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Dear Ministers

**Maules Creek Coal Mine – Biodiversity Management Plan – Impacts on Fauna**

1. We act for the Maules Creek Community Council Inc. Our client has recently been made aware that the Proponent (**Whitehaven**) of the Maules Creek Coal Project (10_0138), approved on 23 October 2012 under section 75J of now repealed Part 3A of the *Environmental Planning and Assessment Act 1979* (**EPA Act**), is seeking to amend is current conditions of operating.

2. We are instructed that Whitehaven is seeking to amend the current Biodiversity Management Plan (**BMP**) that applies to the development to allow operational clearing within the project site during the current winter months of 2014. Our client contends that the amendment is likely to cause further significant impacts upon protected fauna that the condition was specifically in place to mitigate.

3. We are instructed that Whitehaven is seeking this amendment due to the delays that it has experienced in implementing its preferred works program. Our client contends that the hastening of a works program by three months for a project with a 22 year life does not provide a reasonable basis to further significantly impact upon protected fauna, including nationally and state listed threatened species.

4. It is a condition of the project approval that Whitehaven ***implement*** a BMP. Condition 52 of the Maules Creek Coal Project approval states:

*The Proponent shall prepare and **implement** a Biodiversity Management Plan for the project to the satisfaction of the Director General. This plan must:*

*…*

*(e) Include a detailed description of the measures that would be implemented including the procedures to be implemented for:*

*…*

- *Minimising the impacts on fauna on site, including undertaking pre-clearance surveys*

5. Page 27 of Whitehaven's BMP dated June 2013 notes condition 52 is addressed in parts 5.0, 6.0 and 8.0 of the BMP. Part 8.4 of the BMP (p142) provides that:

   *Clearing of areas for mining will be undertaken predominantly in late summer and early autumn periods in order to avoid key breeding/hibernation seasons for threatened bat and bird species known to reside in the Leard State Forest.*

6. We are instructed that this specific condition was incorporated into the BMP as a required mitigation measure of the Government's own environmental agency, in this regard we a briefed with a relevant document to this effect.

7. We are instructed that this condition is a necessary measure to mitigate impacts on all protected species that are known to occur on the project site, including those animals listed as threatened at the State and National level. Most frogs and reptiles go into hibernation during the winter months, and the majority of the bats and small mammals such as gliders are also in torpor during winter. Being in torpor and unable to flee or seek shelter makes them highly vulnerable to habitat removal, and those animals that do survive the clearing would be extremely vulnerable to predators.

8. Of particular concern to our client is the impact any clearing during the winter months will have on the four hollow-dependent threatened bats which are listed in Whitehaven's Environmental Impact Assessment (**EIA**), namely the Yellow-bellied Sheath-tail Bat, Greater Long-eared Bat, Eastern Falsistrelle and Little Pied Bat.[1] The Australian Bat Clinic and Wildlife Trauma Centre states:

   *In winter there are few insects about so microbats, in cold climates (e.g. southern Australia), save energy by hibernating. They roost in a cold sheltered place, and are able to drop their body temperature close to that of their surroundings and slow their heart rate. Disturbance of hibernating bats can cause them to return to operating temperature. This uses up fat reserves, which they need to survive until there are enough insects to feed on. Disturbance of hibernating bats can cause them to die.*[2]

[1] Cumberland Ecology for Hansen Bailey, Maules Creek Coal Project Ecological Assessment, Final Report July 2011 page I.7 of Appendix I of Appendix I

[2] Australian Bat Clinic and Wildlife Trauma Centre

9. Maules Creek experiences minimum temperatures below zero in winter. We are instructed that it is likely that the microbats in the project site will be in hibernation or torpor to conserve energy, and disturbance at that time will likely result in high mortality.

10. Further, the threatened reptiles known or likely to occur on the project site are the Pale-headed Snake and Border Thick-tailed Gecko.[3] We are instructed that the Pale-headed Snake has since been recorded in the vicinity, so can now be considered known to occur. The Squirrel Glider is also listed by Whitehaven in its EIA as likely to occur,[4] and it too has since been recorded in the vicinity.

11. Our client is also very concerned about the Barking Owl, Swift Parrot and Regent Parrot, all of which are considered likely to occur.[5] We are instructed that the Barking Owl is known to occur. Our client notes that as the Barking Owl breeds in winter, its breeding is likely to be significantly disrupted by the proposed clearing. The Swift and Regent Parrots are both migratory species which are considered likely to migrate to the site in winter for foraging purposes, and which would be relying on winter flowering eucalypt species, including White box, as an important nectar source.

12. It is undisputed that the Maules Creek Coal mine is planned to have a significant impact on biodiversity. We note that the Land and Environment Court recently stated in relation to a coal mine project that was also to have a significant impact on biodiversity:

> *The strategies for managing the adverse impacts of a project on biological diversity are, in order of priority of action, avoidance, mitigation and offsets. Avoidance and mitigation measures should be the primary strategies for managing the potential adverse impacts of a project. Avoidance and mitigation measures directly reduce the scale and intensity of the potential impacts of a project. Offsets are then used to address the impacts that remain after avoidance and mitigation measures have been put in place.*[6]

13. Our client is concerned that the management of the biodiversity impacts of the development is focussed significantly on offsetting and that the mitigation of impacts is not being managed as required in accordance with adopted strategies and as required by the law under the project approval. Our client contends that the

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[3] Cumberland Ecology for Hansen Bailey, Maules Creek Coal Project Ecological Assessment, Final Report July 2011, p H.3 of Appendix H of Appendix I

[4] Cumberland Ecology for Hansen Bailey, Maules Creek Coal Project Ecological Assessment, Final Report July 2011, p H.3 of Appendix H of Appendix I

[5] Cumberland Ecology for Hansen Bailey, Maules Creek Coal Project Ecological Assessment, Final Report July 2011, p H.3 of Appendix H of Appendix I

[6] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 [147]

mitigation measures required under the project conditions would be substantially undermined if the BMP is amended and clearing is permitted during the excluded period. While it is acknowledged that the requirement to undertake pre-clearance surveys is a necessary mitigation measure in relation to fauna, our client asserts (as recommended by the Department) that factoring seasonal behaviours of core species that will be significantly impacted is essential in a mitigation program.

14. We draw your attention to the Biodiversity Management Plan of adjacent Boggabri Coal mine, dated October 2012 which states:

> *The following commitments are made by Boggabri Coal in regard to vegetation clearing activities:*
>
> - *vegetation clearing will be undertaken in campaigns corresponding with mine development. Clearing of no more than 12 months of the mine plan will be undertaken in advance*
> - *the removal of native vegetation which contains potential roosting/nesting resources for birds and/or arboreal mammals will be conducted outside known breeding/hibernation periods, during late summer or early autumn*
> - *the methodologies detailed in this procedure will be communicated to relevant Project personnel and managed by the Environment Superintendent.*

15. Further, Whitehaven Coal's nearby Werris Creek Coal Project Biodiversity Management Plan provides: *Clearing activities will be scheduled outside of periods of fauna breeding or hibernation/torpor*[7]

16. Our client respectfully asks that you do not allow the Director-General to amend the BMP to allow clearing during the prohibited winter period.

17. We are very grateful for your attention to this matter and ask that you provide a response to us as soon as you are able. Should you have any questions about this matter please do not hesitate to contact the writer on 9262 6989 or by email at sue.higginson@edonsw.org.au

Yours sincerely,
**EDO NSW**

Sue Higginson
Principal Solicitor

[7] http://www.whitehavencoal.com.au/environment/docs/biodiversity-and-offset-management-plan.pdf See Appendix J Clearing Checklist