6. Keith Hart

Nature Conservation Council
The voice for nature in NSW

Independent Planning Commission (NSW)
Level 3, 201 Elizabeth Street
Sydney NSW 2000

26 February, 2019

Submission of Objection: Hume Coal Project Development Application (SSD 7172) & Berrima Rail Project (SSD 7171)

Dear Commissioners,

The Nature Conservation Council of NSW (**NCC**) is the peak environment organisation for New South Wales, representing 150 member organisations across the state. Together we are committed to protecting and conserving the wildlife, landscapes and natural resources of NSW.

NCC maintains our objection to the proposed Hume Coal and Berrima Rail Projects.

NCC has provided a copy of our original objection on the Hume Coal Project, dated 28/6/17, to the IPC. Today, we will expand on our concerns drawing on new information and reports in relation to the following areas of particular concern:

- Unsuitability of site for development and planning inconsistencies
- Water issues
- Climate Change Impacts and modelling
- Hazards and Impact on infrastructure
- The public interest

[redacted]

We recommend that the proposed project be rejected. If you seek any further information on the issues raised in this submission please do not hesitate to contact me on (02) 9516 1488 or ncc@nature.org.au

Yours sincerely,

[redacted]

Daisy Barham
Campaigns Director
Nature Conservation Council of NSW

NCC SUBMISSION TO IPC – Hume Coal Project Development Application (SSD 7172) & Berrima Rail Project (SSD 7171)
Public Hearing, Moss Vale, 26 February, 2019

Introduction

Over the last 4 years on behalf of the NSW Nature Conservation Council, I would have read about 20 environmental impact statements attempting to justify various coal and coal seam gas projects. In many respects, the Hume Coal EIS is the worst of these.

The type of statement that "there will be no significant impact from the project" occurs repeatedly through the Hume Coal EIS.

This reflects a fundamental flaw in the environmental impact assessment (EIA) regime in Australia. Distinguished environmental lawyer Dr Gerry Bates has discussed this flaw in his environmental law textbook, and the core of his argument is repeated below:

"One of the most oft-repeated criticisms made of the EIA process is that the EIA documentation will be prepared by, or on behalf of, persons having the greatest stake in the acceptance of the proposal. If the proponent does not prepare the statement, then that responsibility will be delegated to a firm of engineering or environmental consultants who would naturally be expected to assess the environmental impact of the proposal in terms that would reflect as favourably as possible the interests of their clients. It is claimed that this relationship will inevitably lead to aspects of a project that are detrimental to the environment being omitted or glossed over by superficial study and glib assurances" [1].

That statement is highly applicable to the Hume Coal Environmental Impact Statement.

Unsuitability of site for development and planning inconsistencies

As the Australia Institute has recently pointed out[2], coal is conspicuously absent from the local development framework, which envisages carbon-neutral energy sources, intensive agriculture, high quality health care and agri-tourism. Mining is not a significant part of the Southern Highlands economy and is antithetical to many mainstream local industries.

The Hume Coal EIS[3] makes much of the fact that, while the project is located on land where mining is prohibited under the Wingecarribee Local Environment Plan, permissibility of underground mining is allowed by Clause 7 of the Mining State Environmental Planning Policy (Mining SEPP), which prevails over any inconsistencies with a Local Environment Plan.

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[1] Gerry Bates, *Environmental Law in Australia*, 9th Ed (2016), LexisNexis Butterworths, pp461-462
[2] http://www.tai.org.au/sites/defualt/files/P226%20For%20Hume%20the%20bell%20tolls%20-%20Southern%20Highlands%20business%20case%20studies%20FINAL_0.pdf
[3] Hume Coal EIS, pp 50-54

The EIS fails to mention the provisions of Clause 12 of the Mining SEPP, which are also highly pertinent to the IPC assessment of the Hume Coal project.

Clause 12 of the Mining SEPP states as follows:

Compatibility of Proposed Mine, Petroleum Production or Extractive Industry with Other Land Uses.

Before determining an application for consent for development for the purposes of mining, petroleum production or extractive industry, the consent authority must:

(a) consider

i. the existing uses and approved uses of land in the vicinity of the development, and
ii. whether or not the development is likely to have a significant impact on the uses that, in the opinion of the consent authority having regard to land use trends, are likely to be the preferred uses of land in the vicinity of the development, and
iii. any ways in which the development may be incompatible with any of those existing, approved or likely preferred uses

A cursory glance at the Australia Institute report already referred to above[4] will show that there is a fundamental incompatibility between the local land uses and the economies they support and the proposed coal mine.

NCC offers two other supportive perspectives which further support this statement.

1. The NSW Department of Planning and Environment, in its report[5] recommending that the Hume Coal project not be approved, made the following statements in its report:

Under the Wingecarribee LEP, mining development is prohibited in all of these land zones...Based on the limited list of permitted land uses, ... the Department is concerned that a new coal mine may not be compatible with the existing, approved and likely preferred land uses of these zones.

2. The widely discussed Rocky Hill Mine case, brought down in the NSW Land and Environment Court by Chief Justice Brian Preston on 8th February, 2019[6]. While much has

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[4] *For Hume the bell tolls – Local economic impacts of the Hume Coal project,* Australia Institute, May 2017
[5] Hume Coal Project and Berrima Rail project SSD Assessment, NSW Department of Planning and Environment, December 2018, pp 10-11
[6] Gloucester Resources Ltd v Minister for Planning [2019] NSWLEC 7, 8 February 2019

been made in the media on both sides of the coal debate about how climate change was one of the reasons for rejection of the Rocky Hill mine, Justice Preston has acknowledged and his judgement clearly shows that this development could have been rejected on planning incompatibility grounds alone.

If the IPC rejects the Hume Coal Project development, as NCC hopes it will, the Rocky Hill decision represents an important legal precedent. Apart from the fact that Rocky Hill is an open cut coal mine and Hume Coal is an underground coal mine, there are many similarities – both projects were recommended to be rejected by the NSW Department of Planning for example, and both had a vast majority of opponents from the local community.

After assessing the Rocky Hill project under Clause 12 of the Mining SEPP, as the IPC as consent authority will have to do for the Hume Coal project, Justice Preston said this about the land use incompatibility of the Rocky Hill mine:

"86: I find that the Rocky Hill Coal Project, by reason of its visual, amenity and social impacts, will be incompatible with the existing, approved and likely preferred uses in the vicinity and that the measures proposed by GRL will not avoid or minimise this incompatibility."*

*[Gloucester Resources Ltd was the proponent of the Rocky Hill mine]

Water Issues

NCC does not support coal mining within the Sydney Drinking Water Catchment. In 2011, the then Leader of the NSW Opposition Barry O'Farrell promised he would not allow mining in drinking water catchments, but he broke that promise in 2013 after becoming Premier.

The Hume Coal EIS devotes very little attention to the State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011 and fails to satisfactorily explain how the project will meet the requirements of the SEPP[7].

In fact the Sydney Drinking Water Catchment SEPP is important since the Hume Coal Project is entirely located in the Sydney Drinking Water Catchment. Clause 10(1) of the SEPP states that:

10(1) A consent authority must not grant consent to the carrying out of development ...on land in the Sydney drinking water catchment unless it is satisfied that the carrying out of the proposed development would have a neutral or beneficial effect on water quality.

[7] Hume Coal EIS, Volume 1, page 72

NCC maintains that the Hume Coal project fails to meet this neutral or beneficial water quality standard and should be rejected on these grounds.

NCC notes that both the Department of Planning and Coal Free Southern Highlands had to engage groundwater experts to assess the Hume Coal EIS water modelling. There were many worrying criticisms of the potential impacts in their reports, including:

- The combination of an untested mining method and an unconventional method of impounding large quantities of mine water underground may result in serious operational safety risks[8]
- The Department considers that the various safety risks may lead to the transfer of additional mine water to the surface and a need to discharge into local watercourses. The Applicant has not assessed this issue or proposed a water treatment plant[9]

NCC maintains that an assessment of expert reports for the Department of Planning and Coal Free Southern Highlands indicate clearly that there is great scientific uncertainty relating to the Hume Coal proposal, and a threat of serious or irreversible environmental damage if the worst case scenario actually occurs in relation to groundwater associated with the project. Under these circumstances, the Precautionary Principle is triggered, as explained in the court case which represents a NSW Land and Environment Court planning principle[10].

This case, of impeccable legal precedent, notes that:

"Where the precautionary principle is activated... there is a shifting of the evidentiary burden of proof... The burden of showing that this threat does not in fact exist or is negligible effectively reverts to the proponent of the economic or other development plan, programme or project"[11].

There is no evidence within the EIS that the proponent has seriously taken the precautionary principle in to consideration in relation to groundwater or flooding impacts.

For example:

- *Cumulative impacts to groundwater and surface water quality are not anticipated as a result of the project.*

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[8] Dept of Planning assessment, p 18 (see reference #5)
[9] Dept of Planning assessment, p 35
[10] Telstra Corp v Hornsby Shire Council [2006] NSWLEC 133
[11] Telstra Corp @ 150

- *Changes to flood peak velocities are considered acceptable with reference to the assessment criteria*[12]

NCC attempted to find an assessment of whether there will be an accumulation of metals in the groundwater as a result of greatly increased contact with coal. One of the experts engaged by Coal Free Southern Highlands claims that the reject material in the voids could consist of up to 40% fine coal. We were unable to find any meaningful data in the EIS on possible metal contamination of the groundwater apart from the following:

- Wingecarribee River is considered a groundwater discharge area[13]. This river is part of the Sydney Drinking Water Catchment. If the groundwater does become contaminated by metals from the coal reject material in the underground mine voids, then it can leak out into the surface water and result in contamination of Sydney's drinking water.
- In an attempt to model the impact of reject material on groundwater, the consultants noted that the magnitude of the exceedance of leachate water quality was substantially larger for certain metals (unspecified) and the final leachate pH was relatively low, indicating acid generation was a potential concern[14].

Higher concentrations of metals can accumulate in acid water. Metals such as mercury and cadmium are found in coal, and these are capable of bioaccumulating up the food chain if they enter the waters of the Sydney Drinking Water Catchment. The extent of such a risk is unassessed by the EIS.

NCC maintains that a development which carries such potential water-related environmental risks is totally unacceptable anywhere in Sydney's Drinking Water Catchment. The Hume Coal Project deserves to be refused on the basis of inadequate assessment of water-related risks in keeping with the precautionary principle, one of the components of ESD.

Climate Change Impacts and Modelling

The Hume Coal Mine Project is being considered in the light of the historic agreement at the UN Conference of the Parties (**the Paris Agreement**) on 12 December 2015. The Paris Agreement was unanimously signed by 195 countries, and has been subsequently ratified by Australia. The agreement commits all signatory nations, including Australia, to keeping global average temperatures to below 2 degrees Celsius.

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[12] Hume Coal EIS, p 190
[13] Hume Coal EIS, p 147
[14] Hume Coal EIS, pp176-177

Climate scientists have advised that to have at least a 50% chance of keeping global warming below 2°C throughout the twenty-first century, globally a third of oil reserves, half of gas reserves and over 80% of current coal reserves should remain unused[15].

The Climate Council of Australia has stated that "for Australia to play its role in preventing a 2 degree Celsius rise in temperature requires over 90% of Australia's coal reserves to be left in the ground, unburned"[16].

The approval of the Hume Coal project is not in keeping with Australia doing our fair share to meet the Paris agreement, nor with the NSW Government's stated commitment to net zero emissions by 2050[17] which will require a phasing out of all coal. It is irresponsible for NSW to be approving new coal mine projects.

We make an additional point on the impacts of climate change on this proposal related to water. Where the basis of the water and flood modelling behind the Hume Coal EIS is actually acknowledged, it appears to be based on the standard 1:100 year rainfall and flood levels. However, in an era of what increasingly seems to be the beginnings of runaway climate change, NCC believes that the use of flood modelling with 1:100 year figures no longer reflects reality.

A projection from the Australian Bureau of Meteorology, a conservative and trusted source, states the following climate projection:

Australia is projected to experience decreases in rainfall across southern Australia with more time in drought, but an increase in intense heavy rainfall throughout Australia[18].

The truth of that prediction was recently demonstrated in Queensland in January 2019, when unprecedented rainfalls flooded an area the size of Victoria. Weather experts and climate scientists determined that the rain received over a seven-day period was 20% higher than any historic rainfall records over similar period. The rainfall event has been described as a 1 in 500 year or even a one in 1000 year phenomenon.

Our point is that a project such as Hume Coal, relying as it does on managing surface water and groundwater without any requirement for surface discharge or a water treatment plant, needs to be subject to more robust weather modelling consistent with climate change rather than what has been traditionally accepted. NSW Department of Planning needs to amend their requirements for such modelling, and any proposal such as Hume Coal should be rejected unless they can demonstrate credible modelling, subject to independent peer review, that incorporates the increased weather impacts expected from climate change.

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[15] C. McGlade & P Ekins: *The geographical distribution of fossil fuels unused when limiting global warming to 2degrees C,* Nature, V. 157, 8 January 2015, pp 187-190

[16] Climate Council of Australia (2015): *"Unburnable Carbon: Why We Need to Leave Fossil Fuels in the Ground", pp iii – iv,* www.climatecouncil.org.au

[17] Sydney Morning Herald, 4/12/18, p6

[18] Australian Government Bureau of Meteorology State of the Climate, 2018

Hazards and Impacts on Infrastructure

The Hazard and Risk Assessment Report[19] exhibits poor knowledge of the local area which will be impacted by the proposed coal mine to the extent that the increased risk of level crossing accidents and potential fatalities is not even mentioned[20]. Whilst not strictly within our NCC remit we feel it important that this safety concern does not go unnoticed.

Some information relating to increased train movements and risk can be gathered from the Executive Summary of the Berrima Rail Project EIS[21]. We learn that:

- Weekly train movements will be approximately 50 movements per week. Along the single Moss Vale to Unanderra rail line, this represents a 1/3 increase in train movements[22]. Traffic delays caused by additional coal trains (four trains daily in each direction) will be up to an extra 24 minutes in total each day[23]. This will be a measure of driver frustration leading to increased chances of some drivers taking risks – a significant cause of level crossing accidents in Australia.

- The Moss Vale – Unanderra rail line has an extraordinary 13 level crossings between the main southern railway junction at Moss Vale and Fountaindale Road at Robertson[24]. Two of these crossings are major road level crossings at Sheepwash Road (Bowral to Illawarra Highway) and Robertson (Illawarra Highway). Both crossings have lights but no gates.

These concerns are not addressed in Appendix P (Volume 9) – Hazard and Risk Assessment which raises concerns about the reliability of the information contained within the EIS. We request that the Minister ensures this risk is fully independently assessed to provide the community with the assurances they deserve about public safety.

Public Interest

As Justice Preston determined in the Rocky Hill mine decision recently[25], community responses to a development application are aspects of the public interest. A large majority of the residents of Gloucester opposed the proposed Rocky Hill open cut coal mine adjacent to their town.

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[19] Hume Coal EIS, Volume 9, Appendix P
[20] Hume Coal EIS, Vol 9, Appendix P, Section 3.6.1, p 29
[21] Hume Coal EIS, Volume 3A, Appendix D, Executive Summary
[22] Hume Coal EIS, Volume 3A, p 143.
[23] Hume Coal EIS, Volume 3A, Berrima Rail Project Executive Summary, p ES.6
[24] Hume Coal EIS, Volume 3A, Figure 9.2, p 134
[25] Gloucester Resources Ltd v Minister for Planning [2019] NSWLEC 7 (8 February, 2019), @ 378

An even larger proportion of the residents of the Southern Highlands have opposed the proposed Hume Coal mine. Department of Planning figures indicate that of 12666 community submissions, 12212 objected – 96.5%[26]. That is the clearest indication you can get that, in terms expressed in the Rocky Hill case, the Hume Coal project is clearly against the public interest.

There is another aspect of the public interest to consider. It is a matter of settled law in NSW that the public interest includes the principles of ESD, as shown in the objects of the NSW EPA Act. As demonstrated above, the Hume Coal project is clearly in breach of the Precautionary Principle, one of the elements of ESD. The Hume Coal project is therefore contrary to the public interest as interpreted by the NSW Courts and must be refused.

[26] NSW Dept of Planning Assessment, p 14