



Environmental Defenders Office

1 September 2020

The Hon Keith Pitt MP
Commonwealth Minister for Resources, Water and Northern Australia
The Hon John Barilaro MP
NSW Deputy Premier and Minister for Regional NSW, Industry and Trade

By e-mail: minister.pitt@industry.gov.au; contact@deputypremier.nsw.gov.au

Dear Ministers

Proposed variation of PEP11 to allow drilling of the Baleen drill target

1. We act on behalf of Save Our Coast in relation to the proposed variation of Petroleum Exploration Permit 11 (**PEP11**) to allow drilling of the Baleen drill target, as submitted by Advent Energy Ltd to the National Offshore Petroleum Titles Administrator (**NOPTA**) on or around 29 December 2019.¹
2. Save Our Coast is a volunteer-run NSW community group that aims to inform, inspire and empower the community to care for the coastal ecosystem, in particular the coastal environments from the Northern Beaches to the Hunter.
3. We are instructed by Save Our Coast to write to you in your capacity as the Joint Authority under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGs Act**).
4. Save Our Coast opposes the proposal by Advent Energy Ltd (as the investee of BPH Energy Limited) and Bounty Oil and Gas NL (**the proponents**) to vary PEP11 to allow for drilling of the Baleen drill target (or for any exploratory or production drilling within PEP11). We note that PEP11 is due to expire on 12 February 2021.²
5. Save Our Coast respectfully requests that the Joint Authority exercise its discretion not to vary the conditions of PEP11.
6. We outline below the statutory framework and the reasons why Save Our Coast submits the variation should not be granted.

¹ NOPTA, 'PEP-11 – Suspension, Extension, Variation, Exemption', <<https://neats.nopta.gov.au/ApprovalTracking/ApplicationDetails/14b14431-ab7b-443b-a217-af2d71b6d470?applicationType=Suspension%2C%20Extension%2C%20Variation%2C%20Exemption>>; BPH Energy Limited, Letter to ASX Limited, 28 January 2020,

<<https://www.asx.com.au/asxpdf/20200128/pdf/44dk8b80n51dg9.pdf>>. It does not appear that the proponents' application for variation of PEP11 is available on the NOPTA web site.

² NOPTA, Exploration Permit PEP-11, <<https://neats.nopta.gov.au/TitleRegister/TitleDetailsEp/8ac87701-18e4-4262-80e2-76982ff88d7d>>.

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Statutory framework

7. In relation to the variation of petroleum exploration permits (**PEPs**), Part 2.11 Division 1 of the OPGGS Act makes provision for the variation of PEPs. Relevantly, section 264 provides (emphasis added):

“(2) The **Joint Authority may**, by written notice given to the permittee, lessee or licensee:
(a) **vary**; or
(b) suspend; or
(c) exempt the permittee, lessee or licensee from compliance with;
any of the conditions to which the permit, lease, or licence **is subject**, on such conditions (if any) as are specified in the notice.”

Reasons why the variation should not be granted

8. Save Our Coast submits that the Joint Authority should exercise its discretion not to vary the conditions of PEP11 to allow for drilling of the Baleen drill target (or for any exploratory or production drilling within PEP11) on the following grounds.

Public interest

9. PEP11 covers a substantial offshore area of 4,547 km² stretching from Newcastle to Sydney’s Northern Beaches.³
10. Save Our Coast acknowledges the Joint Authority has discretion to vary the conditions of PEP11 under section 264(2)(a) of the OPGGS Act. However, Save Our Coast submits that the discretion is not unfettered and must be exercised in the public interest. In this regard, Colvin J in *Pathfinder Energy Pty Ltd v Commonwealth-Western Australia Joint Authority* [2019] FCA 2032 stated, in respect of the discretion under section 264 to determine applications to suspend a condition or extend a term for a permit:

“I note that the nature of the decision to be made by the Joint Authority is one to be made having regard to public interest considerations embedded in the decision-making process provided for by the statute.”⁴

11. Save Our Coast submits that the requirement to have regard to public interest considerations also applies in respect of the discretion to determine an application to vary the conditions of PEP11 under section 264(2)(a).
12. Save Our Coast submits that the significant opposition from communities along the east coast of New South Wales, based on legitimate evidence-based concerns about the impacts of the variation of PEP 11 to allow drilling, demonstrates that is not in the public interest. In this regard, Save Our Coast notes that:

³ NOPTA, Exploration Permit PEP-11, <<https://neats.nopta.gov.au/TitleRegister/TitleDetailsEp/8ac87701-18e4-4262-80e2-76982ff88d7d>>.

⁴ *Pathfinder Energy Pty Ltd v Commonwealth -Western Australia Offshore Petroleum Joint Authority* [2019] FCA 2032, [6].

- a. Since the beginning of August 2020, over 10,000 letters have been sent to local State and Federal Members of Parliament opposing drilling within PEP11.
 - b. In February 2020, our client submitted a petition to Federal Parliament that contained almost 60,000 signatures of concerned residents opposed to drilling within PEP11.⁵
13. Save Our Coast notes there has been significant opposition from communities along the east coast of New South Wales in response to the proposed drilling within PEP11. Communities are concerned with the impacts on the ecosystem, risk of petroleum spills, marine pollution, harm to marine species, visual amenities of rigs, and risk of catastrophic damage to the coast. The ongoing objections of Save Our Coast, other community groups, recreational fishers and tourism operators demonstrate the lack of social licence for drilling within PEP11.
14. In Save Our Coast's submission, drilling occurring within the PEP11 area may also be detrimental to the public health of the residents of Newcastle, the Central Coast and Sydney through the impact of solastalgia. In this regard, stress and emotional distress are common symptoms experienced by individuals who deal with the threat of or actual destruction of their home environment or surrounds. Solastalgia, a recognised psychological condition, expresses the negative emotional effect that environmental degradation can have on communities.
15. Save Our Coast notes that solastalgia was first assessed in the Hunter region, where Professor Glenn Albrecht found that it was demonstrated in people living in communities near the coal mines. This was manifested in "distress caused by the assault on the interviewees' sense of identity, place, belonging, control and good health".⁶ Solastalgia has since been recognised in case law as a condition that may affect the public health of communities, such as in the Warkworth mine case⁷ and the Rocky Hill case.⁸
16. On a wider scale, the public health impacts of climate change are well noted. The Australian Medical Association (**AMA**) has declared that climate change is a health emergency.⁹ Dr Tony Bartone, former AMA President, stated:
- "These effects are already being observed internationally and in Australia. There is no doubt that climate change is a health emergency".¹⁰
17. Not only will climate change "cause a higher incidence of mental ill-health", but it will increase the risk of injury and mortality from heat stress and severe weather events.¹¹

⁵ Coast Community News, 'Parliament to receive popular coastal petition', 4 February 2020, <<https://coastcommunitynews.com.au/central-coast/news/2020/02/parliament-to-receive-popular-coastal-petition/>>; Coast Community News, 'Zali Steggall tables petition in parliament to ban coastal gas exploration', 6 February 2020, <<https://coastcommunitynews.com.au/central-coast/news/2020/02/zali-steggall-tables-petition-in-parliament-to-ban-coastal-gas-exploration/>>.

⁶ Glenn Albrecht, "Solastalgia: A New Concept in Health and Identity" (2005) 2 *PAN: Philosophy Activism Nature* 41.

⁷ *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48; (2013) 194 LGERA 347; appeal dismissed in *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105; (2014) 200 LGERA 375.

⁸ *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7; (2019) 234 LGERA 257.

⁹ Australian Medical Association, 'Climate Change is a Health Emergency', 3 September 2019, <<https://ama.com.au/media/climate-change-health-emergency>>.

¹⁰ Australian Medical Association, 'Climate Change is a Health Emergency', 3 September 2019, <<https://ama.com.au/media/climate-change-health-emergency>>.

¹¹ Australian Medical Association, 'Climate Change is a Health Emergency', 3 September 2019, <<https://ama.com.au/media/climate-change-health-emergency>>.

18. Save Our Coast submits that the impacts of solastalgia and cumulative anthropogenic climate change resulting from the drilling, production and burning of any natural gas within PEP11 will impact members of particular coastal communities in Newcastle, the Central Coast and Sydney directly, substantially and unreasonably. These impacts will potentially endanger life, safety, health, property and/or comfort such as to constitute public nuisance.

Greenhouse gas emissions and climate change

19. Save Our Coast submits that approving the proposed variation to PEP11 to allow for drilling of the Baleen drill target (or for any exploratory or production drilling within PEP11), as an essential step that may ultimately lead to the exploitation of any natural gas resources within PEP11, would be inconsistent with the public interest and contrary to the principles of ecologically sustainable development (**ESD**), in particular the precautionary principle, the principles of social equity for present and future generations, the conservation of biological diversity, and the polluter pays principle. The GHG emissions (Scope 1, 2 & 3) from future exploitation of any natural gas resource within PEP11 would adversely impact on the environment, including the environment of Australia and NSW, and hinder measures to limit dangerous anthropogenic climate change.

20. While Save Our Coast acknowledges that the OPGGS Act does not expressly mention ESD and there appears to have been no judicial consideration of the interaction between the OPGGS Act and ESD,¹² Save Our Coast submits that consideration of the public interest nevertheless includes the requirement to consider ESD.¹³ Consideration of the public interest and ESD, particularly the precautionary principle and the principle of intergenerational equity, has been held in NSW Courts to entail consideration of the impacts of greenhouse gas (**GHG**) emissions on climate change.¹⁴

21. In this regard, Save Our Coast submits that there is overwhelming scientific consensus that carbon dioxide, and other GHG emissions such as methane, are leading to a build-up of gases in the atmosphere, trapping heat and leading to global warming, also known as climate change. GHG emissions, both direct and indirect, are a major threat to the environment. This includes GHG emissions, such as carbon dioxide and methane emissions, associated with natural gas extraction.

22. Save Our Coast submits that the cumulative effects of carbon in the atmosphere arising from the exploitation of any natural gas resource within PEP11, and the burning of any gas extracted from PEP11, are inconsistent with a carbon budget and internationally agreed policy intentions to keep global temperature increases to well below 2 degrees Celsius above pre-industrial levels

¹² Note that reg 3(a) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) states: "The object of these Regulations is to ensure that any petroleum activity or greenhouse gas activity carried out in an offshore area is: ... (a) carried out in a manner consistent with the principles of ecologically sustainable development set out in section 3A of the EPBC Act; ...".

¹³ Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 10th edition), 192; *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* [2013] NSWLEC 48; (2013) 194 LGERA 347, [58].

¹⁴ *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7; (2019) 234 LGERA 257, [498]; citing *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720; *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1; [2007] NSWLEC 59; *Aldous v Greater Taree City Council* (2009) 167 LGERA 13; [2009] NSWLEC 17; and *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221.

and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels.

23. Save Our Coast acknowledges that proposals to vary PEPs must be considered on their merits and in the context of the statutory framework under the OPGGS Act. Nevertheless, Save Our Coast submits that consideration of the best available scientific evidence leads to the conclusion that new fossil fuel developments, including exploratory drilling for natural gas as a precursor to the potential exploitation and burning of a new natural gas resource, run counter to the carbon budget approach towards climate stabilisation and the Paris Agreement temperature limits.¹⁵
24. In this regard, Save Our Coast refers the Joint Authority to the recent report by the Climate Council, *Primed For Action: A Resilient Recovery for Australia* (**enclosed**).¹⁶ In Save Our Coast's submission, consideration of the best available scientific evidence as outlined in the Climate Council's report countenances against approval of the proposal to vary PEP11 to allow drilling of the Baleen drill target (or for any exploratory or production drilling within PEP11) in pursuit of the exploitation and burning of a new fossil fuel resource.
25. In this respect, Save Our Coast submits that considerable weight should be attached to the seminal decision of Preston CJ in *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7; (2019) 234 LGERA 257 (**Rocky Hill case**). In that case, anthropogenic GHG emissions and their impact on climate change was a decisive factor in the refusal of development consent to the proposed Rocky Hill Coal Mine. As his Honour stated at [697]:

“The project will be a material source of GHG emissions and contribute to climate change. Approval of the project will not assist in achieving the rapid and deep reductions in GHG emissions that are needed now in order to balance emissions by sources with removals by sinks of GHGs in the second half of the century and achieve the generally agreed goal of limiting the increase in global average temperature to well below 2°C above pre-industrial levels.”
26. Save Our Coast notes that as a decision of the NSW Land and Environment Court in its class 1 jurisdiction, the *Rocky Hill* case was a merits appeal decision and therefore an exercise of administrative power.¹⁷ Save Our Coast acknowledges that because merits appeal decisions are not exercises of judicial power, they do not create legal “precedent”. However, it is important to note that merits appeal decisions such as the *Rocky Hill* case are “persuasive” authority for administrative decision-makers.¹⁸
27. The *Rocky Hill* case, as persuasive authority, established the “wrong time” basis for refusal of fossil fuel developments.¹⁹ This basis for refusal effectively requires proponents to demonstrate why the fossil fuel reserves relevant to their project should be allowed to be exploited, over and above other projects, at a time when a rapid and deep reduction in GHG emissions is needed to stay within the global carbon budget, and avoid dangerous climate change.

¹⁵ See, for e.g., Climate Council (2020), *Primed for Action: A Resilient Recovery for Australia*, <<https://www.climatecouncil.org.au/wp-content/uploads/2020/05/report-primed-for-action.pdf>>.

¹⁶ Climate Council (2020), *Primed for Action: A Resilient Recovery for Australia*, <<https://www.climatecouncil.org.au/wp-content/uploads/2020/05/report-primed-for-action.pdf>>.

¹⁷ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; [1979] FCA 39.

¹⁸ See, for e.g., *Thorpe v Commissioner of Taxation* [2014] AATA 210, [123].

¹⁹ *Rocky Hill* case, [699].

28. As noted above, drilling of the Baleen drill target is a step preparatory to the potential exploitation of any natural gas resource found with the Baleen site. Save Our Coast notes that in its various announcements to the ASX this year,²⁰ BPH Energy Limited has not demonstrated why any fossil fuel reserves within PEP11 should be allowed to be exploited, over and above other projects currently proposed or active, at a time when the best available science concludes that new fossil fuel developments, including exploratory drilling for natural gas, are inconsistent with the carbon budget approach to climate stabilisation.
29. Moreover, Save Our Coast submits that approval of the proposal to vary PEP11 to drilling of the Baleen drill target (or for any exploratory or production drilling within PEP11) would be in breach of the public trust doctrine. Save Our Coast submits that the Commonwealth and the State of NSW are subject to a public trust duty to protect the air, atmosphere and water resources. These natural resource assets are held in trust for the people. Save Our Coast submits that the public trust doctrine regulates the Joint Authority's exercise of power under s 264(2) of the OPGGS Act, either as part of the "public interest" or separately under the common law.
30. Of the nature of the public trust doctrine as it relates to natural resources, Preston CJ writes (emphasis added):²¹

"The public trust doctrine has its origins in Roman law, specifically in the property concept of *res communis*. These are things which, by their nature, are part of the commons that all humankind has a right in common to access and use, such as the air, running water, the sea and the shores of the sea, and that cannot be appropriated to private ownership. Ownership of these common natural resources is vested in the state as trustee of a public trust for the benefit of the people. **The state, as trustee, is under a fiduciary duty to deal with the trust property, being the communal natural resources, in a manner that is in the interests of the general public, who are the beneficiaries of the trust.**"

31. Save Our Coast submits that the fiduciary duty to which Preston CJ refers is breached by a determination to vary PEP11 to allow drilling of the Baleen drill target, in circumstances where the drilling is an essential step towards the potential exploitation and burning of any natural gas resource discovered, contributing to dangerous anthropogenic climate change.
32. Accordingly, Save Our Coast submits that the Joint Authority should refuse to vary PEP11 to allow drilling of the Baleen drill target (or for any exploratory or production drilling within PEP11).

Conclusion

33. For the reasons outlined above, Save Our Coast respectfully requests that the Joint Authority exercise its discretion to refuse the proponents' application to vary PEP11 to allow drilling of

²⁰ E.g. BPH Energy Limited, 'PEP11 Baleen Geochemical Prospectivity Support', 14 August 2020, <<https://www.asx.com.au/asxpdf/20200814/pdf/44lhsdy4vjj5yq.pdf>>; BPH Energy Limited, 'PEP11, Offshore Sydney Basin', 10 August 2020, <<https://www.asx.com.au/asxpdf/20200810/pdf/44lbh1rkd339b1.pdf>>; BPH Energy Limited, 'BPH Energy Ltd investee Advent Energy- PEP 11 Report – Ampolex', 7 July 2020, <<https://www.asx.com.au/asxpdf/20200707/pdf/44k9njkcqk2qq.pdf>>; BPH Energy Limited, 'BPH Energy Ltd investee Advent Energy- PEP 11 Review -Santos and Ampolex Studies', 30 June 2020, <<https://www.asx.com.au/asxpdf/20200701/pdf/44k3lnj7pty1xp.pdf>>.

²¹ Chief Judge Preston, 'Protected Areas in the Courts: An Overview' (IUCN World Parks Congress, Sydney, 13 November 2014) 29-35.

the Baleen drill target. Save Our Coast reiterates its opposition to any exploratory or production drilling within PEP11.

34. We note that Save Our Coast will send a separate submission to you in due course.

Yours sincerely

Environmental Defenders Office

A handwritten signature in black ink, appearing to read 'Elaine Johnson', with a long horizontal flourish extending to the right.

Elaine Johnson
Principal Solicitor

Reference number: 1926958

Encl: Climate Council (2020), *Primed for Action: A Resilient Recovery for Australia*.