8 March 2019

Commissioners
Independent Planning Commission
3/201 Elizabeth Street
SYDNEY NSW 2000

Attention: Mr Gordon Kirkby

Dear Gordon,

Bylong Coal Project
Response to EDO NSW Submission dated 15 February 2019

1. INTRODUCTION

This letter responds to the matters raised by EDO NSW (EDO) in its letter to the Independent Planning Commission (IPC) dated 15 February 2019 relating to the decision of the NSW Land and Environment Court in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (Gloucester) handed down on 8 February 2019. In Gloucester, the Chief Judge refused the proposed Rocky Hill Coal Project (Rocky Hill Project) in the Class 1 (development merits appeal) jurisdiction of the Court.

2. EDO SUBMISSION

The EDO has made the following submissions:

- The decision in Gloucester "*requires close scrutiny*";
- The Court found, on evidence that is before the IPC, that the Rocky Hill Project would contribute cumulatively to greenhouse gas (GHG) emissions;
- The Court found that there is a causal link between the GHG emissions from the Rocky Hill Project and climate change and its consequences;
- The cumulative impact of the GHG emissions from the Bylong Coal Project (the Project) is "*a relevant consideration to be taken into account by the IPC when assessing the project*";
- The Project will generate more GHG emissions than the Rocky Hill Project;

- Thermal coal of the kind produced by the Project is more substitutable for end uses (eg power generation) than coking coal (which was the kind addressed in Gloucester);
- Climate change impacts "*are relevant to be considered*";
- The contention in Gloucester that the GHG emissions would not necessarily cause the carbon budget to be exceeded was found to be speculative and hypothetical;
- The contention in Gloucester that refusing approval was not the most efficient method of reducing emissions was rejected; and
- The contention in Gloucester that there would be market substitution and carbon leakage was rejected.

3. RESPONSE TO EDO SUBMISSION

KEPCO provides the following response to the submissions made by the EDO:

- Gloucester was a merits review decision in the Class 1 jurisdiction of the Court and as such does not bind the IPC to come to any particular view about similar issues that arise in respect of the development application for the Project;
- There are grave difficulties in relying on the findings of the Court in Gloucester on the basis of a whole body of evidence (including oral evidence) that is not before the IPC and which were made without being tested in Court in respect of the Project. Even in the case of findings by a Court exercising judicial power, findings cannot be adduced in evidence in other proceedings: see *Emmot v Ku-ring-gai Municipal Council* (1954) 3 LGR 177 and *Goldin v Minister for Transport* (2002) 121 LGERA 101;
- No inference should be drawn from the fact that the NSW Department of Planning and Environment (DP&E) did not cross-examine Mr Steffen in Gloucester. DP&E's reasons for not cross-examining Mr Steffen are not known and have not been revealed in the present assessment process for the Project;
- It has been established in previous correspondence to the IPC that KEPCO is a vertically integrated company. KEPCO has targeted the Project to secure a reliable appropriate quality supply of coal for its power stations in South Korea. If the Project is not approved, KEPCO will need to secure an alternative source of coal from elsewhere to meet its energy demands. It is possible that an alternate supply may be of an inferior quality. A refusal of this Project would not in any way influence the quantity of coal forecast to be utilised in KEPCO's power generation in the decades to come; and
- The development application for the Rocky Hill Project was refused in Gloucester because of its significant and unacceptable planning, visual and social impacts. Those impacts were sufficient to warrant its refusal – noting that the Court said that the Rocky Hill Project "*should be refused for th[o]se reasons alone*" (at [556]). What was said about climate change impacts was collateral.

4. CONCLUSION

We trust this letter adequately addresses the matters raised in the EDO submission.

Please do not hesitate to contact us should you have any questions or require any further information.

Yours faithfully

HANSEN BAILEY

Nathan Cooper
Principal

James Bailey
Director

CC: Stephen O'Donoghue – NSW Department of Planning and Environment