

7 December 2018

The Chair
Independent Planning Commission of New South Wales
Level 3, 201 Elizabeth Street
Sydney NSW 2000

By email: ipcn@ipcn.nsw.gov.au

Dear Chair

Bylong Coal Project (SSD 6367) – NSW Aquifer Interference Policy

1. We act for the Lock the Gate Alliance in relation to this matter.
2. We have been instructed to raise our client's profound concerns with the manner in which the *NSW Aquifer Interference Policy* ("AI Policy") has been applied in the decision-making process currently underway in relation to the Bylong Coal Project ("Project"). This letter expands upon the legal basis for the submissions about the AI Policy made by Lock the Gate in its 13 November 2018 submission to the IPCN (particularly at pp 2-3).
3. A central purpose of the AI Policy is to establish and objectively define "minimal impact considerations as they relate to water-dependent assets" (section 3.2.1), to inform the advice provided to the consent authority for the purposes of clauses 12AB and 17 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* ("Mining SEPP").
4. Sub-clause 12AB(7) of the Mining SEPP establishes the following non-discretionary development standard for Aquifer Interference:

Any interference with an aquifer caused by the development does not exceed the respective water table, water pressure and water quality requirements specified for item 1 in columns 2, 3 and 4 of Table 1 of the Aquifer Interference Policy for each relevant water source listed in column 1 of that Table.

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5. Unlike the other non-discretionary development standards in subclauses (3)-(6), there is no limitation to the effect that aquifer impacts only be assessed at "private dwellings" or otherwise outside of Project proponent-owned land.¹
6. Item 1 of Table 1 to the AI Policy requires the potential impacts to the water table and water pressure be assessed at "any water supply work". The Glossary in Section 5 of the AI Policy does not provide a specific definition of the term "water supply work", but it is noted that a number of the terms in the AI Policy are defined in the *Water Act 1912* or *Water Management Act 2000*. Definitions of "water supply" and work" appear in Part 2, section 5(1) of the *Water Act 1912*², and a definition of "water supply work" also appears in Dictionary of the *Water Management Act 2000*.³
7. These definitions do not support any distinction between water supply works on Project proponent-owned lands, and works located elsewhere. In any case, the AI Policy requirements in Table 1 apply to "any" water supply work irrespective of land ownership or use.
8. Despite the clear language of the AI Policy and the statutory definitions that policy picks up, the advice provided by the Department about the aquifer impacts of the Project appears to improperly distinguish between land owned by KEPCO, and "private" land, when assessing aquifer impacts. This includes (underlining added):
 - (a) in the Preliminary Assessment Report for the Project:
 - *"The groundwater modelling undertaken for the project predicts that there would be minimal drawdown impacts on privately-owned bores, such that the project would comply with the minimum impact criteria of the NSW Aquifer Interference Policy".⁴*

¹ Subclause (8) provides: "The Minister is to review a non-discretionary development standard under this clause if a government policy on which the standard is based is changed." We are not aware of any change to the AI Policy since it was published in September 2012.

² "**Water supply**" includes a supply for the carrying on of any industrial operation. "**Work**" includes any dam, lock, reservoir, weir, regulator, flume, race, channel (whether an artificial channel or a natural channel artificially improved), any cutting, well, excavation, tunnel, pipe, sewer, and any machinery and appliances.

³ "**water supply work**" means:

- (a) without limiting paragraphs (b)-(g), a work (such as a water pump or water bore) for the purpose of taking water from a water source, or
- (b) a work (such as a tank or dam) for the purpose of capturing or storing water, or
- (c) a work (such as a water pipe or irrigation channel) for the purpose of conveying water to the point at which it is to be used, or
- (d) any work (such as a bank or levee) that has, or could have, the effect of diverting water flowing to or from a water source, or
- (e) any work (such as a weir) that has, or could have, the effect of impounding water in a water source, including a reticulated system of such works, and includes all associated pipes, sluices, valves, metering equipment and other equipment, but does not include:
- (f) any work (other than a water supply work under the control or management of the Sydney Water Corporation, the Hunter Water Corporation or a local water utility) that receives water from a water supply work under the control or management of the Sydney Water Corporation, the Hunter Water Corporation or a local water utility, or
- (g) any work declared by the regulations not to be a water supply work.

⁴p 5. We also note the DWF (Australia) submission made on behalf of Locaway Pty Ltd on 14 November 2018 that:

The EIS and the DPE's Assessment Report has given either no or very minimal consideration to the environmental, social and economic impacts of the Project on the Property. Although the EIS does not make any statement in relation to the position of Locaway or the Property, it is considered that the glaring omissions in the EIS concerning the Property are based upon the mistaken assumption made by KEPCO, that Locaway is a mine related company. It is assumed that this has occurred because Locaway had entered into an option agreement with the proponent of the (former) Mt Penny Coal Project. If that option had been exercised, it would have led to the Property and Locaway's

- *“This additional modelling predicted that all private bores would be outside the zone of influence of groundwater drawdown and would therefore meet minimal impact criteria specified under the NSW Government’s Aquifer Interference Policy (AIP)”*.⁵
- *“The EIS predicted that no privately-owned groundwater bores in the area surrounding the project site would exceed the ‘minimal impact considerations’ trigger in the NSW Aquifer Interference Policy (ie. 2 metre drawdown at privately-owned bores)”*.⁶

(b) In the Final Assessment Report for the Project:

- *“This analysis indicates that the risk of impact to private bores and groundwater dependent ecosystems (GDE) is extremely low and well within the NSW Government’s minimal impact criteria as defined in the Aquifer Interference Policy (AIP)”*.⁷
- *“The results indicate that it is exceptionally unlikely that drawdown impacts exceeding the 2m minimal impact drawdown target of the Aquifer Interference Policy (AIP) would occur at any privately-owned properties”*.⁸
- *“To provide further context, only one model run of the 140 model runs of the uncertainty analysis predicted an impact that exceeded the NSW Government’s AIP minimal impact requirements on the alluvial aquifer outside of land owned by KEPCO. Under all other uncertainty analysis model runs, the 2m drawdown is confined to land owned by KEPCO within the Upper Bylong River valley catchment”*.⁹

9. Our client is therefore concerned that any advice received from the Minister for Regional Water (or from his Department in accordance with an instrument of delegation) is not in fact based on the considerations in section 3.2 of the AI Policy, including the applicable parts of Table 1, as required by clauses 12AB and 17B of the Mining SEPP. For as long as this situation continues, there is the potential for considerable doubt over the validity of any determination in relation to the Project, due to a failure to properly consider the matters required to be considered by the AI Policy and the Mining SEPP.
10. Our client has instructed us to raise these matters directly with you now in the hope that they can be properly addressed before any determination is made. Our client otherwise reserves its rights in relation to this matter.

Water Rights being owned by a coal mining company. That option agreement was terminated in 2015. KEPCO were informed of this fact by Locaway. It is therefore considered that KEPCO has adopted the position that any impacts from the Project were either not relevant or were not required to be considered in the preparation of the EIS.

In any event, and for the reasons set out in this letter, whether the impact affects a “mine related company” or a “coal mining company” is irrelevant to the Aquifer Interference Policy and to clauses 12AB(4) and 17B of the Mining SEPP.

⁵ p 32.

⁶ p 64.

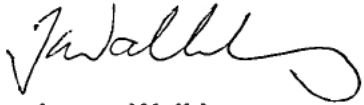
⁷ p vii

⁸ p 21.

⁹ Ibid.

11. We would appreciate your early response to the matters raised, prior to any determination in relation to the Project.

Yours faithfully,
CHALK & BEHRENDT

A handwritten signature in black ink, appearing to read 'J. Walkley', with a long, sweeping flourish extending to the right.

James Walkley
Director

cc. The Hon. Niall Blair
Minister for Regional Water
52 Martin Place
SYDNEY NSW 2000



New South Wales Government
Independent Planning Commission

Mr James Walkley
Director
Chalk & Behrendt
Lawyers & Consultants

Email: [REDACTED]

Dear Mr Walkley

Bylong Coal Project SSD 6367

I refer to your letter dated 7 December 2018 to the Chair of the Independent Planning Commission (Commission) in relation to the NSW Aquifer Interference Policy.

Mary O'Kane has asked me to respond on her behalf.

Your letter has been provided to the Commission panel constituted for the project. The Commission panel will consider the issues raised by your client prior to determination of the project.

Should you require any further information please contact me on 9383 2128.

Yours sincerely

A handwritten signature in blue ink that reads 'Anna Summerhayes'.

Anna Summerhayes
Counsel assisting the Independent Planning Commission

12/12/18