



# MEMORANDUM

**TO:** Panel Chair, Southern Regional Planning Panel

**FROM:** Manager Development Services, Wagga Wagga City Council

**DATE:** 12 May 2016

**SUBJECT:** (JRPP no 2016STH013) DA16/0135 Electricity Generating Works (Solar Energy System) and 3 Lot Torrens Title subdivision and 260 Lot Community Lot subdivision

---

## Summary

The above-mentioned development application is being considered by the Southern Joint Regional Planning Panel (SJRPP) on 17 May 2016. The purpose of this memo is to advise the Panel of a potential risk that the Office of Environment and Heritage (OEH) may not support an approval of the application.

## Background

Although the site is not mapped by Council as a site containing known significant cultural and/or heritage values or items, the SEE submitted with the application states that two (2) aboriginal heritage assessments have been undertaken previously on the site due to development within and proximal to the proposed development site.

- The heritage assessment completed by Kelleher Nightingale in 2008 to support the Wagga Wagga Local Environmental Study included a survey of the subject site. This survey identified an aboriginal artefact in a recently ploughed paddock, which is located approximately 196m north-east the proposed solar panel system. The location of the artefact (BIFA- AGD66) is indicated on the attached plan.
- The environmental assessment completed by AECOM in 2010 in relation to the Bethungra to Wagga looping gas pipeline confirms Aboriginal heritage field survey of the subject site within a 50-100m buffer of the pipeline easement. An artefact scatter was identified during the assessment. The location of the artefact (APA-36) is indicated on the attached plan. The artefact is located well south of the subject site on adjacent land (approximately 180 metres to the south-west) and is not impacted by the project.

The application was referred to the Office of Environment and Heritage with a request to provide comment on or before 11 May 2016. Council received a formal copy of OEH's response yesterday (attached hereto). The OEH is of the opinion that the heritage assessment submitted with the application does not adequately address the potential impacts on Aboriginal Cultural Heritage, and may not provide a defence for the strict liability offence under the *National Parks and Wildlife Act 1974* (NPW Act) relating to the harm of Aboriginal objects.

Council's s79c assessment report indicates that it is satisfied with the information provided in the application particularly given the fact that the footprint of the proposed solar system is clear of the location of the identified artefact on the subject site. The risk associated with Aboriginal Cultural Heritage on the site was considered low and as such Council's assessment was completed and uploaded of the SJRPP's website with

a note that the Office of Heritage and Environment comments are outstanding. The following conditions were recommended by Council to be imposed:

3. *Prior to the issue of the Construction Certificate, a Construction Management Plan shall be prepared and submitted for approval by Council. The approved plan shall be implemented during construction of the solar electricity system. The plan shall include a range of management controls as outlined in the approved SEE and other conditions listed in this consent. The plan shall include, but not limited to:*
  - *Aboriginal Heritage Management*
  - *Construction Traffic Management*
  - *Bush Fire Management*
  - *Waste Management*
  - *Erosion and Sediment Control*
  - *Noise Management*
  - *Dust Management*
  - *Soil and Water Management*
  - *Integrated Site Restoration*
  - *Operation hours*
  - *Security Management*
  - *Requirements and conditions of the APA Group (refer to condition 38 of this Consent)*
  - *Requirements and conditions of Essential Energy to connect to the state power grid (refer to condition 39 under of this consent).*
  
20. *A 'no harm zone' must be established around the location of the identified Aboriginal artefact that is located on the site in consultation with the local Aboriginal community stakeholders. The Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW must be used by individuals or organisations who are contemplating undertaking activities which could harm Aboriginal objects and shall be implemented as part of the Construction Management Plan. This condition is to be read with condition 27 of this consent.*
  
27. *If any Aboriginal object is discovered and/or harmed in, on or under the land, the proponent must not further harm the Aboriginal object, immediately cease all work at the particular location, secure the area so as to avoid further harm to the Aboriginal object, notify the OEH as soon as practicable on 131 555, providing any details of the Aboriginal object and its location, and not recommence any work at the particular location unless authorised in writing by OEH.*

**NOTE:** *The Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW must be used by individuals or organisations who are contemplating undertaking activities which could harm Aboriginal objects. This code will provide a process whereby a reasonable determination can be made whether or not Aboriginal objects will be harmed by an activity, whether further investigation is warranted and whether the activity requires an Aboriginal Heritage Impact Permit. Due diligence may also be exercised by complying with industry-specific codes of practice that have been adopted under the National Parks and Wildlife Regulation 2009.*

Contrary to the above, the OEH is taking a more conservative approach to the development proposal and have suggested that the applicant demonstrate due diligence in the prevention of harm to Aboriginal objects and at least conduct a 'walk-over' visual inspection utilising relevant skills to identify Aboriginal objects prior to the application being determined. In the event that any other objects are discovered, the

OEH will require a site recording and further and appropriate cultural assessment, and if an object is to be harmed by the development, then an Aboriginal Heritage Impact Permit application would be required. The actual Aboriginal Heritage Permit (if applicable) may be issued post approval.

If no additional Aboriginal objects are identified by the assessment, OEH would then support the inclusion of the proposed conditions in Council's s79C report.

### **The way forward**

The applicant's consultant has advised Council that a further assessment in accordance with the OEH will be undertaken in the coming days and that a report to this effect will be provided to the OEH and Council. The OEH have also indicated that they will review the additional information once the relevant documentation has been provided to them with the intent to have a response ready to Council prior to the scheduled SJRPP meeting on Tuesday, 17 May 2016.

There is an obvious risk involved by virtue of the fact that the applicant may not be able to provide the information to the OEH in time to make a proper assessment and there is also a risk that the OEH may not support the application, or based on the timing of their earlier response met the required deadline to provide a response to Council/JRPP. In addition, there would be very little time for the members of the SJRPP to view the relevant documentation prior to the meeting.

In light of the above Council seeks advice from the Panel Secretariat / Panel Members as to whether it would be deemed appropriate to defer the application to be decided at a future date or to wait until the scheduled meeting Tuesday, 17 May 2016 to see what eventuates over the next couple of days, recognising that the panel may not be in a position to make a decision on the day.

If you have any questions in relation to the above, please contact myself or the assessment officer, Adriaan Stander on 02 6926 9562.

Regards

Colby Farmer  
Manager Development Services

*Attachment 1: Locality of identified aboriginal artifacts*

*Attachment 2: Office of Environment and Heritage's comments, dated 11/05/16*





**Southern Cross Energy Pty Ltd  
Bomen Solar Energy System**

0 20 40 60 80 m

Grid: GDA 1994 MGA Zone 55 (EPSG: 28355)  
Project: 214082 Date: 9/5/16



## Legend

  Subject Site

  Proposed Fencing

● BIF1 - AGD 66

  BIF1 30m No Harm Zone

★ Aboriginal site APA-36

— Proposed Solar Modules

O:\Projects\214082\Out\GIS\214082 Project.qgs

© 2016. Whilst every care has been taken to prepare this map, Geolyse Pty Ltd makes no representations or warranties about its accuracy, reliability, completeness or suitability for any particular purpose and cannot accept liability and responsibility of any kind (whether in contract, tort or otherwise) for any expenses, losses, damaged and/or costs (including indirect or consequential damage) which are or may be incurred by any party as a result of the map being inaccurate, incomplete or unsuitable in any way and for any reason.

Data Source: NSW Department of Planning and Environment (Land Zones) and NSW LPI (WMS Aerial Imagery)

Created by: cbigg





**Office of  
Environment  
& Heritage**

Your reference: DA16/0135  
Our reference: DOC16/201979  
Contact: Peter Ewin  
(02) 6022 0606

Mr Colby Farmer  
Manager Development Services  
Wagga Wagga City Council  
PO Box 20  
WAGGA WAGGA NSW 2650

Attn: Mr. Adriaan Stander

Dear Mr Stander

**RE: DA16/0135 - Electricity Generating Works (Solar Energy System)  
299 Trahairs Rd, Bomen**

I refer to your letter dated 26 April 2016 to the Office of Environment and Heritage (OEH) seeking comment on the proposed solar farm at 199 Trahairs Rd, Bomen (DA16/0135). We have also received further information from both yourself and Mr David Walsh of Geolyse Pty Ltd who has prepared the Statement of Environmental Effect (SEE) on behalf of the proponent, Southern Cross Energy Pty Ltd. We have reviewed the information provided, and this letter provides our compiled comments in relation to both Aboriginal cultural heritage (ACH) and biodiversity.

Our key concern relates to the ACH assessment for the proposal. Given the occurrence of significant heritage in the locality, it is our opinion that this assessment does not adequately address the potential impacts on ACH, and may not provide a defence for the strict liability offence under the *National Parks and Wildlife Act 1974* (NPW Act) relating to the harm of Aboriginal objects.

It was stated in the SEE and the subsequent correspondence that the original assessment by Kelleher Nightingale in 2008 covered the proposal area. However, no details (maps, copies of documentation, etc.) to confirm that this is the case have been provided to Wagga Wagga City Council or OEH. We have since located a copy of this report and note that there is limited detail on site assessment, and that the report itself acknowledges that the majority of the assessment was conducted as a desktop review (Page 8). Page 13 also shows a map that details areas of archaeological sensitivity. The proposed development areas at the east and south may be within areas identified as high sensitivity. The assessment by AECOM in 2010 did address part of the proposal area, and importantly, confirmed an Aboriginal object adjoining the property, outside the proposed development footprint, and most probably within an area of high cultural sensitivity identified in the 2008 assessment.

Given that an object has been recorded within the property boundary (recorded in the 2008 study) and that there is evidence of potential for other sites and objects to occur in the area, particularly given proximity to the Bomen Axe Quarry Aboriginal Place, our advice is that the proponent should demonstrate due diligence in the prevention of harm to Aboriginal objects and at least conduct a 'walk-over' visual inspection utilising relevant skills to identify Aboriginal objects as part of the planning assessment. We recommend this technique as a simple and low cost method to quickly identify any cultural heritage extant on the site, and to provide a defence against any strict liability that may later arise by demonstrating that reasonable and practicable measures to avoid harm to Aboriginal objects have been undertaken before the activity commenced.

We recommend that this assessment locates the one recorded Aboriginal object in relation to the development footprint, and traverses all of the proposed footprint area. In the event that objects are discovered, OEH will require site recording and further and appropriate cultural assessment, and if an object is to be harmed by the development, then an Aboriginal Heritage Impact Permit (AHIP) application would be required. We believe it would be appropriate that this assessment be undertaken before approval to give certainty around the future impacts on any objects, but note that

an AHIP is not required to be issued before development consent is granted, just before the works commence.

Wagga Wagga City Council has prepared draft conditions of consent for consideration by the Joint Regional Planning Panel (JRPP), as shown in **Attachment A**. If no additional Aboriginal objects are identified by the assessment, OEH would then support the inclusion of the proposed Conditions 3 (development of a CEMP including ACH that would include the existing recorded site) and 27 (conditioning a process in the case that unexpected ACH finds are made during development). The Note with Condition 27 is not required as this condition relates directly to unexpected finds.

It is our understanding that an archaeologist is likely to visit the site and provide a report to the proponents and Council before the JRPP considers the proposal. If OEH is provided a copy of this assessment, we are prepared to provide further comment or recommendations in regard to the impacts on ACH.

We also have some minor comments relating to the biodiversity assessment for the proposal, particularly biodiversity certification and the proposed screening plantings. These comments are included in **Attachment B**.

If you wish to further discuss this matter please contact me on 6022 0606 or at [peter.ewin@environment.nsw.gov.au](mailto:peter.ewin@environment.nsw.gov.au).

Yours sincerely



**PETER EWIN**  
**Senior Team Leader Planning**  
**South West Region**  
**Regional Operations**  
**Office of Environment and Heritage**

Encl: ATTACHMENT A – Draft conditions of approval proposed by Wagga Wagga City Council relating to Aboriginal cultural heritage  
ATTACHMENT B – Additional comments in relation to biodiversity assessment for the Bomen Solar Farm



**ATTACHMENT A      Draft conditions of approval proposed by Wagga Wagga City Council  
relating to Aboriginal cultural heritage**

3. *Prior to the issue of the Construction Certificate, a Construction Management Plan shall be prepared and submitted for approval by Council. The approved plan shall be implemented during construction of the solar electricity system. The plan shall include a range of management controls as outlined in the approved SEE and other conditions listed in this consent. The plan shall include, but not limited to:*

- *Aboriginal Heritage Management*
- *Construction Traffic Management*
- *Bush Fire Management*
- *Waste Management*
- *Erosion and Sediment Control*
- *Noise Management*
- *Dust Management*
- *Soil and Water Management*
- *Integrated Site Restoration*
- *Operation hours*
- *Security Management*
- *Requirements and conditions of the APA Group (refer to condition 38 of this Consent)*
- *Requirements and conditions of Essential Energy to connect to the state power grid (refer to condition 39 under of this consent).*

*REASON: To ensure development does not reduce the amenity of the area during construction. Section 79C(1)(b) of the Environmental Planning and Assessment Act 1979, as amended.*

20. *A 'no harm zone' must be established around the location of the identified Aboriginal artefact that is located on the site in consultation with the local Aboriginal community stakeholders. The Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW must be used by individuals or organisations who are contemplating undertaking activities which could harm Aboriginal objects and shall be implemented as part of the Construction Management Plan. This condition is to be read with condition 27 of this consent.*

*REASON: To ensure that Aboriginal sites are protected. Section 79C (1)(b) of the Environmental Planning and Assessment Act 1979, as amended.*

27. *If any Aboriginal object is discovered and/or harmed in, on or under the land, the proponent must not further harm the Aboriginal object, immediately cease all work at the particular location, secure the area so as to avoid further harm to the Aboriginal object, notify the OEH as soon as practicable on 131 555, providing any details of the Aboriginal object and its location, and not recommence any work at the particular location unless authorised in writing by OEH.*

**NOTE:** *The Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW must be used by individuals or organisations who are contemplating undertaking activities which could harm Aboriginal objects. This code will provide a process whereby a reasonable determination can be made whether or not Aboriginal objects will be harmed by an activity, whether further investigation is warranted and whether the activity requires an Aboriginal Heritage Impact Permit. Due diligence may also be exercised by complying with industry-specific codes of practice that have been adopted under the National Parks and Wildlife Regulation 2009.*

*REASON: To ensure that Aboriginal sites are protected. Section 79C (1)(b) of the Environmental Planning and Assessment Act 1979, as amended.*

## **ATTACHMENT B      Additional comments in relation to biodiversity assessment for the Bomen Solar Farm**

OEH notes that the site for this proposed development is zoned Industrial and is within Wagga Wagga biodiversity certification area. This means that the impacts on the single paddock tree (with hollows) that has been removed has been addressed in the biodiversity certification and the impacts on threatened species associated do not need to be considered any further. OEH also notes that the patches of vegetation on the site are (and on the LEP Terrestrial Biodiversity Map – Sheet BIO\_003) are environmental plantings, and will not be affected by the proposal.

OEH is supportive of the proposal (section 5.11.3 Mitigation measures) to leave felled trees *in-situ* for at least 24 hours and for qualified personnel to check hollows for wildlife and relocate them is necessary. We are also supportive of the installation of nest boxes within landscaping areas as proposed, although it is not clear how this will be done given tubestock will be used.

It is stated in section 5.11.3 Mitigation measures that “landscaping should incorporate species endemic to the area”, but the Landscaping Plan Drawing TP05 provides a planting schedule for screen plantings that includes a number of species that are not native to the area. *Acacia fimbriata* (Fringed Wattle) is a coastal species, *A. salicina* (Cooba) is not native to the Wagga Wagga LGA, the three *Callistemon* species are not native to the South West Slopes region, the three *Eucalyptus* species are from WA or SA and *Melaleuca linariifolia* (Snow in Summer or Flax-leaved Paperbark) is a coastal species.

While recognising that the primary purpose of these plantings is for screening, the following alternatives that are native to the South West Slopes should be considered: any of the 20 species of *Acacia* recorded in the Wagga Wagga LGA (e.g. *Acacia decora*, *A. hakeoides*, *A. difformis*), *Callistemon sieberi* (River Bottlebrush) and *Dodonaea viscosa* (Sticky Hop-bush). The locally native eucalypts would be *Eucalyptus melliodora* (Yellow Box), *E. blakelyi* (Blakelyi's Red Gum) and *E. albens* (White Box). If there is a concern about the potential height of these trees then *E. bridgesiana* (Apple Box) could be used. Further details of suitable plant species for this site are available in the South West Slopes Revegetation Guide (Stelling 1998) and The Native Vegetation and Threatened Species of the City of Wagga Wagga (Priday & Mulvaney (2005).