

Independent Planning Commission  
Narrabri Gas Project  
Supplementary Submission: Libby Ciesiolka  
21 August 2020

To the Independent Commissioners,

I have been unable to access the legal resources that I need to properly address Santos' new information in the week given by the Commission to respond to the new matters raised by Santos, notified 14 August 2020, due to Covid restrictions at my law libraries. As a result, my response is incomplete, however, I have tried to respond to Mr Lancaster SC's opinion within the time frame provided by the Commission without recourse to precedent or legal databases.

### **Consequence of absence of express reference to the principles of ESD in the Department's Assessment Report**

I agree with Senior Counsel that there is no requirement for the Department's Assessment Report to specifically refer to any of the factors set out in the *Environment Planning and Assessment Act 1979* (EP&A Act) regarding their determination. The material consequence of the Department's failure to refer to highly contentious factors which are of great concern to the community, is that the community is unable to assess the merits of the Department's assessment of those factors. As I understand it, the Department's assessment is that the Precautionary Principle was not engaged as there were no uncertainties on a Regional scale and any threats at a local scale can be determined by commencement of the Project.

Mr Lancaster's instructions are that objectors asked the Commission to draw an adverse inference from the absence of references to ESD in the Assessment Report or Conditions. My understanding of those objections was that the absence of references to ESD meant that they could not consider the merits of the Department's assessment of ESD matters. How can the public evaluate the Department's ESD risk assessment of merits if they are not mentioned? Omissions require inference and supposition. The inability of the public to evaluate the Department's assessment of ESD should be of concern to the Commission so that the merits of the Department's ESD risk assessments are determined according to law. In particular, the integration of those risks into the economic and social assessments required by s 1.3(b) and s 4.15(b) of the EP&A Act, and whether the Department's "negligible risk" assessment impacts the socio economic assessment post approval, in particular, the cost benefits of the Project.

With regard to Pepper J's view in *Barrington – Gloucester – Stroud Preservation Alliance Inc v Minister for Planning* [2012] NSWLEC 197, (2012) 194 LGERA 113 at [174] while no particular method of analysis is mandated, the integration of relevant considerations facilitates ESD considerations. What is required is integration of economic, environmental and social factors so that conditions requiring the future determination of any of these factors are not permissible.

### **The Precautionary Principle in relation to groundwater impacts**

I note that my original submission agrees with Senior Counsel that ESD is engaged through the requirement to consider the public interest and that consideration does not preclude granting consent until certainty has been obtained. I also agree that adaptive management is an accepted approach to managing uncertainty. I differ from Mr Lancaster SC's opinion in that I do not agree that requiring the Proponent to collect baseline data regarding impacts on water sources is an appropriate approach to

adaptive management of those risks. Whether an adaptive management approach is appropriate for the Narrabri Gas Project (NGP) depends on the ability of the baseline data to predict what adaptive measures are needed. I note that Mr Lancaster SC considers *SCHAG Pty Ltd v Minister for Planning and Infrastructure* [2013] NSWLEC 1032 (SCHAG) but does not apply it to the facts of the Department's Assessment Report.

The WEP, despite its belief that the EIS water model was fit for purpose, identified significant deficiencies in the model so that it discerned that that model was not fit for purpose for Phase 2 of the Project. As a result actual baseline information regarding water impacts is required before Phase 2 can proceed. Without baseline information regarding the local impacts on water sources adaptive management cannot be designed in a scientifically sound way so that any adaption of yet to be identified risks are based on an appropriate adaptive method. The parameters for adaptive management have not been defined and, according to the Department, cannot be defined without commencement of the Project. The outcomes that are to be achieved in the Project through adaptive management are contingent on the collection of baseline data, post approval.

Likewise, the Department's Assessment Report and Conditions of Consent recognise that the baseline information used by Santos in their EIS is currently inadequate for adaptive management to be prepared before approval. The Project is still at an exploratory stage, Phase 1. The Department cannot be confident that adaptive management of the water impacts of the Project is a proportionate response as the risks are unable to be identified until further exploration work is done. It was unable to carefully ascertain the risks that need to be adaptively managed without baseline data. What is a proportionate response will depend on what data is collected in the future which infers a "suck it and see" approach to adaptive management rather than calibrated and confirmed risk assumptions that can inform mitigation by adaptive measures.

These factors are analogous to Boral's inability to "calibrate and confirm" their risk assumptions regarding impacts on local water resources in SCHAG.

The Department is not able to assess what adaptive management is required by the Water Management Plan and as a result the integration of socio-economic factors is also unreliable. Maybe that's why it is not mentioned in the conditions requiring numerous water management Baseline information still needs to be collected to determine the risks to water sources in the project area. The Conditions of Consent require information to be collected to assess (and further approve) any future proportionate response. The Conditions of Consent that require the collection of baseline data needed to determine an adaptive response do not facilitate adaptive management of risks, simply because the Department cannot assess the adaptive management needs of the Project in production phase, Phase 2, without a better water model. In any case, the Conditions of Consent shift the onus of developing an adaptive management regime to the Proponent once baseline data is collected.

Both Dr Ziller (social impacts) and Matthew Currell (water impacts) identify inadequate information to facilitate adaptive management in their submissions to the Commission. Orderly planning requires these matters to be determined prior to approval but the Conditions of Consent allow the Proponent to determine these matters for themselves once it has identified those risks through collecting reliable data.

At [55] Mr Lancaster SC states that anticipated water impacts have been reviewed in detail over many years and by three separate bodies. This is true but despite this, anticipated water impacts were not, in fact, able to be determined due to the water model only being fit for purpose for Phase 1 (further exploration) and not Phase 2. The impacts remain unknown until baseline data is collected for that purpose.

I do not agree that the WEP determined that the Project would not have any significant impact on water sources due to the proposed comprehensive suite of conditions. It was unable to determine any significant impacts due to the nature of the water model in the EIS. Instead, the WEP sought a condition

that would provide that information rather than basing its determination on information yet to be collected. It sought this condition because the EIS water model was not fit for purpose for Phase 2. It recommended that the new water model be open for public comment so that it could not have been confident at all regarding significant impacts.

I make the following submissions in relation to Mr Lancaster SC's opinion at [57] of that opinion:

- a) The potential impacts to groundwater users have not been rigorously assessed if more information is needed before adaptive management during production can be articulated with any scientific rigour;
- b) The modelling does not leave "some level of uncertainty", it is so uncertain that baseline information must be collected for this purpose;
- c) The need for baseline conditions to be continuously updated indicates that proposed adaptive management cannot to be determined until this is collected;
- d) The statement that remaining knowledge gaps can only be determined by approving commencement of the Project is contrary to orderly planning especially as the identified knowledge gaps include baseline data necessary for adaptive management;
- e) Baseline data for water impacts remains unknown to the extent needed to make adaptive management decisions so that this baseline data needs to be collected before an adaptive management regime can be determined. The WEP recommended that the Water Management Plan, specifically the new water model, be subject to public comment:

*"293. However, the WEP recommends that Santos should be required to:*

- *upgrade the model to a transient model, based on ongoing monitoring, within 3 years;*
- *make this update available for public comment; and*
- *update the model every 3 years thereafter.*

*294. The Department has reflected this in the recommended conditions for the project."*

Unfortunately, the Conditions of Consent do not provide for public scrutiny of the required updated water model, a model which will provide data which is fit for the purpose of assessing those risks, of such risks. Instead the proposed water model and subsequent plans are to be developed in consultation with "DPIE Water, EPA and the Water Technical Advisory Group". of which a limited number of landholders may participate through the Water Technical Advisory Group: Condition B38(b). I assume this is because once a Project is approved there is no right to public scrutiny of the proposed Management Plans. If the model was really fit for the purpose of adaptive management of unidentified risks the WEP would not recommend that further public scrutiny of the relevant water models that the management plans will implement. If the WEP considered that the information before the public was deficient until actual baseline data was collected then it cannot have approved adaptive management as a proportionate response to identified uncertainties regarding the fitness for purpose of the EIS water modelling. The WEP and other agencies cannot know what adaptive response is appropriate until the model is updated. Santos' EIS modelling is not able to inform what proportional response is needed or whether this response can be adaptively managed after approval.

- f) As mentioned above in e), the establishment of a Water Technical Advisory Group does not implement the WEP's recommendation that the updated water model be available for public comment. Legitimate public scrutiny of baseline data is disengaged by approving the Project before this data is available.

As a result it is open to the Commission to determine that the absence of baseline data means that an adaptive management approach cannot be formulated before approval and therefore an

assessment of a proportionate response based on risk weighted factors, as required by ESD and the Precautionary Principle, is not evident in the Conditions of Consent/approval.

The Conditions of Consent allow Santos to develop the adaptive management criteria rather than the Department: see B4(g)(ii); B81(d) and B47(g)(iii). The Commission should note that the last of these condition appears to apply adaptive management correctly in relation to Koala Research Program whereas the other conditions require Santos to specify what comprises adaptive management for the Project. While this seems practical it impermissibly transfers the responsibility of the Department to assess the proportionality of responses to uncertainties to the Proponent. I have not been able to research relevant case law regarding this point in the limited time in which I have to respond to Santos' new material due to Covid restrictions at my law libraries.

### **Social and Economic Impacts**

I refer the Commission to the submissions of Reg Wade, a planning professional, regarding the Department's failures to comply with the NSW DPE 2015, Guidelines for the Economic Assessment of Mining and Coal Seam Gas Proposals, Sydney, NSW and the NSW DPIE 2018, Technical Notes supporting the Guidelines for the Economic Assessment of Mining and Coal Seam Gas Proposals, Sydney, NSW.

The integration of assessment factors necessitates that if the assessment of water impacts is not robust or requires further baseline data before risks can be determined then this will impact the socio-economic factors of the Project detrimentally to the extent that the assessment of those factors will neither be robust or representative of the original assessment.

I note that Mr Lancaster SC addresses social and economic factors by comparing them to the Land and Environment Court's latest decision on social and economic impacts without referring to the legitimate criticisms made by Reg Wade which are pertinent to the question of whether these factors have been properly assessed to provide an accurate cost benefit analysis of the impacts of the Project. The integration of the deficient water model with social and economic impacts causes these other matters to be deficient, not least with regard to compensation for environmental harm which is determined by reference to the deficient EIS water model. The consequence is that the social and economic impacts will change when the water model is updated and the current assessment of those factors will be irrelevant.

### **The operation of clause 14 of the Mining SEPP**

The Mining SEPP operates having regard to the matters raised above under the heading Social and Economic Impacts. It appears that the defects described above concerning failures to apply the guidelines and technical notes contradict the Department's assessment under cl 14 of the Mining SEPP in relation to all three mandatory considerations in cl 14(1) and the "double duty" found in cl 14(2).

### **"No social licence" submissions**

While the term "no social licence" is not a statutory term or a term that can be applied as the criterion for a judicial declaration, it should not be dismissed as irrelevant to the objects of orderly planning in the EP&A Act.

Orderly planning requires social acceptance of development as is demonstrated by rights to object to development applications and as a matter of common sense. I refer to my original submissions regarding the Department's failure to properly assess community acceptance of the Project by discounting of the majority of objections on the basis that they were form objections. The potential risk to the viability of the Project due to significant and momentous objections that remain unheard is palpable. Mr Lancaster SC's submission seeks to do the same by contriving social acceptance as

an impermissible gloss on the statutory term “public interest” which only operates generally. This characterisation fails to heed the risks associated with a historically significant majority of objectors stating their opinion that the Project is socially unacceptable by using the term “no social licence”.

As a matter for merit assessment it is more precise and rigorous to characterise the term “no social licence” as an objection to the proposed Project on the basis that it has socially unacceptable environmental, social and economic impacts. Dismissing the term “no social licence” as meaningless and irrelevant circumvents an assessment of whether the Project is viable in fact, as those who object to the project on the basis that it has “no social licence” are likely to be willing participants in economic and social action against the Project to ensure its long term unviability which will, in effect, supersede orderly planning in NSW.

Thank you for your attention to my supplementary submissions.

Yours sincerely,

Libby Ciesiolka.