Supplementary Submission No 447a

INQUIRY INTO COAL SEAM GAS

Organisation: Australian Petroleum Production and Exploration Association

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Dear Sir

NSW Legislative Council Coal Seam Gas Inquiry APPEA supplementary comments – September 2011

I write on behalf of the Australian Petroleum Production and Exploration Association (**APPEA**).

APPEA has already made a submission in response to the Government's Inquiry into the Coal Seam Gas (**CSG**) industry dated September 2011.

This submission provides supplementary comments in response to concerns that the CSG industry is not sufficiently regulated to manage impacts of CSG mining activities on the environment and the local community.

On 7 September 2011, the president of the Lock the Gate Alliance, Inc., Drew Hutton, made a submission to the Director of the General Purpose Standing Committee No. 5 in response to the Committee's Inquiry.

APPEA has reviewed Mr Hutton's submission and submits the following comments on inaccuracies in that submission for the Committee's benefit. APPEA also notes that it has made a submission in reply to the Senate Standing Committees on Rural Affairs and Transport inquiry into the impacts of coal seam gas extraction on the Murray Darling Basin (**Commonwealth Government Inquiry**).

Mr Hutton's submissions in response to both the current inquiry and the Commonwealth Government Inquiry do not accurately describe the way in which State and Commonwealth legislation deals with coal seam gas projects and seeks to give an impression of an industry "exempt" from major environmental legislation, when the opposite is true.

As stated in our submission in response to the Commonwealth Government Inquiry, in some respects, Mr Hutton's submission is quite plainly incorrect. It is, in our view, incumbent on those who purport to read and understand the legislation, and to make informed comment, to represent its application fairly and accurately. To do otherwise helps to create and feed an alarmist and histrionic culture of emotional opposition to resource projects generally.

Specific comments

Mr Hutton's submission makes the following assertions:

1. **"of critical importance to this inquiry is the absence of effective legislation and regulation of the CSG industry"**

   This statement is incorrect. The CSG industry is subject to the main State and Commonwealth environmental legislation, including, but not limited to:

- Environmental Planning and Assessment Act 1979: the State's principal piece of planning legislation, which sets out the process for assessing all proposals for development in NSW and requires that environmental assessments be carried out for certain activities, which includes gas exploration. These approvals can take years to obtain.

- Protection of the Environment Operations Act 1997: this Act, the key piece of environment protection legislation administered by the Office of Environment and Heritage, allows the Government to set out explicit protection of the environment policies which make it an offence in NSW to pollute the environment.

- Petroleum (Onshore) Act 1991: Petroleum title will only be granted subject to demonstrating protection of the environment.

- Environment Protection and Biodiversity Conservation Act 1999: This Act protects matters of National Environmental Significance. The EPBC Act contains several powerful compliance provisions, including directed environmental audits (in addition to those required under the approvals) (S458); criminal and civil penalties, remediation orders and injunctions from the Federal Court (S480A); executive officer liability, and remediation determinations by the Minister (S480D). Ultimately, the Minister can suspend or revoke an approval or vary conditions for non compliance (S143).

- Contaminated Land Management Act 1997: This Act regulates land that is contaminated where that contamination is "significant enough to warrant regulation".

- Water Management Act 2000: A "Controlled Activity Approval" is required for "waterfront land" activities within 40m of watercourse and access licences for water extraction and irrigation activities.

- Water Act 1912: Water Licences are required for drilling and testing activities.

- Threatened Species Conservation Act 1995: This Act sets out certain requirements for the protection of threatened flora and fauna.

- Heritage Act 1977: This Act regulates the disturbance of relics.

- National Parks and Wildlife Act 1974: A permit is required under this Act to excavate archaeological sites

- Native Vegetation Act 2003: A permit is required under this Act for the clearance of native vegetation.

- Occupational Health and Safety Regulation 2001: This Act regulates dangerous goods.
- Roads Act 1993: Under this Act, consent is needed for activities likely to impact on a roads network.
- Rural Fires Act 1997: This Act sets out fire safety controls.
- Noxious Weeds Act 1993: Under this Act requires authorities must be notified of notifiable weed.
- National Greenhouse and Energy Reporting Act 2007: This Act sets out greenhouse gas reporting requirements.
- Local Environmental Plans, which set out the zoning of land and outlines the type of development that can be carried out with and without consent, along with activities that are prohibited in certain areas which applies to gas exploration.

Mr Hutton's submission fails to properly consider the above legislation and policy. Rather, his submission seeks to create the impression that the industry is exempt from the most significant Commonwealth and State environmental legislation in reliance on the following statements:

2. "The CSG is outside the National Water Initiative"

Under clause 34 of the National Water Initiative (**NWI**), the signatory Governments agreed that there may be special circumstances facing the petroleum and minerals sectors that need to be addressed by policies and measures beyond the scope of the NWI Agreement:

> "*The Parties agree that there may be special circumstances facing the minerals and petroleum sectors that will need to be addressed by policies and measures beyond the scope of this Agreement. In this context, the Parties note that specific project proposals will be assessed according to environmental, economic and social considerations, and that factors specific to resource development projects, such as isolation, relatively short project duration, water quality issues, and obligations to remediate and offset impacts, may require specific management arrangements outside the scope of this Agreement.*"

Nevertheless, the National Water Commission has highlighted the need for appropriate management of CSG developments, consistent with the objectives of the NWI. To meet NWI objectives, the Commission recommends that industry, water and land-use planners, and Governments adopt a precautionary approach to CSG developments (which is supported by APPEA), ensuring that risks to the water resource are carefully and effectively managed. The Commission's position is that NWI-consistent water access entitlements should be made available to coal seam gas activities wherever possible, as the use of clause 34 of the NWI is only intended to operate in exceptional circumstances. Where clause 34 is used, a clear and transparent explanation of why it was used, rather than complying with the normal water planning and management regime, should be provided.

In response to other observations made in Mr Hutton's submission regarding the sustainability of water consumption from CSG industry activities, Mr Hutton fails to also point out that, in addition to the observations on the Commission's website that are replicated in Mr Hutton's submission, the Commission's website states that the CSG industry "*offers substantial economic and other benefits to Australia*" and, therefore, "*an adaptive and precautionary management approach will be essential to allow for progressive improvement in the*

understanding of impacts, including cumulative effects, and to support timely implementation of 'make good' arrangements". Accordingly, the Commission is not adopting the position that CSG activities should not continue in Australia and APPEA has always supported the sustainable use of the natural resources.

3. "The CSG industry is not subject to State Water Acts"

This statement is incorrect. As noted above, in New South Wales, the CSG industry is subject to the Water Management Act 2000 (NSW) (**Water Management Act**) and the Water Act 1912 (NSW) (**Water Act**). The Water Management Act forms part of a newer regulatory regime and applies to all ground water sources for which a Water Sharing Plan has been gazetted. The Water Act applies to all ground water sources for which no Water Sharing Plan has been gazetted.

Where the Water Act applies, each exploration hole, test well and groundwater monitoring bore and production well must be authorised by a bore licence issued by the NSW Office of Water.

Where the Water Management Act applies, each exploration hole, test well and groundwater monitoring bore and production well must be authorised by a water access licence, a water supply work approval and a water use approval unless one of the limited exemptions applies. The limited exemptions available under the Water Management Act do not result in the CSG industry being exempted from the Water Management Act. The exemptions include:

- projects which have been separately assessed and approved under the Part 3A or SSD regimes with the result that only a water access licence is required under the Water Management Act; and

- CSG exploration where no more than 3 ML a year is extracted.

In addition, the NSW Government has committed to activating the aquifer interference provisions of the Water Management Act which will require that any activity which interferes with an aquifer in NSW, including CSG activities, be authorised by an aquifer interference approval. An aquifer interference policy is currently being developed in consultation with the community and is expected to commence in 2011. The final NSW Aquifer Interference Policy will be applied State wide to clarify approval requirements for aquifer interference activities, including CSG activities.

4. "The CSG industry is not listed in the NSW Acts under which it is supposedly regulated (e.g. NSW On-Shore Petroleum Act 1991)"

Most industries and activities are not specifically listed in NSW legislation intended to be of application to all industries and activities. This is because the legislation is intended to be all-inclusive, unless otherwise specified, so that it is as broad-reaching as possible.

The fact is that CSG developments operate under the Petroleum (Onshore) Act 1991 during the exploration phase (even though the Act does not specifically mention CSG). This is because of the definition of "petroleum", which includes any naturally occurring hydrocarbon, whether in a gaseous, liquid or solid state. Methane (the major component of coal seam gas) is a gaseous hydrocarbon.

Exploration for, or mining of, petroleum may only be carried out in accordance with a petroleum title issued under the Petroleum (Onshore) Act. There are three main types of petroleum titles:

(a) Petroleum exploration licence: the holder of a *petroleum exploration licence* has the exclusive right to prospect for petroleum on the land comprised in the licence.

(b) Petroleum assessment lease: the holder of a petroleum assessment lease has the exclusive right to prospect for petroleum and to assess any petroleum deposit on the land comprised in the lease.

(c) Petroleum production lease: the holder of a petroleum production lease has the exclusive right to conduct petroleum mining operations on the land comprised in the lease and to construct works necessary for the full enjoyment of the lease.

When moving to full production, CSG activities require development approval following assessment under the Environmental Planning and Assessment Act 1979. Under section 67(2) of the Petroleum (Onshore) Act 1991, a petroleum production lease cannot be granted until development approval has been granted.

5. "CSG exploration is not covered by the NSW Protection of the Environment Operations Act"

Again, this statement is factually incorrect. The Act does not carve out the CSG industry, nor does it specifically identify the industries to which it applies, such that there is a glaring omission. The Act:

- Empowers regulatory authorities to issue pollution licences
- Creates a range of pollution offences and penalties
- Allows regulatory authorities to enforce the POEO Act
- Allows the public to take legal action to enforce the POEO Act
- Requires CSG production projects to hold Environment Protection Licences.

The CSG industry receives no special exemptions from the broad-reaching application of this legislation.

6. Mr Hutton's submission also states that "LTGA supports precautionary approaches and rejects Queensland's current emphasis on adaptive management"

The precautionary principle has been a feature of modern environmental law for some time. Its application to the CSG industry has been rigorous and has resulted in the industry being heavily regulated.

The principle does not mean *"if in doubt do not proceed".* Correctly stated, it says: *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 (taken from S3A of the EPBC Act).

This is precisely what has been done in relation to the CSG industry. The State and Commonwealth Governments have required that substantial measures are taken by Government and project proponents to address scientific uncertainty. These measures include the use of adaptive management techniques to gain and assimilate information into management as data is generated.

Adaptive management has been recognised as a means of rational management of risk. In one of the most erudite judgments on the precautionary principle in modern jurisprudence, Mr Justice Preston CJ of the NSW Land and Environment Court said: *"One means of retaining a margin for error is to implement a step-wise or adaptive management approach, whereby uncertainties are acknowledged and the area affected by the development plan, programme or project is expanded as the extent of uncertainty is reduced ...".* (Telstra Corporation Ltd v Hornsby Shire Council (2006) NSWLEC 133.)

This is precisely what is happening in the industry with State and Commonwealth Governments committed to this approach and with proponents having no choice but to comply. It is not necessary to again mention measures that are being employed to implement this approach. They are comprehensive and demanding. The commercial risk implicit in the adaptive management approach is taken by the proponents.

We also draw your attention to our previous comments in relation to the National Water Initiative, which recognises that an adaptive and precautionary management approach is appropriate to the industry.

It should also be noted that the precautionary principle is but one of the principles of ecologically sustainable development that guides application of the EPBC Act. Another is: "*Decision making processes should effectively integrate both long term and short term economic, environmental, social and equitable considerations."*

7. Two other egregious statements made by Mr Hutton in his submission appear on pages 17 and 18:

- **"In NSW, the coal seam gas industry is exempt from a number of important pieces of legislation including the Native Vegetation Act 2003 and the Water Management Act 2000."**

- **"Policies must be development to include consideration of the Fisheries Management Act, the Threatened Species Conservation Act and Environment Protection and Biodiversity Conservation Act."**

The EPBC Act does apply to the CSG industry as outlined above. As no explanation is provided as to why Mr Hutton asserts that it does not, it is difficult to respond to this submission further.

The other Acts referred to above **do** apply to the mining industry and the CSG industry. The exemption to which Mr Hutton appears to be referring to is a limited one.

Certain types of development in NSW are exempt from requiring:

- authorisation under section 12 of the Native Vegetation Act;

- a permit under section 201, 205 or 219 of the Fisheries Management Act 1994
- a permit under section 201, 205 or 219 of the Fisheries Management Act 1994; and
- a water use approval under section 89, a water management work approval under section 90 or an activity approval (other than an aquifer interference approval) under section 91 of the Water Management Act 2000,

amongst other exemptions, where that development is classified as "State significant development" (previously Part 3A, now Division 4.1 of Part 4 of the *Environmental Planning and Assessment Act 1979* (**EPA Act**)). These exemptions are limited in application and are provided as a recognition by the Government of the State significance of certain types of development. The same exemptions are afforded to all other types of State significant development. It does not mean that no regard is given to these Acts in undertaking environmental assessment and assessing the environmental impacts of these types of development.

As per Mr Hutton's submission in response to the Commonwealth Government Inquiry, Mr Hutton's apparent preparedness to ignore and misrepresent the application of significant legislation, approval requirements, and principles of scientific-based decision making is alarming and, accordingly, his submission must be treated with due caution and in the context of his clear objective to paint the industry as under-regulated, poorly controlled, and left to its own devices, when the opposite is in fact the truth.

Yours sincerely

Rick Wilkinson
Chief Operating Officer – Eastern Australia