

**Submission
No 77**

INQUIRY INTO INTEGRITY OF THE NSW BIODIVERSITY OFFSETS SCHEME

Organisation: Singleton Council

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Our Ref: 21/00041

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The Director
Portfolio Committee No 7 – Biodiversity Inquiry
Parliament House
Macquarie Street
Sydney NSW 2001

Dear Director

Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme

Singleton Council is located in the Upper Hunter Region and the NSW coal fields. As a stakeholder Singleton Council provides comment on State Significant Development (SSD) predominantly associated with coal mines and power stations within the shire. Singleton Council also provides comment on post approval documents including biodiversity offset plans, rehabilitation management plans, annual reports and audits. Therefore, Council has an appreciation of the current and past biodiversity offset scheme and how the scheme is assessed as well as delivered post consent.

Council has provided a number of comments relating to the terms of reference of the inquiry. Councils response focuses on issues that are most relevant to Singleton and the Upper Hunter Region as a whole.

The key shortcoming of the Biodiversity Offset Scheme under the *Biodiversity Conservation Act 2016* (BC Act) as Singleton Council see it are the Scheme's inability to adequately address 'no-net-loss' based on a number of key elements. These elements include:

- The outcomes of an applicant's assessment of a cumulative impact have no material impact upon the Biodiversity Assessment Methodology outcome,
- There are no provisions within the Scheme to require the rejection of a Major Project application if the cumulative impact of a proposal results in the complete or at least effective loss of a threatened entity even if that entity is identified as being at risk of serious or irreversible harm,
- No provisions within the Scheme to mandate the provision of local offsets,
- The 'like-for-like' and variation rules available to applicants for both threatened species and Plant Community Types (PCT) and the even more generous variation rules available to the Biodiversity Conservation Trust, and
- The Federal Environmental Protection and Biodiversity Conservation Act (EPBC Act) Bilateral Agreement and how that relates to offset outcomes under the 'like-for-like' and variation rules available to the Scheme.

In addition, Council has some concerns over the Department of Planning Industry and Environment's (DPIE) approach to the review and enforcement of the application of the assessment methodology (the Biodiversity Assessment Methodology (BAM)), and post approval conditioning.

Cumulative Impacts

The assessment of cumulative impacts is particularly relevant to Major Projects applications within the Upper Hunter Region as the impacts associated with coal mines are large, in close proximity to one another, and are undertaken in a staged cumulative nature. Regarding impacts to biodiversity the Scheme does not adequately address the cumulative impact of an individual mine as it expands nor the cumulative impact of all the mines within the region. This assertion is based on the word cumulative being entirely absent from the BC Act, and only occurs in the *Biodiversity Conservation Regulation 2017* (BC Regulation) three times in relation to Part 5 Species Impact Statement (SIS) considerations.

The BAM is the methodology for assessing a development's impact to biodiversity under the Biodiversity Offset Scheme. The BAM is used to calculate residual impact after avoiding and mitigating actions are taken. These residual impacts are then 'offset' by retiring 'biodiversity credits'. This approach is intended to provide a financial disincentive which results in 'improve' biodiversity outcomes. The approach is limited to an individual development's impacts and does not consider the consequences of cumulative losses. The word cumulative only occurs six times in the BAM and only once in relation to impact assessment. This reference is specific and relates to wind turbine strikes and, even in this circumstance, a cumulative impact assessment outcome has no material impact to the outcomes of the credit requirement and the BDAR prepared in accordance with the BAM.

It could be argued that cumulative impacts are addressed within the *Environmental Planning and Assessment Act 1979* (EP&A Act) however the EP&A Act does not require the consent authority to consider cumulative impacts on the outcomes on the BAM, leaving the management of impacts reliant on the application of the Minister's discretion to apply conditions that address a cumulative impact assessment. The draft Cumulative Impact Assessment Guidelines for State Significant Projects July 2021 also fails to adequately address cumulative impacts to biodiversity. The Guideline states that an EIS should detail measures to minimise the cumulative impact of a project. And that 'measures may include... preparing a Voluntary Planning Agreement; providing biodiversity offsets under the Biodiversity Offset Scheme'. Being a guideline, the requirement isn't mandatory and is still reliant on the Minister discretion to apply appropriate conditions with no guidance provided on how the values of additional offsets would be determined.

Serious and Irreversible Impacts Entities

Section 6.6 of the BC Regulation states that '*an impact is to be regarded as serious and irreversible if it is likely to contribute significantly to the risk of a threatened species or ecological community becoming extinct*'. Species and ecological communities that are at risk of extinction from serious and irreversible impacts are identified as Serious and Irreversible Impact Entities. Section 7.16 of the BC Act, the BAM and associated

Guidance determines what a Serious and Irreversible Impact (SAIL) to entities that are at risk of serious or irreversible harm is and when SAIL provisions apply.

Section 7.16 of the BC Act excludes the mandatory refusal of a Major Projects application based on its predicted impacts to SAIL entities, only that the Minister is required to take those impacts into consideration, and to determine whether there are any additional and appropriate measures that will minimise those impacts if consent or approval is to be granted. The refusal provisions only apply to EP&A Act Part 4 local development applications which in Council's opinion is inequitable as it does not include developments that are arguably likely to have the greatest potential impact on a SAIL entity due to their mostly large and localised impacts.

Therefore, the Biodiversity Offset Scheme could theoretically allow for a major project to result in the extinction of a threatened entity, or at least reduce to a point where it would no longer remain viable, with the avoidance of this outcome entirely reliant on the Minister applying their discretion to apply any additional and appropriate measures that will minimise though not avoid those impacts.

'Like-for-Like' Credits and the Offset Variation Rules

Section 6.2 of the BC Regulation details what '*biodiversity conservation measures to offset or compensate for the impacts on biodiversity values after the steps taken to avoid or minimise those impacts*' are allowable by developers. The options available to developers that concern Council include:

- a) the retirement of the required number and class of like-for-like biodiversity credits,
- b) the retirement of the required biodiversity credits in accordance with the variation rules,
- c) payment into the Biodiversity Conservation Fund to satisfy the requirement to retire biodiversity credits.

Councils concern with these options is due to Section 6.3 of the Regulation's broad definition of 'Like-for-Like' credits. In the case of threatened ecological communities, like-for-like biodiversity credits represent the same threatened ecological community located in:

- a) the same or an adjoining Interim Biogeographic Regionalisation of Australia (IBRA) subregion as the impacted site, or
- b) any such subregion that is within 100 kilometres of the outer edge of the impacted site.

In the case of threatened species that are ecosystem credit species or other native vegetation (other than impacts on threatened ecological communities), like-for-like biodiversity credits represent the same class of native vegetation located in:

- a) the same or an adjoining Interim Biogeographic Regionalisation of Australia subregion as the impacted site, or
- b) any such subregion that is within 100 kilometres of the outer edge of the impacted site

In the case of impacts on threatened species that are species credit species, like-for-like biodiversity credits represent the same threatened species generated anywhere in the state.

Council is of the opinion that the definitions of 'like-for-like' are too broad for a number of reasons. As the area covered by the Hunter or adjoining IBRA subregions is so vast the scheme cannot be considered to result in 'no-net-loss' as there is a greater likelihood that credits (offsets) will be sourced well away from where the impact occurs and only from an ecological community of the same class. This will result in an increased likelihood that local extinctions will occur as there is less likelihood that local offset outcomes will be achieved. In addition, this means that landowners within the region will be less likely to benefit from the potential considerable financial offset opportunities generated in the same region by the Scheme.

This is exacerbated by the subsequent variation rules available to developers with the BC Regulation stating that for ecological communities *'the biodiversity credits to be retired need not represent the same threatened ecological community or the same class of vegetation or represent a location in the same or adjoining Interim Biogeographic Regionalisation of Australia subregion'*. This is further exacerbated by the variation rules that apply to the Biodiversity Conservation Trust (BCT) who source credits retired by developers paying into the Biodiversity Conservation Fund (BCF) and the EPBC Act Bilateral Agreement allowing for the application of the Biodiversity Offset Scheme to assess impacts to Matters of National Environmental Significance.

An example of how the combination of variation rules for applicants and the BCT in conjunction with the EPBC Bilateral Agreement combine to result in the potential significant decline in a threatened entity is the Central Hunter Grey Box—Ironbark Woodland Community. This community is restricted to the Central Hunter Valley between about Singleton and Muswellbrook with none in public conservation and is listed as Endangered under NSW legislation and Critically Endangered under the federal EPBC Act.

It has been Council's experience that approvals under the EPBC Act for the impacts to this community required strict like-for-like offsets sourced from within its known distribution. Under the variation rules in combination with the approval of the Scheme under the Bilateral Agreement this community can now be offset much further afield. The result is unlikely to be a 'no-net-loss' outcome for this critically endangered community and a reduction in the financial benefits of the scheme remaining within the region where the impact occurred. Compounding this are the limited areas of homogeneous patches of this community on single landholdings, with landholders willing to place in perpetuity conservation agreements on their properties. The outcome being that applicants and the BCT will be forced to apply the variation rules to satisfy offset obligations for impacts to this community in other regions.

Landholder Opportunities

In addition to the points raised above regarding the likelihood of reduced opportunities for landowners within the Singleton region the financial benefit from the sale of credits are inadequate as they do not outweigh the financial gains from developing land for agricultural or property development purposes. This is particularly the case where land

is in proximity to areas that have already been developed where in many cases species and communities are facing the greatest pressure, their remaining extent is most limited and there is the greatest need for conservation. Market forces in some cases are making the cost to impact on entities prohibitive as intended by the Scheme but only once they are so reduced in extent that the future viability of remnants is at risk, for example Cumberland plains ecological communities and the species they contain.

DPIE Scheme Application and Conditioning

The Department of Planning Industry and Environment (DPIE) is not adequately enforcing the application of the scheme (in particular the Biodiversity Assessment Methodology (BAM)) and is conditioning the retirement of credits contrary to the BC Act giving the option to retire credits after the benefits offsetting allows in regards to development approval have been realised and the impact has occurred.

Section 7.14(4) of the Biodiversity Conservation Act states that for State Significant Development and Infrastructure '*A condition to retire biodiversity credits is required to be complied with before any development is carried out that would impact on biodiversity values.*' However, DPIE are conditioning Major Projects inconsistent with the BC Act which is an option not made available to local development applications. DPIE are conditioning credit retirement for Major Projects by requiring credits to be retired prior to commencing construction under the consent, or other timeframe agreed by the planning secretary which is inconsistent with the BC Act's intention to ensure impacts are offset before they occur.

Concluding Comments

I would like to thank you for the opportunity to provide a submission. Please contact Ziggy Andersons, Singleton Council's Coordinator Environmental Services, on 02 6578 7290 if you have any questions.

Yours sincerely

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