

DEPARTMENT OF AGRICULTURE, WATER AND THE ENVIRONMENT

Ref: 2010/5736

To: s. 22(1)(a)(ii), Ag Assistant Secretary, Assessments (Vic, Tas) and Post Approvals Branch,
Environment Approvals Division

Through: s. 22(1)(a)(ii), Director, Post Approvals Section

**EPBC 2010/5736 – Carmichael Coal Mine and Rail Infrastructure Project, Queensland:
Variation to conditions of approval**

Timing: As soon as possible. The variation request was made on 4 February 2022.

Recommendations:

1. That you agree to vary the conditions attached to EPBC Act approval 2010/5736 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

s. 22(1)(a)(ii)

Signatory:

Date: 19 April 2022

s. 22(1)(a)(ii), A/g AS, EA (Vic/Tas) and PA

Comments:

Clearing Officer: Sent 19/04/2022	s. 22(1)(a)(ii)	Director, Post Approvals Section	s. 22(1)(a)(ii)
Contact Officer:	s. 22(1)(a)(ii)	Assistant Director, Environmental Audit	s. 22(1)(a)(ii)

Key Issues

1. On 4 February 2022, Adani Mining Pty Ltd (Adani – now trading as Bravus Mining & Resources) submitted a request to the department (**Attachment C**) to add conditions 7A and 31A; and vary or add the following definitions, 'Business Day', 'Clear/cleared/clearing', 'Fauna Spotter Catcher', 'Incident', 'Plan/s', and 'Protected Matters', to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) approval for the Carmichael Coal Mine and Rail Infrastructure Project (EPBC 2010/5736). Adani requested:

- To add condition 7A to ensure that a qualified Fauna Spotter Catcher is present during all clearing activities and that daily pre-clearance surveys are conducted. The new condition will also ensure contractors responsible for clearing are made aware of all environmental requirements under the approval.

- To add condition 31A to ensure timely notification to the department of any potential or actual non-compliance.
2. The variation request was a result of negotiations between the department's Environmental Audit Section and Adani in response to a reported non-compliance. Adani agreed to formally request the variation instead of the department pursuing a lengthy directed variation process.
 3. The consultation has resulted in a timelier variation being undertaken and the addition of robust conditions that will result in increased environmental protection.

Background

4. The Minister has delegated you as decision maker for this matter pursuant to section 515 of the EPBC Act.
5. On 14 October 2015, the Hon Greg Hunt MP, the then Minister for the Environment, approved with conditions Adani Mining Pty Ltd (Adani) to develop an open cut and underground coal mine 160 km northwest of Clermont in central Queensland (see EPBC 2010/5736). The approval conditions have been varied in January 2017, September 2019, January 2021, and March 2021. The current conditions of approval are at **Attachment D**.
6. The controlling provisions for the action are World Heritage properties (sections 12 and 15A) National Heritage places (sections 15B and 15C), Wetlands of international importance (sections 16 and 17B), Listed threatened species and communities (sections 18 and 18A), Listed migratory species (sections 20 and 20A), Great Barrier Reef Marine Park (sections 24B and 24C) and a water resource, in relation to coal seam gas development and large coal mining development (sections 24D and 24E).
7. On 6 November 2020, Adani Mining Pty Ltd notified the department that they had changed their Australian trading name to Bravus Mining & Resources. The regulated legal entity (Adani Mining Pty Ltd) has not changed and therefore a transfer of approvals issued under the EPBC Act is not required.

Legal basis for variation

8. 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).

The proposed variation

9. Through consultation with the department, Adani has agreed to request the variation to the conditions of approval to overcome deficiencies within the Species Management Plans and the current conditions of approval. These deficiencies have resulted in confusion surrounding the need for Fauna Spotter Catchers during certain clearing activities and within identified habitat classes.

10. Adani also agreed to, and requested, the inclusion of a condition to improve the reporting requirements for incidents of non-compliance. The current conditions only require Adani to report any non-compliance to the department once a year in their Annual Compliance Report. The addition of condition 31A will require Adani to notify the department of any potential or actual non-compliance with an approval condition within 10 business days of becoming aware of it.
11. The request to vary and add to the definitions list supports the inclusion of the two new conditions.
12. In summary, the variation to conditions includes:
 - Condition 7A – The **approval holder** must:
 - a. Ensure that a qualified **fauna spotter catcher** is present during all **clearing** activities and is given sufficient authority to instruct **clearing** operations, including the authority to instruct **clearing** activities to cease if an individual of a fauna species listed as a **Matter of National Environmental Significance** under this approval is observed in the area being **cleared**.
 - b. Ensure that a qualified **fauna spotter catcher** undertakes all daily pre-clearance surveys in accordance with approved plans.
 - c. Ensure that all contractors, workers, and authorised persons who are tasked with conducting clearing activities are aware of the environmental requirements of this approval.
 - Condition 31A - The **approval holder** must notify the **Department** in writing of any: **incident**; non-compliance with the conditions; or non-compliance with commitments made in **plans**. The notification must be provided to the **Department** as soon as practicable and no later than 10 **business days** after the **approval holder** becoming aware of the **incident** or non-compliance. The notification must specify:
 - a. the condition which is or may be in breach; and
 - b. a short description of the **incident** and/or non-compliance.

Department evaluation

13. The department consulted with Adani to draft the conditions included in the variation request. The proposed conditions will ensure that environmental mitigations are transparent and compliance reporting is provided to the department in a timelier manner.
14. A table showing the current approved conditions and the proposed variation has been prepared (**Attachment E**).
15. With regard to condition 7A, the department has recommended the approval holder agree to include the requirement for the use of Fauna Spotter Catchers in the conditions of approval instead of relying on the Species Management Plan required in the approval conditions 5 and 6 to regulate this requirement.
16. The approved Species Management Plan – SP1 details the need for Fauna Spotter Catchers in habitat classes identified as ‘known habitat’ and ‘likely habitat’ that support Matters of National Environmental Significance (MNES). This requirement is inconsistent with the conditions of approval, specifically, condition 6.d.i.

17. Through detailed analysis of fauna interactions within the approved project area, it has been identified that fauna listed under the EPBC Act, and regulated by the EPBC 2010/5736 approval, are occurring in areas identified as 'potential habitat' and as such, the department is of the view that the need for a Fauna Spotter Catcher should be extended to this habitat class to reduce the risk of impact on specific fauna.
18. The addition of condition 7A has been evaluated as being both necessary and convenient for mitigating damage to a matter protected by a provision of Part 3 of the EPBC Act.
19. The department is responsible for ensuring timely investigations are conducted for any known or potential non-compliance. It is for this reason that the department consulted with Adani for the inclusion of condition 31A. This condition will ensure that Adani report any known or likely non-compliance to the department in a timeframe that allows the Compliance function of the department to undertake a timely and thorough investigation.
20. The addition of condition 31A has been evaluated as being both necessary and convenient for mitigating damage to a matter protected by a provision of Part 3 of the EPBC Act.

Sensitivities

Compliance investigation and findings

21. On 12 January 2021 Adani reported to the department that they had potentially breached an approval condition as a result of clearing vegetation without the presence of a Fauna Spotter Catcher.
22. Condition 6 of the approval requires that a Species Management Plan be developed and that it includes controls to ensure that a Fauna Spotter Catcher is present during all vegetation clearing.
23. Condition 7 of the approval requires the approval holder to implement the approved 'Species Management Plan Carmichael Rail Network – SP1', approved by the department on 20 July 2016.
24. The approved plan only partly includes the controls and mitigations specified in condition 6 of the approval. The plan details the required use of Fauna Spotter Catchers for habitat that has been identified as 'known' or 'likely' MNES habitat but does not extend to 'potential' MNES habitat. The incident report provided to the department identified that the clearing occurred in an area mapped as 'potential' ornamental snake habitat.
25. The compliance investigation that followed identified that on 3 August 2020 clearing was undertaken without the presence of a Fauna Spotter Catcher within the area regulated by the project approval. The Compliance Assessment Report is at **Attachment F**. Further analysis demonstrated that multiple fauna interaction had occurred within areas mapped as 'potential' habitat.
26. The department determined that an appropriate response was for the conditions to be varied so that Adani was required to have a Fauna Spotter Catcher present during all vegetation clearing within the project area, regardless of the identified habitat class.
27. This outcome is considered appropriate and is consistent with department's published compliance policy.

Environmental history**s. 37(2)(b), 47G(1)(a)**

29. On 14 November 2019, the department issued a warning to the approval holder for contravening condition 13 of their approval (**Attachment G**).
30. On 6 March 2020, the department issued a warning to the approval holder for contravening condition 2 of their approval (**Attachment H**).
31. On 30 October 2020, the department issued two infringement notices totalling \$25,920 to Adani Mining for contravening condition 7 of the approval (**Attachment I**).
32. The approval holder's environmental history has been considered when determining the appropriate compliance response.

Consultation

33. The approval holder has been consulted regarding this matter and has engaged positively with the department in response to the department's request for them to request a variation to the conditions of approval.
34. A consultation meeting was held between Adani and the department which resulted in the variation to 'Project Area' and 'Vegetation' being removed from consideration under the variation request.
35. On 2 April 2022, Adani agreed to the final wording of the conditions of approval as included in the variation instrument (**Attachment J**).

Proposed decision

36. On the above basis, the department recommends that you:
 - agree to vary the conditions of approval for EPBC approval 2010/5736 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.

ATTACHMENTS

A: Proposed decision instrument (for signature)

s. 47E(d)

s. 47E(d)

B: Letter to the approval holder advising of your decision (for signature)

s. 47E(d)

C: Variation request

s. 47E(d)

D: EPBC 2010/5736 conditions of approval

s. 47E(d)

E: Comparison of current conditions to proposed variation

s. 47E(d)

F: Compliance Assessment Report

s. 47E(d)

G: Warning Letter (14 November 2019)

s. 47E(d)

H: Warning Letter (6 March 2020)

s. 47E(d)

I: Infringement Notice Letter (29 October 2020)

s. 47E(d)

J: Final agreement on variation instrument

s. 47E(d)