occurred prior to the modification application being lodged to determine whether the changes to offset mechanism and reduction in SLMG species credits are acceptable under the EPBC Act.

If consultation has not yet occurred, BCS recommends that the proposal be discussed with DAWE as soon as possible.

Recommendation

- 4.1 The proposal be discussed with the Commonwealth Department of Agriculture, Water and the Environment as soon as possible.

5 Biodiversity credits must match the statement of reasonable equivalence

The modification proposes to change the way that ecosystem credits are retired, so that credits are purchased from the market or payments are made to the BCF rather than securing a land-based offset.

The proponent has received a statement of assessment of reasonable equivalence of biodiversity credits. For two plant community types (PCTs 840 and 649) the number of ecosystem credits required if the applicant pays into the BCF are higher than if the credits are retired from the offset site originally proposed for the project.

Section 3.2 of the modification report suggests changes to wording of consent conditions. This includes condition 25 of Schedule 3 of SSD 6084. The total number of ecosystem credits proposed to be retired in table 4A do not include the higher number of credits required if the offset mechanism is changed (table 1):

Table 1 Comparison of the ecosystem credit liability in the modification report with those required by the statement of reasonable equivalence if the offset site is withdrawn

PCT	Total ecosystem credits in table 4A of section 3.2 of the modification report	Ecosystem credits required by statement of reasonable equivalence if not securing the offset site
PCT 1093 (HN 570) Red Stringybark - Brittle Gum - Inland Scribbly Gum dry open forest of the tablelands, South Eastern Highlands Bioregion	642	642
PCT 840 (HN 527) Forest Red Gum - Yellow Box woodland of dry gorge slopes, southern Sydney Basin Bioregion and South Eastern Highlands Bioregion	45	60
PCT 649 (HN 501) Apple Box - Broad-leaved Peppermint dry open forest of the South Eastern Highlands Bioregion	90	131

In addition, if there are any changes to the number of species credits required for SLMG, an amended statement of reasonable equivalence will be required to enable retirement of credits.

Recommendations

- 5.1 If the modification is approved, the consent should reflect the higher ecosystem credits required by the statement of reasonable equivalence dated 30 October 2019.
- 5.2 The statement of reasonable equivalence should be then varied to match the change in biodiversity offset liability.

6 Documents associated with the offset area will need to be reviewed

The modification report does not detail the effect that the proposed changes to the offset mechanism and reduction in SLMG species credits will have on management plans associated with the Austen Quarry project particularly the,

- Landscape and rehabilitation plan
- Biodiversity offset management plan
- Silver-leaved Mountain Gum management plan

- Statement of commitments included in the consent for SSD 6084

If the modification is approved, all these documents will need to be updated to incorporate changes.

Recommendations

- 6.1 The proponent details the proposed changes that would be made to management plans and the statement of commitments if consent were granted for modification 3.
- 6.2 If the modification is approved, all documents associated with biodiversity offsets will need to be updated.

7 Staged retirement of biodiversity credits is acceptable

The proponent now intends to stage biodiversity offsets with the credits to be retired prior to the progression of disturbance in each stage.

The ecosystem credits that have been calculated for each stage are based on the lower credit numbers for PCTs 840 and 649 in the statement of reasonable equivalence. As the lower numbers only apply to the land-based offset area, the higher credit liability will need to be used.

Staged retirement of biodiversity offsets is acceptable provided (as stated previously) the credit retirement matches the total required in the statement of reasonable equivalence.

Recommendations

- 7.1 The ecosystem credits to be retired for each stage be recalculated using the higher credit liability for PCTs 840 and 649.
- 7.2 Staged retirement of biodiversity credits can occur provided the total credits retired match the requirement in the statement of reasonable equivalence.