

Case Note

Rivers SOS Inc v Minister for Planning [2009]

BACKGROUND

In this case Rivers SOS Inc (an association of 40 Environmental groups and communities across NSW) sought judicial review of a decision of the NSW Minister for Planning to approve the Metropolitan Coal Project near Helensburgh, NSW. The project involved longwall mining under a catchment, including a number of swamps, the Waratah Rivulet and the Woronora Reservoir. The proposal involved extending an existing coal mine and the extraction of 3.2 million tonnes of coal a year for a period of 23 years.

The Minister for Planning directed the Planning Assessment Commission (PAC) to review potential impacts, make recommendations and to hold a public hearing and consider submissions. After the public hearing process the mining company submitted a substantially different plan, which the PAC reviewed and the Minister for Planning approved without a second public hearing or any opportunity for submissions to be made on the new mine plan. Approval was granted subject to a number of conditions designed to prevent, minimise, and/or offset adverse environmental impacts; set standards and performance measures for acceptable environmental performance; require regular monitoring and reporting; and provide for the ongoing environmental management of the project.

Rivers SOS Inc disputed the approval on five grounds:

1. The Minister failed to make a decision to approve or disapprove the Project to the extent that it related to swamps 76, 77 and 92 or, alternatively, invalidly delegated the responsibility for determining that part of the project application to the Director-General. Condition 4 of Schedule 3 of the approval stated that the proponent shall not undermine Swamps 76, 77 and 92 without the written approval of the Director-General. Rivers SOS argued that this condition was fundamental to and could not be severed from the approval and its validity must result in invalidity of the approval;
2. The Minister failed to notify the Sydney Catchment Authority under s 47(3) *Sydney Water Catchment Management Act 1998*;
3. The Minister failed to comply with cl 12 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (Mining SEPP) requiring the consideration of existing and approved uses of land in the vicinity of the development;
4. The Minister failed to adequately identify what would constitute suitable offsets in Condition 6 of Schedule 6 and this left the project without finality and open to potentially significant change;
5. The revised mine plan differed substantially from the plan which had been the subject of public submissions, thereby breaching statutory provisions for a public hearing as well as rules of natural justice.

DECISION

Justice Preston rejected the first claim that the Minister made no decision to approve or purported to delegate the power to approve the project to the extent it related to swamps 76, 77 and 92.

“The “mining area” is defined in the definitions in the approval as “the area outlined with a solid blue line on the figure in Appendix 3”. Appendix 3 is a map of the project layout. The area outlined in blue on the map includes within it the land on which swamps 76, 77 and 92 are located.

Accordingly, the Minister did in fact make a decision to approve the Project including that aspect relating to the undermining of swamps 76, 77 and 92.”

The second claim that the Minister failed to give two separate notices to the Sydney Catchment Authority was rejected. Preston CJ found that the single notice given was sufficient.

In relation to the third claim Preston CJ held that the Mining SEPP did not apply to the Minister’s exercise of the power to approve or disapprove a Part 3A project, therefore it was not necessary for him to consider whether it had been breached. Preston CJ also made a significant finding that the Minister for Planning may approve a Part 3A project that is prohibited by a SEPP, as the Minister may overcome the prohibition by exercising his or her special power to amend the prohibiting SEPP or by recommending to the Governor General the making of another SEPP removing the prohibition or authorising the project regardless of the prohibition.

Justice Preston agreed that Condition 6 of Schedule 6 did not specify offsets but disagreed with the consequences, finding the Minister was determined to deal with impacts firstly through prevention, mitigation and remediation and only using offsets as a last resort. It was held that even if the condition did lack finality it would not render the condition invalid and does not leave this project open to significant change.

On the final ground Preston CJ found there was no statutory obligation on the PAC to hold a public hearing in relation to the revised mine plan, and “no right, interest or legitimate expectation of the applicant in these proceedings was affected by the PAC not conducting a public hearing”. The only rights the applicants had were statutory rights to make submissions. The argument that this entailed a breach of natural justice was also rejected.

IMPLICATIONS

The Court’s decision that there was no error in failing to conduct a second public hearing demonstrates wide discretionary power given to the Minister to approve major projects under Part 3A of the *Environment Planning and Assessment Act 1979*. It indicates that late and substantial changes can be made to projects once the opportunity for community involvement has passed. The decision is also significant in finding that the Minister for Planning may approve a Part 3A project that is prohibited by a SEPP, as the Minister may overcome the prohibition.