

5 March 2017

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By email: [lmhc.support@environment.nsw.gov.au](mailto:lmhc.support@environment.nsw.gov.au)

Dear Ms Gibbs,

**Consultation draft: Ancillary rules for use of mine site ecological rehabilitation as an offset**

Thank you for the opportunity to provide comment on the *Consultation draft: Ancillary rules for use of mine site ecological rehabilitation as an offset* (**Consultation Draft**).

As you know, EDO NSW has expressed significant concerns about the implementation of the *Biodiversity Conservation Act 2016* and associated regulations and orders.<sup>1</sup> This latest proposal in the Consultation Draft continues the process of undermining protection for biodiversity in NSW, and we re-iterate our opposition to the use of mine rehabilitation as an offset for biodiversity destruction. In our opinion, there is no independent, scientifically verified evidence that mine site rehabilitation can replicate the biodiversity values that are lost through mining. Further, there are strong community expectations that any approval to undertake mining activities should be accompanied by requirements to rehabilitate the land to a pre-mining equivalent condition, quite separately to the need to compensate for the loss of biodiversity caused by the mining activity.

Nonetheless, we recognise that s 6.5(2) of the *Biodiversity Conservation Regulation 2017* permits the creation of ancillary rules that may “set out standards for the ecological rehabilitation of sites impacted by the carrying out of mining under a mining lease and the credit value of any such rehabilitation”. On that basis, we provide the following comments on the Consultation Draft.

**General Comments**

The Consultation Draft fails to incorporate appropriate **timeframes** into the rehabilitation requirements. Mines should be required to specify clear timeframes over which rehabilitation should be achieved.

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<sup>1</sup> Our submissions are available at: [http://www.edonsw.org.au/biodiversity\\_legislation\\_review](http://www.edonsw.org.au/biodiversity_legislation_review).

There should also be a stronger recognition of the **uncertainty** associated with the ability to achieve stated rehabilitation outcomes, and the lag between the environmental harm being done and any environmental gain being achieved. This should be reflected by the number of credits generated by mine site rehabilitation being significantly reduced, when compared to other credit generating activities under the Biodiversity Assessment Method (**BAM**). This should be reflected in section 4.2 *Application of the BAM*.

We also recommend that any proposal under the new biodiversity regime be independently **peer reviewed**, with the report made public.<sup>2</sup>

## **2.1 Requirements for use of ecological rehabilitation to meet a credit requirement**

In relation to point 7 (Consultation Draft p5) - completion criteria should be included in the conditions of consent, rather than in Mine Operations Plans (**MOPs**) and/or Rehabilitation Management Plans (**RMPs**). MOPs/RMPs are discretionary documents that can be easily amended with the approval of NSW Resources and Energy - an agency that does not have the appropriate expertise to determine whether changes to completion criteria would undermine the required rehabilitation objectives. To ensure that rehabilitation requirements are clear and enforceable, they should be included in the conditions of consent.

### **2.2.2 Ecological rehabilitation for species credits**

The requirement to demonstrate the feasibility of achieving the offset is highly subjective. Allowing assessors, who are employed by proponents, to form judgments about feasibility raises concerns regarding the independence and objectivity of assessors.<sup>3</sup> Rather than a requirement for the assessor to demonstrate that rehabilitation is feasible or likely to result in the target species being present, the assessor must be required to demonstrate that there is independent scientific advice available to demonstrate these outcomes can be achieved.

## **3.1 Objectives**

As stated in response to previous consultations, EDO NSW strongly disagrees with the current NSW Government practice of consulting on incomplete drafts of policy documents. This is particularly inappropriate where exhibition of the incomplete draft provides the only opportunity for community and non-government organisation input, and where the unfinished detail will have significant impact on the environmental outcomes achieved. Consulting on Tables 1 and 2 (pp 10 -13 Consultation Draft) at this point in time falls within this category.

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<sup>2</sup> This is consistent with the [OEH Scientific Rigour Position Statement \(PDF 174KB\)](#) that states: *The OEH Scientific Rigour Position Statement (PDF 174KB) ensures that all science undertaken or commissioned by OEH meets globally accepted standards of scientific rigour from start to finish. A commitment to scientific rigour ensures OEH has robust scientific evidence on which to base decisions. It also prevents wasting resources on scientific work which does not meet standards of scientific rigour, and so will not deliver defensible and/or meaningful results.* Available at: <http://www.environment.nsw.gov.au/research-and-publications/our-science-and-research/our-work>

<sup>3</sup> EDO NSW has consistently raised this concern - further comment on this is included in our submissions to the *Biodiversity Conservation Act 2016*.

We are also concerned that the document states that “work is ongoing to develop final completion criteria, in consultation with the mining industry.” Completion criteria should be scientifically robust descriptions of what adequately describes an appropriate rehabilitation outcome. This should be developed in consultation with ecological experts, not the industry that is intended to be regulated by the Consultation Draft.

We agree that the completion criteria and performance indicators must be SMART (i.e. specific, measurable, achievable, realistic and time-bound). However, the Consultation Draft fails to deliver this outcome. We strongly recommend that further public consultation is undertaken on a more developed draft of Tables 1 and 2.

Notwithstanding the incompleteness, we provide the following comment on *Table 1- Ecological rehabilitation objectives, completion criteria and performance indicators for ecosystem credits*. Objective 4 introduces a requirement to measure factors such as soil quality and invertebrate presence. While this is a welcome recognition of the need to achieve a functional ecosystem, it is not clear how success in these areas would be measured. To ensure that there is a measurable and meaningful outcome, these measures must be compared to a pre-disturbance baseline. That is, proponents must be required to assess these features prior to any disturbance arising from mining related activity commencing, and that assessment must be used to define the outcomes that are required to be achieved through the rehabilitation. Outcomes specifying that rehabilitation achieve the same or similar measures must form part of any conditions of consent.

## **4.2 Application of the BAM**

We strongly disagree with the proposal to remove the requirement to provide in-perpetuity protection for credits generated by mine rehabilitation. This is a minimum requirement for all other offset areas and should equally apply here. The proposal to allow in-perpetuity protection to allow a further generation of credits in the future is double dipping.

If you require further information or would like to discuss this submission further, please contact Dr Megan Kessler, Scientific Director EDO NSW or myself on (02) 9262 6989.

Yours sincerely,  
**EDO NSW**



**Rachel Walmsley**  
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