



HUNTER THOROUGHBRED BREEDERS ASSOCIATION

SUBMISSION TO THE INDEPENDENT PLANNING COMMISSION

BYLONG COAL PROJECT SSD 14_6367

CURRENCY OF GATEWAY CERTIFICATE

JULY 2019

OVERVIEW - BYLONG COAL PROJECT SSD 14_6367: CURRENCY OF GATEWAY CERTIFICATE

The Hunter Thoroughbred Breeders Association responds to the Independent Planning Commission's statement of 23 July 2019 inviting comments regarding the expired Conditional Gateway Certificate for the Bylong Coal Project by close of business Friday 2 August 2019.

We refer to the IPC's preliminary view, expressed in a letter to the Applicant, KEPCO Bylong Australia Pty Ltd, dated 18 July 2019 and the subject of an IPC Media Statement of 22 July 2019, that it cannot, as consent authority approve KEPCO's state significant development (SSD) application "in the absence of a Gateway Certificate that is current at the time of determination."

The HTBA agrees with the preliminary view that the IPC, as the consent authority, cannot **determine** KEPCO's SSD application in the absence of a current Gateway Certificate.

We note that the Joint Opinion provided by KEPCO Bylong Australia Pty Ltd "(Joint Opinion)" states that a literal interpretation of the relevant legislative provisions is that for as long as there is a development application it must be accompanied by a current certificate, including up to and at the time of determination. The Joint Opinion also acknowledges that this interpretation would be generally consistent with other requirements relating to development applications.

We believe that this is the correct interpretation to be applied and that a development application must be accompanied by a gateway certificate that is current at the date of determination which would mean that an SSD without a current gateway certificate cannot validly be determined. We also note with interest that while the KEPCO letter to the IPC is dated 23 July 2019 (in response to the IPC letter of 18 July 2019) the Joint Opinion is dated 2 June 2019.

We do not believe the arguments put forward in the Joint Opinion in support of departing from this interpretation to be valid. In particular, we do not agree with KEPCO and the Joint Opinion's arguments that:

- a gateway certificate is solely a "time of application" criterion;
- a gateway certificate has no currency (other than accompanying a development application);
 - The State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) as amended in 2013 to establish the Gateway process stipulates a 5 year maximum limit within which a gateway certificate remains current.
 - Furthermore it also makes provision for a shorter gateway certificate currency period should that be required.
 - This reinforces the need for a current gateway certificate and the view that the Commission should not make a determination based on information that is not current and which cannot be relied upon to competently discharge its functions.
- a current gateway certificate at the time of determination would result in "potentially impractical or absurd outcomes". We do not consider that inconveniencing the proponent is an acceptable argument against the requirement for a valid and current gateway certificate that would enable the consent authority to competently discharge its responsibilities;
- there is any inconsistency between regulation 50A (2) and cl 17B (2) as 50A(2) simply operates to further define the gateway certificate referred to in cl 17B (2).

The Joint Opinion referred to judgments where essential prerequisites to, and part of the process of a consent authority's determination of a development application were ineffective and incomplete or no valid determination of the development application could be made until there was substantial compliance with statutory prescriptions. To the extent these judgments support the view that a deficiency must be cured before a valid determination can be made, we agree.

We are therefore of the view that the gateway certificate must be current at the time of determination, particularly given the significance and importance of the gateway certificate to the SSD assessment process, the Government's policy and legislative requirements.

We recognise that the assessment of SSDs can be a lengthy process. However KEPCO would have been (or should have been) aware of the currency of the gateway certificate and was in a position to exert significant influence and control over the timing and length of that process – unlike affected communities that have no control.

In this submission we also bring to the Commission’s attention the Government’s policy which underpins the Gateway process and the Gateway Panel’s finding in April 2014 that the Applicant has misconstrued the Gateway process and failed to put forward a compliant or considered assessment of its potential impacts on the Equine Critical Industry Cluster.

We recognise the Commission has a difficult task in dealing with land use conflicts. We do not consider it appropriate that as the consent authority it should be forced to make decisions based on non-compliant and out-dated information because the Proponent may be inconvenienced.

In our view the proponent must be required to lodge a fresh gateway application and receive a current gateway certificate to enable the IPC to fulfill its statutory obligations and make a competent and fully informed determination on this project.

Not only would failure to require a current gateway certificate at the time of determination impact on this case, it would fail to recognise the importance of the gateway certificate, it would set an unacceptable precedent and make a mockery of the gateway process.

The Hunter Thoroughbred Breeders Association (HTBA) provides the following details and information in support of our position.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'C. Collins', is centered on the page. The signature is written in a cursive style and is enclosed within a light yellow rectangular highlight.

Dr Cameron Collins
President
Hunter Thoroughbred Breeders’ Association

1. IMPORTANCE OF THE GATEWAY PROCESS.

- 1.1. The Strategic Regional Land Use Plan Upper Hunter ("Plan"), released by the NSW Government in 2012, provides the policy context which underpins the Gateway process for State Significant Developments ("SSDs").
- 1.2. In its introduction of this Plan, (p9) the NSW Government clearly states that:
 - "An **integral component of the plan** is the introduction of a new decision making framework, known as the Gateway process. This process involves an early stringent assessment the potential impacts of mining and coal seam gas development on agricultural land and water resources." (sic)
 - "This plan represents the Government's proposed framework to support growth, protect the environment and respond to competing land uses whilst preserving key regional values over the next 20 years."
- 1.3. In Chapter Eleven of the Plan, (p76) the Government states that the Gateway process is the **key policy response** for resolving land use conflict between mining proposals and strategic agricultural land.
- 1.4. In the foreword, the Premier also states:
 - "More than two million hectares of our State's most valuable agricultural land as well as the critical water sources that supply it are **now subject to protections never before seen in NSW. Much of that land is located in the Upper Hunter.**"
 - "The **national and international significance of the Upper Hunter's wine and thoroughbred industries has also been recognised with large areas of the region also identified for heightened protection.**"
- 1.5. A gateway certificate is a critical element of the State Significant Development assessment process for mining projects as it is the primary means upon which the environmental and socio-economic impacts on strategic agricultural lands (both biophysical strategic agricultural land and critical industry clusters) are assessed and determined. It is therefore essential that the gateway certificate must remain "current" at all times of the process.
- 1.6. That KEPCO is seeking to avoid the need for a current gateway certificate is at odds with their own letter to the Independent Planning Commission (IPC) dated 23 July 2019 which acknowledges the importance and significance of the Gateway process and the gateway certificate in the execution of the Independent Planning Commission's ("IPC's") functions as per its citation of the Strategic Regional Land Use Plan for the Upper Hunter.

2. KEPCO LETTER OF 23 JULY 2019 AND JOINT OPINION BY RPL LANCASTER SC AND D HUME ("JOINT OPINION")

- 2.1. We note the Joint Opinion (para 37) acknowledges that if the provision of the EP&A Regulation is approached literally, *"for so long as there is a development application, it must be accompanied by a current certificate, including being accompanied by a current certificate up to and at the time of determination."*
- 2.2. The Joint Opinion goes on to say (para 37) *"The practical effect of the provision, on this interpretation, could be said to be generally consistent with other requirements related to development applications, for example that owner's consent must be provided by and at the date of determination."*
- 2.3. At para 38, the Joint Opinion notes that *"it may be accepted that if the proper construction of the provision is that a development application must be accompanied by a gateway certificate that is current at the date of determination and if on proper construction of the regulations that requirement is essential to the valid determination of the application, then*

upon the application of orthodox principle ... that would mean that the SSD Application cannot validly be determined."

2.4. The HTBA agrees with the literal or common sense interpretation as articulated in paragraphs 37 and 38 of the Joint Opinion and submits that this would be the correct interpretation in the context of the Government's Strategic Land Use Policies, the Gateway process and relevant legislation and rejects the reasons given in the Joint Opinion for departure from this interpretation.

3. STATE ENVIRONMENTAL PLANNING POLICY (MINING, PETROLEUM PRODUCTION AND EXTRACTIVE INDUSTRIES) ("MINING SEPP") AMENDMENT 2013

3.1. The Mining SEPP Amendment of 2013 established the gateway assessment process with the specific aims, inter alia, to (emphasis added):

- (i) "recognise the importance of agricultural resources, *and*
- (ii) ensure protection of strategic agricultural land and water resources, *and*
- (iii) ensure a balanced use of land by potentially competing industries, *and*
- (iv) provide for the *sustainable growth* of mining, petroleum *and agricultural industries*" (emphasis added).

3.2. Clause 17B(1) of the Mining SEPP "the assessment of development applications" states (emphasis added):

(1) *Before determining* an application for development consent for mining or petroleum development that is accompanied by a gateway certificate, the consent authority *must*:

(a) refer the application to the Minister for Primary Industries for advice regarding the impact of the proposed development on water resources; and

(b) consider:

- (i) any recommendations set out in the certificate, and
- (ii) any written advice provided by the Minister for Primary Industries in response to a referral under paragraph (a), *and*
- (iii) any written advice of the Gateway Panel in relation to the development given as part of the consultations undertaken by the Director General under clause 3(4A) (b) of Schedule 2 to the *Environmental Planning and Assessment Regulation 2000*, *and*
- (iv) any written advice of the IESC Committee provided to the Gateway Panel ..., and
- (v) any cost benefit analysis of the proposed development submitted with the application.

3.3. Clause 17 K of the Mining SEPP, "Duration of gateway certificates" clearly states "*A gateway certificate remains current for a period of 5 years (or such shorter period as is specified in the certificate) (emphasis added) after the date on which it is issued by the Gateway Panel.*"

3.4. The correct interpretation of this clause is that its intent, in line with the specific aims of the Mining SEPP (mentioned above) and the responsibilities of the consent authority, is to ensure the consent authority, in making its determination, has before it all current and relevant information particularly in relation to Strategic Agricultural Land (both Biophysical Strategic Agricultural Land "(BSAL)" and Critical Industry Clusters (in this case the Equine Critical Industry Cluster ("Equine CIC")).

3.5. Further, the reference in clause 17K to "*a shorter period as is specified in the gateway certificate*" acknowledges circumstances where conditions relating to Strategic Agricultural Land could be highly sensitive, vulnerable or variable and the Gateway Panel would be at

liberty to impose a shorter certification period when issuing a Gateway certificate so as to ensure that the IPC had pertinent information before it when exercising its functions.

- 3.6. The setting of an expiry date for gateway certificates reflects the fact that circumstances can change and that beyond that date the information in support of and contained in the gateway certificate cannot be relied upon to be current.
- 3.7. In our view, the intent is that a consent authority could only competently discharge its functions and make its determination based on full, current and relevant information.
- 3.8. We are mindful of the fact that development consent approval processes can take a few years to reach determination (more on this below). However the development consent itself can last for many decades – initially 25 years in the case of the Bylong Coal project (assuming no future modifications or extensions). It makes sense therefore that the consent authority at time of determination has valid, current and up to date expert scientific advice on matters of significance and relevance, such as Strategic Agricultural Land, as stipulated by Government policy and legislation.

4. THE IMPORTANCE OF CURRENCY

- 4.1. The need for a gateway certificate to remain current reflects the importance of the expert advice and findings provided by both the Independent Expert Scientific Committee (“IESC”) and the Gateway Panel and contained in the gateway certificate and recognises that circumstances can over time change requiring a fresh gateway certificate.
- 4.2. That circumstances can change beyond the currency of a gateway certificate is demonstrated for example by changes in scientific knowledge and changes to environmental conditions (such as more frequent and lengthy drought conditions as currently being experienced in the Upper Hunter) which would have (or could exacerbate) potentially significant impacts on stressed water systems, strategic agricultural lands and critical industry clusters.

The IESC

- 4.3. In its advice on the Bylong Coal project dated 14 March 2014, the Independent Scientific Expert Committee, inter alia, stated:
 - 4.3.1. On the potential likelihood and extent of any impacts of the proposal on water resources, as well as the appropriateness of the proposed mitigation measures:

“The limited level of detail in project documentation at the Gateway stage restricts the ability of the IESC to assess the extent and likelihood of impacts to water resources as a result of the proposed project.”

“Key issues include surface-groundwater interactions, impacts as a result of subsidence and potential contamination of water resources following mining. Limited information is available on surface water and ecological impacts at this stage.”
 - 4.3.2. On subsidence:

“There is limited information provided at this stage about the effectiveness of proposed stream remediation measures...”
 - 4.3.3. On groundwater:

“The preliminary groundwater model predicts that once mining commences depressurization of Permian strata occurs and the flow rate from the Permian strata to the alluvium (net 7.7ML.day upward flow across the model domain) will be reduced. ... Given the magnitude of the predicted alluvial drawdown, the potential impacts to porosity and permeability and consequential implications for long-term storage and movement in the alluvium should be assessed.”

“Impacts of groundwater drawdown on ecological assets and associated mitigation measures have not been considered at this stage. The IESC recommends that impacts on water dependent assets (including aquatic ecosystems, terrestrial ecosystems, drinking water supply, irrigation water supply, surface infrastructure and other industries) should be assessed following updates to the groundwater model.”

4.3.4. On surface water:

“The spatial and seasonal variation in streamflow and the groundwater pumping regime should be reflected in future versions of the groundwater model. These modifications would more accurately represent current surface-groundwater flux and therefore improve confidence in the predictions of impacts.”

“The proponent’s documentation contains limited information about other impacts to surface water at the Gateway stage.”

4.3.5. On Final landform:

“There is potential for contamination of the alluvium due to leaching from Coal Handling and Preparation Plant rejects and tailings within the backfilled pit, which may then flow into the adjacent surface water systems, in particular the Growee River and Lee Creek. Groundwater quality modeling of the final landform would be needed to accurately determine the potential transport of contaminants, including salts to the alluvium and surface streams.”

The Gateway Panel

4.4. In its report on the Bylong Coal Project dated 15 April 2014, the Gateway Panel was of the opinion that:

4.4.1. With regard to Biophysical Strategic Agricultural Land (BSAL):

- *“The Project would have direct and significant impacts on the agricultural productivity of verified BSAL within the Project Boundary area;*
- *Indirect impacts on verified BSAL within the Project Boundary area have not been assessed and are potentially significant; and*
- *Indirect impacts on potential BSAL adjacent to the Project Boundary area have not been assessed and are potentially significant.” (p3)*

4.4.2. On the Equine Critical Industry Cluster (“Equine CIC”), *the Gateway Panel rejected the Applicant’s assertions that the Gateway requirements concerning the Equine CIC should not apply.* The Gateway Panel found that the Bylong Coal Project Gateway application is “non-compliant with respect to its assessment of the Equine CIC and lacks proper assessment of potential impacts. It is the opinion of the Gateway Panel that the Project would have a significant impact on the Equine CIC because:

- *There is 1,933 ha of verified Equine CIC land within the Project Boundary area;*
- *The Applicant has already directly impacted the Equine CIC through its acquisition of land, eg, Bylong Park Thoroughbreds, and implemented land use change;*
- *The Project proposes open-cut and underground coal mining that directly impacts lands within the CIC; and*
- *The Applicant has misconstrued the Gateway process and failed to put forward a compliant or considered assessment of its potential impacts on the Equine CIC” (p3).*

4.4.3. Given the independent scientific findings of both the IESC and the Gateway Panel over five years ago, and the paucity of information submitted by the Applicant at the time, it

is only fair, reasonable and just that the consent authority makes fully informed decisions based on a current Gateway certificate in respect of the Bylong Coal Project.

4.4.4. This conclusion is further strengthened by the Gateway Panel's finding that the Applicant put forward a non-compliant Gateway application with respect to its assessment of the impacts of the Project on the Equine CIC.

5. IPC REVIEW REPORT 2017

5.1. Given the issues raised by the IESC, the Gateway Panel and consideration regarding the currency of the Gateway certificate, it is useful to also examine the IPC's Review Report of July 2017.

5.2. In its 2017 report the IPC found, inter alia (p 33- 34) (emphasis added):

- "uncertainty and incomplete information regarding the risks of the project."
- "for a greenfield proposal in a location recognised for its agricultural capacity, exceptional scenic value and heritage importance, caution and great care will be required in weighing the benefits and costs of the project in order to arrive at a balanced decision about competing land uses and interests."
- "from multiple iterations of the groundwater model that doubt persists about the availability of water resources to the project and for other land and environmental uses."
- "In view of the characteristics of the alluvial aquifer relied upon by the project, the Commission considers there is uncertainty around the probability of impacts and the potential consequences."
- Similarly, the probability of mine water discharge and the potential consequences for the wider catchment presents risks that are sufficient to warrant detailed evaluation prior to determination".
- "The validity of arguments that downplay the value of mapped equine CIC and BSAL agricultural land is also unclear to the Commission. The *Upper Hunter Strategic Land Use Plan* (2012) under which the land has been verified is a recent policy of the NSW Government and explicitly defines land attributes that are rare and valuable"
- "The evaluation of visual impacts in a greenfield location is additionally emphasised by the irreversibility of changes that may occur because of mining activities. Proposed landscape treatments are at best long-term in their execution, with few examples of successful implementation."
- "Even with landscape treatments, the morphology of the valley would be substantially and permanently altered. This should be given in-depth consideration in any decision about the project."
- "There is insufficient evidence to conclude that the open cut is essential to the project or that alternate development options, or no development at all, would not better serve the public interest."
- "Moreover, the cost-benefit arguments presented for the project lack the rigour and transparency that would be required to fully evaluate the claimed benefits, the costs of impacts and the risks attached to the project."
- "The effect of many step changes, albeit argued to be individually acceptable, may, taken together, constitute a profound and substantial transformation of Bylong Valley's social, economic, heritage and landscape values."
- "A range of mitigation measures are proposed, but their effectiveness is uncertain and at times qualified. The Commission finds it unusual, for example, that impacts to mapped agricultural land are to be mitigated by the pursuit of agricultural land uses only where the applicant finds it reasonable to do so, or that disturbed land would be restored to productive agricultural land use, despite the absence of empirical evidence that this is possible on the scale proposed"
- "The Commission is of the view that a decision-maker would need to carefully consider the risks attached to the proposed mitigation treatments in its assessment of the overall

merits of the project. The case for the project, particularly those aspects of the project responsible for the most severe impacts, is eroded when impacts and the uncertainty of the proposed mitigation measures are considered together.”

- “the Commission finds that doubts persist about the potential benefits and impacts of this project, despite extensive research and peer assessment. As a result, all aspects of the project will need to be comprehensively and cautiously considered, carefully weighted, and balanced one against another at the determination stage.”

5.3. It is abundantly evident from the IPC’s 2017 Review report that a current Gateway certificate, underpinned by up-to-date, comprehensive and compliant information is critical to the consent authority’s ability to competently discharge its determination function.

6. INCONVIENCE

6.1. Clause 17K of the Mining SEPP – Duration of gateway certificates – clearly stipulates that “A gateway certificate remains current for a period of 5 years (or such shorter period as is specified in the certificate) after the date on which it is issued by the Gateway Panel.

6.2. It is clear from this clause that 5 years is the outside, maximum limit within which the gateway certificate remains current. It is also clear that Clause 17K of the Mining SEPP contemplates and makes provision for situations where a shorter currency period for a Gateway Certificate may be required. To suggest that a Gateway certificate has no currency at all (other than to accompany a development application) would in our view make a mockery of the Gateway process and would be an absurdity.

6.3. The Joint Opinion (para 50) suggests that “potentially impractical or absurd outcomes might come about if the provisions are given particular meaning. In this instance, it seems to us that very inconvenient and perhaps absurd outcomes might follow if cl 50A(2) is interpreted as requiring that there must be a current gateway certificate at the date of determination. For example, if through no fault of the proponent of development the determination of an otherwise compliant development application is delayed past the date of expire of a gateway certificate, the proponent would be required to re-apply for a new certificate and the Planning Secretary would be obliged to consider any recommendations in any new certificate and *may* (emphasis added) amend the environmental assessment requirements for the project.”

6.4. In our view an inconvenience to the proponent is not an acceptable argument against the requirement for a valid and current gateway certificate to enable the consent authority to competently discharge its responsibilities.

6.5. On the Joint Opinion’s above point regarding “an otherwise compliant development application” we note the Gateway Panel’s finding in April 2014 that “The Applicant has misconstrued the Gateway process and failed to put forward a compliant or considered assessment of its potential impacts on the Equine CIC.” (p3)

6.6. We further note that the proponent, in all SSD cases, has considerable control and influence over the timing of the assessment and determination process – unlike affected communities that have no control over the timing of the assessment and determination process.

6.7. In this instance, it is notable that following the issuance of the conditional gateway certificate, the proponent took some 15 months to prepare an EIS, some 5 months to respond to submissions following the EIS exhibition, some 6 to 7 months to respond to the IPC Review report and a further six months before providing comments and submissions on matters either raised by or raised with the Commission. During the five years that this project has been under assessment, the proponent has contributed to or had direct control over some 3 years of the assessment process. We understand that a further ten months of the assessment process, between January 2018 and October 2018, were taken up by discussions between the Department and the proponent regarding alternative mining plans.

7. ABSURD OUTCOMES

- 7.1. KEPCO and its Joint Opinion (paras 41 – 51) argues that a gateway certificate is a “time of application” criterion.
- 7.2. While the Joint Opinion (para 45) states that clause 17B of the Mining SEPP is more particularly directed to the determination of an application, the Joint Opinion argues that the gateway certificate does not need to be current at the date of determination.
- 7.3. On this construction, an absurd outcome would be a situation where a development application is accompanied by a gateway certificate that lapses the day after the DA is lodged; that a gateway certificate carries no currency at all; that the IPC should make a determination which is based on information that is not current and cannot be relied upon so as to competently discharge its function; which, if approved, will hold for many decades based on non-compliant outdated information because the proponent would be inconvenienced.
- 7.4. As discussed in the previous section, in our opinion there is no valid argument supporting the view that requiring a “current” gateway application at the date of determination may give rise to “potentially impractical or absurd outcomes” which would be “very inconvenient” to the proponent.
- 7.5. We respectfully submit that the proponent is clearly aware of the duration of the gateway certificate (in this case 5 years), has substantial control over the timing of the assessment process and therefore the need to ensure the currency of the gateway certificate to enable the IPC to discharge all of its functions in a competent and fully informed manner.

8. EXPIRED GATEWAY CERTIFICATE CURABLE

- 8.1. The Joint Opinion (paras 27 to 30) contemplates judgments where essential prerequisites to, and part of the process of a consent authority’s determination of a development application were ineffective and incomplete and no valid determination of the development application could be undertaken until there was substantial compliance with statutory prescriptions.
- 8.2. In these judgments, the Joint Opinion recognises that substantial compliance may be satisfied by the later provision of the required information or documents thereby “curing” deficiencies at any time until the determination.
- 8.3. Failure to require a current gateway certificate at the time of determination will not only impact on this case, it would fail to recognise the importance of the gateway certificate, it would set an unacceptable precedent and make a mockery of the gateway process.
- 8.4. In our view the proponent must be required to lodge a fresh gateway application and receive a current gateway certificate to enable the IPC to competently discharge its functions, fulfill its statutory obligations and make a properly informed determination on this project.