



# Nature Conservation Council

The voice for nature in NSW

Coal Exploration Steering Group

By email: [cesg.secretariat@trade.nsw.gov.au](mailto:cesg.secretariat@trade.nsw.gov.au)

19 December 2014

## **SUBMISSION TO THE COAL EXPLORATION STEERING GROUP - DISCUSSION PAPER – IMPROVING NSW'S PROCESS TO ALLOCATE COAL EXPLORATION LICENCES**

Dear Sir/Madam,

The Nature Conservation Council of NSW (**NCC**) is the peak environment organisation for New South Wales, representing 130 member societies across the state. Together we are committed to protecting and conserving the wildlife, landscapes and natural resources of NSW.

NCC appreciates the opportunity to respond to the Coal Exploration Steering Group (**CESG**) *Discussion Paper – Improving NSW's Process to Allocate Coal Exploration Licences (Discussion Paper)*.

We note that the October 2013 report of the Independent Commission Against Corruption (**ICAC**) "*Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources*"<sup>1</sup> and the recommendations therein are essential background reading in understanding why the NSW Government has established the CESG and sought public comment on the Discussion Paper.

NCC is pleased to see the Government responding to ICAC's recommendations for an improved process for the allocation of coal exploration licences in NSW (**ELs**)<sup>2</sup>. However we have specific concerns that the proposed strategic preliminary issues assessment will not provide adequate protection for the environment and communities and the two non-economic components to the so-called 'triple bottom line assessment' (social and environmental) will receive only token consideration under the new CESG structure. We are also concerned that in the context of reviewing the future allocation of coal exploration licences there has been no discussion of the urgent need to transition away from fossil fuels.

**Part 1** of our submission will outline some of our specific concerns with the Discussion Paper, particularly in relation to the process for proposed strategic preliminary issues assessment.

**Part 2** will discuss more broadly the policy and regulatory framework for coal exploration and mining in NSW.

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<sup>1</sup> Independent Commission Against Corruption, *Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources* (October 2013)

<sup>2</sup> Ibid.

## **PART 1 – KEY COMMENTS ON THE *DISCUSSION PAPER – IMPROVING NSW’S PROCESS TO ALLOCATE COAL EXPLORATION LICENCES***

### **1.1 ROLE OF COAL EXPLORATION STEERING GROUP**

The Discussion Paper states that: “*the key role of the CESG is to ... make recommendations on where, when and how NSW’s greenfield coal resources are to be released for exploration...*”<sup>3</sup>.

NCC is concerned that the deliberate omission of the word ‘if’ in this sentence reflects an assumption of the inevitable allocation of exploration licences. As outlined in our submission, we would expect that a proper strategic preliminary issues assessment would identify areas, including areas with potential coal deposits, that would not be suitable for exploration (and extraction) due to conflict with no-go zones and unacceptable impacts on the environment and communities. The correct wording should add the word ‘if’ so that this sentence reads “*the key role of the CESG is to make recommendations on if, where, when and how NSW’s greenfield coal resources are to be released...*”.

### **1.2 STRATEGIC PRELIMINARY ISSUES ASSESSMENT**

Prior to undertaking a strategic preliminary issues assessment, the CESG must establish a framework that identifies information required (such as environmental studies and mapping), matters for consideration and outcomes to be achieved. Some of the key issues for consideration are outlined below.

#### **Assessment of land use conflicts**

NCC supports the need for the CESG to assess potential land use conflicts and biophysical, environmental and heritage constraints but is concerned that the CESG does not have the necessary capacity and expertise to adequately perform such an assessment (see our comments below regarding the structure of the CESG). We have no confidence that the social and environmental aspects of a triple bottom line assessment will be considered in a balanced way, particularly given the overwhelmingly economic backgrounds of the members of CESG and lack of representation of environmental experts. We also note that our previous experience in strategic planning, including with the development of the Strategic Regional Land Use Planning Policy, has left us questioning the Government’s commitment for providing adequate protection to our important natural areas and communities.

NCC has long argued that certain areas of the State need substantial protection from the impacts of coal mining and should be off limits to coal (and gas) activities. In particular, we consider that the following areas are of such high value, that they should be off-limits to coal (and gas) activities:

***Drinking water catchments:*** Long wall coal mining activities (and coal seam gas activities) should be banned in drinking water catchments. Recent polling by Lonergan Research found that 73% of respondents want coal and gas development banned in our water catchments<sup>4</sup>. Regardless of the potential value of the coal resource, CESG must adopt a hard edge approach to any coal exploration proposals in this category. The answer to exploration applications in these areas should simply be ‘no’ and no public resources should be spent on further assessment.

***Areas of high conservation value:*** Coal mining (and coal seam gas) activities must be banned from areas of high conservation value. The rapid expansion of the mining (and gas) industry is resulting in the permanent destruction of large areas of native vegetation, wildlife habitat and freshwater ecosystems<sup>5</sup>.

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<sup>3</sup> Coal Exploration Steering Group) *Discussion Paper – Improving NSW’s Process to Allocate Coal Exploration Licences* (November 2014), p 1

<sup>4</sup> Lonergan Research, August 2014, ‘Extreme weather and corporate responsibility

<sup>5</sup> For example, the nature and extent of the damage is illustrated in a report released by the Nature Conservation Council, the Wilderness Society and Hunter Community Environment Centre, entitled ‘*Icons Under Threat: Natural areas and threatened species at risk from mining and gas in NSW*’. Even where offsets are negotiated they are invariably of a lesser standard than those required under the *Native Vegetation Act 2003*; and could even be mined in the future.

**Strategic agricultural land:** NCC supports a ban on coal exploration in areas which will impact on prime agricultural land. Recent decisions to ban expansion of coal mining into areas which would have a major detrimental impact on high value horse studs on prime agricultural land in the Hunter Valley are endorsed. We expect that the CESC would have a similar approach to the issue of ELs.

**Local communities:** NCC supports a ban on the issue of exploration licences in areas where coal mining would have a major negative impact on local communities. A prime example of this kind of negative social impact due to coal mining is documented in the Land and Environment Court judgement on the proposed expansion of coal mining in the Bulga area of the Hunter Valley<sup>6</sup>.

To date, these areas have not been afforded adequate protection despite the Coalition's pre-election statement that 'agricultural land and other sensitive areas exist in NSW where mining and coal seam gas extraction should not occur'<sup>7</sup>.

### **Assessment of Cumulative Impacts**

We note the Discussion Paper contemplates the assessment of cumulative impacts (page 3). The cumulative impacts of the mining (and gas) industry pose very real threats to the health of local communities, and to important water resources. A strategic preliminary issues assessment must assess the cumulative impacts of existing coal mining operations, including impacts on health, air quality and water sources together with future potential impacts from the extraction of potential release areas. The CESC would obviously have to engage outside expertise to assess cumulative health impacts. The CESC should develop clear criteria for the assessment of cumulative impacts prior to the Strategic Preliminary Issues Assessment. We encourage the CESC to make such criteria publically available.

### **Consideration of water entitlements**

The availability and security of water entitlements for potential new mining operations must be assessed prior to approving an exploration licence. If no new water entitlements are available in the area proposed for exploration, no EL should be approved.

## **1.3 CONCERNS WITH THE NSW STRATEGIC REGIONAL LAND USE POLICY**

The Discussion Paper notes that it *"is envisaged that this assessment will interact with NSW's Strategic Regional Land Use Policy by utilising the information contained in the Strategic Regional Land Use Lands for those regions for which it is available"* (page 3).

While NCC supports upfront strategic planning as a way of identifying and managing competing land uses, we do not believe that the Strategic Regional Land Use Policy (SRLUP) and existing Plans has achieved this. In particular, the SRLUP and existing Plans do not provide adequate protection for critical environmental assets, drinking water or residential areas, or for clearly identifying mechanisms for managing cumulative impacts. Significantly, the mapping of high conservation areas was removed from the final plans. If the CESC relies on the Strategic Regional Land Use Policy and existing plans it must recognise the shortfalls of these documents, and ensure that adequate protection is provided to key areas such as environmental assets, drinking water, strategic agricultural land and residential areas.

## **1.4 CONCERNS WITH THE GATEWAY PROCESS**

The Discussion Paper notes that *"the Gateway Process will still apply to those projects that progress to development application stage"* (page 3)<sup>8</sup>.

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<sup>6</sup> Bulga Milbrodale Progress Association v Minister for Planning and Warkworth Mining Ltd [2013] NSWLEC 48

<sup>7</sup> NSW Liberals & Nationals, *Strategic Regional Land Use – Triple bottom line assessment to protect our regions* p 2

The Gateway Process allows for additional scientific scrutiny, but it does not afford definitive protection to important mapped agricultural and high conservation lands. Significant shortcomings include:

- various exceptions which limit the application and rigour of the Gateway assessment and Aquifer Interference Policy and introduce more inconsistency and complexity;
- the inability for the expert panel to refuse a 'Gateway certificate' (removing previously proposed powers to do so), no matter how severe the potential impact on land and water;
- the absence of specific prohibitions of exploration or mining in strategic agricultural or high conservation value lands, despite the Government's election policy 'that agricultural land and other sensitive areas exist in NSW where mining and coal seam gas extraction should not occur.'<sup>9</sup>

## 1.5 STAKEHOLDER CONSULTATION AND COMMUNITY ENGAGEMENT

NCC believes that the CESG's charter, which requires it to consult 'interested parties', should specifically state that interested parties include members of the community (particularly, but not exclusively, those community members who live in the area covered by potential exploration licences and who would be potentially affected by the granting of an exploration licence), and peak environmental organisations such as the Nature Conservation Council of New South Wales.

NCC strongly supports the public availability of the criteria used to make CESG assessments. We note that the ICAC report found that the *"state arrangements that relate to coal provided an opportunity not found in other parts of government for individuals to engage in corrupt conduct"*<sup>10</sup>. A transparent process will greatly reduce the opportunities for corruption which were documented in the ICAC report.

## 1.6 NON-LOCAL ISSUES

We note that the Discussion Paper states that the *"assessment will not consider non-local issues such as the management of greenhouse gas emissions"* (page 3). NCC has a fundamental objection to this statement, which will lead to decisions being made in an environmental vacuum that could ultimately have major ramifications for national greenhouse gas production. Our concerns are further elaborated in Part 2 of our submission.

## 1.7 STRUCTURE OF THE COAL EXPLORATION STEERING GROUP

We note that the structure of the CESG, in particular the appointment of an independent chair, is not consistent with Recommendation 3 of the ICAC Report referenced above. ICAC proposed that the steering group be chaired by a representative of the NSW Department of Planning and Infrastructure<sup>11</sup>. We expect that the intention of ICAC in recommending that a senior officer of Department of Planning and Infrastructure chair the proposed steering group was to ensure that the broad objects of the Environment Planning and Assessment Act (1979), which incorporates a statutory requirement to consider ecologically sustainable development and social and environmental factors as well as economic ones, was part of the exploration licence decision making process. We do not believe that this will be the case under the current CESG structure, given the strong financial /economic background of the majority of CESG members, including the chair.

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<sup>8</sup> The *Environmental Planning and Assessment Amendment (Gateway Process for Strategic Agricultural Land) Regulation 2013* amended the EPA Act and EPA Regulation to establish a gateway process for mining and petroleum development on strategic agricultural lands.

<sup>9</sup> Above no 7, p 1

<sup>10</sup> ICAC Report October 2013, p6

<sup>11</sup> Above no. 1, Recommendation 3 (p 31), ICAC suggests that such a steering group is better placed than the (existing) CAC to consider the social, environmental and economic factors (in relation to the allocation of ELs)".

## 1.8 ALLOCATION OF EXPLORATION LICENCES

We make the following key comments in relation to the allocation of exploration licences:

- Land ownership of coal or exploration companies should not be a consideration for EL allocation processes.
- The assessment process for new ELs must also be applied to all existing exploration licences. The assessment process should be applied again at each renewal application.
- The section of the Discussion Paper titled *Direct allocation of Exploration Licences* (page 5) is remiss in not providing definitions in this section. For example, there is no definition or guidance as to what constitutes a “minor additions to an existing mine”.
- The last dot point on page 5 refers to “*consistency with the Government’s strategic objectives for the coal industry*”. It would have been very useful for the reader of the discussion paper to have those strategic objectives outlined in an appendix to the discussion paper.

## PART 2 - POLICY AND REGULATORY FRAMEWORK FOR COAL EXPLORATION AND MINING IN NSW

We are concerned with the basic assumption of the Discussion Paper, which contemplates a ‘business as usual’ approach to coal mining under a new and tighter regulatory regime developed in response to the ICAC recommendations. We continue to see reports that strongly indicate that the ‘business as usual’ approach to activities which generate greenhouse gases (coal mining and combustion for energy generation being one of the worst offenders) is no longer acceptable.

For example, the Discussion Paper states that the “*assessment will not consider non-local issues such as the management of greenhouse gas emissions*” (page 3).

NCC has a fundamental objection to this statement, which will lead to decisions being made in an environmental vacuum that could ultimately have major ramifications for national greenhouse gas production. In light of the latest Intergovernmental Panel on Climate Change (IPCC) report<sup>12</sup> there is no longer any excuse for head in the sand, business as usual thinking in relation to decisions on coal exploration in NSW. The burning of coal for the generation of power is an acknowledged major contributor to planetary warming through the accumulation of carbon dioxide in the atmosphere, and unless CESG genuinely becomes part of the solution due to a radical change in thinking, then they remain part of the problem.

The latest IPCC report finds that without additional mitigation efforts:

*“...warming is more likely than not to exceed 4 degrees C above pre-industrial levels by 2100. The risks associated with temperatures at or above 4 degrees C include substantial species extinction, global and regional food insecurity consequential constraints on common human activities and limited potential for adaptation in some cases”<sup>13</sup>.*

Sea level rise in the same time frame is closely associated with the melting of glaciers across the planet. The following statement summarises the expert opinion: “*Most glaciologists now think that sea level will rise by at*

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<sup>12</sup> Intergovernmental Panel on Climate Change Fifth Assessment Report, Climate Change 2014

<sup>13</sup> Ibid, section 3.2

least a metre by 2100, and possibly by as much as 2 metres. That is enough to flood many low-lying cities or make them vulnerable to storm surges<sup>14</sup>.

While international efforts attempt to limit global temperature increases to 2 degrees C or less, business as usual decision-making is heading the planet towards a 4 degrees C future in the life of this generation's grandchildren. If the CESC fails to consider the management of greenhouse gas emissions, it becomes part of the climate change problem. This is unacceptable to NCC and arguably unacceptable to the community.

The United Nations continues to advocate control of world emissions of carbon dioxide equivalents so that global average temperatures do not exceed 2 degrees C, but there is no way this target will be reached unless fundamental changes are made to the way decisions are made about exploiting coal resources for the generation of energy. The CESC is not exempt from such a requirement for constraint. NSW, Australia and the world can no longer afford business as usual decisions about coal resource exploitation.

At a recent lecture at the University of Sydney<sup>15</sup>, Professor Lesley Hughes, a member of the IPCC, made the following statement:

*"to maintain the 2 degrees C limit, we need to leave 80% of fossil fuel reserves in the ground and unburnt. At the current rate of 'spending', we will exceed that carbon budget by the mid to late 2020s".*

In the light of scientific information on climate change trends, and the important contribution made to carbon dioxide levels by energy generation from coal, NCC contends that CESC can no longer decide coal ELs on a business as usual basis. In the current situation of a coal surplus in Australia, with prices dropping to uneconomic levels and the largest local coal producer temporarily stopping coal production due to the surplus of supply over demand<sup>16</sup>, CESC has the time to get the decision process right.

We note the vision for a transition away from fossil fuels set out in *Our Environment, Our Future*:

*"The evidence is clear: by burning fossil fuels and destroying forests, we have disrupted the balance of the earth's atmosphere, leading to changes in the world's climate. The predicted impacts of these changes on people and nature are serious and far reaching. Urgent action is required to reduce global carbon emissions. In the absence of a strong international response to climate change, countries around the world face devastating environmental, social and economic impacts. In Australia, achieving deep cuts in domestic emissions will require a range of strategies, including protecting carbon-rich native forests, controlling land clearing, improving industrial efficiency and most importantly, making a transition away from fossil fuels"<sup>17</sup>.*

We urge the CESC to consider its mandate to make recommendations to help improve the quality and transparency of the processes used to allocate coal exploration licences in the broader context of the urgent need to transition away from fossil fuels.

## CONCLUSION

As noted above, NCC is pleased to see the Government responding to ICAC's recommendations for an improved process for the allocation of coal exploration licences in NSW (ELs). There is no doubt that the events that have played out at ICAC have exposed the corruption risks inherent in the NSW system.

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<sup>14</sup> New Scientist, 17<sup>th</sup> November 2012, p 37

<sup>15</sup> Professor Lesley Hughes, Macquarie University: The Biodiversity Crisis: Environmental, Social and Economic Impacts, Sydney Ideas Lecture series, University of Sydney, 7<sup>th</sup> October 2014.

<sup>16</sup> 'Coal surplus sparks fear of more mine shutdowns', Sydney Morning Herald, November 15<sup>th</sup> 2014, Business Day, p3.

<sup>17</sup> Environment Liaison Office *Our Environment, Our Future - Policies for the 2015 NSW State Election and Beyond* (August 2014)

While we welcome the Government's efforts to review the process for the allocation of coal exploration licences, our submission has outlined a number of key concerns with the CSEG Discussion Paper. We also note that similar corruption risks exist in other parts of the broader system governing the mining and coal seam gas exploration and mining. In particular, we note:

- Recent proposed changes to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* will remove petroleum exploration activities, including the 5 wells rule, from being development permissible with consent under Part 4 of the *Environmental Planning and Assessment Act 1979 (EPA Act)*. This change would mean that these projects are no longer assessed by the Department of Planning and Environment as a development application, but rather are assessed by a relevant determining authority under Part 5 of the EPA Act. In our view, the proposed amendment reduces the transparency and scrutiny of assessment that currently exists for petroleum exploration licences under the Part 4 of the EPA Act. In particular, we are concerned that a Review of Environmental Factors (**REF**) does not require as rigorous upfront environmental assessment as a full Environmental Impact Statement (**EIS**).
- Amendments to the *NSW Environment Planning and Assessment Act 1979* have led to significant changes in the way major projects, including mining and gas activities, have been assessed and approved in NSW. Some of the key changes include increased power and discretion concentrated in the Minister for Planning<sup>18</sup>, overriding of important environmental approvals<sup>19</sup> and restriction of third party merit appeal rights<sup>20</sup>. These changes have led to an overall reduction in accountability and transparency for major project approvals, and greater opportunities for corruption as has been demonstrated in the 2013 ICAC report, and also its 2012 report *Anti-corruption Safeguards and the NSW Planning System*.

We hope that the work of the CESG will lead to improved transparency in the allocation of coal exploration licence and improved outcomes for the environment and communities.

Yours sincerely,



Kate Smolski  
Chief Executive Officer

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<sup>18</sup> For example, the introduction of the former Part 3A of the *Environmental Planning and Assessment Act 1979* (EPA Act), which increased the Minister's discretionary decision making powers and which was the cause of much community concern. The Independent Commission Against Corruption recommends that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective (see ICAC, *Anti-corruption Safeguards and the NSW Planning System* (2012) Recommendation 1).

<sup>19</sup> When the former Part 3A (EPA Act) was introduced it removed important licensing and approval requirements from other agencies for Part 3A projects. This continued with the repeal of Part 3A and the reintroduction of state significant development under Part 4. This essentially removed a critical component of the assessment and management of environmental impacts including pollution, and impacts on heritage, water and Aboriginal cultural heritage.

<sup>20</sup> Third party merits appeal rights are important for maintaining accountability and transparency in environmental and planning decisions, including the assessment and approval of major projects. Despite the repeal of Part 3A in 2011, merits appeal rights for state significant development remain limited. Third party merits appeal rights are not available in the case of critical infrastructure proposals, proposals that have been to public hearing as part of a PAC review and proposals that would not have otherwise been designated development. It is noted that ICAC has recommended the expansion of third party merits appeals to a range of additional categories of private sector development (see ICAC, *Anti-corruption Safeguards and the NSW Planning System* (2012) Recommendation 16).