

5.1 Introduction

This chapter reviews Commonwealth, State and local planning legislation and policies that apply to the Delta Electricity and EnergyAustralia Marulan Gas Turbine Facilities to determine the required approvals to allow the proposed development to proceed.

The approval process for the Project is established by the requirements of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, *Environmental Planning and Assessment Act 1979* and other relevant environmental requirements including State Environmental Planning Policies (SEPPs), Regional Environmental Plans (REPs) and Local Environmental Plans (LEPs).

5.2 Commonwealth Legislation

5.2.1 Environment Protection and Biodiversity Conservation Act 1999

Under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), approval from the Commonwealth Minister for the Environment, Water, Heritage and the Arts is required for an action that is:

- likely to have a significant impact on a “matter of national environmental significance”;
- carried out on Commonwealth land and is likely to have a significant impact on the environment;
- carried out outside of the Commonwealth land and is likely to have a significant impact on the environment on Commonwealth land; or
- carried out by the Commonwealth government.

The EPBC Act provides for the establishment of Bilateral Agreements between the Commonwealth and a State or Territory to accredit existing development assessment and approval processes. Such a bilateral agreement was made between the NSW Government and the Commonwealth in January 2007 to cover the assessment components of development/activity related proposals under Parts 3A, 4 and 5 of the EP&A Act.

Matters of National Environmental Significance

The EPBC Act identifies seven matters of National Environmental Significance (NES):

- World Heritage properties;
- National heritage places;
- Wetlands of international importance (Ramsar wetlands);
- Threatened species and ecological communities;
- Migratory species;
- Commonwealth marine areas; and
- Nuclear actions (including uranium mining).

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A search of the EPBC Act Protected Matters database has revealed that the Site is not located within a World Heritage area, a Commonwealth marine environment, nor does the proposed development involve nuclear activities. As discussed further in **Chapter 11**, the flora and fauna assessment undertaken concludes that the Project is unlikely to result in any significant effect on any matters of NES listed under the EPBC Act. Accordingly, the Project is not likely to have a significant impact on any matters protected under the EPBC Act and is therefore not a controlled action. Approval is not required under the EPBC Act

5.2.2 Native Title Act 1993

A search of the relevant Native Title listings identified a Native Title Claim lodged by the Gundangarra Tribal Council Aboriginal Corporation (reference NC97/7) in the area. However, the claim does not apply to freehold estate and accordingly does not apply to the Marulan Site. It is noted that the Gundangarra Tribal Council Aboriginal Corporation has been contacted as part of the environmental assessment.

Native Title listings over the area of the gas pipeline will further be considered in the environmental assessment in support of the separate Project Application for the gas pipeline.

5.3 NSW Legislation

5.3.1 Environmental Planning and Assessment Act 1979

The *Environmental Planning and Assessment Act 1979* (EP&A Act) and its supporting Regulation, the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation), provide the framework for the assessment and approval of proposed developments within NSW. Assessment provisions are provided in three parts of the EP&A Act: Part 3A, Part 4 and Part 5.

The proposed development for the purpose of gas fired power stations falls under the provisions of Part 3A of the EP&A Act. Part 3A of the EP&A Act provides a process for the assessment of developments, which are considered to be “Major Projects” as declared by *State Environmental Planning Policy (Major Projects) 2005* (Major Projects SEPP) or by order of the Minister in the Government Gazette.

The Minister for Planning may also declare development subject to Part 3A to be a “critical infrastructure project” if it is of a category that, in the opinion of the Minister, is essential to the State for economic, environmental or social reasons.

An evaluation of the consistency of the Project with the objects of the EP&A Act is presented in **Chapter 20**.

State Environmental Planning Policy (Major Projects) 2005

According to the Major Projects SEPP, development referred to as a ‘Major Project’ requires assessment and approval of the Minister for Planning in accordance with Part 3A of the EP&A Act. The Major Projects SEPP defines certain types of development as comprising major projects.

The Project constitutes a Major Project under the provisions of Schedule 1 of the Major Projects SEPP pursuant to clause 24(a). Clause 24 (Electricity Generation) provides that a major project is development for the purpose of a facility for the generation of electricity or heat or their co-generation (using any energy source, including gas, coal, bio-fuel, distillate and waste and hydro, wave, solar or wind power), that:

- a) *has a capital investment value of more than \$30 million, or*
- b) *has a capital investment value of more than \$5 million and is located in an environmentally sensitive area of State significance.*

The total estimated capital cost for the Marulan Gas Turbine Facilities as a whole is \$809 million. The proposed development is considered to be defined within Schedule 1 of the Major Projects SEPP as a Part 3A Major Project.

According to the provisions of Part 3A the proponent may submit an application to the Department of Planning (DoP) for a development to be assessed as a Concept Application. Consultation with DoP was undertaken for two separate Gas Turbine Facilities on the Marulan Site. On 12 September 2007, Delta Electricity and EnergyAustralia submitted to the Department of Planning (DoP) a request that their Marulan Gas Turbine Facilities be assessed under the provisions of Part 3A as a Concept Application. On 8 October 2007, the Director-General declared that the project was considered a Major Project and to be assessed under the provisions of Part 3A.

On 14 December 2007, a Concept Application was submitted jointly by Delta Electricity and EnergyAustralia under Part 3A of the EP&A Act for the assessment of the two separate Facilities at the Marulan Site and the gas pipeline and other shared infrastructure. In accordance with Section 75M Clause 3A of the EP&A Act, "a single application may be made for approval of a concept plan for a project and for approval to carry out any part or aspect of the project". Concurrent Project Approval is sought for the Joint Common Works. Project Applications are made for each Facility separately by each Proponent.

On 3 March 2008 Environmental Assessment Requirements were issued for the Project pursuant to section 75F(2) of the EP&A Act (refer to **Appendix A** for the Environmental Assessment Requirements and a table addressing where in the Environmental Assessments the requirements are addressed).

The Site of the proposed development is zoned under the Marulan Local Environmental Plan 1995. The Site is zoned 1(a) General Rural and the proposed development is permissible subject to the granting of consent. Hence, the proposed Marulan Gas Turbine Facilities are not prohibited under an environmental planning instrument.

Critical Infrastructure Projects

On 26 February 2008 the Minister for Planning declared certain power generating facilities to be 'critical infrastructure projects' being development that:

- has capacity to generate at least 250 MW; and
- is the subject of an application lodged pursuant to Section 75E or Section 75M of the EP&A Act prior to 1 January 2013.

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The Project has the capacity to generate in excess of 250 MW and as noted above, an application has been lodged for the Project pursuant to Section 75M prior to 1 January 2013.

Therefore the project is considered to fall within the definition of a critical infrastructure project.

5.3.2 Environmental Planning and Assessment Regulations 2000

Clause 8F of the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation) describes the conditions under which owner's consent is required for applications made under Part 3A of the EP&A Act.

Clause 8F states that:

“(1) The consent of the owner of land on which a project is to be carried out is required for a project application unless:

(a) the application is made by a public authority.”

Clause 8F further states that:

“(3) If the consent of the owner of the land is not required under this clause, then the proponent is required to give notice of the application:

(a) in the case of a linear infrastructure project or a project designated under subclause (1) (e)—to the public by advertisement published in a newspaper circulating in the area of the project before the start of the public consultation period for the project, or

...

(d) in any other case—to the owner of the land at any time before the application is made..”

These *Concept Application* and *Project Applications* are being made on behalf of EnergyAustralia and Delta Electricity that are both public authorities.

The Marulan Site is jointly owned by Delta Electricity and EnergyAustralia. The Site will be further subdivided such that Delta Electricity and EnergyAustralia are the registered owners of the land on which their respective Facilities would be situated. Approval for the further subdivision will be progressed separately through the Upper Lachlan Shire Council.

The land identified for the Gas Pipeline Corridor, as well as transmission lines and access roads, are considered to fall under the definition of *linear infrastructure project* in clause 8F of the EP&A Regulation. Clause 8F of the EP&A Regulation requires public notification by advertisement published in a newspaper circulating in the area of the project before the start of the public consultation period. Such an advertisement will be placed in the Goulburn Post newspaper.

5.3.3 Relevant Environmental Legislation

The EP&A Act provides the framework for the planning and development approvals system within NSW although there are several other relevant Acts and Regulations also to be considered. The relevant Acts and Regulations require consideration in the preparation of the *Concept Application* and Environmental Assessment.

Certain authorisations are not required by an approved Part 3A project under Section 75U of the EP&A Act. Authorisations, relevant to the Project, are not required for:

- *National Parks and Wildlife Act 1974* - a permit under section 87 or a consent under section 90;
- *Water Management Act 2000* (WM Act) - a water use approval under section 89, a water management work approval under section 90 or an activity approval under section 91;
- *Rural Fires Act 1997* - a bush fire safety authority under section 100B ; and
- *Native Vegetation Act 2003* - an authorisation referred to in section 12 to clear native vegetation or State protected land.
- Certain authorisations cannot be refused if it is necessary for carrying out an approved project and authorisation required must be substantially consistent with the approval under Section S75V of the EP&A Act such as:
- *Protection of the Environment Operations Act 1997* (POEO Act) - an Environment Protection Licence under Chapter 3;
- *Roads Act 1993* - consent under section 138; and
- *Pipelines Act 1967* - a licence.

Protection of the Environment Operations Act 1997

The POEO Act relates to pollution and waste disposal in NSW and provides for the licensing of certain types of development. It is anticipated that the proposed development would require licensing under the provisions of the POEO Act.

Under Section 75U of the EP&A Act an environment protection notice under Chapter 4 of the POEO Act may not be issued against the project, as it has been declared to be critical infrastructure.

The Roads Act 1993

According to Section 138 of the *Roads Act 1993* (Roads Act), consent is required for certain actions in relation to public and classified roads including disturbing the surface of a public road.

Delta Electricity and EnergyAustralia propose to construct a gas pipeline crossing under Canyonleigh Road, a new access road and upgrade works to the existing road network.

A permit would therefore be required under the Roads Act to disturb the surface of a public road.

Water Management Act 2000

The *Water Management Act 2000* (WM Act) provides for the protection of river and lakeside land in NSW, formerly held under the *Rivers and Foreshore Improvements Act 1948* for areas covered by a Water Sharing Plan. The Marulan Site adjoins the Wollondilly River. The Facilities are located approximately 150 m from the Wollondilly River. Under the WM Act it is necessary to consider any development within 40 metres of any watercourse onsite. As noted above, approvals under the WM Act are not required as the project is being considered under Part 3A of the EP&A Act.

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Threatened Species Conservation Act 1995

The *Threatened Species Conservation Act 1995* (TSC Act) provides for the conservation of threatened species, populations and ecological communities of animals and plants. It provides a framework for the assessment of any action that may impact on threatened species.

Section 5A of the EP&A Act lists seven factors that must be taken into account in the determination of the significance of potential impacts of a proposed development on threatened species, populations or ecological communities (or their habitats) listed under the TSC Act. The so-called 7-part test is used to determine whether a proposed development is likely to impose 'a significant effect' on threatened biota and thus whether a Species Impact Statement (SIS) is required to accompany a development application. For development applications under Part 4 and 5 of the EP&A Act, if the 7-part test concludes that there is 'likely' to be 'a significant effect' on a listed species, population or EEC, SIS must be prepared.

Under Part 3A of the EP&A Act, however, there is no requirement for Section 5A of the EP&A Act to be addressed; hence there is no requirement for an SIS. Instead, the flora and fauna assessment must be prepared according to the Environmental Assessment Requirements, which refer to the draft *Guidelines for Threatened Species Assessment* (DECC 2005).

Notwithstanding the statutory requirements for Part 3A of the EP&A Act, the approach in the assessment has been to address Section 5A and complete the 7-part test as a guide to assessing impacts on threatened biota that could be affected by the Project. This assessment is discussed further in **Chapter 11**. The assessment concluded that there is unlikely to be a significant impact on listed TSC Act species or communities.

Under Section 75U of the EP&A Act, the following Orders and Notices cannot be issued against the project, as it has been declared to be critical infrastructure:

- an interim protection order (within the meaning of the TSC Act); and
- Division 1 (Stop work orders) of Part 7 of the TSC Act.

Heritage Act 1977

The *Heritage Act 1977* provides for the protection of items of local, regional and State heritage significance. It contains a list of State Heritage Items and outlines processes assessment of development which may impact items of heritage significance.

As outlined in **Chapter 12**, non-indigenous historical sites are not situated within the location of the proposed Gas Turbine Facilities. Given this, no further archaeological work will be required with regard to historic sites or places within the Marulan Site. Further assessment will be undertaken for the gas pipeline at the Project Approval stage.

It should be noted that projects approved under Part 3A of the EP&A Act do not require additional approvals under Part 4 of the *Heritage Act* (interim heritage orders and listing on the State Heritage Register) or an excavation permit under section 139 of the *Heritage Act 1977*.

National Parks and Wildlife Act 1974

The *National Parks and Wildlife Act 1974* (NPW Act) governs the establishment, preservation and management of national parks, historic sites and certain other areas. The NPW Act also provides the basis for the legal protection and management of threatened native flora and fauna and Aboriginal sites within NSW.

The conclusion of the heritage and archaeological assessment clearly identified that the landforms within the study area are most likely to contain Aboriginal archaeological deposits. Details of this assessment and management of the occurrence of artefacts are provided in **Chapter 12**.

However, as stated above, for assessments being considered under Part 3A of the EP&A Act a permit under section 87 or a consent under section 90 of the NPW Act is not required.

Under Section 75U of the EP&A Act, the following Orders and Notices cannot be issued against the project, as it has been declared to be critical infrastructure:

- an interim protection order (within the meaning of the NPW Act); and
- an order under Division 1 (Stop work orders) of Part 6A of the NPW Act.

Native Vegetation Act 2003

The *Native Vegetation Act 2003* (NV Act) provides for the conservation of native vegetation through the prevention of inappropriate clearing and promotion of rehabilitation practices.

As stated above, for developments being considered under Part 3A of the EP&A Act, section 12 of the NV Act does not apply.

Noxious Weeds Act 1993

Under the *Noxious Weeds Act 1993* (NW Act), Council is responsible for the control of noxious weeds in its local government area (LGA). The NW Act provides for the declaration of noxious weeds by the Minister of Agriculture. Noxious weeds may be considered noxious on a National, State, Regional or Local scale. All private landowners, occupiers, public authorities and councils are required to control noxious weeds on their land under Part 3 Division 1 of the NW Act.

Waste Avoidance and Resource Recovery Act 2001

The objective of the *Waste Avoidance and Resource Recovery Act 2001* (WA&RR Act) are to encourage the most efficient use of resources, to reduce environmental harm and to provide for the continual reduction in waste generation in line with the principles of ecological sustainable development. To meet the objectives of the WA&RR Act, a resource management hierarchy has been established, comprising:

- avoiding unnecessary resource consumption;
- recovering resources (including reuse, reprocessing, recycling and energy recovery); and
- disposal (as a last resort).

These measures would be incorporated into both the construction and operation of the Project and incorporated in the CEMP and OEMP for the Facilities.

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Other Acts

Preliminary investigations by the Proponents have indicated that licences/approvals may also be required under *Occupational Health & Safety Act 2000* and *Occupational Health & Safety Regulation 2001*, *Electricity Supply Act 1995* and *Pipelines Act 1967*.

Other legislation considered relevant to the Project includes the *Soil Conservation Act 1938*, *Contaminated Land Management Act 1997* and *Noxious Weeds Act 1993*.

5.3.4 Environmental Planning Instruments

According to Section 75R(3) of the EP&A Act, environmental planning instruments, approval for a project may (but is not required to) take into account the provisions of any environmental planning instrument for projects subject to Part 3A of the Act.

This section considers the provisions of such environmental planning instruments in relation to the project.

State Environmental Planning Policies

State Environmental Planning Policies (SEPPs) are planning instruments under the EP&A Act that address more specific planning matters, where it is not considered appropriate for the EP&A Act to provide the detail. This section discusses SEPPs other than the Major Projects SEPP.

State Environmental Planning Policy No. 33 - Hazardous and Offensive Development (SEPP 33)

This applies to development for the purpose of potentially hazardous industries, and potentially offensive industries. The proposed development would constitute a potentially hazardous and offensive industry as defined under clauses 3 and 4 of SEPP 33. As SEPP 33 would apply the consent authority must consider the Project within the context of its compliance with current circulars and or guidelines published by the DoP and Australian Standard relating to hazardous or offensive development.

An assessment has been conducted for the Facilities and is presented in detail in the respective *Project Applications* and a summary provided in **Chapter 17**. In general, management measures can be put in place during the design phase as well safety management systems put in place during the operation of the Facilities singly and cumulatively that would minimise the potential for such risks to have significant onsite or offsite impacts.

As Concept Approval only is sought for the gas pipeline and some of the detailed information required for a Preliminary Hazard Analysis is not available at this stage, the assessment has included only identification and analysis of the hazards. Further assessment would be conducted when further approvals are sought for this component.

State Environmental Planning Policy No. 44 – Koala Habitat Protection (SEPP 44)

SEPP 44 aims to 'encourage the proper conservation and management of areas of natural vegetation that provide habitat for koalas'. SEPP 44 applies to local government areas (LGAs) listed under Schedule 1 of the Policy. The study area lies within the Upper Lachlan LGA, which is listed under Schedule 1 of SEPP 44.

SEPP 44 requires that a Koala Plan of Management be prepared for developments or LGAs where 'potential koala habitat' and 'core koala habitat' are likely to be affected by development. Under the SEPP, where potential habitat is identified, the area must be investigated for core koala habitat, defined as *"an area of land with a resident breeding population of koalas, evidenced by attributes such as breeding females and recent sightings and historical records of a population"*. Where core koala habitat is found to occur, SEPP 44 requires that a site-specific Koala Plan of Management be prepared.

Core Koala habitat was not identified onsite in the flora and fauna assessment (refer to **Chapter 11**).

Regional Environmental Plans

Drinking Water Catchments Regional Environmental Plan No. 1 (REP No. 1)

REP No.1 addresses the environmental, social and economic future of the catchments that supply drinking water to Sydney, Blue Mountains and the Illawarra, which extend over 16 000 km². The plan commenced on 1 January 2007 and repealed State Environmental Planning Policy 58 - Protecting Sydney's Water Supply.

As the Project is being assessed under Part 3A of the EP&A Act, REP No. 1 does not strictly apply to the development however the Site is located within the Sydney Water Drinking Catchment to which the plan applies. The plan aims:

- (a) *to create healthy water catchments that will deliver high quality water while sustaining diverse and prosperous communities, and*
- (b) *to provide the statutory components in Sustaining the Catchments that, together with the non-statutory components in Sustaining the Catchments, will achieve the aim set out in paragraph (a), and*
- (c) *to achieve the water quality management goals of:*
 - (i) *improving water quality in degraded areas and critical locations where water quality is not suitable for the relevant environmental values, and*
 - (ii) *maintaining or improving water quality where it is currently suitable for the relevant environmental values.*

The Environmental Assessment Requirements note that for the purposes of assessment of impacts on the drinking water catchment, REP No.1 specifies water quality criteria and specific heads of consideration. An assessment has been conducted for the Facilities and is presented in detail in the respective *Project Applications* and a summary provided in **Chapter 14**.

Local Environmental Plans

The Marulan Site is located within the Upper Lachlan Shire local government area. Though this is the case, as the Upper Lachlan Shire Council has not updated their LEP, the Site is still subject to the provisions of the Mulwaree Local Environmental Plan (MLEP) 1995.

Under MLEP 1995 the Site is zoned 1(a) General Rural and the proposed development is permissible subject to the granting of consent by the Minister.