Environmental Defenders Office

14 March 2023

Memorandum

McPhillamys Gold Project: Response to Appendix F of Applicant's additional materials

1. This memorandum responds to select matters raised in Appendix F of the Applicant's additional materials dated 1 March 2023 (**Appendix F**) and part 3.4 of Regis's submission dated 17 February 2023 (page 40). Appendix F is a memorandum prepared by the applicant's legal representatives, responding to materials prepared by the EDO, and Counsel, on behalf of the Belubula Headwaters Protection Group. This letter uses the same defined terms as Appendix F.

2. In the interests of expediency, we are instructed not to prepare a line by line analysis of each individual comment in Appendix F. Our client is comfortable that its position is sufficiently clear and that its legal submissions, when considered in whole, speak for themselves.

Legal Submission: conditions of consent

3. Our client maintains its position that DPE's recommended conditions are not fit for purpose.

4. We do not accept that the 'long-standing' and 'standard' nature and use of the terms and expressions in the recommended conditions for the Project demonstrate that they are certain or strict and precautionary (cf Appendix F [2.3 (a)]-[2.3 (b)]).

5. "Reasonableness", "feasibility" and "generally in accordance with" are inherently difficult concepts to grapple with in the context of enforcement and may easily lead to ambiguity. In particular, where there are very limited criteria in the recommended conditions (i.e. the basic elaboration provided in the definitions) which stipulate the bounds of what may be considered reasonable or feasible. Although it can be accepted that the NSW LEC has found that conditions relying on measures of "reasonableness" and "feasibility" are not necessarily or inherently "so wide as to be meaningless", this is not the same as concluding that:

    (a) in this case the relevant conditions are certain; and, perhaps more foreseeable; and

(b) the draft conditions are fit for purpose bearing in mind the likely impacts of the project and the overarching objects of the EP&A Act. Our client is concerned about conditions that will create foreseeable difficulties for enforcement agencies, the community and indeed the approval holder to form a reliable view as to what is or is not reasonable or feasible, and therefore what constitutes compliance as opposed to noncompliance.

6. As put at [51] of our client's Legal Submission, our client submits that the IPC must consider whether each condition ultimately resolves an issue in a sensible way.

7. We reject any suggestion that an historic lack of civil enforcement proceedings for breaches of conditions is indicative of mining companies in NSW complying strictly and routinely with the conditions of their consents (Appendix F, [2.3(h)]). EDO has extensive experience representing community groups across NSW who are at the coal face of the environmental impacts of developments and who are grappling with enforcement and enforceability issues. Our client urges the IPC to actively and critically turn its mind to whether and in what way the obligations implied by any proposed conditions of consent could, in fact, be readily and concretely construed and ultimately enforced.

Legal submission: Relevance of Rocky Hill

8. The IPC is entitled to consider the Rocky Hill decision and to give it weight. In the NSW Land and Environment Court (**LEC**), decisions in class 1 merits jurisdictions often refer to other LEC merits decisions, even though they are not bound by them.[1]

9. Of course, the IPC does not need to be told that its task in this case is to consider whether this project ought to be approved pursuant to section 4.16 of the EP&A Act, a decision to be made by reference to the matters set out in s 4.15 of the EP&A Act. That is not the same as saying that there is nothing to be learned from the way other decision makers have applied similar facts in other comparable projects.

10. The applicant's attempt to distinguish Rocky Hill and the Bylong Coal Project, from the McPhillamys Gold Mine (at page 40 of the applicant's 17 February 2023 submission) are vague and unpersuasive. The applicant has not explained how the Rocky Hill Project and the Bylong Coal Project's environmental planning and social settings were different or how the likely impacts are significantly different. Similarly, Appendix F [2.5 (d)] of the applicant's additional materials does not state any basis for distinguishing the mining projects.

11. As such we vehemently reject the suggestion at [2.5(d)] of Appendix F that the Rocky Hill judgment is irrelevant. Our client submits that as a decision by the chief justice of the Land and Environment Court, Rocky Hill presents persuasive guidance with respect to the decision-making task of the Commission.

[1] For example *Rocky Hill* and *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48.

SPAL Letter

12. We wish to clarify that any reference to 'minimal harm requirements' in a potential future SPAL application (Appendix F [3.2 (f)] and [3.4(a)]) does not relieve the Commission of its overarching obligation to consider all of the likely impacts of this project, now. This includes the likely impacts to surface water.[2]

13. To be clear, neither the *Water Management Act 2000* (NSW) nor the EP&A Act carve out these impacts from consideration under s 4.15. The Commission must consider all likely impacts. Further, by doing this now the Commission is in the best position to ensure that the consideration takes into account the development as a whole, including cumulative impacts.

If the Commission has any questions in relation to this letter or the enclosed materials, please contact the writer ([redacted];[redacted]

Yours faithfully

[redacted]

Environmental Defenders Office

Nadja Zimmermann
Solicitor

[2] Noting of course that it is well established by case law that likely impacts for the purposes of EP&A Act s 4.15 include impacts that can extend beyond the immediate site of a proposed development. See e.g. *Bell v Minister for Urban Affairs and Planning* (1997) 95 LGERA 86; *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2011) 81 NSWLR 638.