



New South Wales Government
Independent Planning Commission

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Airly Mine Extension Project Modification 5

SSD-5581-Mod-5

Statement of Reasons for Decision

Professor Snow Barlow (Chair)

21 December 2023

1. Introduction

1. On 24 November 2023, the NSW Department of Planning and Environment (**Department**) referred State Significant Development (**SSD**) modification application SSD-5581-Mod-5 (**Modification 5**) from Centennial Airly Pty Ltd (**Applicant**) to the NSW Independent Planning Commission (**Commission**) for determination.
2. Modification 5 seeks to modify the development consent for the Airly Coal Mine (SSD-5581) (**Existing Approval**) pursuant to section 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).
3. In accordance with section 4.5(a) of the EP&A Act and section 2.7(3) of the *State Environmental Planning Policy (Planning Systems) 2021* (**Planning Systems SEPP**), the Commission is the consent authority as the Applicant disclosed a reportable political donation.
4. Professor Mary O’Kane AC, Chair of the Commission, nominated Professor Snow Barlow (Chair) to constitute the Commission Panel in determining Modification 5.

2. Proposed modification

5. The Applicant proposes to modify the existing development consent for the Airly Mine (SSD-5881) to:
 - increase the approved full time equivalent employees from 155 to 190 (i.e. an additional 35 workers); and
 - update the rehabilitation management and performance conditions to reflect the recently updated regulatory requirements as part of the NSW Resource Regulator’s Rehabilitation Reforms under the *Mining Act 1992*.

3. The Commission’s Consideration

3.1 Material Considered by the Commission

6. In this determination, the Commission has considered the following material (**Material**):
 - the Applicant’s Modification Report, dated August 2023 and supplementary information including the Applicant’s Response to Submissions, dated 27 October 2023;
 - all public submissions on the Modification Report made to the Department during public exhibition;
 - all Government Agency advice to the Department;
 - the Planning Assessment Commission’s (**PAC**) [Determination Report for SSD-5581](#), dated 15 December 2016;
 - the Department’s [Assessment Report for SSD-5581 Mod 1](#), dated 30 August 2018;
 - the Department’s [Assessment Report for SSD-5581 Mod 2](#), dated 30 July 2019;
 - the Department’s AR, dated November 2023;
 - the Department’s recommended conditions of consent, undated;
 - the Department’s response to the Commission’s request for further information, dated 14 December 2023;

- the Applicant's response to the Commission's request for further information (via the Department), dated 12 December 2023;
- Council's advice to the Department, dated 22 November 2023; and
- Council's response to the Commission's questions on notice, dated 11 December 2023.

3.2 Public submissions

7. The Department exhibited the Application from 8 to 21 September 2023 and received two submissions from the general public (both in objection) and a supporting submission from Lithgow City Council. These submissions raised a number of matters, which are outlined below.

Climate change impacts

8. The two public submissions objected to the Application on the grounds that the Application would allow for the extension of mining at Airly and is therefore not in the public interest because of the consequential climate change impacts – *“coal production needs to be phased out to help ease the climate disasters the future is facing”*.

Damage to an environmentally sensitive area

9. The two public submissions objected to the Application on the grounds that the Application would result in potential damage to an environmentally sensitive area – *“The environmental damage being done by Airly mine over 20 years, particularly in relation to subsidence, will destroy this area forever”*.

The Applicant's track record

10. One of the public submissions objected to the Application on the basis of the Applicant's track record: *“The last approval stipulated a limit on subsidence and this was exceeded. Virtually nothing was done about this and the fine was minimal. New cracks are appearing. Centennials response was to suggest filling these cracks with wet cement!”*

Community contributions

11. Lithgow City Council's (supporting) submission (dated 12 September 2023) recommended that *“given the increase in employees and potential greater impacts on community/public infrastructure in the area, that condition 15 relating to payment of the annual community contribution be increased”*.

3.3 The Department's Assessment Report

12. The Department's Assessment Report (**Department's AR**) was prepared to set out the Planning Secretary's whole-of-government assessment of the Application. As part of this assessment, the Planning Secretary through the Department, considered the Application with regard to the relevant statutory obligations, supplementary information provided by the Applicant, public submissions and advice from Government agencies.
13. The Department's assessment concluded that:
- “...the potential impacts of the modifications are similar in nature and scale to those of the existing operations and can be appropriately managed through existing and proposed conditions of consent.*

Consequently, the Department considers that the proposed modification is in the public interest and is approvable, subject to the recommended conditions set out in the notice of modification.”

3.4 Statutory Considerations

14. Under section 4.55(1A) of the EP&A Act, a consent authority may modify a development consent if the relevant requirements are met:
- it is satisfied that the proposed modification is of minimal environmental impact, and
 - it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and
 - it has notified the application in accordance with the regulations, if the regulations so require, and
 - it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

3.4.1 Is the proposed modification of minimal environmental impact?

15. The Commission agrees with the Department’s assessment at paragraph 16 of the Department’s AR and is satisfied that the proposed modification is of minimal environmental impact.

3.4.2 Is the proposed modification substantially the same development?

16. The Commission agrees with the Department’s assessment at paragraph 16 of the Department’s AR and is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified.

3.4.3 Has the Application been notified in accordance with the regulations?

17. The Commission is satisfied that the Department has made the necessary notifications in accordance with sections 105 and 109 of the *Environmental Planning and Assessment Regulation 2021*.

3.4.4 Consideration of submissions concerning the proposed modification

Public submissions

18. Pursuant to section 4.55(3) of the EP&A Act, the consent authority must take into consideration such matters referred to in section 4.15(1) of the EP&A Act that are of relevance to the proposed modification. When considering the matters referred to in section 4.15(1), the evaluation is limited to the impacts of the proposed modification, insofar as they are relevant. Matters that are not within the scope of the proposed modification, including any relating to the Existing Approval cannot be reconsidered.

19. Accordingly, the Commission finds that the issues raised in public submissions relating to climate change impacts and environmental damage (“particularly in relation to subsidence”) arise primarily from the existing Airly Coal Mine approved under SSD-5581, are not relevant to the limited scope and nature of the current Application, and would require a reconsideration of the Existing Approval.
20. Likewise, the Commission finds that issues raised in relation to the Applicant’s compliance record are not a relevant consideration in the determination of SSD-5581 Mod 5.

Council submissions

21. Lithgow City Council made a submission dated 12 September 2023 stating that Council had no objection to the Application and recommended that the Applicant address the potential impacts of the Application on “the community/infrastructure in the area” under Schedule 2 condition 15 (Community Enhancement) of the existing consent.

Agency advice

22. Agency advice received by the Department is summarised in Table 2 of the Department’s AR. The Commission notes that no Government agency objected to the Application and that the Environment Protection Authority (**EPA**) and the National Parks & Wildlife Service (**NPWS**) both recommended amendments to conditions which have been incorporated within the Department’s draft conditions of consent:
- [NPWS] that an item be included in the Rehabilitation Strategy condition (condition 27 of Schedule 4) requiring consultation with NPWS during preparation of the Rehabilitation Strategy. This would ensure that NPWS can provide feedback to ensure the Rehabilitation Strategy is aligned with the goals for the Mugii Murum-ban State Conservation Area; and
 - [EPA] that an item be added to the waste condition (condition 23 of Schedule 4) requiring the site’s sewage system to be upgraded in line with the FTE employees on site, and regularly monitor the system and irrigation area to ensure they are operating sustainably.
23. These amendments have both been adopted and imposed by the Commission.

3.4.5 The Commission’s correspondence

Department

24. The Commission wrote to the Department on 7 December 2023 seeking:
- clarification that the Application had enlivened the modification power under section 4.55(1A) of the EP&A Act by effecting some change to the development subject to SSD-5581;
 - confirmation as to how the extra 35 workers were intended to be utilised;
 - confirmation as to how the intent of the existing requirement for a Closure Groundwater Monitoring and Management Plan (existing Schedule 4 condition 27(e)) would be achieved despite the removal of that condition; and
 - a replacement version of the Department’s AR with broken hyperlinks fixed.
25. The Department forwarded the Commission’s letter to the Applicant for their response. The Applicant’s response dated 12 December 2023 and the Department’s response dated 14 December 2023 were received by the Commission on 14 December. The Applicant’s response was subsequently replaced by an updated version received by the Commission on 18 December 2023 (dated 12 December 2023).

- 26. Together, the Department’s and Applicant’s responses addressed the Commission’s queries to the satisfaction of the Commission.
- 27. The Commission accepts the reasons given in both the Department’s response dated 14 December 2023 and the Applicant’s response via the Department dated 12 December 2023 relating to the Commission’s exercising of the section 4.55(1A) EP&A Act modification power and is therefore of the view that the Commission can validly determine the Application.

Council

- 28. The Commission wrote to Lithgow City Council on 11 December 2023 to confirm that Council was not seeking an increase to the Applicant’s community contribution under Schedule 2 condition 15 (Community Enhancement). Council responded via email dated 11 December 2023 confirming that Council was not seeking amendment of that condition.

3.4.6 Mandatory Considerations

- 29. Under section 4.55(3) of the EP&A Act, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application (**Mandatory Considerations**). The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.
- 30. The mandatory considerations are not an exhaustive statement of the matters the Commission is permitted to consider in determining the Application. To the extent that any of the Material does not fall within the mandatory considerations, the Commission has considered that Material where it is permitted to do so, having regard to the subject matter, scope and purpose of the EP&A Act.

Table 1 – Mandatory Considerations

Mandatory Considerations	Commission’s Comments
Relevant EPIs	<p>Appendix B of the Department’s AR identifies relevant EPIs for consideration. The key EPIs include:</p> <ul style="list-style-type: none"> • Lithgow Local Environmental Plan 2014 (Lithgow LEP 2014) • State Environmental Planning Policy (Planning Systems) 2021 (Planning Systems SEPP); • State Environmental Planning Policy (Resources and Energy) 2021 (Resources and Energy SEPP); and • State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP). <p>The Commission agrees with the Department’s assessment of EPIs set out in Appendix B of the AR. The Commission therefore adopts the Department’s assessment.</p>
Relevant DCPs	<p>Section 2.10 of the Planning Systems SEPP states that development control plans do not apply to SSD. The Commission does not consider any development control plans to be relevant to the determination of the Application.</p>

Likely Impacts of the Development	The Commission agrees with the Department's assessment and evaluation of the likely impacts of the Application in Sections 6 and 7 of the Department's AR and finds that these impacts are minimal and acceptable, subject to the conditions imposed by the Commission.
Suitability of the Site for Development	The Commission finds that the Site is suitable because it is the Site of an approved and operating development under the existing SSD-5581 (as previously modified), and the subject Application will not significantly change or impact on the existing use of that Site.
Objects of the EP&A Act	The Commission has carefully considered the reasons given in Appendix B of the Department's AR relating to the Department's consideration of the Objects of the EP&A Act and is satisfied that the Application is consistent with those Objects.
Ecologically Sustainable Development	<p>The EP&A Act adopts the definition of ESD found in the <i>Protection of the Environment Administration Act 1991</i>, as follows:</p> <p><i>“ecological 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:</i></p> <ul style="list-style-type: none"> o <i>the precautionary principle;</i> o <i>inter-generational equity;</i> o <i>conservation of biological diversity and ecological integrity; and</i> o <i>improved valuation, pricing and incentive mechanisms.”</i> <p>The Commission notes that the Application is minor in scope and nature and can be carried out in a manner that is consistent with the principles of ecologically sustainable development as it would:</p> <ul style="list-style-type: none"> o not require clearing of any native vegetation; o have no impact on Aboriginal cultural heritage or historic heritage; o have minimal environmental impact beyond what is already approved; and o provide additional employment opportunities in the region and result in associated economic benefits. <p>The Commission has considered the principles of ESD in its determination as set out below.</p> <p>a) The precautionary principle</p> <p>The Commission finds that the precautionary principle has been satisfied because the Application to modify the existing consent is minor in scope and nature and does not pose a significant threat of serious or irreversible environmental damage.</p> <p>b) inter-generational equity</p> <p>The Commission has considered inter-generational equity in its assessment of the potential environmental, social and economic impacts of the Application, and finds that those impacts are negligible or marginally positive with respect to the health, diversity and productivity of the environment and its maintenance or enhancement for the benefit of future generations.</p>

c) conservation of biological diversity and ecological integrity

The Commission finds that the Application's potential impacts on biodiversity and ecological integrity, including land clearing and loss of habitat are minimal. This is because the Application will not require clearing or introduce other substantive threats as it is located on the site of a previously approved development where these impacts have been previously considered and addressed.

d) improved valuation, pricing and incentive mechanisms

The Commission finds that, due to the nature and scope of the Application, the Application has minimal potential to intersect or impact on valuation, pricing and incentive mechanisms and is therefore not inconsistent with the objective of improving these mechanisms.

The Public Interest

The Commission has considered whether the grant of consent to the Application is in the public interest. In doing so, the Commission has weighed the predicted benefits of the Application against its predicted negative impacts. The Commission's consideration of the public interest has also been informed by consideration of the principles of ESD, as set out above.

The Commission finds that, on balance, the Application is consistent with ESD principles, would have minimal negative impacts and achieve an appropriate balance between relevant environmental, economic and social considerations. The likely benefits of the Application, being the additional employment opportunities and associated economic benefits in the region, warrant the conclusion that an appropriately conditioned approval is in the public interest.

Reasons given by the consent authority for the grant of the consent that is sought to be modified

31. Under section 4.55(3) of the EP&A Act, the Commission must take into consideration such of the matters referred to in section 4.15(1) of the EP&A Act that are of relevance to the proposed modification and the reasons given by the consent authority for the grant of the consent that is sought to be modified. When considering the reasons given by the consent authority for the grant of the consent that is sought to be modified, the substantive question is whether there are any reasons that would preclude the modification of that consent.
32. The Commission has considered the PAC's Determination Report for SSD-5581, dated 15 December 2016 and finds that approval of the current Application would not be inconsistent or conflict with the reasons given by the PAC for its approval of SSD-5581.
33. SSD-5581 Mod 1 sought to modify Schedule 3 condition 1 of the development consent to allow: "pillar splitting and quartering' operations in areas that are downslope of cliffs in the Partial Pillar Extraction Zone before the four panels beneath Mount Airly are extracted; and second workings within a 26.5-degree angle of draw plus 50 metres from the limit of the New Hartley Shale historic workings (as opposed to the limit of the extraction zone)."
34. SSD-5581 Mod 2 sought to augment water supply options at Airly Coal Mine to meet its operational water security needs by enabling the transfer of up to 170 megalitres of water per year (ML/year) from Charbon Colliery to Airly Coal Mine by rail.

35. The Commission has considered the reasons given by the Department for its approval of SSD-5581 Mod 1 and Mod 2 and finds that there is minimal overlap with the current Application. Notwithstanding, the Commission finds that approval of the current Application would not be inconsistent or conflict with the reasons given by the Department for its approval of either Mod 1 or Mod 2.
36. The Commission notes Table 1 of the Department's AR, which states that SSD-5581 Mod 3 and SSD-5581 Mod 4 were withdrawn. The Commission is not aware of any other modifications to SSD-5581.

3.4.7 Requirements under Part 5 of the *Environmental Planning and Assessment Regulation 2021*

37. With respect to sections 98, 99 and 103 of Division 1, Part 5 of the *Environmental Planning and Assessment Regulation 2021*, the Commission notes the advice in paragraph 22 of the Department's AR and is satisfied that the Application has been validly made.

4. The Commission's Findings and Determination

38. The views of the community were expressed through public submissions and comments received (as part of exhibition and as part of the Commission's determination process). The Commission carefully considered all of these views in making its decision.
39. The Commission has carefully considered the Material before it as set out in section 3.1 of this report. Based on its consideration of the Material, the Commission finds that the Application should be **approved** subject to conditions of consent for the following reasons:
- the Application is consistent with the NSW Government's regulatory framework;
 - the Site, being that of an existing operational coal mine, is suitable for the development and is an effective and compatible use of the land;
 - the Application will result in minimal environmental impact;
 - these impacts are capable of being effectively managed through the conditions of consent imposed by the Commission;
 - the Application is consistent with the ESD principles and would achieve an acceptable balance between environmental, economic and social considerations;
 - the Application is in accordance with the Objects of the EP&A Act; and
 - the Application is in the public interest.
40. For the reasons set out in paragraph 39 above, the Commission has determined that the Application should be approved subject to conditions. These conditions are designed to:
- prevent, minimise and/or offset adverse environmental impacts;
 - set standards and performance measures for acceptable environmental performance
 - require regular monitoring and reporting; and
 - provide for the on-going environmental management of the development.
41. The reasons for the Decision are given in the Statement of Reasons for Decision dated **21 December 2023**.



Professor Snow Barlow (Chair)
Member of the Commission



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**For more information, please contact
the Office of the Independent Planning
Commission NSW.**

ipcn.nsw.gov.au

Phone (02) 9383 2100

Email ipcn@ipcn.nsw.gov.au

Mail Level 15 135 King Street Sydney NSW 2001

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