

Appendix 3

Whitehaven Coal's Maules Creek Project

Overview of project¹

Introduction

3.1 The Maules Creek Project is in the Gunnedah Basin near Tamworth in northern New South Wales (NSW). The Department of the Environment (the department) received a referral on 9 July 2010 from Aston Coal 2² who proposed to develop and operate the Maules Creek open-cut coal mine, including a coal handling and production plant and associated facilities.

Impact of the project

3.2 The Maules Creek coal mine will impact on 1665 ha of potential habitat for listed endangered and migratory species (including the swift parrot, regent honeyeater, and greater long-eared bat) and up to 544 ha of the critically endangered White Box-Yellow Box-Blakely's Red Gum Grassy Woodland and Derived Native Grassland ecological community.

Assessment of the proposal

3.3 The project was assessed under an accredited assessment process with the NSW Government Department of Planning and Infrastructure, specifically under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).

3.4 The NSW Government exhibited the Environmental Assessment for the project from 30 August 2011 until 11 October 2011, and received 110 submissions.

3.5 On 16 August 2011, the NSW Minister for Planning and Infrastructure requested that a merit review of the project be undertaken by the Planning Assessment Commission on the impacts on biodiversity from the project, as well as cumulative impacts within Leard State Forest and surrounding remnant vegetation. The Planning Assessment Commission found in its final determination report for the Maules Creek proposal that the proposed restoration and preservation of land for biodiversity conservation will provide a comprehensive framework for mitigation and management

1 The following overview of the project is based on information provided by the Department of the Environment, *Submission 79*, Attachment A, pp 1–4 and also EPBC Referral 2010/5566, http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=5566 (accessed 18 June 2014).

2 Note that Aston Resources Limited merged with Whitehaven Coal on 2 May 2012: see Whitehaven Coal, 'Whitehaven Confirms Implementation of Merger', *ASX Release*, 2 May 2012, http://www.whitehavencoal.com.au/investors/documents_astonasx/2012%20ASX%20ANNOU%20NCE_PDF/MAY2012/WHC-%20Whitehaven%20Confirms%20Implementation%20of%20Merger.pdf (accessed 18 June 2014).

of the biodiversity aspects of the Maules Creek Coal Project itself and for the cumulative impacts of this project and the Boggabri Coal Project.³

3.6 On 23 October 2012, the Planning Assessment Commission approved the Maules Creek coal mine proposal with conditions. Once the NSW Government approval was determined, the Commonwealth undertook a final assessment of the offsets with particular regard to the EPBC Act Environmental Offsets Policy and Offsets Assessment Guide.

3.7 The project was approved by the then Commonwealth Minister for Sustainability, Environment, Water, Population and Communities on 11 February 2013.

Avoidance and mitigation measures

3.8 The department advised that 'a number of avoidance and mitigation measures were implemented prior to the consideration of offsets under the project'. These are listed on pages one and two of Attachment 1 of the department's submission.

Offset requirements

3.9 The offsets package required under the conditions of approval⁴ included requirements to:

- register legally binding conservation covenants over offset areas of no less than 9,334 hectares of an equivalent or better quality of habitat for the regent honeyeater, swift parrot and greater long-eared bat; and 5,532 hectares of an equivalent or better quality of the White Box—Yellow Box—Blakely's Red Gum Grassy Woodland and Derived Native Grassland ecological community;
- verify through independent review the quantity and condition class of White Box—Yellow Box—Blakely's Red Gum Grassy Woodland and Derived Native Grassland ecological community and the quantity and quality of habitat for the regent honeyeater, swift parrot and greater long-eared bat within all proposed offset areas; and, if the offset areas do not meet the requirements of conditions, a requirement to secure additional offset areas until all relevant criteria under the approval conditions are met; and
- prepare and implement an approved offset management plan for all of the offset areas. The approved offset management plan must include: maps, methods and results of baseline surveys measuring ecological conditions, clear ecological management objectives, description of all ecological management activities proposed to be undertaken, details of ongoing ecological monitoring programs, performance criteria, targets and provisions for adaptive management, details of all parties responsible for management,

3 The Boggabri Coal Project is a separate project: see EPBC 2009/5256 http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=5256 (accessed 18 June 2014).

4 See further <http://www.environment.gov.au/epbc/notices/assessments/2010/5566/2010-5566-approval-decision.pdf> (accessed 18 June 2014).

monitoring and implementing the management activities, and details of the funding requirements for the ongoing management activities.

3.10 The approval decision requires the mechanism/s for registering a legally binding covenant to provide protection for the offset areas 'in perpetuity' and to be registered within five years of the date of the approval.

3.11 The approval decision also sets out indirect offsets requiring the proponent to:

- within two years of the approval, submit a project plan to invest \$1 million for research that will identify effective methodologies for achieving rehabilitation and restoration of functioning White Box-Yellow Box-Blakely's Red Gum Grassy Woodland and Derived Native Grassland ecological community on mining sites; and
- provide \$1.5 million over the life of the approval (comprising \$500,000 for each of the regent honeyeater, swift parrot and greater long-eared bat), to deliver activities that implement priority recovery actions consistent with National Recovery Plans.

3.12 The Department of the Environment submitted that:

The location of the offsets have been selected to enhance existing conservation reserve and build upon natural corridors like creeks and rivers to mitigate broad-scale fragmentation. In the conditions of approval under the EP&A Act, the State required 8664 hectares of native woodland and forest be protected and enhanced. The proposed offset strategy meets the requirements of the State approval with an additional requirement of 1000 hectares of native woodland and forest to be protected and enhanced.

Challenges and other issues

3.13 In January 2013, the Northern Inland Council for the Environment and the Maules Creek Community Council raised concerns in relation to the quantity and quality of the Box Gum Woodland on the proposed offset sites for the Maules Creek Coal Mine Project. A number of reports were provided to the Department and subsequently included in the briefing to the minister before he made his decision on 11 February 2013.

3.14 In March 2013, the Northern Inland Council for the Environment requested a Statement of Reasons for the decision to approve the Maules Creek Coal Mine Project under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The Statement of Reasons was provided on 20 June 2013.

3.15 On 18 July 2013, the Northern Inland Council for the Environment applied to the Federal Court challenging the decisions made by the then minister, the Hon Tony Burke on 11 February 2013 under sections 130(1) and 133 of the EPBC Act to approve the Maules Creek Coal Mine and Boggabri Coal Mine Extension. One of the grounds for the challenge was in relation to the offsets and a submission that, as the offsets were not yet finalised, the minister was not able to make a valid decision. The

Northern Inland Council for the Environment was unsuccessful in their applications to the Federal Court in this matter.⁵

3.16 A number of community organisations also made allegations about the provisions of false and misleading information in relation to the quality and quantity of Box Gum Woodland occurring on the proposed offset sites. The department advised that these were provided as part of the assessment material underpinning the Maules Creek Coal Mine approval. The department commenced a preliminary investigation to ascertain whether the allegations required a full investigation under the EPBC Act.⁶ The department advised the committee that the investigation had subsequently been closed, explaining that 'with regard to the accusation of false or misleading information':

The test there is whether beyond a reasonable doubt there is evidence that would indicate that false or misleading information has been provided in a deliberate or negligent fashion. The reason why that investigation has been closed...is that the department is of the view that the apparent accuracy issues associated with the offsets for the project related to differing interpretations of the box gum woodland listing advice and thresholds for significance in undertaking the assessment of impacts. The fact that there is a difference of opinion or uncertainty does not meet the test of false or misleading...⁷

3.17 On 27 December 2013, Whitehaven Coal submitted a report of an independent review to verify the quantity and quality of the offsets for the Maules Creek coal mine project as required under the conditions of approval. The review concluded that the offsets package complies with conditions of the EPBC approval, provided that it is supplemented by three additional properties. In January 2014, verification work was undertaken in relation to the three additional properties. The Independent Review and Verification Report have been made available on the Whitehaven Coal website.⁸

3.18 The department confirmed at the committee's hearing that Whitehaven Coal 'is in the process of securing those additional offsets'.⁹

5 See further *Northern Inland Council for the Environment Inc v Minister for the Environment* [2013] FCA 1419, 20 December 2013, <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2013/2013fca1419> (accessed 4 June 2014).

6 Department of the Environment, *Submission 79*, Attachment A, p. 4.

7 Mr Dean Knudson, First Assistant Secretary, Environment, Assessment and Compliance Division, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 29.

8 Whitehaven Coal, *Submission 83*, p. 6; see also Department of the Environment, *Submission 79*, Attachment A, p. 4 and Whitehaven Coal, *Maules Creek Environmental Management*, http://www.whitehavencoal.com.au/environment/maules_creek_environmental_management.cfm (accessed 18 June 2014).

9 Mr Dean Knudson, First Assistant Secretary, Environment, Assessment and Compliance Division, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 29.

3.19 In February 2014, Whitehaven Coal submitted an offset management plan as required under the conditions of approval.¹⁰

Submission from Whitehaven Coal

3.20 The committee notes that Whitehaven Coal provided a submission to this inquiry. Amongst other matters, Whitehaven Coal submitted that the project was designed having regard to the mitigation hierarchy (as discussed in Chapter 3).¹¹

3.21 Whitehaven Coal also disputed claims 'about the biodiversity significance' of Leard State Forest. Whitehaven Coal submitted that Leard State Forest is a 'mining and logging precinct' which was 'commercially logged for more than a century up until the early 1980s' and further noted that the existing Boggabri Coal Mine is within the Forest.¹²

3.22 Nevertheless, as outlined above, the Maules Creek coal mine required approval under the EPBC Act due to its impacts on potential habitat for listed endangered and migratory species; including the swift parrot, regent honeyeater, and greater long-eared bat the critically endangered White Box-Yellow Box-Blakely's Red Gum Grassy Woodland and Derived Native Grassland ecological community.

3.23 Whitehaven Coal's submission also detailed the information on the environmental offsets for the Maules Creek Project and how the work involved in the independent verification of the offsets.¹³

3.24 Whitehaven Coal concluded that it is 'committed to complying with its offset obligations under the EPBC approval and to dedicating the required offsets in perpetuity as required by condition 13'. Whitehaven Coal concluded that:

The Project is an excellent example where offsets are being used to maintain or improve the viability of protected matters under the EPBC Act, and also to enable the development of a world class mine which will provide very substantial benefits for the region and the nation.¹⁴

Issues with the proposed offsets

3.25 As noted in Chapter 6, the committee does not intend to comment on particular projects. However, the committee notes that submitters and witnesses raised a number of issues in relation to the offsets conditions for this project. These included:

- whether the offsets meet to requirement to 'improve or maintain' (as discussed further in Chapter 3);¹⁵

10 Department of the Environment, *Submission 79*, Attachment A, p. 4.

11 Whitehaven Coal, *Submission 83*, p. 4.

12 Whitehaven Coal, *Submission 83*, p. 3.

13 Whitehaven Coal, *Submission 83*, pp 5–8.

14 Whitehaven Coal, *Submission 83*, p. 8.

15 Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, p. 50.

- the quality of assessment documentation,¹⁶ including possible problems with the vegetation mapping in relation to the offsets (see further Chapter 4).¹⁷ Due to these issues, this project was put forward as an example of the need for careful scrutiny and verification of proposed offsets, whether by the department or independent experts.¹⁸ As outlined above, community concerns raised in relation to the information about the offsets areas resulted in the approval conditions including a requirement for an independent review of the offsets;¹⁹
- whether the offsets can be considered to be 'like for like'²⁰ (as discussed further in Chapter 3). For example, Ms Woods from the Lock the Gate Alliance told the committee 'it is simply not possible for them to find another example of that community of that size of that condition';²¹
- whether the principle of additionality (discussed further in Chapter 3) has been met, as it was argued that the offsets properties are already reasonable well secured;²²
- lack of consultation (as discussed in Chapter 4), particularly with traditional owners and lack of consideration of cultural values of the area to be offset;²³
- the appropriateness of clearing and offsetting an ecological community that is listed as 'critically endangered' (see Chapter 3).²⁴ In addition, Leard State Forest was described as 'irreplaceable' and 'ecologically unique';²⁵

16 Australian Orchid Council, *Submission 2*, pp 2–3; Lock the Gate Alliance, *Submission 20*, p. 2; The Wilderness Society, *Submission 84*, pp 7–8; National Parks Association of NSW Armidale Branch, *Submission 51*, p. 3; Northern Inland Council for the Environment, *Submission 90*, p. 12.

17 Lock the Gate Alliance, *Submission 20*, p. 11; Interdisciplinary Conservation Science Research Group, *Submission 34*, p. 3; Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, pp 50–51.

18 Ms Georgina Woods, Policy Coordinator, Lock the Gate Alliance, *Committee Hansard*, 5 May 2014, p. 23; Lock the Gate, *Submission 20*, p. 10; The Wilderness Society, *Submission 84*, p. 11.

19 ANEDO, *Submission 60*, p. 15; Greenpeace, *Submission 61*, p. 7.

20 Ms Anna Christie, *Submission 55*, pp 1–2; Greenpeace, *Submission 61*, p. 7; The Wilderness Society, *Submission 84*, p. 8; Northern Inland Council for the Environment, *Submission 90*, pp 14–15;

21 Ms Georgina Woods, Policy Coordinator, Lock the Gate Alliance, *Committee Hansard*, 5 May 2014, p. 3; see also Ms Sue Higginson, Principal Solicitor, ANEDO, *Committee Hansard*, 5 May 2014, p. 34; Australian Orchid Council, *Submission 2*, p. 2.

22 Greenpeace, *Submission 61*, p. 7.

23 Gomerioi Traditional Custodians, *Submission 93* and *Committee Hansard*, 18 June 2014; Greenpeace, *Submission 61*, p. 7.

24 Australian Orchid Council, *Submission 2*, p. 2.

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- timing issues with the conditions of approval, including the failure to ensure the adequacy of offsets prior to approval being granted (see further Chapter 4).²⁶ The approval condition requiring an independent review of the offsets after issuing the approval was criticised.²⁷ The Federal Court case, mentioned above, confirmed that the offset conditions need not be satisfied prior to commencing the approved clearing.²⁸ However, submitters queried whether this is desirable and what the consequences would be, for example, if the forest is already cleared and then subsequently the offset conditions cannot be met.²⁹

25 Lock the Gate Alliance, *Submission 20*, pp 2 and 11–12; The Wilderness Society, *Submission 84*, p. 6. However, as noted earlier, Whitehaven Coal disputed claims about the biodiversity values of the Leard State Forest: Whitehaven Coal, *Submission 83*, p. 3.

26 NELA, *Submission 31*, p. 5; ANEDO, *Submission 60*, p. 15; BirdLife Australia, *Submission 77*, p. 10; The Wilderness Society, *Submission 84*, p. 9.

27 See, for example, Greenpeace, *Submission 61*, p. 7.

28 *Northern Inland Council for the Environment Inc v Minister for the Environment* [2013] FCA 1419, 20 December 2013, para 40.

29 Ms Georgina Woods, Policy Coordinator, Lock the Gate, *Committee Hansard*, 5 May 2014, p. 3; Lock the Gate, *Submission 20*, p. 12; The Wilderness Society, *Submission 84*, p. 9 and see also p. 12; see also, for example, Ms Sue Higginson, Principal Solicitor, ANEDO, *Committee Hansard*, 5 May 2014, p. 34.

