

Our Ref: 1014996

15 July 2010

Lisa Corbyn  
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Dear Ms Corbyn

### **Damage to Aboriginal Place in the Illawarra Escarpment – Whale Cave**

We are a non-for-profit community legal centre specialising in public interest environmental law. We are writing to raise concerns about damage to an Aboriginal cultural heritage site, the Whale Cave, located in the Avon / Cordeaux dam catchment on the Illawarra Escarpment (the **Whale Cave**).

The Whale Cave is a sacred site of great cultural and historical significance to the Wadi Wadi people of the Illawarra in New South Wales. The Whale Cave was a meeting place, a sacred site, a place to live and an art gallery, and has great spiritual significance to the Wadi Wadi people.

However, the Whale Cave has been severely damaged by water penetrating cracks in the roof and walls as a result of longwall mining subsistence effects. In a report prepared by BHP Billiton entitled 'Sustainable Development: Illawarra Coal Independent Inquiry into NSW Southern Coalfield' (dated July 2007), it refers to:

'... the catastrophic failure in the 1980s of the Whale Cave site on the Illawarra Escarpment.'

It is apparent that the shallow mining methods used by Illawarra Coal caused the Whale Cave to sustain damage from subsistence related movements. Some attempts were made to repair the Whale Cave with the installation of a combination of mesh and wooden beams to support the cave from collapsing. However, it is clear that the Whale Cave requires further remediation.

Due to the status of the Whale Cave as an Aboriginal Object under the *National Parks and Wildlife Act 1974* (NSW), the Director-General is responsible for the protection of the Whale Cave. We request that you fulfil your obligations in protecting the Aboriginal Object and to take steps to rehabilitate any damage to the Whale Cave.

If you have any questions please do not hesitate to contact me on (02) 9262 6989.



Yours sincerely  
**Environmental Defender's Office (NSW) Ltd**



**Kirsty Ruddock**  
Principal Solicitor



*An independent public interest legal centre specialising in environmental law*

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Hon. Frank Sartor, MP  
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Dear Minister

### **Bulli Coal Seam Project – Development Application No. 08\_0150**

We refer to the development application of Illawarra Coal Holdings Pty Ltd (**ICHPL**) seeking approval under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) for the continuation and further development of the Appin Mine and West Cliff Colliery operations (**the Project**). The Project would (if approved) extend the current life of the Appin Mine and West Cliff Colliery by 30 years and permit the extraction of up to 10.5 million tonnes of coal per year.

Due to the fact that the Project includes activities on state conservation area land, the consent of the Minister for the Environment is required in respect of the mining interest for the Project: s47J(4) of the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**).

We write to request that you reject the mining interest for the Project on the basis that it will significantly and adversely impact the Dharawal State Conservation Area despite the view presented by ICHPL that:

*'...the Project would not have a significant impact on the use of the Dharawal State Conservation Area or Dharawal Nature Reserve'.*

As described in Section 7.5 of Environmental Assessment (**EA**) for the Project, ICHPL acknowledges that components of the Project will require surface activities in the Dharawal State Conservation Area.

On 4 April 1996, the Dharawal Nature Reserve and Dharawal State Conservation Area (**the Reserves**) were reserved by notification in the Government Gazette. As a result of amendments to the NPW Act in 2001, all state recreation areas became state conservation areas.

The Reserves are considered state conservation areas for the following reasons:

- The Reserves encompass almost the entire catchment of the O'Hares and Stokes Creeks. The creeks are significant because they comprise the head-waters of the Georges River and are the only major watercourses on the Woronora Plateau that have not been impounded for water supply purposes;
- The O'Hares Creek catchment has been included on the Register of the National Estate and the National Trust of Australia (NSW) Register as a Landscape Conservation Area;
- The Reserves are located on Woronora Plateau which is dominated by the Triassic Hawkesbury Sandstone Formation, composed primarily of quartzose sandstone.



- The Reserves conserve twenty six exceptional upland swamps which play an important role in capturing, storing and slowly releasing water and consequently contribute to maintaining a more regular flow in the Reserves streams during the dry periods. The swamps are also of considerable scientific importance as they provide an excellent record of climatic, geomorphic and biological events of the past 17,000 years.
- Over 500 plant species have been recorded in the Reserves including:
  - four which are listed as Vulnerable on Schedule 2 of the *Threatened Species Conservation Act 1995* (NSW) (TSC Act); and
  - three which are listed as Endangered on Schedule 1 of the TSC Act;
- Over 600 animal species have been recorded in the Reserves including:
  - three which are currently known to exist in the Reserves and are listed as Endangered on Schedule 1 of the TSC Act; and
  - seventeen which are currently known to exist in the Reserves and are listed as Vulnerable on Schedule 2 of the TSC Act.
- The Reserves are located within an area that was occupied by the Dharawal Aboriginal people extending back at least 15,000 years. As a result of Aboriginal occupation, the Reserves contain high density of archaeological sites. At least 236 sites have been identified including shelters containing rock carvings and deposits. Some sandstone overhangs of the shelters contain exceptionally well preserved examples of drawings, stencils and paintings.

In the interests of protecting the Reserves, the Minister is required to give effect to the objects of the NPW Act. Therefore when deciding whether to grant consent to the Project, the Minister must consider the objects of the NWP Act:

### **2A Objects of the Act**

(1) *The objects of the Act are as follows:*

(a) *the conservation of nature, including but not limited to:*

- (i) *habitat, ecosystems and ecosystem processes, and*
- (ii) *biological diversity at the community, species and genetic levels, and*
- (iii) *land forms of significance, including geological features and processes, and*
- (iv) *landscapes and natural features of significance including wilderness and wild rivers,*

(b) *the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including, but not limited to:*

- (i) *places, objects and features of significance to Aboriginal people, and*
- (ii) *places of social value to the people of New South Wales, and*
- (iii) *places of historic, archaeological or scientific significance,*

(c) *fostering public appreciation, understanding and enjoyment of nature and cultural heritage and their conservation,*

(d) *providing for the management of land reserved under this Act in accordance with the management principles applicable for each type of reservation.*

The management principles referred to in s2A(d) of the NPW Act above that the Minister must aim to achieve includes, amongst other things, the conservation of biodiversity, ecosystem functions and of places, objects and features of cultural value: s30G of the NPW Act. Further, the objects of the NPW Act must be achieved by applying the principles of ecological sustainable development (s2A(2)), as defined in the *Protection of the Environment Administration Act 1991* (NSW).



To support our view that the Project should be rejected, we draw the Minister's attention to a number of concerns that have been raised by government agencies and the community in response to the Project's EA in the following documents:

### **Government Agency's Submissions**

- Department of Environment, Climate Change and Water dated 2 December 2009 (**DECCW 2 December Submission**);
- Department of Environment, Climate Change and Water dated 16 December 2009 (**DECCW 16 December Submission**);
- NSW Office of Water dated 16 November 2009 (**NOW Submission**);
- Sydney Catchment Authority dated 16 December 2009 (**SCA Submission**);
- Sydney Metropolitan Catchment Authority dated 3 March 2010 (**SMCA Submission**);
- Campbelltown City Council dated 18 December 2009 (**CCC Submission**);
- Wollondilly Shire Council dated 23 December 2009 (**WSC 23 December Submission**);
- Wollondilly Shire Council dated 12 February 2010 (**WSC 12 February Submission**); and
- Hurstville City Council dated 2 December 2009 (**HCC Submission**).

### **Public and Community Submissions**

- National Parks Association of NSW (Macarthur Branch) (**NPANMB Submission**);
- National Parks Association of NSW (Southern Sydney Branch) (**NPANSSB Submission**); and
- Total Environment Centre Inc. dated 28 December 2009 (**TECI Submission**).

The significant concerns of the above parties have been summarised below where the objects of the NPW Act are relevant and are likely to be negatively impacted by the Project.

### **Water: Catchment, swamps and subsidence**

With respect to water resources, the following concerns have been raised:

1. The Project may reduce the catchment yield to Cataract Dam, Woronora Dam and Broughtons Pass Weir and that a scientific program is needed to investigate the existence of catchment yield impacts (see SCA Submission);
2. Subsidence impacts will progressively occur throughout the Project area, cumulatively impacting on 100 kilometres of watercourses (see WSC 23 December Submission);
3. Possible irreparable damage to the considerable number of upland swamps of the headwaters (see HCC Submission);
4. There is no perched groundwater monitoring with swamps, which is a significant deficiency, and there is insufficient discussion of shallow groundwater quality (see SCA submission);
5. More evidence is needed before any assessment can be made in relation to the role of shallow and deeper ground water on (see WSC 23 December Submission):
  - a. baseflow and recharge of watercourses;
  - b. supporting ecosystems;
  - c. water levels (including deep water storage) in reservoirs and dams; and
  - d. groundwater resources and the movement of water in ways not yet fully understood.
6. Underground mining operations will likely cause uncontrolled and unmanageable ground cracking that will permanently drain, and hence destroy, some upland swamps and will affect



- river beds directly causing loss to river flows, which will have negative impacts on aquatic biodiversity (see SMCA Submission; NOW Submission). The SMCA is 'not convinced that cracking under upland swamps and in river beds can be controlled or even adequately managed to mitigate deleterious effects' (see SMCA Submission);
7. Potential cracking of many of the feeder streams to the Georges River, such as Stokes and O'Hares Creeks (see HCC Submission);
  8. There is no evidence to prove that (see WSC 23 December Submission);
    - a. surface flows diverted through stream bed fractures re-emerge further downstream;
    - b. water can be guaranteed to re-emerge downstream;
    - c. if the water does re-emerge downstream, it is the same water that was lost from further upstream; and
    - d. if the water does re-emerge downstream, it is of the same quality.
  9. While ICHPL has identified a total of 55 swamps to be at real risk of negative environmental consequences, the DECCW has identified 78 swamps that are likely to be subjected to significant negative environmental impact (see DECCW 16 December Submission). Further, the EA presents no assessment of the cumulative impact of the operations on swamps and therefore significantly downplays the environmental impact.
  10. The EA does not provide adequate consideration of the water use dependence on the particular rivers, many of which have reached their limits for extractive uses. Further, the EA does not consider the potential impact upon statutory water uses either within the project area, or downstream reaches of the Nepean or Georges Rivers (see NOW Submission);
  11. A number of streams within the Project area are in or near pristine condition (including the almost wholly protected catchments of Stokes and O'Hares Creeks) and even temporary loss of water in permanent pools that characterises the watercourses of the Woronora Plateau would have a devastating impact upon aquatic ecosystems, mitigation patterns and other ecological values (see TECI Submission); and
  12. The EA does not mention what will happen to the surface water flows for streams currently receiving dam water after the cessation of mining. The EA does not examine the potential impacts and consequences that this loss of water may have on the riparian environment (see WSC 12 February Submission);

## Flora and Fauna

With respect to potential or likely impacts on plant and animal species as a result of the Project, the following issues have been raised:

1. The EA has not sufficiently assessed the potential impacts of the Project on the condition of identified habitat corridors and associated potential impacts on the movement of fauna species (see CCC Submission);
2. The Project would significantly affect the species of remaining *Persoonia hirsuta*, which is listed as Endangered on Schedule 1 of the TSC Act (see DECCW 2 December Submission);
3. Inadequacy of ICHPL to consider all species records and potential impacts the Project may have on:
  - a. *Acacia baueri* subsp. *aspera*; and
  - b. Giant Burrowing Frog
 which are both listed as Vulnerable on Schedule 2 of the TSC Act (see NPANMB Submission and NPANSSB Submission);
4. The fauna surveys contained in the EA have failed to confirm the extent of habitat used by the Southern Brown Bandicoot within the West Cliff Coal Wash Emplacement and the



mitigations strategies proposed in the EA are unsatisfactory (see DECCW 2 December Submission);

5. The translocation of the Broad-headed Snake, which is listed as Endangered on Schedule 1 of the TSC Act, as a means of mitigating the impact of the Project is unacceptable (see DECCW 2 December Submission);
6. The West Cliff Coal Wash Emplacement contains land that could be considered as 'core habitat' for koalas under the State Environmental Planning Policy No 44 – Koala Habitat Protection (SEPP 44) and will therefore impact the koala, which is listed as Vulnerable on Schedule 2 of the TSC Act (see DECCW 2 December Submission);

### **Aboriginal Heritage**

Archaeological surveys of the Woronora Plateau conducted by the Illawarra Prehistory Group have identified over 1,000 Aboriginal sites. However, the 'Dharawal Nature Reserve and Dharawal State Conservation Area: Management Plan' adopted by the Minister for Environment on 26 July 2006 (the **Management Plan**) indicates that the estimated potential resource of the Woronora Plateau is estimated to be over 15,000 sites.

On this basis, there is little reason to doubt the DECCW's submission that further field surveys need to be undertaken by ICHPL to comprehensively identify and accurately record all Aboriginal sites that are in the Project area. Further, where it is identified that any of these Aboriginal sites could be impacted, ICHPL needs to examine strategies to stabilise and protect the sites in consultation with DECCW and the Aboriginal community (DECCW 2 December Submission);

### **Concurrence of the Minister for the Environment**

Given the severe concerns of your Department, other government agencies and the public with respect to the negative impacts the Project will or is likely to have on the Reserves, we believe you should not approve the mining interest for Project pursuant to s47J(4) of the NPW Act.

As your own Department's Management Plan suggests, the risk of subsidence as a result of mining in the Reserves is likely to adversely affect the continual flow of water supported by the upland swamps and, consequently, the health of the aquatic. The Management Plan further provides that:

*'This subsidence may alter surface drainage patterns adversely affecting water dependent flora and fauna, and could destabilise steep slopes and rock overhangs threatening public safety and certain Aboriginal sites such as rock shelters'.*


Under these circumstances, it would be prudent to reject the mining interest for the Project in its entirety or as far as it relates or impacts on the Reserves.

We note that the concurrence of the Minister for the Environment with respect to granting the mining interest for the Project is unaffected by s75V of the EPA Act. Pursuant to s75V(1) of the EPA Act, a mining lease cannot be refused if it is necessary for carrying out an approved project and is to be substantially consistent with the approval under Part 3A of the EPA Act. However, due to the fact that ICHPL has made an application for the renewal and extension of its existing mining lease, s75V(1) of the EPA Act does not apply: s75V(3)(a).



If you have any questions please do not hesitate to contact me on (02) 9262 6989.

Yours sincerely  
**Environmental Defender's Office (NSW) Ltd**



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