



BYLONG COAL

KEPCO BYLONG AUSTRALIA

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25 October 2018

BY EMAIL AND POST: [REDACTED]

Referrals Gateway
Assessments and Governance Branch
Department of the Environment and Energy
GPO Box 787
Canberra ACT 2601

Dear Sir or Madam

Bylong Coal Project – EPBC 2014/7133
Comments on the request to reconsider the controlled action decision under section 78A

Thank you for your letter dated 12 October 2018 inviting KEPCO Bylong Australia Pty Ltd (KEPCO) to provide comments on the request to reconsider the controlled action decision for the proposed action, the Bylong Coal Project (Project), by 26 October 2018. A copy of that letter is attached for ease of reference.

The request to reconsider (Request) was made by the Lock the Gate Alliance (LTGA) pursuant to section 78A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

This letter contains KEPCO's comments on the Request. In providing these comments, KEPCO has relied on the advice of its lawyers and consultants.

Executive Summary

In summary, it is KEPCO's position that:

1. the Request is not valid; or, alternatively,
2. if the Minister for the Environment (Minister) determines that the Request is valid, either:
 - (a) none of the relevant grounds are satisfied and, therefore, the Minister should confirm the original controlled action decision; or
 - (b) if the Minister is satisfied that any of the relevant grounds are met, the Minister should choose not to exercise its discretion and confirm the original controlled action decision.

Set out below in more detail are the reasons and basis for KEPCO's position.

Background

In February 2014, KEPCO referred the Project to the Minister under section 68 of the EPBC Act to determine whether or not it is a controlled action (Referral).

On 12 March 2014, the delegate of the Minister determined that the Project is a controlled action under section 75 of the EPBC Act and specified the following controlling provisions:

- Listed threatened species and communities (sections 18 and 18A).
- A water resource, in relation to coal seam gas development and large coal mining development (sections 24D and 24E),

(Controlled Action Decision).

On 21 September 2018, the Minister received the Request seeking the reconsideration of the Controlled Action Decision and the inclusion of World Heritage property (sections 12 and 15A) as a controlling provision.

In the Request, the LTGA contends that the Controlled Action Decision should be reconsidered on the basis or ground that substantial new information about the impacts that the Project has or will have, or is likely to have, on a World Heritage property – namely, the Greater Blue Mountains Area World Heritage Area (GBMWhA).

The substantial new information that is primarily relied upon by the LTGA is the following:

1. Regional modelling of the hydrological impacts of mining contained in the Bioregional Assessment for the Hunter sub-region of the Sydney Basin bioregion, which was conducted by the Department of the Environment and Energy, Bureau of Meteorology, CSIRO and Geoscience Australia and was published in June 2018 (Regional Modelling).
2. Noise modelling contained in the Environmental Impact Statement produced by KEPCO published in September 2015 (Noise Modelling).
3. Heritage assessments undertaken and commissioned by the Heritage Council of NSW and the NSW Planning Assessment Commission (now Independent Planning Commission (IPC)) (Heritage Assessment).

The Request also refers to a potential fourth category of substantial new information comprising a State of Conservation Report dated 2004 relating to the impacts of mining on the GBMWhA (2004 Report).

Requirements for the Request

The EPBC Act and the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) (EPBC Regulations) specify the following requirements for a request to reconsider and provide that a request must:

- be in writing (EPBC Act, s 78A(2)(a));
- set out the basis on which the person thinks the decision should be reconsidered (EPBC Act, s 78A(2)(a));
- identify the ground(s) in paragraphs 78(1)(a) to (ca) of the EPBC Act that are being relied upon to make the request (EPBC Regulations, r 4AA.01(2)(a));

- include the source of any information provided (EPBC Regulations, r 4AA.01(2)(b)); and
- provide details of when the information became available (EPBC Regulations, r 4AA.01(2)(c)).

In addition, a request in relation to paragraph 78(1)(a) of the EPBC Act must contain the following:

- any new information that was not considered when the original decision was made; and
- information which demonstrates that a change in the potential impacts of the action is likely to happen with a high degree of certainty,

(EPBC Regulation, r 4AA.01(3)).

Relevantly, the Department's *Policy Statement – Reconsideration: Implementing the requirements of sections 78, 78A, 78B and 78C of the EPBC Act* (Reconsideration Policy) provides that, in order to determine if there is substantial new information, all of the following requirements must be satisfied:

- Has the person making the request provided 'information'?

The documents must provide some form of factual or expert evidence relating to the impacts of the action to qualify as 'information'.

- Is the information new?

The documents either were not available or were not in the possession / knowledge of the Minister at the time of the decision.

- Is the information substantial?

The documents must have the potential to demonstrate that the action does in fact have significant impacts that were not previously considered or that the impacts are greater than previously thought.

- Does the information actually relate to the adverse impacts of the action on the protected matter?

The documents must relate to the adverse impacts of the action on a protected matter and must show that the adverse impacts of the action are substantially more than originally determined by the Minister.

KEPCO's Comments

The Request is not valid

Contrary to regulation 4AA.01(3) of the EPBC Regulations and the Reconsideration Policy, the relevant substantial new information does not '*demonstrate that a change in the potential impacts of the action is likely to happen with a high degree of certainty*' for the reasons that follow. In the circumstances, the Request is not valid and, therefore, should not be processed.

In particular, the Request fails to demonstrate how the Regional Modelling, Noise Modelling, Heritage Assessment and, to the extent the LTGA relies on it, the 2004 Report demonstrate that a change in the potential impacts of the Project is likely to happen with a high degree of certainty. The Request is devoid of any commentary on any alleged change in the potential impacts of the Project since its consideration at the time of the Controlled Action Decision.

KEPCO notes that the Referral provided that the '*[p]otential indirect impacts to the [GBMWSHA] include ... Alteration to hydrological regimes surrounding the Project Boundary due to underground mining effects*'. As a result, it is clear that the potential impact of the Project on the hydrological regimes of the GBMWSHA were considered in connection with the Controlled Action Decision.

Finally, the 2004 Report concerns the impacts of five existing coal mines within the GBMWSHA and not the Project. Consequently, it cannot be said to be relevant in any possible way to the Request.

No relevant grounds are satisfied

In order to make good the ground of availability of substantial new information, the four requirements set out in the Reconsideration Policy must be satisfied.

Set out below is KEPCO's position on each of the relevant documents against the requirements that KEPCO says are not met in this case:

- Regional Modelling:
 - This document does not qualify as 'information' because it does not relate to the impacts of the Project.
 - If this document is 'information', then the document must have the potential to demonstrate that the action does in fact have significant impacts that were not previously considered or that the impacts are greater than previously thought.
- Noise Modelling:
 - This document does not have the potential to demonstrate that the Project does in fact have significant impacts that were not previously considered or that the impacts are greater than previously thought.
 - This document does not show that the adverse impacts of the Project are substantially more than originally determined by the Minister.
- Heritage Assessment:
 - This document does not qualify as 'information' because it is not documentary material but rather refers to discussions about a potential heritage assessment. If the LTGA relies on a particular document, KEPCO reserves it right to make a further submission in respect of that document.
- 2004 Report:
 - This document does not qualify as 'information' because it does not relate to the impacts of the Project.
 - It is unclear if this document was available to or in the possession / knowledge of the Minister at the time of the Controlled Action Decision.

Hansen Bailey, on behalf of KEPCO, has also prepared a document which addresses the merits of each of the submissions made by the LTGA in the Request to the effect that the Regional Modelling, the Noise Modelling and the Heritage Assessment do not constitute substantial new information within the meaning of section 78(1)(a) of the EPBC Act (see attachment).

Minister's discretion

The Reconsideration Policy provides that, even if one of the grounds in section 78 of the EPBC Act are satisfied, the Minister may exercise its discretion not to revoke or substitute a new decision where there is a sound reason(s) for so doing, including but not limited to:

1. compelling policy reasons; or
2. extenuating circumstances.

KEPCO submits that there are sound reasons for the Minister to exercise its discretion not to revoke or substitute a new decision for the Controlled Action Decision even if the requirements of section 78(1)(a) are satisfied (which KEPCO does not concede):

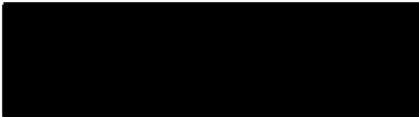
- The LTGA has acted unreasonably by withhold the information until now and seeking to have the Controlled Action Decision reconsidered in circumstances where:
 - the Regional Modelling was available in June 2018;
 - the Noise Modelling was available in September 2015; and
 - the 2004 Report has been available for well over 10 years.
- Any revocation of the Controlled Action Decision and substitution for a new decision is likely to cause KEPCO undue hardship in circumstances where the NSW Department of Planning and Environment has released its Final Assessment Report, the Project development application will be the subject of a public hearing before the IPC on 7 November 2018, and the IPC is likely to determine the Project development application over the coming months.

Conclusion

In conclusion, KEPCO respectfully submits that the Minister should refuse the Request and confirm the Controlled Action Decision for the reasons set out in this letter.

If you require any further information or have any questions in relation to this letter, please do not hesitate to contact me on (02) 8904 9508.

Yours sincerely



William (Bill) Vatovec
Chief Operating Officer
KEPCO Australia Pty Ltd

Attachments:

Letter dated 12 October 2018 from the Department to KEPCO

Letter dated 24 October 2018 from Hansen Bailey



North Sydney NSW 2060

Phone: [REDACTED] Fax: 02 8904 9588

14 November 2018

The Commissioners
Independent Planning Commission
Level 3, 201 Elizabeth Street
Sydney NSW 2000

Attention: Mr David Way

Bylong Coal Project (SSD 6367) –Response to IPC Site Visit & Public Meeting

I refer to the Commissioner's visit to the site of the Bylong Coal Project (Project) on 6 November 2018 and the public meeting held at the Parklands Hotel in Mudgee on 7 November 2018. We appreciate the time and opportunity to provide an overview of the site to the Commissioners, the Secretariat and the community members in attendance. KEPCO understands that all attendees were provided a clear appreciation of the Project and its layout and that any queries raised during the site visit by attendees were appropriately addressed.

In addition to the site visit, the Commissioners heard a total of 56 presentations at the public meeting. This included 18 (32%) presentations supporting the Project, 38 (66%) presentations opposed to the Project and one presentation not directly related to the Project.

As at the date of this letter, 68 presentations heard at the public meeting and/or submissions subsequently provided had been uploaded on the Independent Planning Commission (IPC) website. It is understood that further presentations and stakeholder submissions will be uploaded to the IPC website in the near future. KEPCO reserves the right to review and respond to these presentations / submissions, where appropriate.

Whilst there continues to be considerable local support for the Project (as expressed in the supporting presentations), presentations from stakeholders in objection to the Project expressed various matters which they continue to be concerned about. These matters include (but are not limited to): agriculture and water resource impacts, amenity and social impacts, transportation impacts, ecological impacts, impacts to the Greater Blue Mountains World Heritage Area and climate change.

KEPCO and its Project team believe that the matters raised in presentations at the public meeting have been thoroughly addressed within the comprehensive planning approvals documentation prepared for the Project. Further to this, the Development Consent conditions referred to the IPC by the NSW Department of Planning and Environment (DPE) have been strengthened to stipulate more stringent requirements for the management of potential environmental, social and economic impacts resulting from the Project. The exhaustive environmental assessments completed for the Project and in many cases peer reviewed by independent experts and governmental officials as well as the strengthened conditions of approval appear to have been overlooked by some stakeholders.

KEPCO is available to direct the Commissioners to the relevant sections of the planning approvals documentation, where matters raised by stakeholders at the public meeting have been definitely addressed. Further to this, KEPCO is also available to answer any further questions that the Commissioners may have during its determination considerations.

Please contact me on 02 8904 9508 if you would like to discuss any queries that you may have in relation to the Bylong Coal Project.

Yours faithfully,



William (Bill) Vatovec
Chief Operating Officer
KEPCO Australia Pty Ltd



Mr William Vatovec
Chief Operating Officer
KEPCO Bylong Australia Pty Ltd
[REDACTED]
NORTH SYDNEY NSW 2060

Dear Mr Vatovec

Reconsideration request – Bylong Coal Project, north-east of Mudgee, New South Wales (EPBC 2014/7133)

I am writing to you in relation to the above proposed action referred on your behalf under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

On 12 March 2014, the proposed action was determined to be a controlled action, due to likely significant impacts on:

- listed threatened species and communities (sections 18 and 18A)
- a water resource, in relation to a coal seam gas development or large coal mining development (sections 24D and 24E)

On 21 September 2018, the Minister for the Environment received a request under section 78A of the EPBC Act to reconsider the controlled action decision. I have attached the request for your consideration. It has also been published on the Department's website for public comment.

I invite you to provide comment (within 10 business days from the date of this letter) on any matter you consider relevant to this request including whether a matter referred to in any of paragraphs 78(1)(a) to (ca) of the EPBC Act is applicable in relation to the proposed action. You can send information to us

by email:

[REDACTED]

by post:

[REDACTED] Gateway
Assessments [REDACTED]
Department of the Environment and Energy
[REDACTED]

Invitations to comment have also been extended to relevant state and Commonwealth ministers. If [REDACTED];
[REDACTED] [u](#)), quoting the EPBC reference number at the beginning of this letter.

Yours sincerely

[REDACTED]

Mike Smith
Acting Assistant Secretary
Assessments and Waste Branch

12 October 2018