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Senate Standing Committee
Environment and Communications
S1.57 Parliament House
CANBERRA ACT 2600

Sent by email: chris.lawley@aph.gov.au

Dear Sir/Madam,

Senate Standing Committee on Environment and Communications - Inquiry into the Environment Protection and Biodiversity Conservation Amendment Bill 2013 (EPBC Bill) – Questions on Notice

We refer to the questions on notice that we received in respect of this matter. Our responses to these three questions are provided below.

1. AGL Energy's Submission (submission 202)

Question

Senator Cameron requested that we respond to AGL Energy's (**AGL's**) submission in respect of the EPBC Bill. This request was made during the hearing in Sydney on 17 April 2013.

Response

We note that AGL's submission advances five main points, of which points 2, 3 and 4 fall within the scope of our expertise as environmental lawyers. We will therefore respond to these three points in turn.

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Point 2 from AGL's submission*: The Proposed Amendments duplicate State Government processes which assess the impact of CSG developments on water resources. This regulatory duplication unnecessarily increases costs of CSG projects and reduces business efficiency.*

ANEDO strongly disagrees with the assertion that the EPBC Bill will duplicate State Government processes which assess the impacts of CSG development on water resources.

First, based on our analysis, environmental regulation at a State and Territory level does not adequately address the specific requirements of the EPBC Act. This being the case, it is difficult to argue that assessment and approval of CSG development and large coal mining development under the EPBC Act is duplicative. We canvass this issue in considerable detail in our submission concerning the *Draft Framework for Standards for Accreditation of Environmental Approvals under the EPBC Act 1999*. Rather than repeating our comments, we refer you to our submission which is available online.[1]

Second, drawing on our extensive experience as environmental lawyers, we developed 10 best practice standards for planning and environmental regulation in response to COAG's proposal to streamline environmental assessment. We then evaluated the relevant laws in each State and Territory against these standards. Based on our analysis, no State or Territory currently has a regulatory regime that reflects ANEDO's 'best practice metric'. In short, this means that States and Territories do not adequately regulate the impacts of mining on water resources. Again, this negates any suggestion that assessment and approval under the EPBC Act is duplicative and therefore redundant. Conversely, it highlights the need for greater scrutiny of high-impact activities by the Commonwealth Government. A copy of the 10 best practice standards is available online.[2]

Third, we note that AGL has significant CSG exploration projects underway in Gloucester and the Hunter Valley region.[3] We will therefore provide more specific information regarding the deficiencies of the regulatory regime in NSW.

Environmental assessment and development consent for mining and petroleum exploration and production activities in NSW is governed by three central parts of the *Environmental Planning and Assessment Act 1979* (**EPA Act**): Part 3A, Part 4 (State Significant Development or **SSD**), and Part 5.

Of principal concern is the fact that Part 3A, Part 4 (SSD) and Part 5 all confer broad discretion upon the relevant decision-maker to determine how environmental impacts will be assessed, and subsequently whether consent will be granted. There is therefore no guarantee of comprehensive EIA of these projects on groundwater in NSW

[1] Dated November 2012 and available at: http://www.edo.org.au/edonsw/site/pdf/subs/121123COAGCthaccreditationstandardsANEDOsubmission.pdf

[2] Ibid. See attachment A of submission.

[3] As noted on AGL Energy's website. Information retrieved 24 April 2013: http://www.agl.com.au/ABOUT/ENERGYSOURCES/UPSTREAMGAS/Pages/default.aspx

legislation. We will address each of these Parts in turn, referring to case law where necessary. We will also discuss recent policy developments in NSW concerning the regulation of CSG activities.

Part 3A

Background

Part 3A was repealed in 2011 following considerable community concern regarding the generality of the environmental assessment requirements for large developments, including CSG developments and large coal mining developments. As transitional provisions were incorporated into the EPA Act at the time of repeal, a significant number of projects continued to be assessed under Part 3A. There are currently over 70 development applications belonging to the category 'Mining, Petroleum and Extraction' being assessed pursuant to this Part.[4]

Environmental assessment

To summarise, Part 3A provides the Director-General of Planning and Infrastructure (**DG**) with very broad discretion to determine how environmental impacts – including impacts on water resources - will be assessed.[5] While the DG is required to prepare a report that includes 'an assessment of the environmental impact of the project',[6] Part 3A does not outline any minimal standards which must be met when preparing this document. Furthermore, Part 3A projects are exempt from a significant list of 'concurrence approvals' normally required from various agencies (concerning, for example, coastal protection, native vegetation, bush fire management and water management).[7]

Consent

The consent authority for Part 3A mining development is in most instances the Minister for Planning and Infrastructure (**Minister**),[8] or the Planning and Assessment Commission (**PAC**).[9] The Minister or PAC must 'consider' the DG's report regarding environmental assessment. As there is considerable case law indicating that 'consider' does not require a consent authority to do anything more than 'turn their mind' to the matter in question,[10] the Minister may ultimately ignore both the DG's report and any advice provided by the PAC. Furthermore, failure to consider a matter prescribed by

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[4] See NSW Department of Planning and Infrastructure, Major Projects Register. Information retrieved 24 April 2013:
http://majorprojects.planning.nsw.gov.au/index.pl?action=search&page_id=&search=&authority_id=&search_site_type_id=9&reference_table=Part3A&status_id=&decider=&from_date=&to_date=&x=46&y=5

[5] Environmental Planning and Assessment Regulation 2000, cl. 8B (a).

[6] EPA Regulation, cl. 8B (a).

[7] EPA Act, s. 75U.

[8] EPA Act, s. 75J (repealed, but still applicable under transitional provisions).

[9] EPA Act, s. 23D.

[10] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24.*

legislation will not always empower the Court to invalidate the decision.[11] In other words, it is difficult to successfully appeal the legality of a decision, even where the consent authority has not taken into account a relevant matter, such as the environment.

Similarly, the Minister or PAC (as the case may be) is not required to assess the development – regardless of its scale - against any specific criteria including impacts on native vegetation, threatened species, Aboriginal cultural heritage or water resources. Rather, they have broad discretion to approve or refuse the project as they see fit. With the exception of State Environment Planning Policies (SEPPs), environmental planning policies do not apply when assessing Part 3A development.[12]

CASE STUDY – Part 3A and impacts on water resources

Barrington-Gloucester-Stroud Preservation Alliance Incorporated v Planning Assessment Commission and AGL Upstream Infrastructure Investments Pty Limited (2012) (Gloucester Gas Project Case)

EDO NSW, on behalf of Barrington-Gloucester-Stroud Preservation Alliance Inc. commenced judicial review proceedings against two decisions of the Planning Assessment Commission (PAC) to approve parts of the Gloucester Gas Project.

The Gloucester Gas Project involves 110 coal seam gas wells within a 210km area between Barrington and Great Lakes, transporting the gas from the processing facility to the existing gas supply network via a 95-100 km pipeline traversing several local government areas, and a gas delivery station at Hexham. The Alliance is concerned about the risks of surface and groundwater contamination and the lack of data about groundwater impacts.

The key issue raised by the Alliance in the hearing before the Land and Environment Court was that the PAC failed to properly apply the precautionary principle in approving the development on the basis of only preliminary groundwater investigations, and that certain conditions imposed in relation to groundwater and wastewater left open the possibility of a significantly different development from that for which approval was sought and were therefore uncertain.

Justice Pepper dismissed the claim, stating that the conditions imposed in relation to the project were within the permissible limits of Part 3A, were not uncertain with respect to impacts, and that the precautionary principle was adequately considered by the PAC in granting the project approval.

In short, the Court affirmed that the PAC was able to approve the project under Part 3A on the basis of preliminary groundwater studies.

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[11] See for example: *Minister for Planning v Walker [2008] NSWCA 224*; *Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355; Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24.*

[12] EPA Act, s. 75R (repealed, but still applicable under transitional provisions).

Part 4 (SSD)

Background

Part 4 (SSD) was enacted to replace Part 3A. It therefore applies to the same forms of mining and petroleum exploration and production activities. These include all coal mining activities, petroleum production and certain petroleum exploration activities.[13]

Environmental assessment

Like Part 3A, Part 4 (SDD) confers broad discretion on the DG to determine how the environmental impacts of a mining development will be assessed.[14] While an EIS must be prepared for SSD, the EPA Act and associated Regulation do not provide any indicative criteria with respect to environmental assessment. Specifically, the Regulation states that:

> ***3 Environmental assessment requirements***
>
> *1) Before preparing an environmental impact statement, the responsible person must make a written application to the Director-General for the environmental assessment requirements with respect to the proposed statement.*[15]

Consequently, there is no statutory requirement to carry out groundwater assessment and/or monitoring for CSG projects or large coal mining projects. In light of Pepper J's findings in the Gloucester Gas Project Case, it is unlikely that the DG would be compelled under Part 4 (SSD) to require the proponent to produce anything more than basic groundwater studies, even for large CSG exploration projects.

Like Part 3A projects, SSD is exempt from a significant list of 'concurrence approvals' normally required from various agencies (concerning, for example, coastal protection, native vegetation, bush fire management and water management).[16]

Consent

The Minister (or PAC or other approved delegate) is the consent authority for SSD.[17] The consent authority must 'take into consideration' a range of matters including: any relevant environmental planning instrument (**EPI**); the likely social, economic and environmental impacts of the development; and the public interest.[18] As previously indicated, a requirement to 'take into consideration' does not compel a consent authority to implement the provisions of a particular EPI, or to privilege environmental or social impacts over economic impacts.[19] Furthermore, the NSW Court of Appeal has held that

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[13] See State Environmental Planning Policy (State and Regional Development) 2011, Schedule 1. Available at: http://www.legislation.nsw.gov.au/maintop/view/inforce/epi+511+2011+cd+0+N

[14] EPA Act, s. 78A (8A); EPA Regulation, Schedule 2, Part 2.

[15] EPA Regulation, Schedule 2, Part 2.

[16] EPA Act, s. 75U.

[17] EPA Act, s. 89D.

[18] EPA Act. ss. 89H, 79C.

[19] *Minister for Planning v Walker [2008] NSWCA 224*.

the requirement to consider the public interest does not mean that the Minister (or relevant consent authority) must consider a particular aspect of the public interest, for example ecologically sustainable development (**ESD**).[20]

Part 5

Part 5 of the EPA Act applies to certain mining activities that do not require development consent. This includes certain CSG exploration and monitoring activities.

Under Part 5, the determining authority (the relevant Minister or public authority) must 'take into account to the fullest extent possible' all matters affecting or likely to affect the environment.[21] While certain prescribed matters require an EIS,[22] others (such as the exploration activity being undertaken in the Fullerton Cove Case, discussed below) do not. The Fullerton Cove Case also clarified the limitations of the term 'to the fullest extent possible.' In short, preliminary groundwater studies for high impact CSG exploration activity within the vicinity of a Rasmar-listed wetland are sufficient to meet the requirements of this section of the EPA Act.

CASE STUDY – Part 5 and impacts on water resources

Fullerton Cove Residents Action Group Incorporated v Dart Energy Limited & NSW Department of Trade and Investment, Regional Infrastructure and Services (2013) (Fullerton Cove Case)

EDO NSW acted for Fullerton Cove Residents Action Group (FCRAG) in a challenge to Dart Energy's proposal for the drilling of coal seam gas exploration wells at Fullerton Cove near Newcastle. The Pilot Appraisal Exploration Program (PAEP) is for two vertical wells drilled into two separate coal seams, with four lateral wells, two in each coal seam. The PAEP includes the continuous pumping of water out from the coal seams (16,000 Litres per day) for 12 months, allowing the gas to flow. It is to be located on a floodplain zone, in a high water table area, near an internationally-listed RAMSAR wetland.

FCRAG argued that the PAEP is high-impact development, and Dart should have prepared a full Environmental Impact Statement (EIS), and be subject to the formal public consultation processes under Part 5 of EPA Act. FCRAG also argued that the PAEP was not properly assessed under Part 5 of the Act, particularly in relation to potential impacts on groundwater, threatened species and ecological communities. In particular, the Department of Trade and Investment had not been provided with any groundwater assessment by Dart before approving the project.

On 5 September 2012, FCRAG was successful in obtaining an injunction restraining Dart Energy from drilling the wells until the main case had been decided. The injunction was necessary because Dart refused to agree to stop work while the case was on foot.

[20] *Minister for Planning v Walker [2008] NSWCA 224*.
[21] EPA Act, s. 111.
[22] EPA Act, s. 112.

The main proceedings were heard in the Land and Environment Court on 15-19 October 2012 before Justice Pepper. On 28 March 2013, Justice Pepper dismissed FCRAG's case.

The Court found that although there was no consideration of any groundwater assessment, the Department had complied with its requirements to consider environmental impacts "to the fullest extent possible" under s111 of the EPA Act. Her Honour took into account the fact that this was a pilot project, and the Department had general knowledge of the geology of the area, and information collected in reports for nearby exploration wells.

In summary, Her Honour considered that Part 5 of the EPA did require either an EIS for the project, or the proponent to provide detailed groundwater studies before it was approved.

Strategic Regional Land Use Policy

The NSW Government recently developed a Strategic Regional Land Use Policy (SRLUP) which is intended to improve regulation of CSG activities, in particular in relation to the impact of these activities on agricultural land.[23]

EDO NSW has written submissions responding to various sub-policies that sit within the SRLUP. These submissions are available online and include:

- A submission responding to the Draft Code of Practice for Coal Seam Gas Exploration;[24]
- A submission responding to the Draft Aquifer Interference Policy – Stage 1; [25]
- A submission responding to the 'Gateway Process' under the SRLUP;[26]

Briefly, these submissions highlight a number of deficiencies in each of the sub-policies. They also question the overall regulatory impact of the SRLUP, particularly in light of the fact that policy documents that are not incorporated into legislation or regulations are ultimately unenforceable.

Draft Mining SEPP – 2km exclusion zone

The NSW Government recently released the Draft State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Coal Seam Gas Exclusion Zones) 2013 (NSW) for public comment (**Draft Mining SEPP**).[27] The Draft Mining SEPP proposes to prohibit CSG development on or under land within 2km of

[23] For further information see: http://www.planning.nsw.gov.au/srlup
[24] Dated 2 May 2012: http://www.edo.org.au/edonsw/site/pdf/subs/120502draft_code_practice.pdf
[25] Dated 3 May 2012: http://www.edo.org.au/edonsw/site/pdf/subs/120503aquifer_interference.pdf
[26] Dated December 2012: http://www.edo.org.au/edonsw/site/pdf/subs/121217SubmissiononGatewayprocessSRLUP.pdf
[27] See: http://www.planning.nsw.gov.au/tabid/205/ctl/View/mid/1081/ID/101/language/en-US/Default.aspx

residential zones or future residential growth areas, and within critical industry cluster. In a submission responding to the Draft Mining SEPP, EDO NSW noted that exclusion zones are an important part of strategic regional planning. However, it was noted that first, 2km was an entirely arbitrary figure and second, did not seek to protect water resources. A copy of this submission is available online.[28]

***Point 3 from AGL's submission**: There is no need for the Proposed Amendments, given that the Federal Government already has the power to regulate the impact of CSG projects on water resources under the existing regime of the EPBC Act.*

As noted by ANEDO during the Senate Committee hearing on the EPBC Bill, the Commonwealth Minister for the Environment currently relies on one of the eight matters of NES to regulate the impacts of CSG development and large coal mining development on water resources. Where one of these matters is not likely to be significantly impacted by a development, the Minister has no legislative basis to intervene under the EPBC Act. In practice, this means that many CSG developments and large coal mining developments that are likely to have a significant impact on water resources could not be declared 'controlled actions' under the EPBC Act.

Furthermore, even where one of the eight matters of NES is 'triggered' under the EPBC Act and the Minister for the Environment issues a conditional approval, it is arguable that the Minister's conditions must relate to the matter of NES.[29] Therefore it is possible that the Minister may be prohibited from imposing broad conditions that seek to regulate or mitigate significant impacts on a water resource where those impacts have no bearing on the relevant "trigger" (for example a listed threatened species or ecological community, as was the case with the Gloucester Gas Project).[30]

We further note that the Minister for the Environment is not bound to act on the advice of the Independent Expert Scientific Committee. Rather, the Minister is only required to 'consider' their advice when assessing a CSG development or large coal mining development that is likely to have a significant impact on water resources.[31]

In light of the foregoing analysis, ANEDO is of the view that the proposed ninth matter of NES would clarify the Minister's power under the EPBC Act to assess and conditionally approve (or alternatively reject) CSG development or large coal mining development that is likely to have a significant impact on water resources.

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[28] Dated 12 April 2013: http://www.edo.org.au/edonsw/site/pdf/subs/130412CSGexclusionzonesSEPPamendment.pdf

[29] EPBC Act, s.134.

[30] The Commonwealth Minister for the Environment issued a conditional consent for the Gloucester Gas Project on 11 February 2013.

[31] EPBC Act, s. 136 (2) (fa).

***Point 4 from AGL's submission**: There is considerable uncertainty in the drafting of the provisions of the Bill such that CSG activities that have minimal environmental impact may need to be referred to the Minister.*

ANEDO strongly disagrees with this assertion. To clarify, only matters that are likely to have a **significant impact** on a matter of NES are referred to the Commonwealth Minister for the Environment under the EPBC Act.[32]

2. Definition of 'water resource'

Question

On 18 April 2013, Senator McKenzie requested that we respond to the following question:

- *The EPBC Act defines a 'water resource' as:*

    a) *Surface water or groundwater; or*
    b) *a watercourse, lake wetland, or aquifer (whether or not it currently has water in it)*

    and includes all aspects of the water resource (including water, organisms and other components and ecosystems that contribute to the physical state and environmental value of the water resource).[33]

    However, the bill does not identify which water resources would be matters of national environmental significance.

    Do you know which water resources would be deemed to be matters of national environmental significance? That is, water resources in which geographic locations would be MNES (for example, the Great Artesian Basin, the Murray Darling Basin)?

Response

The EPBC Bill proposes to add a ninth matter NES to the EPBC Act. The Bill does not define this ninth matter in terms of specific water resources. Rather, it is defined as an action taken by a specified entity (for example a constitutional corporation) involving coal seam gas development or large mining development that has, will have or is likely to have a significant impact on a water resource. In other words, the ninth matter NES is defined in terms of development type and the scale of its impact on a water resource. ANEDO supports this approach of focussing on the relevant impact of the activity, rather than limiting application to specifically listed water resources, as this ensures comprehensive and consistent coverage of potential significant impacts.

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[32] EPBC Act, ss. 67, 68, 68A. To be read in conjunction with Part 3 and Part 9 of the Act.

[33] See EPBC Act 1999, s 528 and Water Act 2007, s 4.

3. Application of 'water trigger' to agricultural activities

Question

On 23 April 2013, Senator McKenzie requested that we respond to the following question:

- *Do you see the water trigger applying to other industries such as agriculture?*

Response

We note in the first instance that the Bill in question relates to specified mining activities that are likely to have a significant impact on the environment. That is, there is no suggestion that the Bill will apply to other forms of development, such as agriculture.

We would further refer Senator McKenzie to our submission, in which we propose that the "water trigger" be expanded to capture all forms of unconventional gas development, and large mining activities that excavate beneath the water table. That is, the proposed expanded trigger would still only relate to mining activities.

Finally, we would like to refer Senator McKenzie to our comments in the transcript regarding the application of the "water trigger" to agricultural activities. Specifically, we stated that we did not consider the "water trigger" an appropriate mechanism to regulate the impacts of irrigation on water sources. We reiterate that the EPBC Act was never intended to apply to all activities, only those with nationally significant impacts. Therefore the vast majority of daily agricultural activities would not trigger the Act as they would not constitute a significant impact.

Yours sincerely,
ANEDO

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