



Statement of Reasons for decision to vary approval conditions under the *Environment Protection and Biodiversity Conservation Act 1999*

I, Tyrie Starrs, Director, Tasmania Assessments Section, provide the following statement of reasons for my decision on 19 April 2022 in my capacity as Acting Assistant Secretary, Environment Approvals (Vic/Tas) and Post Approvals Branch, and as delegate for the Minister for the Environment, to vary the conditions attached to the approval for the action identified as EPBC 2010/5736, under section 143 of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**).

Legislation

1. Relevant legislation is at **Annexure A**.

Background

2. On 14 October 2015, the Hon Greg Hunt MP, then Minister for the Environment, approved with conditions Adani Mining Pty Ltd (Adani) (now trading as Bravus Mining & Resources) to develop an open cut and underground coal mine, 189 km rail link and associated infrastructure, approximately 160 km north west of Clermont in central Queensland (see EPBC 2010/5736) (the action).
3. The approval conditions have been varied four times since the action was approved. The variations were approved, and took effect, on 5 January 2017, 26 September 2019, 13 January 2021, and 15 March 2021.
4. 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).

Variation request

5. On 4 February 2022, Adani requested to add conditions 7A and 31A and add the following definitions, 'Business Day', 'Clear/cleared/clearing', 'Fauna Spotter Catcher', 'Incident', 'Plan/s', and 'Protected Matters', to the EPBC Act approval for the Carmichael Coal Mine and Rail Infrastructure Project (EPBC 2010/5736).

6. In summary, the variation to the conditions is to add:

- 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.

7. 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:

- a. protecting a matter protected by any provision of Part 3 for which the approval has effect, or
- b. 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).

8. The variation request resulted from negotiations between the department's Environmental Audit Section and Adani in response to a reported non-compliance with the existing approval conditions. Adani agreed to formally request the variation instead of the

department pursuing a lengthy directed variation process. The outcome of this process has resulted in a more timely variation decision which improves environmental protections.

Evidence or other material on which my findings were based

9. In making my decision on 19 April 2022, to vary the conditions attached to the approval of the action, I took into account the departmental briefing and recommendations provided to me on 19 April 2022, which included:
 - a. Decision brief and attachments regarding the requested variation to the conditions of approval, dated 19 April 2022.
 - b. EPBC 2010/5736 approval conditions.
 - c. Letter from Adani, 4 February 2022.
 - d. Compliance Assessment Report, July 2021.

Findings on material questions of fact

10. My decision and findings on material questions of fact were based on the information contained in the departmental briefing and recommendations. I considered that there was adequate information before me to decide whether or not to vary the conditions of approval.

Compliance investigation and findings

11. On 12 January 2021, Adani reported to the department that it had potentially breached an approval condition as a result of clearing vegetation without the Presence of a Fauna Spotter Catcher. The incident report provided to the department identified that the clearing occurred in an area mapped as 'potential' ornamental snake habitat.
12. I accepted the department's advice that the 'Species Management Plan Carmichael Rail Network – SP1', approved by the department on 20 July 2016, only partly addresses the controls and mitigations specified in condition 6 of the approval, in that it details the required use of Fauna Spotter Catchers for habitat that has been identified as 'known' or 'likely' Matters of National Environmental Significance Habitat (**MNES**), but does not extend to 'potential' MNES habitat. Condition 6(d)(i) of the approval requires the use of Fauna Spotter Catchers prior to, and during, all vegetation clearing activities.
13. I accepted the department's advice that, as a result of a compliance investigation, the department had determined that an appropriate response was for the conditions of the approval to be varied so that Adani is required to have a Fauna Spotter Catcher present during all vegetation clearing within the project area, regardless of the identified habitat class.
14. I also accepted the department's advice that the approval holder had agreed to formally request the variation.

15. I accepted the department's advice that it had assessed the reported contravention in accordance with the department's published compliance policy.

Necessary or convenient

16. As outlined above, I accepted the department's advice that the Species Management Plan only partly addresses the controls and mitigations specified in condition 6 of the approval, as it does not extend to 'potential' MNES habitat. I also accepted the department's advice, based on detailed analysis of fauna interactions within the approved project area, that fauna listed under the EPBC Act and regulated by the EPBC 2010/5736 approval have been found to occur in areas identified as 'potential' habitat.

17. Condition 7A requires the use of Fauna Spotter Catchers as a condition of approval, rather than relying on the Species Management Plan to regulate this requirement. I accepted the department's advice that the extension of the Fauna Spotter Catcher requirement to 'potential' habitat clarifies Adani's obligations and will reduce the risk of impact on specific fauna.

18. I agreed with the department's evaluation that the inclusion of condition 7A as a condition of approval is both necessary and convenient for mitigating damage to a matter protected by a provision of Part 3 of the EPBC Act.

19. Condition 31A requires that Adani notify the department, in writing, of any incident, non-compliance with conditions, or non-compliance with commitments made in plans as soon as practicable and no later than 10 business days after it becomes aware of the incident or non-compliance. I accepted the department's advice that this will improve the enforceability of the conditions of approval by ensuring that Adani reports any known or likely non-compliance to the department in a timeframe that allows the department to conduct a timely and thorough investigation.

20. I agreed with the department's evaluation that the inclusion of condition 31A as a condition of approval is both necessary and convenient for mitigating damage to a matter protected by a provision of Part 3 of the EPBC Act.

21. The additional definitions of 'Business Day', 'Clear/cleared/clearing', 'Fauna Spotter Catcher', 'Incident', 'Plan/s', and 'Protected Matters' support and clarify the operation of conditions 7A and 31A. Accordingly, I found that they are necessary or convenient for mitigating damage to a matter protected by a provision of Part 3 of the EPBC Act.

Agreement to variation

22. On 2 April 2022, Adani agreed to the draft variation notice.

History in relation to environmental matters

23. Section 143(3)(a) of the EPBC Act provides that, in deciding whether or not to revoke, vary or add to any conditions attached to the approval of the taking of an action, the Minister may have regard to the holder of the approval's history in relation to environmental matters. I decided to have regard to Adani's history in relation to environmental matters, and noted the following aspects in making my decision to approve the variation of conditions attached to the approval:

- a. On 14 November 2019, the department issued a warning to Adani for contravening condition 13 of the approval.
- b. On 6 March 2020, the department issued a warning to Adani for contravening condition 2 of the approval.
- c. On 30 October 2020, the department issued two infringement notices totalling \$25,920 to Adani for contravening condition 7 of the approval.

Conclusion

24. Considering the findings above, I agreed with the department's advice, and was satisfied, that the variation of conditions attached to the approval, in accordance with section 143(1)(c) of the EPBC Act, was:

- a. necessary or convenient for mitigating damage to a matter protected by a provision of Part 3 of the EPBC Act; and
- b. agreed to by Adani.

25. Accordingly, I decided to vary the conditions attached to the approval as set out in the decision instrument.



Signed

Tyrie Starrs

Director, Tasmania Assessments Section

Environment Approvals (Vic/Tas) and Post Approvals Branch

Environment Approvals Division

7 July 2022

Annexure A

Section 143 of the EPBC Act relevantly provides:

143 Variation of conditions attached to approval

- (1) The Minister may, by written instrument, revoke, vary or add to any conditions (other than the condition referred to in subsection 134(1A)) attached to an approval under this Part of an action if:
 - (a) any condition attached to the approval has been contravened; or
 - (b) both of the following conditions are satisfied:
 - (i) the action has had a significant impact that was not identified in assessing the action on any matter protected by a provision of Part 3 for which the approval has effect, or the Minister believes the action will have such an impact;
 - (ii) the Minister believes it is necessary to revoke, vary or add a condition to protect the matter from the impact; or
 - (ba) all of the following conditions are satisfied:
 - (i) the action has had a significant impact on a matter protected by a provision of Part 3 for which the approval has effect, or the Minister believes the action will have such an impact;
 - (ii) the Minister is satisfied that the impact is substantially greater than the impact that was identified in assessing the action;
 - (iii) the Minister believes it is necessary to revoke, vary or add a condition to protect the matter from the impact; or
 - (c) the holder of the approval agrees to the proposed revocation, variation or addition, or the Minister has extended the period for which the approval has effect under section 145D, and the Minister is satisfied that any conditions attached to the approval after the proposed revocation, variation or addition are necessary or convenient for:
 - (i) protecting a matter protected by any provision of Part 3 for which the approval has effect; or

- (ii) 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).

(1A) If, under paragraph (1)(c), the holder of an approval agrees to conditions mentioned in paragraph 134(3)(e) (about an action management plan) being added and attached to the approval, the holder is taken to have made an election under section 132B before the approval was granted.

(1B) The holder of an approval may request the Minister, in writing, to vary a condition attached to an approval of an action.

(2) The Minister may, by written instrument, revoke any condition (other than the condition referred to in subsection 134(1A)) attached to an approval under this Part of an action if the Minister is satisfied that the condition is not needed to protect any matter protected by a provision of Part 3 for which the approval has effect.

(3) In deciding whether or not to revoke, vary or add to 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.

(4) The revocation, variation or addition takes effect on the day specified in the instrument. The Minister must not specify a day earlier than the day the instrument is made.

(5) As soon as possible after making the instrument, the Minister must:

- (a) give a copy of it to the holder of the approval; and

- (b) publish the instrument in accordance with the regulations.

Note: If the holder is not satisfied with changed conditions attached to the approval of the holder's action, he or she can ask the Minister to reverse the change by making another change to the conditions under this section.

(6) However, the Minister must not publish so much of the instrument as:

(a) is:

- (i) an exempt document under section 47 of the *Freedom of Information Act 1982* (trade secrets etc.); or
- (ii) a conditionally exempt document under section 47G of that Act (business documents) to which access would, on balance, be contrary to the public interest for the purposes of subsection 11A(5) of that Act; or

(b) the Minister believes it is in the national interest not to publish.

The Minister may consider the defence or security of the Commonwealth when determining what is in the national interest. This does not limit the matters the Minister may consider.