

FURTHER AMENDED POINTS OF CLAIM

COURT DETAILS

Court	Land and Environment Court of New South Wales
Registry	225 Macquarie Street, Sydney
Case number	40691 of 2009

TITLE OF PROCEEDINGS

Applicant	Rivers SOS Inc
First Respondent	NSW Minister for Planning
Second Respondent	Helensburgh Coal Pty Limited

FILING DETAILS

Filed by	Rivers SOS Inc
Legal representative	Ian Ratcliff, Environmental Defender's Office
Legal representative reference	12886
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THE APPLICANT CLAIMS THAT:

The parties

- 1 The Applicant is:
 - a. an incorporated association established in 2005 as an alliance of about 40 environmental and community groups across New South Wales who are concerned about the impacts of mining operations on rivers and water. The Applicant brings this action on its own behalf and in the public interest.
 - b. a person entitled to bring proceedings by reason of section 123(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).
- 2 The First Respondent (**the Minister**) is the approval authority under Part 3A of the EP&A Act.
- 3 The Second Respondent, Helensburgh Coal Pty Limited:
 - a. is the proponent of the Metropolitan Coal Project, major project application number MP08_0149 (**Project**); and
 - b. is incorporated under the *Corporations Act 2001* (ACN 086463452);

The land

- 4 The Metropolitan Colliery is located approximately 30 kilometres north of Wollongong on the Woronora Plateau.

- 5 The site of the proposed Project is shown in Figure 2 included in the Director General's Environmental Assessment Report of June 2009 (**the land**). The proposed new mining area is bounded by Garawarra State Conservation Area and the F6 Southern Freeway, to the west by the Woronora Special Area and to the north by the Heathcote National Park.

The development application process

- 6 Metropolitan Coal began extracting coal by underground methods in the 1880s. Longwall mining began in the mid 1990s.
- 7 Until recently, Metropolitan Coal had been operating without the requirement for development consent.
- 8 In May 2005, the *State Environmental Planning Policy (Major Projects) 2005* was gazetted. The SEPP established a five year transition period during which all mines in NSW which did not have existing development consent were required to obtain a project approval under Part 3A.
- 9 On 25 July 2008 the Second Respondent lodged the Part 3A project application seeking approval for existing and proposed long wall mining activities in respect of the land pursuant to section 75J of the *EP&A Act*.
- 10 The Environmental Assessment was publicly exhibited in October and November 2008.
- 11 The Project was referred to the New South Wales Planning Assessment Commission (**PAC**) in November 2008, and the PAC produced a report in May 2009.
- 12 Following the PAC recommendations, the proponent submitted a Preferred Project Report. The original mine plan was revised so that the area proposed for new long wall mines was split in two, purportedly decreasing the likelihood of subsidence impacts on the Waratah Rivulet and the lower stretch of the Eastern Tributary.
- 13 On 22 June 2009, the Minister purported to approve the Project, subject to the conditions set out at in Schedules 2 to 7 to the purported approval (**Approval**).

Ground 1 – Condition 4 of Schedule 3 is beyond power

- 14 Condition 4 of Schedule 3 provides as follows:

The proponent shall not undermine Swamps 76, 77 and 92 without the written approval of the Director-General. In seeking this approval, the Proponent shall submit the following information with the relevant Extraction Plan (see condition 6):

- (a) a comprehensive environmental assessment of the

- potential subsidence impacts and environmental consequences of the proposed Extraction Plan;
 - potential risks of adverse environmental consequences; and
 - options for managing these risks
- (b) a description of the proposed performance measures and indicators for these swamps; and
- (c) a description of the measures that would be implemented to manage the potential environmental consequence of the Extraction Plan on these swamps (to be included in the Biodiversity Management Plan-see condition 6(f)below) and comply with the proposed performance measures and indicators.
- 15 Section 75J(1) of the *EP&A Act* reposes in the Minister alone the power to approve or disapprove the carrying out of the project.
- 16 Section 75J(4) of the *EP&A Act* reposes in the Minister alone the power to approve a project subject to conditions.
- 17 Condition 4 of Schedule 3 is beyond power because it creates a separate and unauthorised process for determining an aspect of the project, contrary to the scheme of Part 3A of the *EP&A Act*, which reposes in the Minister alone the power to approve or disapprove the carrying out of a project.
- 18 In breach of section 75J(1), the Minister has failed to approve or disapprove of the carrying out of the project to the extent that it relates to the undermining of Swamps 76, 77 and 92.
- 19 Alternatively to paragraphs 17 and 18 above, the Minister has invalidly delegated to the Director-General the power to approve or disapprove of the carrying out of the project to the extent that it relates to the undermining of Swamps 76, 77 and 92.
- 20 The Minister thereby failed to properly exercise her power of determination with respect to Condition 4 of Schedule 3.
- 21 Condition 4 of Schedule 3 is inseverable from the balance of the project approval.
- 22 In the premises, the project approval is invalid and of no effect.

Ground 2 – Failure to notify the Sydney Catchment Authority

- 23 Section 47(1) of the *Sydney Water Catchment Management Act 1998 (SWCM Act)* provides that a public agency may not, in relation to land within a special area, exercise functions other than functions under the SWCM Act unless notice is first given to the SCA.
- 24 The Minister is and was a “public agency” within the meaning of s.47 of the SWCM by dint of the definition in s.43 of that Act.
- 25 The land is within a special area, as defined in s.44 of the SWMC Act.

Particulars

- a. The Woronora Catchment Area as proclaimed in *Gazette* No 37 of 21 March 1941.
- 26 In December 2008 the SCA made representations concerning the Project to the following effect:
- (a) there shall be no damage to the SCA's infrastructure;
 - (b) there shall be no permanent reduction in water quantity or quality; and
 - (c) there shall be no adverse environmental consequences of subsidence impacts.
- 27 In March 2009, the SCA repeated those representations and stated that it believed that there was insufficient evidence to demonstrate that mining would not have a measurable effect on water resources.
- 27A On 9 June 2009, the SCA made representations in relation to a draft set of conditions of approval provided by the Department on 5 June 2009.
- 28 On 11 June 2009 the SCA made representations to the effect that the draft approval was not consistent with the PAC recommendations that there should be negligible environmental consequences for the Waratah Rivulet and the Eastern Tributary.
- 29 Each of the matters referred to at paragraphs 26 to 28 above was a representation by SCA to the Minister within the meaning of s.47(2) of the SWCM Act, in respect of the project.
- 30 Section 47(3) of the SWCM Act provides that a public agency may not exercise functions contrary to any such representations unless, before the exercise of the functions, not less than 28 days' notice has been given to the SCA of the functions intended to be exercised.
- 31 The "function intended to be exercised" was in this case the Minister's duty to determine whether to approve or disapprove of the carrying out of the project, pursuant to s.75J(1) of the EPA Act.
- 32 By dint of s.75J(1)(b), the Minister's duty to determine whether to approve or disapprove of the carrying out of the project only arose upon the Director-General giving his report to the Minister, which occurred on about 20 June 2009.

- 33 In the premises, on the proper construction of s.47(3) of the SWCM Act, the Minister's obligation to give 28 days' notice to the SCA of the functions to be exercised only arose on about 20 June 2009.
- 34 The Minister failed to give 28 days' notice to the SCA prior to making her decision to approve the carrying out of the project, on 22 June 2009.
- 35 Condition 1 of Schedule 3 of the project approval set out performance measures which authorise damage from subsidence to occur to first and second order creeks, swamps, the Waratah Rivulet between LW20 and LW24, a substantial portion of the Eastern Tributary and Tributary B.
- 36 Conditions 2 and 6(f) of Schedule 3, and conditions 1 and 6 of Schedule 6 of the project approval assume that there will be breaches of the performance measures;
- 37 The Extraction Plan which must be implemented under condition 6 of Schedule 3 requires effective recovery of the available coal resource which cannot take place without breach of the performance measures.
- 38 The Extraction Plan is not required to ensure that extraction of coal from second workings does not breach the performance measures.
- 39 No adaptive management measures are proposed for LW20 to LW22, to the effect that mining will not be adjusted to ensure that subsidence impacts and effects remain within predicted bounds and the performance measures are met.
- 39A Many of the amendments to the draft conditions proposed by the SCA on 9 June 2009 were not incorporated into the final form of the conditions approved by the Minister on 22 June 2009.
- 40 By reason of the facts and matters pleaded at paragraphs ~~363~~ to 39A7 above, in approving the carrying out of the project, the Minister exercised her function under s.75J(1) of the EPA Act contrary to the representations made by the SCA.
- 41 In breach of section 47(3) of the SWCM Act, the Minister failed to give 28 days' notice to the SCA prior to making her decision to approve the carrying out of the project.
- 42 In the premises, the project approval is invalid and of no effect.

Ground 3 – Breach of clause 12 of the Mining SEPP

- 43 Clause 12 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)* required the Minister,

before determining an application for consent for development for the purposes of mining, to consider existing and approved uses of land in the vicinity of the development, whether or not the development is likely to have a significant impact on uses that are likely to be the preferred uses of land, and any incompatibility of the development with existing, approved or likely preferred uses, and to evaluate and compare respective public benefits of the development and existing, approved or likely preferred uses.

44 Clause 12 of the Mining SEPP applied to the Minister's decision under s.75J(1) by dint of s.75R(2)(b) and/or (3) of the EPA Act.

45 In breach of cl.12 of the Mining SEPP, in making the decision to approve the carrying out of the project, the Minister failed to:

- a form an opinion as to what were likely to be the preferred uses of land in the vicinity of the development, having regard to land use trends;
- b consider 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, were likely to be the preferred uses of land in the vicinity of the development,
- c consider any ways in which the development might be incompatible with any of those existing, approved or likely preferred uses; and
- d b evaluate and compare the respective public benefits of the development and the existing, approved or likely preferred uses; and
- e evaluate any measures proposed by the applicant (proponent) to avoid or minimise any such incompatibility.

46 In the premises, the project approval is invalid and of no effect.

Ground 4 – Minister failed to determine the project

47 Condition 6 of Schedule 6 provides as follows:

If the Proponent exceeds the performance measures in Table 1 of this approval, and either

- (a) the contingency measures implemented by the Proponent have failed to remediate the impact; or
- (b) the Director-General determines that it is not reasonable or feasible to remediate the impact,

then the Proponent shall provide a suitable offset to compensate for the impact to the satisfaction of the Director-General.

48 The project approval lacks finality in that it fails to deal adequately with the issue of the mitigation of impacts of the project on the Woronora catchment.

- 49 Alternatively, the Minister failed to determine the project application in that the project approval fails to deal adequately with the issue of the mitigation of impacts of the project on the Woronora catchment.
- 50 The effect of Condition 6 of Schedule 6 is to leave open the possibility that the project as approved will be a significantly different development from that in respect of which application was made.
- 51 Condition 6 of Schedule 6 is inseverable from the balance of the project approval.
- 52 In the premises, the project approval is invalid and of no effect.

Ground 5

- 53 Clause 268R(1)(a) of the *Environmental Planning and Assessment Regulation 2000* required the PAC to conduct a public hearing if requested to do so by the Minister.
- 54 On 14 November 2008 the Minister issued a Direction to the PAC in respect of the Metropolitan Coal Project (**Direction**). The Minister requested the PAC to:
- (a) carry out a review of the potential subsidence related impacts of the Metropolitan Coal Project on the values of Sydney's drinking water catchment, and in particular its potential impact on the Waratah Rivulet and Woronora Reservoir, taking into consideration the recommendations of the Southern Coalfield Inquiry;
 - (b) advise on the significance and acceptability of these potential impacts, and to recommend appropriate measures to avoid, minimise, or offset these impacts; and
 - (c) identify and comment on any other significant issues raised in submissions regarding the Metropolitan Coal Project during the hearings.
- 55 The Minister also directed the PAC to conduct a public hearing as part of the review, in the Helensburgh area, commencing after 16 February 2009, and to provide its final report by 16 March 2009.
- 56 The PAC received a number of written submissions relating to the project from members of the public, and also from Government agencies.
- 57 The PAC held public hearings on 11 and 12 March 2009.
- 58 A preferred project report (**PPR**) was requested by the Department on 20 April 2009.

- 59 The PPR was submitted by the second respondent to the Department on 23 April 2009.
- 60 The PPR contained a new mine plan, which substantially revised the version originally prepared and exhibited.
- 61 The subsidence impacts of the new mine plan contained within the PPR are substantial and quite different to the impacts associated with the original version of the project.
- 62 The PPR was provided to the PAC on 28 April 2009 and is annexed to the PAC report dated 22 May 2009.
- 63 The PAC was advised on 18 May 2009 that a revised PPR was to be provided shortly to the Department.
- 64 The revised PPR was provided to the Department on 21 May 2009 (**revised PPR**).
- 65 The PAC provided its report to the Minister in May 2009.
- 66 The revised PPR was considered by the Director General in his Environmental Assessment Report dated June 2009.
- 67 The PAC failed to hold a public hearing on the revised PPR that was ultimately the subject of the project approval by the Minister, in breach of clause 268R(1)(a) of the *Environmental Planning and Assessment Regulation 2000*.
- 68 Further or alternatively, there was no opportunity for members of the public nor government agencies to make submissions or to appear at a public hearing in relation to either the PPR or the revised PPR, as part of the PAC review or otherwise, thus giving rise to a breach of the rules of natural justice.
- 69 The PAC report is invalid because it failed to report on submissions and a public hearing in relation to the revised PPR.
- 70 Section 75(2)(c) requires that a copy of the PAC report is to be included in the Director General's report.
- 71 The Minister considered the PAC report in making the determination to approve the carrying out of the project.
- 72 As a consequence of the invalidity of the PAC report, the Minister's decision to approve the carrying out of the project is also invalid.
- 73 In the premises, the project approval is invalid and of no effect.

Relief

74 The applicant seeks the relief claimed in the Summons.

NOTICE OF AMENDMENT: UCPR 19.5

- 1 This document is amended pursuant to leave granted by the court on 11 November 2009.
- 2 The amendments are indicated as follows:
 - (a) Omitted information is struck through.
 - (b) New information is in underlined text.

SIGNATURE

Signature of legal representative

Capacity

Solicitor for the Applicant

Date of signature