

26 November 2016

Director, EIA Improvement Project
GPO Box 39
Sydney NSW 2001

Dear Sir/Madam,

**RE: SUBMISSION ON THE ENVIRONMENTAL IMPACT ASSESSMENT
IMPROVEMENT PROJECT**

Please find below a submission from Peabody Energy Australia Pty Ltd (Peabody) on the New South Wales (NSW) Department of Planning and Environment's (DP&E) Environment Impact Assessment (EIA) Improvement Project Discussion Paper (October 2016).

Background

Peabody is the world's largest private-sector coal company with metallurgical and thermal coal customers in more than 25 countries on six continents.

Peabody currently operates from three mine sites in NSW (the Wambo Coal Mine, Wilpinjong Coal Mine and Metropolitan Mine) and is investing in infrastructure for NSW as a founding shareholder with a long-term commitment to the operation of the Newcastle Coal Infrastructure Group (NCIG) Coal Export Terminal at Kooragang Island in Newcastle.

Overview of Comments on the EIA Improvement Project

Overall, Peabody Energy **supports** the stated purpose of the EIA Improvement Project, which is to:

streamline the EIA process and improve environmental outcomes ...

In particular, Peabody **supports** initiatives proposed by the DP&E to provide greater certainty on assessment timeframes (**Initiative 6**) and facilitate approval flexibility for necessary project changes over the extended life of mining projects (**Initiative 8**), subject to the outcome of these initiatives being consistent with the stated purpose above.

Peabody also generally supports the comments of the NSW Mineral Council's submission in regard to three significant issues which should be specifically addressed by DP&E in the EIA Improvement Project:

1. Inter-agency interaction.
2. Interaction with the Commonwealth approval process (under the *Environment Protection and Biodiversity Conservation Act, 1999*).
3. The Planning Assessment Commission (PAC) process.

It is noted the EIA Improvement Project covers all State Significant Development in NSW, and is not mining industry specific.

The comments and recommendations below focus on areas where the Initiatives of the EIA Improvement Project are of particular relevance to NSW mining operations. It is noted that mining operations are typically more dynamic in nature than some other State Significant Developments and this should be given due consideration in the process.

It is noted the EIA Improvement Project poses a number of initial initiatives as options that may be subject to further consultation. However, at this stage Peabody brings to the DP&E's attention that there is significant potential for direct contradiction in the outcome between some of the initial Initiatives proposed in the EIA Improvement Project Discussion Paper.

General Recommendation: Avoid potential for contradiction between Initiatives

Examples:

Initiative 1 aims to refine the EIS scoping process and focus assessment on key issues.

Initiative 2 proposes wider consultation and involvement during the EIS scoping process.

In Peabody's opinion Initiative 2 is more likely to complicate, or add to, rather than refine or simplify the EIS scoping process.

Initiative 3 aims to simplify EIS documentation and make it more approachable.

Initiative 5 proposes extending the use of peer reviews.

In Peabody's opinion Initiative 5 may increase technical documentation requirements for the topics that are subject to peer review.

Initiative 4 proposes strengthening performance based conditions.

Initiative 3 proposes increased project description information be contained in the Development Consent.

In Peabody's opinion Initiative 8 is likely to reduce project flexibility within already approved environment impact envelopes.

Further specific comments and recommendations on the Initiatives of the Discussion Paper are provided below. These are provided by Peabody in consideration of the objective of avoiding potential contradictions between Initiatives and consistent with DP&E's overall stated purpose of the EIA Improvement Project.

Initiative 1: Develop a consistent framework for scoping within the EIA Process

Peabody **supports** a consistent framework that sets out a clear scoping methodology during development of Secretary's Environmental Assessment Requirements (SEARs).

However, based on Peabody's experience in NSW with large and complex mining projects any screening process (i.e. risk assessment, stakeholder consultation or combined risk assessment and consultation) is unlikely to materially *reduce* technical assessment requirements for any aspect of the EIA, given the typical level of public and regulatory interest.

It is also noted that the previous Part 3A major project assessment process incorporated an Environmental Risk Assessment, but this was not typically accompanied by any material reduction in technical assessment requirements for lesser ranked environmental issues.

Similarly, scoping the project through early engagement with stakeholders is also unlikely to result in scope refinement during preparation of SEARs as this could result in additional issues being raised that are of limited technical relevance to a project. DP&E would then either have to justify why these additional issues are not included in SEARs, or alternatively include them in SEARs.

There is also currently an opportunity for the PAC to focus in on what may have been initially considered a lesser or second tier environmental aspect, later in the approval process. Therefore any simplification of EIA assessment requirements would also need to be reflected in the PAC's role in reviewing the merits of a project.

It has also been observed in NSW and other jurisdictions in Australia that what may have been assessed as a lesser or second tier environmental aspect in the initial environmental assessment stage was subsequently identified by motivated litigant as a potentially productive avenue to legally pursue on a merits basis with the intent to delay or frustrate a major project in the approvals and permitting space.

Therefore, there should be an opportunity for major mining projects *to opt out* of any such SEAR workshop/scoping process and proceed directly to issue of fully comprehensive technical assessment SEARs.

To achieve this it is recommended:

Recommendation 1

- a) Any simplification of SEARs based on issue scoping needs to be fully considered within the legal and PAC review process contexts.
- b) For large and complex mining projects, there should be an option for proponents to directly opt out of any workshop/scoping process and proceed to issue of full comprehensive technical SEARs.

Initiative 2: Earlier and better engagement

Peabody supports effective stakeholder engagement that is timed appropriately for the relevant phase of the project approval process.

For example, the appropriate timing for broad community engagement regarding study results is following EIS finalisation (to avoid potential confusion if initial draft results are used for early engagement and subsequently refined, or if consultation is undertaken before any meaningful assessment results are available).

In particular, Peabody **supports** the idea of a pre-lodgement meeting with DP&E to discuss the community engagement strategy, and receiving feedback from DP&E at this stage.

Peabody does **not support** government-led community engagement on key project issues. This is more appropriate to be undertaken by proponents, who have knowledge of the project and assessment studies (as suitable technical information becomes available).

Peabody **supports** the NSW Mineral Council's comment that DP&E should only lead stakeholder engagement where it specifically relates to approval processes.

In addition, Peabody does **not support** engagement through a mandatory town hall meeting format, with preference being a drop-in information session format that allows engagement to be stakeholder specific. This also avoids public consultation being dominated by more outspoken members of the community at the expense of others who may have other legitimate concerns or issues, but may not be as comfortable expressing these concerns in a public forum.

It must be acknowledged that early engagement on Major Projects before environmental impacts are understood may result in unintended consequences by causing concern and stress to community stakeholders. Therefore any engagement strategy must ensure that stakeholder engagement activities are undertaken at appropriate times in the approval process, to prevent unwarranted stakeholder concern.

With respect to refinement of early engagement, it is unlikely early engagement during preparation of SEARs will refine the scoping process. Rather, this engagement may lead to additional issues being raised that are of limited technical relevance to a project. DP&E would then either have to justify why these additional issues are not included in SEARs, or alternatively include them in SEARs (i.e. increasing the scope of the EIS requirements in direct contradiction to **Initiative 1**).

To this end, it is recommended:

Recommendation 2

- a) Any mandatory early engagement requirements developed by DP&E should not contradict **Initiative 1** (refinement of scoping process) and should be reflective of the assessment stage to manage stakeholders expectations about the level of technical information available.

Initiative 3: Improve the consistency and quality of EIA documents

Peabody **supports** an EIS that is focused on targeted assessments as required by the SEARs.

It is noted the audience of an EIS may include regulatory agencies (and their associated technical specialists), independent peer reviewers (refer to **Initiative 5**), the Commonwealth and the PAC.

Accordingly, EIS documentation is necessarily technical (e.g. for key issues) to avoid delays during the assessment phase resulting from additional information requests from regulators and peer reviewers.

The EIS Executive Summary is suggested as the existing appropriate mechanism by which a summary of information presented in the EIS can be provided for non-technical readers.

If DP&E is unsatisfied with existing EIS Executive Summaries, further guidance material on minimum (and maximum) information requirements could be provided.

Peabody considers any attempt to simplify EIS documentation should consider and preempt the potential counter criticism that the EIS does not contain sufficiently detailed technical information (e.g. from a government appointed technical reviewer whose interest is in one subject alone and understandably would like to see the highest possible level of detail in their specific area of specialty) and the potential for delay caused by any associated requests for additional information.

To achieve this it is recommended:

Recommendation 3

- a) DP&E should provide guidance on minimum (and maximum) requirements of the EIS Executive Summary to standardise the presentation of summary EIS information for less technical readers.

Initiative 4: Set a standard framework for conditioning projects

Peabody understands that, for mining projects, this is to some extent being standardised via preparation of generic or pro-forma Development Consent conditions for open pit mines and underground mines.

Peabody **supports** the initiative *to prioritise outcome/performance based conditions*.

It is considered this is best achieved through the EIS process defining an environment impact envelope, within which the Project can operate via environmental performance based approval conditions.

This is preferential to inflexible project description related conditions, given that mining projects are typically projects with investment that may be >\$1 Billion over a life of >20 years, and project description details will inevitably change over the life of the project due to commercial/market forces and operational improvements or constraints.

To prioritise performance based conditions, it is recommended:

Recommendation 4

- a) DP&E avoids the requirement for additional project description information to be appended to approval conditions (this is adequately covered by requiring projects to operate generally in accordance with their EIS).
- b) Performance based approval conditions should be prioritised and should reflect the environmental impact envelope identified and approved through the EIS process.

Initiative 5: Improve the accountability of the EIA professionals

Peabody considers any additional requirement for a “code of practice” for EIS lead authors would be a duplication of Clause 6 of Schedule 2 of the NSW *Environmental Planning and Assessment Regulation, 2000*, which states:

- (f) *a declaration by the person by whom the statement is prepared to the effect that:*
 - (i) *the statement has been prepared in accordance with this Schedule, and*
 - (ii) *the statement contains all available information that is relevant to the environmental assessment of the development, activity or infrastructure to which the statement relates, and*
 - (iii) *the information contained in the statement is neither false nor misleading.*

In regard to independent peer reviews, Peabody considers this practice should not replace DP&E’s review and assessment. Rather, to avoid significant time delays during the assessment period (refer **Initiative 6**), the scope of any independent peer review should be limited to areas of material disagreement between government agencies and DP&E/Proponent’s experts, with additional peer reviews providing non-binding advice for DP&E’s consideration.

It is recommended:

Recommendation 5

- a) DP&E communicates to interested stakeholders the existing requirements of Clause 6 of Schedule 2 of the NSW *Environmental Planning and Assessment Regulation, 2000*.
- b) To avoid assessment delays, the scope of independent peer reviews should be limited to any material areas of disagreement between government agencies and DP&E/Proponent's experts, with additional peer reviews providing non-binding advice for DP&E's consideration.

Alternatively, peer reviews should be conducted by DP&E *during the public exhibition of the EIS* to avoid significant observed assessment delays associated with peer reviews.

Initiative 6: Provide greater certainty on EIA timeframes

Peabody **agrees** that the post EIS lodgement process should be improved with greater transparency and certainty regarding EIS assessment timeframes, and better communication and consistency between NSW government agencies.

Current internal key performance indicators (KPIs) appear relatively ineffective and are not always applied transparently with respect to what comprises/requires "stopping the clock". In addition, while Peabody supports the increased selective use of DP&E sponsored peer reviews, the timing and management of these reviews could be better planned and executed to avoid increasing assessment and approval timeframes.

In addition, government agency submissions should cover all relevant aspects of the EIS in a single round of comments. Past experience has been that agencies comment on some aspects of an EIS in an initial submission, and then raise additional (and unrelated) comments on different aspects of the EIS in a subsequent assessment. This process of providing multiple rounds of comments contributes to delays in assessment timeframes.

Project determination uncertainty and delay is a key investment risk for mining projects in NSW.

Peabody **does not agree** that Proponent timeframes should be specified for EIS lodgement. The decision to lodge an EIS should be at the Proponent's discretion as this decision is subject to a number of commercial variables.

To achieve greater certainty regarding EIS assessment timeframes, and accordingly, reduce investment risk, it is recommended:

Recommendation 6

- a) Whole-of-government assessment phase performance timeframes are published, including the NSW regulatory review, PAC and interaction with Commonwealth approval processes and provided to proponents on lodgment of an EIS.

Guidance should also be provided with respect to what would legitimately "stop the clock" (e.g. as per guidelines for assessment under the *Environment Protection and Biodiversity Conservation Act, 1999*).

Initiative 7: Strengthen the monitoring, auditing and reporting of compliance

Peabody **supports** demonstration of meeting environmental performance conditions and commitments through compliance monitoring.

In addition, Peabody **supports** any initiative that streamlines and improves post-approval reporting requirements by removing duplication of separate requirements of Development Consents, Environment Protection Licences and Mining Lease conditions (and others).

To achieve this it is recommended:

Recommendation 7

- a) A common system for monitoring, auditing and compliance is developed by DP&E that enables a single annual (and publicly available) reporting mechanism, to remove duplication of the separate requirements of Development Consents, Environment Protection Licences, Water Licences and Mining Lease conditions (and other requirements).

Initiative 8: Project change processes following approval

Peabody **supports** a mechanism whereby the project description process allows for flexibility in projects within consented environmental performance envelope.

This is in consideration of the long term nature of mining projects and the inevitability that a mining project will change over time due to technical and commercial/market forces.

The project description (and approval) should allow for a mining development to change to reflect the dynamic market environment of such commodities providing it can continue to conform with an approved environmental impact envelope.

Peabody Energy appreciates the opportunity to make a submission on the proposed NSW EIA Improvement Project Discussion Paper.

Yours faithfully



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