



**ENVIRONMENT PROTECTION AND BIODIVERSITY
CONSERVATION ACT 1999**
Part 10 Strategic Assessments
Section 146 Agreement

**Strategic Assessment of a Biodiversity Plan for Coal Mining in the Upper
Hunter Valley, NSW**

between

THE COMMONWEALTH OF AUSTRALIA

and

THE STATE OF NEW SOUTH WALES

CONTENTS

1	PARTIES	3
2	DEFINITIONS	3
3	PREAMBLE	5
4	BACKGROUND.....	5
5	TERMS OF REFERENCE	6
6	PREPARATION OF THE STRATEGIC ASSESSMENT AND BIODIVERSITY PLAN.....	7
7	ENDORSEMENT OF THE BIODIVERSITY PLAN	8
8	APPROVAL OF ACTIONS UNDER THE BIODIVERSITY PLAN	9
9	VARIATION, CONFLICT RESOLUTION AND TERMINATION	9
	SIGNATURES	10
	Attachment A – Geographic Area.....	11
	Attachment B – Terms of Reference	12

1 PARTIES

The Parties to this agreement are:

The Commonwealth of Australia, represented by the Minister for Sustainability, Environment, Water, Population and Communities

and

the State of New South Wales, represented by the Minister for Planning and Infrastructure and the Minister for Environment.

2 DEFINITIONS

2.1 Unless stated otherwise in this Agreement, the definitions, meanings and terms in the *Environment Protection and Biodiversity Conservation Act 1999* apply to this Agreement and its attachments.

2.2 In this Agreement:

agreement means this strategic assessment agreement entered into between the Commonwealth of Australia and the State of New South Wales on the date the last party executes this agreement.

Biodiversity investigation area is the geographic extent of the biodiversity assessment as illustrated at Attachment A.

Biodiversity Plan is the Biodiversity Plan for Coal Mining in the Upper Hunter Valley which constitutes the 'policy, plan or program' pursuant to section 146 of the EPBC Act. The Biodiversity Plan identifies biodiversity values in the strategic assessment area, priorities for conservation and mechanisms to achieve desired conservation outcomes.

day means a business day as measured in Canberra, Australian Capital Territory.

Department means the Australian Government department administering the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

EPBC Act means the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Minister means the Minister responsible for administering the EPBC Act or the Minister's authorised delegate.

MNES means matters of national environmental significance protected under Part 3 of the EPBC Act.

Parties mean the Minister and the State of New South Wales (the State); each a Party.

strategic assessment means the strategic assessment to which this agreement relates, namely an assessment of the impacts of possible coal mining in the Upper Hunter Valley on matters of national environmental significance protected under the

EPBC Act and protected threatened ecological communities and species under the *Threatened Species Conservation Act 1995* (NSW).

Strategic Assessment Report means the report assessing the likely impacts on MNES and protected State threatened ecological communities and species from possible coal mining in the Upper Hunter Valley.

Strategic impact assessment area means the impact area where eligible coal mining developments may occur as illustrated at Attachment A.

Supplementary Report means the report submitted to the Department following public exhibition of the draft Strategic Assessment Report and Biodiversity Plan which addresses and responds to public comments including revisions to the Strategic Assessment Report and Biodiversity Plan.

TSC Act means the *Threatened Species Conservation Act 1995* (NSW).

Terms of Reference means the terms of reference for the Program Report and the Strategic Assessment Report.

Work Plan means a plan jointly developed by the Parties for undertaking the strategic assessment, documenting a common understanding about what strategic assessment tasks will be completed by whom, by when, and what resources are required for those tasks, amongst other things.

3 PREAMBLE

- 3.1 The parties agree that significant benefit may be derived from developing and implementing a program that identifies and provides for protection of biodiversity in the upper Hunter Valley, including MNES protected under the EPBC Act and threatened ecological communities and species protected under the TSC Act.
- 3.2 The parties note that biodiversity in the Upper Hunter Valley may be affected by proposed new and expanding coal mining operations and that mechanisms are needed to identify and work towards protection of priority conservation areas.
- 3.3 The parties agree to prepare a Biodiversity Plan for Coal Mining in the Upper Hunter Valley (Biodiversity Plan) and to undertake a strategic assessment of the impacts of implementing this plan on MNES protected under the EPBC Act and threatened ecological communities and species protected under the TSC Act.
- 3.4 The parties agree to work cooperatively, including with interested mining companies and other stakeholders, to avoid duplication and to progress the strategic assessment in a timely way.
- 3.5 The strategic assessment does not affect the application of the EPBC Act in the strategic assessment area in relation to actions or activities already approved or for which approval is sought through the assessment and approval process established under Parts 7, 8 and 9 of the EPBC Act.

4 BACKGROUND

- 4.1 Subsection 146(1) of the EPBC Act allows the Minister to agree in writing with a person responsible for the implementation of a policy, plan or program to assess the impacts of actions taken under that policy, plan or program on MNES.
- 4.2 For the purposes of the Agreement, the policy, plan or program is the Biodiversity Plan. A Strategic Assessment Report will also be prepared to assess the impacts of implementing the Biodiversity Plan on MNES and threatened ecological communities and species protected under the TSC Act.
- 4.3 A draft Strategic Assessment Report and draft Biodiversity Plan will be made available for public comment for a minimum of at least 28 days. Following the public comment period, a Supplementary Report (addressing public comments) and a revised Biodiversity Plan (if necessary) will be submitted to the Minister.
- 4.4 After considering these, the Minister may decide to endorse the Biodiversity Plan if satisfied that the reports adequately address the impacts and endorsement criteria to which this Agreement relates and that recommended modifications (if any) to the Biodiversity Plan made by the Minister, or modifications having the same effect, have been made.

- 4.5 The Parties acknowledge that the endorsement of the Program itself does not constitute any approval for the taking of actions under Part 10 of the EPBC Act.
- 4.6 If the Minister endorses the Biodiversity Plan, the Minister may then approve the taking of an action, or class of actions, in accordance with the Biodiversity Plan and the EPBC Act. The effect of this approval decision is that any actions or class of actions approved under section 146B would not need further approval by the Minister under the EPBC Act if taken in accordance with the endorsed Biodiversity Plan.
- 4.7 For the purposes of this Agreement, classes of actions that may be considered for approval under the EPBC Act include new or expansions of existing coal mining operations for which licence areas occur in the defined Upper Hunter Valley strategic impact assessment area (Attachment A) and that have been considered and assessed in the Biodiversity Plan and Strategic Assessment Report.
- 4.8 The Parties acknowledge that, where proponents propose to take an action in accordance with the Program that is not the subject of an approval under section 146B, they are able to seek approval for that action through the assessment and approval process established under Parts 7, 8 and 9 of the EPBC Act. Paragraphs 87(3)(b) and 136(2)(e) of the EPBC Act provide that the strategic assessment report for a policy, plan or program must be taken into account in deciding the level of assessment and approval for actions that are referred under the EPBC Act.

5 TERMS OF REFERENCE FOR THE REPORT

- 5.1 The Parties will prepare draft Terms of Reference for the Strategic Assessment Report that will include the following (at a minimum):
- Purpose and description of the Biodiversity Plan.
 - Description of the area in which the Biodiversity Plan will be implemented.
 - Identification of coal mining lease areas subject to the strategic assessment.
 - MNES and NSW protected threatened ecological communities and species addressed by the Biodiversity Plan.
 - Identification and prioritisation of conservation values, including methodologies used to determine these.
 - Identification and analysis of potential impacts on MNES and NSW threatened ecological communities and species if coal mining licence areas are developed using the NSW Biodiversity Certification Assessment Methodology (BCAM).
 - Measures to avoid, mitigate or offset likely impacts on MNES and NSW threatened ecological communities and species.
 - Mechanisms to ensure protection of priority conservation values, including through offset arrangements.
 - Endorsement criteria.
 - Adaptive management and risk management.
 - Auditing and reporting requirements.

- 5.2 The State will provide the draft Terms of Reference for public comment by notice consistent with arrangements for other major environmental impact assessment projects including:
- (a) posting on relevant agency websites;
 - (b) publishing in relevant newspapers circulating in New South Wales; and
 - (c) circulation to key stakeholder groups agreed between the Department and the State.
- 5.3 The notice inviting public comment must state:
- (a) the draft Terms of Reference are available;
 - (b) how copies may be obtained;
 - (c) the contact details for obtaining further information; and
 - (d) that public comments are invited for a period of at least 28 days.
- 5.4 Following the public comment period for the draft Terms of Reference, the State will submit to the Minister:
- (a) proposed final Terms of Reference;
 - (b) public responses relating to the draft Terms of Reference; and
 - (c) a report on how the public responses have been taken into account.
- 5.5 Following receipt of the proposed final Terms of Reference, the Minister will notify the State that the proposed Terms of Reference:
- (a) are approved, or
 - (b) are not approved, in which case the Minister will notify the State of any concerns and invite the State to provide revised Terms of Reference which take those concerns into account.
-

6 PREPARATION OF THE STRATEGIC ASSESSMENT REPORT AND BIODIVERSITY PLAN

- 6.1 The State will prepare a draft Strategic Assessment Report and Biodiversity Plan in accordance with this Agreement and the Terms of Reference approved in accordance with clause 5.5.
- 6.2 The State will provide the draft Strategic Assessment Report and Biodiversity Plan to the Department for comment prior to finalising the documents for public exhibition.
- 6.3 The State will release the draft Strategic Assessment Report and Biodiversity Plan for public comment by notice consistent with arrangements for other major environmental impact assessment projects, including:
- (a) posting on the relevant agency websites;
 - (b) publishing in relevant newspapers circulating in the State and the assessment region; and
 - (c) circulation to key stakeholder groups agreed between the Department and the State.

6.4 The notice inviting public comment must:

- (a) state the draft Strategic Assessment Report and Biodiversity Plan are available for public comment;
- (b) advise how copies may be obtained;
- (c) provide contact details for obtaining further information; and
- (d) invite public comments on the draft reports for a period of at least 28 days, as specified by the Minister.

6.5 The State will:

- (a) prepare a Supplementary Report and revise the Biodiversity Plan (if necessary), taking into account any public comments pursuant to clause 6.4(d); and
- (b) provide drafts of these reports to the Department for comment prior to their finalisation and submission to the Minister.

6.6 The Department agrees to assist the State in ensuring that the reports adequately address the requirements for strategic assessments described in Part 10 of the EPBC Act and to provide comments in a timely manner.

7 ENDORSEMENT OF THE PROGRAM

7.1 The State will submit to the Minister:

- (a) the draft Strategic Assessment Report (which was exhibited for public comment);
- (b) the Supplementary Report (explaining how relevant public responses have been addressed);
- (c) the final Biodiversity Plan (incorporating any revisions in light of public comments);
- (d) public comments received during the consultation relating to the Strategic Assessment Report and Biodiversity Plan; and
- (e) any other documents required to support the State's submission.

7.2 If the Minister is not satisfied that the reports adequately address the impacts of actions on MNES, or that the Biodiversity Plan does not provide for adequate protection of MNES, then:

- (a) the Minister can make recommendations to amend the Biodiversity Plan;
- (b) the State may seek clarification from the Minister on these recommendations;
- (c) the State will then submit to the Minister for consideration the revised Biodiversity Plan, and a summary of how the Minister's recommendations were given effect;
- (d) the Minister will consider the revised Biodiversity Plan, and any supporting material provided, and may accept it as the final Biodiversity Plan; and
- (e) the Minister may request further modifications if still not satisfied that the Biodiversity Plan provides for adequate protection of MNES.

7.3 The Minister may endorse the Biodiversity Plan if satisfied that the reports submitted under clause 7.1 adequately address the impacts to which this Agreement relates, and that any recommended modifications to the Biodiversity Plan (clause 7.2), or modifications having the same effect, have been addressed. In considering whether to endorse the Biodiversity Plan the Minister will also consider the endorsement criteria in the Terms of Reference.

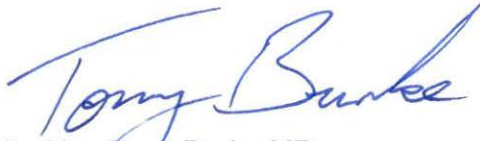
8 APPROVAL OF ACTIONS UNDER THE BIODIVERSITY PLAN

- 8.1 The Minister may approve, or approve with conditions, the taking of an action or class of actions in accordance with the endorsed Biodiversity Plan under Section 146B of the EPBC Act. In doing so, the Minister must act in accordance with sections 146F-M of the EPBC Act. This includes considering MNES in the strategic assessment area covered by the Biodiversity Plan and economic and social matters.
- 8.2 The Minister will seek comment from other Australian Government Ministers with administrative responsibilities relating to the proposed actions before approving the taking of an action, or class of actions, pursuant to section 146C of the EPBC Act.
- 8.3 Both Parties will make publicly available electronic copies of the endorsed Biodiversity Plan, the draft Strategic Assessment Report, the Supplementary Report and any approval decision and conditions through their respective websites.
- 8.4 Approvals for actions or classes of actions may occur progressively after endorsement of the Biodiversity Plan.

9 VARIATION, CONFLICT RESOLUTION AND TERMINATION

- 9.1 This Agreement may only be varied by written agreement (including electronic communications) between the Parties and in accordance with the EPBC Act.
- 9.2 Where there is a dispute between the Parties to this Agreement on a particular matter, the Parties will consult in a spirit of mutual cooperation in relation to that matter and will use their best endeavours to negotiate a mutually acceptable resolution.
- 9.3 This Agreement may be terminated by either Party by written notice to the other.
- 9.4 The Parties do not intend this Agreement to create contractual or other legal obligations, or that a breach of the Agreement will give rise to any cause for legal action, or right to take legal proceedings.
- 9.5 To avoid any doubt, nothing in clause 9.4 is intended to override the provisions of the EPBC Act.

SIGNATURES



The Hon Tony Burke MP
Minister for Sustainability, Environment, Water,
Population and Communities

20. 9. 12

Dated



The Hon Brad Hazzard MP
Minister for Planning and Infrastructure

15 AUG 2012

Dated



The Hon Robyn Parker MP
Minister for the Environment

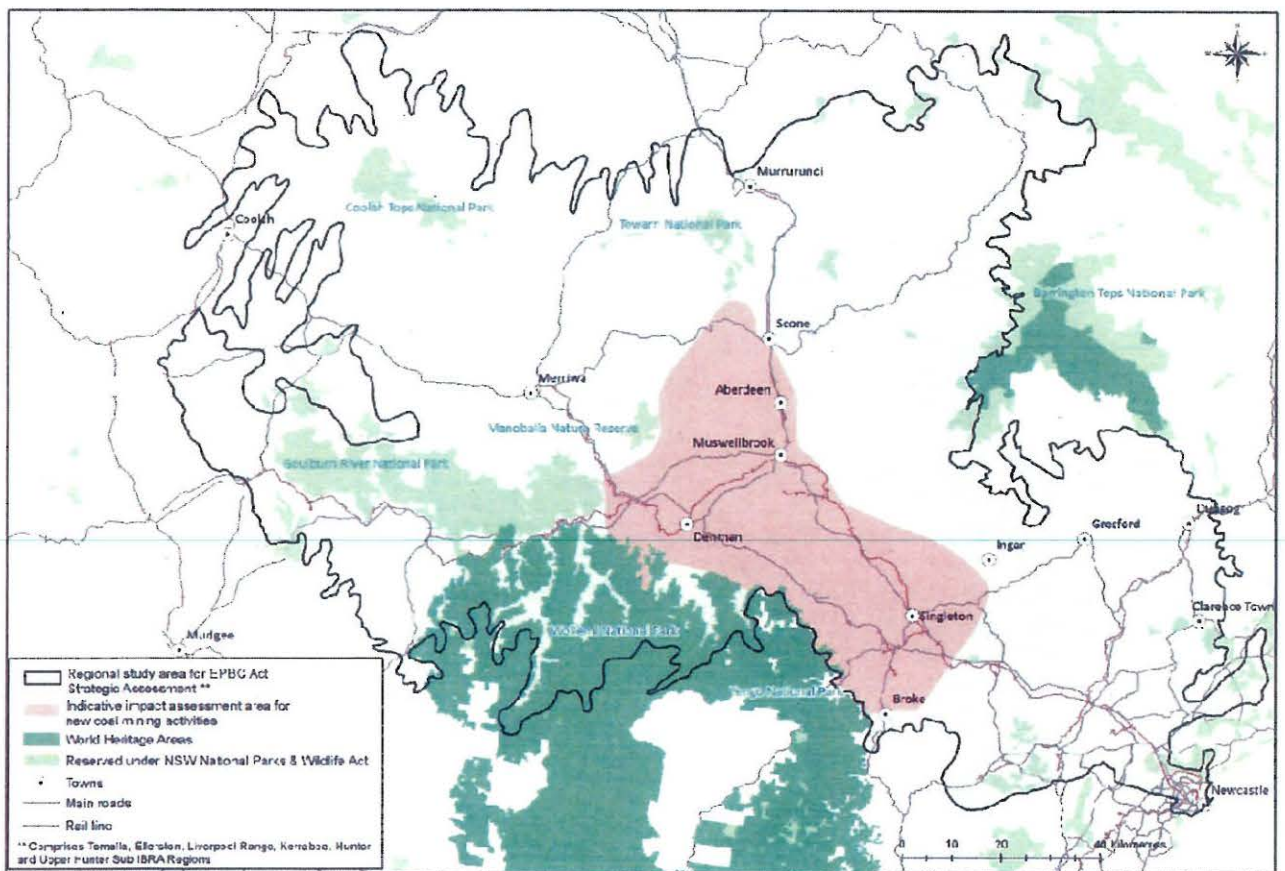
5th September 2012

Dated

Attachment A – Geographic Area

STRATEGIC ASSESSMENT – GEOGRAPHIC AREA

The geographic extent of the strategic assessment area is illustrated below.



Attachment B – Terms of Reference

To be finalised following public consultation on draft terms of reference