



Environmental Defenders Office

29 April 2022

Ms Georgina Beattie
Deputy Secretary, Mining, Exploration and Geoscience Department of Regional NSW
1 Monaro St
Queanbeyan NSW 2620

CC Jamie Tripodi, Executive Director, Assessments and Systems, Mining, Exploration and Geoscience of Regional NSW

Dear Ms Beattie

Seeking refusal of Whitehaven Coal's Exploration Licence Applications adjacent to the Narrabri Underground Mine

1. We act for Lock the Gate Alliance.
2. We are writing to seek your refusal of exploration licence applications (**ELAs**), ELA6442 and ELA6443, submitted by Narrabri Coal Pty Ltd (**Narrabri Coal**)¹ on 24 February 2022.
3. The ELAs cover subject land that is adjacent to the Narrabri Underground Mine as identified at **Appendix 1**.
4. Our client seeks refusal of the ELAs on the basis that they do not comply with the requirements for an operational allocation under s 13C of the *Mining Act 1992* (NSW) (**Mining Act**). The release pathway being pursued is also contrary to NSW Government policy on future coal exploration as set out under the Strategic Statement on Coal Exploration and Mining in NSW (**Strategic Statement**).
5. Our client is of the view that, prior to any exploration licences being issued over the subject land, there should be a full Preliminary Regional Issues Assessment (**PRIA**) under the Strategic Release Framework (**SRF**) in accordance with the Strategic Statement.

¹ Narrabri Coal Pty Ltd is a subsidiary of Whitehaven Coal.

Background

6. Under the Mining Act, coal exploration licences can be granted through one of three release pathways:
 - a. Operational allocation;²
 - b. Strategic release framework;³ and
 - c. Competitive allocation.⁴
7. Narrabri Coal has lodged the ELAs under the operational allocation pathway.
8. The requirements for an operational allocation are set out under s 13C of the Mining Act, cl 20 of the *Mining Regulations 2016* (NSW) (**Mining Regs**) and the Guidelines for coal exploration licence applications for operational allocation purposes (**Guidelines**).
9. In summary, the statutory framework allows mining title holders to apply for an area up to 33% of their existing tenement size,⁵ for the purposes of developing a better mine design, recovering coal resources that would otherwise be likely to be sterilised, or extending the life of a mine.⁶
10. The areas covered by the ELAs overlap the Gorman North potential area for proactive release for coal exploration identified under the Strategic Statement. The Gorman North area is covered by a government authority, AUTH216, as indicated at **Appendix 1**.
11. These potential areas for proactive release, including Gorman North, indicate where coal exploration can occur under the SRF.
12. As of April 2022, the process to release Gorman North under the SRF has not formally commenced.

ELAs breach NSW mining legalisation related to operational allocation requirements

13. Applications for operational allocations are subject to size requirements under s 13C(2)(b) of the Mining Act.
14. Details of these requirements are set out under cl 20(2)(a) of the Mining Regs, which state:

² *Mining Act 1992* (NSW) s 13C.

³ *Mining Act 1992* (NSW) sch 1A

⁴ *Mining Act 1992* (NSW) sch 1A. The NSW Government may use competitive allocations where the other two pathways are not appropriate. Operates under a faster process than the Strategic Release Framework.

⁵ *Mining Regulations 2016* (NSW) cl 20(2)(a).

⁶ *Mining Regulations 2016* (NSW) cl 20(1)(b).

For the purposes of section 13C (2)(b) of the Act, if the operational allocation purpose for which the relevant application under section 13C (1) of the Act is made is—

(a) one referred to in subclause (1) (a) or (b) (i), (ii) or (iii)—the area of land to which the application relates must not exceed an area equivalent to 33% of the area of the land to which the exploration licence, assessment lease or mining lease concerned relates

15. In this instance, Narrabri Coal has applied for two separate, but contiguous, ELAs which cover a combined area of 3717 hectares (ha):
 - ELA6442: 1745 ha
 - ELA6443: 1972 ha
16. The mining lease held by Narrabri Coal (ML1609), adjacent to the ELAs, is 5298 ha in size.
17. Therefore, the combined area of the two ELAs is 70% of the size of ML1609 and in exceedance of the 33% area threshold under the Mining Regs.
18. When considered independently, ELA6443 is itself larger than 33% of ML1609.⁷
19. Failure to comply with requirements under the Mining Act and the Mining Regs gives rise to a ground for refusal under s 13C(3) of the Mining Act.
20. Our client seeks your intervention to refuse the ELAs on the basis that, contiguously and independently, these ELAs do not comply with the size requirements under the Mining Act and Mining Regs.

ELAs contrary to NSW Government policy set out under the Strategic Statement on Coal Exploration and Mining in NSW and the Strategic Release Framework

21. The aim of the Strategic Statement is to improve certainty about where coal mining should not occur while supporting responsible coal production in areas deemed suitable for mining.⁸
22. Areas deemed suitable for mining are characterised under the Strategic Statement as:

Areas where there are minimal conflicting land uses, where social and environmental impacts can be managed, and where there is significant coal production potential. New areas identified for coal exploration will be released

⁷ The area size of ML1609 equates to 37% of the ELAs.

⁸ Department of Regional NSW – Mining, Exploration and Geoscience, ‘Strategic Statement on Coal Exploration and Mining in NSW’ (Webpage)
<https://www.regional.nsw.gov.au/__data/assets/pdf_file/0017/1304135/Strategic-Statement-on-Coal-Exploration-and-Mining-in-NSW.pdf>

*through a transparent, competitive tender process whenever there are multiple operators who could develop the resource.*⁹

23. These areas are specifically identified under the SRF as potential areas for proactive release for coal exploration.¹⁰
24. Gorman North is one such area and it covers the same land that is covered by the ELAs.
25. Under the SRF, an area will be released “only after environmental, social and economic factors have been considered and the community has had an opportunity to identify its values and issues” (emphasis added).¹¹
26. It is our client’s view that allowing the ELAs to be assessed as operational allocations and thereby circumventing the SRF process would be contrary to both the Strategic Statement and community expectation raised by that document.
27. It is therefore requested that these ELAs be refused at this time. The Gorman North area should be subject to a full assessment under the SRF, including a PRIA before any exploration licences are granted. Failure to do so would, in our client’s view, unjustly limit the rights of landholders and other affected communities to identify and raise issues of concern prior to a decision on release.

Notification of ELA contrary to NSW Government policy on public comment processes

28. In accordance with s 13A of the Mining Act, Narrabri Coal notified the public of the ELAs and invited comment on 24 March 2022. A copy of each notice published in the Sydney Morning Herald is attached at **Appendix 2**.
29. The notices state that “comments received that relate to mining will not be considered in this process” (emphasis added).

⁹ Department of Regional NSW – Mining, Exploration and Geoscience, ‘Strategic Statement on Coal Exploration and Mining in NSW’ (Webpage)
<https://www.regional.nsw.gov.au/__data/assets/pdf_file/0017/1304135/Strategic-Statement-on-Coal-Exploration-and-Mining-in-NSW.pdf>

¹⁰ See Map of areas in NSW coal regions available and excluded from future coal exploration and mining at
<https://www.regional.nsw.gov.au/__data/assets/pdf_file/0007/1236976/Coal-mining-release-and-exclusion-areas-map.pdf>

¹¹ Department of Regional NSW - Mining, Exploration and Geoscience, ‘Strategic Release Framework for Coal and Petroleum Exploration Overview’ (Webpage)
<https://www.regional.nsw.gov.au/__data/assets/pdf_file/0004/753160/Strategic-Release-Framework-OVERVIEW_APPROVED.pdf>

30. However, this statement is contrary to the NSW Government's Guidelines on Public Comment Process.¹² These Guidelines state (at p. 2):
- “All submissions will be considered when determining an exploration licence application; however...The weight given to submissions generally opposed to exploration, mining or petroleum development will be less than those raising matters that inform the assessment of potential impacts for the exploration process regarding the specific exploration licence application” (emphasis added).*
31. Our client recognises that submissions that generally oppose mining are given less weight when determining an exploration licence application as stated by the Guidelines. However, this approach is distinguishable from the ELA notice, which expressly excludes all comments related to mining.
32. It is our client's view that Narrabri Coal's notice is therefore misleading and unjustly limits the community's right to public participation.
33. Furthermore, failure to comply with the Guidelines on Public Comment is a denial of procedural fairness.
34. Notwithstanding the primary recommendation of this letter, to refuse the ELAs, the invitation for public comment must be withdrawn as soon as practicable and re-submitted in accordance with the NSW Government's Guidelines on Public Comment Process.

Conclusion

35. There is clear evidence that the ELAs submitted by Narrabri Coal are contrary to the statutory framework for operational allocations. The ELAs are also contrary to policy set out under the Strategic Statement and community expectations raised by that document.
36. For the reasons set out in this letter, the ELAs submitted by Narrabri Coal should be refused.
37. Whilst a decision on the ELAs is pending, the invitation for public comment should be withdrawn and any future notice should comply with the NSW Government's Guidelines on Public Comment Process.
38. Following refusal, applications for exploration licences should only be considered once the Gorman North area has been subject to a full assessment under the SRF, including a PRIA.

¹² Department of Regional NSW – Mining, Exploration and Geoscience, 'Public Comment Process: For the exploration of coal and petroleum, including coal seam gas' (Webpage, 2011) <https://www.regional.nsw.gov.au/___data/assets/pdf_file/0009/426582/Public-Comment-Process-Documents.pdf>

39. Our client seeks a response to this letter by Friday 20 May 2022.

Yours sincerely,

Environmental Defenders Office

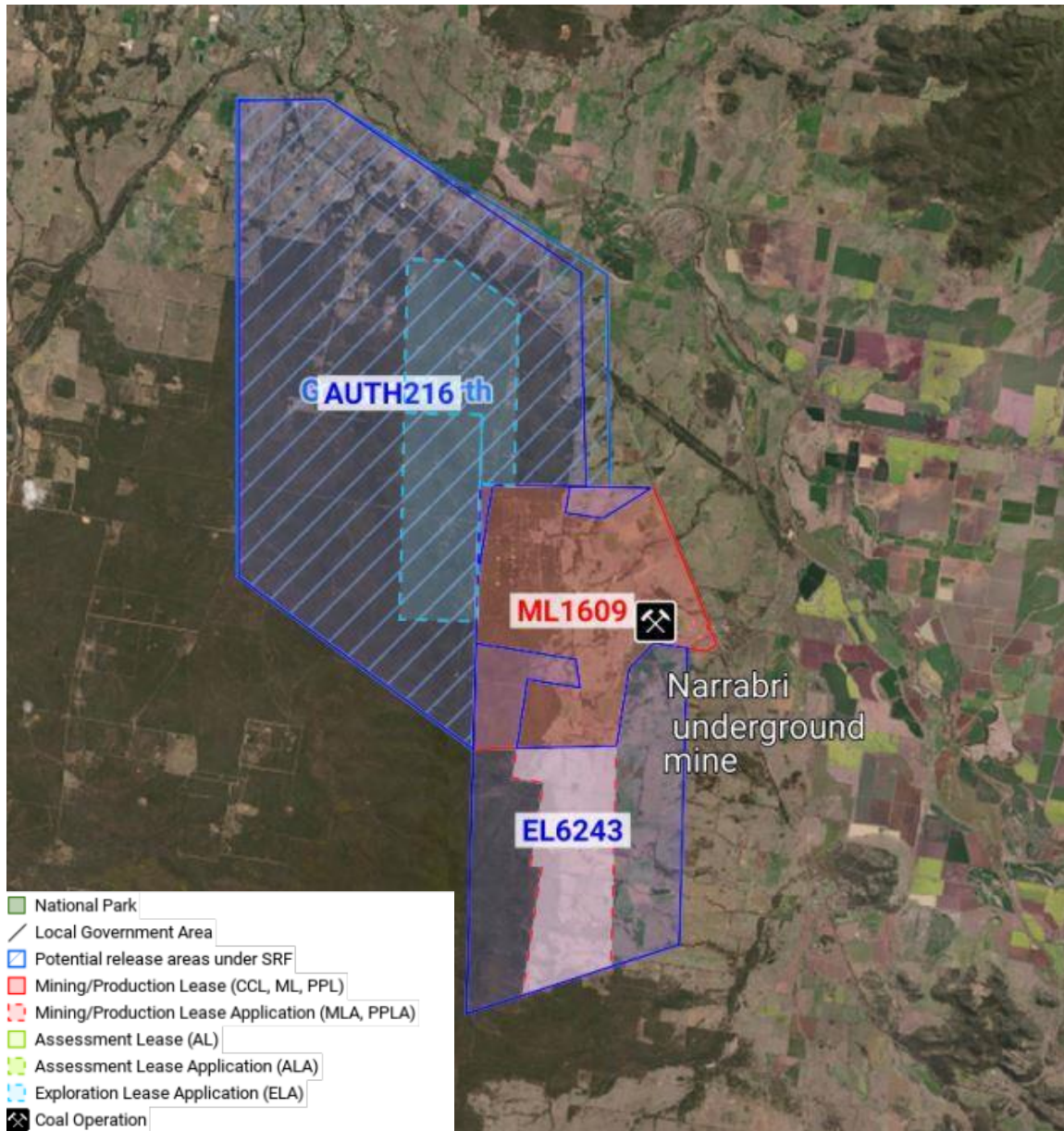
A handwritten signature in black ink that reads "Jemilah Hallinan". The signature is written in a cursive style with a long horizontal line extending to the right.

Jemilah Hallinan

Solicitor

Head, Legal Education

Appendix 1 – Map of ELAs adjacent to Narrabri Underground Mine and within the Gorman North proposed release area under the SRF



Appendix 2 – Invitations for public comment on ELA6442 and ELA6443 published in Sydney Morning Herald

3/24/22, 2:23 PM

- Sydney Morning Herald, 3/22/2022

Exploration licence application

Notice is given in accordance with Section 13A of the Mining Act 1992 and Clause 15 of the Mining Regulation 2016 that exploration licence application number ELA6442 for Group 9 (coal) has been lodged with the Department of Regional NSW by Narrabri Coal Pty Ltd (ACN 107 813 963), Narrabri Coal Australia Pty Ltd (ACN 110 262 925), Upper Horn Investments (Australia) Pty Ltd (ACN 129 190 281), J-Power Australia Pty Ltd (ACN 002 307 682), Posco International Narrabri Investment Pty Ltd (ACN 139 088 967), and KORES Narrabri Pty Limited (ACN 138 993 263), over an area of approximately 1,746 Ha located approximately 23 kilometres South of the town of Narrabri, as shown on the diagram below.

Information regarding this application can be obtained from Whitehaven Coal, phone number 02 9937 2686.

Information regarding landholder's rights is available from the Department's website www.regional.nsw.gov.au/meg/community/landholder-rights

Invitation for public comment

Public comment on any exploration licence granted as part of this application, may be made within 28 days of this advertisement.

To find out more on the public comment process go to: www.regional.nsw.gov.au/meg/community/landholder-rights/public-comment-on-coal-and-petroleum-titles or call the Department of Regional NSW on (02) 4063 6600.

Comments received that relate to mining will not be considered in this process as an exploration licence does not permit mining activities to occur.

The Department reserves the right to make all or part of any submission publicly available, however personal information identifying an individual will not be published.



3/24/22, 2:21 PM

- Sydney Morning Herald, 3/23/2022

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Information regarding this application can be obtained from Whitehaven Coal, phone number 02 9937 2686.

Information regarding landholder's rights is available from the Department's website www.regional.nsw.gov.au/meg/community/landholder-rights

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