PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Cougar Energy Limited v Debbie Best, Chief Executive Under the Environmental Protection Act 1994* [2011] QPEC 150
PARTIES:	**COUGAR ENERGY LIMITED ABN 75 060 111 784** (Applicant/Appellant) **AND** **DEBBIE BEST, CHIEF EXECUTIVE UNDER THE ENVIRONMENTAL PROTECTION ACT 1994** (Respondent)
FILE NO/S:	3818/11
DIVISION:	Planning and Environment
PROCEEDING:	Hearing of an application
ORIGINATING COURT:	Planning and Environment Court of Queensland, Brisbane
DELIVERED ON:	21 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	16 December 2011
JUDGE:	RS Jones DCJ
ORDER:	**1. The application is dismissed.** **2. I will hear from the parties as to costs.** **3. I will hear from the parties as to directions for the future conduct of the appeal.**
CATCHWORDS:	APPLICATION FOR A STAY PURSUANT TO S 535 OF THE ENVIRONMENTAL PROTECTION ACT 1994 *Environmental Protection Act* 1994 ss 9, 14 and 535 *Cook Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* (2008) Qd R 453 *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 *Attorney-General for the State of Queensland v Fardon* [2011] QCA 111
COUNSEL:	Mr D. O'Brien for the applicant/appellant

Mr G. Gibson Q.C. with Mr R. Laidely for the respondent

SOLICITORS: Blake Dawson for the applicant/appellant

Legal branch of the Department of Environment and Resource Management for the respondent

[1] This matter was argued before me on 16 December 2011. The nature and timing of the application are such that it warranted urgent determination. As a consequence, I have had to give less time to the drafting and editing of this judgement than usual.

[2] The proceeding is concerned with an application for a stay pursuant to s 535 of the *Environmental Protection Act* 1994 to stay until the appeal is determined that part of the decision made by the Chief Executive on 7 July 2011. The relevant decision by the Chief Executive was in essence to insert two new conditions, C10-7 and C10-8, as amendments to the relevant environmental authority held by Cougar. These conditions relevantly provide:

> "C10-7: Within 30 days of this amended environmental authority taking effect a documented decommissioning and rehabilitation procedure must be prepared and submitted to the administrating authority, to fully decommission and rehabilitate the underground cavity to ensure removal of all residual contaminants attributed to underground coal gasification processes from the cavity and from groundwater impacted by the underground coal gasification. The procedure must reflect proven practices, and include a methodology and programme of monitoring to determine that the removal of contaminants has been effective.
>
> C10-8: Within 60 days of this amended environmental authority taking effect the decommissioning and rehabilitation procedure must be commenced and then continued until the objectives identified in C10-7 are achieved."

[3] On behalf of Cougar it is asserted that these conditions have the effect of requiring Cougar to decommission and rehabilitate its gas project site.

[4] The decision of the Chief Executive including Conditions C10-7 and C10-8 have been appealed to the Planning and Environment Court by way of appeal filed 30 September 2011.

[5] For the following reasons, the application is refused.

Background

[6] This project is located approximately 10 km south of Kingaroy.

[7] On or about 18 February 2009 the Queensland government released its underground coal gasification policy. This policy identified that three underground coal gasification project pilots were to be established to determine and demonstrate the technical, environmental and commercial viability of the relevant technology.

[8] Cougar was by way of an environmental authority authorised to carry out one of the pilot projects. The relevant environmental authority authorised gas production associated with the pilot plant over an area to be of no more than one hectare and for a period not exceeding three years. The quantity of coal gas was limited to 20,000 tonnes and bore drilling was also limited to a prescribed depth. The technology and methodology involved is largely unproven, thus the limitation on the process to pilot projects.

[9] Not surprisingly, the authority prohibited the release of contaminants to any waters, including groundwater, outside of the underground coal gasification working cavities. Condition A3-1 also required the installation of all measures, plant and equipment necessary to ensure compliance with the conditions of the authority. Reporting Condition A5-1 required Cougar to advise the relevant department as soon as is practicable upon it becoming aware of any emergency or incident which results in the release of contaminants not in accordance or reasonably to be expected to be in accordance with the conditions of the environmental authority. Various other conditions dealt with reporting, including scientific reporting requirements.

[10] Cougar commenced operations on or about 15 March 2010. Within five days, on or about 20 March 2010, the only operational production well being operated by Cougar had a failure involving the fracturing of the cement grout lining of the well wall. As a result of this incident, the well became blocked and gas, including the contaminants benzene and toluene, escaped into the surrounding geology.

[11] Cougar advised staff of the Department of Environment and Resource Management (DERM) of a "flare malfunction" and that the inner casing of the well identified as P4 had moved due to "thermal expansion". However, it was not until 30 June 2010 that DERM was informed that a "failure" of the well had occurred.

[12] Following this event monitoring of bore data was undertaken that revealed elevated levels of benzene, which was a breach of the conditions of the environmental authority. The most recent monitoring, which occurred in July 2011, has revealed benzene in the lower aquifer known as the Kunioon coal seam, which has stabilised at a level approximately 15 times greater than the water quality trigger level permitted by the environmental authority.

[13] As a consequence of this event, the department took a number of formal steps, including:

- On 17 July 2010 an environmental protection order was issued to secure compliance with the general environmental duty and conditions of the environmental authority. On the same day, the department also issued a notice requiring an environmental evaluation of the incident.

- On 18 August 2010 a further environmental protection order was issued.

- On 16 September 2010 a further notice requiring an environmental evaluation was issued.

- On 28 August 2011 a notice of a proposed action advising of a proposal to amend the environmental authority under which Cougar operated was also issued.

- On 7 July 2011 the department issued an information notice regarding amendments to the environmental authority. It was this authority that imposed Conditions C10-7 and C10-8.

- Cougar objected to the proposed amendments to the environmental authority and the department undertook an internal review of its decision.

- On 31 August 2011 an internal review decision was made effectively confirming the original decision made.

- On 30 September 2011 Cougar filed a notice of appeal in this court. The grounds of appeal are quite extensive, but of particular relevance is that it is asserted that the new conditions prescribed under the notice of proposed action issued by the department effectively set aside original Conditions A8-1 to A8-5, which effectively allowed Cougar to carry out its operations and replaced the environmental authority with a new Condition A8-1, which prescribed:

  > "All underground coal gasification activities on site are limited to decommission, rehabilitation, care and maintenance of the site."

[14] In Ground 8 of the notice of appeal, it is asserted that these amendments to the environmental authority are:

(a) not amendments within the meaning of s 292, 294(a), 295(1)(b), and 297(1)(a) of the Environmental Protection Act; and

(b) are in effect a cancellation of the environmental authority within the meaning of ss 293, 294 and 297 of that Act.

[15] Other attacks on the decision based on fact and law are raised in the grounds of appeal, including that the cancellation of an environmental authority could only occur if one or more of the prescribed events identified in s 293(2) of the Act had occurred. It is asserted in the notice of appeal that no such events had occurred.

[16] It is also asserted that there was no power to amend the environmental authority in the way decided. And, alternatively, if there was power to amend the environmental authority in the way the department did, in the circumstances of this case there were not sufficient grounds to make it either necessary or desirable to make those amendments because the breakdown in Production Well P4:

(a) did not result in any environmental harm;

(b) has been analysed and investigated and can be prevented in the future;

(c) did not result in any increased risk of environmental harm.

[17] It is also asserted that the prohibition of any underground coal gasification activities is an unreasonable and disproportionate response to an event which did not cause environmental harm and which did not reveal any increased potential for such harm.

[18] I should pause here to again observe that the present stay application is only concerned with the operation and effect of Conditions C10-7 and C10-8, to which I have already referred.

The Application

[19] The bases upon which the stay is brought is that:

(i) Without the stay being granted the appeal will be rendered futile, in that Cougar will be forced to comply with Conditions C10-7 and C10-8 before the appeal is determined. To use the words of Mr O'Brien, counsel for Cougar, "without the stay being granted, the appeal will be rendered futile. Cougar will be forced to decommission and rehabilitate its gas project site before its appeal in relation to the continued operation of the site is determined."

(ii) It is said that Cougar intends to otherwise comply with the environmental management obligations imposed on it in relation to the site, including the other conditions of the environmental authority including the monitoring conditions.

[20] Notwithstanding that these proceedings involve an appeal against what is effectively an administrative decision, it is generally agreed that the general principles associated with the granting of a stay in usual civil litigation are applicable, subject to some variation or adjustment where necessary. By reference to cases such as *Cook Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* (2008) Qd R 453; *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685; and *Attorney for the State of Queensland v Farden* (2011) QCA 111, the following principles seem to be established:

(1) It is not necessary for the applicant for a stay to show special or exceptional circumstances which warrant the grant of a stay.

(2) The fundamental justification for granting a stay pending an appeal is to ensure that the orders which might ultimately be made by the court are fully effective.

(3) While the prospects of success on the appeal are a relevant consideration, unless it can be said that the appeal is frivolous or not arguable, the court will generally not descend into a detailed assessment of the prospects of the appeal.

(4) Finally, will the applicant for the stay be irreparably prejudiced if the stay is not granted.

[21] As to the first of these matters, it is not contested that the applicant does not have to show special or exceptional circumstances to warrant the grant of a stay. As to the third of the matters just referred to, this appeal involves matters of both fact and law. It is impossible at this stage to make any meaningful assessment about the prospects of Cougar's appeal. However, it appears to me that it could not be said that the appeal was not arguable. It is significant in this regard, I think, that Mr Gibson QC, senior counsel for the respondent, did not contend otherwise.

[22] The other matters, in cases such as this, require a consideration of impact on the parties resulting from any decision made concerning the stay. That is, it is not only the applicant's position that has to be considered if the stay were not to be granted, but also the respondent's position if the stay is granted. To adopt the words of

Justice Chesterman in *Fardon* at para 18, "The determination of the application must balance these competing considerations.

[23] On behalf of the applicant, it is asserted that it is difficult to think of a more appropriate case for a stay. At the heart of this assertion are these propositions. First, that there is really no serious environmental risk involved; second, that in the event of a successful appeal, if a stay is not granted, Cougar would have been required to commit expenditure of both time and money it was not lawfully required to do and there is no prospect of the company being reimbursed for that work. Third, that if a stay is not granted, the company could be exposed to criminal and enforcement proceedings. Fourth, if a stay is not granted, Cougar will in effect have to cease all meaningful operations on the site. The conditions will, according to Mr O'Brien, require Cougar to decommission and rehabilitate the site before the appeal is heard.

[24] In respect of the risk issue, it is asserted that the actions of the respondent was an overreaction being politically driven. In paragraph 17 of the applicant's written outline, it is asserted:

> "That is, in circumstances where, despite the department's protestations to the contrary, there is no evidence before the court to suggest that there has been any environmental harm occurred or that environmental harm will occur if the stay is granted. This is confirmed by the reports prepared by GHD Goulder, relevant extracts of which are contained in the attached table. It is also consistent with the fact that the department:
>
> (a) has repeatedly stated that there is no risk to the environment, as the reported levels of benzene and toluene were so low and have not been detected recently; and
> (b) the department has not required urgent rehabilitation or decommissioning despite issuing three EPAs over the last 18 months."

[25] In paragraph 25:

> "The expert evidence and the evidence of Mr Lee filed by the department does not explain why decommissioning and rehabilitation is required now, pending the appeal. The key conclusion of the experts appears to be that further monitoring is required. But there are already in place comprehensive monitoring conditions that are being complied with. If the department is not satisfied with the monitoring, the relevant response is not to enforce the decommissioning and rehabilitation of the site, but to enforce the monitoring conditions or issue EPAs requiring further monitoring to be undertaken."

[26] According to the applicant, after a controlled shutdown of Well P4 only very low levels of benzene and toluene were reported in the groundwater monitored. In Mr O'Brien's written submissions in paragraph 5 it is asserted that "the results were either at or marginally above, the trigger levels for the Australian drinking water guidelines for benzene in April, May and June 2010. Then in paragraph 6,

"Importantly, the last detection of benzene above Australian drinking water guidelines was on 27 May 2010. There has been no detection of any benzene or toluene for nearly 16 months."

[27] Before continuing further, it is worth making a brief observation about the contaminant benzene. In Mr Glynn's affidavit, behind Tab 26, is a Queensland Health briefing note dated 17 September 2010. It says in respect of benzene:

> "Benzene is a human carcinogen with a drinking water guideline value of one part per billion. However, the Australian drinking water guidelines 2004 also state that there is no safe concentration of benzene in drinking water. The guideline value of one part per billion reflected in the limit of quantification achievable in 2004. The Queensland Health organics laboratory can now achieve a limit of quantification of zero per one part per billion."

The standard of 1 part per billion is also referred to sometimes as 1 microgram per litre. As Mr Gibson said, extraordinarily low levels.

[28] On 15 July 2010 the Queensland government issued a statement saying that it intended to close Cougar's operations until investigations were carried out. On or about 15 July 2010 a risk assessment report was prepared by the applicant and forwarded to the respondent. This report is attached to the affidavit of Mr Glynn at Tab 6. This report relevantly stated:

> "A benzene concentration of two parts per billion was recorded in the aquifer at Bore Hole T5037 over a period of 20 days. Benzene is not present in this borehole at the present time. A benzene concentration of 84 UG/L was recorded in T5038 of the first time on 29 June 2010. At the same time, benzene has not been recorded in any other shallow bore locations, so whether this sample is an anomaly or not will be confirmed when future samples are analysed."

[29] The report then goes on to say:

> "One bore (Cougar Energy Bore 37) recorded a very low benzene concentration of two parts per billion for approximately 20 days, which is above the Australian drinking water guidelines trigger value of one part per billion."

The report concluded that the immediate risk to the community is extremely low.

[30] Consistent with his written submissions, Mr O'Brien took me to a number of ministerial-type press or other statements to support his client's view that there was no real risk associated with this incident. For example, Exhibit PBG-8 of Mr Glynn's affidavit and Exhibit BJG-11. This exhibit relevantly says in part:

> "Neither benzene nor toluene have been detected in the latest three testing results and no results were recorded at unsafe levels.

> Mr Bradley said the test results included trace levels of hydrocarbons at levels 95% lower than the Australian drinking water guidelines and did not represent risk to human health. Hydrocarbons can result from naturally occurring or other sources.
>
> Sample results are still being analysed and further analysis will be available early next week.
>
> While these results are encouraging, DERM and Queensland Health will review further sampling and analysis prior to altering the current advice to neighing landholders, Mr Bradley said.
>
> Rural property owners within a two kilometre radius of the UCG plant and two kilometres of plantation bore are advised not to use water from their bores for human consumption or stock watering until further notice.
>
> Cougar Energy has been directed to make alternative water supplies available to landholders which require it and have made those arrangements this weekend."

That release is dated 18 July 2010.

[31] Other examples include Exhibit BJG-12, dated 24 July 2010, BJG-15 dated 2 August 2010, BJG-14 dated 11 August 2010, BJG-17 dated 11 August 2010 and BJG-18 dated 11 August 2010.

[32] In or about August 2010 Cougar carried out further investigations. On 16 August 2010 it produced a report to the respondent containing an environmental evaluation. At p 96 of that report monitoring bore data is set out and following it is asserted that:

> "It is noted that these ADWG levels (that is Australian Drinking Water Guideline levels) were exceeded twice for benzene in T5037 (at 2 PPB) for samples taken on 11 May … and 27 May … . All subsequent readings have been below the level of reporting. Toluene levels just above the level of reporting but well below ADWG levels have been measured on a number of occasions in T5038. No measurements above the level of reporting for either hydrocarbon have been determined in any of the landholder's bores."

[33] That report is Exhibit PJG-20 of Mr Glynn's affidavit.

[34] A further environmental evaluation report was prepared by Cougar on 10 November 2010. This report was submitted as part of the response to the environmental evaluation notice issued by the respondent on 16 September 2010. At p 5 of that report details of the water monitoring bores are set out. The geological layers, as I understand it, that were investigated included the basalt, lateritic clay, the lower basalt and upper basalt layers. By reference to the earlier report that I have referred to, which is at Tab 20 p 114 of Mr Glynn's affidavit, those geological layers sit above the clay aquatard which separates the basalt layer from the coal seam. The

diagram at that page also shows that the well the subject of this incident, P4, penetrated down through the clay aquatard which forms the kunioon coal seam groundwater system, through the coal measures layer, and into the coal seam. The test bore T5037 only penetrated so far as the lateritic layer, and T5038 through the lateritic layer into the basalt layer. I will come back to that issue in a moment.

[35] Other scientific studies also seem to suggest that there were no real risks associated with benzene contamination. For example, Exhibit BJG-37 to the affidavit of Mr Glynn. My understanding of this quite complex scientific evidence is that the various press releases that I was taken to by Mr O'Brien, and indeed even those parts of the various scientific reports I was taken to, are concerned with results assessing contamination limited to the lateritic and basalt geological layers. That is as far as test bores T5037 and T5038 penetrated. As I observed earlier, the actual Production Well P4 penetrated below those geological layers down to the coal seam. That tests were not carried out below the basalt geological layer might have been because the layer referred to as the clay aquatard was considered to be effectively impenetrable.

[36] In a combined report dated December 2011, which I will refer to as the Gilbert and Sutherland report, these various geological layers are broken up into three groundwater systems, being the lateritic clay, the basalt, and kunioon coal seam groundwater systems. The kunioon system lies below the basalt system and therefore below the levels of test bores T5037 and T5038, but was penetrated by the Production Well P4.

[37] Groundwater monitoring has identified that while water in the lateritic and basalt aquifers is only suitable for stock and agricultural uses, groundwater within the kunioon aquifer is relatively fresh and considered to be at least a potential future source for potable, that is, human drinking water.

[38] The existence of this future potential drinking water supply is significant to the respondent. It is concerned that, among other things, if action is not taken, this potential source might be contaminated.

[39] On 16 August 2011 a report was prepared on behalf of the applicant and provided to the respondent. The report was said to be a response to the revised environmental authority issued on 7 July 2011. It is noted at p 4 of that report that in essence its authors accepted the concentric ring monitoring borehole layout currently being utilised. As I understand it, that is the concentric ring layout set out at p 5 of the report. Of significance is that Wells P1, P4 and test bore T5038 are located towards the centre of those rings. In what appears to be a separate but related report dated August 2011, which is set out at Tab 46 of Mr Glynn's affidavit, it is identified that the authors were engaged by Cougar to prepare a groundwater management plan for its pilot underground coal gasification plant. Wells P1 and P4, and test bore T5038 are identified in Figure 1 at p 5 of that report. At pp 12 and 13, reference is made to the potential for potable water in the kunioon coal seam groundwater system. Following that discussion, at pp 17 and 18 reference is made to trends in contaminant concentration and compliance. At p 17 it is said, "This section summarises the trends in contaminant concentration over the monitoring period, in order to provide a meaningful background to assessment of prior, current and potential future contamination conditions." It goes on to say, "The contaminant trends presented herein are based on analytical data supplied by Cougar."

Monitoring bore T5038 is located in between P1 and P4, the two pilot bores used for the UCG trial and the centre of the impacted area. The plots indicate the following features:

- Benzene has displayed a consistent decrease in concentration since the pilot test, and appears to have stabilised at around 15 UGL, which exceeds the drinking water and stock water limits.

- Toluene has also displayed a decreasing trend and has been below the laboratory level of reporting of 2 UGL since February 2011. This is two orders of magnitude below the drinking water limit of 800 UGL.

[40] Figure 4 at p 18 of that report shows that as at early May 2011 benzene contaminants at test bore T5038 were about eight times above the acceptable level of benzene contamination. Then after the incident in June, the level of contamination exceeded the acceptable level by about 90 and since that time has fallen away and stabilised at about 15 UGL which, as I understand the evidence, means that the level of contamination exceeds the acceptable level by about 15 times.

[41] At p 25 of the report, it is said in part:

> "In summary, benzene has decreased in the pilot UCG trial area and is currently reported at concentrations of between around 15-40 UGL in monitoring and pilot bores in the immediate vicinity of the trial area (i.e. within around 20-25 metres)."

[42] At p 26 of the report, it concludes, "As illustrated in Figures 4-13, concentrations of COPC are generally displaying decreasing trends, indicating that the contamination is attenuating naturally due to processes such as mechanical dispersion and biodegradation. On this basis, and in the absence of an ongoing primary source, and given the risk to existing beneficial uses are considered low (refer to s 3.2.10), it is recommended that monitored natural attenuation (MNA) is an appropriate management response to the identified contamination as per the monitoring plan presented in the following section." Figure 4 is that figure dealing with benzene concentration trend plot levels, to which I referred earlier, showing levelling at about 15 times above the acceptable drinking water levels. The reference to the risk being a low one seems to be concerned with livestock and agricultural water uses and the fact that any contaminant plumes are not likely to pose a risk to man or beast. It does not, however, refer to or deal with, as far as I understand it, the potential actual risk to the water supply itself. I should pause to note here that at least as at 16 August 2011 the applicant seems to have been supportive of the decommissioning and rehabilitation of the P4 cavity in the way recommended by the GHD report. I refer here to pp 7-8 of the 16 August 2011 report.

[43] The concerns of the respondent are summarised in the affidavit of Ms Lee, sworn 15 December 2011. It expresses concern not only with the integrity of the aquifers and geological stability, but also with the spread of contaminants. In paragraphs 43-45, Ms Lee asserts:

> "DERM is concerned that the information provided to date concerning the geology beyond the immediate vicinity of Cougar's

> UCG activity is not sufficient to provide appropriate assurance about the continuity of the aquatard and geological stability of the area. DERM is also concerned that Cougar has not been able to provide sufficient information about the contamination plume and its behaviour in order to provide the appropriate assurance that the plume is contained and is being attenuated and biodegraded in a manner consistent with the assumptions upon which the MNA proposal is based. DERM is further concerned that should the plume spread at a rate, direction or distance that is different from the assumptions upon which the MNA proposal is based there is a risk that contaminants in the ground water will travel horizontally through the kunioon coal seam aquifer until a fracture, or other preferential pathways encountered and contaminates be transported vertically into the upper aquifer."

[44] The fact that the concerns expressed by Mr Lee are not expressed as absolutes or quantified does not in my view mean that there is in this case no real risk of environmental harm. The fact that the risk cannot be quantified or defined is primarily due to a lack of scientific data. That deficiency was to a large part to be addressed by the monitoring programme proposed by GHD as part of the decommissioning and rehabilitation process.

[45] On the evidence before me, I am satisfied that the potential for environmental harm associated with this case is real and significantly exceeds that contended for on behalf of the applicant. The applicant's position seems not only to be contradicted by the scientific evidence but also the definition of environmental harm as defined in the *Environmental Protection Act* which, under s 14, includes not only adverse effects but also potential adverse effects.

[46] The numerous press releases, and indeed some of the report extracts I was taken to on behalf of the applicant, have little relevance, in my view, once it is realised that the data on which those statements were made was limited to the results produced by test bores which did not penetrate below the basalt geological layer and were probably otherwise inhibited by incomplete data.

[47] I also consider the submission to the effect that the risks must be low because the government has sat on its hands to be also rather disingenuous in all the circumstances. It is clear that we are concerned here with an experimental form of mining. By reference to the various technical reports to which I have been referred, it is also clear that since the incident giving rise to these proceedings occurred the scientific considerations involved are highly technical, discouraging any quick decision making. Also, the submission seems to ignore the respondent's actual response to events. Following receipt of the August 2011 reports to which I have referred, and after the respondent maintained its position in respect of the new environmental authority conditions, on 19 September 2011 the Queensland government wrote to Cougar Energy concluding that DERM was open to consideration of the monitored natural attenuation proposal as being a decommissioning and rehabilitation option, however, that significant additional detail was required. A joint meeting was also proposed. That letter is Exhibit PJG-48. Following receipt of that letter, the applicant wrote to the respondent noting its contents and then asked for a 30-day extension to the date of decommissioning and rehabilitation. On 7 October 2011 the Queensland

government extended the date of the commencement of decommissioning and rehabilitation procedures until 2 December 2011. That letter also noted that:

> "DERM agrees that the MNA remediation proposal involves complex technical matters that would be resolved more efficiently through joint discussion and evaluation between Cougar's and DERM's technical teams. DERM looks forward to meeting with Cougar and its representatives when the additional comments provided above have been digested."

[48] On 4 November 2011 the applicant responded to that letter and said in part and to the effect that given that it had appealed the decision of the respondent to the Planning and Environment Court, any further discussions between it and DERM concerning commencing decommissioning and rehabilitation work would be premature. The letter concluded by asking for an agreement for a suspension of the Conditions C10-7 and C10-8 being considered here.

[49] I do not accept that it could be said that the government has sat on its hands because of the lack of any risk. It would appear that the State's actions thus far, or at least up until recently, have been a result of a lack of sufficient scientific information, the complexities of the issues involved and, to a limited extent, by the correspondence between the parties to which I have referred.

[50] Turning then from the question of risk or environmental harm to the alleged threat of these conditions effectively requiring the applicant to shut down its operations. I must say that I have some difficulty at the outset with this assertion. As I said before, Conditions A8-1 to A8-5 of the original environmental authority, which effectively allowed the applicant to carry out its operations, were set aside and replaced with a new Condition A8-1, which provided, "All underground coal gasification activities on site are limited to decommissioning, rehabilitation, care and maintenance of the site." That condition is of course under appeal, but is not the subject of this stay application. It would appear to me that any operational limitations on the site would have more to do with Condition A8-1 rather than C10-7 and C10-8.

[51] Leaving that difficulty aside though, although it was said that Conditions C10-7 and C10-8 would effectively cause the applicant to cease operations, I was not taken to any objective evidence supporting those assertions. Indeed, there is evidence to the contrary. Here I refer to the Gilbert and Sutherland report dated December 2011 at p 19. I note here for example that I was not taken to any part of the GHD reports commissioned by the applicant, which suggested that operations would have to cease. On balance, I do not consider that this allegation has been made out.

[52] Turning to the exposure to prosecution and enforcement proceedings. On balance, I do not consider that these considerations justify the granting of the stay. It seems to me that in respect of these risks, future events and consequences lie in the hands of the applicant, including taking steps to prosecute its appeal as quickly as is practicable. In this context it would appear that at least the statutory construction arguments could be dealt with as a preliminary issue.

[53] Turning then to the cost and time argument. Here the applicant's argument is essentially to the effect that if it is required to comply with these conditions and

succeeds on appeal, those costs and time would be wasted and not reimbursed by the respondent or any other relevant authority.

[54] As to the assertion that the refusal to grant a stay would effectively force the applicant to decommission and rehabilitate its gas project start before the appeal is determined, I was not directed to any evidence which convinces me that that would be so. As I read Conditions C10-7 and C10-8 they refer to decommissioning and rehabilitation procedures referable to "the underground cavity". These conditions, at least as far as I read them, do not seem to be directed towards the whole of the applicant's gas project site, but to the subject P4 cavity. This seems consistent with the observations in the Gilbert Sutherland report at p 19. Also, the letter to which I have already referred from the applicant dated 4 November 2011 (Exhibit BJG-51), which, while referring to what the applicant considers to be wasted costs if P4 has to be decommissioned and rehabilitated at this stage, it does not refer to or suggest that compliance with Conditions C10-7 and C10-8 would cause a cessation of operations over its entire site. While reference is made to the "plant", which I take to mean Well P4 and its ancillary plant and equipment being non-operational, there is no reference to the entire site being rendered unoperational.

[55] On balance, I do not consider that this allegation is made out and, accordingly, does not provide grounds either on its own or together with other matters sufficient to justify the granting of a stay.

[56] Turning then to the assertion that compliance with the conditions would require the applicant to expend time and money for which it will not be reimbursed, while I am prepared to accept that satisfying these conditions would necessarily have a cost for the applicant, both in respect of time and money, that is really as far as the evidence goes. The applicant provided no evidence as to what the actual cost of compliance might be. When pressed on this point, Mr O'Brien argued that that situation is not surprising given that details of what will eventually be required have not yet been ascertained. That might be so, but in circumstances where it is apparent that Condition C10-7 has already been substantially met and in circumstances where the applicant has commissioned investigations sufficient to formulate a possible solution, I find it difficult to accept that the applicant is in no position to provide at least some form of estimate of the time and money involved. In this regard I am referring to the GHD report commissioned by the applicant, which recommended that the appropriate approach to rehabilitation of the P4 cavity would be by way of monitored natural attenuation.

[57] As I have already said, the requirements of C10-7 have apparently already been largely met. This was a point acknowledged by Mr O'Brien in submissions and is consistent with the observation made in the Gilbert and Sutherland report at p 19. It was one of the authors of that report's opinion that to satisfy Condition C10-7 would require only "relatively minor extension of the existing documentation". I note here that this assertion was not challenged.

[58] As to Condition C10-8, while, consistent with the approach of the applicant, the respondent has not attempted to quantify what would be involved in completing or satisfying Condition C10-8. It was, however, in the Gilbert and Sutherland report at p 20 stated that the imposition of Condition C10-8 would not represent an additional cost and would not be a waste in the event of a successful appeal. The report in part states:

> "The appellant's current lack of complete knowledge of the rehabilitation regime and cost represents a project risk that should be addressed in our view. This means that the imposition of C10-8 does not, in and of itself, represent an additional cost as it is an intrinsic requirement of a pilot study (i.e. research). Accordingly, the proposed works [are] necessary and in no way a waste."

This assertion was not challenged.

[59] By way of completeness in this context I should also note that while it has been asserted that to comply with C10-7 and C10-8 would detract from the financial and human resources available to the applicant, no quantification or more fulsome explanation of what is meant by that assertion has been given. Nor was I taken to any evidence or any detail or particularisation of a more efficient and effective approach to dealing with the current situation.

[60] For the reasons given, I am not persuaded to exercise my discretion to grant the stay.

[61] I would finally observe that all the parties consider future monitoring is appropriate. As much was conceded by Mr O'Brien in his reply at T1-7 LL25-30. But his client now wants to resile from the Monitored Natural Attenuation Programme with which it once agreed and is still considered to be an appropriate response at this stage by Gilbert and Sutherland, DERM and GHD, the consultants retained by the applicant.

[62] For the reasons given, the orders are:

(1) The application is dismissed.

(2) I will then hear from the parties as to costs.

(3) I will hear from the parties as to directions for the future conduct of the appeal.