

20 May 2016



The Minister  
Department of Planning - Major  
Projects  
GPO Box 39  
SYDNEY NSW 2001

SWAAB Attorneys

ABN 71 028 846 652

Level 1, 20 Hunter Street  
SYDNEY NSW 2000

DX 522 SYDNEY NSW

T +61 2 9233 5544  
F +61 2 9233 5400

[www.swaab.com.au](http://www.swaab.com.au)

Dear Sir

**Gunlake Extension Project  
715 Brayton Road, Brayton**

- 1 We act for the Kahlbetzer family who have a residence located approximately 1.8 km from the Gunlake Quarry, at Lot 192 DP 750053.
- 2 We set out a submission below which addresses a number of concerns with the Environmental Impact Statement (EIS) prepared by the proponent, in relation to development of 715 Brayton Road, Brayton (**the Site**) and requests that relevant principles in case law be adopted in the decision making process.

**Summary of concerns**

- The Gunlake State Significant Development Application (**the Proposal**) does not satisfy the objectives of the RU1 Primary Production or RU 2 Rural Landscape Zones.
- The Proposal does not properly address the noise assessment requirements set out in the Secretary's Environmental Assessment Requirements in that the choice of sensitive receptor is not explained and no noise measurements have been either taken at, or estimated for, our client's land.
- There will be unacceptable biodiversity impacts if the Proposal is approved. There has been no qualitative assessment of the Commonwealth listed critically endangered ecological community located on the Site and its importance in the context of what examples of that community are left in the locality is unknown.
- The economic analysis is deficient and there is not a balanced assessment of the economic benefits of the proposal against the principles of ecologically sustainable development. The economic analysis fails to provide a detailed assessment of the costs and benefits of the development as a whole and so does not meet the Secretary's Environmental Assessment Requirements. It is not clear whether the Proposal will deliver a net benefit to NSW.

**Partner**

Chris Shaw

**Contact**

Cecilia Rose  
Special Counsel  
+61 2 9777 8316  
[cxr@swaab.com.au](mailto:cxr@swaab.com.au)

Our ref

160738

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- The Transport Options Analysis does not properly assess the rail options as compared to the road options as it does not provide an assessment of the cost of the contribution of the road option to greenhouse gas emissions.
- The Traffic Impact Study does not provide a Traffic Management Plan for assessing the ongoing impact of the significant increase in truck movements on a daily basis. There is also a failure to assess the impact on the increase in truck movements on those residences located close to the haulage routes.
- The Traffic Impact Study proposes road works be undertaken but provides no environmental impact assessment of the road works and very little detail regarding the proposed works. It is unclear whether Council is required to consent to the application as the local roads authority, and if consent is required, whether that consent has been given.

### The decision making process to determine a project application

- 3 The exercise of the Minister's power under section 89E of the *Environmental Planning and Assessment Act 1979 (EPA Act)* to grant consent to the application or refuse consent to the application requires consideration and weighing of the environmental impacts, and social and economic impacts of the development. Section 89H of the EPA Act says that section 79C of the EPA Act applies to the determination of the development application. His Honour Justice Preston, the Chief Judge has described this decision making process as a polycentric problem, saying "A polycentric problem involves a complex network of relationships, with interacting points of influence. Each decision made communicates itself to other centres of decision, changing the conditions, so that a new basis must be found for the next decision".<sup>1</sup> His Honour's decision was appealed but dismissed on appeal, the Court of Appeal noted that Justice Preston, the Chief Judge used the words "polycentric problem" "as a catchphrase to describe the multifaceted nature of the issues that had to be determined."<sup>2</sup>
- 4 The task of the Minister in determining the Proposal, is to identify the relevant matters to be considered, find the facts that relate to the relevant matters, then determine how much weight to give each of the relevant matters and finally, to balance the weighted matters to arrive at a managerial decision.<sup>3</sup> We urge the Minister to adopt the course described by his Honour Justice Preston in *Bulga*.

### Inconsistent with relevant zone objectives

- 5 Very little consideration of the applicable *Goulburn Mulwaree Local Environmental Plan 2009 (LEP)* is revealed in the EIS (see page 63). Section 79C requires consideration of the relevant environmental planning instruments, of which the LEP is one. The Site is partly zoned RU1 Primary Production, and part RU2 Rural Landscape. Clause

<sup>1</sup> *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48; 194 LGERA 347 at [31] (*Bulga*) (noting that the appeal in [2014] NSWCA 105; (2014) 200 LGERA 375 was dismissed).

<sup>2</sup> *Warworkth Mining Ltd v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105 (2014) 200 LGERA 375 at [171] (*Warkworth*).

<sup>3</sup> *Bulga*, op cit, at [36].

2.3(2) of the LEP requires that "The consent authority must have regard to the objectives for development in a zone when determining a development in respect of land within the zone."

6 The objectives of the RU1 Primary Production Zone are:

- *To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.*
- *To encourage diversity in primary industry enterprises and systems appropriate for the area.*
- *To minimise the fragmentation and alienation of resource lands.*
- *To minimise conflict between land uses within this zone and with adjoining zones.*
- *To promote the use of agricultural land for efficient and effective agricultural production.*
- *To avoid or minimise impacts on the natural environment and protect environmentally sensitive land.*
- *To allow the development of non-agricultural land uses which are compatible with the character of the zone.*
- *To allow the development of processing, service and value-adding industries related to agriculture and primary industry production.*
- *To protect and enhance the water quality of receiving watercourses and groundwater systems to reduce land degradation.*
- *To minimise the visual impact of development on the rural landscape.*

7 The objectives of the RU2 Rural Landscape Zone are:

- *To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.*
- *To maintain the rural landscape character of the land.*
- *To provide for a range of compatible land uses, including extensive agriculture.*
- *To protect, manage and restore areas with high conservation, scientific, cultural or aesthetic values.*
- *To protect and enhance the water quality of receiving watercourses and groundwater systems and reduce their degradation.*
- *To preserve environmentally sensitive land, including catchment areas, and prevent development likely to result in environmental harm.*
- *To minimise the potential for conflict between adjoining land uses.*

8 The proposal is inconsistent with several of the objectives set out above.

9 The proposal does not minimise conflict between land uses. Impacts revealed by the EIS include an increase in noise at sensitive receptors, and an increase in dust emissions in the area which will impact on the residences associated with rural uses in the immediate locality. A more detailed analysis of the noise impacts is set out below.

10 The proposal does not minimise impacts on the natural environment or protect, manage and restore areas with high conservation value. A Commonwealth listed Critically Endangered Ecological Community (CEEEEC) is identified on the Site which is proposed for removal as part of the expansion. The proposal to remove CEEEC does not meet these objectives. A more detailed analysis on the CEEEC is set out below.

11 The expansion does not maintain the rural landscape character of the land or minimise visual impact of the proposal on the rural landscape. A cursory analysis of the rural views seen from some locations in the

area is set out in the EIS however the view impact from our client's land has not been considered. The EIS Executive Summary page 13 states "The quarry is visible from the residence approximately 1.2km north west of the infrastructure area, and isolated parts of surround [sic] properties have long distance views of generally more than 5km." Our client's land is located approximately 1.8km from the Site and the quarry is visible from our client's land. **Attachment 1** to this letter includes photographs of the view of Gunlake Quarry from our client's land.

- 12 Extractive industries are an innominate permissible use in the RU2 Rural Landscape Zone.
- 13 Also relevant is clause 12 of the State Environmental Planning Policy (Mining Petroleum and Extractive Industries) 2007 which requires the consent authority to consider the existing and approved uses of land in the vicinity of the proposed development.

### Noise impacts

- 14 The noise and vibration assessment (**NVA**) prepared as part of the EIS (Appendix K) states that it was prepared on the basis of assessing the potential noise and blasting impact at the nearest sensitive receivers (page 1). However there is no analysis of how the most sensitive receivers were determined in the NVA. The NVA identifies 8 assessment locations, R1 through to R8. R1 through to R4 are within 1.5 km of the site and R5 through to R8 are more distant to the site but identified as sensitive receivers. The criteria for identification as a sensitive receiver is not described in the NVA. This is contrary to the requirement in Part 3, clause 3, point (e) of the EPA's EIS Requirements.
- 15 Our client's residence is located approximately 1.8km from the proposal. It is located closer to the site than the identified sensitive receivers R5 and R6. Our client's residence has not been assessed in any part of the NVA, and the Site is visible from our client's residence. **Attachment 2** to this letter includes Google Earth images that identify our client's residence, relative to the Site.
- 16 The NVA purports to quantify the existing background noise levels in the surrounding environment, and then on the basis of those levels and some attended testing during one off events at locations closer to the existing quarry, estimate impacts on the identified sensitive receivers. In the R7 location the operational noise levels were described as during the extension project (at page 32) as follows:  
  
*"Night-time noise levels during worst case winds and F class temperature inversion are predicted to be up to 3dB above the PSNLs. This is considered to be a moderate level of noise impact (during worst case night-time meteorological conditions only) and entitles this location to mitigation upon request in accordance with the VLAMP."*
- 17 The NVA reveals relatively significant noise impacts at the R7 location, which is more distant from the Site than our client's land. Moreover, the intensification of crushing as a consequence of the proposal will occur in the location of the quarry which is closest to our client's land.
- 18 The NVA does not identify how sensitive locations were identified. Residences closer than "sensitive locations" recorded in the NVA have been ignored and no reason for their exclusion has been explained in the NVA. On the basis of the summary set out above, it is likely that there will be a noise impact experienced at our client's residence. The application should not be approved until the noise impact at our client's

property has been quantified, and our client has had an opportunity to review the revised NVA.

- 19 The NVA indicates that blast monitoring is undertaken for all blast events at the "nearest potentially affected residence" (page 41). No indication of the measurements taken is provided in the NVA. The NVA states that "noise emissions from the quarry are typically inaudible at the nearest residential locations" (page 41). The locations are not identified, and "typically" indicates that on some occasions, noise emissions are audible however there is no record of the measurements taken or the level of impact on those occasions. Increasing the blast events would indicate that there is likely to be an increase in those occasions when a blast is audible. Measurement of the noise levels when blast events occur at properly defined locations should be undertaken and the proposal should not be approved until these noise impacts are properly understood.
- 20 The NVA does not include an adequate assessment of noise impacts, as required by the EPA in their letter dated 15 June 2015.

### **Biodiversity impacts**

- 21 Two important ecological communities have been identified in the expansion area of the project. Yellow Box – Blakely's Red Gum Grassy Woodland and Derived Native Grasslands (**Box Gum Woodland EEC**) is listed under both the *Threatened Species Conservation Act 1995 (TSC Act)* and the *Environmental Protection Biodiversity Conservation Act 1999 (Cth) (EPBC Act)* although the listing descriptions vary slightly. Broad-leaved Peppermint – Red Stringybark Grassy Open Forest and Derived Native Grassland is also identified, although not listed.
- 22 The Biodiversity Assessment Report (Appendix I) states that the Box Gum Woodland EEC meets the description of the Commonwealth listed Box Gum Woodland EEC (page 29). The report identifies that 15.4ha will be impacted by the proposal. The total area of Box Gum Woodland EEC in the 5km radius outside the study area (page 41) is noted as 756.6ha. The proposed reduction of Box Gum Woodland EEC is represented as being 2% in the locality and the assessment is that "given the small reductions in vegetation and habitat in the locality...the extension project is not expected to have a significant impact on biodiversity at the local or regional level" (page 41). This analysis is entirely quantitative and makes no assessment of the qualitative impacts.
- 23 There is no data available on the Vegetation Information System database for the Box Gum Woodland EEC regarding its distribution and extent in the IBRA subregion (page 45). This means that the best example of the Box Gum Woodland EEC in the region may be removed by the Proposal. With so little information on the quality of the Box Gum Woodland EEC available in the region, it would not be reasonable for the Minister to permit the removal of Commonwealth listed critically endangered EEC as proposed by this application.
- 24 "Much of the original extent of the Box-Gum Grassy Woodland and Derived Grassland ecological community has been cleared for agriculture. In most of the areas that remain, grazing and pasture-improvement have effectively removed the characteristic understory, leaving only the overstorey trees with an understory dominated by exotic species.....Due to the high levels of clearing that have taken place.....regenerating overstorey are rare. Areas containing a number of mature trees or regenerating trees are important as they provide

current and future breeding and foraging habitat for woodland animals....." <sup>4</sup> However, in order for a patch to be listed, it must have a predominantly native understory.<sup>5</sup> Given this description and the criteria for listing, there is little confidence in the conclusion that removal of the EEC would not result in a significant impact on Box Gum Woodland EEC.

- 25 The Biodiversity Assessment also reveals that the removal of the Box Gum Woodland EEC will result in isolation of a portion of the Box Gum Woodland EEC that may be able to be utilised by threatened fauna species that have been identified in the surveys undertaken. Again the basis on which this is justified in the report is quantitative, as opposed to a qualitative assessment of the vegetation specimens, and no insight is provided as to whether the identified fauna species prefer the better quality EEC that is proposed to be removed.

### Economic analysis

- 26 The Economic assessment Report (EAR) provided in Appendix N does not support a conclusion that the economic benefits of the proposal outweigh the environmental and other impacts of the proposal.
- 27 There is little detail provided on the employment that the extension project will generate locally. There is no description of the expected positions as a result of the extension project, and wage expectations for those positions (see pages 37 and 38). It is assumed that most people will live locally however with delivery of the product mainly to the Sydney region, there is no clarification of the assumption of the number of the projected locally based workers. The analysis does not appear to be based on the current operation of the quarry. The benefit to the local area of the Proposal is unclear.
- 28 The EAR is deficient in its analysis of the impact on ecology and the economic cost of this impact. The report describes "impacted vegetation, and associated fauna, is likely to have non-use values to the community that would be lost as a result of the extension project.....Provided that values held by the community for the offsets are equal or greater than values that would be lost then no additional economic costs warrant inclusion in the CBA apart from the capital and operating costs...."<sup>6</sup>. The EAR proceeds on the basis that the impacted vegetation and associated fauna is the same as the offset provided. The EAR then proceeds on the basis of this assumption without making any attempt to understand or analyse how the community could value the loss of the impacted vegetation. As set out above, there has been no qualitative analysis of the impacted vegetation, the value to the community of the loss is unknown.
- 29 The EAR makes no assessment of intergenerational equity nor intra-generational equity. The EAR states that such judgments are "subjective and therefor left to decision makers" (page 23). Ecologically

<sup>4</sup> Advice to the Minister for Environment and Heritage from the Threatened Species Scientific Committee (TSSC) on Amendments to the List of Ecological Communities under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) found at: <http://www.environment.gov.au/biodiversity/threatened/communities/pubs/box-gum.pdf>, page 2.

<sup>5</sup> Ibid, page 4.

<sup>6</sup> Page 36, EAR.

sustainable development (ESD) is not mentioned anywhere in the EAR. The principle of ESD is critical in any assessment which seeks to understand the impacts of a proposal that affects the natural environment. There is a serious failure to address the concept of ESD in the EAR and in the EIS generally. ESD is defined as:

*ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:*

*(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.*

*In the application of the precautionary principle, public and private decisions should be guided by:*

*(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and*

*(ii) an assessment of the risk-weighted consequences of various options,*

*(b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,*

*(c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,*

*(d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as:*

*(i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,*

*(ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,*

*(iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.<sup>7</sup>*

- 30 The EAR dismisses the need to assess intergenerational equity and intra-generational equity and fails to make any assessment of the components of ESD outlined above. No other components of ESD are genuinely assessed in the EIS. It would be difficult for the Minister to proceed to making a decision without the benefit of understanding how the Proposal implements the principles of ESD.

### **Greenhouse gas emissions**

- 31 The Proposal involves an increase of up to 440 truck movements per day at its peak operation. This is an increase of close to 300 truck movements per day. The increase in greenhouse gas emissions as a consequence of these truck movements is significant. There is a paucity of analysis of the cost to the community over the operating period of the quarry of this increase in greenhouse gas emissions. The greenhouse gas emission analysis that has been completed as part of the Economic assessment report is not considered in any way in the

<sup>7</sup> section 6(2) *Protection of the Environment Administration Act 1991*.

Transport Option Review. It is relevant to consider when analysing genuine transport options, the greenhouse gas emissions generated by rail as opposed to the option of truck – only transportation. This analysis has not been undertaken by the proponent in its EIS and should be properly analysed to genuinely consider the transport options.

- 32 A considered analysis of the vehicle emissions that will be generated as a consequence of this proposal are necessary to properly understand the impacts of the Proposal on the environment, as required by section 79C of the EPA Act. The Minister in considering the polycentric problem presented by this Proposal, will not be able to resolve the competing impacts that will be caused by the Proposal, without a proper understanding of the impact on the atmosphere.

### **Traffic impacts**

- 33 There is no analysis of the impact of the significant increase in traffic movements for residences located on the haulage routes either in the Traffic Impact Report or the NAV. This assessment must be undertaken to properly understand the impacts of increasing the truck movements daily so substantially. The impact of evening truck movements, including light spill or any management of those issues is unknown. While the Environmental Management Strategy (Appendix C) indicates there is an updated Traffic Management Plan (TMP) (page 12), the TMP is not attached to the EIS and does not appear to deal with the truck movement increase for which the Proposal seeks consent. Part 6.2 of the Traffic Impact Report (page 57) says that the existing TMP would be applicable to the proposed quarry extensions. This is not acceptable given the extent of increase in the volume of traffic estimated by the Proposal. A TMP that reflects the new operation, addressing the impacts on residences (currently unknown) should be required for the Minister's consideration.

- 34 The need to assess the impact of the future increase in truck movements at residences along the truck haulage routes is particularly important given the prediction that on busy future production days, the potential maximum number of units could increase to 690. The Traffic Impact Report notes that the maximum peak of 29 loads per hour would not increase however, the hours of operation (24 hours is sought) would be utilised to achieve the maximum removal of quarry product. This means residences on the haulage route will be subjected to night time heavy vehicle movements. There is no assessment at all of the impact on residences along the proposed haulage routes. This aspect of the Proposal is critical to assessing the:

- (a) off site transport noise impacts;
- (b) issues raised by Goulburn Mulwaree Council (see point 4 of the letter dated 12 June 2015)

which are required in the Secretary's Environmental Assessment Requirements dated 13 October 2015.

- 35 The prolonged use of local roads at such a high daily vehicle movement rate will undoubtedly impact on infrastructure. The Proposal outlines some upgrades to roads and contributions to be given to mitigate the impact of the increase in truck movements. Brayton Road is not proposed to be upgraded notwithstanding the estimated 81% increase in traffic generation (see page 40 of the Traffic Impact Report). A more prudent approach would involve regular road conditions testing. The Minister should consider imposing conditions that require pavement and level of service surveys over the length of the project, to ensure that



local infrastructure is not unfairly impacted upon by the Proposal, if consent is ultimately granted.

- 36 Part 6 of the Traffic Impact Report sets out the proposed road and intersection improvements. Very little detail is provided in respect of how these improvements will be delivered, the impact on the environment of the proposed intersection works, and the timing of the works ( a timeframe of before 2025 is provided). In *CEAL Limited v Minister for Planning & Ors* [2007] NSWLEC 302; 159 LGERA 232 (*CEAL*) her Honour Justice Jagot refused an application for a quarry on the basis of the limited information provided by the developer in respect of the proposed road upgrades. It is unclear whether Council's consent has been obtained in relation to any relevant road works proposed in Council's road reserve.

- 37 Her Honour Justice Jagot in *CEAL* said at [33]:

*The upgrading, whether as proposed by Mr Hallam or Mr Samsa, involves a real potential for material environmental impacts. However, the environmental impacts of the upgrading and the capacity to effectively ameliorate those impacts cannot be identified on any reasonably informed basis. There is also a real chance that the operations of the quarry, and its associated consequences, will interact with the nature and extent of the road upgrading, the conditions to which it might be subject and, in consequence, the associated environmental impacts. An assessment of the quarry under s 79C(1) as sought by the applicant, in these circumstances, runs a real risk of being incomplete or inappropriate. Accordingly, I consider that it would be inconsistent with the objects of the EPA Act (specifically the promotion and co-ordination of the orderly and economic development of land) to accede to either of the applicant's option (a) or (b).*

- 38 The Minister in his decision making process should ensure that the appropriate information is provided to ensure a reasonable conclusion on environmental impact of the Proposal can be formed. There is insufficient information in the current application to enable the Minister to reasonably conclude what the environmental impacts of any roadworks will be and what measures can be implemented to mitigate any environmental impacts.


#### **Dust impacts - Attached photographs**

- 39 We have attached to the submission in **Attachment 1** photographs which demonstrate the view of the Gunlake Quarry from our client's land, but they also show dust levels escaping at the present mine operation. These photographs demonstrate that dust is escaping the quarry presently. Our clients are concerned that the expansion of the quarry operation will increase these impacts currently being experienced.
- 40 We also attach to the submission **Attachment 2** which is a Google Earth extract which demonstrates where our client's land is referable to the Gunlake Quarry, and provides an estimation of the distance between the two locations.

## Conclusion

- 41 We have set out above a summary of the concerns that our client has in relation to the Proposal. In particular the noise, traffic and dust impacts are not properly addressed in the EIS provided to support the application made to the Minister. The Minister should at a minimum require that each of these matters be addressed in a further revised EIS.
- 42 Please let us know if you have any questions in respect of the above matters.

Yours faithfully

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Chris Shaw