



POINTS OF CLAIM

COURT DETAILS

Court Land and Environment Court of New South Wales
Class 4
Case number 40411 of 2011

TITLE OF PROCEEDINGS

Applicant **Barrington-Gloucester-Stroud Preservation Alliance Inc**
First Respondent **Minister for Planning and Infrastructure**
Second Respondent **AGL Upstream Infrastructure Investments Pty Ltd**

FILING DETAILS

Filed for **Barrington-Gloucester-Stroud Preservation Alliance Inc, Applicant**
Legal representative Kirsty Ruddock, Environmental Defender's Office (NSW) Ltd
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THE APPLICANT CLAIMS THAT:

The Parties

- 1 The applicant is an incorporated non-profit association under the *Associations Incorporation Act 2009*.
- 2 The first respondent is the NSW Minister for Planning and Infrastructure and:
 - (a) By instrument of delegation, dated 18 November 2008 (and published in the New South Wales Government Gazette No. 155, 5 December 2008), the Planning Assessment Commission (**PAC**) was conferred with the Minister's powers and functions under s.75J *Environmental Planning and Assessment Act 1979 (EP&A Act)* to determine major project applications for which a statement disclosing a reportable political donation had been made,
 - (b) By instrument of delegation, dated 28 September 2010 (and published in New South Wales Government Gazette No. 118, 1 October 2010), the Minister for Planning delegated his powers under ss.75O and 75P *EP&A Act* to the PAC with respect to the concept plan application for the Gloucester Gas Project.
- 3 The second respondent is AGL Upstream Infrastructure Investments Pty Ltd which is incorporated under the *Corporations Act 2001 (Cth)* and is the proponent for the purposes of that definition in s.75A of the *EP&A Act (the proponent)*.

Particulars

- i. "Gloucester Gas Project: Environmental Assessment", dated November 2009 identified AGL Gloucester LE Pty Ltd as the operator of PEL 285 proponent,
- ii. Letter dated 30 August 2010, AGL Upstream Infrastructure Investments Pty Ltd advised the Department of Planning that AGL Gloucester LE Pty Ltd had been renamed as AGL Upstream Infrastructure Investments Pty Ltd.

Part 3A concept plan and major project

- 4 On 31 July 2008 an application was made for concept plan and major project approval in respect of a coal seam gas extraction, processing, and transportation system at Gloucester which involved:
 - (a) Concept plan approval for a potential gas extraction area of approximately 210km² (also referred to as gas field development area (**GFDA**)), and
 - (b) Project approval for extraction within a portion of the 210km² site (**Stage 1 GFDA**).
- 5 By written application and accompanying letter dated 30 and 31 July 2008 respectively, the (then) proponent sought concept plan approval for the following:
 - (a) Gas wells and gathering lines within a field area,
 - (b) A central processing facility, and
 - (c) A pipeline corridor of 1 km width from Stratford to Hexham,

(the concept plan).
- 6 By that same written application and accompanying letter dated 30 and 31 July 2008, the proponent also sought concurrent project approval for Stage 1 GDFA, including the following:
 - (a) 60-90 gas wells,
 - (b) A central processing facility, and
 - (c) A 100m wide pipeline corridor within the 1 km concept corridor from Stratford to Hexham,

(the major project).

- 7 By letter dated 11 August 2009 AECOM, on behalf of the proponent, advised the Department of Planning of the following amendments to the concept and major project application for which approval was sought:
- (a) Change to the location of the Central Processing Facility (CPF), and inclusion of a second CPF location for Project Approval, on the condition that only one CPF would be constructed at one of the assessed locations only,
 - (b) Inclusion of a small scale 15 megawatt (MW) ancillary power generation facility within the footprint of the CPF,
 - (c) Inclusion of a construction workforce camp during the drilling program in the Stage 1 GFDA, and a construction workforce camp for the construction of the gas transmission pipeline, and
 - (d) Minor amendments to the alignment of the 100 m Project Area pipeline corridor.
- 8 On or about 11 November 2009, an environmental assessment for the concept plan and concurrent project application (EA) was submitted to the Department of Planning and Infrastructure and which sought approval for up to 110 gas wells.
- 9 On or about 30 July 2010, a report entitled "Preliminary groundwater assessment and initial hydrogeological model" (**preliminary groundwater and hydrogeological report**), prepared by SRK Consulting (Australasia) Pty Ltd, was submitted to the Department of Planning.
- 10 In or about November 2010, the Director-General issued report under s.75I of the EP&A Act.
- 11 In respect of the impact of both proposals on groundwater:
- (a) The Director-General's Requirements issued pursuant to s.75F (**DGRs**) dated 26 August 2008, identified groundwater as being a key issue to the concept plan and major project application,
 - (b) The DGRs, dated 26 August 2008, also identified a general environmental risk analysis as being a key issue to the concept plan and major project application,
 - (c) The PAC determination report, entitled "Concept and Project Application for Gloucester Gas Project" (**PAC determination report**), dated 22 February 2011, identified groundwater as a key issue with respect to the concept plan and Stage 1GFDA.

12 The use and environmental impact on groundwater is an essential and inextricable part of the coal seam gas extraction process for which approval was sought.

13 Material risks to groundwater from the gas field development (including hydraulic fracturing and methane extraction) include the following:

- (a) Dewatering of shallow aquifers,
- (b) Increased aquifer permeability as a result of the fracturing and removal of groundwater,
- (c) Reduction in stream (base) flow if dewatering of the alluvial and shallow aquifers occurs as a result of fracturing and gas extraction,
- (d) Surface storage leakage of saline groundwater,
- (e) Cross contamination of groundwater aquifers.

Particulars

- i. AECOM, "Gloucester Gas: Environmental Assessment", November 2009 at pp. 13-5 & 13-6.

14 The use and environmental impact on water re-use and water disposal are an essential and inextricable part of the coal seam gas extraction process for which approval was sought.

15 In respect of the impact of both proposals on water re-use and water disposal:

- (a) The DGRs, dated 26 August 2008, identified how extracted water would be stored, used, disposed of and/or re-supplied to other users as being a key issue to the concept plan and major project application,
- (b) The DGRs, dated 26 August 2008, identified surface and groundwater as being a key issue to the concept plan and major project application,
- (c) The DGRs, dated 26 August 2008, also identified a general environmental risk analysis as being a key issue to the concept plan and major project application,
- (d) The PAC determination report identified groundwater and surface waters as being a key issue to the concept plan and major project application.

16 Material risks to surface water during the operation of the major project include the following:

- (a) Increased contamination / salinity of surface waters and detrimental impacts to surrounding vegetation as a result of the accidental release of produced water

through the leak of water pipes in the water gathering system and / or the rupture or overflow of the water holding ponds,

- (b) Increased salinity / contamination into surface water from the accidental release of saline drill, frac and produced water from storage tanks or during workovers,
- (c) Increased sedimentation / turbidity / contamination of surface water if flooding occurs,
- (d) Increased salinity / contamination into surface water from the accidental release of saline brine from the reverse osmosis water treatment plant or from trucks transporting the brine / solid salt waste.

17 On 22 February 2011 the PAC determined to approve:

(a) The concept plan:

- i. with conditions purported to be imposed pursuant to s.75O(4) and s.75P(1), of the EP&A Act listed in Schedule 2 of that purported approval,
- ii. did not identify any performance criteria or guidelines with respect to groundwater which the proponent had to adhere to for any subsequent stages project as referred to in paragraph (c) of the purported concept approval,

(b) The major project application, subject to conditions purported to be imposed pursuant to s.75J(4) of the EP&A Act.

Ground 1 - conditions of major project approval leaving open the possibility of a significantly different development in respect of groundwater

18 By the imposition of conditions 2.1, 3.5, 3.8, 3.9, 4.1, 4.2 and 7.4(e)(i) the PAC in purporting to approve a project application which (because of matters relating to groundwater):

(a) Deferred matters of essential consideration of the concept approval being:

- i. Groundwater criteria generally,
- ii. Conditions as to the quantities of water, sand, chemicals, or other matter that would make up the hydraulic fracture stimulation fluid to be used,
- iii. Conditions specifying the chemicals that were permitted as part of the hydraulic fracture stimulation fluid.

- (b) Has the potential for significantly different development from what was sought in the major project application and with significantly different environmental impacts of the development from that for which approval was sought and putatively granted, because:
- i. Project approval sought by the proponent is set out in 4(b), 6, 7 and 8 above,
 - ii. The project approval sought included approval for some environmental harm,
 - iii. Project approval was granted to the proposal referred to in Schedule 1, subject to Schedule 2 conditions of the approval referred to in paragraph 17(b) above,
 - iv. The PAC in approving the locations of gas wells in Schedule 1 (which provides that the project comprises Stage 1 gas field development area, being 110 wells and associated infrastructure within approx 50 km² section of 210 km² area) has sought to constrain the location of the wells in an envelope,
 - v. The PAC, in Schedule 2 of the major project approval has sought to impose conditions with the following effects:
 1. Condition 1.1 to the effect that the proponent shall carry out project generally in accordance with the EA, the preliminary hydrogeological report, the concept plan approval, and the conditions,
 2. Condition 1.2 to the effect that where there is inconsistency the project approval prevails over the EA and the hydro report (but not the concept plan or conditions),
 3. Condition 2.1 to the effect that gas wells are to be located within the 50 km² area consistent with locational principles set out in statement of commitment 3 (concept area), with consideration to flood prone land and minimising risk of groundwater impacts per condition 3.10. The proponent must submit location sheets identifying final location of wells and infrastructure. There is no specification within the approval as to how to weigh/prioritise the matters contained in the locational principles, floodprone land and groundwater impacts as required by this condition. There is specification in the EA on

"prioritisation of issues" at page ES17 which may inform implementation of the locational principles (water management is medium priority which must include groundwater). There is also, in EA at 8-2 to 8.3, which sets out prioritisation of issues in which impacts on groundwater and potential for degradation of water are assessed as low and medium respectively,

4. Condition 3.5 to the effect that the proponent shall implement all reasonable and feasible measures to ensure that gas wells avoid and minimise gas migration risks and adverse impacts to beneficial aquifers including associated groundwater users, surface water users and groundwater dependent ecosystems, without specification of what is either feasible or reasonable with respect to the environmental harm which has been approved,
5. Condition 3.7 which bans BTEX chemicals but there are any number of other unnamed chemicals that will be used as part of the fracking process, and different chemicals may be used for different wells depending on the different geological features where the proponent is drilling,
6. Condition 3.9 which has the potential to affect where the wells will be located and the manner in which the project will be staged, all of which was not known to the PAC,
7. Condition 3.10 to the effect that the proponent shall ensure gas wells are developed in a phased manner to avoid and minimise adverse impacts to beneficial aquifers consistent with condition 3.5. The project approval deals with "phased" in two ways, firstly, the EA states at E17 that Stage 1 would form the first phase of a staged approach to the wider development of the concept area. The project approval provides for the stage one approval itself to be undertaken in a phased manner, pursuant to condition 3.10, second paragraph, which refers to 3.9(c). Condition 3.9(c) requires the updated hydrogeological model to include recommendations for phased gas well development at Stage 1. There is no detail or specification about how this phased approach is to be carried out, other than that it is to be provided in further reporting,

8. Condition 4 which requires the proponent, prior to commencement of construction proponent, to develop a groundwater monitoring program,

vi. In imposing the conditions referred to in 18(b)(v) above, the PAC has:

1. Approved an environmental envelope approach which provides the ability to locate up to four wells within any given envelope, EA and approvals contemplate changed location,
2. Provided that the development must take place within the envelope subject to the locational principles and condition 2.1, and is subject to condition 3.5,
3. Also provided locational principles that are so discretionary that they do not in fact constrain the location of the wells, which leaves open the possibility that the wells in locations and numbers different to that which was approved,
4. Not assessed the environmental, social and economic impacts, depending on where the wells are ultimately located and the receiving environment,

vii. The matters listed in 18(b)(i)-(vi) above are not appropriate standards or limits,

viii. As a consequence of all the matters listed in paragraph 18(b)(i)-(vii), the purported approval and its conditions leave open the prospect that the PAC purported to approve development for which the proponent did not apply because of:

1. The location of the wells, and
2. As some environmental harm has been applied for, a different environmental harm has been approved.

19 The matters identified in paragraph 18 are matters which fall outside of the statutory power in s.75J(4) to approve a project subject to modifications or conditions and consequently those conditions, not being severable, cause the major project approval to be invalid.

20 In the alternative:

- (a) The conditions of approval create a separate and unauthorised process for the Director-General to determine the extent of environmental harm caused by the major project, and
- (b) The delegation of the Minister's power to approve the major project did not permit the PAC to sub-delegate the power to decide to a third party, being the Director-General.

21 As a consequence of the matters pleaded in paragraph 20, the major project approval is invalid.

Ground 2: conditions of major project approval leaving open the possibility of a significantly different development in respect of water re-use and disposal of waste water

22 By the imposition of condition 3.12 the PAC in purporting to approve a project application which (because of matters relating to water re-use and disposal of waste water):

- (a) Deferred matters of essential consideration, as it purported to grant approval without:
 - i. An extracted water management strategy having been developed prior to the approval,
 - ii. Any standards or limits in respect of the treatment of wastewater,
 - iii. Any knowledge of the chemicals to be used or their proportions, to make up the hydraulic fracture stimulation fluid to be used,
 - iv. Identification of the actual treatment process for the produced water,
 - v. The terms of an environmental protection licence relating to the discharge of waste water.
- (b) Has the potential to be a significantly different project from that for which approval was sought and putatively granted.

23 In the alternative:

- (a) The conditions of major project approval create a separate and unauthorised process for the Director-General to determine the extent of environmental harm caused by the major project, and
- (b) The delegation of the Minister's power to approve the major project did not permit the PAC to sub-delegate the power to decide to a third party, being the Director-General.

Ground 3(a): failure to consider the precautionary principle in respect of groundwater: the concept plan

24 When the PAC purported to grant concept plan approval under ss.75O and 75P of the EP&A Act, the PAC:

- (a) Was bound to consider the principles of ecologically sustainable development set out in s.6(2) of the *Protection of the Environment Administration Act 1991*, being an element of the public interest.

Particulars

- i. The precautionary principle is an element of ecologically sustainable development and it indicates that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation – cf *Protection of the Environment Administration Act 1991*, s.6(2)(a).
- ii. The concept plan creates a threat of serious or irreversible environmental damage as the material risks associated with the gas extraction process as set out in paragraphs 13 and 16 above, and also includes, as described in PAC determination report, "Concept and Project Application for Gloucester Gas Project, dated 22 February 2011, at pp. 5-6, the following:
 - a. Possible release of coal seam waters to surface waters,
 - b. Possible release of coal seam waters to shallow aquifers,
 - c. Possible loss of waters from existing surface streams and shallow aquifers,
 - d. Possible contamination of surface waters by substances in coal seam waters and fracking fluids,
 - e. Possible contamination of shallow aquifers by substances in coal seam waters and fracking fluids,
 - f. Escape of gas to the surface,
 - g. Escape of gas to shallow aquifers.
- iii. There is scientific uncertainty as to the threat of the environmental damage, as at the time of determining to approve both the concept

plan and major project application, the PAC held the view that a greater degree of definition of the geology and groundwater modelling in the Environmental Assessment and supporting documents would have given a greater degree of assurance that the risks were negligible, as described in the PAC determination report, "Concept and Project Application for Gloucester Gas Project, dated 22 February 2011, at pp. 5-6.

- iv. The precautionary principle is and was enlivened with respect to the determination of the concept plan and required specific consideration by the PAC with regard to the material risk just identified.
- (b) Determined to approve the concept plan in the absence of sufficient evidence as regards the nature or extent of the environmental impacts of the concept plan.

Particulars

- i. At the time of determining to approve both the concept plan and major project application, the PAC held the view that a greater degree of definition of the geology and groundwater modelling in the Environmental Assessment and supporting documents would have given a greater degree of assurance that the risks were negligible: see PAC determination report, "Concept and Project Application for Gloucester Gas Project, dated 22 February 2011, at pp. 5-6.
- ii. No consideration of the impact of removing groundwater at a maximum rate of 6 ML per day of hydraulic connectivity.
- iii. Condition 2.1(c) of the concept plan approval requires the proponent to demonstrate that the environmental impacts associated with a subsequent stages project are generally consistent with the nature of environmental impacts identified for the Stage 1 project.
- iv. Condition 2.1(f) of the concept plan approval requires the proponent to prepare a groundwater impact assessment.

25 In the premise, the concept plan approval is invalid.

Ground 3(b): failure to consider the precautionary principle in respect of groundwater: the major project

26 When the Planning Assessment Commission purported to grant stage 1 major project approval under s.75J of the EP&A Act, it was bound to consider, as an

element of the public interest, the principles of ecologically sustainable development set out in s.6(2) of the *Protection of the Environment Administration Act 1991*.

Particulars

- i. See particulars at 24(a) above.
- ii. The Director-General's Environmental Assessment report refers to ecologically sustainable development and the precautionary principle at [3.6]
- iii. The Director-General's Environmental Assessment Report states that, consistent with the principle for the appropriate valuing of natural resources, the Department, in its assessment of key issues, considered the requirement for appropriate contingency strategies in relation to groundwater impacts to surrounding users.
- iv. The substance of the precautionary principle was not considered in the Director-General's Environmental Assessment Report in that no assessment of the risk-weighted consequences of various options.

27

The PAC determined to approve the concept plan in the absence of sufficient evidence as regards the nature or extent of the environmental impacts of the major project.

Particulars

- i. The proponent did not demonstrate that the likely impacts of the wells would be consistent with the New South Wales Office of Water's Groundwater Quantity Management Policy.
- ii. The proponent did not demonstrate that the likely impacts of the wells would be consistent with the New South Wales Office of Water's Groundwater Dependent Ecosystems Policy.
- iii. Significant further environmental assessment in relation to the hydrogeology of the area was required.
- iv. The PAC approved the major project without a construction environmental management plan before them which was to include an environmental risk analysis outlining cumulative impacts.
- v. The conditions of approval did not incorporate measure to prevent the risk of environmental damage.

28 In the premises:

- (a) The stage 1 major project approval is invalid, and
- (b) The proponent proposes to carry out works in the absence of a valid stage 1 major project approval.

Ground 4(a): failure to consider the precautionary principle with respect to water re-use and disposal of waste water: the concept plan

29 When the Planning Assessment Commission purported to grant concept plan approval under s.75O of the EP&A Act, it was bound to consider, as an element of the public interest, the principles of ecologically sustainable development set out in s.6(2) of the *Protection of the Environment Administration Act 1991* and failed to consider it.

Particulars

- i. Material risks associated with water re-use and disposal of water as set out in paragraph 13 above and, as identified in AECOM, "Gloucester Gas: Environmental Assessment", November 2009 at pp. 13-5 & 13-6.
- ii. The concept plan creates a threat of serious or irreversible environmental damage.
- iii. There is scientific uncertainty as to the threat of the environmental damage.
- iv. Development within the Concept Area would comprise similar activities to the proposed development of the Stage 1 GFDA. Potential impacts to surface water quality during construction, operation and rehabilitation would be similar to those identified for the Stage 1 GFDA.
- v. As such water treatment would be required prior to disposal of the water, as described in Section 5.5.3. A number of alternatives have been proposed for the treatment of produced water and the destination of the treated water as further detailed in Section 4.4.
- vi. Water treatment is also required due to the potential gas and chemical contamination of the produced water.

30 In the premises the concept plan approval is invalid.

Ground 4(b): failure to consider the precautionary principle with respect to water re-use and disposal of waste water: the major project

- 31 When the Planning Assessment Commission purported to grant stage 1 major project approval under s.75J of the EP&A Act, it was bound to consider, as an element of the public interest, the principles of ecologically sustainable development set out in s.6(2) of the *Protection of the Environment Administration Act 1991* and failed to consider it.

Particulars

- i. See particulars to paragraph 29.
- ii. The PAC conditions of approval states that no condition of the approval removes the obligation for the proponent to obtain, renew or comply with necessary licences, permits, and approvals required for the development of the project.
- iii. An environment protection licence under Chapter 3 of the *Protection of the Environment Operations Act 1997* (for any of the purposes referred to in s.43 of that Act) cannot be refused if it is necessary for carrying out an approved project and is to be substantially consistent with the approval under Part 3A of the EP&A Act. A reference in this section to an authorisation or approval includes a reference to any conditions of the authorisation or approval.

32 In the premises:

- (a) The stage 1 major project approval is invalid, and
- (b) The proponent proposes to carry out works in the absence of a valid stage 1 major project approval.

Conclusion

33 On the grounds set out above, the applicant seeks the relief set out in its summons.

SIGNATURE

Signature of legal representative

Capacity

Date of signature

per N.H.W.B.L.
Solicitor on the Record

5 July 2011