From:	Howard Reed
To:	Alana Jelfs
Cc:	David Koppers; Mike Young (DPE-DASP); Samantha McLean
Subject:	RE: United Wambo - revised draft conditions
Date:	Wednesday, 10 July 2019 12:44:20 PM
Attachments:	United Wambo - DPE Response to IPC - 15 May 19.pdf

Hello again Alana,

In respect of the ecological mine rehabilitation issue raised by the IPC, I provide the following advice.

My team consulted with the Resources Regulator prior to preparing the correspondence which addressed this matter and was signed out by Mike Young on 15 May 2019 (copy attached). The Resources Regulator indicated that it was happy that the following text was accurate:

- The Resources Regulator regulates mine rehabilitation under the *Mining Act 1992.*
- Under its mining lease, the applicant would be required to provide the Resources Regulator with a rehabilitation security deposit (bond) prior to commencing development. The value of the security should cover the full costs of rehabilitation to ensure that the people of NSW do not incur financial liability in the event that the applicant goes into liquidation and cannot fulfil its rehabilitation obligations.
- It is important to note that this deposit serves as a last resort as there are other compliance functions under the *Mining Act 1992* and *Mining Regulation 2016* that can be used to enforce rehabilitation requirements.
- The Resources Regulator has developed a calculation tool to assist with estimating how much security should be held. This rehabilitation cost estimate (RCE) tool was most recently updated in July 2017 to address the findings of the NSW Auditor-General's 2017 audit on Mining Rehabilitation Security Deposits.
- All RCE's are carefully reviewed by the Resources Regulator and the security deposits are regularly updated to ensure the value remains up-to-date to ensure they reflect the progress of mining operations and rehabilitation.
- The RCE tool and associated guidelines state that value must cover the full costs of undertaking all outstanding rehabilitation works (ie all works required to meet the rehabilitation objectives in the consent and the rehabilitation completion criteria set out in the Rehabilitation Management Plan).
- The recommended rehabilitation objectives for United Wambo require 'ecological mine rehabilitation' to be *restored to self-sustaining native woodland ecosystems that align with reference sites in the local area and use State-recognised plant communities to meet the applicable EPBC Act or BC Act listing criteria for the CEEC or EEC.*
- This means that the RCE/security deposit would include the applicant's potential liability for ecological mine rehabilitation and the deposit would be available for completing any unsuccessful ecological mine rehabilitation.
- Upon successful completion of ecological mine rehabilitation by the applicant, the security deposit (or part thereof) can be released.
- Successful completion of ecological mine rehabilitation would be when the applicant can demonstrate that it has met the necessary rehabilitation objectives and completion criteria, to the satisfaction of the Resources Regulator. With the added requirement of complying with specific plant community types and listing criteria, the Resources Regulator would also consult with OEH prior to signing off on the rehabilitation.

The Resources Regulator also indicated at that time that:

- … our usual procedure will be followed whereby we do not sign off on rehabilitation until we have received input from relevant Agencies (e.g. the EPA when an EPL applies to the site, the OEH with regard to offsets, the consent authority with regard to complying with the development consent, etc).

The Resources Regulator further indicated that this advice could be made publicly available. It was on this basis that the advice to the IPC was prepared and finalised.

I would further add that the *Mining Act 1992* contains no specific mechanism whereby rehabilitation requirements under a development consent must be subject to a security deposit under that Act. Instead, that Act only requires that a security deposit must be provided in respect of obligations under that Act, most particularly in respect of conditions of mining lease. It would appear that no avenue is open to either the IPC or DPIE to achieve the outcome of every element of a development consent being specifically subject to a security deposit under the *Mining Act 1992*. However, s. 4.42(1)(c) of the EP&A Act requires that a mining lease (but only a lease granted following the grant of consent) must be "substantially consistent with" the terms of the consent.

The only mechanisms available to provide such a stronger nexus is the instrument of consent itself and within the documents that it establishes. On this basis, the draft conditions of consent require the following:

- Cdn B85 (Table 6) sets clear rehabilitation objectives for the areas proposed for Ecological Mine Rehabilitation under cdn B55;
- Cdn B87 requires the site's Rehabilitation Strategy (which requires the rehabilitation objectives to be "built upon") to be prepared in consultation with the Resources Regulator;
- Cdn B90 requires the site's Rehabilitation Management Plan (RMP, which addresses how the rehabilitation objectives are be "achieved" by the Applicant and cross-references cdns B87 and B59) to be prepared to the satisfaction of the Resources Regulator; and
- A Note to cdn B92 provides that the RMP can be combined with another regulatory plan required by the Resources Regulator, which is currently termed the Mining Operations Plan but which in due course is likely to be known as a Rehabilitation Plan.

I trust that the content of the conditions, coupled with the clear assurances provided by the Resources Regulator, satisfactorily address the IPC's request.

Howard Reed

Director Coal & Quarries

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Ms Samantha McLean
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Dear Ms McLean Sam

United Wambo Coal Project (SSD 7142) - Additional Information

I refer to the letter from the Commission, dated 23 April 2019, requesting additional information to facilitate the Commission's determination of the United Wambo Coal Project.

The Department has prepared detailed responses to each of the Commission's requests in Attachment A, including additional information on the Department's approach to setting conditions of consent.

If you wish to discuss this matter further, please contact me on [redacted].

Yours sincerely,

15/5/19

Mike Young
A/Executive Director
Resource Assessments and Compliance

Attachment A

1. *Noise*

The Commission has requested the Department re-undertake the noise assessment analysis for the project using the Applicant's recently provided noise predictions presented to the tenth decimal place (see Table 3.2 of the Applicant's Response to the IPC February 2019 Public Meeting). The Commission has also asked if changes are required to recommended conditions in B1, D1 and D2 based on this analysis.

The Department notes that, for many years, all relevant policy documents relating to noise assessment published by the Environment Protection Authority (EPA) use whole numbers not decimal places (i.e. 40 dB rather than 40.0 dB). This includes the *Industrial Noise Policy* (INP) and the more recent *Noise Policy for Industry* (NPfI). This later policy specifically addresses the issue of 'rounding' and states that noise levels used in the policy should be rounded to the nearest integer.

This policy position reflects the inherent limitations in the precision of any mathematical modelling and the fact that it is not possible for the human ear to detect such small changes in noise levels. This in turn informs the position adopted by both the Department and the EPA in compliance monitoring, where minor exceedances of noise levels measured in decimal places are not used as the basis for enforcement action.

In this case, the Department is satisfied that the Applicant has used appropriate rounding to the nearest integer, in accordance with both scientific and policy requirements and practice, to predict the potential impacts of the project on the local community.

Based on the above, the Department does not consider it is consistent with best available science or current regulatory policy/practice to use the tenth decimal place modelling data to set the noise criteria under the consent (or for any other consent) or to determine rights under the *Voluntary Land Acquisition and Mitigation Policy* (VLAMP). Consequently, it does not recommend any changes to conditions B1, D1 and D2.

2. *Final Landform*

The Commission has requested the Department undertake an assessment of the Applicant's additional information on the environmental impacts and benefits of potentially filling the proposed Wambo void, setting aside economic and other considerations (see sections 2.7 and 3.1.2 and Appendix 6 of the Applicant's Response to the IPC February 2019 Public Meeting).

The Department notes that the Applicant engaged AGE Consultants to undertake additional groundwater modelling to assess the impacts of backfilling the Wambo void on water resources.

This assessment found that groundwater levels would equilibrate at around 80 – 83 mRL in the absence of the void (compared to 55 mRL if left open), resulting in saline groundwater (from being in contact with spoil material) flowing towards the lower lying North Wambo Creek alluvium.

The assessment did not quantify the potential resulting water quality impacts in the alluvium and creek but acknowledged that the salinity of the discharged water would be higher than background levels.

On this basis, AGE considered that backfilling the Wambo void would present a higher risk to surrounding water resources than if the void remained open. A peer review undertaken by Kalf and Associates also agreed that the most appropriate option would be for both voids to remain open.

Following this assessment, the Applicant maintains that filling the Wambo void would result in prolonged environmental impacts, significant economic costs and adverse water impacts associated with the loss of a long-term groundwater sink.

The Applicant also maintains that the proposed final landform would provide a balanced outcome from mine planning, economic, environmental and social perspectives. In particular, the Applicant argues that the proposed final landform would be an acceptable outcome because it would avoid impacts on surrounding water quality, retain the number of currently approved voids, provide an appropriate landform and provide an appropriate economic return for itself and the State.

Based on the new information provided, the Department accepts that a backfilled Wambo void would result in saline groundwater flowing into the North Wambo Creek alluvial groundwater system. As these water quality impacts have only been presented qualitatively, it is difficult to assess their severity.

Nevertheless, even with an unknown severity, these long-term downstream water quality impacts, combined with the prolonging of mining-related environmental impacts and the additional costs of backfilling, are likely to outweigh the benefits of re-instating 24 hectares of grazing land.

As requested, by the Commission, the Department sought advice from the Department of Industry, Water Division (DoI – Water) and the Natural Resources Access Regulator. DoI - Water agreed with the predictions of the model, by maintaining salinity with flows towards a final void. DoI – Water also raised no concerns with the model's outputs regarding groundwater flow directions. DoI – Water noted that the modelled scenarios focused on void or no void, rather than a full analysis of all options to manage salinity and optimise overall environmental outcomes.

Consequently, the Department remains of the view that the final landform, as proposed with two voids, is an acceptable and appropriate environmental outcome.

3. Notification of Exceedances

The Commission has requested the Department to clarify recommended condition D6 and whether information regarding exceedances should be made publicly available on the Applicant's website.

The Department notes that recommended condition E15 requires the Applicant to regularly report on the environmental performance of the mine and provide a comprehensive summary of the monitoring results on its website.

The Department considers this information should include any exceedances of the applicable criteria, any non-compliances and any trends in the data that indicate there is an emerging issue with the environmental performance of the mine over time.

However, the Department also considers that the separate requirement to notify affected landowners directly under recommended condition D6 should be retained in the conditions.

This ensures that the information provided can be appropriately explained to affected landowners, including their rights under the development consent (e.g. independent review) and any additional mitigation measures proposed by the Applicant to address the exceedance at their property.

4. Climate Change

The Commission has requested the Department to undertake an assessment of the Applicant's additional information in relation to greenhouse gas emissions (GHGEs) and climate change (see Submission 2 of the Applicant's Response to the IPC February 2019 Public Meeting which

includes legal advice from Ashurst, titled Response to the Findings in the Rocky Hill and Wallarah 2 Cases on Climate Change and Greenhouse Gas Emissions).

The Commission also asked the Department to provide clarification as to whether any changes to its assessment of the Project's Scope 3 emissions are necessary, having regard to the relevant legislative and policy frameworks, including but not limited to the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2019 (Mining SEPP).

The additional information provided by the Applicant seeks to clarify the relevance of the recent Rocky Hill and Wallarah 2 Land and Environment Court (LEC) cases, summarise impact assessments already carried out for the project, provide an overview of the policy framework, clarify the export coal market and demand for Australian coal, and respond to submissions made at the Commission's public meeting.

The key arguments put forward by the Applicant, are that:

- the Rocky Hill merit appeal does not set a legal precedent for dictating the extent to which GHGEs generated by either the project or the combustion of the project's coal by other parties (whether domestic or international) are to be considered and weighted in determining a development application under the *Environmental Planning and Assessment Act 1979* (EP&A Act);
- the Commission is not obliged to adopt, consider or follow any particular aspect the LEC's decision on Rocky Hill;
- the project is a brownfield expansion that has been designed to limit GHGEs;
- the Australian Government has not, in any climate change law or policy, indicated that the development of new coal mines, or expansion of existing coal mines, is to be prohibited or restricted in any way for the purpose of achieving Australia's nationally determined contribution (NDC) under the *Paris Agreement*;
- as the project's coal would largely be exported, Scope 3 emissions would be accounted for, regulated and reported by the respective consumer countries and therefore these emissions should not outweigh the significant social and economic benefits that the project would deliver at a local, regional and State level;
- electricity generation will continue to drive global demand for coal through to 2040; and
- the project would produce high quality coal using low-cost, low-emissions methods owing to the favourable geology and highly efficient production processes and technologies used in the Australian mining industry. This means that most other supply substitutions would result in inferior coal filling the supply gap, leading to a net increase in GHGEs.

The Department has also given additional consideration the *NSW Climate Change Policy Framework* (CCPF), which contains the Government's aspirational objectives to align with the Australia's national commitments under the *Paris Agreement.* It is important to the note that the CCPF does not set any prescriptive emission reduction criteria, targets, or other outcomes that have application to the private sector or to development assessment and control. The CCPF seeks to manage decisions made by the NSW Government in relation to government assets and services.

While the Department fully recognises the importance of reducing GHGEs to limit increased climate change impacts, it does not consider it necessary to change its assessment approach or weighting of GHGEs impacts in light of the recent LEC case, particularly when neither the current State or national policy frameworks promote restricting private development as a means for Australia to meet its commitments under the *Paris Agreement.*

Further, the Department does not consider that any changes to its assessment of the project's Scope 3 emissions are necessary and remains satisfied that it has comprehensively and appropriately considered GHGEs in accordance with clause 14 of the Mining SEPP and the objects and other mandatory requirements of the EP&A Act.

5. Ecological Mine Rehabilitation

On 2 May 2019, the Commission asked the Department to clarify how the rehabilitation bond required under the Mining Act 1992 would apply to rehabilitation that is to be used for biodiversity offsetting (ie ecological mine rehabilitation).

The recommended rehabilitation objectives for the project require the mine to be restored to self-sustaining native woodland ecosystems in accordance with appropriate ecological completion criteria.

The completion criteria would be documented in the Rehabilitation Management Plan which would be prepared in consultation with the Resource Regulator and the Office of Environment and Heritage (OEH).

The Department has confirmed with the Resource Regulator that the rehabilitation bond would be calculated and updated to ensure it covers the full cost of undertaking all aspects of any remaining rehabilitation required under the Rehabilitation Management Plan.

The Applicant would then be required to demonstrate to the satisfaction of the Resource Regulator that it has successfully met the necessary rehabilitation objectives and completion criteria. Where appropriate, the Resources Regulator would consult with OEH prior to relinquishing the rehabilitation bond to ensure appropriate ecological outcomes had been achieved.

If the Applicant is not able to demonstrate it has met its rehabilitation obligations, it would be required to retire any remaining biodiversity credits using other mechanisms under the *Biodiversity Conservation Act 2016* and the Resource Regulator would be able to withhold the bond (or part thereof) to complete any necessary rehabilitation on the site, if required.