

BELUBULA HEADWATERS PROTECTION GROUP
MCPHILLAMY'S GOLD MINE PROJECT

A. INTRODUCTION

1. The Belubula Headwaters Protection Group (**BHPG**) opposes the development application for the McPhillamys Gold Project, SSD-9505 (**Project**) and seeks a determination that it be refused.
2. The BHPG's case is that the Project should be refused on the basis of its serious impacts on the environment, the surrounding community and future generations.
3. The BHPG also considers that the Department's proposed conditions of consent dated 17 November 2022 are inadequate in that they fail to set out clear mitigation measures and to ensure accountability and responsibility for impacts. Impacts will thus burden future generations. Many of the conditions also lack certainty. As such, the BHPG argues that the proposed conditions are inadequate and in some cases are likely invalid.
4. These submissions address the legislative regime within which the Independent Planning Commission (**IPC**), convened to determine the Project, must make its decision and is structured in four parts:
 - a. The key legislative provisions;
 - b. Weighing the impacts and benefits;
 - c. Conditions recommended by the Department; and
 - d. Concluding remarks.
5. I have been briefed with expert scientific evidence with respect to the following topics:
 - a. Social impacts (Dr Alison Ziller);
 - b. Tailings dam engineering and management and mine closure and rehabilitation (Prof Gavin Mudd);
 - c. Surface water and groundwater (Dr Ryan Vogwill);
 - d. Water quality, including pipeline water quality (Dr Ian Wright);
 - e. Koalas (Assoc Prof Mathew Crowther); and
 - f. Economics (Prof Chris Fleming & Mr Andrew Buckwell).
6. These submissions draw on and make some reference to this expert evidence. However, the IPC is referred directly to the submissions for important analysis as to the likely impacts of the

Project, including adequacy of the proponent's impact assessment and limitations of the Department's analysis.

7. I am aware that the BHPG is raising additional matters on which I am not briefed, significant to its case for refusal. To this end the IPC is directed to the BHPG's separate submission

B. KEY LEGISLATIVE PROVISIONS

Role of the IPC

8. The primary legislation governing the decision of the IPC is the *Environmental Planning and Assessment Act 1979 (EP&A Act)* and *Environmental Planning and Assessment Regulations 2021 (EP&A Regulations)*.
9. The role of the IPC is to make independent and objective decisions on State significant development applications.
10. Section 4.38 EP&A Act identifies that the IPC must:
 - a. approve the development application with conditions; or
 - b. refuse the application.
11. The decision of the IPC is the final opportunity for the project to be assessed on its merits. It cannot be appealed (other than on issues of law): s 8.6 (3)(a) EP&A Act.

Key legislative provisions and principles

12. The EP&A Act requires a development application for State significant development to be accompanied by an environmental impact statement (**EIS**) that addresses the State Environmental Assessment Requirements (**SEARs**): s 4.39 EP&A Act; s 190 and 191 EP&A Regulation.
13. The EIS must set out the likely impact of the Project on the environment and the reasons justifying the carrying out of the development, having regard to biophysical, economic and social considerations, including the principles of ecologically sustainable development (**ESD**): s 192(1)(f) EP&A Regulation. (See [21]-[26] below for a brief elaboration of the principles of ESD).
14. The IPC must exercise its powers for the purpose of achieving such of the objects of the EP&A Act as are relevant to its decision. The objects appear in s 1.3 EP&A Act. They include

the following – and include specific reference to ESD (See [21]-[26] below for a brief elaboration of the principles of ESD):

- a. to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources;
- b. to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment;
- c. to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats;
and
- d. to provide increased opportunity for community participation in environmental planning and assessment. (*emphasis added*)

15. Section 4.15 of the EP&A Act outlines matters for consent authorities to consider in determining State Significant Development applications:

4.15 Evaluation (*cf previous s 79C*)

(1) **Matters for consideration—general** *In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—*

(a) the provisions of—

- (i) *any environmental planning instrument, and*
- (ii) *any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*
- (iii) *any development control plan, and*
- (iv) *any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and*

- (v) *the regulations (to the extent that they prescribe matters for the purposes of this paragraph),*
- (vi) *(Repealed)*

that apply to the land to which the development application relates,

- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (c) the suitability of the site for the development,*
- (d) any submissions made in accordance with this Act or the regulations,*
- (e) the public interest.*

(emphasis added)

16. Section 4.15 is the statutory successor of former s 79C(1) and, before then, s 90(1) of the EP&A Act. What Moffitt P said of s 90(1) in *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 340 applies equally to s 4.15(1). His Honour there said:

The obligation is to take into consideration (a) to (s) matters which are in fact relevant, and not those which the authority or its officers considers relevant. By remaining ignorant of relevant environmental matters, an authority could not avoid its obligation to consider and, in its ignorance, give a valid consent without considering harm (not de minimis) to the environment which in fact fell within (b). Accordingly, despite the absence of a direct obligation to do so, the requirement of s. 90(1) to consider carries with it an indirect obligation, which rests upon the authority to acquaint itself with such material as will permit it to consider such s. 90(1) matters as are in fact material. Thus, if it is to consider the impact of the development upon the environment, if [sic] is to consider whether it is likely to cause harm, if it is to consider the ways the environment may be protected or, if it is to consider the ways likely harm may be mitigated, it must be aware of each of these matters, namely, what is the impact, the likely harm and the ways to protect or mitigate. (emphasis added)

Consideration of the “likely impacts”

17. In other words, the IPC is obliged to acquaint itself with such material as will permit it to consider the likely impacts of the development. It is not confined to the material placed before

it by the proponent. And, where likely impacts are in issue, the IPC must make itself aware of the impact, the likely harm and the ways to protect or mitigate.

18. In assessing likely impacts, it is incumbent on the IPC to form an estimate of the likelihood or possibility of the impact: *Cartier Holdings Pty Ltd v Newcastle City Council* [2001] NSWLEC 170 at [25].
19. The expression “likely impact” has a well-understood meaning. An impact is “likely” if there is a “real chance or possibility” of the impact whether or not the impact is “more probable than not”: *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2011) 184 LGERA 104 at [43]-[47].
20. The likely impacts of a development include both direct and indirect environmental impacts: *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 at [494].

The Principles of ESD

21. As noted above, ESD is identified in the objects of the EP&A Act. It is also incorporated into s 4.15, in that decisions of the Land and Environment Court and the NSW Court of Appeal have held that the public interest (as identified at EP&A Act s 4.15(1)(e)) necessitates consideration of principles of ESD during merits assessment of projects that are equivalent to State significant developments.¹
22. Pursuant to s 1.4 of the EP&A Act, the principles of ESD are defined in s 6(2) of the *Protection of the Environment Administration Act 1991* (**POEA Act**) to include:
 - a. the precautionary principle;
 - b. inter- generational equity;
 - c. conservation of biological diversity and ecological integrity; and
 - d. the “polluter pays” principle.
23. The POEA Act expressly provides that ESD ‘can be achieved through the implementation of the precautionary principle, intergenerational equity and the conservation of biological diversity and ecological integrity’:² s 6(2) POEA Act.

¹ *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* (2012) 194 LGERA 113; [2012] NSWLEC 197 per Pepper J at [170]; *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347, [58]-[60].

² With reference to one further “principle and program”, namely, “improved valuation, pricing and incentive mechanisms”.

24. The precautionary principle is defined in the POEA Act to mean ‘that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation’: s 6(2)(a) POEA Act.³ Practically put, it means, better safe than sorry or look before you leap. The precautionary principle is a tool for decision makers to manage environmental risks.
25. Intergenerational equity is defined in the PEOA Act to mean ‘that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations’: s 6(2)(b) POEA Act.
26. The conservation of biological diversity and ecological integrity is defined in the PEOA Act to mean that conservation of biological diversity and ecological integrity should be a fundamental consideration: s 6(2)(c) POEA Act.
27. It is the BHPG’s submission that, on the material put before it by the Proponent and the Department, there is so much scientific uncertainty that the IPC cannot be confident that it is aware of the likely harm and the ways to protect or mitigate that harm to satisfy the IPC’s obligations arising under the EP&A Act and to satisfy the principles of ESD and the objects in s1.3. A small number of examples of the evidence supporting the BHPG’s is set out in Part 0. The IPC is referred directly to the expert reports referred to above at [5].

C. WEIGHING THE IMPACTS AND BENEFITS

28. The manner in which the IPC should consider the benefits and impacts of the Project should be guided by the decision of Preston CJ of the Land and Environment Court in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (**Rocky Hill**). The task before the IPC, in determining the merits of the Project, is the same as the task that was before the Land and Environment Court in Rocky Hill.
29. In *Rocky Hill*, his Honour identified two steps in considering the matters of s4.15 EP&A:
- a. the consent authority should make the relevant findings of fact; what it says are the relevant facts rather than what is put to it by the Proponent; and then
 - b. balance the public interest in approving or disapproving the Project having regard to the competing economic and other benefits and the potential negative impacts the project would have if approved: *Warkworth Mining*.

³ The POEA Act also states in relation to the precautionary principle that, in its application, “public and private decisions should be guided by— (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and (ii) an assessment of the risk-weighted consequences of various options”.

30. His Honour referred to the balancing exercise as one of ‘intuitive synthesis’’: see *Rocky Hill* at [686] – [691].

31. In *Rocky Hill*, the Chief Justice also made the following points about the use of evidence in conducting the balancing exercise or ‘intuitive synthesis’:

- a. balancing the benefits and costs of the Project is in the end a qualitative and not quantitative exercise; and
- b. forms of economic assessment such as cost benefit analysis which quantify monetise and aggregate different factors assist but are not a substitute for the intuitive syntheses required of the consent authority: at [687].

32. At [694] of the decision in *Rocky Hill*, his Honour considered the location of the proposed development and importantly stated:

One of the principles of ecologically sustainable development is the principle of sustainable use – the aim of exploiting natural resources which is sustainable or prudent or rational or wise. The principle also has an ecological core: use of natural resources needs to be within ecological limits. The use of natural resources should be ‘within their capacity to sustain natural processes while maintaining the life-support systems of nature’.

33. The principle of sustainable use also arose in *Hub Action Group v Minister for Planning* [2008] 161 LGERA 136. There, the Court said:

The principle of sustainable use of natural resources involves the exploitation of natural resources in a way which is sustainable in the long term and which reduces the environmental harm. It involves consideration of the effects of use on all natural resources, certainly the effect of the use on the resources the intended subject of the activity but also the effect that the use of those resources might have on the sustainable use of other resources.

34. At this point in the analysis, it is important to reflect on the objects of the EP&A Act and the principles of ESD to be applied. The objects speak to ‘protection’ of the existing environment, with particular reference to threatened species. This aligns with the principles of ESD, including in relation to intergenerational equity (which requires the present generation to ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations), the precautionary principle, and the conservation of biological diversity.

35. What the future generation could look forward to from this mine begs the question, 'what is the benefit of mining for gold?'
36. The Departmental report attempts to justify the addition of a mine on the basis that because NSW moving is away from coal mining and therefore the income that comes with coal mining licences, the State must further its economic agenda by issuing licences that allow the mining of minerals.
37. Preston CJ in *Rocky Hill* considered the argument that coal (in that instance) must be mined wherever the resource exists and rejected it. His Honour said:

A development that seeks to take advantage of a natural resource must be located where the natural resource is located... but not every natural resource needs to be exploited.

38. The Departmental report makes the following related arguments but in each case fails to substantiate it:
- a. that NSW has untapped resources for a range of minerals and the NSW Government has a vision to build on the State's potential to become a major global supplier and processor of critical minerals and high tech metals (*emphasis added*). However, the Departmental report does not identify gold as either a critical mineral or high tech metal. The BHPG is of the view that is because it is neither.
 - b. that NSW should mine gold because of its value to renewable energy (*emphasis added*). However, there is no support for that proposition in any material provided by the Proponent.
 - c. that transition to renewable energy will depend on availability of raw metals, but gold is not one of the metals identified as one such required.

39. The Department's assessment report also concedes that the demand for gold is globally driven and the four markets that drive demand are jewellery (55%), investment sector (25%), central banks (11%) and technology (8%).

Applying the facts in Rocky Hill to this Project

40. Without providing an exhaustive analysis, in this section we note several parallels between the considerations and conclusions reached in *Rocky Hill* and the evidence before the IPC in relation to the Project.

41. As here, the alleged benefits from the Rocky Hill mine were to be jobs and a mining licence and the impacts included a very similar laundry list of adverse outcomes for residents of, there, Gloucester and the local environment.
42. Preston CJ found that the Rocky Hill Project would not be a sustainable use and would cause substantial environmental and social harm causing noise, air and light pollution that would contribute to adverse social impacts with significant impacts on people's way of life, community, culture, health, wellbeing, surroundings, fears and aspirations. It would cause distributive inequity both within the current generation and for future generations.
43. In relation to visual, amenity and social impacts, we note several similarities: .
- a. Visual impacts: In Rocky Hill, his Honour held screening would not mitigate. As identified by Dr Ziller, the screening by trees offered by Regis will not be effective until year 6 of the 11 year project.
 - b. Amenity impacts: even though air quality was found to comply with the Mining SEPP in Rocky Hill, the threat to the health of the residents and the potential for people to leave Gloucester and not be replaced due to poor air quality and effects on their health was held to be a significant adverse impact and supported disapproval. Dr Ziller, engaged by the BHPG, identified that the same concerns arise in Blayney and Kings Plains which would change the fabric of the community. Such a change was impermissible in his Honour's reasoning in Rocky Hill.
44. Again, as a signpost towards the detailed analysis of impacts and issues contained in the expert reports referred to at [5], above, further impacts raised by the experts in this matter include the following:
- a. Ground water: the IPC has been provided with a significant amount of scientific data about the working of springs beneath the tailings dam. Professor Mudd identified a likelihood of seepage of potentially acid forming tailings into ground water.
 - b. Tailings dam: Professor Mud identified inadequate monitoring of the dam wall in the proposal which would likely contribute to adverse impacts in ways not set out by the Proponent or the Departmental report.

D. THE DEPARTMENT'S RECOMMENDED CONDITIONS

45. The Department refers to its revised conditions as demonstrating a comprehensive, 'strict' and precautionary approach. It is implicit in the legislative regime that the IPC has an obligation to closely examine and interrogate that statement.

46. The conditions are the main pathway or 'protector' in reducing and mitigating the impacts that may result from an approval of the development project under s4.15 EP&A.
47. As elaborated below, it is the BHPG's submission that the proposed conditions are not fit for purpose (i.e. they will not effectively mitigate the impacts of the Project) and in some cases likely invalid due to issues of uncertainty, unenforceability, and/or ineffectiveness.

Legal Principles Regarding Uncertain and Unenforceable Conditions

48. A development consent that leaves open the possibility that the development carried out will be significantly different from the development for which consent was sought or which lacks finality or is uncertain may be invalid.⁴ For example, where a condition allows for a significant variation of the development proposed.⁵
49. Similarly, conditions that are open-ended, uncertain or incapable of enforcement may also be declared to be invalid. For example, where the fulfilment of a condition is dependent on the cooperation of third parties.⁶

Conditions Lack Certainty and Effectiveness

50. Many of the recommended conditions lack certainty leaving accountability to another person or body or another day. In particular, language of 'could', 'would', to the satisfaction of the Secretary' and 'unless otherwise agreed by the Secretary' contained in the Conditions. Amongst those are:

Condition number	Text of the condition	Submission
A1	'...the Applicant must implement all reasonable and feasible measures to prevent, and if prevention is not reasonable and feasible, minimise, any material harm to the environment that may result from the construction and operation of the development,	In the BHPG's submission, the use of the terms 'reasonable and feasible' and 'generally in accordance with' would not ensure that the Conditions effectively limit impacts to those outlined in the EIS. For example, what happens if reasonable and feasible measures are not enough to prevent catastrophic environmental harm?

⁴ *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23, [28].

⁵ *Ibid.*

⁶ *Fairfield City Council v Holroyd City Council* [1999] NSWLEC 122, [27].

	or rehabilitation of the development.'	
B13	'The applicant must take all reasonable and feasible steps to minimise noise from construction and operational activities'	The BHPG is concerned that the current definitions of 'reasonable', 'feasible' (see definitions in the Conditions at pages 4-5) allow the Proponent to determine what is 'reasonable' and 'feasible'. What is feasible to the Department or the Proponent or the community are likely to be very different perspectives and outcomes. Accordingly, the criteria are entirely subjective and uncertain. This also raises issues with respect to enforceability.
B30	'The Applicant must ensure that all reasonable and feasible avoidance and mitigation measures are employed so that particulate matter emissions generated by the development do not cause exceedances of the criteria listed in Table 4 at any residence on privately-owned land'	There is no way of quantifying the condition in a practical way and no accountability or identification of what happens if there is a failure. Again, this raises issues of certainty and enforceability.
B34	'The applicant must prepare an Air Quality and Greenhouse Gas Management Plan for the mine site and mine access road to the satisfaction of the Planning Secretary. That plan to be prepared in consultation with the EPA and CCC'.	This raises many variables, thereby introducing significant uncertainty: what will be satisfactory to the Planning Secretary? Against what measures will the Secretary reach that state of satisfaction? What is the consultation to achieve? Does the consultation need to have impact or is a token meeting sufficient?
B49	'The Applicant must ensure that all surface discharges from the site comply with all relevant provisions of the POEO Act, including any discharge limits (both volume and quality) set for the development in any EPL'.	Independent scientific evidence of Dr Ian Wright, adduced by the BHPG provided that: 'In the recommended 'Conditions of Consent' there were no details provided on the future EPA EPL licence' and 'it appears possible that the EPA water quality licence will offer very weak protection of Belubula River water quality. This could be through ineffective regulation that allows

		environmentally hazardous concentrations of pollutants to potentially be mobilised from the mining operation to the Belubula River' (page 5 of Dr Wright's report dated 12 February 2023, before the IPC).
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51. Key considerations here are: does each condition ultimately resolve an issue in the mind of the IPC and does it do it in a sensible and reasonable way? Or does the draft condition merely 'kick the can down the road' for determination at a later date by a different party at a different time.

E. CONCLUSION

52. The independent scientific evidence adduced by the BHPG (both oral and written) has demonstrated that the Department and the proponent have significantly underestimated the environmental and social impacts of the Project. The evidence also identifies many areas of uncertainty as to the likely impacts including due to failure by the proponent to properly investigate and report on the likely impacts.

53. It is the BHPG's submission that on the basis of these impacts, and on the basis that the proposed conditions of consent as currently drafted are uncertain and ineffective, including due to enforceability issues, the Project must be refused.

MA McGrath
Nigel Bowen Chambers

15 February 2023