

OBJECTION

Dear Mr Ko,

We would like to take this opportunity to thank you for the extension you approved to the deadline for submissions as a result of the affected communities being taken by surprise by AGL Energy's modification proposal for its shelved plans for a power station in Dalton (DPP).

We write on behalf of the Burrinjuck Greens, a grassroots local political organization covering the villages of Dalton and Gunning, plus Upper Lachlan and Yass Valley shires.

This is an OBJECTION to the Application by AGL to extend the lapsing date of the approval for the Dalton Power Project by 2 years.

We consider that granting the proposed modification would run contrary to the following nine points as listed below:

1. The wishes of the Upper Lachlan shire Council

The Burrinjuck Greens notes that on 10 April the ULSC unanimously passed a motion to object to AGL's request to extend the DPP approval. This motion reflects the extreme anger and concern shared by residents of Dalton and Gunning in particular, but extending well beyond the immediate vicinity of the Proposed DPP.

The Burrinjuck Greens endorses the submission of the ULSC.

2. Project Approval: Schedule B13. This project approval shall lapse five years after the date on which it is granted, unless the works subject of this approval have been commenced before that time.

The original approval for the DPP provided authorisation to build specific infrastructure subject to a specific set of conditions.

The condition in B13 already goes one step further than the transitional arrangements that would be expected to apply to this project. These specify that the approval would lapse five years after October 2011, as below:

An approval for a transitional Part 3A project will lapse on the day that is 5 years after 1 October 2011 unless:

- ☐ *the project is physically commenced on the land before that lapsing date, or*
- ☐ *the approval is subject to a condition that provides for the approval to lapse on an earlier or later day, or*
- ☐ *if the approval is for a use, that use actually commences before the day that the approval would otherwise lapse (Sched 6A, cl11)ⁱ.*

Therefore the intention behind the conditions of consent was to approve the DPP for five years only. The Burrinjuck Greens recommend that the requested time extension be disallowed on these grounds.

3. Project Approval: Schedule D1 (c) the establishment and operation of a Community Consultative Committee generally in accordance with the Guidelines for Establishing and Operating Community Consultative Committees for Mining Projects (Department of Planning, 2007 or its latest version);

Forming a consultative committee was also one of the conditions of consent of approval for the DPP. Since October 2012 AGL has made no attempt to do so or to communicate with the local community in any way until 5th April, which is after the original deadline for submissions. For five years AGL made no attempt to satisfy the conditions of approval for the DPP and gave the community sound reason to conclude that it was not planning to proceed with the project. A request for a further two years of approval is not just a simple

extension of an approval already received. The request represents a substantial change given the reasonable community expectation that the DPP was not proceeding.

Let me refer you at this point to the publicly available recording of AGL's one and only public address in the last 5 yearsⁱⁱ, which clearly shows the extent of AGL's utter disregard for its neighbouring landowners in Dalton. From allowing the proliferation of noxious weeds on its land to the dismissal of evidence of local market problems presented by the local Real Estate agent, the arrogance with which AGL has conducted itself is staggering. This is a far cry from the impression AGL lawyers put forward of the company in the Land and Environment Court during AGL's prosecution for non-disclosure of political donations, where those lawyers successfully argued for a lenient sentence given AGL's status as a "good corporate citizen" which had "taken a number of actions to ensure that such failures do not occur again"ⁱⁱⁱ.

The assertion by AGL in this modification request that

In the 7-8 years since the initial development activities at Dalton; AGL's approach to community consultation has improved in effectiveness and sophistication
is demonstrably false and has been made in bad faith.

The Burrinjuck Greens conclude that AGL did not satisfy the conditions of consent, that an extension of time for a shelved project is inconsistent as defined by s75w of the NSW Environmental and Assessment Act 1979 and that the modification should be disallowed on both counts.

4. The relevant Environmental and Socio-Economic assessments, which date from 2011

Important legal protections for our community and environment would be circumvented by allowing AGL free rein to operate in Dalton without a relevant Environmental Assessment (new species have been discovered) or relevant conditions of consent to be arrived at through a consultative process with stakeholders affected and the oversight of the PAC.

AGL is incorrect to claim that the extension of the lapse date would result in negligible environmental or socio-economic impacts. The environment relevant to an approval extending into 2018 and 2019 is substantially different to the environment pertaining to a much earlier submission. Substantial environmental and socio-economic impacts of an extension include:

- Extreme stress imposed on a community that had sound reasons to conclude that the project had been shelved in October 2012, and would not ever proceed.
- Incompatibility with the combined Regional Strategic Plan of Upper Lachlan, Yass Valley and Goulburn-Mulwaree shires for growth and development released in 2016. Extension of the DPP approval period would hinder the priority areas for development in the region selected by the Councils, and thus create substantial socio-economic damage
- Damage to property values in the region that have greatly increased since the project suspension, thus causing unjustified financial hardship to a large number of families
- Derailing of the tourism renaissance of Gunning and Dalton villages, due to the renewed threat that an AGL development may occur.

In addition, the original approval was expressly granted with the provision of a more reliable source of energy in mind. This was determined by examining the prevailing socio-economic conditions and weighing them up against the findings of the EA of the time. This is not a calculation which can speak to current environmental and socio-economic conditions.

In the end, even that calculation was found wanting, as witness the fact that the plant was never built, which suggests that the need for more reliable electricity was not important enough for a private company to generate actual expenditure on the DPP. The forecasts for peak demand which were considered to be increasing at the time never materialised. The reports on which the decision were made have since been widely discredited.

Making more gas generation capacity available is only a short-term fix and does not seriously address the changes needed to maintain, in the words of the National Electricity Objective, a secure, reliable and affordable supply of electricity.

Demand management is widely accepted as a far cheaper option than building peaking power stations, and is readily available technology with the advent of the "Internet of things", for example by remotely switching off industrial air conditioners.

Therefore the Burrinjuck Greens contend that the original socio-economic and environmental contexts no longer apply, and a new application needs to be made by AGL so that these can be properly assessed. The Burrinjuck Greens petition the Minister to exercise his power under the following Section 75w of the Act which states:

Division 5 Miscellaneous 75W Modification of Minister's approval (1) In this section: Minister's approval means an approval to carry out a project under this Part, and includes an approval of a concept plan. modification of approval means changing the terms of a Minister's approval, including:

(3) The request for the Minister's approval is to be lodged with the Director-General. The Director-General may notify the proponent of environmental assessment requirements with respect to the proposed modification that the proponent must comply with before the matter will be considered by the Minister.

5. The definition of Critical Infrastructure

Critical infrastructure has been defined by the NSW Government as:

Development for the purpose of a facility for the generation of electricity, being development that: (a) has capacity to generate at least 250 megawatts, and (b) is the subject of an application lodged pursuant to section 75E or section 75M of the Environmental Planning and Assessment Act 1979 prior to 1 January 2013^{iv}.

AGL has made it clear (see Objection 8, below), that the extension of the DPP approval would be an "insurance policy". An insurance policy is not critical infrastructure. Critical infrastructure is an asset that contributes to the public good. In this case there is no asset, as nothing has been built. No prepayment has been made, whether to the Upper Lachlan Shire or in bricks and mortar on the site where the DPP was approved. AGL has not disbursed a cent towards the public good.

In addition AGL is not seeking more time to build the approved infrastructure. It has applied for time to be used in another way, namely to review the project with respect to considerably changed economic and technological conditions in Australia, and lodge an even more substantive modification. AGL is not seeking an extension of time in the sense that normally applies to development approvals. AGL has admitted that there is no justification for building the DPP as approved and is seeking approval for a completely different project.

However, AGL is imposing anxiety, real estate uncertainty, and a general paralysis on the inhabitants of the region with no skin in the game itself. Dalton is suffering a retrospective liability for an increased penalty, with no inkling this was coming, no communication from AGL in the long years since it publicly shelved plans to build the approved infrastructure, and no contribution to the public purse.

Therefore the Burrinjuck Greens consider it unreasonable to assess the modification of this project under the rules which apply to critical infrastructure, since the project has been shelved long-term by its own proponent, a proponent who has no desire to resurrect it in anything resembling its current form.

6. The spirit of the judgement in Secretary, Department of Planning and Environment v AGL Energy Limited; Secretary, Department of Planning and Environment v AGL Upstream Infrastructure Investments Pty Limited [2017] NSWLEC 2

The original approval for the DPP was given under legislation now repealed due to the propensity for corruption it created. This fear was borne out by AGL's subsequent conviction for non-disclosure of political donations relating to this specific project, amongst others^v.

The Environmental Planning and Assessment Act deals with non-disclosure of political donations and gifts, with the express object being to ensure that political donations and gifts are not relevant to the determination of planning applications. Since AGL entities were found guilty of making political donations relating to a number of approval processes, including that of the proposed Gas power station in Dalton, the Burrinjuck Greens consider that granting an extension to the original approval as AGL has requested would not be acting in the spirit of the sentence imposed or the laws which seek to protect communities and our natural environment from the influence of big corporations.

The Burrinjuck Greens conclude that the approval process was flawed, and that the approval should have been annulled when AGL was convicted for non-disclosure of relevant political donations in January. The Burrinjuck Greens note the intention in the judgement to punish AGL and mitigate the effects of the wrongdoing.

ing, and therefore recommends that any modifications to the approval should be disallowed, and a new approval sought by AGL.

7. AGL's policy which prohibits the making of any political donation by or on behalf of AGL Energy and its related bodies corporate

Seeking to have this extension approved is underhand and runs contrary to AGL's own policy U-turn after it was convicted in the Land and Environment Court in January 2017^{vi}, which is set out as follows:

In his affidavit of 21 July, Mr Fitzgerald deposed, under the heading "Remorse and contrition":

The AGL Entities have taken a number of actions to ensure that such failures do not occur again. In particular, AGL Energy has put in place a policy which prohibits the making of any political donation by or on behalf of AGL Energy and its related bodies corporate.

AGL should not be seeking to circumvent public protections brought in to guard against misuse of political donations, especially after giving a public commitment to this effect, a public commitment which contributed to the leniency of the sentence eventually imposed.

The Judge stated that

"The change in [AGL's] policy is a matter for consideration as part of the sentencing process as it is clearly relevant to the question of whether or not there is any necessity for a requirement for specific deterrence to ensure that AGL commits no further breaches of this nature in the future."

However seeking an extension to a project approved where due process was not followed undermines this seemingly commendable policy of AGL's. If AGL were committed to a sentiment of contrition and remorse, then that would preclude it from applying for an extension of the approval originally granted. It would instead apply for a new assessment, like a good corporate citizen.

The Burrinjuck Greens note that the Judge in this instance was also at pains to outline the purpose of the Act, being

punishment, deterrence, protecting the community, to promote the rehabilitation of the offender, to make the offender accountable, to denounce their conduct, and to recognise the harm done to victim and community^{vii}

To allow an extension of the approval of the DPP would be to negate all of the above. AGL's *cash for approvals* policy would be validated, not punished. Others would be encouraged to apply for modifications to approvals retrospectively found to be wanting. The communities affected would not be afforded the protections that the legislation intended, and nor would democracy itself. Rehabilitation of the offender would not be promoted, nor would their conduct be denounced. Certainly, there would be no recognition of the harm done to the political process or the community on the ground. The Burrinjuck Greens therefore recommend the modification be disallowed.

8. Free market economics and the public good

The role of the government is to enable private companies to react to the market, not to protect private companies from the market at the expense of the public. AGL made it very clear at the Internet streamed public meeting in Dalton on Wednesday 5 April (<http://www.goulburnpost.com.au/story/4580479/power-company-faces-the-people/>), by using the phrase "insurance policy" a number of times, that it wanted to hedge against uncertainty in the NEM by keeping its options open in Dalton.

AGL, Engie and Origin already monopolise the market for domestic gas. Monopolies are not good for reducing gas prices. Early last year, Adelaide's 478-megawatt gas-fired Pelican Point power station was taken offline, despite being one of the most efficient and lowest-emission thermal power stations in Australia. Its owner, Engie, said it was unable to trade profitably based on expected prices of gas and electricity.

Why should Dalton put up the collateral to give AGL a monopolistic advantage in relation to its competitors in the wholesale energy markets? Monopolistic practices keep prices high for the consumer and discourage innovation.

In addition, AGL is clearly confused about its position in relation to the NEM.

- One minute it publishes a submission stating “AGL does not consider that there is a material problem with the design of the wholesale electricity market ^{viii}” and the next writes an op-ed calling for reform of the NEM.^{ix}
- AGL applies to build a peaking power station on the grounds of energy security, then never builds it.
- AGL refuses to testify at the SA Senate enquiry into energy reliability, then justifies the present modification proposal on the South Australian blackouts.

How can anyone possibly take AGL’s policy positions seriously when they are so inconsistent? The Burrinjuck Greens recommends that AGL be made to actually respond to market conditions, so that it has some direction on how to go about its core business.

9. The Minister’s worthy efforts at eliminating the loophole by which part 3a developments are not subject to the same rigour as other developments

The Burrinjuck Greens note the emphasis in the judgement against AGL in the Land and Environment Court on

“disclosure provisions giving rise to these charges were enacted ...as a transparency process designed to enhance and protect public confidence in the integrity of the development approval process both for projects (or modifications to approved projects) dealt with at a state level”^x.

The Burrinjuck Greens also note and commend the Minister’s efforts to restore public confidence in the planning process as proposed in the Environmental planning and Assessment bill 2017.

Under current *part 3a* legislation, a modification of approved projects is permissible whether or not it is substantially the same, in which case a pertinent question to consider would be why has no project, similar or otherwise, been proposed? AGL have had 5 years to think up a better project. (Incidentally, they have also had 5 years to consult the community and weed their paddock, but have not chosen to do so.)

The answer to this question is that AGL is aware that once the new Act is passed it will be impossible to make substantial changes to a project which has been approved under *part 3a*. So instead, it has submitted this vague and insubstantial proposal which, if passed, would allow AGL to claim that any further modification (Mod2 as cited in the request) is in fact what was outlined in the proposed Mod1 request all along.

It is very clear that AGL is trying to exploit the loophole that currently exists, into allowing it to build whatever project it wants under the old *part 3a* legislation without the need for any robust scrutiny. The Burrinjuck Greens are tempted to conclude that AGL’s request has been prepared by lawyers keen to exploit a notoriously unethical loophole, not AGL’s engineering policy team.

AGL has admitted that what happens in Dalton will be substantially different from and inconsistent with the original approval. The Burrinjuck Greens conclude that such a modification should be disallowed, and that were AGL to be invited to reapply for the approval, transparency and public confidence would be much better served.

Conclusion:

The Burrinjuck Greens conclude that the modification request regarding the DPP does not meet the necessary criteria for approval, and runs contrary to:

- 1. The wishes of the Upper Lachlan shire Council**
- 2. Project Approval: Schedule B13. This project approval shall lapse five years after the date on which it is granted, unless the works subject of this approval have been commenced before that time.**
- 3. Project Approval: Schedule D1 (c) the establishment and operation of a Community Consultative Committee generally in accordance with the Guidelines for Establishing and Operating**

Community Consultative Committees for Mining Projects (Department of Planning, 2007 or its latest version)

4. **The relevant Environmental and Socio-Economic assessments, which date from 2011**
5. **The definition of Critical Infrastructure**
6. **The spirit of the judgement in Secretary, Department of Planning and Environment v AGL Energy Limited; Secretary, Department of Planning and Environment v AGL Upstream Infrastructure investments Pty Limited [2017] NSWLEC 2**
7. **AGL's policy which prohibits the making of any political donation by or on behalf of AGL Energy and its related bodies corporate**
8. **Free market economics and the public good**
9. **The Minister's worthy efforts at eliminating the loophole by which part 3a developments are not subject to the same rigour as other developments**

ⁱ <http://www.legislation.nsw.gov.au/regulations/2011-510.pdf>

ⁱⁱ <http://www.goulburnpost.com.au/story/4580479/power-company-faces-the-people/>

ⁱⁱⁱ https://www.caselaw.nsw.gov.au/decision/5875bc13e4b0e71e17f565dd#_Toc471972947

^{iv} http://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gaz_Gazette%20Split%202008_2008-24.pdf

^v <https://www.caselaw.nsw.gov.au/decision/5875bc13e4b0e71e17f565dd>

^{vi} https://www.caselaw.nsw.gov.au/decision/5875bc13e4b0e71e17f565dd#_Toc471972947

^{vii} https://www.caselaw.nsw.gov.au/decision/5875bc13e4b0e71e17f565dd#_Toc471972947

^{viii} <http://www.aemc.gov.au/getattachment/65fb050f-440d-454a-b3d2-157db39fe387/AGL-Energy-received-21-June-2016.aspx>

^{ix} <http://www.smh.com.au/comment/bungled-closure-of-hazelwood-shouldnt-have-been-allowed-to-happen-20170407-gvfrz7.html>

^x https://www.caselaw.nsw.gov.au/decision/5875bc13e4b0e71e17f565dd#_Toc471972947