

16 May 2019

Prof Mary O'Kane
Chair of Rix's Creek Coal Mine MOD 10
Independent Planning Commission
Level 3, 201 Elizabeth Street
Sydney, NSW 2100

By email: ipcn@ipcn.nsw.gov.au

Dear Prof O'Kane

Rix's Creek Coal Mine MOD 10 (DA 49/94 MOD10)

1. We act for the Hunter Environment Lobby (**HEL**) in relation to the proposed Rix's Creek Coal Mine Mod 10 (DA 49/94 MOD10) (the **Modification**).
2. We were requested to provide the following information on behalf of our client in light of the requirements of s 4.55(3) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**). Section 4.55(3) of the EPA Act applies to the Modification. However, in our client's view it has not been adequately addressed by the former Department of Planning and Environment (the **Department**) in its assessment of the Modification, as set out in the Department's Assessment Report for the Modification dated April 2019 (**Dept Assessment Report**).
3. We were also requested to provide the following information on behalf of our client in light of the recent decision of the NSW Land and Environment Court (**Court**) in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (**Rocky Hill Decision**), which was handed down on 8 February 2019. In that case, Justice Preston, the Chief Judge of the Court, dismissed an appeal against the Rocky Hill Coal Mine's refusal and determined the mine's application by refusal. The requirements of s 4.55(3) and the application of the Rocky Hill Decision to the Modification are discussed further below.

Legislative framework

4. The Dept Assessment Report states that the Modification application has been lodged under s 4.55(1A) of the EPA Act and in the view of the Department, will be of "*minimal environmental impact*" as required by

s 4.55(1A).¹ Relevantly s 4.55(3) applies to applications lodged under s 4.55(1A) and provides:

3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified. [our emphasis]

5. Section 4.15(1) of the EPA Act provides:

(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
- (iiia) 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
- (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),
- (v) (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. [our emphasis]

6. Accordingly, our client respectfully submits that the IPC is required to carefully consider the Modification against all of the matters identified in s 4.15(1) to first determine whether they are relevant and, if relevant, to consider these matters in determining the Modification.

7. The Dept Assessment Report states that the “*development, as proposed to be modified, would remain substantially the same development as last modified under section 75W.*”² The now repealed s 75W differs significantly to s 4.55. Section 75W did not require a consideration of the matters set out in s 4.15(1) (formerly s 79C(1)). Under s 75W the proponent was required only to comply with the Director-General’s environmental assessment

¹ Dept Assessment Report at p 6.

² Dept Assessment Report at [3.1] on p 6.

requirements.³ Accordingly, the statutory requirements for the determination of the Modification are different to those that applied to the previous modifications considered under s 75W. It is clear that the Department has taken the approach that previous assessments undertaken on air and noise impacts remain relevant and are not required to be updated.⁴ Our client respectfully submits that this approach is incorrect and fails to address the fact that the Modification is to be determined pursuant to a different statutory regime to that which applied to the previous modifications, which were assessed under s 75W. We have summarised below some of the statutory requirements that were not properly addressed by the Department in its assessment of the Modification.

Environmental Planning Instruments

State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)

8. The Dept Assessment Report states that the Department has assessed the Modification against the relevant provisions of the Mining SEPP and that the Department considers the Modification can be undertaken in a manner that is generally consistent with the aims, objectives and provisions of the Mining SEPP.⁵ However, section 5 of the Dept Assessment Report relevantly provides in relation to air quality and noise⁶:
 - a. **Air quality:** The Department stated that there will be no increase in dust-generating activities, accordingly it was noted that previous assessments undertaken for the project remain relevant and there was no need to update previous air quality impact assessments. The Department notes that air quality related conditions of the consent were updated under Modification 8 in 2016.

There is no reference to the provisions of the Mining SEPP in relation to air quality in the Dept Assessment Report. Clause 12AB(4) of the Mining SEPP sets a non-discretionary development standard for cumulative air quality levels. This standard is that the development does not result in a cumulative annual average level greater than 25 µg/m³ of PM₁₀ or 8 µg/m³ of PM_{2.5} for private dwellings. This standard was introduced by the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Air and Noise Impacts) 2018* which did not exist in 2016 when Modification 8 was determined under s 75W. The consolidated conditions for the Rix's Creek Coal Mine relating to air quality are not consistent with the PM₁₀ criteria and do not address PM_{2.5}.

³ For a discussion of s 75W see *Barrick Australia Ltd v Williams* [2009] NSWCA 275, particularly [53].

⁴ Dept Assessment Report at Table 3 on pp 12 and 13.

⁵ Dept Assessment Report at [3.3] on p 8.

⁶ Dept Assessment Report at pp 12 and 13.

pollution at all.⁷ Further, cl 12AB(4) of the Mining SEPP relates to cumulative impacts, and necessarily requires consideration of changes in the receiving environment and not just what is proposed by the Modification. Clearly, the receiving environment has changed significantly since the mine was first approved in 1995.

- b. **Noise:** The Department states that the Modification will not result in any increase in operational noise impacts and accordingly the Department noted that previous assessments undertaken for the project are relevant and do not need to be updated.

There is no reference to the provisions of the Mining SEPP in relation to noise impacts in the Dept Assessment Report. Relevantly clause 12AB(3) of the Mining SEPP was amended by *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Air and Noise Impacts) 2018* to require consideration of cumulative noise levels of the development based on Table 2.2 of the *Noise Policy for Industry 2017*, rather than the acceptable amenity noise levels, as determined in accordance with Table 2.1 of the *Industrial Noise Policy 2000*. However, despite this amendment, no assessment has been undertaken under the *Noise Policy for Industry 2017* in relation to the Modification.

Social Impacts

- 9. The Modification is not supported by a Social Impact Assessment. Further, consideration of social impacts in the Dept Assessment Report is limited to a brief consideration of impacts to jobs (the number of which will be potentially impacted is not quantified) and some limited economic considerations. Further, the Dept Assessment Report does not address the requirements of the *Social Impact Assessment Guideline (Social Guideline)*.
- 10. In the recent Rocky Hill Decision, Preston CJ assessed the Rocky Hill Coal Mine's social impacts using the Social Guideline.⁸ The Social Guideline lists nine key categories in which social impacts may occur: way of life; community; access to and use of infrastructure, services and facilities; culture; health and wellbeing; surroundings; personal and property rights; decision-making systems; and fears and aspirations.⁹ Preston CJ concluded that the significant net negative social impacts of the Rocky Hill Coal Mine were a justification for refusing consent to the mine. He found that the Rocky Hill Coal Mine would have significant social impacts on people's way

⁷ Consolidated Development Consent, Schedule 2 Condition 13B.

⁸ [*Gloucester Resources Limited v Minister for Planning*](#) [2019] NSWLEC 7, Note 1 at [270].

⁹ *Ibid*, referring to p 5 of the Guideline.

of life; community; access to and use of infrastructure, services and facilities; culture; health and wellbeing; surroundings; and fears and aspirations.¹⁰

Social Impacts: Health and wellbeing – noise and air

11. In the Rocky Hill Decision, Preston CJ held that although noise and air quality impacts would comply with the relevant non-discretionary development standards in, respectively, cl 12AB(3) and 12AB(4) of the Mining SEPP, this did not preclude consideration of the social impacts of the mine's noise and air quality impacts.
12. Objections in relation to the Modification raised concerns in relation to impacts on air quality and lack of impact assessment in regards to noise and air quality. In addition to the fact that there was no updated air quality impact assessment or noise impact assessment prepared for the Modification, there was also no consideration of the social impacts, or the perception of residents of the air quality and noise impacts on their health, in the Dept Assessment Report. Accordingly, our client respectfully submits that there has been inadequate assessment of the Modification's social impacts.

Economic Impacts

13. Similarly, the Modification has not been assessed under the *Guidelines for the economic assessment of mining and coal seam gas proposals (December 2015) (Economic Guideline)*. The Economic Guideline was introduced to assist proponents to provide the necessary information to meet some of the requirements of the then s 79C of the EPA Act, particularly in relation to the public interest and the likely impacts of a development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.¹¹
14. Our client respectfully submits that, in light of the significant structural changes to the coal industry in recent years, the IPC's consideration of the Modification would benefit from an economic assessment of the Modification conducted in accordance with the Economic Guideline.

Environmental Impact and Public Interest - Climate Change

Rocky Hill Decision – carbon budget and causation

15. As you would be aware, in the Rocky Hill Decision the Court accepted Professor Will Steffen's expert opinion in relation to the climate change impacts of the Rocky Hill Coal Mine project and found that "*the direct and*

¹⁰ Ibid at [421].

¹¹ <https://www.planning.nsw.gov.au/-/media/Files/DPE/Guidelines/guidelines-for-the-economic-assessment-of-mining-and-coal-seam-gas-proposals-2015-12.pdf?la=en>, page 1 of the Guideline.

*indirect GHG emissions of the Rocky Hill Coal Project will contribute cumulatively to the global total GHG emissions*¹² and “*all anthropogenic GHG emissions contribute to climate change.*”¹³ Significantly, Professor Steffen’s evidence was not contested by the Minister for Planning in the Rocky Hill Decision.

16. Professor Steffen adduced evidence on the carbon budget, which is a commonly used approach to determine the cumulative carbon emissions that can be permitted if nations are to meet the goals of the Paris Agreement, namely to limit global temperature rise to 1.5° to 2° C above pre-industrial levels.¹⁴ Professor Steffen stated that, as at 2018, there were 215 Gt C (billion tonnes of carbon, emitted as CO₂) left before the carbon budget was exhausted. At the present rate of emissions (~10 Gt C per year), that would mean that the carbon budget would be exhausted in 21-22 years.¹⁵ Accordingly, Professor Steffen opined that fossil fuel combustion must be phased out quickly and no new fossil fuel development was consistent with meeting the Paris Agreement, in light of the carbon budget.¹⁶ Preston CJ noted the logic of Professor Steffen’s opinion but considered the better approach was:

[553]... to evaluate the merits of the particular fossil fuel development that is the subject of the development application to be determined. Should this fossil fuel development be approved or refused? Answering this question involves consideration of the GHG emissions of the development and their likely contribution to climate change and its consequences, as well as the other impacts of the development. The consideration can be in absolute terms or relative terms.

[554] In absolute terms, a particular fossil fuel development may itself be a sufficiently large source of GHG emissions that refusal of the development could be seen to make a meaningful contribution to remaining within the carbon budget and achieving the long term temperature goal. In short, refusing larger fossil fuel developments prevents greater increases in GHG emissions than refusing smaller fossil fuel developments.

[555] In relative terms, similar size fossil fuel developments, with similar GHG emissions, may have different environmental, social and economic impacts. Other things being equal, it would be rational to refuse fossil fuel developments with greater environmental, social and economic impacts than fossil fuel developments with lesser environmental, social and economic impacts. To do so not only achieves the goal of not increasing GHG emissions by source, but also achieves the collateral benefit of preventing those greater environmental, social and economic impacts.

17. Moreover, the Court found in relation to causation that:

¹² [Gloucester Resources Limited v Minister for Planning](#) [2019] NSWLEC 7, [515].

¹³ *Ibid* at [514].

¹⁴ Australia is a party to both the Climate Change Convention and the Paris Agreement. Under the Paris Agreement, each party commits to make its contribution to keeping the global average temperature rise to the 1.5-2°C range by reducing their GHG emissions through their Nationally Determined Contributions (**NDC**).

¹⁵ [Gloucester Resources Limited v Minister for Planning](#) [2019] NSWLEC 7 at [443].

¹⁶ [Gloucester Resources Limited v Minister for Planning](#) [2019] NSWLEC 7 at [447].

[525] There is a causal link between the [Rocky Hill Coal Mine] Project's cumulative GHG emissions and climate change and its consequences. The [Rocky Hill Coal Mine] Project's cumulative GHG emissions will contribute to the global total of GHG concentrations in the atmosphere. The global total of GHG concentrations will affect the climate system and cause climate change impacts. The [Rocky Hill Coal Mine] Project's cumulative GHG emissions are therefore likely to contribute to the future changes to the climate system and the impacts of climate change. In this way, the [Rocky Hill Coal Mine] Project is likely to have indirect impacts on the environment, including the climate system, the oceanic and terrestrial environment, and people.

18. As a result, the Court concluded that the Rocky Hill Coal Project's "*poor environmental and social performance in relative terms*" justified its refusal and that included the "*GHG emissions of the [Rocky Hill Coal] Project and their likely contribution to adverse impacts on the climate system, environment and people*".¹⁷
19. We also note that Gloucester Resources Limited (**GRL**) decided not to pursue an appeal in the NSW Court of Appeal against the decision of Preston CJ in the Rocky Hill Decision.
20. In our client's submission, GRL's decision in this regard effectively confirms that:
 - a. The Rocky Hill Decision remains highly persuasive and legally correct; and
 - b. There are no legal impediments to the IPC accepting Preston CJ's approach to assessing a fossil fuel development's environmental impacts, particularly his Honour's approach to assessing GHG emissions and their likely contribution to climate change and considering the "wrong time" basis for refusal.

The Modification

21. As noted above, the cumulative impact of the Rocky Hill Coal Mine's direct and indirect GHG emissions on global climate change were relevant considerations to be taken into account in the Court's decision to refuse development consent for the project. Similarly, our client submits that the cumulative impact of the Modification's direct and indirect GHG emissions on global climate change is a relevant consideration to be taken into account by the IPC when assessing the Modification.
22. The Dept Assessment Report states that the Modification does not involve the intensification, expansion or alteration of the approved mining operations. Accordingly, the Dept Assessment Report states that the Modification is unlikely to increase greenhouse gases beyond those already

¹⁷ Ibid at [556].

approved as the 9Mbcm of material to be moved has already been approved for extraction.¹⁸

23. While this is factually correct, with respect, our client submits that it fails to consider that the Modification seeks a nine month extension and accordingly GHG emissions will continue over a new time period outside of what was originally considered and approved. This is important because, as the Rocky Hill Decision highlights, the scientific evidence relating to climate change impacts and the judicial approach to causation vis-à-vis GHG emissions has significantly evolved since the time of the original approval in 1995. Accordingly, our client respectfully submits that the IPC should consider the indirect and direct GHG emissions of the Modification, relating to the nine month extension period, separately to what was considered in the original approval. Further, in our client's view, that separate consideration should occur in the context of the most up to date scientific evidence on climate change, in particular the global carbon budget, and adopt the assessment approach set out by Preston CJ in the Rocky Hill Decision; which provides a framework for a thoroughly rigorous assessment of a fossil fuel development's GHG emission and climate change impacts.

Rocky Hill Decision rejection of least cost, leakage, substitution arguments etc

24. In relation to climate change impacts of the Rocky Hill Coal Mine project, the Court further relevantly found, amongst other things:

[529] The first reason GRL gave was that the increase in GHG emissions associated with the Project would not necessarily cause the carbon budget to be exceeded, because, as Dr Fisher had argued, reductions in GHG emissions by other sources (such as in the electricity generation and transport sectors) or increases in removals of GHGs by sinks (in the oceans or terrestrial vegetation or soils) could balance the increase in GHG emissions associated with the Project.

[530] I do not accept this reason. It is speculative and hypothetical...

[531] The second reason given by GRL was based on Dr Fisher's argument that "the size of the global abatement task calls for making emissions reductions where they count most and generate the least economic and social harm." (Fisher report [13]). Dr Fisher considered that refusing approval to individual coal mines, such as the Rocky Hill Coal Project, would not achieve this abatement at least cost.

[532] I do not accept this second reason. A consent authority, in determining an application for consent for a coal mine, is not formulating policy as to how best to make emissions reductions to achieve the global abatement task. The consent authority's task is to determine the particular development application and determine whether to grant or refuse consent to the particular development the subject of that development application. Where the development will result in GHG emissions, the consent authority must determine the acceptability of those emissions and the likely impacts on the climate system, the environment and people. The consent authority

¹⁸ Dept Assessment Report, at p 13.

cannot avoid this task by speculating on how to achieve “meaningful emissions reductions from large sources where it is cost-effective and alternative technologies can be brought to bear” (Fisher Report, [13]). Such emissions reductions from other sources are unrelated to the development that is the subject of the development application that the consent authority is required to determine.

...

[534] The third reason GRL advanced for approving the Project was that the GHG emissions of the Project will occur regardless of whether the Project was approved or not, because of market substitution and carbon leakage...

...

[536] I reject this third reason. On carbon leakage, GRL has failed to substantiate, in the evidence before the Court, that this risk of carbon leakage will actually occur if approval for the Rocky Hill Coal Project were not to be granted...

...

[538] The market substitution argument is also flawed. There is no certainty that there will be market substitution by new coking coal mines in India or Indonesia or any other country supplying the coal that would have been produced by the Project...

25. The Rocky Hill Coal Mine proposal was for a coking coal, not a thermal coal, mine.¹⁹ The Rix’s Creek coal mine produces thermal coal and coking coal. The argument that coking coal is not easily substituted was addressed in the Rocky Hill Decision by Preston CJ as follows:

[546] The fourth reason GRL advanced for approving the Project is that the GHG emissions associated with the Project are justifiable. GRL contended that the Project will produce high quality coking coal, not thermal coal, which is needed for the main way of producing steel, by the BOF process; steel is critical to our society; and there are limited substitutes for coking coal in steel production.

[547] I find that GRL overstates this argument. It may be true that currently most of the world’s steel (around 74%) is produced using the BOF process, which depends on coking coal, and although technological innovations might reduce the proportion of steel produced using the BOF process, for the reasons given by Mr Buckley, there is still likely to be demand for coking coal for steel production during the life of the Project.

[548] The current and likely future demand for coking coal for use in steel production can be met, however, by other coking coal mines, both existing and approved, in Australia...

¹⁹ Note 1 at [546].

Public Interest

26. The Dept Assessment Report states that Bloomfield (the proponent for the Modification) submitted an application to the Department for a new State Significant Development Consent (SSD 6300) on 27 October 2015.²⁰ Under the current approval, coal extraction is approved until 24 June 2019.²¹ The Department states that it would be “*unreasonable for Bloomfield to have to cease operations at Rix’s Creek South, while the pending SSD 6300 remains on foot and close to determination*”.²² Further, in its letter referring the Modification to the IPC the Department “*requests the Commission determine the modification as soon as practicable, to avoid any uncertainty or disruption*”. Given SSD 6300 was lodged in 2015, Bloomfield has had more than adequate time to consider what action to take to ensure that there is no disruption to its operations. In our client’s view, it is inappropriate for the Department to focus on potential disruption to mining operations and to urge the IPC to determine the Modification quickly for at least two reasons. First, because the Department’s position is predicated on the assumption that SSD 6300 will be approved. However, this is clearly still an open question, and one that is entirely within the IPC’s remit to answer (as opposed to the Department), at the time a determination of SSD 6300 is made. Second, because a “quick determination” of the Modification would be inappropriate in light of the significant inadequacies in the proponent and Department’s assessment of the Modification, as identified by our client and detailed above.
27. Further, our client respectfully submits that Bloomfield’s history of non-compliance with its approval for the Rix’s Creek Coal Mine is a relevant consideration for the IPC as part of the public interest. As set out in the Response to Submissions dated April 2019, in August 2017 the Department reported that Bloomfield carried out mining operations in breach of its approval, which resulted in Bloomfield entering into an enforceable undertaking with the Secretary of the Department.²³ We are instructed that it may have been Bloomfield’s breaches of its development consent (and the subsequent enforcement action required to be taken by the Department) that, at least in part, may have resulted in any delay in the determination of SSD 6300.

Conclusion

28. The above analysis of the Modification in light of the requirements of s 4.55(3) of the EPA Act suggests that the Department has failed to comply

²⁰ Dept Assessment Report at [1.3] on p 5.

²¹ Ibid at [1.2] on p 4.

²² Dept Assessment Report p14.

²³ Response to Submissions at [5.1] on p 11.

with the requirements of this section and accordingly the impacts of the Modification are uncertain. Our client respectfully submits that on the basis of the information currently available to it, the IPC cannot be satisfied that the risks and impacts of the Modification can be effectively mitigated by the conditions of any consent, such that approval of the Modification is in the public interest. Further, in our client's view, given the lack of certainty of the impacts of the Modification it is difficult to understand how the Department formed the view that the Modification was of "*minimal environmental impact*" for the purposes of s 4.55(1A).

29. Please do not hesitate to contact the solicitor responsible for this matter, Natalie Vella, on ph: (02) [REDACTED] or email [REDACTED]

Yours sincerely,
EDO NSW

A handwritten signature in blue ink, reading "Brendon Robb".

per Natalie Vella
Senior Solicitor

Our Ref: 1926645