



April 2019

Mr Gordon Kirkby, Chair, Bylong Coal Project Panel
Independent Planning Commission
Level 3, 201 Elizabeth St
Sydney 2000
Email: gordon.kirkby@ipcc.nsw.gov.au

Dear Mr Kirkby

RE: DRAFT CONDITION 25 and COMPENSATORY WATER AGREEMENTS FOR THE PROPOSED BYLONG COAL PROJECT

Introduction

We are agricultural landholders in the Bylong Valley and our properties are in close proximity to the proposed Bylong Coal Project. We are dependent on ground water for stock, domestic and irrigation purposes. The proposed mining development plans to access the same groundwater resources that we depend on. The Bylong Coal Project is currently being assessed by the Independent Planning Commission. We believe that the mine project should not be approved, primarily because of the threats to our water supplies.

We have previously expressed concern to the Planning Assessment Commission (prior to becoming the Independent Planning Commission) and the Independent Planning Commission (IPC) about the threats to our water supply should this project be approved. We are concerned that the Department of Planning and Environment appears to have not taken our concerns seriously and has recommended that the mine be approved despite the fact (to the best of our knowledge) that the proponent does not have sufficient water licences to account for the proposed water take.

The NSW Department of Planning and Environment has already taken steps to deal with the threats to water security for agriculture by including in their draft conditions, condition 25 (Attachment 1). Condition 25 outlines measures that should be taken by KEPCO to provide water or financial compensation.

However, we believe that additional steps need to be taken to ensure that the measures in condition 25 are strengthened to ensure that the supply of water for agriculture is not compromised.

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It is a matter of great concern to us that the terms of condition 25 are, in our view, unfavourable to landholders and do not guarantee that water will be made available to a farm when the supply has been interrupted by mining operations. Furthermore, KEPCO is attempting to enter into contractual agreements on water with landholders with contract conditions that are even less favourable than condition 25.

We are also aware that Condition 25 and KEPCO's water agreement are less favourable to landholders than conditions and agreements in other mines, see for example the Conditions at Ulan and Wallarah 2, (Attachment 2).

For the reasons set out below we have two main concerns. Firstly, that the measures outlined in condition 25 do not give an adequate level of certainty about the maintenance of water supplies. Secondly, the proposed water agreement developed by KEPCO offers weaker protection for our supply than draft condition 25.

Burden of proof with the landholder in the KEPCO water agreement

Condition 25 states that the burden of proof lies with the mining company, (Attachment 1). However, the water agreement developed by KEPCO proposes that the burden of proof lies with the landholder; a process which could be long, drawn out, costly and ultimately unsuccessful because an individual farmer has to prove that the loss of water was directly caused by the project. Condition 25 should state that KEPCO cannot contract out of its obligations in condition 25 and the landholder should be no worse off as a consequence of the project.

It appears inconsistent for KEPCO to impose an onerous burden on landholders to prove that mining caused loss of water when the Department of Planning & Environment and the proponent claim that the water supply to farms in the Bylong Valley will not be affected by mining. If water supplies will not be affected by mining why is the water agreement so tilted towards favouring the mining company? Surely if mining is not going to adversely affect water supplies then KEPCO does not need to aggressively protect itself from claims of water loss due to mining operations? Furthermore, KEPCO has the resources and operational knowledge to be able to accept the responsibility for proving that mining operations were not the cause of any disruption to water supply.

Clear evidence that landholder ground water impacted by the project

Condition 25 must state what evidence is sufficient to trigger the compensatory water obligation on KEPCO. Otherwise the condition is ripe for dispute. We suggest the minimal impact provisions in the Aquifer Interference Policy are sufficient to trigger the compensatory water obligation once project construction has commenced.

A dispute between a landholder and KEPCO as to the cause of the landholder's water impact places the landholder in a precarious position, particularly if he or she will not get compensatory water until that dispute is settled. KEPCO should be required to pay the landholders' invoiced legal and expert costs on submission of an invoice, and any damages sustained as a consequence of the impact on the water.

Irrigation should be included

Condition 25 and KEPCO's proposed compensatory water agreement do not specifically include irrigation water and impliedly exclude irrigation water in the interim supply obligation. It is essential to include irrigation water to properly balance the proposed mining activities with the continuation of agriculture. Irrigation is a major water use in the Bylong Valley. To curtail irrigation would cause financial hardship and in some cases, where irrigation is the major part of the business, render a farm unviable. Interruption of the supply of water for irrigation must be included in Condition 25 and any subsequent compensatory water agreement.

Make up water to be provided within 24 hours

Condition 25 and the current water agreement propose that in the event of interruption to the water supply and where the landholder can prove that the mine project was the cause then the mine will supply make up water 'as soon as practicable'. This term of condition 25 is vague and unenforceable. It leaves the decision of when to supply water entirely to the discretion of KEPCO. Condition 25 should state that water will be supplied within 24 hours.

Need for independent monitoring bores

Condition 25 which aims to ensure that farm water supplies are maintained must be supported by independent monitoring of bores established by DPI Water. Currently monitoring is proposed to be run by KEPCO. KEPCO seeks to place monitors in our bores and run the monitoring program. This arrangement would give KEPCO an unfair advantage in any dispute unless the results of all the bore data, including data from bores on KEPCO's land, are publicly available and in real time.

In addition, there must independent oversight of the monitoring program with real time monitoring data publicly available. Bore data obtained by KEPCO must be supplemented by data obtained by DPI water from an adequate number of regulatory bores.

Non-disclosure of nullifying a provision in condition 25

Condition 25 includes a provision that allows for the payment of compensation in the event of water loss. However, this provision can be nullified if the landholder enters into an agreement with KEPCO. However, the compensatory water agreement drafted by KEPCO does not state that this provision can be nullified if the landholder signs a compensatory water agreement.

KEPCO has already provided water agreements to landholders and asked landholders to sign these agreements without disclosing that signing an agreement would nullify the compensation provision in Condition 25.

'Direct Impacts'

Condition 25, as currently drafted, makes compensatory water contingent on a landholder's water supply being "adversely and directly impacted". The use of the word "directly" opens up an avenue for a debate as to "direct" versus "indirect" impacts, thus potentially allowing the proponent to abnegate responsibility for impacts that are clearly project related but, in some sense (according to their view), not "direct". The requirement for "direct" impacts should be removed, and the condition phrased simply in terms of impacts, as is the case for the equivalent condition for Ulan ("... whose supply is adversely impacted..."), (Attachment 2).

Conclusion

We believe that the Bylong Coal Project should not be approved, however if it is approved then our water supplies should not be adversely affected. We urge you to correct the balance between the requirements for agriculture and mining. It is our view that to correct the balance the following changes should be made to condition 25;

- Condition 25 should specify that compensatory water must continue to be supplied until or unless the mine owner has demonstrated that the impact is unrelated in any way to the operation of the mine.
- Condition 25 should state that compensatory water should be supplied within 24 hours of supplies being interrupted. Interruption should be determined by the minimal impact provisions of the Aquifer Interference Policy.
- Condition 25 should explicitly state that compensatory water should be provided for stock, domestic and irrigation purposes
- Condition 25 should include a provision for independent monitoring of ground water levels in bores upstream and downstream from the project.
- Condition 25 should specify that all bore data is publicly available and the government water authority has an oversight role in monitoring bore data.
- Condition 25 should state that a proponent cannot contract out of its compensatory water obligations or the compensation obligations in the Development Consent.
- Remove the reference to 'direct impacts' in Condition 25.

Sincerely *Graham Tanner*

Eagle Hill BULONG

Signed. *G Tanner*

CC. Ms Wendy Lewin,
CC. Mr Steve O'Connor,
CC. Secretary,

Panel Member, Independent Planning Commission
Panel Member, Independent Planning Commission
NSW Department of Planning

ATTACHMENT 1

Draft Conditions Compensatory Water Supply 25.

The Applicant must provide a compensatory water supply to the landowner of privately-owned land whose water supply is adversely and directly impacted (other than a negligible impact) as a result of the development, in consultation with Dol Water, and to the satisfaction of the Planning Secretary.

The compensatory water supply measures must provide an alternative supply of water that is equivalent, in quality and volume, to the loss attributable to the development. Equivalent water supply should be provided (at least on an interim basis) as soon as practicable after the loss is identified, unless otherwise agreed with the landowner.

If the Applicant and the landowner cannot agree on whether the loss of water is to be attributed to the development or the measures to be implemented, or there is a dispute about the implementation of these measures, then either party may refer the matter to the Planning Secretary for resolution.

If the Applicant is unable to provide an alternative long-term supply of water, then the Applicant must provide compensation, to the satisfaction of the Planning Secretary. However, this condition does not apply if the Applicant has a compensatory water agreement with the owner/s of the land and the Applicant has advised the Department in writing of the terms of this agreement.

Notes: •The Water Management Plan (see condition 28) is required to include trigger levels for investigating potentially adverse impacts on water supplies. •The burden of proof that any loss of water supply is not due to mining impacts rests with the Applicant.

ATTACHMENT 2

Conditions Ulan Mod 3 and Wallarah 2

Ulan Coal Mine Approval Mod 3 consolidated 14 March 2016

Compensatory Water Supply

30. The Proponent shall provide a compensatory water supply to any owner of privately-owned land whose supply is adversely impacted (other than an impact that is negligible) as a result of the project, in consultation with DPI Water, and to the satisfaction of the Secretary.

The compensatory water supply measures must provide an alternative long-term supply of water that is equivalent to the loss attributed to the project. Equivalent water supply must be provided (at least on an interim basis) within 24 hours of the loss being identified.

If the Proponent and the landowner cannot agree on the measures to be implemented, or there is a dispute about the implementation of these measures, then either party may refer the matter to the Secretary for resolution.

If the Proponent is unable to provide an alternative long-term supply of water, then the Proponent shall provide alternative compensation to the satisfaction of the Secretary.

Walarah 2 Development consent conditions 16 January 2018

Compensatory Water Supply

16. Prior to the commencement of extraction of coal, the Applicant must notify any owner of privately-owned land whose water supply could potentially be affected by the development of their right to a compensatory water supply, if their water supply is adversely and directly impacted as a result of the development.

The Applicant must provide a compensatory water supply to any owner of privately-owned land whose water supply is adversely and directly impacted (other than a negligible impact) as a result of the development, in consultation with CLWD and to the satisfaction of the Secretary.

The compensatory water supply measures must provide an alternative long-term supply of water that is equivalent, in quality and volume, to the loss attributed to the development. Equivalent water supply must be provided (at least on an interim basis) within 24 hours of the loss being identified.

If the Applicant and the landowner cannot agree on the measures to be implemented, or there is a dispute about the implementation of these measures, then either party may refer the matter to the Secretary for resolution.

If the Applicant is unable to provide an alternative long-term supply of water, then the Applicant must provide alternative compensation to the satisfaction of the Secretary.

Note: The burden of proof that any loss of surface water or groundwater access was not due to mining impacts rests with the Applicant.

