

Climate-ready planning laws for NSW

Rocky Hill and beyond

Implications for current projects



Environmental Defenders Office NSW

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NSW



**DEFENDING THE ENVIRONMENT
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Introduction

In March 2019, EDO NSW released *Climate-ready planning law for NSW – Rocky Hill and beyond*, a report that recommended changes to the NSW planning system to ensure we reduce further contributions to global greenhouse gas (GHG) emissions, and make preparations to live with the current and projected impacts of climate change. **Addendum - Rocky Hill and beyond** builds upon this work and discusses some key factors for consideration in decisions being made about new fossil fuel developments in NSW today.

In February 2019, the NSW Land and Environment Court (LEC) handed down its decision in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (the **Rocky Hill case**). In that decision, the LEC dismissed the proponent's appeal of the decision to refuse the proposed Rocky Hill Coal Project (Project) in the Gloucester Valley on the mid-north coast of NSW, in part because of the Project's impact on climate change.

The decision in the *Rocky Hill* case was groundbreaking, but not radical. The LEC recognised that in undertaking its task it was necessary to properly consider a range of issues. These included the environmental impacts of the project on the natural and built environment, which includes both direct and indirect environmental impacts (including indirect downstream (Scope 3) GHG emissions), the public interest, and the principles of ecologically sustainable development (ESD), particularly the precautionary principle and the principle of intergenerational equity.

The LEC relied on expert scientific evidence on the impacts of climate change. This evidence was undisputed. The Court also relied on the global commitment entrenched in the Paris Agreement in holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels. The Court accepted the application of the carbon budget approach to consider the emissions of the Project in the context of a set limit on the GHG emissions that can be released in order to meet the targets set by the Paris Agreement.

Ultimately, the Court found it was the “wrong time” for the project because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when an urgent, rapid

and deep decrease in GHG emissions is needed in order to meet the Paris Agreement targets. Significantly, the case provides an example of best practice decision-making in relation to GHG emissions.

The *Rocky Hill* case also brought to light the limited attention given to GHG emissions during the assessment process for the Project (i.e. those assessments undertaken by the proponent, the NSW Government and the former Planning Assessment Commission). This demonstrates that the NSW planning system does not provide clear guidance to ensure that decisions about fossil fuel developments are consistent with a safe and stable climate system.

We believe that significant planning reforms are crucial in order to provide certainty and consistency for investors, proponents and the community. The reforms would also ensure that decision makers act consistently with the need to limit the increase in global average temperature to well below 2°C above pre-industrial levels.

This paper expands on those considerations and examines the relevance of Nationally Determined Contributions (NDCs) under the Paris Agreement, the carbon budget and emission reduction technologies (such as offsets) in light of the *Rocky Hill* case for decisions being made today.

The Paris Agreement and Nationally Determined Contributions

Local decision making about fossil fuel developments occurs in the context of the global commitment to respond to climate change. Australia is a signatory to the Paris Agreement, which has at its heart a pledge of:

Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.¹

As at August 2019, 185 of 197 signatories, including Australia, have ratified the Paris Agreement.² Each signatory articulates its commitment to achieving the

¹ Paris Agreement, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) art 2(1)(a).

² United Nations, 'Paris Agreement - Status of Ratification,' *United Nations Climate Change* (Web Page) <<https://unfccc.int/process/the-paris-agreement/status-of-ratification>>.

Agreement through NDCs. Signatories are then expected to implement domestic mitigation measures that will achieve the objectives of their NDCs.³ Australia's NDC is to "implement an economy-wide target to reduce greenhouse gas emissions by 26 to 28 per cent below 2005 levels by 2030".⁴

Achieving the Paris Agreement targets means meeting the goal of limiting global warming to 1.5-2°C above pre-industrial levels. However, it is important to note that meeting current NDCs will **not** achieve the Paris Agreement targets. Carbon Action Tracker⁵ has calculated that if all Paris Agreement signatories meet their current NDCs, and governments around the world implement their current unconditional pledges and targets to reduce emissions, globally we are on track to reach warming levels of 2.7-3.0°C above pre-industrial levels.⁶ Locally, the Climate Change Authority has identified that Australia's current NDC does not commit Australia to achieving its fair share of global emission reductions.⁷

The need for decision makers to consider the GHG impacts of local projects on global climate change was confirmed in the *Rocky Hill* case. The LEC held that a consent authority is required to consider the "environmental impacts of the project on the natural and built environments", which include "both direct and indirect environmental impacts".⁸ This includes Scope 3 emissions.⁹ The LEC held that consideration of Scope 3 emissions was required by clause 14(2) of the Mining SEPP¹⁰ and clause 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.¹¹ Moreover, the LEC found that consideration of Scope 3 emissions was consistent with the public interest and the principles of ESD, particularly the precautionary principle and the principle of intergenerational equity.¹²

The LEC also referred to the aims of the applicable Local Environmental Plan, particularly "to embrace and promote the principles of ecologically sustainable development" and "to recognise the cumulative impacts of climate change".¹³

The LEC recognised that there was a "causal link" between the Project's cumulative GHG emissions and climate change impacts and held:

*the exploitation and burning of a new fossil fuel reserve, which will increase GHG emissions, cannot assist in achieving the rapid and deep reductions in GHG emissions that are necessary in order to achieve "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (Article 4(1) of the Paris Agreement) or the long term temperature goal of limiting the increase in global average temperature to between 1.5°C and 2°C above pre-industrial levels (Article 2 of the Paris Agreement).*¹⁴

Therefore, it would be wrong for local decision makers to assume that the local and global environmental harm caused by burning Australian mined fossil fuels in other countries, which are signatories to the Paris Agreement (i.e. the harm caused by Australia's Scope 3 emissions), will be appropriately limited by those countries' current NDCs. Instead, local decision makers should consider the harm to NSW and Australia caused by increasing global GHG emissions, wherever those emissions are generated under current commitments to curb GHG emissions. Given that current NDCs will not avoid dangerous climate change, the only way that decision makers can be sure that the climate impacts of local fossil fuel extraction projects will be avoided consistently with meeting the Paris Agreement targets is to prevent or offset GHG emissions from those fossil fuel developments that will contribute to driving warming beyond 1.5-2°C above pre-industrial levels.

The role of the carbon budget

In the *Rocky Hill* case, the LEC used the "carbon budget" to assess the impacts of the Project's Scope 3 emissions. The carbon budget is an accepted tool for calculating the cumulative amount of GHG emissions that can be released into the atmosphere over a certain period before warming levels reach a defined threshold,

3 United Nations, 'Nationally Determined Contributions (NDCs),' *United Nations Climate Change* (Web Page) <<https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs>>.

4 Australia, 'Australia's Intended Nationally Determined Contribution to a new Climate Change Agreement – August 2015,' *UN Framework Convention on Climate Change INDC* (Web Page) <<https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Australia/1/Australias%20Intended%20Nationally%20Determined%20Contribution%20to%20a%20new%20Climate%20Change%20Agreement%20-%20August%202015.pdf>>.

5 Climate Action Tracker, 'Temperatures,' *Climate Action Tracker* (Web Page) <<https://climateactiontracker.org/global/temperatures/>>.

6 Based on a 66% probability of success.

7 Climate Change Authority, *Final Report on Australia's Future Emissions Reduction Targets, 2 July 2015* (Final Report, July 2015) available at <http://climatechangeauthority.gov.au/sites/prod.climatechangeauthority.gov.au/files/Final-report-Australias-future-emissions-reduction-targets.pdf>.

8 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [494].

9 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [428].

10 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [491].

11 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [494].

12 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [488], [498].

13 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [493].

14 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [527].

such as the Paris Agreement targets of 1.5°C or 2°C. McGlade and Ekins¹⁵ have estimated that based on a 50% probability of meeting a 2°C temperature target, 62% of the world’s existing fossil fuel reserves¹⁶ need to be left in the ground, unburned. When McGlade and Ekins considered coal, oil and gas separately, they calculated that 88% of global coal reserves are unburnable. In order to meet the 2°C target, over 90% of Australia’s existing coal reserves cannot be burned.¹⁷

In our view, the *Rocky Hill* case provides a best practice example of how the global carbon budget can be used in local decision making about fossil fuel developments. In evaluating the direct and indirect environmental impacts of an individual fossil fuel development, including the GHG emissions of a development and its likely contribution to global climate change, the LEC set out an approach in “absolute” or “relative” terms:¹⁸

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.

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.

The LEC evaluated the Project’s climate impacts in relative terms. The LEC refused the Project on the basis of its significant and unacceptable planning, visual and social impacts, but also found that the GHG emissions of the Project and their likely adverse impacts on the climate system, environment and people added a further reason for refusal.¹⁹

¹⁵ Christopher McGlade and Paul Ekins, ‘The geographical distribution of fossil fuels unused when limiting global warming to 2°C’ (2015) 517 *Nature* 187-190.

¹⁶ McGlade and Elkin define reserves as “a subset of resources that are defined to be recoverable under current economic conditions and have a specific probability of being produced”: *Ibid* 188.

¹⁷ *Ibid* 189.

¹⁸ *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [553]-[555].

¹⁹ *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [556].



This ultimately led to the formulation of the LEC’s “wrong time” basis for refusal, which was articulated in the penultimate paragraph of the *Rocky Hill* judgment:²⁰

In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people’s homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused.

The “wrong time” basis for refusal effectively requires proponents to demonstrate why the fossil fuel reserves relevant to their project should be allowed to be exploited

²⁰ *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [699].

and burned, over and above other projects, at a time when a rapid and deep reduction in GHG emissions is needed to stay within the global carbon budget, and avoid dangerous climate change. The “wrong time” basis for refusal is particularly relevant for local decision-making given evidence that predicted GHG emissions from existing (including approved but not yet constructed) fossil fuel developments will already set us on course to exceed the carbon budget.²¹

Decision makers today need to consider how proposed new fossil fuel developments will fit within a carbon budget that limits warming to 1.5-2°C above pre-industrial levels.

The use of emission reduction technologies

In the *Rocky Hill* case, the LEC identified that one way that new fossil fuel developments could address their carbon emissions is by “*deploying emission reduction technologies, such as carbon capture and storage, or offsetting the GHG emissions of the development*”.²² However, in the absence of a price on carbon, technologies such as carbon capture and storage (CCS) or negative emission technology have not come online at the scale required, and this is unlikely to change in the absence of further policy change.²³ Furthermore, not all offsets are created equal.

The Climate Council report *Land Carbon: No Substitute for Action on Fossil Fuels*²⁴ identified significant concerns with offsetting carbon emissions produced by fossil fuels with what they call “land carbon” offsets. Land carbon offsets can include avoiding clearing old growth vegetation; protecting and increasing regrowth; increasing soil carbon; and protecting carbon stored in coastal ecosystems. Land carbon offsets operate within the “active” carbon cycle – this is carbon that moves between the land, ocean and atmosphere. While land carbon can be increased, it is vulnerable to loss from activities such as bushfires, droughts, insect attacks and heatwaves, all of

which can release significant amounts of land carbon into the atmosphere, returning it to the ‘active’ carbon cycle.²⁵

In contrast, carbon in fossil fuels has been locked away for millions of years. Therefore, burning fossil fuels and releasing carbon dioxide to the atmosphere introduces a store of carbon that is additional to the current ‘active’ carbon cycle. While the land and ocean will absorb some of this extra carbon, almost half of the carbon dioxide emitted from fossil fuel combustion remains in the atmosphere, driving global warming.²⁶ According to the Climate Council report, current annual global carbon emissions from fossil fuels are ten times greater than the annual amount of carbon that could be stored by sustainable land carbon mitigation methods.²⁷

In light of this information, GHG emissions, their likely contribution to climate change, and the ability to meaningfully store or offset them must be key relevant considerations in any assessment of a fossil fuel development.

Rocky Hill as persuasive authority for future decision making

The *Rocky Hill* case was a merits appeal in the LEC’s class 1 jurisdiction, which involved the LEC substituting its decision in place of that of the original decision maker, the then Planning Assessment Commission (now called the Independent Planning Commission (IPC)).²⁸ As a merits appeal, the *Rocky Hill* case was an exercise of administrative power and not judicial power.²⁹ Such decisions do not create legal “precedent” or “binding authority”, but can still be “authoritative and persuasive”³⁰ for future decision makers.

In the LEC, decisions in the class 1 jurisdiction often refer to other merits appeal decisions, despite not being legally bound by them.³¹ Preston CJ has stated that:³²

25 *Land carbon: no substitute for action on fossil fuels*, p 12-15.

26 *Land carbon: no substitute for action on fossil fuels*, p 11.

27 *Land carbon: no substitute for action on fossil fuels*, p 40.

28 *Land and Environment Court Act 1979* (NSW), s 39(2); *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [7].

29 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; [1979] FCA 39.

30 Roger Douglas et al, *Douglas and Jones’s Administrative Law* (2018), The Federation Press: Sydney, p. 276, see also See, for e.g., *Thorpe v Commissioner of Taxation* [2014] AATA 210, [123].

31 See, for example *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7; *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48.

32 Hon Justice Brian J Preston SC, ‘Characteristics of successful environmental courts and tribunals’, Presentation by the Hon Justice Brian J Preston SC to the Eco Forum Global Annual Conference Guiyang 2013: The 3rd Environmental Justice Seminar, 19-21 July 2013, <<http://www.lec.justice.nsw.gov.au/Documents/characteristics%20of%20successful%20ects%20-july%202013.pdf>>, pp. 48-49.

21 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [527], [697], [699].

22 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [530].

23 For example the International Energy Agency has said “*With only two large-scale CCUS [Carbon Capture, Utilization, and Storage] power projects in operation at the end of 2018 and a combined capture capacity of 2.4 million tonnes of CO₂ (MtCO₂) per year, CCUS in power remains well off track to reach the 2030 SDS [sustainable development scenario] level of 350 MtCO₂ per year. As CCUS applied to power is at an early stage of commercialisation, securing investments will require complementary and targeted policy measures such as tax credits or grant funding*”. Available at: <https://www.iea.org/tcep/power/ccus/>.

24 Steffen, W., Fenwick, J. and Rice, M. (2016) *Land carbon: no substitute for action on fossil fuels* Climate Council of Australia. Available at: <https://www.climatecouncil.org.au/resources/land-carbon-report/>.

ECTs [environmental courts and tribunals] undertaking merits review can add value to administrative decision-making by extrapolating principles from the cases that come before them and publicising these to the target audience, who can apply them in future administrative decision-making.

The desire for consistency in administrative decision-making,³³ not just on review but also by primary decision makers such as the IPC, is a significant justification for the merits review process – what has been described as its “normative goal”.³⁴ In order for the consistency to be achieved, primary decision makers (such as the IPC) should be able to take into account decisions of merits review bodies (such as the LEC in its class 1 jurisdiction) and apply them where possible so as to achieve consistent decision making.³⁵ This, of course, does not detract from considering cases on their merits, but encourages treating like cases alike, particularly at the primary decision-making level, which is where the IPC is located.

Accordingly, the *Rocky Hill* case can be appropriately considered a highly persuasive case for primary decision makers such as the IPC, as well as merits review tribunals, to take into account in their determinations regarding future fossil fuel developments.

Conclusion

The *Rocky Hill* case provided the LEC with the opportunity to deeply examine issues relating to the assessment of the impacts of GHG emissions from fossil fuel developments on the climate, environment and people. Although the *Rocky Hill* case is not binding authority, it is persuasive authority. The merits review process allowed a detailed and thorough examination of the scientific method of assessing GHG emissions within the context of limiting warming in line with the Paris Agreement. This consideration led the LEC to form the view that it was the “wrong time” for the Project because of its GHG emissions.

The approach applied in the Rocky Hill case should be highly persuasive for decision makers tasked with assessing the impacts of GHG emissions of other fossil fuel developments in the future.

While the LEC did infer that that one way that new fossil fuel developments could address their carbon emissions is by deploying emission reduction technologies, such as CCS, or offsetting the GHG emissions of the development, there are serious concerns that the technology needed to deliver CCS is not on track to provide the necessary carbon capture, and existing offset approaches may not provide reliable and equivalent offsetting options for GHG emissions.

This creates a significant risk that deferring decisions on whether further GHG emissions will be appropriately mitigated, such as by approving new fossil fuel projects in reliance on CCS, will not achieve the Paris Agreement targets and avoid dangerous climate change. The problem is compounded by the fact that even if all countries meet their current NDCs, globally we are on track to reach warming levels of 2.7-3.0°C above pre-industrial levels. This reinforces the need for local decision makers to consider the environmental harm that will arise from increasing global GHG emissions as a result of individual projects, wherever those emissions are generated.

In order to provide greater certainty and consistency for investors, proponents and the community, and to compel decision makers to adopt the scientific approaches applied in the *Rocky Hill* case, the proposals for reform recommended in the *Climate-ready planning law for NSW – Rocky Hill and beyond* report should be enacted to ensure decision makers make decisions consistent with keeping the increase in global average temperature to well below 2°C above pre-industrial levels.

Until such reforms are enacted, a comprehensive and robust merits assessment of any proposed new fossil fuel developments requires appropriate consideration of the GHG emissions of the proposal, including the factors discussed in this paper.

³³ See *Segal v Waverley Council* (2005) 64 NSWLR 177; [2005] NSWCA 310, in which the Court of Appeal stated that although planning principles do not bind the LEC to reach the same outcome on similar cases, “consistency in the application of planning principles is, clearly, a desirable objective”: [96].

³⁴ See, for e.g. Gabriel Fleming, ‘Administrative Review and the “Normative” Goal – Is there anybody out there?’ (2000) 28 *Federal Law Review* 61; Administrative Review Council, ‘Better Decisions: Review of Commonwealth Merits Review Tribunals’ (1995), Chapter 6.

³⁵ Administrative Review Council, ‘Better Decisions: Review of Commonwealth Merits Review Tribunals’ (1995), Chapter 6.

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