

Friends of Minnamurra River Incorporated¹

9 Samuels Lane
KIAMA DOWNS
NSW 2533

Email: FOMR2533@gmail.com



30 January 2023

Ms Tanya Plibersek MHR
Minister for Environment
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

tanya.plibersek.mp@aph.gov.au

cc. Dr Georgia McWhinney, Senior Policy Officer, DCCEW (georgia.mcwhinney@dcceew.gov.au; ATSIHPA@awe.gov.au); Environment Minister's Electorate Office, PO Box 2676, Strawberry Hills, NSW 2012; Mr Dan Doran, Chief of Staff, Environment Minister's Office, PO Box 6022, House of Representatives, Parliament House, Canberra 2600.

Dear Minister Plibersek

RE: FURTHER SERIOUS CONCERNS THAT YOUR DEPARTMENT IS MISLEADING YOU

We refer to your Department's email (*Appendix 1 (30/01/23)*) of 27 January 2023 to FOMR Inc.

The email informs us that "The department intends *to rely on*² the document titled 'Information on Ground Penetrating Radar (GPR) survey findings – Boral – 27-09-22_Redacted' towards its assessment of Ms Sharralyn Robinson's section 10 and section 12 applications."

On 10 September 2021, Ms Robinson made applications under sections 10 and 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, seeking protection of a specified area known as Boral Limited's Dunmore Lakes Sand & Soil, also known as Boral's proposed Stage 5B sand mine, at Dunmore, just north of Kiama, NSW. (A Mr Gary Caines

¹Friends of Minnamurra River (FOMR) is an active incorporated community-based association formed five years ago to conserve, protect and enhance the estuarine and catchment ecosystems of the Minnamurra River. It has qualified expertise available to it and within its membership in plant and animal ecology, archaeology, hydrology and environmental science.

² "*rely*" – Definition: 'to depend confidently; put trust in', The Macquarie Dictionary, 2nd Revised Edition, The Macquarie Library Pty Ltd, Chatswood, NSW 1987, p. 1437.

also made applications, on 7 September 2021, under sections 10 and 12 of the ATSIHP Act for protection of the same area.)

The 27 January DECCW email gives rise to further and new very serious concerns that your Department is wrongly advising and/or misleading you in relation to Boral Limited's proposed new sand mine on its lease at Stage 5B, Dunmore.

Only one week ago (23 January) we wrote to you (*copy of letter attached as Appendix 2 23/01/23*) advising that your Department had relied on another Boral Limited document to advise you that the company and the NSW Department of Planning had not breached the MNES provisions of the EPBC Act when, in fact, all the evidence suggests that a breach of the Act did occur and that there are likely to be further breaches caused by the Department's incorrect advice to you.

From information provided by your Department, it is clear that it accepted, *prima-facie* and without any further investigation or research, a second-hand and theoretical environmental assessment from a mining company proponent that has a huge vested interest in downplaying any and all environmental impediments to its proposed Stage 5B project at Dunmore.

Your Department and its officers should not have made any decision on such a flimsy basis about whether or not there had been a breach of the MNES provisions of the EPBC Act in this case and whether or not there is a need for Commonwealth Ministerial approval of the 'activity', ie. Boral Limited's proposed new Stage 5B sand mine at Dunmore.

However, it is evident from a letter to us of 23 December 2022 (and a nearly identical one signed by you on 26 December 2023) that such decisions have, in fact, been made.

To compound this, we now have your Department's advice that it is going to rely on yet another Boral Limited document (27 September 2022) for its assessment of applications under Sections 10 and 12 of the ATIHP Act, this one containing a number of submissions, including the company's so-called interpretation of Ground Penetrating Radar (GPR) scans of part of its proposed Stage 5B mine site.

In August last year, Boral Limited had its archaeological consultant undertake the GPR scans of parts of its proposed Stage 5B Dunmore mine site because it is desperate to try to prove that in developing its mine it will not dig up the victims of the 1818 massacre by Europeans settlers of First Nations' families camped at the time on or in the immediate vicinity of the mine site.

Numerous qualified authorities and experts in relevant fields, as well as the descendants of massacre survivors themselves, regard it as 'almost certain to likely' that the remains of their ancestors are buried in the very sand that Boral now intends to mine.

Boral Limited is the *only* entity ever to have claimed that there are no Aboriginal burials in its proposed Stage 5B mining area. Typically, it based its denial on its incorrect interpretations of its scientifically baseless GPR scans of the mine site.

FOMR Inc raises the following issues in relation to your Department's proposal to again rely on a document from not only the actual proponent of the subject mining project but a proponent that has the highest vested interests in opposing the ATIHP Act

applications, to make an assessment, leading to a determination, of those same applications.

Additionally, given the Department's announced intention to rely on the Boral Limited document, we must also question the qualifications of the Department's decision makers involved in making assessments of a technical nature, such as Ground Penetrating Radar and its use in archaeology, given the decision makers' apparent location in Departmental organizational units not concerned with environmental and other assessments of a technical nature.

- The submissions contained in the Boral Limited document are completely opposed to the findings from the wide ranging and lengthy investigations of an Australian Government expert consultant who recommended in 2021 that the proposed mining site area at Dunmore be declared a Significant Aboriginal Area under Section 10 of the ATSIHP Act.
- FOMR warned you in a letter on 5 December 2022 that Boral's assertions in their submission of 27 September 2022, particularly in their report on the GPR scanning – on which your Department now intends to rely – were “misleading, inaccurate and scientifically baseless.” (*See the letter at Appendix 3 (05/12/2022)*).
- FOMR Inc. based this warning on very sound evidence, including evidence contained in an Australian Government publication (Department of Prime Minister and Cabinet) on GPR scanning and on overseas and Australian scientific evidence. (*See Appendix 3 (05/12/2022)*).
- **The sum total of all the evidence is that despite anything that Boral Limited or its consultant asserts or claims in its September 2022 document – the same one on which your Department now intends to rely – proves, quite simply and clearly, that Ground Penetrating Radar, originally developed for mining companies to locate the presence underground of valuable minerals and metals, cannot detect ancient human remains**, such as those of the victims of the 1818 massacre at or very near the proposed Dunmore mine site. (*Appendix 3 (05/12/2022)*). Human remains buried in caskets and/or with substantial grave goods, for example, may be detected by expert GPR operators and trained and experienced GPR analysts but we know that this was not the case with the victims of the Dunmore massacre 202 years ago.

In questioning the reasons for and setting out the hazards and inadvisability of your Department relying on a conflicted proponent company's document to advise you on assessments of Sections 10 and 12 ATSIHP Act applications in this case, FOMR Inc also asks why the Department is ignoring the weight of all the alternative evidence, expert and rigorous, from multiple expert and well informed entities and individuals and practically *all of it* in support of the ATSIHP Act applications.

Further, as far as we are aware, all the submissions to you and your department on the Sections 10 and 12 ATSIHP Act applications from Mrs Robinson and Mr Caines in this matter, are in full support of your expert consultant's recommendations, including that you declare the proposed mine site and surrounds a Significant Aboriginal Area.

And as we made clear in our letter to you last week (23 January 2023, at *Appendix 2 (23/01/23)*), the evidence is incontrovertible that under the MNES provisions of the EPBC Act, you must intercede and make a Ministerial decision as to whether or not Boral Limited's sand mine at Stage 5B, Dunmore, can proceed.

In summary, FOMR Inc. and its members and supporters are seriously concerned that your Department has relied on and intends to rely again on defective, inconsistent and incomplete documentation provided by a proponent mining company, with the highest vested interests, for the Department's assessment, under Commonwealth legislations, of that same company's environmental and cultural heritage impacts on an area of very high Aboriginal significance and national environmental values.

We find that your Department's decisions and actions in this matter are entirely inconsistent with what we have come to expect, since Federation, that the Commonwealth public service will provide governments and ministers with balanced, unbiased and accurate advice and information, 'without fear or favour'.

Further, we are of the very strong view that with such decisions and actions, your department is also undermining all the renewed hope you promised Australians after 21 May last – that with the new government would come more robust and effective environmental public policy to redress the appalling neglect of the previous decade or more and to prevent a continuation of that neglect.

We ask you to immediately address these inconsistencies and deficient Departmental decisions and actions by utilising the Ministerial authority vested in you under the MNES provisions of the EPBC Act and the powers under Section 10 of the ATSIHP Act, to make prompt Ministerial decisions on the basis of the weight of all the evidence, including the recommendations of your expert consultant in the case of the ATSIHP Act, in relation to Boral Limited's proposed Stage 5B sand mine at Dunmore, NSW.

We are, of course, open to providing you with any further information or the answers to any questions. Please contact us accordingly at any time.

Yours sincerely,

Will Chyra
Chair, FOMR Inc.

0419 633 191

APPENDIX 1 (30/0123)

----- Original Message -----

From:
"ATSIHPA" <ATSIHPA@dcceew.gov.au>

To:
"ATSIHPA" <ATSIHPA@dcceew.gov.au>

Sent:
Fri, 27 Jan 2023 01:23:45 +0000

Subject:
Procedural Fairness Documents - Dunmore - 10 September 2021 Section 10 and 12 Applications [SEC=OFFICIAL:Sensitive]

Dear parties

We refer to the applications made under sections 10 and 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) on 10 September 2021 by Ms Sharralyn Robinson, seeking protection of a specified area known as Dunmore Lakes Sand & Soil in Dunmore, New South Wales (**specified area**).

The department intends to rely on the document titled 'Information on GPR survey findings – Boral – 27-09-22_Redacted' towards its assessment of Ms Robinson's section 10 and section 12 applications. This document was provided to interested parties on 31 October 2022 in relation to the 7 September 2022 section 10 application.

If you have any issues or questions in relation to the use of this document and this process, please provide comments by reply email to ATSIHPA@dcceew.gov.au by no later than **3 February 2023 by 5:00pm AEST**.

We kindly request that you confirm receipt of this email.

Kind regards,

Georgia

Dr Georgia McWhinney

Senior Policy Officer

First Nations Heritage, Wildlife and Planning Division| First Nations Heritage Office | First Nations Heritage Assessments Section

Ngunnawal Country, John Gorton Building, King Edward Terrace, Parkes ACT 2600
Australia

Department of Climate Change, Energy, the Environment and Water

DCCEEW.gov.au ABN 63 573 932 849

Acknowledgement of Country

Our department recognises the First Peoples of this nation and their ongoing connection to culture and country. We acknowledge First Nations Peoples as the Traditional Owners, Custodians and Lore Keepers of the world's oldest living culture and pay respects to their Elders past, present and emerging

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APPENDIX 2 (30/01/23)

Friends of Minnamurra River Incorporated

9 Samuels Lane
KIAMA DOWNS
NSW 2533



Email: FOMR2533@gmail.com

Ms Tanya Plibersek MP
Minister for Environment
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

23 January 2023

cc. Environment Minister's Electorate Office, PO Box 2676, Strawberry Hills, NSW 2012; Mr Dan Doran, Chief of Staff, Environment Minister's Office, PO Box 6022, House of Representatives, Parliament House, Canberra 2600.

Dear Minister

This is to alert you that research and scientific advice available to Friends of Minnamurra River (FOMR) Inc³ indicates that decisions by your Department may have resulted in a breach of the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and will probably result in further breaches of the Act, particularly its provisions relating to a Matter of National Environmental Significance (MNES).

The possible breach of the Act is indicated in a letter sent to FOMR on your behalf on 23 December 2022 from a Ms Kate Gowland, A/g Head of your Department's Environment Assessments (NSW, ACT) Branch.

In that letter, Ms Gowland referred to a proposal by Boral Limited for a deep sand mine and associated infrastructure at Boral's Stage 5B site at the Dunmore Lakes Sand Mining Project immediately south of Dunmore House, near the Minnamurra River at Dunmore, NSW.

The new mine, on leasehold land, is awaiting imminent development as a sand mine after approval by the NSW government and is the subject of two applications under sections 9, 10 and 12 of the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act).

In December 2020, on the basis of all the evidence, our FOMR secretary formally complained to the former Commonwealth Minister for Environment that both Boral Limited and the NSW Department of Planning, Industry and Environment, had failed to notify the

³ Friends of Minnamurra River (FOMR) is an active incorporated community-based association formed five years ago to conserve, protect and enhance the estuarine and catchment ecosystems of the Minnamurra River. It has qualified expertise available to it and within its membership in plant and animal ecology, archaeology, hydrology and environmental science.

then federal Minister for Environment that they were proposing a mine named the Dunmore Lakes Project ‘that will have, or is likely to have, a significant impact on a Matter of National Environmental Significance (MNES), a Commonwealth-listed critically endangered ecological community of SE Littoral Rainforest’.

Failure to notify your Department of a possible impact of an activity or development on a federally listed endangered ecological community such as the SE Littoral Rainforest, is, of course, a breach of the EPBC Act.

It is important to note that the critically endangered SE Littoral Rainforest community at and near the Dunmore Lakes Project mine site varies from mature SE Littoral Rainforest, some of which actually overhangs the boundary fence of the mine site and the proposed dredge pit, to young regrowth and semi-mature stands at and surrounding the proposed dredge pit site.

Importantly, the Littoral Rainforest species is ecologically associated with – in fact, an integral part of – the ancient Bangalay Sand Forest ecosystem on the mining site.

Both Boral Limited and the NSW Department of Planning, have acknowledged that this Bangalay Sand Forest and its associated plant communities, including the SE Littoral Rainforest in various stages of maturity, regrowth and recovery, is to be completely cleared – levelled - to make way for the mine and its infrastructure at Stage 5B.

Both Boral Limited and the Department are unaware - or seem to be unaware - that the critically endangered and Commonwealth-listed SE Littoral rainforest is ecologically associated or integrated with the Bangalay Sand Forest community/ecosystem which is to be totally destroyed.

This returns us to your Department’s 23 December 2022 letter to FOMR.

Ms Gowland states that as a result of our 2020 complaint to the former minister, “Boral were made aware of their responsibility to refer the project under the EPBC Act, if there is likely to be a significant impact on a matter protected by the EPBC Act.”

Ms Gowland also stated: “At the same time, the former Department of Agriculture, Water and the Environment *reviewed the assessment documentation that Boral provided to the NSW Government for the proposal.* (FOMR’s italics, for emphasis.)

Ms Gowland continued: “That documentation indicated that areas of threatened ecological communities, including communities equivalent to the EPBC Act listed Coastal Swamp Oak (*Casuarina glauca*) Forest of New South Wales and South East Queensland and Littoral Rainforest and Coastal Vine Thickets of Eastern Australia *will be avoided.*” (FOMR’s italics, for emphasis, again).

These statements to FOMR from your Department are demonstrably incorrect and misleading and as such subvert and undermine the EPBC Act, particularly its MNES provisions, so much so that you may be wrongly advised and consequently forego your legislative responsibility to give Ministerial approval of an action ‘if the action has, will have, or is likely to have, a significant impact on a matter of national environmental significance’.

As a result of Ms Gowland's letter to FOMR, we are very much concerned that it appears that your Department has accepted, *prima-facie* and without any further investigation or research, a second-hand environmental assessment from a mining company proponent that has a huge vested interest in downplaying any and all environmental impediments to its proposed project.

Your Department and its officers should not have made any decision on such a flimsy basis about whether or not there had been a breach of the MNES provisions of the EPBC Act in this case and whether or not there was a need for Commonwealth Ministerial approval of the 'activity', ie. Boral Limited's proposed new Stage 5B sand mine at Dunmore, NSW.

However, it appears from your Department's letter to us of 23 December that such decisions have, in fact, been made.

FOMR is writing to you now both to point out that your Department's decision in this case has nearly certainly resulted in a breach of the EPBC Act (failure to refer to the Minister an action that is likely to have a significant impact on a matter of national environmental significance) and put the Department in danger of not detecting and preventing potential serious breaches of the EPBC Act in relation to the proposed new sand mine at Dunmore, NSW.

We will also provide you with the documentary evidence to support this.

To start with, your Department's reliance on the NSW Department of Planning is administratively defective and scientifically doubtful because of the NSW department's shortcomings in the process leading to Boral being granted approval for the new sand mines at Dunmore Lakes.

The evidence all points to the NSW department shepherding Boral's mining license application through the NSW planning bureaucracy, circumventing legalities/regulatory requirements along the way.

Expert scientific advice available to FOMR also indicates serious deficiencies and inadequacies in the NSW department's environmental and other assessments of the Dunmore Lakes project, assessments based not on empirical research and independent investigation by the NSW department but nearly totally reliant on Sydney-centric desk studies and again, on Boral's own self-serving assessments – on which your Department has also inadvisably relied.

During the first five months of 2021, following the NSW Independent Planning Commission's (IPC) approval in November 2020 of Boral's proposed Stage 5B sand mine, FOMR undertook a very intensive and detailed examination of all the data and information - including the environmental assessment on which your Department has more recently relied - generated by both Boral Limited and the NSW Department of Planning to support Boral's years-long application for the new mines at Dunmore Lakes.

The report's Summary of Conclusions (a – d, below) should be disturbing enough to prompt your officers to urgently read the full report (*Appendix 1*) and consider it against what Ms Gowland has stated re: MNES in the Department's 23 December 2022 letter to us.

“The unavoidable conclusions to be drawn from a reading of the following analysis (Appendix 1) are that:

- (a) **There has not so far been any scientifically-based environment assessment, detailed or accurate, of the impacts of the proposed Boral Australia new sand mining pits in the Minnamurra River catchment, approved in November 2020 by the NSW government-appointed Independent Planning Commission (IPC);**
- (b) **The Assessment report on the proposed new sand mining pits prepared for the IPC by the NSW Department of Planning, Industry and Environment (DPIE) – and on which the IPC said it relied almost entirely as the basis for its approval of the new mines - was a theoretical exercise conducted from the department’s head office without the benefit of much needed peer reviewed fieldwork or scientific studies;**
- (c) **The DPIE’s ‘Assessment’ on which the IPC relied, was not formulated from original research, studies or fieldwork by the department but in large part comprised only selected summaries of a 25 April 2019 document entitled *Environmental Assessment of the Dunmore Lakes Sand Extraction Project Modification 2*, produced by consultants to Boral Australia to support the company’s application for new sand mining pits in the Minnamurra River catchment and also relying extensively in key assessments only on broad ‘guidelines’ provided by NSW government agencies, and**
- (d) **As a consequence, the two IPC commissioners did not have complete, balanced or scientifically rigorous information available to them on which to base their decision to approve Boral’s two new mine pits and it is reasonable to propose that their decision would have been different if they had been fully, properly and scientifically informed by DPIE or an independent environmental assessor.**

The full report of FOMR’s findings, which have been extensively published, is at *Appendix 1*.

The past failure to refer to your Department the proposed complete destruction of the 100 to 400-year old Bangalay Sand Forest trees and their associated listed EEC of Littoral Rainforest, to make way for the Boral sand mine at the Stage 5B site at Dunmore, appears to be in clear breach of the EPBC Act and it is evident there will be continuing, serious breaches if your Ministerial approval for the mining activity is not sought, even at this stage.

Boral Limited has told FOMR, as it has also asserted to your Department (as we know from Ms Gowland’s 23 December letter), that the two Commonwealth-listed EECs on its Stage 5B mine site will not be affected by its mine. In a letter to FOMR, Boral stated: “Swamp Oak Floodplain Forest (an EEC also listed under the EPBC Act) and Littoral Rainforest occur to the south east of the site but will not be directly impacted by the modification (the new Stage 5B mine)”⁴. (Note that Boral made no mention of indirect impacts which must also be included in any sound environmental impact assessment.)

⁴ Letter from Adnan Voloder, Boral Limited Planning and Development Manager (NSW and ACT), to Will Chyra, Chair, FOMR Inc, 29 June 2021.

However, there is no doubt, from applying the Australian Government criteria, that the new Stage 5B mine *will* cause impacts to those two Commonwealth-listed Endangered Ecological Communities which will potentially cause further breaches of the MNES provisions of the EPBC Act.

FOMR applied the Significant Impact Criteria for Critically Endangered and Endangered Ecological Communities, as set out in your Department's publication, *Matters of National Environmental Significance, Significant impact guidelines 1.1*⁵ and found that all seven impacts described would, in all likelihood, apply to the new Stage 5B mine at Dunmore and therefore, require your Ministerial approval for the mine to proceed.

The Commonwealth's significant impacts criteria are easy to understand because they are intended as guidelines for "a self-assessment process, including detailed criteria, to assist persons in deciding whether or not referral may be required."⁶ They state:

An action is likely to have a significant impact on a critically endangered or endangered ecological community if there is a real chance or possibility that it will:

- *reduce the extent of an ecological community*
- *fragment or increase fragmentation of an ecological community, for example by clearing vegetation for roads or transmission lines*
- *adversely affect habitat critical to the survival of an ecological community*
- *modify or destroy abiotic (non-living) factors (such as water, nutrients, or soil) necessary for an ecological community's survival, including reduction of groundwater levels, or substantial alteration of surface water drainage patterns*
- *cause a substantial change in the species composition of an occurrence of an ecological community, including causing a decline or loss of functionally important species, for example through regular burning or flora or fauna harvesting*
- *cause a substantial reduction in the quality or integrity of an occurrence of an ecological community, including, but not limited to: assisting invasive species, that are harmful to the listed ecological community, to become established, or*
- *causing regular mobilisation of fertilisers, herbicides or other chemicals or pollutants into the ecological community which kill or inhibit the growth of species in the ecological community, or*
- *interfere with the recovery of an ecological community.*

On the evidence, every one of these criteria will cause or is likely to cause significant impacts on the Commonwealth-listed EEC, the SE Littoral Rainforest, in the proposed Boral Limited mine site, Stage 5B, at Dunmore, NSW.

Such adverse impacts on the Littoral Rainforest, and probably at least parts of the second Commonwealth-listed EEC at the site, the Coastal Swamp Oak Forest, are simply unavoidable if the mine proceeds because the Littoral Rainforest alone, in its various stages

⁵ *Matters of National Environmental Significance – Significant impact guidelines 1.1 – Environment Protection and Biodiversity Conservation Act 1999*, Australian Government, Department of the Environment, Commonwealth of Australia, Canberra ACT, 2013, p.11.

⁶ *Ibid.*, p. 1.

of maturity and ecological recovery after earlier European land use, is present practically throughout and also immediately adjacent to the proposal Boral mine site.

Consequently, it is simply false to state, as Boral Limited has done, that the sand mining activities at the 5B site would be “avoidable”. The mining ‘activities’ include dredging a very large open-cut mine, 27-metres deep, and after the two year life of the mine leaving it as a privately-owned lake only a couple of hundred metres from the pristine reaches of the Minnamurra River..

Additionally, it is completely inexpedient for an Australian Government department, particularly that responsible for the environment portfolio, to base on a second-hand, defective and theoretical environmental assessment from a company project proponent with the highest vested interests, any determination about both the notification and the impact of mining activities by that same company on a Commonwealth-listed Endangered Ecological Community.

As you know, under the EPBC Act, an action will require approval from the Minister if the action has, will have, *or is likely* to have, a significant impact on a matter of national environmental significance.

Significantly, the Department’s document states: “To be ‘*likely*’, it is not necessary for a significant impact to have a greater than 50% chance of happening; it is sufficient if a significant impact on the environment is a real or not remote chance or possibility.

“If there is scientific uncertainty about the impacts of your action and potential impacts are serious or irreversible, the precautionary principle is applicable. Accordingly, a lack of scientific certainty about the potential impacts of an action will not itself justify a decision that the action is not likely to have a significant impact on the environment.”⁷

On the basis of your Department’s own guidelines, then, Boral Limited’s Stage 5B mine at Dunmore will need your Ministerial approval to proceed.

As you are undoubtedly aware, substantial penalties apply for taking such an action (in this case proceeding with the Stage 5B sand mine at Dunmore) without Ministerial approval: civil penalties up to \$5.5 million or criminal penalties up to seven years imprisonment.

In order to investigate whether there would likely be indirect significant impacts on the two EECs in the Stage 5B mining area at Dunmore, indirect impacts that FOMR may not have previously considered, following your Department’s 23 December letter, we asked one of our FOMR expert advisers to provide a report on whether or not there are any other factors which may count, directly or indirectly, as significant impacts, as defined by your Department’s guidelines, on the Stage 5B Commonwealth-listed EECs.

There most certainly are and our adviser’s report is at ***Appendix 2***.

In summary, FOMR is hereby alerting you to an existing apparent breach of the EPBC Act by your Department (failure to notify an activity which may have a significant impact on an EEC) and asking you to immediately ensure that your Ministerial approval is required for the

⁷ *Ibid.*

Stage 5B sand mining at Dunmore to proceed, thereby preventing any further breaches of the MNES provisions of the EPBC Act.

Please contact us if you require any further information or clarification of any matters contained in this letter.

We would also appreciate your advice at the earliest possible time that you have taken the actions necessary to restore our confidence, and that of the public, in the decision-making in relation to Boral Limited's proposed Stage 5B sand mine at Dunmore, NSW, and the protection of the two Commonwealth-listed EECs at the site.

Yours sincerely,

Will Chyra
Chair

0419 633 191

APPENDIX 1 (23/01/23)

INACCURACIES, INCONSISTENCIES AND OMISSIONS OF THE SEPTEMBER 2020 ASSESSMENT REPORT BY THE NSW DEPARTMENT OF PLANNING, INDUSTRY AND ENVIRONMENT (DPIE) OF AN APPLICATION BY BORAL AUSTRALIA FOR A STAGE 5 SAND MINING OPERATION IN THE MINNAMURRA RIVER CATCHMENT, DUNMORE NSW

by

FRIENDS OF MINNAMURRA RIVER INC., 21 MAY 2021

SUMMARY OF CONCLUSIONS

The unavoidable conclusions to be drawn from a reading of the following analysis are that:

- (e) There has not so far been any scientifically-based environment assessment, detailed or accurate, of the impacts of the proposed Boral Australia new sand mining pits in the Minnamurra River catchment, approved in November 2020 by the NSW government-appointed Independent Planning Commission (IPC);**
- (f) The Assessment report on the proposed new sand mining pits prepared for the IPC by the NSW Department of Planning, Industry and Environment (DPIE) – and on which the IPC said it relied almost entirely as the basis for its approval of the new mines - was a theoretical exercise conducted from the department’s head office without the benefit of much needed peer reviewed fieldwork or scientific studies;**
- (g) The DPIE’s ‘Assessment’ on which the IPC relied, was not formulated from original research, studies or fieldwork by the department but in large part comprised only selected summaries of a 25 April 2019 document entitled *Environmental Assessment of the Dunmore Lakes Sand Extraction Project Modification 2*, produced by consultants to Boral Australia to support the company’s application for new sand mining pits in the Minnamurra River catchment and also relying extensively in key assessments only on broad ‘guidelines’ provided by NSW government agencies, and**
- (h) As a consequence, the two IPC commissioners did not have complete, balanced or scientifically rigorous information available to them on which to base their decision to approve Boral’s two new mine pits and it is reasonable to propose that their decision would have been different if they had been fully, properly and scientifically informed by DPIE or an independent environmental assessor.**

Background

This issue arises from a determination by the Independent Planning Commission on 16 November 2020, endorsed by the DPIE exercising its Ministerial delegation.

DPIE says this determination, which gave consent to a new sand mining project (known as Dunmore Lakes - Modification 2), necessitates the destruction of 4.5ha of rare, ancient and high quality bird and animal habitat, being the Bangalay Sand Forest, comprising 100 to 400-year old trees.

This Bangalay Sand Forest, protected as an Endangered Ecological Community (EEC) under Regulations for which the Minister holds statutory authority, is to be cut and cleared to make way for the two new sand mining pits – with an operational life of only three to four years - in a sensitive river catchment area.

Further, in addition to the destruction of the protected 4.5ha of Bangalay Sand Forest, other protected vegetation and potentially significant environmental matters were not subject to sufficient scientific assessment of the direct and indirect impacts of the proposed new sand mining.

These additional protected ecosystems include:

- the Critically Endangered SE Littoral Rainforest, protected under NSW legislation and listed under the federal *Environment Protection and Biodiversity Conservation Act* (EPBC Act);
- another Endangered Ecological Community (EEC), Coastal Saltmarsh, protected in NSW and listed as vulnerable under the EPBC Act and for which the NSW government has developed a “Save Our Species” recovery program to try to reverse the continuing loss of this high value EEC, and
- Swamp Oak Flooplain Forest (EEC) protected in NSW and listed as Endangered under the federal *Environment Protection and Biodiversity Conservation Act* (EPBC Act).
- DPIE also says that six fauna species listed as threatened under the NSW *Biodiversity Conservation Act* have also been recorded in the mining site to be cut and cleared: the Dusky Woodswallow, Varied Sittella, Southern Myotis, Eastern Bentwing-bat, Eastern Freetail-bat and the Grey-headed Flying Fox

The NSW Government’s Threatened Species Scientific Committee says that Littoral Rainforest in the NSW North Coast, Sydney Basin and South East Corner Bioregions is likely to become extinct in nature in New South Wales unless the circumstances and factors threatening its survival (including further fragmentation, clearing, mining and development) or evolutionary development, cease to operate.

However, the IPC has approved potentially more of its destruction or degradation in its Dunmore Lakes determination.

In addition to the high risks to some of the most sensitive, protected and rare ecosystems/environments in NSW, this same IPC determination approving Boral Australia’s two new sand mining pits presents other potentially significant and adverse environmental impacts in the sensitive Minnamurra River catchment.

Despite this and because DPIE conducted and approved an environmental assessment using legislation and regulations repealed 10 years ago, no Environmental Impact Statement (EIS)

has been undertaken to determine the full extent and details of the various environmental impacts.

Indeed, the IPC has relied on a lower and repealed standard in order to support its determination.

The DPIE also says the proposed clearing represents a very small proportion of the Bangalay Sand Forest EEC and would attract an offset obligation commensurate with the vegetation quality present across the site.

In recommending to the IPC the approval of the two new Boral sand mining pits, one of them only 160 metres from the tidal reaches of the Minnamurra River estuary, the department told the IPC that despite the destruction of a substantial area of a State-protected Endangered Ecological Community with all its many unique, high quality bird and animal habitats, together the destruction of other native vegetation and animal and bird habitats and the risks to adjoining additional Endangered Ecological Communities, also State-protected, ***“the proposed modification could be carried out in a manner that would not cause significant impacts to surrounding areas”***.

Clearly the Planning and Industry divisions of the department outweighed the considerations of the Environment division because the DPIE came out in the summary of its Assessment of the proposal on the side of the economics of the sand mining expansion – regardless of the planned total destruction of some of the rarest ecosystem in NSW.

The Department’s assessment has also found that subject to the imposition of suitable conditions, the proposed modification could be carried out in a manner that would not cause significant impacts to surrounding areas.

The IPC said it approved the two new sand mining pits on the basis of the economics of the project, relying on DPIE’s dismissal of the environmental destruction and other environmental risks as ‘not significant impacts’.

FOMR and its advisers have closely analysed DPIE’s assessment of the sand mining extension and found that the environmental assessment in particular is highly deficient and misleading, containing inadequacies and inaccuracies and serious incompleteness by omission.

FOMR has publicly stated that DPIE did not provide all the data and assessment information essential for the IPC to make a fully informed decision on whether or not to approve the sand mines and there is a good chance that the IPC may not have approved the mines if it had received all relevant assessment data and information.

The NSW government already has the regulatory power to stop the mines proceeding and to order a full and proper assessment under new and existing legislation.

This document is an attempt to identify some of the many gaps left by the NSW DPIE in its assessment of the impacts of the proposed new sand mining and its advice to the IPC and consequently, to raise serious questions about the effects that the shortcomings of the DPIE report may have had on the soundness of the IPC decision to approve the new sand mines.

INACCURACIES AND INCONSISTENCIES:

Vegetation

1. **The DPIE Assessment report of September 2020** (<https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2020/09/du-nmore-lakes-project-modification-2/referral-from-the-department-of-planning-industry-and-environment/dpie-modification-assessment-report.pdf>) clearly **provided inconsistent and inaccurate and therefore entirely misleading information to the Independent Planning Commission (IPC) on the most important of all the assessment criteria – the impact of the proposed new mine pits on the natural environment of the Minnamurra River catchment.**
2. The most glaring inconsistency is the stark variation in DPIE's Assessment report of the numbers of 100-year-old to 400-year-old trees it states are in the State-protected Endangered Ecological Community of Bangalay Sand Forest that will be cut down and cleared to make way for a 27-metres deep sand mine pit, 5B.
3. Additionally, DPIE does not name the trees anywhere in its report, possibly in an attempt to de-emphasise the severity of the destruction of an ancient and rare, legislatively protected forest, classified by the NSW government as an Endangered Ecological Community (EEC) and with extremely high wildlife habitat values which cannot be replaced or substituted.
4. In the entirety of its report, the DPIE identifies the trees only as 'Hollow bearing trees' but as they are shown in the report as being located in the Bangalow Sand Forest EEC, they must be the ancient and rare Bangalay trees (*Eucalyptus botryooides*) because the only tree which grows hollows in Bangalay Sand Forest is the Bangalay.
5. The DPIE report contradicts itself about the actual numbers of Bangalay trees and 'Stags' (dead but standing Bangalay trees of immense value as bird and wildlife habitat) to be destroyed in the 5B mine site.
6. To exemplify the contradictions, the report's Figure 6 on page 31 shows nine (hollow bearing) Bangalay trees and one Stag in the Bangalay Sand Forest on the mine site but on page 30, the report states that the 5B site includes "38 hollow bearing trees and 4 hollow bearing stags". (Observations by FOMR advisers show that this higher figure is most likely closer to the correct number but still may be underestimated.)
7. To further exemplify the inaccuracies and inadequacies in DPIE's Assessment report, particularly in relation to the all-important Bangalay Sand Forest, Figure 6 - *Bangalay Sand Forest EEC at the (5B) site* (p.31 of Assessment report) – shows eight "hollow bearing trees" which FOMR knows to be Bangalay trees, on the parts of the site which DPIE says (without substantiation) are areas of Poor condition and Moderate condition Bangalay Sand Forest but only one Bangalay tree in the area it says has Good condition BSE. Observations show that this mapping is yet another inaccuracy in DPIE's report.

8. The fact remains, however, that the IPC was never accurately or fully informed by DPIE about the actual number of rare and protected trees which are to be cut and destroyed by preparation for the new sand mine 5B.
9. Despite this, the IPC in making the decision to approve the new mine sites, a decision which will ultimately result in the endangered forest's destruction, says there will be "no long-lasting ill-effects to the environment", echoing the conclusion of DPIE's Assessment report that the new mines will have "only limited environmental impacts", all based on the same inadequate and inaccurate DPIE report.
10. There are serious discrepancies over time in the reported number of Bangalay trees in the Bangalay Sand Forest Endangered Ecological Community to be cleared to make way for the proposed mine pit 5B.
11. DPIE's Assessment report says the number of trees to be cleared is "38 hollow bearing trees and 4 hollow bearing stags' (dead trees providing prolific wildlife habitat).
12. The original Boral consultant's Assessment report of 25 April 2019 describes the trees to be cleared to make way for mine pit 5B as 11 Bangalay trees and 1 stag with a total of 31 hollows.
13. Boral's Planning and Development Manager in a Zoom meeting in 2020 described what was to be removed as 38 hollow bearing trees in a 50 tree total. FOMR strongly believes that the 38 trees described simply as 'hollow bearing trees' are Bangalay trees (*Eucalyptus botryoides*), constituting a substantial part of the site's protected Endangered Ecological Community, Bangalay Sand Forest.
14. DPIE's Assessment report also does not mention other tree species which FOMR's experienced advisers have also observed in the 5B mine pit site. These include several large mature Coastal banksia (*Banksia integrifolia*) and several large mature Cheese trees (*Glochidion ferdinandi*) scattered though the clumps of Bangalay Sand Forest Endangered Ecological Community.
15. There are also numbers of other trees visible from a nearby hilltop, including some that look like Corkwood (*Duboisia myoporoides*). The DPIE Assessment makes no mention of any such diversity of trees or other vegetation.
16. The DPIE Assessment report also fails to point out to the IPC and other readers the importance of the Bangalay Sand Forest for animal and bird habitat. FOMR's advisers state that the number of hollows in the "38 hollow bearing trees" plus 4 stags must surely exceed 100 and certainly many more than the originally presented 31 hollows. However, a final or updated number of hollows cannot be found in any report.
17. Hollows – as wildlife habitat - are the most outstanding feature a Bangalay tree presents to this proposed mining site. Bangalay trees, which often live to more than 500 years, throw or discard more and more limbs as they age, thereby creating more and more hollows for bird nesting and refuge and for other wildlife habitat.

18. The manufactured bird nesting boxes which the DPIE Assessment report says can replace the cleared Bangalay trees at the mine site can only be seen as a very poor substitute, just on the basis of the time they last – about 30 years for the highest quality manufactured nesting box compared with the 400 years of the natural Bangalay.

INACCURACIES AND INCONSISTENCIES

Vegetation

19. **The DPIE Assessment report contains unbalanced statements in key sections, such as Terrestrial Biodiversity, which serve to minimise or de-emphasise the potential negative impacts of the proposed new mine pits, particularly 5B.**
20. For example, after stating that 4.5ha of a rare, ancient, endangered and protected Bangalay Sand Forest will be cut and cleared to make way for the 5B mine pit, DPIE says: “The proposed clearing represents a very small proportion of this EEC (Endangered Ecological Community), which is recorded all along the Eastern seaboard from Sydney to the Victorian Border and covers a total area of around 6,300 ha.”
21. If the Bangalay Sand Forest is, as DPIE states, so prolific that we can afford to lose parts of it for sand mining, why is it protected under NSW law and listed, also under NSW law, as an Endangered Ecological Community (EEC)?
22. The DPIE’s Assessment report conflicts directly with the reality of the true plight of the remaining endangered ecological communities of Bangalay Sand Forest as described by other agencies and advisory bodies of the NSW government itself.
23. Therefore, when referring the matter to the IPC, the DPIE did not advise that the clearing of native vegetation is listed as a Key Threatening Process under the NSW *Threatened Species Conservation Act (1995)* or that the Bangalay Sand Forests are ‘likely to become extinct’ directly as a result of the sort of destructive clearing that the preparation for the 5B sand mine pit would cause.
24. In fact, instead, DPIE stated in its referral to the IPC that the new sand mining operations:
“could be carried out in a manner that would not cause significant impacts to surrounding areas.”
25. Also unbalanced and misleading in DPIE’s report for the IPC is the emphasis on monetary compensation by Boral for destruction of the Endangered Ecological Community and several bird species.
26. DPIE told the IPC members through the DPIE Assessment report – and the IPC members in granting approval for the new sand mines agreed – that the State-protected endangered ecological community could be cut and cleared provided that the mining company, Boral Australia, paid compensation monies, as Biodiversity credits, into a NSW biodiversity Trust Fund.

27. Of course, dollars in a government trust fund are never going to compensate for or provide instant substitutes for 100-year-old to 400-year-old trees or their diversity of multiple ecosystems that currently support a wealth of rare habitat for animals, birds, plants, insects and microbes, many of them listed as endangered – not even following the mine pits’ operational closure after only three or four years. Community representatives were denied the opportunity to impart their own authoritative knowledge about the values of the proposed mine sites’ environments.

INACCURACIES AND INCONSISTENCIES:

General/Administrative

28. All indications are that DPIE prepared its Assessment of Boral’s new sand mines’ application entirely in head office in Sydney. There is no evidence of any field investigations or studies by DPIE or its consultants in the areas in the Minnamurra River catchment to be impacted by the new sand mines.
29. Apart from a site visit of less than a day by the two Independent Planning Commission government appointees, during which selected members of the community were permitted to accompany the officials, DPIE denied FOMR and other interested members of the community permission to visit and inspect the two proposed sand mine pit sites.
30. Even during the only visit by the IPC appointees, most of the time was spent at Boral’s existing sand mining site discussing sand dredging pit rehabilitation. Only about 25 minutes was spent by the IPC appointees and the accompanying officials and community members at the proposed two new sand mine sites and there was no time allowed for a walk around or close inspection of the sites, particularly 5B.
31. Leadership/direction of DPIE’s Assessment process/project changed no fewer than five times in the course of the assessment project following the announcement that the IPC would determine the Boral new mines’ application.
32. FOMR has the names of five DPIE officers who took over leadership of the assessment effort, including liaison with FOMR and other interested members of the community, before disappearing shortly after becoming familiar with their task and being replaced by a new officer. Each new officer had to start the leadership, knowledge-gathering and liaison/communications’ process all over again, before that person also disappeared and the entire learning and familiarisation process had to begin again with yet another new officer.
33. From FOMR’s observations, the revolving door leadership of DPIE’s Assessment effort militated against the sort of untrammelled communications which should normally be expected in such government assessment project processes, both between NSW government agencies and the community and between the government agencies involved, particularly DPIE, and local governments, scientific bodies and other authorities.

34. In FOMR's experience, it is apparent that such administrative dysfunction in DPIE's assessment process not only resulted in some of the many of the inadequacies, inaccuracies and omissions of the department's final Assessment report detailed in this FOMR analysis but nearly completely undermined any confidence that FOMR and other community members may have had in DPIE's ability to properly assess and provide balanced and informed assessment information.
35. Such information would have been clearly essential for the IPC if it were to make a proper, fully informed decision for or against Boral's new mines' application.

INACCURACIES AND INCONSISTENCIES:

Scientific Rigour

36. **DPIE's Assessment report lacks any of the scientific rigour normally expected in such assessments. For example, practically the entire report contains only assertions, statements and predictions *all* without any scientific referencing or substantiation.**
37. Take, for example, the primary conclusion in the Assessment report, the conclusion that went forward to the IPC:
- "The Department has considered all issues raised in submissions and assessed the impacts of the proposed modifications in detail in accordance with all relevant NSW legislation, policies and guidelines.*
- "Based on this assessment, the Department has found that the proposed modifications offer several benefits, including that they would provide:*
- for the continued development and recovery of a State significant sand resource;*
 - high quality construction sand products to the Illawarra and Greater Sydney regions; and*
 - continuity of operations and employment of 10 operational staff and additional truck drivers at an established quarrying operation.*
- "The Department's assessment has also found that subject to the imposition of suitable conditions, the proposed modification could be carried out in a manner that would not cause significant impacts to surrounding areas."*
38. The department's last paragraph above completely ignores the complete destruction of an ancient, rare and endangered ecological community, Bangalay Sand Forest, and all the other components which make up this rare and endangered EEC, currently protected by NSW government legislation, to make way for the 5B sand mine pit.
39. And overall, after the Department's assessment of the proposal - not against scientific or environmental assessment criteria but against only "all relevant NSW legislation, policies and guidelines" – DPIE finds in favour of economics over and above the obvious strong environmental considerations:

40. DPIE concludes that the loss of an endangered and State-protected rare ecosystem together with the manifold threats to three other adjoining endangered ecological communities, is less important than • *the continued development and recovery of a State significant sand resource; • high quality construction sand products to the Illawarra and Greater Sydney regions; and • continuity of operations and employment of 10 operational staff and additional truck drivers at an established quarrying operation.*
41. The IPC approved the project on precisely these economic factors alone, quoting nearly verbatim the DPIE Assessment report in a news release on 16 November 2020 detailing the reasons for its approval of the new mine pits:

“[T]he Application would extend the life of an established quarrying operation and would ensure the continued delivery of high-quality construction sand products to the Illawarra and Greater Sydney region,” it found. “[T]he continued development and recovery of a State significant sand resource is an orderly and economic development of the Site” and “will generate economic benefits for the region and for NSW and will also provide ongoing social benefits through continuing employment.”

INACCURACIES AND INCONSISTENCIES:

Vegetation

42. In its Assessment report, the NSW DPIE ‘cherry picks’ a document titled *Environmental Assessment of the Dunmore Lakes Sand Extraction Project Modification 2* prepared for Boral Australia in April 2019 by its consultant, Element Environmental Pty Ltd.

The ‘Environmental Assessment’ was an environmental assessment mainly in name only and (see later) conducted under NSW government guidelines designed to calculate the monetary compensation which must be paid to the NSW government by developers and miners who destroy native flora and fauna in the course of their projects.

43. This “Assessment’ drawn on by NSW DPIE in the preparation of its assessment for the IPC, used an incorrect and scientifically erroneous name for the Bangalay Sand Forest EEC. It described it as ‘Bangalay Old-man Banksia open forest on coastal sands’. The DPIE Assessment report also failed to name by species or even by common name the trees which form the Bangalay Sand Forest, the endangered ecological community which the department says will be destroyed to make way for the 5B sand mine pit. DPIE described them only as “hollow-bearing trees”. This has the effect of downgrading the importance of the Bangalay trees in the mining site area being assessed.
44. In its 16 November 2020 *Statement of Reasons for Decision* (to approve) the two new mining pits, the IPC stated that the Project posed only “limited environmental

impacts” and only “residual risks” (p.17). It also makes no reference at all and does not recognise the very high habitat values of ‘Bangalay Sand Forest’ specifically. It refers only to “the removal of habitat trees, including hollow bearing trees.” (p.11)

45. The IPC’s apparent ignorance of the importance and value of the protected and endangered Bangalay Sand Forest in an IPC decision that would ultimately mean its destruction, obviously arose from DPIE’s failure in its Assessment report on the mining proposal to highlight the ecological importance of Bangalay trees and failure to provide accurate figures of the number of such trees and associated dead tree habitats.

INACCURACIES AND INCONSISTENCIES:

Aboriginal Cultural Heritage

46. **The Aboriginal cultural heritage information provided to the IPC in the DPIE Assessment report is so summarised as to be seriously deficient, completely under playing as it does the evidence of the archaeological and cultural heritage significance of the proposed sand mining site 5B.**
47. It appears that DPIE did not undertake ‘due diligence’, as required, in its Aboriginal heritage assessment. The Boral consultant’s 2019 archaeological report indicates that there are very rich archaeological deposits in the proposed mining area. This should have prompted further investigations over a wider range.
48. Additionally, the DPIE did not evaluate the impacts of the proposed 5B sand dredge pond at the 1818 Minnamurra Massacre site. Maps developed by Professor Lyndall Ryan, of Newcastle University, indicate that the dredge pond may correspond to the massacre site.
49. There are still Aboriginal people in the Illawarra who identify with the families killed or escaped from this massacre.
50. The Aboriginal community has been calling for the entire site to be recognised as a ‘cultural landscape’, and this has been completely ignored in DPIE’s assessment.

OMISSIONS:

Vegetation

51. **At no stage did the DPIE undertake an Environmental Impact Statement (EIS) of the areas in the Minnamurra River catchment which would be impacted by the proposed two new sand mining pits. In fact, DPIE also did not conduct even a detailed assessment based on field observations and studies. An EIS under State government guidelines has never been done.**

52. Instead, the department ‘cherry picked’ from an “Environmental Assessment” of the proposed new sand mining undertaken in April 2019 for Boral Australia by its consultant, Element Environmental Pty Ltd, leaving out much vital information that would inform the IPC of the real impacts of the proposed new mine pits and their infrastructure.
53. However, the Boral consultant’s assessment on which DPIE relied in its report, was also not a rigorous assessment of the impacts of the proposed mine pits on the biological diversity of the area in which they would be located in the Minnamurra River catchment.
54. Rather, it was, as the consultant’s report shows, only a paper or theoretical assessment:

“Potential biodiversity impacts from construction and operation of the proposed modification were assessed in accordance with the Office of Environment and Heritage’s (OEH) (2017) Biodiversity Assessment Method (BAM). Ecosystem and species credits were calculated for proposed vegetation clearing in accordance with the BAM.

“Public databases, vegetation mapping and the BAM Calculator were used to predict the threatened flora and fauna species, and threatened ecological communities, which could exist in or frequent the modification site.”

55. Note the words ‘calculated’, ‘predict’ and ‘could exist’. This was an exercise conducted in the office, a desk study only. There were no reported scientific studies or assessments or any fieldwork or site inspections undertaken.
56. Not only was it a theoretical exercise, it was conducted under a NSW government assessment method – Biodiversity Assessment Method (BAM) - developed in 2017 only to calculate how much developers or miners would have to pay in compensation to the government for destroying native vegetation and flora and fauna habitats in the path of their development of mining projects.
57. The BAM has since been discredited by a number of studies including one by the Nature Conservation Council of NSW which found that the scheme, which is also the subject of corruption claims, is ‘pushing more endangered species to the brink’.

OMISSIONS:

Fauna

58. The DPIE Assessment report lists **only** six of the probable 41 listed threatened or endangered fauna species which the NSW government’s biodiversity mapping system says are likely to occur in the 5B mining area.
59. It compounds this serious shortcoming in its advice to the IPC by attempting to downplay even further the importance of the faunal diversity of the 5B mining area to be cleared by stating:

“Six threatened fauna species listed under the BC Act were also recorded during (earlier Boral consultancy) field surveys, being the Dusky Woodswallow, Varied Sittella, Southern Myotis, Eastern Bentwing-bat, Eastern Freetail-bat and Grey-headed Flying Fox. The biodiversity assessment identifies that none of these six threatened bird, bat and mammal species were recorded as using the area for breeding.”

60. In other words, the theoretical government biodiversity assessment manual may not have identified the area to be destroyed as breeding areas *per se*, but it is obvious that the threatened species were using it as their favoured habitat.
61. FOMR also has expert advice that one of the important bird species missing from DPIE’s report is the endangered Powerful Owl.

OMISSIONS:

Flora

62. According to the NSW government’s biodiversity databases, 20 threatened flora species may occur in the 5B mining site area to be cleared but the DPIE does not list *any*.
63. Owing to the scant detail of the DPIE Assessment report, FOMR believes it is easy to understand why species which it believes to be present, like *Zieria* are not listed. It is unlikely to be the rare and endangered *Zieria granulata* - Illawarra *Zieria* - or the very rare and critically endangered *Zieria ziebaeuerlenii* - Bomaderry *Zieria* - but is assured by its advisers that there is *Zieria* present. The only problem is, that with the scantiness of the DPIE Assessment report and DPIE’s refusal to allow a site inspection by FOMR or other community members, it is not possible at this stage to determine which *Zieria* is on the proposed mine site to be cleared.

OMISSIONS:

General

64. There are numerous other questions on the merits of the project arising from DPIE’s inadequate assessment of environmental impacts. These include:
65. Failure to analyse cumulative impacts with the existing proposal and the new proposed infrastructure;
66. Failure to address the impact of the proposal on the Minnamurra River, a high priority Groundwater Dependent Ecosystem;
67. Failure to consider the impacts of other legislation (ie. EPBC Act);
68. Failure to properly consider impacts in relation to groundwater for threatened species and habitats, and

69. Failure to properly consider the precautionary principle in relation to the broad range of direct and cumulative environmental impacts of sand mining on the Minnamurra River catchment.
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APPENDIX 2 (23/01/23)

REPORT ON NEGATIVE ENVIRONMENTAL THREATS AND IMPACTS ON ENDANGERED ECOLOGICAL COMMUNITIES POSED BY CONSTRUCTION OF BORAL LIMITED'S STAGE 5B SAND MINE DREDGE POND AND ASSOCIATED INFRASTRUCTURE AT DUNMORE LAKES, NSW

Apart from the obvious threats and negative impacts caused by the proposed total destruction of the irreplaceable Bangalay Sand Forest - and the Littoral Rainforest species associated with it – in mining site Stage 5B, there are a number of environmental threats that are likely to result from the construction of a deep freshwater sand mining dredge pond, as proposed, closely adjacent to the Minnamurra River.

Changes to the River salinity and threats to Mangroves and native fish species

It has been observed that significant increases in freshwater entering tidal rivers can alter the Mangrove ecosystem. This has occurred where Rocklow Creek, fed by water from Boral Limited's sand mining dredge ponds upstream at Dunmore, enters the Minnamurra River.

At Rocklow Creek, a housing development has resulted in increased run-off of freshwater into the brackish estuary of the Minnamurra River and had a significant impact on the existing mangrove community as the salinity has altered.

Grey Mangrove (*Avicenia marina*) requires more saline conditions than River Mangrove (*Aegiceras corniculatum*) which prefers less saline conditions.

So by changing the levels of salinity, we change the distribution of the Mangrove species

Currently, freshwater percolates slowly through the existing Bangalay Sand Forest in the Stage 5B mining area before entering the river, and much of this water is taken up by the existing trees or held in suspension in the sand and organic matter.

This will no longer be the case when a deep pond of freshwater is constructed in the place of a healthy existing Bangalay Sand Forest.

The Minnamurra River currently has a healthy self- sustaining population of the fish, Australian Bass (*Macquaria novemaculeata*) and is also known to support the Australian Grayling (*Prototroctes maraena*), which is listed as an endangered species in NSW.

Any changes to the Minnamurra River's salinity and biota are likely to have a detrimental effect on these two species also.

Bass require a salinity range of 8 to 12 parts per thousand of sea water for successful spawning and it is inevitable that in high rainfall events, such as those regularly experienced in the local area in the past 12 months, freshwater spilling from a Stage 5B dredge pond would prevent or modify Bass spawning in the Minnamurra River estuary.

Australian Grayling breed in the freshwater section of the Minnamurra River and their larvae then spend time developing in salt water. Consequently, they are likely to be affected by

changes in water quality downstream of the normal freshwater zone of the Minnamurra River caused by the Stage 5B dredge pond.

Noxious Weed Invasion

Based on observations of what has already occurred in the Boral Limited sand mine pond adjacent to Swamp Road, Dunmore, just to the north of the Stage 5B site, it is highly likely that the new sand mine dredge pond will be colonised by the declared noxious weed known as Alligator Weed (*Altanathera philoxeroides*) which has a devastating effect on aquatic environments by smothering the water surface and choking waterways.

Additionally, when the weed dies in winter, the decomposition of organic matter causes deoxygenation of the water which readily kills fish and other aquatic life.

This highly invasive South American weed can grow on land around the margins of ponds as well as on the main water body.

It is readily spread by water birds as seed or tiny fragments of the plant are carried on their legs from one pond to another.

There is a biological control in the form of the Flea Beetle present in the existing population but as it is dormant in the cooler months, it is not effective in controlling local infestations.

Efforts by the Illawarra Weed Control Agency to control the spread of Alligator Weed have been ineffective so there is no reason to think it will not become a major infestation of the proposed Stage 5B sand mine pond.

Invasion by Common Carp

Based on observations of what has already occurred in Boral's existing sand mine pond adjacent to Swamp Road, it is highly likely that the Common Carp (*Cyprinus carpio*) will find its way into the Stage 5B pond and establish a massive population.

Carp eggs can be transported on the legs of water birds from one water body to another, as well as by humans deliberately translocating them for recreational fishing purposes.

Carp are known to be highly detrimental to our native aquatic ecosystems as they breed prolifically, consume huge amounts of food that native species rely on and destroy reed beds and other plant life by grubbing for food in water body bottom sediments. This feeding method also causes turbidity which reduces light penetration of the water thus affecting plant and animal health.

The Australian Government is currently spending millions of dollars on researching carp control methods.

The native species, Australian Bass, were introduced into Boral's existing sand mine pond adjacent to Swamp Road at Dunmore to control the Carp which entered this pond from an adjoining sand mine pond. However, the Bass have failed to control the carp, as has been the experience elsewhere.

In times of high rainfall, it is inevitable that Carp will swim out of the proposed Stage 5B dredge pond and enter the Minnamurra River. Once there, they would have a serious impact on water quality and native fish.

Given the fact that Boral's sand mining activities at Dunmore have been responsible for the proliferation of two highly invasive and environmentally destructive pest species, through the construction of previous dredge ponds, it is very concerning that the company now has approval to construct a new one (5B) where the same invasive pests are almost certain to establish.

APPENDIX 3 (05/12/23)

Friends of Minnamurra River Incorporated⁸

9 Samuels Lane
KIAMA DOWNS
NSW 2533

Email: FOMR2533@gmail.com



5 December 2022

Ms Tanya Plibersek MHR
Minister for Environment
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

tanya.plibersek.mp@aph.gov.au

cc. Dr Georgia McWhinney, Senior Policy Officer, DCCEW
(georgia.mcwhinney@dcceew.gov.au; ATSIHPA@awe.gov.au)

Dear Minister Plibersek

SUPPLEMENTARY EVIDENCE AND SUPPORTED COMMENT FURTHER CONFIRMING BORAL LIMITED'S MISLEADING, INACCURATE AND SCIENTIFICALLY BASELESS SUBMISSIONS RE: CAINES' ATSIHP ACT APPLICATION

We refer to your Department's email to us of 29 November 2022 seeking any further information we may have in relation to Mr Gary Caines' applications made on 7 September 2021 under sections 10 and 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, seeking protection of a specified area, Stage 5A and Stage 5B, of the Dunmore Lakes Sand and Soil Project, Dunmore, NSW.

Background and Summary

In relation to Sections 10 and 12 of the ATSIHP Act, FOMR Inc investigations for this submission⁹ have further confirmed that the letter sent to you on 23 September 2022 by Boral Limited's wholly owned subsidiary, Dunmore Soil and Sand, is in all material ways, particularly in relation to their archaeological consultant's use of Ground Penetrating Radar (GPR) at the Specified Area (5B), misleading, inaccurate and scientifically baseless.

⁸Friends of Minnamurra River (FOMR) is an active incorporated community-based association formed five years ago to conserve, protect and enhance the estuarine and catchment ecosystems of the Minnamurra River. It has qualified expertise available to it and within its membership in plant and animal ecology, archaeology, hydrology and environmental science.

⁹ This is the fourth response by Friends of Minnamurra River Inc (the third dated 7 November 2022) to invitations by your department to comment further on Gary Caines' ATSIHP Act application.

We also reaffirm all the other information and comments contained in our third submission to you on this matter on 7 November 2022.

Section 12 - Summary

In relation to Mr Caines' application under Section 12 of the ATSIHP Act, seeking the preservation and protection of a specified object or class of objects (including human remains) from injury or desecration, FOMR can inform you that our organisation was the first to publicly disclose the destruction of a wealth of assemblages of Aboriginal artefacts, unprecedented in the local area in question, during Boral Limited's preparation for its new sand mine now established at Stage 5A of the Specified site. (See more detail later.)

In fact, our public call for the protection of Aboriginal objects at the Specified Site came two months before Mr Caines' ATSIHP Act application.

FOMR also called for the protection of that wealth of Aboriginal heritage at Stage 5A but despite this, Boral Limited continued with the complete destruction of Stage 5A and it is now a deep and deepening sand mining dredge pit, just as Boral Limited proposes soon for Stage 5B of the Specified Area.

FOMR also announced and sought public and government protection for the equally if not greater wealth of Aboriginal objects and artefacts which we predicted would occur at Stage 5B of the Specified Area, predictions which were subsequently confirmed by archaeological test pits at Stage 5B.

This huge wealth of Aboriginal heritage occurs throughout the Stage 5B site – the same site in which local Aboriginal custodians, FOMR Inc and other authorities and submitters have informed you and your department that it is nearly certain contain Aboriginal burials, including those of the victims of a massacre by European settlers of Aboriginal people camped at the site in 1818.

We also show and reaffirm below that NSW legislation which purportedly protects Aboriginal heritage in the State is actually designed to aid and abet mining companies and developers to modify and destroy Aboriginal sites and cultural material that may, without the legislation, potentially impede or prevent mining and development projects.

Section 10 and Section 12 - Boral Limited's Scientifically Baseless Ground Penetrating Radar (GPR) Submissions

Boral Limited claims in its submission to you/your Department on 23 September 2022, that Ground Penetrating Radar (GPR) scanning conducted by its archaeological consultant, proves that there are no burials in its Stage 5B site.

There is **only one thing** which the Boral consultant's GPR scanning of the site proves – and that is **not** the absence of Aboriginal burials. What the GPR work **does prove** is that, as also evidenced by the wealth of Aboriginal cultural material previously excavated from salvage archaeology test pits at the Stage 5B site, the area is one of the most important archaeological and Aboriginal cultural heritage sites in southeast Australia.

FOMR now has recent evidence from the Australian Government's National Indigenous Australians Agency (NIAA), within the Department of Prime Minister and Cabinet, which further confirms our submission to you of 7 November 2022 and our information from overseas GPR authorities, also conveyed to you on 7 November, that

it is practically impossible for GPR to detect Aboriginal skeletal material in the form of Aboriginal burials, particularly those of 100 years' antiquity or more.¹⁰

The NIAA publication warns that any report of GPR scanning that discusses only the word “anomalies”, as Boral Limited has done in its September submission to you, to try to locate possible human burials on GPR images, should **‘never be trusted’**.

The NIAA publication states (p. 82):¹¹

“Never trust results that only discuss ‘anomalies’ that might be seen in GPR amplitude maps or profiles.

“Anomaly is a meaningless term in GPR, as all GPR reflections by definition are anomalies generated by changes in the ground.”

Again, Boral Limited discusses only ‘anomalies’ in its submission to you on its consultant’s GPR scanning of its proposed Stage 5B mining site. **This is yet another demonstration, if any were needed, that Boral’s submission to you claiming that there are no Aboriginal burials in its Dunmore mine site is baseless, completely without foundation.**

Also note the fact that Boral Limited is the *only* entity ever to have claimed that there are no Aboriginal burials in its proposed Stage 5B mining area.

Every other researcher, authority, entity, organisation and Aboriginal custodian and community with a knowledge of the area, has frequently confirmed the near certainty that Aboriginal burials exist in and around Boral’s Stage 5B mine site and not just the burials of the victims of the 1818 massacre by Europeans of an Aboriginal encampment at the site.

As just a couple of examples, the NSW government and the Kiama Municipal Council, acknowledge the high likelihood of human burials at and near the site, the NSW government with roadside signage less than 250m from the proposed mine site stating that the place was favoured by First Nations’ people for the burial of their dead in the adjacent sandy riverbanks and terraces, and the Kiama Council with signage near the proposed mine site acknowledging the 1818 massacre and the nearby burial of its victims.

Again, the NIAA publication¹², in its chapter on Ground Penetrating Radar (GPR) in helping to identify unmarked Aboriginal graves and cemeteries, makes these statements:

“To date (September 2021) no Aboriginal and Torres Strait Islander mass grave and massacre sites have been identified with GPR in Australia.” (p.77)

“...not all burial plots will contain the expected interment and the great age of some of the burials (that leads to decomposition), means they cannot be easily identified with GPR, if there is no coffin, casket or associated burial goods, an issue that is commonly encountered within all burial contexts.” (p. 69)

¹⁰ Sutton, Mary-Jean (Dr); St Pierre, Emma (Dr); Mitchell, Peter (Dr); Conyers, Lawrence (Prof.) and Pearce, Simon, *A Grave Responsibility to Honour Our Ancestors: A National Guide for Aboriginal and Torres Strait Islander Communities to Identify and Protect Unmarked Graves and Cemeteries*, NIAA, Australian Government, Canberra, September 2021.

¹¹ *Op. cit.*

¹² *Op. cit.*

“The main thing to keep in mind is that GPR will rarely be able to identify human remains themselves (particularly those of great antiquity), and more regularly relies on identifying grave cuts, disturbances to the soil profiles, caskets and coffins, and other material remains interred with the deceased.” (p. 80)

The final confirmation that Boral Limited’s claims of no Aboriginal burials in its proposed mine site at Dunmore are scientifically unsubstantiated in their entirety, completely unsupported and therefore almost certainly false, comes from a group of scientists and researchers from the University of Queensland, Flinders University, the Australian National University, Wollongong University, the National Museum of Australia and Wallis Heritage Consulting.

In a paper in *Archaeology in Oceania* in 2014, entitled *Ground-penetrating radar and burial practices in western Arnhem Land, Australia*, the eight scientists wrote: ¹³

“Yet GPR does not offer foolproof detection of all graves, sometimes producing false positives due to other sources of disturbance or, in cases where graves are indistinguishable from the surrounding strata, false negatives or no results (Bevan 1991; Dalan et al, 2010; Davenport 2001; Nobes 1999).

“Unmarked burials, which are common in Australian historical archaeology and almost exclusively the case in Australian Indigenous archaeology, present specific challenges. The particular form of these burials (eg. Bundle, cremation, limited grave goods, shallow depth, no coffin, etc.; see Meehan 1971) and the nature of the geologically ancient sediments into which interment occurs, often impedes their identification with GPR.

“Further, in areas where the sedimentary matrix consists of gravelly, shelly or cobble-rich sediments, there can be significant ‘distortions’ in the data for both the disturbed area of the grave shaft and undisturbed areas adjacent to the grave, adding to the complexity of interpretations (Conyers 2006).

“The limited case studies with which to compare and contrast results in Australia also mean that interpretation is often speculative, with excavation rarely carried out to confirm the specific nature of GPR-identified anomalies.”

More on Section 12

As stated earlier and in previous submissions to you, FOMR has been trying for a number of years to protect the now well identified and established wealth of Aboriginal artefacts, cultural assemblages and manifold other items of Aboriginal heritage from total destruction at Boral Limited’s Stage 5A and 5B mine sites.

Before the Stage 5A site was completely destroyed, along with all its in-situ Aboriginal cultural material earlier this year, for the start of Boral’s sand dredging, the FOMR had publicly campaigned for a cessation to the threats to and destruction of Aboriginal cultural materials. (See FOMR’s two news releases on the matter, issued last year, at **ATTACHMENT 1 and ATTACHMENT 2**)

FOMR also publicly supported the local RAPs (Registered Aboriginal Parties), members of local Aboriginal communities and some Aboriginal custodians of the area, when they went on strike, refusing to continue to conduct Boral’s salvage archaeology at Stage 5A because they were too

¹³ Lowe K.M, Wallis L.A, Pardoe C, Marwick B, Clarkson C, Manne T, Smith M. A, Fullagar R, *Ground-penetrating radar and burial practices in western Arnhem Land, Australia*, **Archaeology in Oceania**, 49 (3), 2014, pp. 1 – 2.

distressed at being continually ordered to destroy their ancestors' cultural heritage at the site using destructive, non-scientific methods. (Again, see the Attachments.)

More recently, the same RAPs have refused to undertake salvage and test archaeology on Boral's Stage 5B site, not only because they were again being asked to destroy their own cultural heritage but because they were severely stressed and distressed about the prospect of disinterring the remains of their ancestors.

Several of the area's Aboriginal custodians have withdrawn their services completely and want nothing further to do with Boral Limited on its proposed sand mine at the site.

However, in submissions to you, Boral claims to have the support of these RAPs. From what FOMR has been informed by the Aboriginal people themselves, it most certainly does not.

Section 13 (2)

FOMR notes that, in accordance with Section 13 (2) of the ATSIHP Act, you "shall not make a declaration in relation to an area, object or objects located in a State or the Northern Territory unless (you have) consulted with the appropriate Minister of that State or Territory as to whether there is, under a law of that State or Territory, effective protection of the area, object or objects from the threat of injury or desecration."

FOMR wants to point out to you the irony of this ATSIHP Act clause in relation to the relevant laws of NSW.

The irony (and perversity) is that it is precisely the laws of NSW, together with the way the current NSW government has applied them in the case of Boral Limited's sand mining proposals at Stages 5A and 5B of the Specified Area, which have led you to considering declarations of the Specified Area under Sections 10 and 12 of the ATSIHP Act.

Not only is the NSW government allowing Boral Limited to override all the State's legislative protection for the biodiversity and the flora and fauna of the Specified Area, particularly Stage 5B, but NSW National Parks and Wildlife legislation actually aids and abets the destruction of Aboriginal heritage and objects if they are an impediment to mining and development projects.

We have several times publicly raised the issue of the destructive intent of NSW legislation in relation to Aboriginal heritage potentially impeding mining and development projects.

In a FOMR news release last year (at **ATTACHMENT 1**), we raised the matter again and explained just how actually and potentially destructive the NSW legislation is to the wealth of Aboriginal heritage and objects contained in the Specified Area, particularly Stage 5B, of Boral's new sand mining projects at Dunmore.

We ask you to consider that when applying Section 13 (2) in the case of the Specified area at Dunmore.

And Finally...

It is highly significant that the ATSIHP Act defines a *significant Aboriginal object* as including Aboriginal remains.

This is because very much of the angst and human distress being caused among Aboriginal and non-Aboriginal people by the sand mining proposal at Dunmore, NSW, arises from the near certainty that Aboriginal burials, including those of the victims of the 1818 massacre at the site, will be not only be desecrated but obliterated if Boral Limited is permitted to proceed at Stage 5B.

Such loss would be a dreadful addition to the destruction of a unique Aboriginal landscape of biodiversity and ancient and historical cultural heritage so important, so vital to the wellbeing, of the local living relatives of the people who occupied the site for many millennia.

The NIAA publication¹⁴ describes such potential loss in these terms:

*“This guide was developed for, and with, Aboriginal and Torres Strait Islander communities to address the national issue of lost and desecrated graves and resting places of their ancestors and families, **the deep hurt that comes from these losses, and the solemn responsibilities communities have to find and protect these final resting places.**”*¹⁵

We trust that a declaration soon under Sections 10 and 12 of the ATIH Act at the Specified Area at Dunmore, NSW, will permanently stop this hurt, at least in our large region south from Sydney.

Please contact us for any further information or with any questions.

Yours sincerely,

Will Chyra
Chair
FOMR Inc

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0419 633 191

¹⁴ NIAA publication, *Op. cit.*

¹⁵ *Op. cit.* p. 7.

Friends of Minnamurra River Incorporated

9 Samuels Lane
KIAMA DOWNS
NSW 2533

Email: FOMR2533@gmail.com



ATTACHMENT 1

For Immediate Publication

**NEWS RELEASE
with Photo**

15 July 2021

NSW GOVERNMENT REGULATIONS PERMIT INDUSTRY'S DESTRUCTION OF ABORIGINAL CULTURAL HERITAGE AT MINNAMURRA RIVER

NSW government regulations are permitting the destruction of ancient and unique State-significant archaeological and Aboriginal cultural heritage sites in the Minnamurra River catchment at Dunmore.

The river protection community organisation, Friends of Minnamurra River Inc (FOMR), warned today that archaeological consultants working for Boral Limited on two new approved sand mining sites near the Minnamurra River estuary, are literally washing away archaeological and Aboriginal cultural heritage sites many thousands of years and possibly tens of thousands of years old.

Current NSW government regulations on archaeological and cultural heritage assessment¹⁶ allow the “salvage” of potential archaeological sites, such as those in the Minnamurra River catchment, using techniques that destroy those sites and prevent their scientific investigation for the recovery of their full records of Aboriginal cultural heritage.

The government regulations specifically exempt corporations and individuals from prosecution for damaging or destroying Aboriginal artefacts and potential archaeological sites in mining and development project areas.

FOMR says soil from the salvage archaeology sites being dug at Boral's Minnamurra River future sand mining pits is flushed through screens using water.¹⁷

Flushing with water leaves only a jumble of undated stone artefacts of very little scientific or educational use and destroys practically all other material which could otherwise be used to scientifically determine the age of the site, the richness and change of Aboriginal lifestyle and culture through time, as well as climate and other local and regional environmental changes over many thousands of years.

FOMR Chair, Will Chyra, says Aboriginal stone artefacts, the predominant archaeological objects recovered when archaeological dig soil is washed by water, tell virtually nothing about local Aboriginal cultural heritage because they are not dated and therefore cannot be placed in any prehistoric cultural or environmental timeline or change sequence.

Reliable sources report that large numbers of stone artefacts of various types are being flushed out even at the site of low significance currently being ‘salvaged’ in front of Dunmore House.

¹⁶ *Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales*, Department of Environment, Climate Change and Water NSW, September 2010, and *Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales*, Department of Environment, Climate Change and Water, September 2010.

¹⁷ In scientifically conducted, non-salvage, stratified archaeological ‘digs’, material carefully excavated layer by layer, each layer about 40mm to 50mm thick, is shaken through 2.0mm to 2.5mm mesh screens or sieves to separate out not only solid artefacts but also organic material such as remains of plants and animals, and carbon from ancient campfires, essential for dating the site/s being excavated.

“This tragic wastage of our human cultural heritage and knowledge of prehistory is worsened by the fact that the government regulations require the stone artefacts recovered, probably many thousands to hundreds of years old, to be bundled together and sent to the Australian Museum in Sydney just for storage”, Mr Chyra says.

FOMR says stratified and accurately dated archaeological sites in the Illawarra region and along the NSW coast are relatively rare and the sites near the Minnamurra River estuary currently being or about to be ‘salvaged’ - and destroyed - are likely to be potentially unique in telling the prehistory of the Illawarra and possibly other areas of the NSW coast.

“Their destruction, permitted by government regulations, is robbing humankind of parts of its history,” Will Chyra says.

Boral’s archaeological consultants, Kelleher Nightingale, has classified two of the larger sites to be ‘salvaged’ near the Minnamurra River as “sites of high to moderate archaeological significance” with their “intactness the most important variable for determining archaeological significance in this instance”¹⁸. The NSW Department of Planning, Industry and Environment has been informed of this.

However, once ‘salvaged’, the sites’ scientific archaeological and Aboriginal cultural heritage values will be completely lost and any sites not destroyed by the salvage archaeology are scheduled to be destroyed anyway when Boral starts mining sand on its site 5B.

Will Chyra says FOMR last week appealed in writing to Boral Limited to stop the current destructive salvage archaeology operations and asked Boral instead to request its consultants to conduct full and proper scientific archaeological investigations or ‘digs’ at the two sites near the Minnamurra River estuary classified as highly to moderately significant.

Boral has yet to reply.

The Illawarra Local Aboriginal Land Council says it is very unhappy about what’s occurring at Boral’s Minnamurra River sites but is powerless to do anything about it because of the NSW government regulations permitting the destruction.

The Land Council says the regulations exist only to allow industrial projects to proceed.

It told the NSW Independent Planning Commission in November last year of “what we believe is a failure in the approach that (Boral’s consultants) Kelleher Nightingale have applied and the predetermined position in our view of consultants that are engaged to undertake what should be the protection of Aboriginal heritage but inevitably becomes a process to get the proponent through the planning process.”¹⁹

¹⁸ Letter from Kelleher Nightingale Pty Ltd to Boral Land and Property Group, 29 October 2019, at: <https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=DA195-8-2004-MOD-2%2120201126T033641.582%20GMT>

¹⁹ *Submission to NSW Independent Planning Commission on Dunmore Lakes Project Modification 2*, Paul Knight, CEO, Illawarra Local Aboriginal Land Council, 2 November 2020, p. 4. <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/project-submissions/2020/09/dunmore-lakes-project-modification-2/20201104t122911/dunmore-lakes-project-odification-2--ipcsigned.pdf>.



Photo (FOMR): Salvage archaeology under way in July at Boral Limited's approved sand mining site 5A near the Minnamurra River estuary at Dunmore, NSW. In the background, archaeological dig workers use water to flush soil excavated from the dig pit in the middle foreground through mesh screens, destroying practically all archaeological evidence but stone artefacts impossible to accurately date or put into scientific archaeological context.

Media Contact: Will Chyra, Chair, FOMR Inc, 0419 633 191

Friends of Minnamurra River Incorporated

9 Samuels Lane
KIAMA DOWNS
NSW 2533

Email: FOMR2533@gmail.com



ATTACHMENT 2

For Immediate Publication

NEWS RELEASE

28 September 2021

SAND MINE NEAR KIAMA WILL BE THE AUSTRALIAN EAST COAST'S JUUKAN GORGE

The Federal and NSW governments and mining company, Boral Limited, will oversee the east coast's Juukan²⁰ Gorge if sand mining is permitted to destroy what archaeologists have recently discovered is perhaps the richest Aboriginal cultural heritage site in coastal Australia, close to the Minnamurra River near Kiama, NSW.

The river-protection community organisation, Friends of Minnamurra River Inc (FOMR), issued the warning today as it announced its support for the Illawarra region's Indigenous groups and the Illawarra Local Aboriginal Land Council (ILALC) which has formally applied to the Federal government, under Section 9 of the *Aboriginal and Torres Strait Islander Heritage Protection Act*, requesting a stop work at the proposed sand mining site.

The stop work would enable a review of the impact to cultural heritage objects and potential skeletal remains at the site, beside the river at Dunmore, NSW.

Archaeologically-experienced Registered Aboriginal Stakeholders, employed by Boral's archaeological consultants, have for three months been conducting an archaeological salvage program, excavating numerous one-metre square test pits at the proposed mine site. They have become increasingly concerned about their finding of a surprising and unexpected wealth of cultural material created by their ancestors living in the area for probably over tens of thousands of years.

They are frustrated by the current NSW government regulations on archaeological and cultural heritage assessment²¹ which allow the "salvage" of potential archaeological sites, such as the potential mine site in the Minnamurra River catchment, using techniques that destroy those sites and prevent their scientific investigation for the recovery of their full records of Aboriginal cultural heritage.

²⁰ The mining company, Rio Tinto, in December 2020 attracted international shame by allowing its employees to destroy 46,000 year old Aboriginal archaeological and cultural sites at Juukan Gorge in Western Australia. Rio Tinto executives resigned and the company has published this apology: *In allowing the destruction of Juukan Gorge to occur, we fell far short of our values as a company and breached the trust placed in us by the Traditional Owners of the lands on which we operate. It is our collective responsibility to ensure that the destruction of a site of such exceptional cultural significance never happens again, to earn back the trust that has been lost and to re-establish our leadership in communities and social performance.*

²¹ *Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales*, Department of Environment, Climate Change and Water NSW, September 2010, and *Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales*, Department of Environment, Climate Change and Water, September 2010.

The NSW government regulations specifically exempt corporations and individuals from prosecution for damaging or destroying Aboriginal artefacts and potential archaeological sites in proposed mining and development project areas.

The experienced First Nations' archaeological teams, known as Registered Aboriginal Stakeholders under NSW government legislation, at Boral's proposed new mine site at Dunmore are also constantly fearful that they will unearth burials, known to be in the vicinity of the site, of the six Aboriginal people murdered by a group of white settlers in 1818. There are still descendants of some of those victims living in the local area.

The Illawarra Local Aboriginal Land Council has stated on ABC news that it believes the registered Aboriginal personnel on the site are working under duress and that the site is too significant to be continuing the work.

Like FOMR, it wants Boral to abandon its plans for the sand mining at the site - mining which Boral says would have an operating life of only three years anyway - and the landscape left in its natural state.

"The richness and cultural heritage of the proposed mining site and its importance to us all as a site of human adaptation, experience and gathering for tens of thousands of years is simply too great to have it destroyed for very short term industrial and commercial expedience," says Will Chyra, Chair of FOMR.

"The destruction of this site at Dumore by mining would be the Australian east coast equivalent of the dreadful and irrevocable loss that all Australians witnessed with a mining company's destruction of Juukan Gorge in Western Australia less than a year ago," Mr Chyra says.

The proposed mining site, currently an endangered ecological community protected by NSW law - which the NSW government would allow Boral to override to dig its mine and completely destroy the site - covers an ancient landscape where the saltwater of the sea met the freshwater thousands of years ago.

FOMR says that this indicates it was a significant meeting place and ceremonial land for freshwater and saltwater Aboriginal tribes.

"The multitude of stone tools and other ancient artefacts being unearthed show a long continuous occupation of Aboriginal cultural heritage, similar to Juukan Gorge, so the site they're coming from must be preserved. Boral's proposed sand mine must be stopped," Mr Chyra says.

The ILALC's application to the federal Environment Minister to order a stop work at Boral's proposed new Dunmore mine site is the second Federal government intervention sought to stop the mine proceeding.

A number of local residents and the Federal Member for Gilmore, late last year complained to the Federal Environment Minister that, among other things, Boral and the NSW Department of Planning, Industry and Environment (DPIE) breached the Australian *Environmental Protection and Biodiversity Conservation Act* (EPBC Act) by failing to disclose that the proposed sand mine would or could impact SE Littoral Rainforest at and near the site. The SE Littoral Rainforest is listed under the EPBC Act as "critically endangered".

The threat to the SE Littoral Rainforest is in addition to what the NSW DPIE concedes are other major effects if Boral's proposed new mine proceeds:

- Destruction of 4.5ha of rare, ancient and high quality bird and animal habitat, Bangalay Sand Forest, a State-protected Endangered Ecological Community comprising 100 to 400-year old trees;
- Risks to another Endangered Ecological Community, Coastal Saltmarsh, protected in NSW and listed as vulnerable under the EPBC Act and for which the NSW government has developed a "Save Our Species" recovery program to try to reverse the continuing loss of this high value EEC;
- The cutting and clearing of an additional 3.0 ha of high value native vegetation, unique to the Minnamurra River catchment area.
- Six fauna species listed as threatened under the NSW *Biodiversity Conservation Act* have been recorded in the mining site to be cut and cleared.

Media Contact: Will Chyra, Chair, FOMR Inc, 0419 633 191