



FILED ON
31 AUG 2023

SUMMONS (JUDICIAL REVIEW)

COURT DETAILS

Court Land and Environment Court of New South Wales
Division Class 4
Registry Land and Environment Court Sydney
Case number 2023 / 278997

TITLE OF PROCEEDINGS

Applicant **Maules Creek Community Council Incorporated (INC9894709)**
First Respondent **Environment Protection Authority (ABN 43 692 285 758)**
Second Respondent **Maules Creek Coal Pty Ltd (ACN 140 533 875)**

FILING DETAILS

Filed for **Maules Creek Community Council Incorporated (INC 9894709)**
Filed in relation to Whole decision
Legal representative Elaine Johnson, Environmental Defender's Office Ltd
Legal representative reference S5337/5338
Contact name and telephone Elaine Johnson , Anita O'Hart (02) 9262 6989
Contact email elaine.johnson@edo.org.au; anita.ohart@edo.org.au.

HEARING DETAILS

This summons is listed at

29 SEP 2023

at 9:15am

LAND AND ENVIRONMENT COURT OF NSW
225 Macquarie Street
SYDNEY NSW 2000

TYPE OF CLAIM

Administrative Law

ORDERS SOUGHT

- 1 A declaration that the review dated 2 June 2023 of Environment Protection Licence no 20221 performed under section 78 of the *Protection of the Environment Operations Act 1997* by the Environment Protection Authority (EPA) is invalid.
- 2 An order in the nature of certiorari setting aside the Decision.
- 3 Costs
- 4 Interest on costs

A copy of this document
must be served

8 SEP 2023

by.....

- 5 Such further or other order as the Court considers appropriate.

GROUNDS

- 1 The Applicant is the Maules Creek Community Council (MCCC) incorporated under the *Associations Incorporations Act 2009*, incorporation no INC9894709. MCCC was formed in 2010 to address concerns of residents regarding the developments in the Leard State Forest and surrounding farmlands, near Narrabri, including proposals for new and expanded open-cut coal mines.
- 2 One of these mines was the Maules Creek Coal mine ('the mine') which is an open-cut mine located in the Leard State Forest near the town of Maules Creek, between Boggabri and Narrabri that is operated by Maules Creek Coal Pty Ltd (MCCPL). It has been in operation since 2015, running 24 hours per day 7 days a week. It produces on average 12 million tonnes of coal per annum.

The mine, the EPA and the Environment Protection Licence

- 3 The mine was granted project approval on 23 October 2012 by the Planning Assessment Commission (PAC) under s75J of the *Environmental Planning and Assessment Act 1979* (EP&A Act). Subsequently the Environment Protection Licence No.20221 (the EPL) was issued by the EPA on 2 May 2013 under the *Protection of Environment Operations Act 1997* (POEO Act).
- 4 The EPA is established under the *Protection of Environment Administration Act 1997*. Its objectives are:
- (a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development and
 - (b) to reduce the risks to human health and prevent the degradation of the environment.
- 5 Environment Protection Licences are reviewed every 5 years, as required by section 78 of the POEO Act. The EPL review for the Maules Creek Coal mine was due on 2 May 2023. A public notice about the review was published on the EPA website in January 2023 outlining all licences to be reviewed in the first half of 2023.

Evidence of the decision

- 6 On 2 June 2023, the EPA conducted a review of the EPL. The responsible officer completed a four-page checklist entitled "Licence Review Record". The form included the following comments
- (i) *"Have submissions and any issues outstanding from other EPA actions been considered? Blast fume incident currently before the Land and Environment Court"*
 - (ii) *"Has section 45 of the POEO Act been considered, as appropriate? Yes. Conditions on the license address Section 45 considerations"*
- 7 The review was then submitted to the relevant approving officer through the EPA's licensing system known as PALMS, who approved and completed the review on 5 June 2023.

Pollutants produced by the mine

- 8 Mining operations on the site involve coal works that include drilling, blasting, crushing, grinding or separating, hauling, collection and transportation of coal. The EPL licences 5 million tonnes of coal-handling works, 2 million tonnes of processing capacity and 5 million tonnes of mining production capacity.
- 9 As a result, the mine produces a number of air pollutants that cause emissions into the air, namely:
- a. Metals and metalloids
 - b. Nitrogen oxides (NO_x), mostly comprising nitrogen dioxide (NO₂) and nitric oxide (NO)
 - c. Particulate matter including PM_{2.5} and PM₁₀
 - d. Sulphur dioxide (SO₂)
 - e. Carbon monoxide (CO)
 - f. Ozone (O₃), arising from secondary atmospheric reactions with volatile organic compounds (VOCs) emitted from coal mining
- 10 Metals and metalloids can be produced during coal mining including zinc, chromium, cadmium, mercury, nickel, lead, copper, arsenic and selenium. These toxicants from mining can be released into the atmosphere and return to the surface and enter water bodies. Metals and metalloids can lower energy levels and damage the functioning of the brain and nervous system, kidney, liver, blood

- composition and other organs. Several (e.g. arsenic, cadmium and nickel) are known to be cancer causing.
- 11 Nitrogen oxides (NO_x) are a mixture of gases that are composed of nitrogen and oxygen. Low levels of NO_x can irritate eyes, nose, throat and lungs, possibly leading to coughing, shortness of breath, tiredness and nausea. Breathing high levels of NO_x can cause rapid burning, spasms and swelling of tissues in the throat and upper respiratory tract, reduced oxygenation of tissues, a build-up of fluid in the lungs (up to 1–2 days after exposure), and maybe even death. Nitrogen dioxide (NO₂) is also known to aggravate asthma.
 - 12 Particulate matter describes small solid and liquid particles suspended in the air which can be made up of variety of components including nitrates, sulphates, organic chemicals (VOCs, etc.), metals, soil or dust particles and allergens. PM₁₀ are small enough to pass through the throat and nose and enter the lungs. Once inhaled, these particles can affect the heart and lungs and cause serious health effects. PM_{2.5} are so small they can get deep into the lungs and into the bloodstream. There is sufficient evidence that exposure to PM_{2.5} over long periods can cause adverse health effects.
 - 13 Studies have shown association between exposure to particles and increased hospital admissions, as well as death from heart or lung disease. There is no evidence of a threshold below which exposure to particulate matter does not cause any health effects. Short-term exposure can lead to irritated eyes, nose and throat, worsening asthma and lung disease, chronic bronchitis, heart attacks and irregular heartbeat, increase in hospital admissions and premature death due to diseases of respiratory and cardiovascular systems. Long-term exposure can lead to reduced lung function, development of cardiovascular and respiratory diseases, increased rate of disease progression and reduction in life expectancy.
 - 14 Sulphur dioxide (SO₂) is produced from burning fuel with a high sulphur content, including through heavy equipment that uses diesel. SO₂ affects the respiratory system, particularly lung function, and can irritate the eyes. SO₂ irritates the respiratory tract and increases risk of tract infections. It causes coughing, mucus secretion and aggravates conditions such as asthma and chronic bronchitis.
 - 15 Carbon monoxide (CO) inhaled at low levels can lead to headache, dizziness, light-headedness and fatigue. Long-term (chronic) exposure to CO at low levels can cause heart disease and damage to the nervous system.

- 16 Ozone (O₃) irritates and inflames eyes, nose, throat and lower airways leading to coughing, sore throat and congestion of the respiratory system. Prolonged exposure can cause reduced lung function and exacerbation of asthma and chronic respiratory diseases.

Greenhouse gases produced by the mine

- 17 The mine also produces other pollutants, including greenhouse gas emissions (GHGs) namely:
- Carbon dioxide (CO₂)
 - Methane (CH₄)
 - Nitrous oxide (N₂O)
- 18 The mine produces carbon dioxide at the mine site during the mining of the coal. Nitrous oxides can be released from coal mining operations by combustion of coal on site, use of internal combustion engines in stationary plant or mine vehicles and potentially from soils in the removal of overburden. Methane is released from the coal and rock strata during mining activities.
- 19 Emissions of GHGs into the atmosphere increases the amount of heat being trapped in the Earth System, which leads to global warming and anthropogenic climate change.
- 20 Carbon dioxide, methane and nitrous oxide are greenhouse gases that contribute to anthropogenic climate change and global warming. In order to take into account the global warming potential of each of these gases, they are assigned a global warming potential (GWP) relative to warming potential of CO₂. CO₂ has a global warming potential of 1 regardless of the time period used.
- 21 Over a 100-year period, CH₄ has a global warming potential of 28; over a 20-year year period it has a GWP of 86. Over a 100-year period N₂O has a global warming potential of 273.
- 22 Fossil fuel developments (coal, gas and oil) are a major driver of GHG emissions. GHG emissions in the atmosphere cause impacts to the NSW environment. In NSW in the past three years, GHGs in the atmosphere have caused physical impacts, including increased temperatures and extreme heatwaves, increased bushfire activity and poor air quality, record low rainfall and abrupt changes to heavy rainfall, and in 2022 persistent intense rainfall in Sydney and along the NSW coast and inland causing widespread flash flooding and major riverine flooding. This has caused consequential economic and social impacts including impacts to

human health and wellbeing. Recognising the risks of continuing to emit greenhouse gases unchecked are too high to accept, governments around the world including Australia, have agreed under the Paris Agreement to 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.

- 23 The world is currently not on track to meet the Paris Agreement goals, and urgent action to reduce sources of emissions is now required at all levels of government.

Chapter 3 of the POEO Act

- 24 EPLs may be issued and otherwise dealt with in accordance with Chapter 3 of the POEO Act: s 42.
- 25 The decisions that fall under chapter 3 include the approval or refusal to issue, vary, transfer, surrender EPLs, as well as reviews of EPLs and decisions to impose conditions, suspend or revoke licences. The statutory review under s 78 every 5 years is mandatory. Upon review, the EPA has the discretion to deal with the licence in various ways as provided by Chapter 3 such as deciding to vary the licence by imposing additional conditions, or amending the existing conditions or suspending or revoking a licence.
- 26 Section 78(1) states:
- The appropriate regulatory review is required to review each licence at intervals not exceeding 5 years after the issue of the licence.
- 27 Section 45 is headed "**Matters to be taken into consideration in licensing functions**". The chapter states:
- "In exercising its functions under this Chapter, the appropriate regulatory authority is required to take into consideration such of the following matters as are of relevance ..."
- 28 The Dictionary defines 'function' as including a 'power, authority or duty'. It defines 'exercise a function' as including 'perform a duty'.
- 29 The s 78 duty to review constitutes a 'function' exercised by the EPA pursuant to Chapter 3. Therefore in performing a statutory review of an EPL pursuant to s 78, the EPA must take into consideration the matters listed in s 45 as are of relevance.

Ground 1

- 30 In performing its review function under s 78 of the POEO Act, the EPA was required by s 45(1)(f) of the POEO Act to take into consideration whether MCCPL was a fit and proper person, having regard to, inter alia, the factors set out in s 83 of the POEO Act.
- 31 The EPA failed to take into consideration whether MCCPL was a fit and proper person.

Particulars

- (i) The Licence Review Record did not assess whether MCCPL was a fit and proper person, by reference to the matters in s 83 or otherwise;
- (ii) The Licence Review Record asserted that "Conditions on the license address Section 45 considerations". The conditions on the licence made no reference to whether MCCPL was a fit and proper person, by reference to the matters in s 83 or otherwise.

Ground 2

- 32 The EPA did not take into consideration MCCPL's relevant criminal history, its record of non-compliance with the relevant environment protection legislation and its character, all of which were relevant matters in determining whether MCCPL was a fit and proper person to hold the EPL.

Particulars

- 33 Section 83 states that in determining whether a person is a fit and proper person the EPA may take into consideration:
- a. whether the corporation has contravened any of the environmental protection legislation or other relevant legislation (s 83(2)(a));
 - b. the corporation's record of compliance with the environmental protection legislation (s 83(2)(c));
 - c. whether a related body corporate has contravened any of the environmental protection legislation or other relevant legislation (s 83(2)(a)) and a related body corporate's record of compliance with the environmental protection legislation (s 83(2)(d)).
 - d. in the opinion of the EPA, whether the person is of good repute, having regard to character, honesty and integrity (s 83(2)(g)).

- 34 In respect of s 83(2)(a), MCCPL in April 2022, was convicted of three water pollution offences under s120(1) of POEO Act and fined \$158,750 after an EPA prosecution: *EPA v Maules Creek Coal Pty Ltd* [2022] NSWLEC 33.
- 35 In respect of s 83(2)(c), MCCPL's record of compliance with the environmental protection legislation relevantly includes:
- a. November 2021, blasting suspension and prevention notice issued to MCCPL by EPA relating to unsafe blasts causing toxic fumes that was subsequently varied 9 times between December 2021 and October 2022 until it was revoked in December 2022.
 - b. August 2021, official caution issued to MCCPL by EPA for burying waste tyres on the mine site without being licenced to do so.
 - c. April 2020, clean up notice issued to MCCPL by EPA due to water pollution incident which was varied in May 2020.
 - d. February 2020, clean up notice issued to MCCPL by EPA due to release of polystyrene balls into local water way.
 - e. May 2018 penalty notice issued to MCCPL by EPA for failing to minimise dust pollution from truck movements on haul roads.
 - f. May 2017, penalty notice issued to MCCPL by EPA for exceeding standards of air impurities.
 - g. In February 2017, penalty notice issued to MCCPL by EPA for failing to provide the government with information and records during blast investigation.
 - h. July 2015, investigation of blast fumes incident related to MCCPL by EPA.
- 36 In respect of s 83(2)(a) and s 83(2)(d), related body corporates to MCCPL have contravened the environment protection legislation or any other relevant legislation and have a record of non-compliance with the environment protection legislation as follows:
- a. July 2022, penalty notice issued to Tarrawonga Coal Pty Ltd (TCPL) by EPA for contravening condition of EPL under POEO Act;
 - b. September 2021, two penalty notices issued to TCPL by EPA after discharging dirty water from failed sediment dam and for breach of EPL condition and order to undertake environmental audit under POEO Act;

- c. August 2021, Narrabri Coal Operations Pty Ltd (NCOPL) convicted of breaching licence conditions for 10 incidents of breaches of *Mining Act 1992* including construction of unauthorised tracks and failing to rehabilitate drilling sites resulting in fines of \$372,500 - *Stephen James Orr v Narrabri Coal Operations Pty Ltd; Stephen James Orr v Narrabri Coal Pty Ltd* [2021] NSWLEC 85;
- d. August 2021, official caution issued to TCPL and Werris Creek Coal Pty Ltd (WCCPL) by EPA for burying waste tyres on site without being licenced under POEO Act;
- e. September 2020, penalty notice to WCCPL by EPA for contravening EPL condition with uncontrolled water discharge under POEO Act;
- f. August 2020, penalty notice to TCPL by EPA for overflow of sediment dam at Tarrawonga mine under POEO Act;
- g. August 2020, penalty notice to TCPL by EPA for contravening condition of EPL under POEO Act;
- h. April 2020, penalty notice to TCPL by EPA for contravening condition of EPL under POEO Act;
- i. February 2020, penalty notice to NCOPL by EPA for exceeding noise limits at Narrabri underground mine under POEO Act;
- j. June 2019, penalty notice to NCOPL by EPA for failure to minimise dust at stockpile at Narrabri underground mine under POEO Act;
- k. April 2019 and May 2019, clean up notices issued to NCOPL by EPA for dumping of cannisters improperly from Narrabri underground resulting in fires at Narrabri Council rubbish dump under POEO Act;
- l. March 2019, Whitehaven Coal Mining Ltd (WCML) convicted for contravening EPL under POEO Act for blast fume leaving the site and drifting over neighbours property and fined \$38,500 at Rocglen mine - *Environment Protection Authority v Whitehaven Coal Mining Ltd* [2019] NSWLEC 27;
- m. December 2014, penalty notice to TCPL by EPA for contravening condition of EPL under POEO Act;
- n. December 2014, penalty notice to NCOPL by EPA for mining more coal than licence allowed at Narrabri underground mine under POEO Act;

- o. September 2012, penalty notice to WCCPL by EPA for contravening condition of EPL in relation to noise under POEO Act;
- p. September 2012, penalty notice to WCCPL by EPA for contravening condition of EPL under POEO Act;
- q. September 2012, penalty notice to WCCPL by EPA in relation to polluting waters under POEO Act;
- r. June 2012, WCCPL required to produce and implement Pollution Reduction Program to undertake Best Management Practice in relation to reducing emissions of particulate matter at the Werris Creek mine under POEO Act;
- s. May 2012, two penalty notices to TCPL by EPA for contravening condition of EPL under POEO Act;
- t. May 2012, two penalty notices to NCOPL by EPA for pollution water and one penalty notice to NCOPL by EPA for contravening condition of EPL under POEO Act;
- u. May 2012, penalty notice to WCML for contravening condition of EPL under POEO Act at Roclgen mine;
- v. July 2009, WCCPL convicted for contravening EPL in relation to discharge limits under POEO Act and fined \$49,000 towards rehabilitation of Quipolly Dam- *Environment Protection Authority v Werris Creek Coal Pty Ltd*, *Environment Protection Authority v Holley* [2009] NSWLEC 124.

37

In respect of s 83(2)(g) the following facts are relevant to the question of MCCPL's character by reason of the following convictions and matters:

- a. In November 2021, MCCPL was convicted for unlawfully taking 1 billion litres of water without a licence contrary to s 60A(2) of the *Water Management Act 2000* over a three year period and fined \$187,500 after a Natural Resources Access Regulator (NRAR) prosecution;
- b. Enforceable Undertaking between MCCPL and NRAR dated August 2021 to rectify offences under *Water Management Act 2000* by ensuring diversions and dams were dismantled to ensure water is returned to Back Creek;
- c. February 2021, warning letter to MCCPL from the Department of Planning and Environment (DPE) in regard to removal of infrastructure prior to Heritage Management Plan approval;

- d. Enforceable Undertaking between MCCPL and Resource Regulator in August 2020 over serious work health and safety incident at the mine site;
- e. May 2020, official caution issued to MCCPL from DPE in relation to exceedance of noise limits;
- f. February 2020 penalty notice issued to MCCPL by DPE for failing to seek consent for construction of two water pipelines;
- g. April 2018, official caution issued to MCCPL by DPE for exceeding sound power levels of fixed plant in 2016 and 2017 in contravention of development consent;
- h. August 2015, penalty notice issued to MCCPL by DPE to the mine for failure to implement proper weed and feral management control as per Biodiversity Management Plan.

Ground 3

- 38 In purporting to take into consideration the matters in s 45(1)(c) and (d) of the POEO Act, the EPA failed to consider the pollution caused or likely to be caused by the carrying out of the activity or work concerned and the likely impact of that pollution on the environment and the practical measures that could be taken to prevent, control or abate or mitigate the pollution and to protect the environment from harm as a result of the pollution that was not regulated by the EPL

Particulars

- (i) The pollutants related to the mine and their impacts on the environment and their risks to human health are set out in paragraph 8 to 23 above.
 - (ii) The EPL conditions do not address the pollutants set out below and there is no other information to suggest that the EPA have considered the impact of the following pollutants and whether it was necessary to take measures on the licence to mitigate their impacts.
 - a. PM 2.5
 - b. Ozone
 - c. Metals and Metalloids
 - d. Carbon monoxide
 - e. Nitrous oxide
 - f. Sulphur dioxide
 - g. Greenhouse Gas Emissions, particularly carbon dioxide and methane
39. The Applicant seeks the relief set out in the summons.

SIGNATURE OF LEGAL REPRESENTATIVE

This summons does not require a certificate under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014.

I have advised the Applicant that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Solicitor on record

Date of signature

3 | August 2023

NOTICE TO RESPONDENT

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the relief claimed in the summons and for the plaintiff's costs of bringing these proceedings.

Before you can appear before the court you must file at the court an appearance in the approved form.

HOW TO RESPOND

Please read this summons very carefully. If you have any trouble understanding it or require assistance on how to respond to the summons you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the summons from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

Court forms are available on the UCPR website at www.ucprforms.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address

Level 4, 225 Macquarie Street, Sydney NSW 2000

Postal address

As above

Telephone

(02) 9113 8200

[on separate page]

PARTY DETAILS**PARTIES TO THE PROCEEDINGS****Applicant**

Maules Creek Community Council
Incorporated

Respondents

Environment Protection Authority
Maules Creek Coal Pty Ltd

FURTHER DETAILS ABOUT APPLICANT**Applicant**

Name	Maules Creek Community Council Incorporated		
Address [The filing party must give the party's address.]	c/Public officer	"Wongalea"	
	66	Teston	Lane
	Maules Creek via Boggabri	NSW	2382

Legal representative for Applicant

Name	Elaine Elizabeth Johnson		
Practising certificate number	49602		
Firm	Environmental Defender's Office Ltd		
Contact solicitor	Anita O'Hart/Grace Bramwell		
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	8	O'Connell	Street
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DETAILS ABOUT RESPONDENTS**First Respondent**

Name	Environment Protection Authority		
Address	4 Parramatta Square		
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	Parramatta	NSW	2150

Second Respondent

Name	Maules Creek Coal Pty Ltd		
Address	Level c/Whitehaven Coal Ltd		
	Level 28, 259	George	Street
	Sydney	NSW	2000