

20 December 2021

Steve O'Donoghue
Director – Resource Assessments
Department of Planning, Industry and Environment
Locked Bag 5022
Parramatta NSW 2024

Dear Steve,

RE: WARKWORTH – SSD-6464-MOD-1 - REQUEST FOR ADDITIONAL INFORMATION

We write with respect to Warkworth Mining Limited's (Warkworth) application for an administrative modification to SSD-6464-MOD-1 to clarify biodiversity offset requirements for the Warkworth Continuation Project and to facilitate in-perpetuity conservation of biodiversity offset land.

In that regard, we refer to:

1. Development Consent SSD-6464, granted on 26 November 2015;
2. Yancoal's Administrative Modification application dated 29 April 2021;
3. The Department's Request for Additional Information emailed on 9 August 2021;
4. Yancoal's detailed response to this request dated 2 September 2021; and
5. The Department's further "Addendum to request for information" dated 11 October 2021.

The Department's request outlined in Item 5 above seeks further information on Warkworth's approved Biodiversity Offset Strategy (BOS), as certified under clause 14(3) of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (Mining SEPP) (OEH, 2014). The Department has also requested further information on the need for the proposed modification.

As evidenced in the above Yancoal submissions (numbered 2 and 4 above), Yancoal has previously provided a detailed account of the development of the Warkworth BOS, incorporating various statements and conclusions from the NSW government. This information previously provided to the Department demonstrates that the BOS, as approved and endorsed by the NSW government, **satisfies** the biodiversity offsetting obligations of the Warkworth Continuation Project.

An "Outcomes" Focus

The critical requirement of the Warkworth BOS is to provide a biodiversity and conservation outcome in perpetuity that is at least equal to and preferably greater than the biodiversity impacts of the Warkworth Continuation Project. In simplified terms, the Warkworth BOS, as approved and endorsed by the NSW government, achieves the biodiversity conservation objectives via:

- Identifying existing biodiversity values and increasing the protection afforded to the land on which they are located;
- Identifying land where biodiversity values can be increased or created via passive and/or active management, and increasing the protection afforded to those lands;
- Undertaking or funding research into biodiversity conservation; and
- Undertaking significant restoration and rehabilitation of land directly disturbed by the Warkworth Continuation Project.

Irrespective of how these outcomes are achieved, it is important for all stakeholders to remain focussed on the achievement of biodiversity **outcomes**.

In that regard, we note Warkworth has undertaken all necessary activities to ensure the biodiversity outcomes are being achieved in line with its commitments and in line with expectations.

Dynamic Regulatory Regime

We note the regulatory landscape in respect of biodiversity impact and protection has been particularly dynamic since the grant of the Warkworth approval in November 2015. The intervening policy changes have resulted in circumstances where the biodiversity protection regimes contemplated in the consent conditions at the time of the grant of the consent by the Planning Assessment Commission are no longer available, either to the proponent or to government.

This is particularly the case for the provision of protection to areas of biodiversity value that were approved to offset the residual biodiversity impacts of the Warkworth Continuation Project, i.e., the biodiversity offset land that constitutes a portion of the Warkworth Continuation Project BOS.

During the assessment of the Warkworth Continuation Project in 2015, the NSW government was implementing a change to the way resource projects were being conditioned to facilitate in-perpetuity conservation of biodiversity offset land. This resulted in **unique** conditioning of the Warkworth Continuation Project to include reference to various biodiversity offset lands, **both** in respect of area **and** in respect of “biodiversity credits”.

The government’s endorsement of the BOS is a clear demonstration that it considered the biodiversity offset areas listed in the consent and the quantum of credits to be retired to be **identical**.

Superseded Regulatory Mechanisms

The way in which credits were calculated (**the Biodiversity Certification Assessment Methodology - BCAM**) is no longer supported by government, and the credit retirement mechanism (**biobanking**) is no longer available.

On that basis, Warkworth is technically **unable** to satisfy the conditions as they were drafted in 2015.

Notwithstanding, we reiterate that the biodiversity **outcomes** are being consistently achieved, as is evidenced in the Annual Review.

Stewardship Agreement

The NSW government has suggested Warkworth enter into a Biodiversity Stewardship Agreement (BSA) as a mechanism to retire “credits” and to provide “in perpetuity” security. It is recognised by both the NSW government

and by Warkworth that BCAM credits calculated in 2015 under the BBAM as modified by the Upper Hunter Strategic Assessment **do not translate** to credits calculated under the new BAM, which would be required to satisfy a BSA.

On that basis, we are **opposed** to entering into a BSA, as:

- We are **unable** to re-survey the impact area (some of which has already been disturbed), and the costs associated with re-survey is in effect a retrospective application of new legislation;
- We are **unwilling** to re-survey the offset areas (again, a retrospective impost);
- The total fund deposit required under a BSA is a **significant financial impost** which would **not** have been required under the biobanking regime;
- There would be significant additional capital costs associated with retiring credits under a BSA (over and above that required under a biobanking arrangement); and
- Such an approach would effectively delay the time by which an “in-perpetuity” conservation mechanism would be finalised.

Warkworth’s modification application seeks to retain and achieve the committed and endorsed biodiversity offset outcomes, without resulting in additional **costs** and without incurring unnecessary time delays.

Yancoal’s Guiding Principles

On Warkworth’s behalf, Yancoal is committed to continuing to achieve all of the agreed biodiversity outcomes under the approved BOS, and to securing the biodiversity offset lands in perpetuity.

Warkworth is **not prepared** to entertain any mechanism which results in any additional costs over and above what it would have incurred under a biobanking regime.

This was the position at the time the consent was granted in 2015, and should remain the case in the implementation of the biodiversity regime.

Appropriate Biodiversity Conservation Mechanisms

Yancoal is aware of only two in-perpetuity conservation mechanisms that are appropriate for this unique circumstance:

1. Transfer of land to the NSW National Parks and Wildlife Service Estate – applicable for the North Rothbury offset (the Hanwood Estate).
2. Register covenants (both positive and restrictive) on title under section 88E(3) of the *Conveyancing Act 1919* (*Conveyancing Act*) – applicable for other biodiversity offset lands.

The transfer of the North Rothbury offset has been specifically requested by the NSW government and Yancoal is supportive of this approach.

Positive and Restrictive Covenants

Yancoal proposes the remainder of the offset lands be secured by the registering of positive and restrictive covenants on title. This is the only mechanism of which we are aware which provides security in perpetuity without

requiring the proponent to incur significant additional and unnecessary survey costs and without the need to fund a “total fund deposit”.

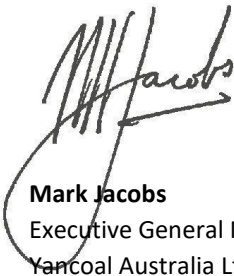
We note:

- This mechanism has been accepted by the Department as being appropriate at several Yancoal mines (including Duralie, Strateford and Moolarben);
- It has already been successfully implemented at each of those operations, and on that basis its appropriateness is self-evident;
- Template covenants have already been reviewed by the Department’s lawyers at these other sites and have been endorsed; and
- The Chief Judge of the NSW Land and Environment Court has identified covenants on title under the conveyancing act as being appropriate. In *Ironstone Community Action Group Inc v NSW Minister for Planning and Duralie Coal Pty Ltd [2011] NSWLEC 195*, Preston CJ endorsed at [116] the use of covenants (both positive and restrictive) as providing long term security of biodiversity offset land (emphasis added):

... there should be greater specificity, and less discretion, in providing long term security of the offset area. Condition 42 of Schedule 3 should be amended to specify that the long term security of the offset area is to be provided either by reservation in perpetuity by a conservation agreement ... or by a public positive covenant and/or a restriction on the use of land (in favour of an appropriate public authority), in either case on the title of all lands comprising the offset area.

Notwithstanding, Yancoal is willing to consider other mechanisms if they do not result in additional costs (specifically, additional surveys and the application of an upfront total fund deposit).

Yours sincerely,



Mark Jacobs
Executive General Manager - Environment & Community
Yancoal Australia Ltd

Copy: Clay Preshaw, Executive Director Assessments: clay.preshaw@dpie.nsw.gov.au