Submission No. 34
Received 10 October 2016

10 October 2016

Mr Rob Hansen
Research Director
Agriculture and Environment Committee
Parliament House
By email: aec@parliament.qld.gov.au

Dear Mr Hansen

Submission regarding the *Environmental Protection (Underground Water Management) and Other Legislation Amendment Bill 2016* (Bill)

Origin Energy thanks the Agriculture and Environment Committee for the opportunity to provide a written submission about the Bill.

Executive summary

Origin recognises the importance of a robust regulatory environment for the management of underground water resources and a strong, workable make good regime. However, Origin has some concerns with the amendments proposed by the Bill.

In summary, Origin's concerns about the proposed amendments in the Bill fall into four broad categories:

1. Power to condition exercise of underground water rights
2. Gassy bores
3. Change to the definition of "impaired capacity"
4. Make good agreement negotiation process

We set out our concerns below.

1. Power to condition exercise of underground water rights

The Bill proposes to:

- Allow conditions to be imposed on the exercise of underground water rights, including to amend an existing environmental authority (**EA**) where an Underground Water Impact Report (**UWIR**) identifies impacts (or potential impacts) to environmental values from the exercise of underground water rights.
- Insert a requirement to provide information with EA applications (and relevant EA amendment applications) relating to the exercise of underground water rights, the likely impacts on environmental values and groundwater quality, and strategies for avoiding, mitigating or managing the impacts.

Conditioning the exercise of underground water rights

Underground water rights are defined in section 185 of the *Petroleum and Gas (Production and Safety) Act 2004* (**PAG**) and recognise that the take or interference with underground water as a result of carrying out authorised activities on a petroleum tenure is necessary, and subsequently authorises this take. The authorised take is limited to that which is necessary or unavoidable.

Underground water rights are a fundamental principle upon which Queensland's LNG projects proceeded. Origin is concerned that the new provisions will have unintended consequences and may

Origin Energy • 135 Coronation Drive Milton QLD 4064
GPO Box 148 Brisbane QLD 4001 • Telephone (07) 3858 0600 • Facsimile (07) 3369 7840 • www originenergy com au

fetter the right to extract underground water, which is necessary to carry out authorised activities. For example, this new power potentially allows the Department of Environment and Heritage Protection to determine that underground water take impacts on an environmental value and, accordingly, impose a condition on an EA requiring necessary and unavoidable underground water take to somehow be reduced. A reduction in underground water take would necessitate a reduction in the volume of gas able to be produced.

Secondly, there appears to be a level of duplication between the proposed amendments considering impacts to environmental values as part of an EA or EA amendment application and those that are proposed to be included in a UWIR in the future. Given the nature of underground water, there are overlapping, cumulative potential impacts due to the exercise of underground water rights by multiple tenure holders and other water users. Consequently, it is difficult to provide the required assessment information unless the impacts of all operations and water use are modelled. The Office of Groundwater Impact Assessment (**OGIA**) is the only entity that currently has access to the required information and can complete the cumulative impact modelling. From a practical perspective, tenure holders could therefore need OGIA to re-run cumulative models for every EA and EA amendment application. Origin suggests that it is also duplicative to impose conditions on EAs to control impacts of underground water take, when OGIA was established with the specific objective to monitor and model underground water reserves (providing the basis for the make good regime) and to produce the UWIR, which already considers impacts to springs associated with underground water take.

Retrospective application

The amendments as proposed also require the retrospective consideration of impacts to environmental values from the past lawful exercise of underground water rights. Companies rely on the laws and approvals in place at the time they proceeded with a project and the retrospective application of laws places significant investment at risk.

If conditions can be imposed on EAs through an amendment application to address past impacts of underground water take (even where the change to underground water take is negligible), a project may become subject to significant additional compliance obligations as a result of these new conditions. Consequently, the amendments proposed by the Bill have the potential to significantly impact on already approved and operational projects, as well as potentially limit or remove the existing underground water rights on which the initial investment decision was made.

Information requirement for EA and EA amendment applications

In terms of the new requirement to provide information with an EA application, Origin is concerned that there is little detail about the type and level of information to be provided. Given the way in which gas projects are developed, it may not be possible to comply with those new requirements, as detailed information, such as well locations and water volumes, is unknown during exploration and the early stages of production. Also, due to the cumulative nature of impacts associated with underground water take, it would be necessary for a body such as OGIA to model such impacts. Further, the Bill proposes that information relating to underground water rights and potential impacts to environmental values will be required for EA amendment applications that involve 'changes' to the exercise of underground water rights. This trigger to provide additional information is broad and may capture a significant number of EA amendment applications, even if the change to underground water take is negligible.

Origin suggests that the amendments relating to underground water rights should not progress until consideration has been given to impacts on stakeholders (such as through a Regulatory Impact Statement). If this is not to be undertaken, then Origin believes that the retrospective provisions should be removed. Further, if future impacts to environmental values as a result of the exercise of

underground water rights are to be considered, Origin believes these could be considered in the UWIR. Additionally, in Origin's view, EA conditions should seek to mitigate and manage impacts on environmental values arising from the exercise of a petroleum tenure holder's lawful right. Conditions should not seek to control the actual exercise of the right.

2. Gassy bores

Origin supports the principle that bores that have become gassy due to resource activities should be 'made good'. Currently, there is no legal requirement to 'make good' a bore that has an impaired capacity as a result of becoming gassy. However, Origin has been proactive in addressing landholder concerns around bores that have experienced increased gassiness. Origin has 'made good' (on behalf of Australia Pacific LNG) a number of bores where no formal make good obligations have existed for community benefit, to mitigate potential future issues with the bore's ability to supply a reasonable quantity or quality of water and potential safety reasons.

In our view, however, the proposed changes do not reflect the above principle as the criteria to identify gassy bores for make good are not clear and there is ambiguity about the extent of resource activity impact required for a bore to qualify for make good.

The Bill proposes to explicitly include under the make good regime (through the amended definition of "impaired capacity") those bores that have suffered "*adverse effects*" where "*free gas derived from the carrying out of authorised activities under a resource tenure has, or has likely, caused or materially contributed to the adverse effect*".

"*Adverse effects*" is defined as:

> "- *Damage to the bore or to the bore's pumps or other infrastructure*
>
> - *That the bore poses a health or safety risk*
>
> - *That the bore can no longer, or it is likely that the bore can no longer, provide a reasonable quantity or quality of water for its authorised use or purpose*"

This drafting seems ambiguous; specifically:

- The term "free gas" is not defined and has a range of possible meanings;
- The threshold for impairment caused by free gas is inconsistent with the threshold for other impacts leading to impaired capacity. An adverse effect for a gassy bore is that "*the bore can no longer, or it is likely that the bore can no longer, provide a reasonable quantity or quality of water for its authorised use or purpose*". For all other impacts, it is required that the bore "*can no longer provide a reasonable quantity or quality of water for its authorised use or purpose*". In these circumstances, the bore must have actually suffered an impact, rather than being only 'likely' to suffer one in the future (as is proposed for gassy bores);
- The term 'likely' is used twice in the definition of "impaired capacity" for gassy bores. For example, a bore will be suffering impaired capacity if it is *likely* that the bore can no longer provide a reasonable quantity or quality of water and that the free gas from authorised activities has *likely* caused or materially contributed to this adverse effect;
- The adverse effect relating to "health or safety risks" is too broad and guidance should be provided to determine the threshold for when that risk is such that action should be taken;
- There are no criteria to assist in determining whether free gas is likely to have caused an adverse effect. As many water bores have historically experienced 'gassiness' prior to gas

activities in the region, it is critical that assessment criteria be developed (in consultation with industry and landholders).

The uncertainty of meaning in this provision has the potential to lead to confusion and extended disputes about which bores are subject to make good obligations.

Secondly, Origin is concerned that the proposed amendments also appear to allow a new bore to be drilled into a water source that is known to be gassy (or likely to become gassy in the future), such as the Walloon Coal Measures or the Springbok Sandstones, and for a make good obligation to then attach to that new bore. This is not an issue under the current regime, as the decline in water levels of new bores needs to be greater than that predicted by the applicable UWIR for make good to apply. Origin suggests that new bores in specific aquifers and locations be excluded from attracting make good obligations, given that there is a reasonable expectation that bores in these aquifers will be or become gassy in the future. Alternatively, the UWIR could be required to predict potential free gas areas and that new bores in these 'free gas areas' be excluded from the make good regime, similar to the existing regime relating to a predicted decline in water levels

Finally, in relation to causation (that is, "has likely caused" and "materially contributed to"), our comments below relating to the definition of "impaired capacity" apply also.

3. Change to the definition of "impaired capacity"

The Bill proposes to amend the definition of "impaired capacity" to be a decline in water level where:

> "*the exercise of underground water rights has, or has likely, caused or materially contributed to the decline*".

Currently, the decline in water level must be "*because of*" the exercise of underground water rights.

Origin is concerned about the proposed amendment for two reasons. The first is that the policy intent of this amendment is unclear. Origin would value insight into the substantive issue that this policy change addresses. The second is that this amendment will create additional uncertainty due to ambiguity around key terms. This has the potential to lead to delays in resolving make good negotiations. The phrases "has likely" and "materially contributed to" are terms that could either be defined, or else removed.

Further, the term "materially contributed to" may capture bores where the exercise of underground water rights contributed to a water level decline but was not the actual cause of the impairment (and the impairment was due substantially to other factors).

4. Make good agreement negotiation process

The Bill proposes:

- that gas companies pay for the facilitation of alternative dispute resolution (**ADR**) and for the costs of hydrogeological advice associated with the negotiation or preparation of make good agreements; and
- to provide a 'sliding-scale' cooling-off period for make good agreements of up to 40 business days (but possibly no cooling-off period at all), depending on when any agreement is signed.

Origin is supportive of improvements to the make good agreement negotiation process which facilitate quicker resolutions and greater certainty in the process. This is beneficial for both landholders and the gas industry. However, Origin believes that the proposed changes will instead add complexity and uncertainty to the negotiation of make good agreements for both sides.

ADR Costs

The Bill proposes that gas companies pay for the cost of facilitation of ADR, regardless of who refers the matter to ADR. Additionally, the Bill does not limit the number of ADR processes that might be called. Currently, the party referring a matter to ADR is lawfully responsible for the costs of the ADR. This regime aligns with that for negotiating a Conduct and Compensation Agreement (**CCA**) under the PAG Act. The proposed changes do not seem to incentivise parties to actively negotiate prior to ADR and, without a limitation on the number of ADRs that can be called, has the potential to be misused. Furthermore, the most recent review of the land access framework confirmed that the approach proposed by the Bill is not recommended in the context of land access.

Origin suggests that the ADR process (including responsibility for costs) remains aligned with the CCA process under the PAG Act. Alternatively, if this new cost allocation is to remain, Origin believes it would be appropriate to limit it to a single ADR referral. Additionally, we suggest that government consider other mechanisms, such as case appraisal, which have the potential to make the process simpler and faster while keeping the parties better informed about their respective positions.

Hydrogeological advice

Currently, gas companies are required to carry out bore assessments for bores as set out by the applicable UWIR. A bore assessment must be carried out in accordance with the government's 'Bore assessment guideline' and certified by an independent third party. Further, landholders may request a review of any bore assessment by the Department of Natural Resources and Mines (**DNRM**).

Origin believes that the current regime, which has regulator oversight, provides a suitably robust bore assessment mechanism.

Gas companies must already reimburse the landholder for accounting, legal and valuation costs reasonably incurred in negotiating or preparing a make good agreement. This provides landholders with access to a breadth of expert advice to assist them in negotiating a make good agreement for a bore determined to be subject to make good. Additional hydrogeological advice is unlikely to enable a landholder to better participate in the make good agreement negotiation process, when a second expert opinion is already available from DNRM.

Cooling-off period

In terms of the proposed cooling-off period of up to 40 business days, Origin is concerned that it does provide equitable protection to landholders. The 40 business day period starts on the day the bore assessment for a water bore is undertaken. As such, an agreement signed quickly could have a long cooling-off period. One signed towards the end of the 40 business day period would only have a short cooling-off period and agreements signed outside of the 40 business day window would have no cooling-off period at all. In Origin's experience, it is difficult to reach agreement with landholders within the 40 business day period, and given the increasing uncertainty in the negotiation regime, Origin believes that it will become increasingly difficult. Consequently, the cooling-off period, as proposed, is unlikely to actually apply to many make good agreements signed by landholders. Further, it is not clear what the impact would be on a cooling-off period where the 40 business day period for negotiation is extended by the Minister. In Origin's view, a five business day cooling-off period starting on the day following signing of a make good agreement would be more appropriate (and aligns more closely to cooling-off periods applicable to other standard consumer agreements).

Summary

Origin's view is that any amendments proposed by the Bill should contribute to a more effective regulatory regime with improved outcomes and timely resolution of make good agreements. It is critical that the make good regime is clear and creates certainty for all stakeholders. This includes ensuring that landholders can determine the bores to which make good obligations apply and that gas producers can exercise underground water rights in accordance with the PAG Act.

If you have any questions about Origin's submission, please contact Susan Moore, Manager Public Policy & Government Engagement at [redacted]

Yours faithfully,

Maia Schweizer
Chief Development Officer, Integrated Gas
Origin Energy