



Climate Law Bulletin

The monthly climate update from the Environmental Defender's Office

Issue 9 – FEBRUARY/MARCH 2011

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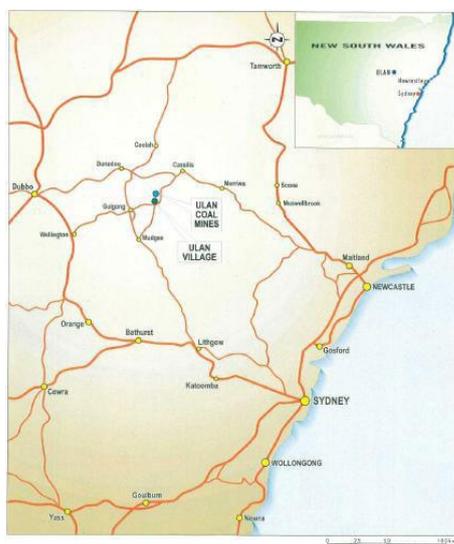
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1. EDO Case Update: *Hunter Environment Lobby Inc v Minister for Planning and Ulan Coal Mines Ltd*



The EDO, on behalf of the Hunter Environment Lobby Inc, has commenced proceedings in the Land and Environment Court to challenge the merits of the Minister for Planning's approval of the expansion of the Ulan Coal Mine, located 40 kilometres north of Mudgee. This case is only the second objector merits appeal case bought under Part 3A of the *Environmental Planning and Assessment Act 1979*. It is also the first Class 1 merits appeal since *Greenpeace Australia Limited v Redbank Power Company Pty Limited* [1994] NSWLEC 178 to consider greenhouse gas emissions.

In a Class 1 merits appeal, the Applicant asks the Court to reconsider the decision as to whether an approval (or consent) should be granted or refused, or have its conditions varied.

In this matter, proceedings were commenced against the NSW Minister for Planning and Ulan Coal Mines Ltd. The approvals being challenged allow for the consolidation of Ulan's 24 existing development consents into a single planning approval, expansion of its existing underground "longwall" mining operations and new open cut mining operation. These approvals will see a doubling of Ulan's existing approved production rate to up to 20 million tonnes of coal per year.

The greenhouse gas emissions from the mine will add approximately 12.7 million tonnes of carbon dioxide per year to the atmosphere, which represents approximately 7% of NSW's annual emissions. The mine expansion is also predicted to have a significant impact on groundwater, which is expected to take 200 years to recover. It will also result in the clearing of 409 hectares of vegetation, including 69 hectares of endangered ecological communities and habitat for several fauna species.

The grounds of appeal are in relation to groundwater, biodiversity, greenhouse gas emissions and climate change.

In the absence of a comprehensive, national legislative scheme, running climate change litigation is one way to develop Australia's legal framework for responding to climate change. The issue we

will be arguing is that the principle of intergenerational equity (which is one of the principles of Ecologically Sustainable Development or ESD) should mean that no new coal projects should be approved or, if they are approved, their emissions should be regulated or costed, particularly in relation to the coal to be burned overseas (scope three emissions). The EDO considers that the expansion of the Ulan Coal Mine will exacerbate global anthropogenic climate change and increase Australia's contributions to greenhouse gas concentrations in the atmosphere, which will impact adversely on future generations. The expansion also threatens biological diversity and ecological integrity as the proposed mine will impact negatively on threatened species and their habitats.

The proposed expansion permits the mining of up to 20 million tonnes of coal per year. It will be burnt in thermal combustion to produce electricity in coal fired power stations. Over the 20 year lifetime of the proposal, scope 1, 2 and 3 greenhouse gas emissions totalling 575 million tonnes of carbon dioxide equivalents, will be emitted into the atmosphere. Ultimately, the EDO is questioning whether the Minister has considered the proposal's greenhouse gas emissions in the context of Australia's international commitments to reduce them?

The matter will be heard on 6 June 2011. The hearing is expected to go for 15 days.

To view the EDO's statement of Facts and Contentions, please visit:

http://www.edo.org.au/edonsw/site/pdf/casesum/110207hel_ulan_statement_of_facts_and_contentions.pdf

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National Update

Law

2. EDO Case Update: Climate camp protestors

The EDO represented 71 climate camp protestors facing trespass type charges in the Muswellbrook Local Court at the end of January. The charges resulted from direct action which was the culmination of Climate Camp 2010, a nationally organised protest about climate change, which was held in the Upper Hunter Valley at Lake Liddell near the Bayswater and Liddell Power Stations on 5 December 2010. During a march, hundreds of protestors pushed down a damaged fence leading onto the grounds of Pacific National Rail, which is leased and operated for the purposes of transporting coal to the Bayswater and Liddell power stations. The protestors sat on the rail lines and many attached themselves with locking devices to the rail lines to prevent any coal trains from reaching the power stations. Protestors remained on the rail lines for most of the day and until they were arrested and/or removed.



Most of the protestors who appeared before the Court were charged with an offence of "enter and remain on rail lines" under the *NSW Rail Safety (Offences) Regulation 2008*. Some protestors were subjected to various other ancillary charges and some also faced claims for compensation by Pacific National for the loss of work and the resources they employed to deal with the day of action. As a result of negotiation, EDO lawyers ensured that the compensation claims were not pursued and that some of the ancillary charges were withdrawn.

On 31 January 2011, the Muswellbrook Local Court was filled with all those pleading guilty before

the Court. The Court allowed the EDO lawyer representing the protestors to explain why the protestors felt the protest action was necessary. Submissions were made about the evidence of climate change and the contribution of the coal industry to climate change. The Court also heard that Bayswater Power station which was one of the targets of the action is the equal largest source of carbon dioxide emissions in Australia and that it is the site of one of 12 proposed new coal-fired power stations in Australia. The Court heard about why people engage in non violent direct action when governments fail to take appropriate action viewed as necessary by the participants, experts and a critical mass in the community.

The Court acknowledged the submissions made on behalf of the protestors and stated that those submissions were taken into account in determining an appropriate penalty. All protestors were convicted of the primary offence with which they were charged and fined. Many of the protestors have appealed their sentences on the grounds that the conviction and penalty in the circumstances were too severe. Their appeals will be heard in the District Court of NSW.

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3. Flood levy appears set to pass

The Federal Government looks to have assured the passage of its flood levy through Parliament. The Government had won over the Greens and Family First's Steve Fielding but it was yet to secure the support of South Australian independent Nick Xenophon. However Julia Gillard struck a deal with Nick Xenophon requiring States to try to shield taxpayers from large repair bills following future disasters. The deal stops short of Xenophon's initial demand that the government withhold disaster funding unless the states had sufficient prudential measures in place. Instead, it says the government "may" withhold funding if states fail to meet a series of requirements to insure against natural disasters. The Government got the \$1.8 billion levy through the House of Representatives in late February after winning the support of four key crossbenchers.

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4. More solar options for households in ACT



The amended [Electricity Feed-in \(Renewable Energy Premium\) Act](#) takes effect in the ACT on 7 March 2011. This allows for medium sized solar schemes to access the ACT's feed-in tariff. Community groups will now be able to invest in collaborative solar power projects, up to 200kW. This represents a more cost beneficial solution for householders working together and means that people don't have to individually install systems on their roofs. There has already been a high level of uptake in the micro generation category, with more than 3,500 solar installations on roofs in the ACT.

Meanwhile, the Government has promised new legislation to back a large-scale renewable generation scheme in coming months.

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5. Government has outlined its climate change framework

The Australian Greens and the Australian Government have detailed an agreement which tracks towards a carbon price which could take effect on 1 July 2012. The agreement sets out elements of a transition to emissions trading once Parliament can agree on emission reduction targets.

The two-stage plan for a carbon price mechanism will start with a fixed price period for three to five years before transitioning to an emissions trading scheme. The Government will propose that the carbon price commences on 1 July 2012, subject to the ability to negotiate agreement with a majority in both houses of Parliament and pass legislation this year. The Government has taken the line that a price on carbon pollution is the cheapest and fairest way to cut pollution and build a clean energy economy. It believes that the best way to stop businesses polluting, and encourage investment in clean energy, is to charge for pollution. To view the agreement, please see

<http://greens.org.au/sites/greens.org.au/files/MPCCC%20Carbon%20Price%20Mechanism%20Final.pdf>.

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6. Independent Climate Commission headed by Professor Flannery



An independent Climate Commission has been established which will provide expert advice and information on climate change to the Australian community. Minister for Climate Change and Energy Efficiency, Greg Combet, has appointed Professor Tim Flannery, a leading science communicator and former Australian of the Year to the position of Chief Commissioner.

Professor Flannery has also authored such books as *The Weather Makers: The History and Future Impact of Climate Change and Here On Earth: An Argument for Hope*.

Mr Combet commented that the Climate Commission has been set up to provide an authoritative, independent source of information for all Australians.

Other members of the Climate Commission are Professor Will Steffen, Professor Lesley Hughes, Dr Susannah Elliott, Mr Gerry Hueston and Mr Roger Beale. All have expertise in a range of areas including the science of climate change, science communications, business, public policy and economics.

The Climate Commission will be supported by a Science Advisory Panel.

To view the related media release, the Commissioners' biographies and the Terms of Reference, please see www.climatechange.gov.au/minister/greg-combet/2011/media-releases/February/mr20110210.aspx.

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7. EDO Policy submission on Carbon Farming Initiative



The Australian Network of Environmental Defender's Offices (ANEDO) recently wrote a submission relating to the Federal Government's carbon farming initiative (CFI).

ANEDO tabled several serious reservations with the proposed scheme.

Principally, ANEDO is concerned that the CFI lacks a clear emissions reduction objective and does not include the necessary safeguards to guarantee its integrity. Reducing atmospheric concentrations of greenhouse gases should be a key objective of the legislation, whilst the offset scheme will not succeed in reducing atmospheric greenhouse gas levels unless it is complemented by a carbon price and emissions cap. The proposed scheme will not be effective in isolation and must be linked to a comprehensive regulatory framework.

The scheme needs strong monitoring, compliance and enforcement provisions to ensure projects remain eligible. For example, if carbon sink projects are lost to bushfires, farmers should be required to return credits or rebuild the projects. Like other businesses, farmers participating in the CFI should have to manage the risk of natural disturbance by buying insurance.

"The primary consideration of the CFI scheme must be to ensure that only credits for genuine and long-term abatement are available on the market," ANEDO said.

ANEDO opposes allowing projects to avoid deforestation as currently proposed or reduce fertiliser use into the scheme because it: "effectively pays people not to pollute". That would be inconsistent with the "polluters pays principle" enshrined in other Australian laws.

Finally, ANEDO called for the legislation to include third-party rights to review decisions on the scheme, including on their merits to encourage better decision-making and promote transparency and accountability.

To read more, please visit: http://www.edo.org.au/policy/110121carbon_farming_initiative.pdf

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8. QLD State Planning Policy: incorporating climate change into flood estimates



The QLD Government is updating Queensland's *State Planning Policy 1/03: Mitigating the Adverse Impacts of Flood, Bushfire and Landslide*. The new policy seeks to provide practical guidance to local governments on how to incorporate the impacts of climate change into their planning policies. The State Office of Climate Change and Department of Infrastructure and Planning have partnered with the Local Government Association of Queensland on the Inland Flooding Study to improve Queensland's

resilience to extreme flood events due to climate change.

The study provides Queensland's local governments with a recommended climate change factor for increased rainfall intensity for incorporation into their flood studies. It recommends that local governments adopt a climate change factor for increased rainfall intensity of 5 per cent per degree of global warming and incorporate this into local flood studies and planning schemes. This 5 per cent increase in rainfall intensity per degree of global warming can be incorporated into the 1-in-100, 1-in-200 and 1-in-500 year flood levels for the location and design of new development in the State Planning Policy 1/03. This climate change factor is limited to flood risk management for planning purposes as described by the policy and does not extend to more frequent events such as a 1-in-50 year floods or more extreme events than a 1-in-500 year flood.

The study recommends that local governments should use the following temperature increases and planning horizons for the purpose of applying this climate change factor: 2°C by 2050, 3°C by 2070 and 4°C by 2100.

The policy is scheduled for completion by 2013.

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International update

Law

9. California's emissions trading scheme to proceed



California adopted the first large-scale cap-and-trade program in the U.S., in a move officials say will protect the environment without hurting the state's still-struggling economy. The state's Air Resources Board voted to adopt laws, scheduled to commence in 2012, that place a limit on greenhouse gas emissions for the state that will decline over time.

Power plants, refineries and other industrial facilities that emit carbon dioxide and can't cut their emissions by the required amount will be able to obtain pollution allowances from the state or buy them from other emitters with excess allowances. Gov. Arnold Schwarzenegger said the cap-and-trade rules will help fight climate change and also boost California's clean-technology industry and overall economy.

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10. Japan to legislate for a cleaner energy market

Japan plans to make the power sector buy electricity from a wider range of renewable energy sources than it does currently in a feed-in tariff incentive scheme starting April 2012.

The government is expected to submit related bills for the new scheme during the current parliament session, aiming to make electricity low-carbon and to support a clean-energy market. Currently, Japan's 10 power companies are required to pay 48 yen (USD\$0.60) per kilowatt hour for surplus solar electricity from house owners and 24 yen per kwh for the surplus from small businesses and are allowed to add on the extra costs to users evenly.

Under the new scheme prices for wind, small-sized hydro, biomass, and geothermal will be either

15 yen or 20 yen per kwh. Prices for solar are yet to be decided.

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Policy

11. US House of Representatives passes spending bill



A bill that would include billions of dollars in spending cuts to environment-related regulatory agencies was approved by the US House of Representatives on 19 February. For example, an amendment to funding for the Environment Protection Agency (EPA) is specifically aimed at thwarting the agency from enforcing any rules or regulations pertaining to greenhouse gas emissions. Some of the more concerning amendments included:

- Reducing the EPA's ability to protect the public from the nation's second largest industrial waste stream – toxic coal ash;
- Blocking the EPA's authority to veto permits to "fill" and destroy streams and wetlands in mountaintop removal mining projects;
- Removing the EPA's ability to regulate air emissions for Arctic Ocean drilling activities;
- Preventing the EPA from enforcing laws currently on the books to limit greenhouse gas pollution from the nation's biggest polluters;
- Blocking U.S. funding for the Intergovernmental Panel on Climate Change, the leading international scientific body for the assessment and peer review of the most recent scientific, technical and socio-economic data on climate change.

The bill will now be voted on in the U.S. Senate.

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Media, reports and other news

12. European Trading System closes following theft of carbon credits

The European Trading System was closed for a week following the theft of carbon credits. The European Trading System suspended spot trading in carbon credits on 19 January 2011, after 475,000 EU carbon dioxide emissions allowances (EUAs) worth a total of US\$37.7 million were stolen from the Czech Republic's carbon registry. The theft was not the first such "security breach" to plague the European Trading System.

The Australian Government's proposed ETS would be designed to link to the EU ETS to allow Australian-generated credits to be traded on the international carbon market. However, Head of Baker and McKenzie climate change practice, Martijn Wilder cautioned against using the security breaches to criticise the EU ETS, labelling it "a problem that illustrates why any new system has to be robust".

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13. Images and stories of king tide impacts on Tuvalu



Oxfam Australia is currently in Tuvalu to witness the king tide – the name given to the highest tides of the year – and talk to the people of this small Pacific island nation about the impact of climate change on their lives.

Ask your questions here: <http://www.oxf.am/kingtide> and they will investigate the issues that you want to know.

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14. Invitation to join the EDO's Scientific Expert Register



The Environmental Defender's Office (EDO) is seeking scientific and technical experts with 10 or more years experience in a range of fields to join our Expert Register. PhD students are also encouraged to apply.

The Expert Register is a list of scientific experts who are willing to assist the EDO with public interest environmental matters on a pro bono basis. A key aim of the service is to increase the public's capacity to participate effectively in the environmental planning and development assessment process.

The EDO is also seeking to develop relationships with research organisations and environmental consultancies interested in doing pro bono work.

If you would like more information on how to be involved in the scientific work of the EDO, and have expertise in climate science or a relevant environmental field, please contact the EDO on (02) 9262 6989.

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15. EDO's Coastal Law and Climate Change project

The Environmental Defender's Office (EDO) has been funded by the Federal Government through its Caring for Our Country program to produce a guide to coastal law and climate change. To order a free copy of *Caring for the Coast: A guide to environmental law for coastal communities in NSW*, please email education@edo.org.au with your details and we'll send you a copy as soon as they are printed.

If you would like the EDO to come to your area to present a workshop on coastal law and climate change, please contact our Education Director at education@edo.org.au, or call 9262 6989.

Requests from rural and regional groups in NSW will be given priority.

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