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4 November 2013

**Mining Projects
NSW Planning & infrastructure
GPO Box 39
SYDNEY NSW 2001**

Attention: Mr Mike Young

By email: mike.young@planning.nsw.gov.au

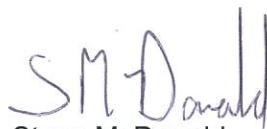
Dear Mr Young,

Re: Liddell Coal Operations Modification 5

Please find enclosed Council's submission with respect to Liddell Coal Operations Modification 5.

I thank NSW Planning and Infrastructure for providing Muswellbrook Shire Council the opportunity to comment on this project and for granting an extension of time until today to lodge the submission.

Yours faithfully,



Steve McDonald
General Manager

Liddell Coal Operations Modification 5

[Application pursuant to s75W of the
Environmental Planning and Assessment Act 1979]

COUNCIL SUBMISSION



**muswellbrook
shire council**

The Application

1. By Application Dated 19 September 2011 (the **Application**), Liddell Coal Operations Pty Limited (the **Proponent**) seeks, pursuant to the now repealed s75W of the *Environmental Planning and Assessment Act* 1979 (the **Act**), to modify the Liddell Mine open-cut coal mine (the **Project**).
2. It is not clear from the Application (or the supporting material) which conditions the Proponent applies to have revoked or varied or whether the Applicant seeks a further condition.

Submissions in summary form

3. Council does not support the Application and notes that:
 - (a) The consent authority is without jurisdiction to assess the matter in the absence of the Proponent's specification of the relief sought by its s75W Application;
 - (b) It is not reasonably open to the consent authority to determine that the Application falls within the jurisdictional power of section 75W;
 - (c) The Project falls well short of 'best practice' insofar as final landform and rehabilitation is concerned. The Project fails to provide adequate micro relief of its overburden emplacement and proposes a deep final landform void;
 - (d) The Project would have an unacceptable impact on the provision of community services; and
 - (e) The Project would contribute to particulate matter in the Upper Hunter air shed in circumstances where the air shed is at capacity insofar as the National guideline is concerned. The Project makes no sufficient attempt to manage dust with best practice techniques.
 - (f) Council submits that *ad hoc* extensions by s75W variation, in circumstances of such rapid local industry growth, would effect a complete disengagement of the community from important considerations about the extent and cumulative impact of mining and is therefore contrary to the public interest.
 - (g) Council submits that, in circumstances of such rapid and intensive local mining industry growth the public interest is best served by extensions supported by full environmental impact statements of the type contemplated by a Part 4 of the Act.

The terms of the Application

4. As noted, above it is not clear from the Application which conditions the Proponent applies to have revoked or varied or whether the Proponent seeks a further condition.
5. The necessity to actually set out the specific revocations, variations or new conditions sought derives from the wording of s75W¹. The failure to specifically identify those matters may render the consent authority without jurisdiction to determine the matter. The NSW Court of Appeal has held that a request for modification of an approval

¹ *Barrick Australia Limited v Williams* [2009] NSWCA 275 per Basten JA (McColl JA agreeing) at paras. 13 and 14.

under Part 3A of the Act within the terms of s75W is a precondition to the exercise of the power under s75W².

The section 75W issue

6. The Court of Appeal in *Barrick Australia Limited v Williams* made some comment on the scope of section 75W but noted, ultimately, that any assessment of the nature of the modifications which may be sought under s. 75W was ultimately for the Minister to make and not the Land and Environment Court³. The Minister's decision, however, is still subject to judicial review⁴. The Court noted difficulties with the wording of s. 75W and with the notion of 'radical transformation' and the Minister's submission concerning the phrase "new and different". The Court did, however, note that:

If the 40 day period is to be taken as an indicator of the nature of the modifications which may be sought under s. 75W, it suggests a constrained view of the scope of the provision. The power of the Director-General to require a level of environmental assessment, which must be complied with "before" the request is considered by the Minister, is liable to render all but the most minor amendments and cursory environmental assessment impossible in practical terms, within the period specified.

7. In the present matter, Council submits that a determination that the Application (at least insofar as the extension is concerned) is a modification which may be sought under s. 75W, is not reasonably open in the circumstances and would invite judicial review.
8. The original application (and EIS) contained no evidence concerning the impact of the project by extending the project so as to uncover an additional 14 years of coal not contemplated by the original application.

Road Closures

9. There is an existing section of Hebden Road within the Application Boundary that does not align with the legal road reserve. Council requires the Proponent to make an application under Part 4, Division 1 of the *Roads Act* 1993 to close that part of the unnecessary legal road reserve and seek the creation of a legal road reserve capturing the existing formed road.

Community Services

10. Council notes that in Hunter Valley Energy Coal's (HVEC) application for expansion of the Mt Arthur coal mine, it noted that:

The potential cumulative impacts on the local region are likely to include:

[(a)] likely significant strains on health services, in particular hospitals;

[(b)] contribution to strains on the existing childcare services; and

² *Supra* 1, per Basten JA (McColl JA agreeing) at paras 13 and following.

³ *Supra* 1, at para. 53.

⁴ *Supra* 1, at para 21. Also see *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 at paras. 99 and 100.

[(c)] potential pressures on existing primary education services.

11. HVEC was right to make those concessions concerning health services. In the intervening period, the Hunter New England Local Health District (HNELHD) has confirmed that poor population health presentation statistics at Muswellbrook Hospital are partly because of grossly inadequate health service availability in the Muswellbrook area. Those poor population health statistics include:
 - (a) In “the period 2007 to 2009, 0-35 year-old people resident in the Muswellbrook postcode had higher rates of emergency department presentations for both asthma and overall respiratory illness than the remainder of the [HNELHD] and Sydney” ;
 - (b) “For rates of asthma presentations, residents in the Muswellbrook postcode ranked highest among people aged less than 35 years of age” ;
 - (c) “Muswellbrook area has high rates for emergency department presentation for asthma” ;
 - (d) “Singleton and Muswellbrook local government areas have higher rates of cardiovascular disease hospital separations than all of the [HNELHD] or NSW”.

Additionally, Muswellbrook has the highest preventable mortality rate in the Hunter and the emergency department at the hospital has been described by HNELHD as “grossly undersized”. It is understood the floor area of the existing emergency department, for example, is 1/20th of the appropriate clinical standard.

12. In addition to the above impacts which are repeated for the present project, Council submits that the health services strain will, in addition, be on general medical practitioner services, midwifery and other allied health services including ambulance services.
13. Council submits that the Project will have a deleterious effect on human health and should be refused. Council submits that assessed impacts on human health should not be “bundled up” with other considerations in a balancing exercise undertaken to assess public interest.
14. Council submits that HVEC’s was also right to make concessions with respect to its assessed impact on childcare and early and primary education services. Council notes that it holds an independent Shire-wide children services study which confirms that assessment. Council subsidises childcare services, particularly costly out-of-hours day care services, in the Shire and the Project will place an unacceptable burden on Council and its community.

Blasting Policy

15. A Mining Blast Management Policy has recently been adopted by Council. The policy shall be taken as part of Council’s submission.

Final Landform to Look Natural

16. The Project includes a conceptual final landform that includes expansive planar slopes and a distinct lack of micro relief and natural appearance. This is particularly evident from Lake Liddell and the Main North rail corridor, which carries passenger

rail services. The landscape plan falls well short of best practice being deployed at neighbouring mines.

17. Council's mining rehabilitation policy encourages research into best practice rehabilitation techniques particularly in this field of emplacement geomorphology to attain stable and natural looking landforms.
18. Since developing the policy, a number of mining operations have employed software such as GeoFluv and others to develop much more natural looking plans. Such sophisticated landscape design and modelling should be employed by the proponent for final landform development so that mining rehabilitation strategies and management plans may be better informed and developed.
19. The proposal on public exhibition is silent on the alleviation of the visual impact of the final landform from prominent vantage points. Council has a long held policy that rehabilitated landforms should look natural.
20. Council is firmly of the view that it is a critical component of the social licence to operate that the community has confidence in the final landscape design put forward.

Final Voids

21. The final landform includes two voids in which no effort has been made to create a more natural looking void landscape.
22. These voids appear to be greater in size than previously approved. Council's policy is to seek reduction in mining void size or removal altogether is not practical use can be found.
23. The final landform includes a final landform void. No effort has been made to create a more natural looking void landscape. The Conceptual final landform appears as if there is no doubt that further mining approvals would be sought and granted.
24. Council submits that an achievable final landscape be provided for the case that no further mining is permitted following the end of this current proposed timeframe.
25. Council requests that in addition to the indicative detailed cross sections of the proposed void, indication of the depth of contained water, grade of all slopes approaching water body, catchment area, vegetation within the catchment area, areas of exclusion of stock, vehicles and pedestrians should also be provided.
26. Council submits that the proposed final landform voids represent a substantial and permanent environmental detriment and that the Project makes no sensible attempt to minimise its use of voids and that it is legitimate to refuse development consent, in conjunction with other principles of public interest, for that reason.

Revegetation

27. Council's mining rehabilitation policy seeks the commitment of 70% of the disturbed area to be rehabilitated to "high density tree planting", which is defined in the order of greater than 30 trees per hectare.
28. Council submits that the landscape rehabilitation should be determined from the integration of potential land uses considering the proximity to road access, utilities, water supply, surrounding land uses, slope, aspect, outlook or visibility and elevation.

The analysis of these factors should result in a series of sub-domains that meet the strategic objectives set out in Council's Land Use Development Strategy.

29. It is proposed that following the completion of rehabilitation, when the completion criteria is met, that the land be rezoned to appropriate land use zones in the Muswellbrook Local Environment Plan.
30. Any land that may be proposed for RU1 should be characterised by:
 - (a) having access to roads, water and utilities and the final land form must be of a suitable geomorphology to allow for functional association with adjacent high quality agricultural land; and
 - (b) infrastructure or utilities necessary to give effect to the land-uses contemplated by the plan.
31. All land rehabilitation plantings should provide for biodiversity connectivity- that is - no more than 3km spacing between minimum patches sizes of 10 hectares and interstitial tree plantings at 60-80m spacing (3-4 trees per hectare).

Air quality

32. The National Environment Protection Measures (NEPM), of no more than 50 micrograms per cubic metre of 10 micron particulate matter averaged over a 24 hour period (and having a target goal of no more than 5 breaches of that standard over a 12 month period) has already been exceeded in the Muswellbrook township and grossly exceeded in the Singleton township. The putative standard for the potentially more harmful 2.5 micron material has been exceeded substantially more in the Muswellbrook township.
33. The standard sets a limit beyond which experts agree that human population health is intolerably compromised.
34. The proposed development will contribute additional dust to the Upper Hunter air shed in circumstances where human health has already been intolerably compromised. The Proponent's air quality methodology avoids assessing the cumulative impact of its emissions on the tolerance threshold created by the standard in circumstances where the air shed has cumulatively exceeded the threshold. Council submits that the development will have an intolerable impact on human health and development approval should be refused.
35. Further, and in the alternative, Council submits that the Proponent's application falls well short of best practice dust management.
36. Further, Council notes that 12:00pm to 12:00am dust readings have typically been higher than daytime readings. A mix of different operational methods during the night together with air inversion compressions is likely to be contributing factors.
37. Council notes that the night mining close to townships is a challenging environment but notes that routine high levels of dust emission during the night offset by lower day emissions (so as to approach but not exceed the daily average) is not best practice.
38. Council notes that a condition requiring a maximum standard for night dust emissions be imposed.

39. This assessment should include the predicted contribution from the mine on the whole of the nearest large population, in this case the town of Muswellbrook.
40. The Environmental Assessment undertakes some analysis of PM_{2.5} emissions and impacts and indicate the highest concentration of emissions will be the Lake Liddell Recreation Area, which provides accommodation to permanent and temporary residents.
41. The contribution of PM_{2.5} material must also be related to a health risk assessment over the life of the mine.
42. The recent proposed changes to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries)* 2007 recommended that mining operations should not contribute to a PM₁₀ concentration above 50µg.m-3 on a daily basis or above 30µg.m-3 on an annual basis. Council considers this should be applied with respect to the Application.
43. Real time PM_{2.5} monitoring should be included as a requirement of an air quality monitoring program.

Planning and regulatory capacity

44. While not being the consent authority, Council makes on behalf of its community, comprehensive submissions as part of the approval process for all major developments – including recommending specific conditions of consent. Council's submission is invited by reason of statute and as consent authority for various attendant matters relating to the development.
45. The process is exhaustive of staff time. Council is not appropriately resourced to conduct the important task of evaluating complex and lengthy applications – particularly in the absence of cumulative data. Council receives no application fee to offset the cost of the assessment of mining applications and the direct cost of that process is therefore directly borne by the community.