Friends of Minnamurra River (FOMR) Incorporated

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Mr Robert Stokes MP
Minister for Planning and Public Spaces
GPO Box 5341
SYDNEY NSW 2001

23 March 2021

cc. Ms Gladys Berejeklian MP, Premier;
Mr Matt Kean MP, Minister for Energy and Environment
Mr Gareth Ward MP, Member for Kiama.
Hon Sussan Ley MHR, Minister for the Environment
Ms Fiona Phillips MHR, Member for Gilmore
A/g General Manager, Kiama Municipal Council
General Manager, Shellharbour City Council

Dear Minister,

FOMR is an incorporated community association dedicated to the ecological sustainability of the Minnamurra River catchment and its surrounding communities. We are writing to you to seek your intervention in a State-significant planning matter by invoking your authority under Part 2A, Public Interest consideration for Part 3A projects of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulations 2017.*

Failure to intervene, in the public interest, will result in otherwise avoidable environmental degradation and habitat destruction in the coastal areas near Kiama, and this will in turn lead to further concerted public objection and actions ahead of the 2023 NSW election.

The issue for the Minister arises from a determination of the Independent Planning Commission (IPC) on 16 November 2020, endorsed by the Department of Planning, Industry and Environment (DPIE) exercising its Ministerial delegation. This determination consented to a sand mining project (known as Dunmore Lakes - Modification 2), which DPIE says necessitates the destruction of 4.5ha of rare, ancient and high quality bird and animal habitat, Bangalay Sand Forest, comprising 100 to 400-year old trees.

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

This same IPC determination also permits other potentially significant and adverse environmental impacts in the Minnamurra River catchment and because the approval pathway adopted by DPIE was repealed 10 years ago, there was no requirement for an Environmental Impact Statement (EIS) to determine the full extent and details of what will clearly be substantial and serious environmental impacts of the new sand mining.

Indeed, the IPC has relied on a lower and repealed standard (advised by the DPIE) in order to support the determination. **This, surely, cannot be in the public interest**.

Further and in addition to the destruction of the 4.5ha of Bangalay Sand Forest, other potentially significant environmental matters were not subject to sufficient scientific assessment in relation to direct or indirect impacts.

These additional protected ecosystems include:

- the Critically Endangered SE Littoral Rainforest which adjoins the mine site, protected under NSW legislation and listed under the federal *Environment Protection and Biodiversity Conservation Act* (EPBC Act);

- another Endangered Ecological Community, Coastal Saltmarsh, only about 150 metres from the mine site, 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

- an additional 3.0 ha of high value native vegetation, unique to the Minnamurra River catchment area

- 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.

Therefore, as the responsible Minister, it may be perceived that you have erred in law and misconstrued your jurisdiction when determining the Modification Application on the following basis: that between 28 February 2018 and April 2019, when the Environmental Assessment (EA) was lodged, no environmental assessment requirements were notified and, there being no intention to notify EARs, the Minister knew or ought to have known that the "Request" could not by itself be sufficient for the purpose of a section 75W modification application to proceed.

Given the above and an array of specific matters raised in written objections to the IPC, FOMR believes that the Minister therefore has the following grounds for exercising authority under Part 2A, Public Interest consideration for Part 3A projects:

The Need for the project has not been demonstrated

The Applicant failed to demonstrate why it needs a new area for mining when adequate reserves exist within its existing approved mining area outside the Minnamurra River catchment. The DPIE failed to properly assess this in light of the Applicant's existing approved reserves. Accordingly, the IPC failed to exercise due care and erred in its key finding "*that the public interest is best served by meeting demand for the sand product on economic grounds"*.

Strong and broad based community objection to the Project

Starting with a mass public rally attended by more than 1,000 local residents (a high proportion of the affected electorate), the new sand mining pits continue to be met with broad community objection, with strong opposition from both Shellharbour City and Kiama Councils. At the State level, your Ministerial colleague and local MP, Gareth Ward, as well as the Member for South Coast, have been actively engaged with supporting the local community. The Federal member for Gilmore, has represented the matter to the Federal Minister for Environment and notified the federal Department of Agriculture, Water and Environment of a potential breach of the EPBC Act, given that the DPIE failed to refer the matter to the Federal Minister.

The community has been denied due process and appeal rights

The DPIE enabled the Applicant to use a Regulation repealed 10 years ago which had the effect of avoiding due diligence of the Project through an Environmental Impact Statement (EIS). Additionally, the DPIE gave the applicant the benefit of internal DPIE legal advice, a discretional benefit not available to the community, when it stated in a letter to the applicant:

" there is a degree of risk that "Modification 2" would not be considered substantially the same as the development for which the consent was originally granted. Alternatively, the above modification request may continue under section 75W approval pathway, provided that a complete EA is provided to the Department by no later than 28 February 2019."

It should be noted that the cut-off date under the regulations for the lodgment of the modification application under section 75W was 1 March 2018, nearly 12 months prior to the date represented by the DPIE. As your colleague, Minister Ward, told Parliament in August 2019:

"In what seems to be an extraordinary stretch, the applicant has asked for a modification to an old consent for a fifth stage (of the existing mines) at a location over a kilometre away."

The IPC's assessment of the Project or "modification" under the provisions of a regulation repealed a decade ago, also denied the community any right of appeal on the merits of the IPC's final determination. In addition to those merit-based grounds, serious questions arise as to potential grounds for any judicial review, which as you are aware, most communities do not have the capacity to sustain. These include:

- *whether a Request was made (Jurisdictional Fact) by 28 February 2019;*
- *DPIE's power to extend the effect of the Savings, Transitional and Other Provisions (STOP) provisions of the* Environmental Planning and Assessment Regulations2017*;*
- *formation of an opinion by the Minister without sufficient information within the Request;*
- *whether or not the project was indeed a modification within the meaning of s75W because of material differences, including the facts of separate parcels of land, in a different and more sensitive catchment area.*

The outdated section 75W approval pathway enabled inadequate environmental planning and assessment

Specific environmental and community impacts of Boral Australia's proposal were not tested as a result of the DPIE advising the applicant to proceed under legislation which no longer existed. Additionally, there were omissions and errors in key assessment information provided by the applicant and adopted by the DPIE in its referral to the IPC. The Environmental Assessment (EA) was therefore not a sufficient basis for the IPC, the Secretary, nor the Minister to rely on when determining a matter under Regulations which were repealed 10 years before.

In seeking to exercise your regulatory powers under Section 2A, (Public Interest consideration for Part 3A projects), FOMR contends that it is clearly in the public interest for the Minister to require a new application to be subject to an assessment under current legislation and regulations, including an EIS, to ensure an adequate scientific basis for the Minister to be able to determine any consent.

As the minister is aware, when exercising your powers under Section 2A, you are not bound to take into account whether the departmental Secretary's report on the project did or did not give consideration to, or make any recommendation about, the public interest or any particular aspect of the public interest.

Given that in this particular case, where the approval process being used by the DPIE and the IPC was repealed 10 years ago, and the public's right to an appeal of the merits extinguished, the Minister should give particular weight to the public interest and apply the Regulation open to you.

The attached Addendum provides more detail in support of the above and if you or your officers require any clarification or further information, we would welcome such contact.

Yours sincerely,

Will Chyra
Chair, FOMR
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