

Objection submission

Condition 63, Schedule 3 of Maules Creek Project Approval (10_0138) – Employee Transportation Modification



This is a submission prepared by Dr Kerri Clarke and Ms Anna Christie MCCC environmental representative and alternate.

The authors object to changes to the Employee Transportation modification.

1. OBJECTIONS TO MOD 3

Our objection to any modification of Condition 63, Schedule 3 in PA 10_0138 is based on the modification EA:

- fails to fully address matters that are required to be considered by section 79C of the *Environmental Planning and Assessment Act 1979*;
- does not provide adequate justification for modifying Condition 63 of PA 10_0138;
- in particular, ignores the impact of motor vehicle traffic on wildlife in the East-West Biodiversity Corridor and the potential of collisions therefrom;
- and in doing so, undermines the required Biodiversity Management Plan and Offset Strategy.

In addition to rejecting MOD 3, we believe that the recidivist breaching of Condition 63 since the previous infringement penalty in 2015 should be penalised by the Department of Planning & Environment. We question why the Department has acquiesced for so long to the breaching of Condition 63.

The neighbouring coal mine Boggabri Coal operated by Idemitsu Resources also has a contractor and labour-hire component of its workforce, and appears fully capable of maintaining a shuttle bus service.

This proposed modification represents a significant lowering of road safety standards in the roads between Maules Creek coal mine, and the town of Boggabri.

It fails to address key vehicle collision risks, including the risk of colliding with wildlife, and the risks of fatigued mine workers driving at speed following or preceding 12-hour shifts doing often dangerous and physically demanding work.

The wildlife have a high significance because they characterised as being in the East-West Biodiversity Corridor. The east-west biodiversity corridor is a core foundation of the Maules Creek and Boggabri Coal offset strategies AND the Leard Regional Biodiversity Strategy. The entire Maules Creek offset strategy has been based on this corridor which theorises animals will follow a westwards path to the Pilliga Forest, traversing the Kamilleroi Highway, and feeder roads to the mine. The Maules Creek EA by Hansen Bailey consultants stated at p.128, that “A consolidated ecological management program across all biodiversity offset areas and network of wildlife corridors” was a “key objective for the establishment of the Maules Creek biodiversity offsets strategy”. As a consequence, the land acquisition strategy of Maules Creek mine has also been based on the East-West Biodiversity Corridor.

Below we provide reasoning for our position on this modification.

2. MATTERS FOR CONSIDERATION

2.1 Section 79C of the Environmental Planning and Assessment Act 1979 (EP&A Act)

Section 79C specifies “matters for consideration” by the consent authority.

Relevant to the evaluation of this Modification, the consent authority is required to consider:

“79C Evaluation

(1) Matters for consideration—general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

...

(b) the **likely impacts of that development**, including **environmental impacts** on both the **natural and built environments**, and **social and economic** impacts in the locality,

(c) the **suitability of the site** for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the **public interest**.

2.2 Likely environmental impacts of modification

The only environmental impacts considered by the EA are traffic congestion, noise and greenhouse gas emissions. It fails to include other environmental impacts such as:

- high likelihood of presence of large numbers of wildlife on road, including kangaroos, wallabies, echidnas - all found in considerable numbers during main commute period coinciding with 7AM-7PM shift changeover;
- the conflict between the east-west biodiversity corridor which is supposed to provide an avenue of escape for wildlife fleeing the fallen Leard Forest, and mine access road;
- reported high numbers of “owls” - or possibly misdescribed Tawny Frogmouths - being found on roads.

2.3 Past unlawful conduct contrary to Project Approval conditions

The past unauthorised conduct is a relevant consideration to assist in the assessment of the likely impacts of the MOD 3 proposal: *Walton v Blacktown City Council* [2011] NSWLEC 1008.

We submit that there is a history of non-compliance with Condition 63, dating back prior to 2015, and likely commencing soon after the construction phase ceased. This non-compliance has given rise to unacceptable impacts on road safety of the general community, worker commuter safety, wildlife mortality, and wear and tear of the roads.

The past unauthorised conduct and its social and environmental impacts, in addition to warranting a penalty, also provides information relevant to the consideration of MOD 3.

The Chief Justice of the NSW Land and Environment Court, Preston CJ in *Jonah Pty Ltd v Pittwater Council* (2006) LGERA 408 discussed the relevance of an unlawful past use. At [35-38] His Honour states:

“37 ... mere unlawfulness of past use is not a relevant factor does not mean, however that ... any consideration of its unlawfulness cannot ever be relevant.

38 For instance, past conduct (regardless of whether it is unlawful) may have given rise to unacceptable impacts,... The experience of impacts of the past use could be relevant in evaluating, first, the likely impacts of a prospective use for which consent is sought of the same or similar character, extent, intensity and other features as the past use, secondly, the acceptability of the likely impacts and thirdly, if likely impacts are considered to be unacceptable, the appropriate measures that ought to be adopted to mitigate the likely impacts to an acceptable level. Past use would, therefore be of relevance but it is for proper planning reasons, not because the past use happened to be unlawful. ...”

Therefore, it is incumbent on the Department to examine all available evidence concerning impacts that have prevailed during the extended period of ongoing breaches in Condition 63. The impacts are well known to local community and mine workers alike, and have been communicated to the company at previous CCC meetings (especially Triple mine CCC meetings). This being the case, we dispute the reliability of the MOD 3 EA as it has completely avoided all reference to the known impacts of the past (and ongoing) unlawful conduct. In addition, a Biodiversity Impact Statement should be an essential requirement of the EA.

2.4 “Likely” environmental impacts

Environmental impact which is a “likely” consequence of the modification needs to be considered, and there is no basis to exclude such impact under section 79. “Likely” impacts must not be too remote. The following observations are made from the history of past, unlawful conduct contrary to Condition 63, and are neither mere conjecture nor supposition.

Rushing workers, driving fast on dark country roads, are at higher risk of impact with animals, especially as the shift changeover coincides with the most active time for wildlife i.e. in the early morning and at dusk/early evening.

Information provided to the Wando CCC by mine workers and community members is unanimous that:

1. there have been exceptionally large numbers of road kill since the 2015 Leard Forest clearings
2. Maules creek staff member is daily delegated to remove carcasses daily (we can’t verify because much of this happens on private roads)

In addition, we have been informed that the **shuttle bus has had wildlife collisions** several times and needed panelbeating.

The community believes that the ongoing non-compliance with Condition 63 has given rise to an alarming level of wildlife deaths on the mine access road, of which the Proponent is aware. The community also submits that the abandonment of the shuttle bus service requirement, in favour of predominantly 1-passenger commuting trips, has given rise to unacceptable road safety risks, and impacts negatively upon the safety of other community members using the road network during shift changeover periods, as well as risks to the workers themselves.

None of these matters have been addressed in the EA, except in the most tangential of fashions by referring to the road usage numbers. There has been no extrapolation from these basic statistics. There is no reference to driver behaviour in the EA. This omission fails to recognise the actual risks posed by the abandonment of Condition 63, which are material to the consideration of this modification just as they were in the formulation of Condition 63 at the time of its inception. Matters that should be considered, but have not been referred to in the EA, include (but not excluding other matters):

- driver fatigue after working a 12-hour shift in extremely heavy working conditions
- driver sleepiness and/or fatigue driving to work after minimal breaks
- commuters speeding to get home/to the mine
- volume of traffic travelling in a column in same direction poses risks to slower vehicles
- overtaking said slower vehicles by mine worker vehicles impatient to get to their destinations increases risks to other commuters
- increased chance of encountering wildlife on the road
- the EPBC Act conditional provisions imposed in the PA should require an independent impact assessment for public and private WHC roads.

2.5 Biodiversity Corridor

Presented here are four views of the unfortunate problem of the Mine Access Road being directly in the path of the East-West Biodiversity Corridor.

Figure 1 shows the east-west wildlife corridor devised by Hansen Bailey in the Maules Creek Mine EA submitted by Aston Resources. The railway line over the Namoi River and Kamillaroi Hwy looking in a southwesterly direction as shown in Figure 1 takes in some of the East-West Biodiversity Corridor as wildlife moves toward the Pilliga. Additional areas of connectivity, which should be taken into account by authorities are provided in Figure 2.

Extensive and rapid clearing of Leard State Forest (Figure 3) for coal production forces wildlife out of their native habitat and to seek refuge. Wildlife connectivity to surrounding habitat has been allocated by WHC as the East-West Biodiversity Corridor and Maules Creek Corridor located between Maules Creek and Boggabri coal mines (see Figure 2). With the biodiversity corridors generally parallel to roads, any changes to employee transportation (Condition 63 Schedule 3) will clearly increase risk to refuge seeking wildlife. The aerial photograph provided in Figure 4 clearly shows the proximity of roads to animal habitat, where road and railway line must be traversed to reach the East-West Biodiversity Corridor put in place by WHC and accepted in the project approval.

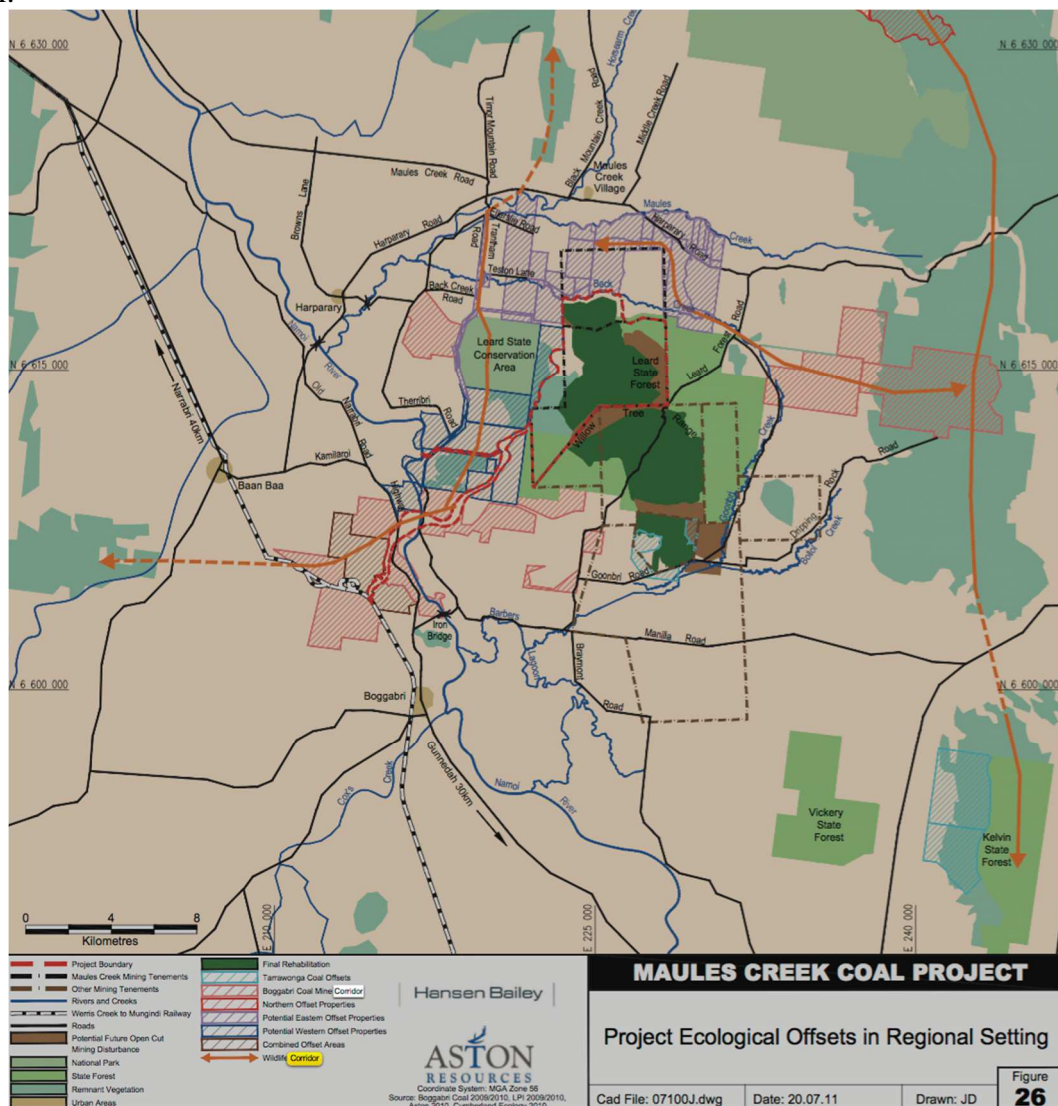


Figure 1. MOD 3 EA. Note the S-W direction of the Mine Access Road and the railway where the biodiversity corridor is supposed to be link between the Leard State Forest and the Pilliga Forests.

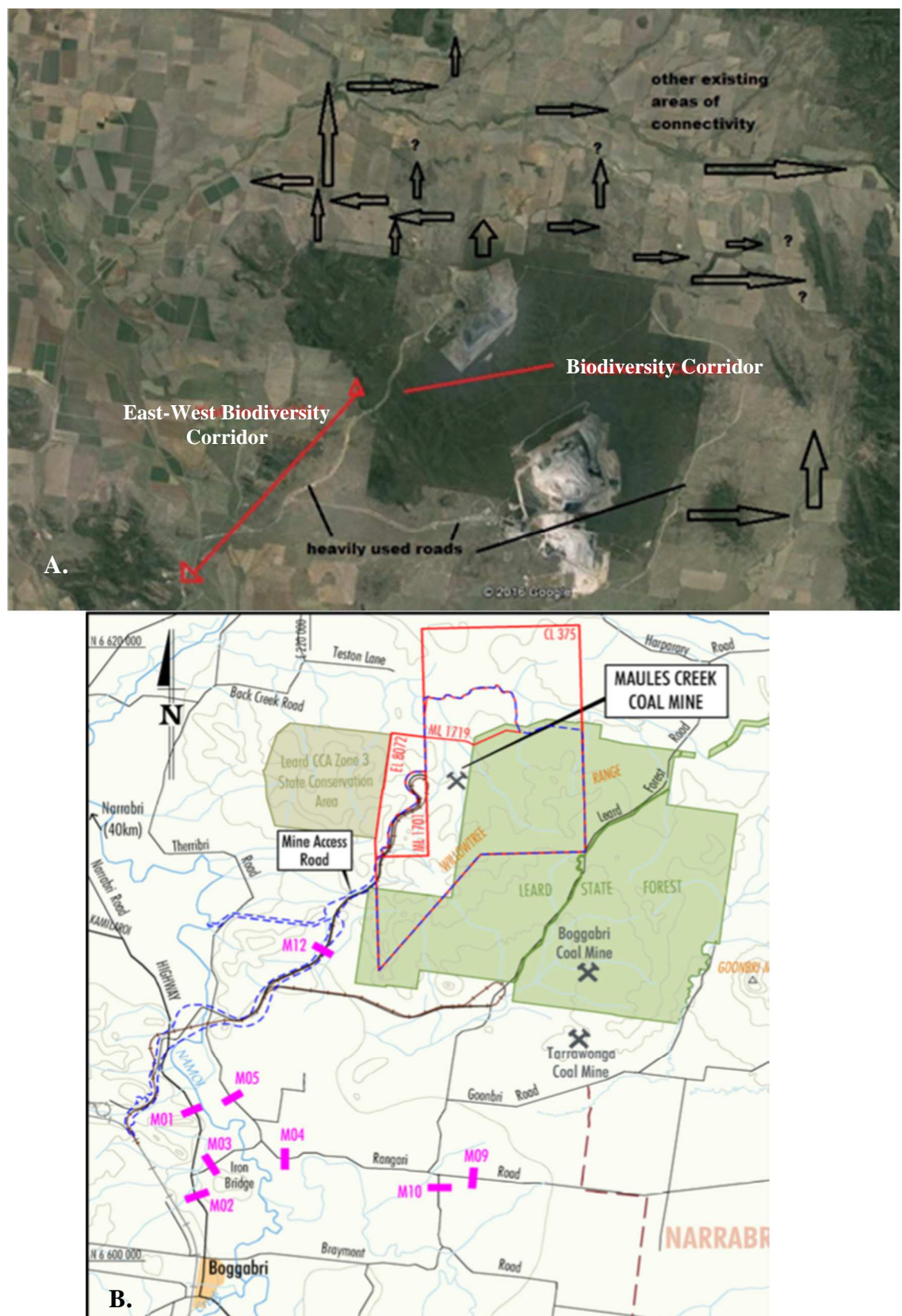


Figure 2. Biodiversity Corridors and habitat connectivity. A. Shows the East-West Biodiversity Corridor and Maules Creek Biodiversity Corridor, and the proximity to major roads used to access Maules Creek mine, compared to B. transportation monitoring sites on the local road network provided in the EA.

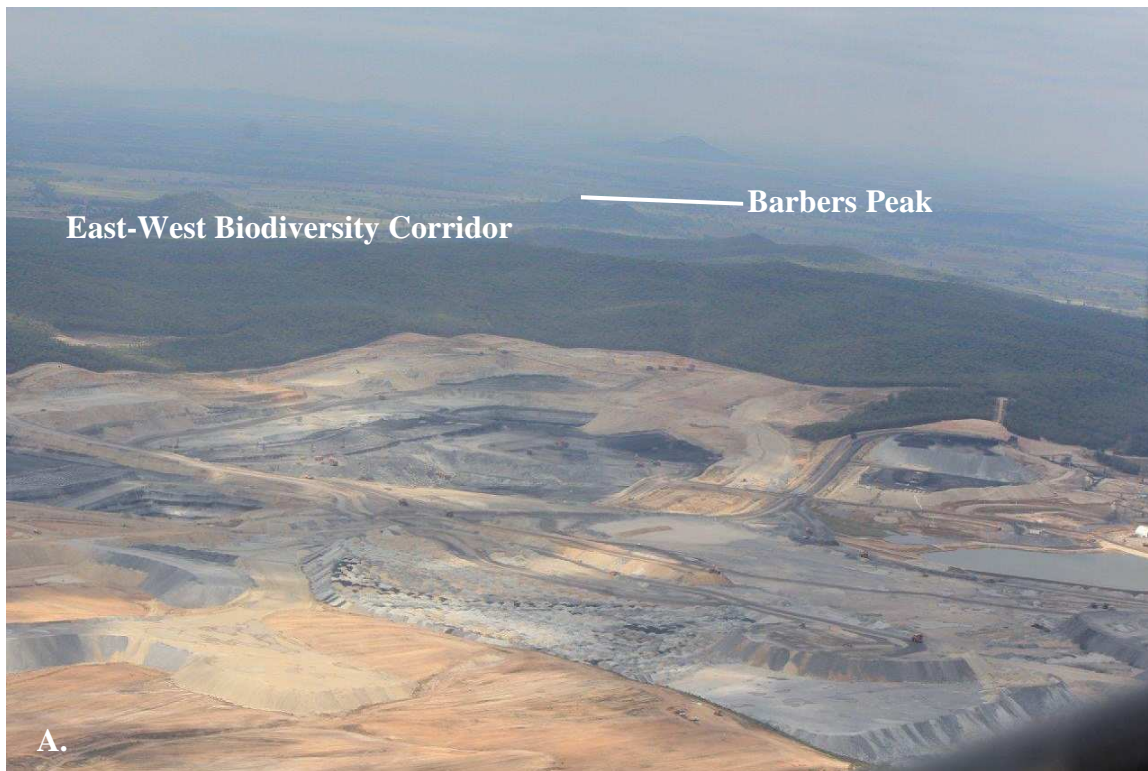


Figure 3. Aerial photographs of extensive clearing and habit loss. A. Clearing of Leard State Forest in January 2016 and B. in June 2016 shows that the mine is rapidly progressing toward the biodiversity corridor, reducing habit in that area and forcing wildlife to seek refuge. Barbers Peak has been designated as an offset for habitat loss in Leard State Forest.



Figure 4. Aerial photograph showing the close proximity of roads and railway line to the area allocated by WHC as the East-West Biodiversity Corridor. Wildlife fleeing deforestation of Leard State Forest are expected to access the biodiversity corridor by traversing road and railway lines.

2.6 Decision on MOD 3 must consider regional biodiversity impacts

Mod 3 is being sought without reference to a key overriding instrument, the **Leard Forest Mining Precinct Regional Biodiversity Strategy (RBS)**. This strategy, whose stage 2 was due in January 2014 and is still awaited, is required under the conditions of consent for all of the Leard Forest coal mines.

Members of the community have been calling for access to view and comment on stage 2 of the RBS, requested both via the Maules Creek CCC and the Department, but have been advised that this will not be possible until August 2016. As a result, the community must refer back to the Stage 1 scoping report.

The Regional Biodiversity Strategy (RBS) is based on Recommendation 1 from the Planning Assessment Commission Review Report (February 2012), which states that the strategy should:

- “...set out an appropriate framework for the strategic conservation of the biodiversity values and functions likely to be impacted by the mining of land within the Leard State Forest and surrounds.”

According to the Stage 1 scoping report, May 2013, produced by consultants Eco Logical Australia, the objectives of the RBS (at p. 5) include to:

- identify and map biodiversity values of the broader study area (which extends to Mt Kaputar to the North, Pilliga to the west, Kelvin Ridge to East and Namoi River to the South, and extending to Vickery Forest to the South-East)
- scientifically and practically demonstrate where in the landscape offsets and [biodiversity] corridors are best placed
- and identify opportunities to better align proposed mitigation commitments to maximise efficiencies and ecological outcomes
- to provide a spatial framework to facilitate strategic placement of future proposals and offsets in the Leard Forest area

To date, the RBS Stage 2 was intended to be in place before any of the final plans for the Maules Creek or Boggabri mines, still remains in limbo and it is not known whether any scientific investigation into the biodiversity corridors has been conducted. If it has, there is no evidence in any Maules Creek mine documentation, and there is no evidence of any species or populations studies being conducted to assess the impacts of road traffic on wildlife. It is clear from the intention of the RBS that the survival and population outcomes of native fauna seeking refuge following clearing of the Leard State Forest by Whitehaven are within the scope of the Strategy and must be included in the EA for modifying the Employee Transportation.

In the Comments on the Draft Scoping Report, the Department of Planning & Infrastructure (now DP & E) stated in an email from Mike Young, Head of Planning-Mining to Danny Young at Whitehaven Coal) that to achieve its objectives, Whitehaven in its strategy would need to “establish a defensible scientific basis for the study area... Including consideration of connectivity with areas to the west” and “identify and consider other (potential competing) land uses,” – but does not mention specifically road users. In the same communication, the DPI also called on Whitehaven to “undertake field based verification of high priority locations.” Considering the proximity of the Biodiversity Corridors to roadways and increasing traffic transportation must be included.

Consultation with the local community on the RBS is to be undertaken primarily via existing community consultative committees (CCC’s) according to the Stage 1 Scope (at p 9). However, this has not occurred. There is no evidence of any consultation with members of the Maules Creek Mine CCC to date and the document delivery delayed for more than 2 years. CCC members have asked for access to view the draft Stage 2 document, but have been denied pending OEH feedback. Given that apart from Whitehaven itself, the community is best placed to provide feedback on local environmental impacts, the failure to consult community members is a serious and fatal admission reflecting poorly on the process and likely outcomes of the RBS. This needs to be corrected urgently by including community members in the development of the RBS.

Clearly this has been designated to occur “**primarily** via existing Community Consultation Committees” [emphasis added] (P 9 Scope) and the CWA / P4P unless they gain a representative seat at the Maules Creek CCC, consider it imperative that they be included in consultation about the RBS and other documentation such as seen in this EA. Omission implies a lack of transparency and avoidance of community consultation, which has been a common practice with WHC seen manipulating the community consultation process.

For now, we wish to state that the wildlife casualties arising as a result of Whitehaven’s continued breaching of Condition 63 have not been considered. For the Department to even consider MOD 3 with the inadequate level of scientific rigour and feedback about the volume of animals using the

corridor and traversing roadways, is contravening the intentions of the PAC, and the conditions of approval.

2.7 Greenhouse gas emissions

According to the EA GHG impacts of replacing the shuttle buses were so “small” they are disregarded as follows (at p.11, para 4.4):

“4.4 OTHER ENVIRONMENTAL IMPACTS

Because of the reduction in use of buses relative to the approved MCCM, the Modification would result in additional use of private light vehicles to access the site relative to the approved MCC. This has the potential to give rise to additional scope 3 (indirect) greenhouse gas emissions associated with the MCCM. However, these emissions would be small compared with other scope 3 emissions (e.g. use of the product coal) and did not warrant specific inclusion in the Maules Creek Coal Project Air Quality Assessment (Pacific Environment Limited, 2011)...”

We regard this as an unacceptable. It is a retrograde step to abandon the 90% shuttle bus condition and drop down to a substantially lower target of 70%, of whom labour-hire, contractors and senior management are excluded. So the actual percentage of workers would be much less than 70%. The EA states: “These emissions would be mitigated by ongoing encouragement of bus transportation and car pooling.” However, we believe “encouragement has not been shown to be effective, hence previous fine for breaching Condition 63 in 2015, and subsequent ongoing non-compliance leading up to today.

2.8 Objects of EP&A Act

Condition 63 was inserted in PA 10_0138 for valid reasons which were enunciated in submissions from the community. To alter this, requires a consideration of impacts (as above) within the framework of the Precautionary Principle (PP).

The Objects of the EP&A Act specified in s 5(a)(i), and s 5(a)(vii) are in terms of “promoting the social and economic welfare of the community and a better environment”, and “ecologically sustainable development”.

3. JUSTIFICATIONS FOR MOD3 ARE WITHOUT FOUNDATION

According to the EA, these are the justifications for modifying Condition 63:

- (1) The prevalence of a “locally residing workforce”, as opposed to what was originally forecast by Whitehaven Coal of a significant component of fly-in fly-out (FIFO), or drive-in drive-out (DIDO) workers
- (2) The “preference” of those workers to use their own car and their unwillingness to comply with the shuttle bus program which is stipulated by the conditions of approval of Maules Creek mine
- (3) the claim that “There are no material road transport implications” (page ES-1 of Executive Summary)

We reject all three justifications.

3.1 “Locally residing workforce”

The EA states that the modification is justified because:

“...it was anticipated that a large proportion of Project employees would need to be sourced from outside the local government areas and would be travelling into the area temporarily to work their roster and reside at the Boggabri and Narrabri Workers Accommodation Facilities” (at p 1,para 1.2) and “Since approval of the MCCM, employment conditions in the mining industry have deteriorated significantly and as a consequence more employees reside in the local area than was originally anticipated (as opposed to being accommodated in local mine Workers Accommodation Facility).”

However there are some significant gaps in this reasoning. It always was promised by the company that “local” employment would prosper under the economic boom provided by the Maules Creek mine so changing the bus route may be appropriate to allow local mine workers to conform to Condition 63. If some mine workers reside in Gunnedah then maintaining the bus transportation to and from Maules Creek Mine as required in Condition 63 is the most sensible and safest option for all. Clear facts around the workforce domicile and structure of the workforce i.e. employed vs self-employed require further justification within the EA.

Mine workers on 12-hour shifts doing heavy demanding work then driving local roads are at a greater risk of having an accident due to fatigue no matter the distance travelled. So while the driving risks have *increased*, the company has actively ignored Condition 63, and now seeks to legitimise breaches of Condition 63 by *reducing* worker safety provisions provided in the legal requirement.

There is a “peak hour” that occurs at the shift changeover involves columns of cars driving at speed from the mine to Kamilleroi Highway. Community members note that it is not a good time to be traversing these roads due to the speed of drivers anxious to get home from work at the mine. This is understandable after working a 12-hour shift, but at what cost? Practices such as dangerous overtaking and tailgating are common around the shift changeover time as a result.

The Department of Planning and Environment needs to validate some of the claims that have been made about the workforce some of which conflict with the evidence. Defining what is recognized as “local” to the Maules Creek mine is also required.

3.2 Worker “preference” – not to be considered

“GTA Consultants (2016) assessed impacts on the surrounding road systems of the maximum operational workforce of 470 employees, **assuming the current workforce travel behaviour (i.e. bus use/car pooling)**” (p 10, para 4.2.2)

However, this is an empty assumption because unlike nearby Boggabri Coal, the workforce of Maules Creek mine has apparently rejected the shuttle service, and apparently carpooling (noted as 1.6 people per car in the EA). The preference appears to be single occupant private vehicles. The Department needs to investigate why Maules Creek workers are loath to use the free shuttle bus provided by the company, when compared to Boggabri Coal employees and contractors alike appear to be using the facility. The worker preference must be disregarded and enforcement of the project approval ruling be applied.

In reference to the Roads and Maritime Services (RMS), the EA refers to “internal MCC communication with staff regarding positive driver behaviour” (p 4) but provides no detail about the message content, channels of communication, or frequency of messaging.

3.3 “No material road transport implications”

Although the EA states there are no material road transport implications, we believe that the matters raised above under “impacts” and “justification” refute this proposition. In fact, there are many road transport implications associated with wildlife collisions, driver fatigue, interaction between fast moving columns of workers with slower moving locals, etc as provided in the preceding paragraph.

4. FAILURE OF COMMUNITY CONSULTATION

The CCC is the single required portal for the exchange of information between the company and the community. Despite this, a letter detailing the application to modify the operating conditions regarding transport was emailed to CCC members on the 20th June from CCC Chair John Turner, who had received the email from the company on the 31st of May. No mention of the EA submitted by WHC to modify Condition 63, Schedule 3 was made at the Maules Creek Mine CCC meeting on the 18 May 2016, or the EA submission closing date for comments (at CCC or in the email communication). Having the audacity to state that consultation has taken place with the CCC is pure fiction.

An infringement of Condition 63 was reported to the MCCM CCC on the 20th May 2015 DP & E for noncompliance with condition 63, to have 90% staff bussed to site. No further communication about action taken by MCCM to attempt to achieve compliance was made. CCC member Councillor Lloyd Finlay asked about a double decker bus transporting staff to the Maules Creek area –he was advised it was for Downer Contractors to get to work (Downer are operators of Boggabri Coal Mine). Apparently the neighbouring mine (Boggabri Mine) which does not have the 90% rule as part of its approval has voluntarily used buses to transport staff but MCCM workers prefer not to comply with regulations

On 2nd March 2016 at the CCC meeting a community representative raised the fact that traffic on Therribri Road appeared to be increasing, an observation that had been made by other community members concerned about safety of driving during the "peak hour". Craig Simmons (then Whitehaven Area Manager Services) informed the CCC that the majority of employees are bused to work. While he was technically correct at this time, the Mine was still in breach of their conditions and this was not reported to the Community Consultative Committee. There has been no engagement with the CCC regarding what looks like a continual breach of the operating conditions potentially since the mine’s inception.

5. CONCLUSION AND RECOMMENDATIONS

Para 1.3 “CONSULTATION” MCC consults with relevant NSW Government agencies on a regular basis in relation to the current MCCM operations. We question what nature of consultation this is, when the Department did not consider it appropriate to require a biodiversity impact statement to accompany this modification application.

The crisis of roadkill and the animals fleeing the Leard State Forest is well-known to locals and workers at the Maules Creek mine. We question how it has come about that the Department is unaware of this problem.

This EA is extremely lacking in supporting information, in particularly addressing the matters that are required by statute for the consent authority to consider.

For the reasons outlined within this document, we submit that any acceptance of MOD 3 should not be considered by the Department in the current form. We believe that the Department has two choices:

- reject MOD 3 – our preferred option
- place MOD 3 on hold until RBS process is completed. In the meantime fining Whitehaven coal for openly breaching Condition 63 continuously since breaching fine in 2015, and enforcing compliance with Condition 63 until such time as a lawful modification has been approved.