



# ***Watermark Coal Project***

*Modification Assessment  
(SSD 4975 MOD 1)*

December 2018

Photo Source: Department of Planning and Environment 2018

### **Cover photo**

Mt Watermark

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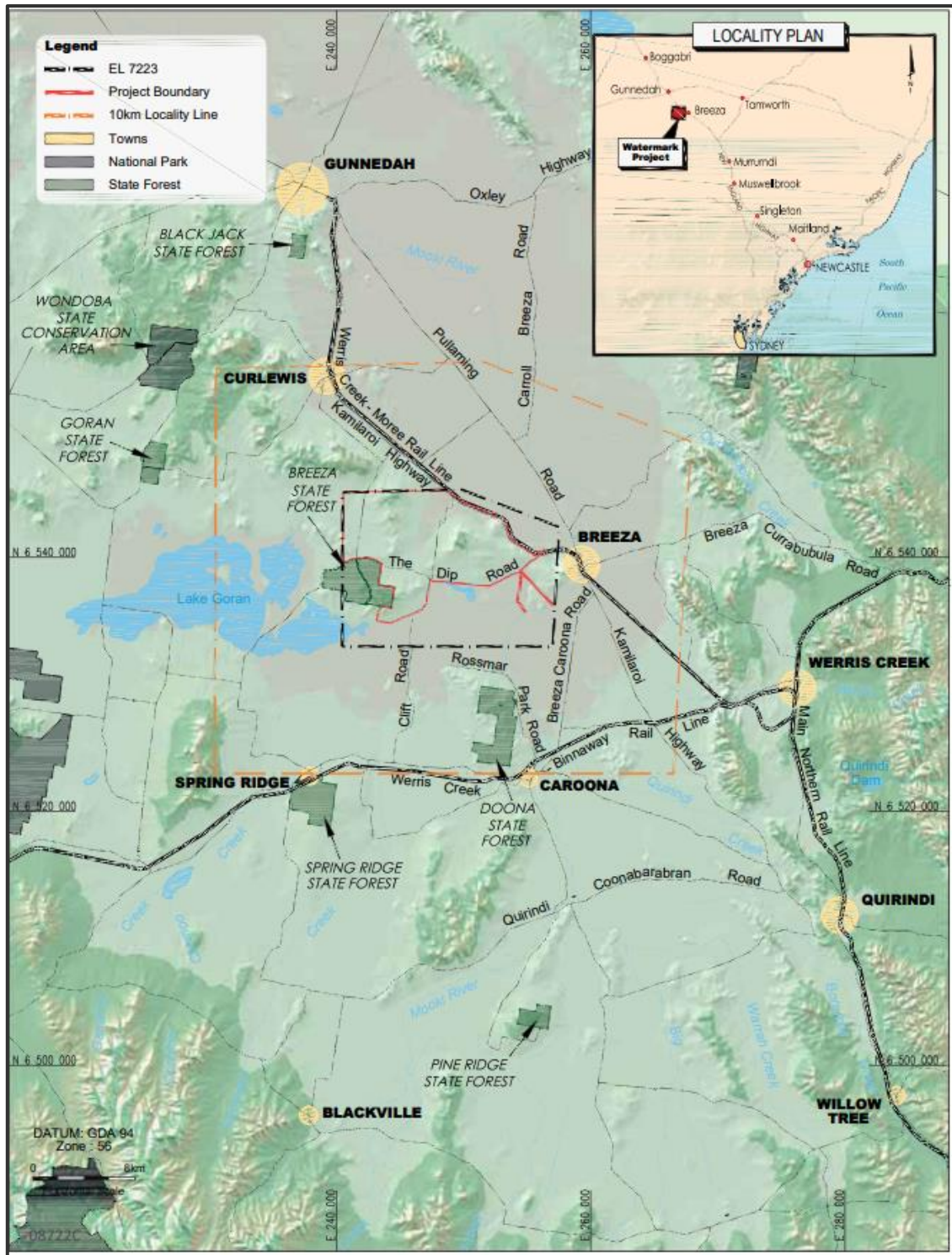
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# 1. Introduction

Shenhua Watermark Coal Pty Ltd (Shenhua) has approval to develop the Watermark Coal Project, an open cut coal mine to be located 3 kilometres (km) west of the village of Breeza and 25 km south east of Gunnedah on the Liverpool Plains (see **Figure 1**).



**Figure 1** | Project Locality



The project involves the:

- extraction of up to 10 million tonnes per annum (Mtpa) of run-of-mine (ROM) coal over 30 years;
- construction and operation of a coal handling and preparation plant (CHPP);
- construction and operation of a 5 km rail spur and rail loop;
- transportation of product coal via rail; and
- construction and operation of ancillary infrastructure

The project was approved on 28 January 2015 by the then Planning Assessment Commission (the Commission) under delegation of the Minister for Planning. However, the development has not yet commenced.

Shenhua is currently preparing a detailed feasibility study for the mine prior to making a final investment decision on the project.



## 2. *Proposed Modification*

Shenhua is seeking to modify the project approval to:

- include a definition of construction that allows certain pre-construction activities to be undertaken without triggering all the requirements under the project approval;
- change the timing for completing certain obligations in the project approval; and
- require notice to be given of the commencement date for the project.

The detailed feasibility study requires further geotechnical drilling and test pitting to be undertaken in the proposed mine infrastructure and rail corridor areas to determine ground conditions for civil engineering purposes.

Under the existing conditions for the project these works are construction activities and hence trigger all the obligations in the consent, including preparing a range of management plans, securing large biodiversity offset areas, and triggering acquisition provisions for large areas of agricultural land surrounding the mine.

To allow these activities to proceed without triggering all the obligations associated with construction, Shenhua is seeking to exclude geotechnical and other minor works, such as surveying, from the definition of construction.

The development consent includes several conditions requiring actions to be carried out within a certain period from the date on which the consent was granted. Legally, Shenhua is only required to comply with the conditions of consent when it acts on the consent, and cannot be compelled to carry out activities before this. Consequently, Shenhua is seeking to link the completion of these actions to the commencement of construction.

Shenhua has also requested that a new condition be included requiring the company to notify the Department in writing of its intention to commence the project to indicate when it elects to take up the consent.

The proposed modification (Mod 1) is described in the attached supporting information (see **Appendix A**).



## 3. Statutory Context

The project was originally approved under Section 4.38 (previously Section 89E) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and any modification to this consent must be made under Section 4.55 of the EP&A Act.

The Department is satisfied that the application can be characterised as a modification to the development consent as the proposal is administrative in nature and would not change the environmental impacts of the development as approved.

The Minister for Planning is the consent authority for the modification application. However, under the Minister's delegation dated 11 October 2017, the Executive Director, Resource Assessments and Business Systems, may determine the application as no reportable political donations were made and neither Gunnedah Shire Council nor Liverpool Plains Shire Council objected to the proposal.



## 4. Engagement

The Department made the modification application and supporting documentation publicly available on its website from 31 October 2018. Given the administrative nature of the application, the Department did not formally exhibit the application.

However, the Department referred the application to Gunnedah Shire Council and Liverpool Plains Shire Council and sought advice from the Environment Protection Authority, the Resources Regulator and the Division of Resources and Geoscience.

The Department also notified 11 landholders near the project site that have acquisition rights under the development consent about the modification application.

The agencies and councils confirmed that they had no comment, noting the administrative nature of the modification (see **Appendix B**).

Although the Department did not formally exhibit the application, it received representations from Beatty Legal acting on behalf of the Caroona Coal Action Group Inc (CCAG) and the Gomeroi Traditional Custodians. These representations raised concerns about the impacts of the geotechnical works and the potential for the modification to affect the commencement of the development consent. These matters are discussed in section 5.

The representations also asked for the application to be exhibited as there is a broader public interest. However, as discussed above, the Department considers the modification to be administrative in nature and that exhibition was not warranted.



## 5. Assessment

In assessing the merits of the modification application, the Department has considered the:

- current conditions of consent;
- the modification application and supporting information;
- the issues raised by Beatty Legal; and
- the requirements of the EP&A Act.

### Pre-Construction Works

Surveying and geotechnical investigations are necessary for preparing the detailed design of the project. These activities are part of the approved project and the impacts were fully assessed when the project was approved.

These activities are a standard requirement of most approved projects and can commonly be carried out as pre-construction works without triggering all the detailed obligations in the development consent because they involve minimal impact.

The Department is satisfied that the modification involves activities that are already approved, and that the activities would occur within the disturbance footprint and involve minimal environmental impact. Consequently, the Department considers that the work would meet the criteria for pre-construction and should be allowed to be carried out without triggering all obligations under the consent.

Accordingly, the Department has recommended the inclusion of a definition for “construction” that excludes these minor works and investigations and a definition of “pre-construction”. The proposed definitions are shown below.

*Construction: The construction works for the development as described in the EIS, excluding all pre-construction work.*

*Pre-construction works: Pre-construction works that may be required for the development, including surveys, acquisitions, fencing, investigative or geotechnical drilling or excavation, minor clearing, minor access roads, minor adjustments to services/utilities, works which allow isolation of the site so that access for construction can be provided (including service relocations)*

However, the Department considers that prior to undertaking any pre-construction works, Shenhua should provide more specific information about the nature of the works and the measures that would be employed to ensure minimal environmental impacts.

Consequently, the Department has recommended a condition requiring Shenhua to prepare a Pre-Construction Works Management Plan to the satisfaction of the Secretary, before it may commence any pre-construction works.

This will ensure there are suitable measures in place to minimise the impacts associated with these works.

### Revised Timing of Conditions

Changes to the consent are required to address two matters.

The first is to give effect to the introduction of pre-construction works (see above) and to allow these works to be carried out without triggering all of the obligations in the consent.

The second is that under the EP&A Act, conditions only take effect once the Applicant acts on the consent. This recognises that an Applicant may not act on the consent and should not be obliged to comply with any obligations under the consent until it decides to act on or commence the development approved under the consent.

The Watermark Coal Project consent includes obligations requiring Shenhua to carry out actions either from the date of the consent or by an arbitrary date, rather than prior to acting on the consent (see Table 1). These conditions must be changed to make them legally enforceable.

In changing the timing of the conditions, the Department considers the key requirement is to ensure that all safeguards are in place prior to any potential adverse impacts occurring. Therefore, the Department has recommended that most conditions should be linked to the commencement of construction (i.e the obligations must be fulfilled prior to the commencement of construction). This would ensure the relevant management plans and agreements with Councils etc. are in place before any significant development occurs on-site.

However, so that the community can be kept informed throughout all stages of the development, the Department has recommended that the CCC should be established as soon as practicable after the development commences.

The Department has also recommended that the biodiversity offsets should be secured after the commencement of construction, (noting that this is an administrative obligation only and generally takes some time to finalise) and the Koala Habitat Management Plan be prepared prior to the commencement of pre-construction works.

The Department has also recommended that the independent audit should be completed after the commencement of construction as it is intended to report on the environmental performance of the company.

Table 1 summarises the recommended revisions to the timing of the development consent conditions.

**Table 1** | Changes to timing of conditions

Condition Number	Obligation	Current Timing	Proposed Timing
Schedule 2: Condition 13	Shenhua to enter into VPA's with Councils	By the end of April 2015	Prior to the commencement of construction
Schedule 3: Conditions 5, 19, 26, 34, 36, 42, 46	Preparation of Management Plans	Prior to the commencement of any development	Prior to the commencement of construction
Schedule 3: Condition 32	Preparation of an Interim Koala Habitat Management Plan	Within one month of the date of the consent	Prior to the commencement of pre-construction works
Schedule 3: Condition 33	Secure biodiversity offsets	End of May 2015	Within four months after the commencement of construction
Schedule 3: Condition 35	Establishment of a Koala Technical Working Group	Prior to the commencement of any development	Prior to the commencement of construction
Schedule 3: Condition 47	Shenhua to enter into road maintenance agreements with Councils	Prior to the commencement of any development	Prior to the commencement of construction
Schedule 4: Condition 1	Shenhua to notify certain landowners that they have acquisition rights	Within 2 months of the consent	Prior to the commencement of construction
Schedule 5: Condition 1	Preparation of an Environmental Management Strategy	Prior to the commencement of any development	Prior to the commencement of construction

Condition Number	Obligation	Current Timing	Proposed Timing
Schedule 5: Condition 6	Establish and operate a CCC for the project	End of March 2015	Within 2 months of the commencement of the development
Schedule 5: Condition 9	Independent environmental audit of the development	By the 30 June 2017	Within 1 year of the commencement of construction

## Physical Commencement of Development

Under the EP&A Act, development consent “*does not lapse if building, engineering or construction work relating to the building, subdivision or work is physically commenced on the land to which the consent applies .....’*”.

There is a significant body of case law that supports a broad interpretation of “physical commencement”. If Shenhua were to carry out the surveying and geotechnical drilling then it would likely be physically commencing the development approved under the consent. However, as discussed above, the Department considers these activities would involve minimal environmental impact and has recommended revising the timing of most conditions to ensure that the relevant management plans are in place prior to any adverse environmental impact occurring. The Department considers that the proposed inclusion of a condition notifying the Department of the company’s intent to commence the development would provide a trigger for compliance monitoring and is consistent with contemporary mining consents.

Beatty Legal raised concerns that the wording proposed by Shenhua<sup>1</sup> could be interpreted as an alternative way of commencing the project that sits outside of the physical commencement provisions set out in the EP&A Act, as described above, and that this could fundamentally change some of the obligations under the consent.

This is not the case. The provisions of the EP&A Act would take precedence over any conditions. To avoid any uncertainty, however, the Department has recommended the inclusion of a condition requiring Shenhua to notify the Department of the commencement of any pre-construction or construction works.

This will enable the Department to program compliance inspections to ensure Shenhua is complying with the conditions of consent.



## 6. Evaluation

The Department has assessed the merits of the proposed modification in accordance with the relevant requirements of the EP&A Act.

This assessment has concluded that there is merit in allowing various works, such as surveying and geotechnical investigations, to be carried out prior to construction without triggering the detailed obligations in the consent.

<sup>1</sup> The Applicant shall:

- (a) notify the Secretary in writing of the date of commencement of development under this consent; and
- (b) may only commence development under this consent once the Secretary has agreed in writing that all prerequisites to the commencement of development have been met.

*Note: The prerequisites under the approval include the approval of management plans etc that are required to be approved prior to commencement of construction. Any conditions requiring the Proponent to acquire any property do not operate until the notice under this condition has been issued to the Secretary.*



This is because these works can be carried out with minimal impact, and are necessary to inform the detailed design and decisions on the feasibility of the project.

Notwithstanding, the Department has included a condition to ensure there are suitable controls in place to minimise the impacts of any pre-construction works.

The Department has recommended changes to the conditions to incorporate pre-construction works, and the timing of various obligations and ensure the Department is notified prior to any pre-construction or construction works.

Given these are largely administrative changes to the approved development that would not result in any additional environmental impacts, the Department considers the application should be approved subject to conditions.



## 7. Recommendation

The Department has prepared a Notice of Modification (see **Appendix C**) for the proposed modification and a consolidated version of the development consent as modified (see **Appendix D**).

The proposed amendments include a definition for “construction” which specifically excludes geotechnical drilling and other minor works; the requirement to notify the Department of the commencement of development; and changes to the timing of obligations to link them to the commencement of construction or the commencement of the consent.

The changes to the timing of obligations are summarised in **Table 1**.

The Department has also recommended some minor administrative changes to reflect revised names of NSW government agencies.

It is recommended that the Executive Director, Resource Assessments and Business Systems as delegate of the Minister for Planning:

- **considers** the findings and recommendations of this report; and
- **determines** that the modification falls within the scope of section 4.55(1A) of the EP&A Act;
- **accepts and adopts** all of the findings and recommendations in this report as the reasons for making the decision to grant approval to the applications;
- **modifies** the development consent (SSD 4975); and
- **signs** the attached approval of the modification (**Appendix D**).

Recommended by:

**Rose-Anne Hawkeswood**

Senior Environmental Assessment Officer  
Resource and Energy Assessments

Recommended by:

**Stephen O'Donoghue**

A/Director  
Resource and Energy Assessments



## 8. *Determination*

The recommendation is: **Adopted / Not adopted by:**

**David Kitto**

Executive Director

Resource Assessments and Business Systems

# ***Appendices***

## Appendix A – Modification Application and Supporting Letter

Refer to the Department's website:

[http://majorprojects.planning.nsw.gov.au/index.pl?action=view\\_job&job\\_id=9547](http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9547)

## Appendix B – Agency Advice

Refer to the Department's website:

[http://majorprojects.planning.nsw.gov.au/index.pl?action=view\\_job&job\\_id=9547](http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9547)



## Appendix C – Notice of Modification

Refer to the Department's website:

[http://majorprojects.planning.nsw.gov.au/index.pl?action=view\\_job&job\\_id=9547](http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9547)

## Appendix D – Consolidated Approval

Refer to the Department's website:

[http://majorprojects.planning.nsw.gov.au/index.pl?action=view\\_job&job\\_id=9547](http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=9547)