



David Clarke
NSW Farmers Association

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Independent Planning Commission NSW
Level 3, 201 Elizabeth Street
SYDNEY NSW 2000

By email: ipcn@ipcn.nsw.gov.au

To whom it may concern,

RE: SUBMISSION RE EXPIRED CONDITIONAL GATEWAY CERTIFICATE FOR THE BYLONG COAL PROJECT

I write regarding the opportunity to comment on KEPCO's expired conditional Gateway Certificate. As flawed as the gateway process is, our position is that a *current* certificate should be required for this coal mine to be determined.

As you may recall, our submission to the IPC on the Bylong Coal Project included a critique of the gateway process. The fact that a Gateway Panel can find that a proposal fails 10 out of 11 criteria but to nevertheless be in a powerless position to stop that project represents a serious flaw and failing of government.

Not only do we have a gateway process with no gate, we now have the proponent arguing an expired certificate should suffice for the project to proceed. There is no precedent for this. In a similar vain, expired development applications under the Local Government Act must be renewed before a development can proceed. The community should be afforded the protection of new and up to date information being included appropriately in any deliberations as it comes to hand.

This project represented one of the first of its kind to undergo scrutiny by the Gateway Panel.

The fact that a project can proceed, through a flawed Gateway process to a second round of determinations is damning criticism enough of a process that was intended to provide upfront scientific and independent advice to Government and to provide protection to highly sensitive strategic agricultural land, without it incomprehensibly being allowed to proceed on an expired certificate.

The experts on this panel did identify a number of issues that the proponent had failed to address in assessing impacts to agricultural land and water in their executive summary and the proponent should now address these issues.

The panel stated that;

- "... The Project would have direct and significant impacts on the agricultural productivity of verified BSAL within the Project Boundary area; Indirect impacts on verified BSAL within the Project Boundary area have not been assessed and are potentially significant; and,
- Indirect impacts on potential BSAL adjacent to the Project Boundary area have not been assessed and are potentially significant."

The panel also rejected the proponent's assertion that the requirements associated with operating within the Equine CIC should not apply and further concluded that the proponent's application to the panel was "non-compliant with respect to its assessment of the Equine CIC and lacks proper assessment of potential impacts." The panel's report goes on to consider all of these issues in detail. Ultimately the only choice left to the panel was to issue a conditional Gateway Certificate that identified no less than 11 significant issues that the proponent did not adequately address.

One of the main reasons for the failure of the proponent to meet the criteria set by the panel was their inability to provide and describe precedence and processes for the restoration of BSAL.

The proponents must be asked to explicitly and in detail address issues that the panel raised in their Gateway Report. It needs to be made clear to the community how those issues have been addressed and mitigated and the AIS, nor the Environmental Impact Statement (EIS), attempt to do this.

Now we learn that as compromised as the process is, the proponent is now arguing that a *current* certificate is not required for this mine to be determined by the IPC.

The role of the Gateway Process and the duration of gateway certificates

S 170 of the Mining SEPP states that one of the functions of the gateway panel is: *"to provide advice to the consent authority under clause 17B (1) of this Policy in relation to applications for development consent"*.

Clause 17B (1) (b) (i) says: *"Before determining an application for development consent for mining or petroleum development that is accompanied by a gateway certificate, the consent authority must consider any recommendations set out in the certificate"*.

By law in NSW, a "gateway certificate remains current for a period of 5 years (or such shorter period as is specified in the certificate) after the date on which it is issued by the Gateway Panel."

In our view, this means that the IPC – as consent authority – must consider *current* recommendations from a *current* certificate.

Why a current certificate is required

The IPC's recent letter to the NSW DoPIE ¹ inquiring into impacts on and rehabilitation of Biophysical Strategic Agricultural Land (BSAL) is evidence that a current assessment by a suitably qualified gateway panel is required as an input to properly determine this application. The Bylong Valley and its farming community deserve the benefit of having a Gateway Panel assess:

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¹ <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/10/bylong-coal-project/requests-for-additional-information/190722outdpie-re-bsalredacted.pdf>



- What the relevant legislative and policy frameworks that apply to BSAL in NSW are
- The veracity of the information provided by the Applicant that the site can and will be restored to BSAL-equivalent land through the rehabilitation strategy proposed
- Whether there has been analysis by relevant agencies of the Bylong Coal Project with regard to the recommended completion criteria for rehabilitation? If there has been, is this satisfactory or does it require independent expert analysis?
- Do the precedent rehabilitation examples put forward by the Applicant provide adequate evidence that approximately 400ha of BSAL can be rehabilitated to be BSAL-equivalent land?
- Are there examples of rehabilitated BSAL that have been productive agricultural land once the site is no longer owned by the mining company?
- The proposed Bylong Coal Project open cut will arguably directly impact approximately 13% of the BSAL in the Bylong Valley. What proportion of BSAL in a given vicinity is an acceptable loss of BSAL?
- How are known aquifers factored into assumptions that underlie minimum rainfall as a water supply criteria in the BSAL Protocol?
- With regard to the groundwater resources, does the Gateway Panel consider that the Project Site can be restored to BSAL-equivalent land, given the length of time modelled for the aquifer to recharge post-mining?
- Is BSAL viewed uniformly as a resource in terms of its quality and value to agriculture, or is some BSAL considered more 'valuable' than others, for example, BSAL in close proximity to markets or BSAL that meets both the minimum annual rainfall threshold and the aquifer water supply criteria?
- Does any other government authority monitor BSAL over time in terms of changes in land use or loss of BSAL through activities such as mining or extractive industries? If so, what is the known rate of loss?

We would also ask you to take into account that in September 2013, the Government, under the direction of the then Minister for Planning, The Hon. Brad Hazzard unilaterally and singlehandedly changed the policy framework by which decision on approvals for state significant development are made, to make the value of the coal, the principle consideration for decision makers to take into account when assessing project.

This is the process under which this project was considered.

NSW Farmers expressed alarm at the amendments contained within the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013 ("Proposed Amendments"), which were enacted and became part of the Mining SEPP generally for a number of reasons, with the main concern being the removal of a triple-bottom-line approach to approvals.

Our Association, as well as thousands of other interested stakeholders were shocked at these amendments. I am not overstating that. Upon further questioning by us, the government alluded to the fact that this was an intentional and completely unapologetic attempt at "suring up" the framework for a number of mining projects to proceed.



In fact, a Ministerial minute obtained by NSW Farmers through the GIPA process states that the majority of submissions (around 85 percent) received in the short exhibition time of two weeks, objected to the changes or had strong concerns about their implementation.

That same minute also, wrongly in our opinion, concluded that the change to this regulation should not be subject to the Governments own self-imposed "Guide to Better Regulation".

- ***Government was changing policy on the run to try to pre-empt a favourable outcome for a mine application.***

In 2015, with a new Minister and new Premier, this policy was changed – back to what it originally was. Government clearly identified that they had made a mistake. Other criticisms of the planning process include the lack of real regulatory teeth on the supposed Gateway Process and the lack of an enforceable Aquifer Interference Regulation.

The gateway process was intended to provide upfront scientific and independent advice to government and to provide protection to highly sensitive strategic agricultural land. The fact that more than five years after the Gateway Panel's first – and damning – assessment, the IPC is still considering a request by KEPCO to directly impact approximately 13% of the mapped BSAL in the Bylong Valley is alarming. The Bylong Valley has some of the country's best soils, it is close to the Hunter Valley horse and wine industries and the wine industry in Mudgee and has good access to Sydney.

Our submission is that it is critically important and in our view essential, that you as consent authority have access to a current assessment of both the impact that the proposed Bylong Coal Project would have on strategic agricultural lands and the viability of any proposed rehabilitation programs. One way to achieve this outcome is to insist that your agency is provided with *current* recommendations from a *current* certificate.

The community deserve nothing less.

Regards

David Clarke
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NSW Farmers Association.