

29 April 2021

Mr Matthew Sprott
Director – Resource Assessments
Department of Planning, Industry and Environment
Locked Bag 5022
PARRAMATTA NSW 2124

Dear Matt

**SSD-6464 Warkworth Continuation Project – s4.55(1) Modification Report
Proposed Deletion of Conditions 28 and 31**

Warkworth Mining Limited is seeking a modification to the Warkworth Continuation Project Development Consent SSD-6464. Warkworth Mining Limited (**WML**) considers that the modification should be assessed under Section 4.55(1) of the *Environmental Planning and Assessment Act, 1979* (the **EP&A Act**) which provides for modification of a consent to correct a minor error, misdescription or miscalculation.

The misdescription relates to a duplication of biodiversity offset obligations under Development Consent SSD-6464 which have led to unnecessary confusion and delays in securing land-based offsets for the development under both the NSW and Federal approvals. The purpose of this modification is to rectify this misdescription and to make the conditions achievable. This will allow WML to fulfil its offsetting obligations.

WML proposes to achieve this outcome by requesting:

- the **deletion** of Condition 28;
- the **retention** of Condition 29;
- the **amendment** of Condition 30; and
- the **deletion** of Condition 31

of Schedule 3 of the conditions of consent.

We consider that this achieves the intent of the biodiversity conditions and will ensure the outcome assessed by the Department and approved by the Planning Assessment Commission (**PAC**) will be achieved.

Introduction and Strategic Context

Development Consent SSD-6464 was granted on 26 November 2015 and included various conditions relating to biodiversity offsets. At the time of grant of Development Consent SSD-6464, the assessment and conditioning of biodiversity offsets for mining projects in the Hunter Valley were transitioning from the previous non-credit based system to the credit based *BioBanking Assessment Methodology* and the *BioBanking Certification Assessment Methodology* supported by the *NSW Biodiversity Offsets Policy for Major Projects* and the Framework for Biodiversity Assessment (as modified by the *Upper Hunter Strategic Assessment [UHSA]*).

At the time of grant, the approach to offset conditioning for transitional projects had not been settled. This resulted in Development Consent SSD-6464 being granted with duplicated conditions (two conditions with the same intent). **Condition 28** of Schedule 3, framed much like contemporary conditions, to retire BBAM credits to offset the biodiversity impacts of the development, **AND Condition 30** of Schedule 3, consistent with the standing model at that time, to secure land-based offsets

to offset the biodiversity impacts of the development. These conditions serve the same purpose and there is no clear link (or distinction) between the two.

To Yancoal's knowledge, there are no other State Significant Development (SSD) consents granted with both obligations to retire credits and secure land-based offsets. This demonstrates that the biodiversity offset conditions in SSD-6464 were caught up in the uncertain approach to conditioning transitional projects.

The framing of these conditions has now created much confusion for both WML and Government, and this confusion has been further exacerbated by the recent biodiversity reforms. As a result, WML **will not be able to** fulfil the offsetting obligations described in Conditions 28 – 31 of Schedule 3 of the consent.

Notwithstanding, the issue is administrative in nature. In practice, the subject lands have been established and are currently being managed as conservation areas under the respective offset management plans.

Despite the inclusion of both Conditions 28 and 30, it is clear from the assessment process that the land-based properties listed in Condition 30 were acknowledged as satisfying the offset obligations of the credits listed in Condition 28 (excluding those provided by rehabilitation). It is also clear from the assessment process that the satisfaction of credit requirements was determined utilising the methods current at the time, i.e. the BBAM and the BCAM as modified by UHSA.

Examples of these endorsements by the PAC, the Department and the Office of Environment and Heritage (OEH) are provided below (bolding added for emphasis).

The PAC Review Report (dated 4 March 2015) states:

"The proposed biodiversity offset strategy fully compensates for the impacts of the 2003 extension and the proposed 2014 extension in accordance with contemporary BioBanking Assessment Methodology (BBAM) and the BioBanking Certification Assessment Methodology (BCAM) as modified by the Upper Hunter Strategic Assessment. The biodiversity offset strategy was also certified as adequate in accordance with Clause 14(3) of the Mining SEPP."

The Secretary's Environmental Assessment Report (dated May 2015) states:

"OEH confirmed that it accepted the Hanwood Estate (North Rothbury Biodiversity Area) as meeting its recommendation to the consent authority of an additional land-based offset of equal or greater biodiversity value to the 72 hectares of Warkworth Sands Woodland EEC'... This satisfaction was based on the site supporting the two woodland EECs and particularly the critically endangered P. pauciflora. OEH indicated that the site would make a significant contribution to the protection and recovery of this critically endangered species. The Department amended the recommended conditions to reflect the additional offset area and OEH's acceptance."

"The Department is satisfied that the Warkworth Sands Woodland EEC re-establishment program would effectively mitigate the risk of Warkworth Sands Woodland EEC extinction to an acceptable standard.

...

Warkworth has proposed a comprehensive biodiversity offset strategy that comprises almost 2,900 ha of land-based offsets, rehabilitation of 1,600 ha of woodland on the mine site, and various supplementary measures to manage, enhance and restore areas of Warkworth Sands Woodland. Both OEH and the Department are satisfied that these offsetting measures would adequately compensate the biodiversity impacts of the project."

The PAC Determination Report (Second Review) (dated August 2015) states:

"In its first Review Report, the Commission made recommendations relating to biodiversity impacts, which sought further clarification and details about the application of the Biodiversity Offset Policy. The Commission is generally satisfied that these impacts were

addressed through the provision of additional information from the Department and the Applicant, and consultation with relevant agencies.

...

The Commission notes that OEH has provided a certified report in accordance with clause 14(3) of the Mining SEPP, which states that the measures to mitigate or offset the biodiversity impacts of the Project are considered adequate. Furthermore, OEH's report concludes that the proposed offset strategy is consistent with the six principles of the Biodiversity Offset Policy."

"Overall, the Commission is satisfied that the Project is consistent with government policy in relation to biodiversity impacts and offsetting and notes that a number of improvements to the conditions of consent have been made throughout the development assessment process, which would ensure that biodiversity impacts are appropriately minimised, managed or offset."

Development Consent SSD-6464 for the Warkworth Continuation Project was granted in November 2015.

Description of the Modifications, Assessment of Impacts and Evaluation

Conditions relating to biodiversity offsets include Conditions 28, 29, 30 and 31, Schedule 2 of Development Consent SSD-6464. The following paragraphs describe the requested modifications to these conditions. The fundamental change proposed is the removal of Condition 28 to rectify the overlap with Condition 30.

No changes are proposed to the project itself, the project area, physical layout and design, use or activities undertaken, related development or project sequencing.

Condition 28 relates to the methods for retirement of ecosystem and species credits as well as providing a list of vegetation communities and species that require offsetting. **WML proposes that this condition is deleted.**

Condition 29 relates to rehabilitation requirements. **No change** is proposed to this condition on the basis that the retiring of credits generated by rehabilitation isn't required for some time. It is noted that a future modification may be required to facilitate retiring equivalent credits or areas under the contemporary Biodiversity Offsets Scheme.

Condition 30 relates to the in-perpetuity protection of land-based offsets. Retaining this condition, over Condition 28, is consistent with other SSD consents granted around 2015. However, WML proposes that this condition is **amended** as follows.

- Include flexibility to extend the deadline to accommodate for delays that are outside the control of WML. For example, insert *"unless the Secretary agrees otherwise"*.
- Add an additional footnote under Table 12 that allows for detailed land survey as part of securing the land. For example, *"The areas listed in Table 12 for each Offset Area are subject to detailed land survey as part of securing the land. Notwithstanding, the total cumulative area of all Offset Areas must be equal to or greater than the sum of areas listed in Table 12, to the satisfaction of the Secretary"*.
- Add a note that requires the subdivision of land, where the Offset Areas listed in Table 12 are part of a larger allotment. For example, the Northern Biodiversity Area is part of a larger allotment that will need to be subdivided, with the resultant lots being less than the minimum lot size. This amendment will allow for a subdivision application to be made to Council, and for the biodiversity offset land to be secured in perpetuity post subdivision.

Condition 31 relates to the use of surplus credits. This condition gives WML the flexibility to 'bank' surplus credits generated from its offset areas (excluding for Putty Road Biodiversity Area and 2003 Warkworth Sands Woodland Area). **WML proposes this condition is deleted.** In doing so, WML acknowledges that it commits to retiring all credits associated with the land listed in Table 12, should a credit-based security mechanism be pursued.

Summary and Conclusion

WML considers that the application can be characterised as a modification involving a minor error, misdescription or miscalculation as it involves a correction to the development consent conditions to remove uncertainty and to clarify biodiversity offset obligations, particularly in light of changes in NSW Government policies since 2015. The proposed changes are administrative in nature and would not result in any environmental impacts beyond those that were already assessed and approved under the Development Consent SSD-6464.

We request that this application be progressed to enable the expedient security of the land-based offsets, and their biodiversity values, associated with the Warkworth Continuation Project.

Please don't hesitate to call if you wish to discuss this in greater detail.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mark Jacobs', with a large, stylized loop at the bottom.

Mark Jacobs
Executive General Manager, Environment & Community
Yancoal Australia Limited