

## DEPARTMENT OF AGRICULTURE, WATER AND THE ENVIRONMENT

To: Kim Farrant, Assistant Secretary  
 T s. 22(1)(a)(ii) Director, Post Approvals Section  
 s. 22(1)(a)(ii)

rch 2021

**EPBC 2010/5566 - Maules Creek Coal Mine: Variation to change Offset Requirements**

**Timing:** 31 March 2021. The current timeframe for securing offsets is 31 March 2021.

**Recommendations:**

1. That you agree to vary the conditions attached to EPBC Act approval 2010/5566 in accordance with the decision instrument at Attachment A.

**Agreed / Please discuss**

2. If you agree to Recommendation 1, that you sign the decision instrument at Attachment A for publication.

**Signed / Not signed**

3. If you sign the instrument at Attachment A, that you sign the letter at Attachment B advising the approval holder of your decision.

**Signed / Not signed**



**Signatory:** Kim Farrant, Assistant Secretary,  
 Assessments (Vic and Tas) and Post Approvals Branch  
 Environment Approvals Division

**Date:** 24 March 2021

**Comments:**

**Key issues**

- On 26 February 2021, Whitehaven Coal Limited (WHC), the parent company of Aston Coal 2 Pty Ltd, the approval holder for EPBC 2020/1/5566 (Maules Creek Coal Mine), formally requested a variation to the approval to allow for an extension of time to establish a legal mechanism for securing approved offset areas in perpetuity, and to allow for a process to verify and secure additional offset properties to meet their approval requirements (Attachment C).
- This request follows discussions with the Department since September 2020 about the offsets. There have been three previous variations since 2017 to provide additional time for establishing these mechanisms.
- The Environmental Defenders Office (EDO) wrote the Hon Sussan Ley, Minister for the Environment, on behalf of South East Forest Rescue (SEFR), on 23 February 2021, raising concerns about the Maules Creek project, its offsets, and the environmental history of WHC (Attachment D and Attachment E). This follows concerns raised over many years about the project's offsets and the delayed establishment of legal mechanisms to secure them in perpetuity.

**Background to approval**

- The Minister has delegated you as decision maker for this matter pursuant to section 515 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

5. On 11 February 2013, the Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, approved with conditions the action to construct and operate an open cut coal mine 18 km north-east of the township of Boggabri in New South Wales, including associated infrastructure.
6. The controlling provisions for the action are listed threatened species and communities (Sections 18 & 18A) and listed migratory species (sections 20 & 20A). The conditions of approval provide for the protection of Box Gum woodland ecological community, regent honeyeater, swift parrot and greater long-eared bat.
7. The original timeframe for establishing a legally binding covenant over direct offsets in perpetuity was 5 years after the approval (by 11 February 2018). The approval was corrected once and varied on five occasions, three of which were to extend the direct offsets timeframe. The most recent variation, approved on 19 March 2020, varied condition 13 to allow for an extension, from 31 March 2020 to 31 March 2021, of that timeframe, and contains the current approved conditions (**Attachment F**).

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### Legal requirements

14. Under section 143(1)(c) of the EPBC Act, the Minister may revoke, vary or add to any conditions (other than the condition referred to in section 134(1A)) attached to an approval if the holder of the approval agrees to the proposed revocation, variation or addition, and the Minister is satisfied that the conditions attached to the approval after the proposed revocation, variation or addition are necessary or convenient for:
  - protecting a matter protected by any provision of Part 3 for which the approval has effect, or

- repairing or mitigating damage to a matter protected by a provision of Part 3 for which the approval has effect (whether or not the damage has been, will be or is likely to be caused by the action).
15. In deciding whether or not to vary any conditions attached to the approval of the taking of an action by a person, the Minister may have regard to:
- (a) the person's history in relation to environmental matters; and
  - (b) if the person is a body corporate—the history of its executive officers in relation to environmental matters; and
  - (c) if the person is a body corporate that is a subsidiary of another body or company (the **parent body**)—the history in relation to environmental matters of the parent body and its executive officers.

### The proposed variation

16. The purpose of the variation is to further extend the timeframe for establishing legal protection in perpetuity over three remaining offset properties (Wirradale, Wongala South and Mount Lindesay) identified in the original approval, and to establish conditions to regulate the provision of new offset areas that the approval holder has identified as necessary to meet the direct offset requirements of their approval (**Attachment C**).
17. The Department has also identified a number of changes to the approval conditions to provide for the above requirements, and to tighten up the conditions related to direct offsets. The variation also presents the conditions for direct offsets more logically.

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s. 47G(1)(a)

### Environmental History

19. On 23 February 2021, EDO, on behalf of SEFR, provided information to the Minister, copied to Departmental officers, that they believe is relevant to a decision to vary the approval (Attachment D). In summary, they urge the Minister to consider that Maules Creek is non-compliant with its approval if they are unable to secure the offsets by 31 March 2021.
20. They support this request by pointing to information they have received from the NSW Biodiversity Conservation Trust that the amount of Box Gum Woodland CEEC in the offsets is insufficient, despite independent verification in 2013 and 2014.
21. They also point to WHC's compliance history across a range of coal mine projects. They cite a number of incidents in which WHC (as ultimate approval holder) was fined or otherwise subject to compliance action by NSW authorities, including several at Maules Creek.
22. They have also requested the Minister to require that clearing Box Gum Woodland CEEC should be halted until the offsets are in place. There is no provision in the approval for this action, other than a failure to meet condition 6 (disturbance limits approach). The Department is not aware that this condition has been breached. A compliance report for 2020 is due to be submitted by 31 March 2021, and any reported failure to meet conditions will be considered by the Department's Environment Compliance Branch.

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25. EDO have also supplied a report prepared by an expert that concludes that the Box Gum offsets on the original offset properties have been over estimated (Attachment E). This is largely the same issue that WHC have advised the Department in September 2020, and part of their reasons for seeking a variation to allow them to acquire, assess, verify and then legally secure additional offsets to fully meet the approval requirements. This report will be used by the Department as part of its assessment of any future requests by WHC to change the offsets and to add additional offsets.

### Department Evaluation

26. A comparison table showing the proposed variation in relation to the current conditions is at Attachment G.
27. The additional 3 months to secure the remaining direct offsets proposed in the original assessment under a legal mechanism will not materially affect the environmental outcome,

as Whitehaven have had control of the direct offsets for some years and have managed them under a NSW approved management plan.

28. The insertion of new conditions to allow for additional offsets to be assessed and verified by an independent expert will provide a clear process to ensure that any new offsets proposed to ensure that the approval's offset requirements are met, will ensure that direct offsets are suitable. It will also provide clear timeframe for management plans to be in place and for legal mechanism to secure them are in place.
29. A number of other changes are designed to clarify the intent of the approval, correct some minor errors and to update some references.

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31. The Department considers that the proposed variation will provide for an orderly process to finalise the direct offsets for the approval, by establishing a clear process for assessing additional offsets and establishing a trigger to ensure that management planning is conducted in timely manner.

32. On 22 March 2021, WHC agreed to the draft variation (see Attachment H).

#### **Proposed decision**

33. The Department considers the conditions attached to the approval after the proposed variation are, in accordance with section 143(1)(c) of the EPBC Act, necessary or convenient for protecting the matters for which the approval is required.

34. On the above basis, the Department recommends that you:

- agree to vary the conditions of approval for EPBC approval 2010/5566 in accordance with the variation decision instrument at Attachment A;
- sign the decision instrument at Attachment A; and
- sign the letter at Attachment B advising the approval holder of your decision.

**CONTACT OFFICER:** s. 22(1)(a)(ii)

**ATTACHMENTS****A: Proposed variation decision instrument (for signature)**

<http://spire.environment.gov.au/spire/855732/855004/103/2010-5566%20Maules%20Creek%20Coal%20Project/2010-5566-20210322-variation-attachment-draft%20notice-agreed.docx>

**B: Letter to the approval holder (for signature)**

<http://spire.environment.gov.au/spire/855732/855004/103/2010-5566%20Maules%20Creek%20Coal%20Project/2010-5566-20210316-variation-attachment-letter.doc>

**C: Request for variation 26/2/2021**

<http://spire.environment.gov.au/spire/855732/855004/103/2010-5566%20Maules%20Creek%20Coal%20Project/2010-5566-20210316-variation-attachment-letter-whc-202010226-Request.pdf>

**D: EDO letter 23/2/2021**

<http://spire.environment.gov.au/spire/855732/855004/103/2010-5566%20Maules%20Creek%20Coal%20Project/2010-5566-20210316-variation-attachment-EDO%20Letter%20to%20Minister%2020210223-version1.pdf>

**E: EDO email 12/3/2021 and attached report**

[2010-5566-20210316-variation-attachment-edo\\_email\\_20210312-att\\_expert\\_report.pdf](http://spire.environment.gov.au/spire/855732/855004/103/2010-5566-20210316-variation-attachment-edo_email_20210312-att_expert_report.pdf)

**F: Current conditions (as varied on 19/3/2020)**

[2010-5566-20210316-variation-attachment-current\\_conditions.pdf](http://spire.environment.gov.au/spire/855732/855004/103/2010-5566-20210316-variation-attachment-current_conditions.pdf)

**G: Table comparing current conditions to draft variation**

<http://spire.environment.gov.au/spire/855732/855004/103/2010-5566%20Maules%20Creek%20Coal%20Project/2010-5566-20210316-variation-attachment-comparison%20table.docx>

**H: Agreement to variation wording**

<http://spire.environment.gov.au/spire/855732/855004/103/2010-5566%20Maules%20Creek%20Coal%20Project/2010-5566-20210322-email-agreement%20to%20draft%20variation%20notice.msg>