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Nature Conservation Saves for Tomorrow

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SCEC References Committee
PO Box 6100,
Parliament House,
Canberra ACT 2600

By email: ec.sen@aph.gov.au

Submission to the Standing Committee on Environment and Communications References Committee: Inquiry into Environmental Offsets

1. Introduction

The Blue Mountains Conservation Society has approximately 850 members. Its mission is to conserve the natural environment of the Blue Mountains. It has links to the Nature Conservation Council, Colong Foundation, Protect Sydney's Water Alliance, RiversSOS, Lock the Gate, and Stop CSG Blue Mountains, amongst others.

This submission relates principally to the Society's **concerns** regarding biodiversity-offset systems. Environmental degradation from coal and CSG exploration and exploitation, impacts on the quality of surface water and groundwater resources (particularly in drinking water catchments), the potential outcome should the Bells Line of Road Long Term Strategic Corridor Plan ever be implemented, and other threats to the Greater Blue Mountains World Heritage Area, are all likely to be exacerbated through the use of offset processes.

One of the Society's principal current campaigns is to achieve reservation of the various components of the Gardens of Stone Stage 2 Proposal, which covers significant parts of the western Blue Mountains. The proposal covers a region which is an acknowledged biodiversity 'hot spot', as well as possessing magnificent scenic values. It covers areas encompassing critically endangered ecological communities (CEECs) and species (CE). Parts of it are subject to underground and open cut coal mining proposals and, particularly the latter, are seeking to offset the acknowledged environmental damage.

The fact that there is a Senate Inquiry into environmental offsets emphasises the diversity of opinion as to how such offsets should be determined and whether they are justified when the impact is on threatened species and communities. NSW has a draft policy on biodiversity offsets[1]. Although superficially sound,

[1] *http://www.environment.nsw.gov.au/resources/biodiversity/1480bioffspol.pdf – this is the draft policy document. http://www.environment.nsw.gov.au/resources/biodiversity/1482draftfba.pdf – this aims to quantify the proposal's 'unavoidable' impacts, and identify the types of available offset which the proponent may use to prepare an offset strategy to accompany the application.*

the policy is actually loaded in favour of 'miners' because it creates a situation in which everything can be offset in a range of ways which do little or nothing to directly offset the acknowledged damage. A brief article on the NSW policy is presented in ***Appendix A.*** It is extremely likely that some of the concerns raised in ***Appendix A*** are equally applicable to the Federal approach and should be noted as part of the present submission.

The Society recognises that much of the Draft NSW Policy is similar to the *EPBC Act Environmental Offsets Policy* of October 2012. It is likely and (in the way that governments are cooperating to the detriment of the environment) unfortunately logical that the similarity accords with the agreement between the Federal and NSW governments whereby responsibility for assessing matters of national environmental significance (MNES) may be 'devolved' to the State planning system. **The Society strongly opposes such devolution for reasons given in a previous submission to the Senate Environment and Communications References Committee's Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012 (**attached hereto as ***Appendix B*****).**

2. BMCS' over-riding contentions

- Any offsets policy, which is designed to only come into consideration after avoidance and mitigation have been implemented (as far as is practicable), **must not be treated as the default setting (**i.e., there must not be an in-built assumption that the residual damage can be offset**).** Such an assumption renders it extremely difficult (almost politically impossible) to refuse the proposal.

- **Threatened species and ecological communities are precisely that, irrespective of whether they are critically endangered or 'just' endangered.** For a species or community to be listed, it must have been subject to thorough assessment and a scientifically-based decision must have been made about the need to conserve it – no ifs, no buts! If you have eight of something and three are destroyed, you are left with five – the population is diminished and its viability compromised – despite any contrary claims, no amount of offsetting will change this.

- The whole concept of offsetting is a subterfuge introduced by governments to facilitate approving mine-related development applications which have the capacity to destroy or otherwise compromise MNES, or impact on state-listed species and/or communities. **The principle promulgated by the approach is that economic considerations outweigh environmental and social values and that these must therefore be 'offset'.**

- BMCS rejects the short-sighted, narrow and non-cumulative attitudes embodied in the government's approach to offsets, and asks **what offsets are in place to justify the ongoing exploitation of fossil-fuel-based power in the context of the findings of the IPCC Fifth Assessment Report?**

3. Offset principles

The Environmental Offsets Policy (EOP) Box1 p8[2] presents the overarching principles which are applied in determining the suitability of offsets. They make interesting reading and are quoted below:

"Suitable offsets must:

1. *deliver an overall conservation outcome that improves or maintains the viability of the aspect of the environment that is protected by national environment law and affected by the proposed action*
2. *be built around direct offsets but may include other compensatory measures*

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www.environment.nsw.gov.au/biodivoffsets/1481bioffund.htm - this deals with the proposed NSW Biodiversity Offsets Fund for Major Projects

[2] *Environment Protection and Biodiversity Conservation Act 1999* – Environmental Offsets Policy October 2012

3. *be in proportion to the level of statutory protection that applies to the protected matter*
4. *be of a size and scale proportionate to the residual impacts on the protected matter*
5. *effectively account for and manage the risks of the offset not succeeding*
6. *be additional to what is already required, determined by law or planning regulations or agreed to under other schemes or programs (this does not preclude the recognition of state or territory offsets that may be suitable as offsets under the EPBC Act for the same action, see section 7.6)*
7. *be efficient, effective, timely, transparent, scientifically robust and reasonable*
8. *have transparent governance arrangements including being able to be readily measured, monitored, audited and enforced.*

In assessing the suitability of an offset, government decision-making will be:

9. *informed by scientifically robust information and incorporate the precautionary principle in the absence of scientific certainty*
10. *conducted in a consistent and transparent manner."*

Frankly, many of these ten items (specifically 3, 4, 7, 8, 9 and 10) are motherhood statements to the extent that **they set down what one hopes might be happening. However, the remaining items contain weasel words which effectively provide loopholes big enough to drive the biggest mining dump truck through!**

For example:

- **Item 1** refers to *"an overall conservation outcome that improves or maintains the viability"* – what is really meant by an overall conservation outcome? How can a CEEC or a CE species be trashed and yet have its viability maintained or improved by an offset? If only it were that easy. It is not surprising that Senator Waters considers that offsets are *"…often magic pudding calculations to justify irreversible environmental damage"*[3].

- **Item 2** emphasises *"…direct offsets…"* (this might be construed as 'like-for-like' offsets but it is carefully not specified) and then the door is thrown open by including *"…other compensatory measures".* Once again, it is abundantly clear why Senator Walters says that offsets *"…are being used more and more as an excuse for governments to tick and flick environmentally damaging projects for the big mining companies"*[3].

- **Item 5** raises concerns about accounting for and managing *"…the risks of the offset not succeeding"*, yet in **item 9** the emphasis is on incorporating the precautionary principle in the absence of scientific certainty – it is most disturbing that trashing areas by open cut mining is approved based on offsets where failure is a possibility[4] – surely the application of the precautionary principle would demand that the proposal be rejected?

Why has the Society emphasised the amount of 'wriggle' room created in these offset principles? It might at first seem that the criticisms are largely focused on semantics and a lack of clarity which could stem from trying to draft a difficult document, but this is not the case. **It is in fact clear that the document was carefully drafted to ensure that the residual impacts from the vast majority of proposals would be accommodated by offsetting.**

What this really tells us is that the red (or green) tape which frustrates the mining industry has nothing to do with ensuring sound environmental outcomes. Rather, it comprises a smokescreen created by governments to hide the fact that they are principally committed to appeasing the mining industry.

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[3] *Cited in http://www.smh.com.au/federal-politics/political-news/senate-inquiry-into-failure-of-environmental-offsets-20140304-341ud.html*

[4] *Refer to information about Maules Creek and Bimblebox in www.smh.com.au/federal-politics/political-news/senate-inquiry-into-failure-of-environmental-offsets-20140304-341ud.html*

4. Offset packages

In the EOP p10, the wriggling continues to ensure that few proposals are refused. An offsets package is said to be a *"…suite of actions that a proponent undertakes in order to compensate for the residual significant impact of a project. It can comprise a combination of direct offsets and other compensatory measures. It can comprise a combination of direct offsets and other compensatory measures.* We are then told that direct offsets are those which provide a measurable conservation gain for the impact and that they must comprise at least 90% of the offset requirements. Unfortunately, the seemingly rigid requirement may then be ignored in circumstances where it can be shown that: (a) a better environmental outcome can be achieved through allowing a higher percentage of compensatory measures [**'sounds'** satisfactory]; and (b) scientific uncertainty is so high that it isn't possible to determine a direct offset that is likely to benefit the protected matter. **Clearly item (b) is a case where the project should be refused rather take unacceptable risks, but the EOP again opens the door to other possibilities.** Thus, EOP Box2 p12 announces that whereas the primary consideration in determining suitable offsets is delivering a conservation gain for the impacted project**, the delivery of offsets which have positive social or economic co-benefits is encouraged.**

This is similar to NSW Minister Hazzard's planning system in which there was a clause attempting to make economic outcomes a principal factor in assessing a mining or CSG proposal. As with the rest of the system, it has (for the time-being) been withdrawn.

5. Other considerations

The Society finds it disturbing that the Department of the Environment, which is charged with protecting MNES, is also responsible for promoting and administering the matter of biodiversity offsets, which are designed to facilitate mining regardless of the environmental outcomes. Surely this constitutes a significant conflict of interest? This same issue has been raised in relation to the NSW Office of Environment and Heritage (OEH), which is placed in the position of having to negotiate offsets (hopelessly inadequate offsets – in BMCS' view) that effectively sanction the destruction of threatened species and communities which OEH is required to protect.

Even if BMCS were to support the current Offsetting Policy, the document says little about how the quality of the impact being offset and the quality of the proposed offset will be evaluated[5]. Nothing of which the Society is aware suggests that the DoE is sufficiently well staffed to evaluate and field check the quality of the information with which it is provided. Under the bilateral agreements being reached between the Federal and State governments, it is conceivable that much of this work is to be undertaken by the States. This would however be most unsatisfactory because (refer to): firstly, these staff will be controlled by and attuned to a State's priorities rather than having an Australia-wide perspective; secondly, the State-based organizations lack the capacity to handle this additional body of work; and thirdly, companies and their consultants have entrenched (and seemingly had accepted by government) far too many ways of minimising the true extent of environmental impacts[6].

Throughout this policy there is negligible reference to the cumulative nature of impacts. This is a critical issue which has been focused upon by the NSW Planning Assessment Commission and is noted as a factor in more recent Director-General's requirements. Yet companies address the issue in the most simplistic of ways and believe that the broader (regional) issues are not their responsibility. Thus, damage inflicted by an earlier mining operation should not adversely affect a current assessment – indeed, the indication is that because damage exists, additional damage is of lesser importance. Furthermore, any less advanced proposal (despite it clearly being signalled) should not adversely influence a current assessment. This collectively amounts to rejection of impacts from a series of open-cut coalmines along (say) the western escarpment of the Blue Mountains. In terms of CEECs and CE species, it may be argued that the impact of a proposal will be minimal because of suitable habitat and known occurrences in nearby State Forests and other crown lands.

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[5] *EOP Section 8.1 p28 provides a general statement about sources of data used – it is notable that sources "may include consulting scientists, scientific literature, and data collected by both the department and proponents." It is regrettable that 'captive' consultants are deemed to provide bias-free data, whereas the responses of environmental and community special-interest groups seemingly lack weight!*

[6] *For more on this, refer to* ***Appendix B.***

The questions then become, how many minimal impacts does it take to make a substantial impact and is the cumulative consequence rectilinear or exponential as a function of hectares destroyed by open cuts?

6. Conclusions

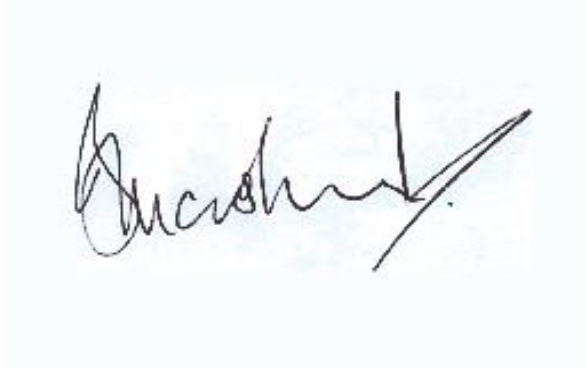
The Society concludes that:

- Offsets policies have developed in response to competing environmental and economic needs. The policies are heavily loaded in favour of mining developments due to the economic clout of mining companies and political pragmatism stemming from either a lack of courage to confront the mining companies or a lack of belief in the value of the environment.

- The policies create an expectation that proposals will be approved following negotiations over 'suitable' offsets, but the quality of the offsets and their capacity to improve or maintain environmental outcomes is far from convincing.

- There is a need to remove the conflict of interest whereby those charged with protecting the environment are required to negotiate over the destruction of MNES despite specious claims that their will be improved environmental outcomes.

- If no other changes occur, it is crucial that some of the more outrageous offset possibilities are removed from consideration, and cumulative impacts are fully addressed in terms of both refusing to approve proposals and developing any form of meaningful offset.



Dr Brian Marshall,
For the Management committee.

Attachments: Appendices A and B

APPENDIX A.

Great for mining: shame about the environment!

Brian Marshall

The **Draft** NSW Biodiversity Offsets Policy for Major Projects[7] has the intention of clarifying, standardising and improving biodiversity offsetting for major project approvals. The policy will be applied to state significant development and state significant infrastructure ('major projects') under the *Environmental Planning and Assessment Act 1979.* It will happen irrespective of whether the determining authority is the Minister for Planning, the Planning Assessment Commission, or senior staff within the Department of Planning.

Why is the policy necessary? I quote from its 'Introduction' (p4): *"There is currently no standard method for assessing impacts of major projects on biodiversity. This can lead to wide variations in assessments and lengthy and costly debates around the adequacy of an assessment and its outcomes. Similarly, biodiversity offsets are usually negotiated between proponents and government on a case-by-case basis. The resulting offset requirements can vary widely, leading to uncertainty for proponents and the community. The lack of clear and standard guidance can also result in inferior environmental outcomes due to inconsistencies in biodiversity assessments and offset site selection and management."* The policy's objectives (p5) are therefore to provide clear, efficient and certain guidance for stakeholders, to improve outcomes for the environment and communities, and to provide a practical and achievable offset scheme for proponents.

The justification and objectives **sound** sensible. The justification presses the right buttons by emphasising non-uniformity, uncertainty of outcome, the time element, and costs. It falls nicely into the domain of cutting red tape, but for whose benefit? If we call it 'green tape' the answer becomes obvious: to give miners certainty of outcome and, in doing so, effectively compromise the true value of the impacted biodiversity. As always, the language is right, but the devil is in the detail!

The policy is to be phased in over a transitional period which is likely to commence in the second half of 2014. 'Phasing in' will involve the proponents and the consent authority applying the policy 'administratively', but some flexibility will be applied in order to 'accommodate any problems' and address 'finer details'. Read this as follows: to cover unforeseen deficiencies when the thought bubbles are turned into a practicable process; to allow miners to complain and have any 'unnecessary' constraint diluted; and (perhaps) to enable a backflip should the government have misjudged the strength of community opposition!

Once again we have a situation where a system has been devised on a 'one size fits all' basis. Just as the Minister for Planning's new planning system was withdrawn due to its impracticability and its promoting the needs of developers over environmental and social concerns, so must the Minister for the Environment be made to realize that this new offsets policy will not wash and is unacceptable in its present form. Her glossy statement that *"This policy will provide much-needed certainty for industry and improve environmental outcomes"*[8] is far from reality; industry's certainty will be attained at the environment's cost.

Some of the specific concerns stem from:

- The basic premise underpinning the 'avoid, minimise, offset' hierarchy being that the proponent's application **will be approved** through complying with an offset determined under the Draft Framework for Biodiversity Assessment (FBA)[9].

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[7] *http://www.environment.nsw.gov.au/resources/biodiversity/1480bioffspol.pdf – this is the draft policy document.*

[8] *http://www.enviroinfo.com.au/draft-biodiversity-offsets-policy-for-new-south-wales/#.Uzf2kFlvO70 – this reports Minister Parker's views.*

[9] *http://www.environment.nsw.gov.au/resources/biodiversity/1482draftfba.pdf – this aims to quantify the proposal's 'unavoidable' impacts, and identify the types of available offset which the proponent may use to prepare an offset strategy to accompany the application.*

- The biodiversity investigations of the proposal under the terms of the FBA being conducted by an accredited ecological consultant **hired by the proponent** – this has the capacity to undermine the whole policy – government must appoint the consultant and pay the person from a central fund.
- The notion that the offset can be acquitted by paying money into the yet to be established NSW Biodiversity Offsets Fund for Major Projects[10], or by other measures such as funding mine-site rehabilitation, and funding research and forms of education.
- The broadening (or effective abandonment) of 'like-for-like' requirements in determining an offset, such that it need not be matched to the impacted biodiversity and can be targeted to relevant 'higher conservation priorities'.
- The consent authority being allowed to reduce offset requirements where they might otherwise render the project unviable and there are demonstrable overall social or economic benefits.
- The organization (OEH) charged with conserving the environment under the *National Parks and Wildlife Act* being complicit in the systemic subjugation of environmental well-being to the interests of the mining industry.

It is unconscionable that, under this policy, threatened ecological communities and species **have little or NO protection**; all can be offset in variously contrived ways. If an ecological community exists in only ten places and three are destroyed, no sane person would deny that the risk to the remaining seven has exponentially increased. If a land system is unique, no sane person would sanction its destruction in exchange for throwing money at the NSW Biodiversity Offsets Fund.

Biodiversity is under severe pressure from the destruction and fragmentation of habitat in response to population growth, governments obsessed with commercial developments in National Parks and on Crown lands, and an economy keyed to the exploitation of finite natural resources by high-impact horrendously destructive methods. Why should we make it easier and less costly for increasingly powerful multi-national and foreign-owned companies to exploit our finite natural resources, when organizations attempting to protect the environment have very limited human and financial resources? The environment is part of your quality-of-life. It is time to take a stand!

What to do! Please send in a submission. It need not be long. Just say that you value biodiversity and the natural environment, and that the policy is unacceptable. Submissions regarding the policy may be made by email to *offsets.policy@environment.nsw.gov.au*. Submissions will be accepted up to 5 pm, Friday 9 May.

[10] *www.environment.nsw.gov.au/biodivoffsets/1481bioffund.htm*

APPENDIX B.

December 16, 2012

Submission to the Senate Environment and Communications References Committee's Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012

Preamble

"The Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012 prevents the Commonwealth from handing responsibility for approving proposed actions that significantly impact matters protected under the EPBC Act to a State or Territory."[11]

The content of the Society's present submission is largely an abridgement of the Society's previous submission to the ***Inquiry into the effectiveness of threatened species and ecological communities' protection in Australia.*** The submission (identified as *SenateEnvCommRefCttee_BMCSSubmission_121213.pdf*) was sent to Ms Dunstone on 14/12/2012 and its receipt was acknowledged by Ms Warhurst on 17/12/2012.

This Society has opted for this approach because much of what was previously presented in *SenateEnvCommRefCttee_BMCSSubmission_121213.pdf* aimed to identify deficiencies in the NSW State and, to a lesser degree, the Federal systems of assessment. The Society contended that the deficiencies impeded the effectiveness of threatened species and ecological communities' protection, and that this would be exacerbated by devolving federal responsibilities under the *EPBC Act* to the states.

1. INTRODUCTION

The Blue Mountains Conservation Society has approximately 850 members. Its mission is to conserve the natural environment of the Blue Mountains. It has links to the Nature Conservation Council, Colong Foundation, RiversSOS, Lock the Gate, Stop CSG Blue Mountains, to name a few.

This submission principally stems from the Society's concerns with respect to coal mining, sand mining, CSG exploration and exploitation, water quality, the Bells Line of Road Long Term Strategic Corridor Plan, and any threats to the Greater Blue Mountains World Heritage Area. One of the Society's principal campaigns is to achieve reservation of the various components of the Gardens of Stone Stage 2 Proposal[12].

The Society wholeheartedly supports the aim of this *EPBC* Amendment Bill, and believes that:

- ***The Inquiry should fully support Senator Walters' Bill as being in the best interests of environmental protection.***

2. GREEN TAPE ERADICATION

[11] *http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs894%22 – quoted from the explanatory memorandum by Senator Walters*

[12] *http://www.bluemountains.org.au/gos2.shtml - this site provides a link to the main proposal document*

The abrogation of responsibility for enforcing the *EPBC Act 1999* from the Commonwealth to a State or Territory largely stems from business groups and the Australian Mining Industry Council at the inaugural COAG Business Advisory Forum in April 2012. The concept of making life easier for 'business' would certainly have the support of the dominantly Liberal-National state governments, but seemingly negligible thought was given to the environmental implications and even the practical problems of trying to get the States' differing systems of environmental planning to meet Commonwealth needs, although some aspects of this now seems to be appreciated[13]. Nevertheless, it is noted with some trepidation, that the Federal Government will introduce its own legislation *"…to reduce the time taken for approvals of big development projects and to set out whole categories of projects that won't need federal approval at all."*[14] Such a move could well reduce the already inadequate time available for public exhibition[15], and create a range of proposals over which the Federal Government would play Pontius Pilate in terms of its environmental responsibilities. The Society strongly opposes both aspects.

Whereas 'business' is always claiming that overlapping federal and state environmental powers cost them billions of dollars[16], the claim is partly nonsensical and partly a function of the way businesses have been handling the requirements. [The latter comment is based on the Society's interaction with coal companies in the Western Coalfield.]

Nonsensical is used because the claim is grossly hyperbolic and loaded according to their accounting preferences; the expenditure is always a charge against profits. Furthermore, the 'loss' to business is never (or barely) considered in terms of the $-impact the business is having on: greenhouse gas emissions (GGE) of the State, Australia and globally; and other social, heritage and environmental concerns. In fact, the benefit/cost analyses with which the Society has been involved deal with GGE in reductionist ways, and treat environmental assets as intangibles to be handled through so-called biodiversity offset strategies.

Environmental impact statements (EISs)[17] tend to comprise a company report using segments from consultants' reports. The latter reports are attached as appendices and may also be accompanied by peer reviews. These EISs (sometimes termed preliminary; usually comprising in the order of 100-500 MB of data) are sent to SEWPaC with a covering document stating that the company believes the proposal should/should not be a controlled action under the *EPBC Act 1999*. In either case, the documents go on public exhibition to enable community and environmental groups (collectively termed special interest groups or SIGs) to make submissions as to why the proposal should be deemed a controlled action; and in due course SEWPaC decides whether the proposal should/should not be a controlled action and what (if controlled) needs to be addressed. In many cases, SEWPaC then uses delegated authority to enable the department of planning to evaluate the proposal's compliance with both State and now flagged Federal requirements.

The Society emphasises that the company sends in the whole of the EIS, without any real attempt to limit the submission to matters likely to be of national environmental significance (MNES). Somewhat cynically, it would seem that the compliance costs are thereby maximised, while ensuring SEWPaC and the SIGs are buried in electronic paper.

Once the EIS (as now amended by the company to reflect the inputs from SIGs and SEWPaC) goes to 'planning', it may be deemed suitable for public exhibition or more clarification/work be demanded. When 'planning' is satisfied, it goes on public exhibition, submissions are received from other government departments and SIGs; the company then responds to the criticisms and provision is made for further response by government departments and SIGs.

Other cases are known where the 'preliminary' EIS has gone firstly to 'planning' and been placed on public exhibition. The company benefits from having government departments and SIGs provide guidance as to areas which need to be upgraded. It also benefits from these organizations identifying MNES and applying to SEWPac for the proposal to be called in.

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[13] *http://www.smh.com.au/opinion/political-news/bid-to-cut-green-tape-bogs-down-in-detail-20121205-2avve.html*

[14] *http://www.smh.com.au/opinion/political-news/bid-to-cut-green-tape-bogs-down-in-detail-20121205-2avve.html*

[15] *This is currently about 10 working days, yet companies, using highly paid consultants, take from many months to more than a year to develop the EA – this is a gross imbalance which particularly fails to appreciate the limited resources available to volunteer-based environmental groups.*

[16] *http://www.smh.com.au/opinion/political-news/bid-to-cut-green-tape-bogs-down-in-detail-20121205-2avve.html*

[17] *In some cases called Environmental Assessments (EAs) – this terminology will be treated as interchangeable*

Clearly the process *in toto* is cumbersome and costs money, but once the proposal receives approval, these compliance costs are tiny compared with the company's development costs, and pale into insignificance relative to the revenue from the sale of the commodity. In fact, because of the creative-accounting potential open to companies, the 'billions of dollars' are a very small factor in minimising a company's tax. And all this disregards the many 'unseen' government subsidies, best appreciated when the mining industry was presented (by Treasurer Swan) with the option of losing some of its subsidies in order to retain a 1% reduction in company tax; it was no contest – they kept their subsidies.

Business will always be looking at reducing time and energy spent on environmental compliance[18]; why else does it operate in countries with high political risk but low compliance costs? Business aims to maximise profit in the context of its shareholders, although it now seems that it is more in the interests of the executives' package[19]; business will only stop seeking to undermine processes which truly favour sustainable environmental outcomes when these become a major factor in the executives' rewards. **Surely the Federal Government has learnt its lesson over the re-negotiated mining tax and royalties fiasco?**

- ***The Inquiry should fully appreciate the consequences of accommodating the demands of mining companies run by executives with performance-based remuneration packages.***

3. SYSTEMIC DEFICIENCIES & CORRUPT PRACTICES

3.1 General picture

Why is federal oversight essential? The current dealings being examined by ASIC in relation to the Obeid **family, a government minister, and assorted business people, incontrovertibly demonstrate that corrupt behaviour is simmering below the surface. This is very much a facet of human nature; with power comes** arrogance and financial greed. Past examples include the behaviour linked to the banknote bribery scandal, the AWB oil-for-wheat scandal, the Poseidon nickel scandal in the 1970s, the collapse of MinSec, and collapses surrounding HIH and One-tel.

The point is that wherever business operates, room exists for dishonest practices which generally involve a few gaining at the expense of the less-informed public. In environmental matters where intangible natural assets are pitted against the exploitation of metallic and non-metallic resources, the financial incentive looms large; there is no such thing as too much oversight. Aspects pertinent to this are developed below.

3.2 Specific aspects

In terms of development and exploitation, EISs/EAs rely heavily upon the reports of consultants. In a majority of cases the consultants are either 'rusted on' to the company or group of companies, or are recognised within the industry for the 'sensitivity' of their reports. This does not necessarily mean that the consultants deliberately lie, but in cases where there is room for uncertainty the consultant tends to favour the company. After all, he who pays the piper calls the tune! The contest in which the environment generally scores the wooden spoon, involves the imperatives of the company, the input of the consultants who also run businesses, and the role of government departments operating under the exigencies of the government of the day.

The NSW Department of Planning and Infrastructure (DoPI) has the principal role in approving development applications, but many other government departments have opportunities to affect the conditions under which approval is granted, and they also play significant roles in subsequent regulatory practices. Perhaps not surprisingly, when faced with decisions to err on the side of precautionary environmental protection, or give approval subject to imposed (but regrettably poorly regulated) conditions which sanction damage through risk-management practices, the state government opts for approval. Clearly, when this approach extends to matters of national environmental significance (MNES), protection should not and must not be subjugated to the vagaries of state governments, which are less attuned to the bigger picture.

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[18] *Some companies profess to be good environmental citizens, but to the extent that the claim applies, it is forced on them by government regulation.*

[19] *See Ross Gittins' comments at http://www.smh.com.au/business/execs-put-their-salaries-ahead-of-shareholders-20121216-2bhh6.html*

The foregoing and the matters to be raised in the following subsections have bearing on the overall integrity of the processes used by DoPI. They pertain to the effectiveness of threatened species and ecological communities' protection in NSW and Australia, and therefore the need of the Commonwealth (through SEWPaC) to retain oversight of MNES.

- ***The Inquiry should recommend that the protection of MNES under the EPBC Act should and must remain subject to rigorous oversight by the Commonwealth.***

3.2.1 Exploration licences

Environmental concerns commence in advance of approvals for development and exploitation of resources. They reflect problems relating to the issue of exploration licences (ELs).

Irrespective of whether for coal, oil, CSG, sand, clay or metallic minerals, ELs may be granted over parks, water supply special areas, state forests, agricultural land and even within city precincts. The right to explore is granted without any commitment to the right to exploit a resource. It must nevertheless be recognised that: (i) exploration companies operate on the expectation that the right to exploit will not 'unreasonably' be withheld; (ii) affected lands are damaged through the generation of tracks and drilling sites; (iii) owners and the public experience destabilization due to the possibility of exploitation; and (iv) the exploration processes have the capacity to contaminate the surface water and groundwater regimes and their associated ecosystems.

BMCS has been assured by DECC (now OEH) and DII (now DoPI) that there will be no mining or CSG extraction under NSW National Parks and the Greater Blue Mountains World Heritage Area (GBMWHA). However, the community was once told that: (i) shooting would not be allowed in these lands, yet it is happening; (ii) horse riding would not be permitted in wilderness areas, yet pilot schemes are to be implemented; and (iii) exploration for uranium would not be sanctioned in NSW, yet this has been changed. Clearly, political expedience results in changes which have adverse environmental consequences. No matter what weasel words are used, the net consequences of such changes impact on the protection of threatened species and ecological communities, irrespective of whether they are listed under state and/or federal legislation. The Society therefore believes that any areas precluded from exploitation must be excised before any form of exploration title is granted.

The current Strategic Regional Land Use Planning for NSW provides no certainty whatsoever. In replacing the scandalous Part 3A system and attempting to meet the requirements of farmers and environmental groups, the State Government has failed miserably. Uncertainty is the only certainty! It is inconceivable that the Commonwealth would devolve its environmental responsibilities to such a chaotic system.

- ***The Inquiry should support World Heritage regions and any other areas identified as being of national environmental significance by recommending that they be automatically excised from any form of exploration licence.***

3.2.2 'Cross fertilization', collusion, integrity?

From its examination of various development applications and the detailed consultants' reports, it would seem that various consulting groups have met to ensure a consistent story. For example, a groundwater consultant presents an 'experience-based' interpretation of what might happen and cites the 'supporting' conclusions of the mining and flora consultants, but when the reports of these consultants are examined, it becomes apparent that their conclusions substantially rely on the groundwater consultant's experience-based input.

There are obviously grey areas between seeking opinion, cross-fertilization to better inform a consultant's evidence-based positions, and collusion which leads to a consultant offering interpretation beyond his/her expertise and evidence-base. The latter incestuous process is poor science and leads to 'shaped' findings. A consultant should provide his/her interpretation of his/her investigation in his/her area of expertise; practising 'group-think' is unacceptable – or it should be!

The Society strongly believes that DoPI should be cognizant of 'cross-fertilization' and collusive practices which lead to over-enthusiastic endorsements of the proponent's interests. Such awareness should be conveyed in instructions to those preparing applications; suitable penalties should be highlighted.

The Cate Faehrmann's Bill attempted to address the problem of consultants too closely associated with the needs of the company. Its rejection demonstrated that the NSW Government was not prepared to confront this issue.

'Self-regulation' through membership of professional associations has never been and will never be the answer. The Society contends that a company's proposal must be founded on reports by accredited experts appointed and paid by government from funds raised from the pertinent industry. Such a process could address the issue of 'rusted on' consultants whose livelihoods are linked to 'repeat business'. The deep pockets of industry should be kept at arms-length.

Collusive behaviour, lack of scientific rigour when an hypothesis or opinion is treated as proved, and the conflict of interest faced by 'rusted on' consultants, inevitably detract from the integrity of the assessment process. This applies at both state and federal levels because DoPI and SEWPaC tend to receive the same sets of reports. **Accordingly, the inbuilt deficiencies require that SEWPaC more rigorously exercises its responsibilities under the *EPBC Act;* this can never be achieved by handing its responsibilities to the state.** Indeed, the actions of the present NSW Government seem more in keeping with the fox being invited to enter the hen house!

3.2.4 NSW Planning Assessment Commission (PAC)

The PAC and various independent panels of inquiry are an attempt to remove the onus of decision from the government. BMCS supports this in principle, but the independence of the appointed panel and the assigned ToR are matters of concern.

Once again the problem from the viewpoint of protecting threatened species and ecosystems is that, if the recommendations of a panel are shaped by its composition and ToR, environmental issues may be inadequately addressed. **Then, if the Federal Government has delegated its responsibilities to the State, MNES could be compromised.**

3.2.5 Reductionism and minimization

Reductionism involves reducing a problem to its parts such that each can be assessed in isolation. On a regional level, the impact of a coal-mining proposal on the hydrologic regime, or on threatened species and endangered ecosystems, could be assessed as minor in isolation, but only if one disregards the impacts from several other open-cut mining operations. At a more local level (i.e. within the project's limits) it can comprise isolating groundwater from surface water considerations as if they were totally independent, separating the cliff-collapse risks due to highwall mining from subsurface pillar failure due to pump-out from old workings, and seeing preservation of a plant species (perhaps by a narrow buffer) as being separate from other parts of an encompassing ecosystem.

Minimization largely amounts to playing down an impact by disparaging its significance. Typically, an impact is said to be 'unlikely' and then, even in the event that something does happen, it would be 'minor' or of 'negligible significance'[20]. Alternatively, a simple numerical comparison is made by expressing the compromised area of forest (say) as a percentage of the total area of forest; a few percent is 'obviously' of no real significance! Typical examples from longwall mining are: (i) any reduction of surface flow due to local upsidence is inevitably deemed 'minor' and likely to 'recover over time due to self-healing'[21]; and (ii) in terms of the hydrological regime, the additional discharge of mine-make from two proposed longwalls is deemed to be insignificant when compared with the magnitude of approved discharges from twenty existing longwalls[22].

The Society considers that DoPI and SEWPaC should see reductionism and minimization as shoddy practices regularly used by proponents and their consultants to the detriment of environmental issues, obviously including MNES.

3.2.6 Cumulative impacts

The addition of a new mine or the expansion of an existing mine in a region disproportionately enhances adverse impacts. For any given impact, the cumulative impact potentially exceeds the sum of the contributions from the pre-existing and proposed operations. Yet, in some cases, it has been suggested that contaminants discharged into

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[20] *This is usually considered in the context of either the dollar-value of the proposal or the costs of reducing the risk, and effectively being classed as 'acceptable collateral damage' or 'capable of remediation'.*

[21] *But does self-healing stop all losses or perhaps just reduce the rate of loss, and how does this impact on surface flows, and riparian and groundwater-dependent ecosystems?*

[22] *But what is the existing impact of the current discharges and how will adding to them improve matters?*

an already-polluted watercourse will have negligible impact on water quality. This leads to suggestions that mining should be allowed because previous mining has already compromised the region. The Society strongly opposes this 'things can't get any worse' argument; the mining industry underestimates its capacity to wreak environmental mayhem!

The notion of cumulative impacts currently receives consideration within EIS/EA documentation. However, the way it is treated by consultants **at best** demonstrates a misunderstanding of the nature and importance of cumulative effects and, **at worst**, involves the use of reductionism and minimization to deliberately downplay them. The net result is that the treatment is environmentally insulting.

Cumulative impacts can be examined with respect to a discrete activity (say open-cut mining from several mines), or from diverse activities (say open-cut mining, LW mining, power generation, forestry and high-impact recreation). Each can then be considered at a single time or over a protracted time, and a further option is whether the evaluation relates to a single site or a broader region. Examples of differing types of cumulative impact are provided in ***Appendix B Section 2.2.***

The Society believes that DoPI and SEWPaC give insufficient weight to the role of cumulative impacts in the context of threatened species and ecological communities, and obviously including MNES.

3.2.7 Section 3 conclusion

The collective consequences of the items raised in Sections 3.2.1-3.2.6, in relation to the effectiveness of protecting threatened species and ecological communities, and thereby pertaining to MNES, are two-fold:

(a) The outlined deficiencies **must inevitably reduce** the effectiveness of any protection provided by the Commonwealth because, although much of what has been specified relates to DoPI and other NSW government departments, SEWPaC's evaluation is subject to similar reports from companies and their consultants.

(b) In the context of the possible devolution of the Commonwealth's powers under the *EPBC Act* to States, it must be recognised that the reduction of effectiveness to the detriment of MNES **will be substantially exacerbated.**

- ***The Inquiry should register concern at the range of practices used by companies and their consultants to compromise the protection of threatened species and ecological communities, and particularly MNES; it should therefore recommend that the Commonwealth retain its powers under the EPBC Act, and concurrently recommend that pertinent departments of Federal and State Governments cooperate in rigorously penalising such practices.***

4. SPECIFIC EXAMPLES

4.1 Drinking water catchments

The National Water Commission[23], Sydney Catchment Authority[24], the NSW Scientific Committee[25], and the Planning Assessment Commission[26] (Bulli Seam Operations, July 2010) have variously recognised the threats posed by coal mining to water quality and quantity and to the dependent ecosystems; they have particularly emphasized the cumulative effects. The State Government has so far failed to deal with the challenge to the extent that the Strategic Land Use Policy makes no sensible provision with respect to protecting environmentally sensitive lands, including Sydney's drinking water catchments. Minister Hazzard claims that he must be getting the legislation about right because environmental organisations, agricultural interests and resources companies are opposed to what he has put in place. A far more realistic assessment would be that 'his' system fails everyone because of its extreme uncertainty.

[23] *http://www.nwc.gov.au/www/html/629-effects-of-mining-on-groundwater.asp?intSiteID=1*
[24] *http://www.environment.nsw.gov.au/water/sdwc2010.htm*
[25] *http://www.environment.nsw.gov.au/threatenedspecies/LongwallMining.htm*
[26] *www.pac.nsw.gov.au/DesktopModules/PAC_Review.../getdocument.aspx?...*

The NSW Government continues to allow longwall coal mining, and now CSG exploration (and presumably exploitation), under drinking water catchments. The provisions of the special catchment areas that once protected the quality and quantity of the impounded waters are being watered down! These actions are in accordance with the NSW Government's belief that the mining and extractive industries must be given priority to ensure financial well-being. There is currently little sign that the government is in any way concerned with the environment.

- ***The Inquiry should recommend that all drinking water catchments and their contained species and ecosystems be deemed MNES and be protected under federal law from the surface to the 'centre of the Earth'.***

4.2 Temperate Highland Peat Swamps on Sandstone (THPSS) and the Subsidence Management Plan (SMP) Process

In addition to the organisations concerned about the ravages of coal mining, as cited in Section 4.1, the EPA Board notes[27] that the planning system has substantial deficiencies to the extent that it: (i) requires insufficient assessment of underground mining impacts at the approval stage; (ii) permits too much emphasis on the risk-management approach which characterizes the Subsidence Management Planning (SMP) process; and (iii) effectively through the SMP and various management plans facilitates ongoing exploitation to the detriment of the environment.

Longwall mining under Newnes Plateau in the western Blue Mountains has caused damage to both surface water and groundwater and the dependent THPSS. The THPSS (also termed Newnes Plateau Shrub Swamps) are listed under State and Federal legislation. As a consequence of this damage, the company was required to sign an 'enforceable undertaking' to the value of $1.45 million, yet the company continues to argue that accepting the undertaking is not an acknowledgement of being at fault. Regardless of this, the company was not required to stop mining and is now continuing to expand the area of longwall mining to the east beneath the major swamps in the Carne Creek region, and to the north beyond the East Wolgan River.

The main thing to be learnt from this is that DoPI and also SEWPaC (as the additional longwalls were called in as a controlled action) continue listening to and accepting the assurances of the company and its consultants. This is despite those assurances having a history of being at fault. It is clear that the EPA Board [items (i)-(iii) above] is correct. The SMP process, the development application process (through DoPI), and the Federal oversight (through SEWPaC) have failed to protect those threatened species and ecological communities identified by State and Commonwealth as being MNES.

The Society believes that the SMP process, which has now been operating for about 8 years[28], has demonstrably failed to protect the environment. The main fault is that, while it aims to avoid catastrophic short-term impacts on significant physiographic features, longer term and less dramatic impacts are ascribed to factors 'unrelated' to subsidence. The onus of proof is placed on environmental groups to counter the opinions and interpretations of well-rewarded consultants. It is unlikely that there will be any improvement as long as the companies are allowed to operate under a risk-management system which facilitates ongoing mining at the expense of environmental protection**. BMCS contends that companies should be required to adhere to the Precautionary Principle unless they can prove that adverse short-term, longer term and cumulative effects will not eventuate. Trial and error is not the answer.**

A fuller examination of some of the deficiencies of the SMP process can be provided if required by the Standing Committee on Environment and Communications.

- ***The Inquiry should examine the focus on risk-management planning within the SMP process as it has failed to protect threatened species and ecological communities, including MNES.***

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[27] *NSW EPA Board, Inquiry into NSW Southern Coalfield. NSW EPA Board Submission, July 2007*

[28] *The SMP process has been superseded by the MREMP (Mining, Rehabilitation and Environmental Management Plan) process but many mines continue to operate under the old system.*

- ***The Inquiry should also examine the MREMP[29] process and make findings as to whether it is environmentally better than the SMP process, or whether its principal function is to reduce green tape and facilitate mining.***

- ***The Inquiry should appreciate that, in the event of the Commonwealth devolving its powers, MNES will be at the mercy of the failed SMP process or the unproved and obfuscatory MREMP approach.***

5. CONCLUDING REMARKS

The Society has focused on the many deficiencies of the existing NSW system for evaluating development applications (principally for coal mining) and the contained environmental assessments, and its interaction with the Federal Government regarding MNES.

Even with the current level of federal oversight, the Society's experience is one of a battle in which 'volunteer-group' Davids confront 'mining' Goliaths. The mismatch between combatants in terms of the massive financial resources available to Goliath, is exacerbated by systems in which: (i) company consultants are treated as unbiased (Ho! Ho!) professionals whereas environmentalists are seen as passionately biased amateurs (irrespective of the expertise available within their membership); (ii) environmental and other management plans are determined at meetings between government departments, coal-company personnel, and selected consultants – environmental groups have no say; (iii) the 'same' participants develop the risk-management plans involving triggers and required actions; and (iv) assessment of environmental damage and remediation plans are carried out and devised behind closed doors by the same parties. The system gives the appearance of protecting the environment, including MNES, but it actually ensures mining continues with minimal disruption unless there is a catastrophic disaster. At least with Commonwealth separation from the state system, the extent of the mismatch is less extreme, yet Goliath resents the system's bureaucratic impediment and the need to expend resources on what it perceives as little more than a charade.

So, to summarize, despite the hundreds of MB of data and the NSW Government's attempts to pacify farmers and environmental groups, without stopping the export of coal and gas, the Society believes that:

- **The NSW systems that are in place to supposedly protect threatened species and ecological communities are beset by deficiencies which seriously compromise their effectiveness.**

- **The Federal Government's overseeing role in relation to MNES has similar deficiencies, but in the kingdom of the blind, the one-eyed man is King – there is no doubt whatsoever that the Society supports full retention of a separate Federal role – there is equally no doubt that the Society opposes any devolution of responsibilities to the State system.**

- **At a time when there is a substantial expansion of mining, it is essential that the government departments which are required to evaluate very complex issues are appropriately resourced – the indications are that this is not happening.**

- **Despite the push from business to reduce green tape, there is greater need than ever for full community engagement – and this means longer times for public exhibition and more transparency.**

- **Other more specific beliefs are highlighted in blue-bold at the end of various sections - if acted upon the effective protection of threatened species and communities would be substantially enhanced.**

[29] *See footnote 18 – MREMP stands for Mining, Rehabilitation and Environmental Management Plan – this is presented as 'one size fits all' – it seems intent on covering everything from the commencement of mining through to rehabilitation after mining finally ceases the Society is particularly concerned with how the environment is treated under this system.*