

The case of Rocky Hill:

Merits considerations in the
NSW Land and Environment Court

DPIE

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- long-term planning, planning assessments, infrastructure priorities, natural resources, the environment, energy and growing the State's industries.
- DPIE Governance and Legal Services
 - ~150 lawyers
 - advice – statutory interpretation, decision-making
 - litigation including prosecution, law making, property and transactions

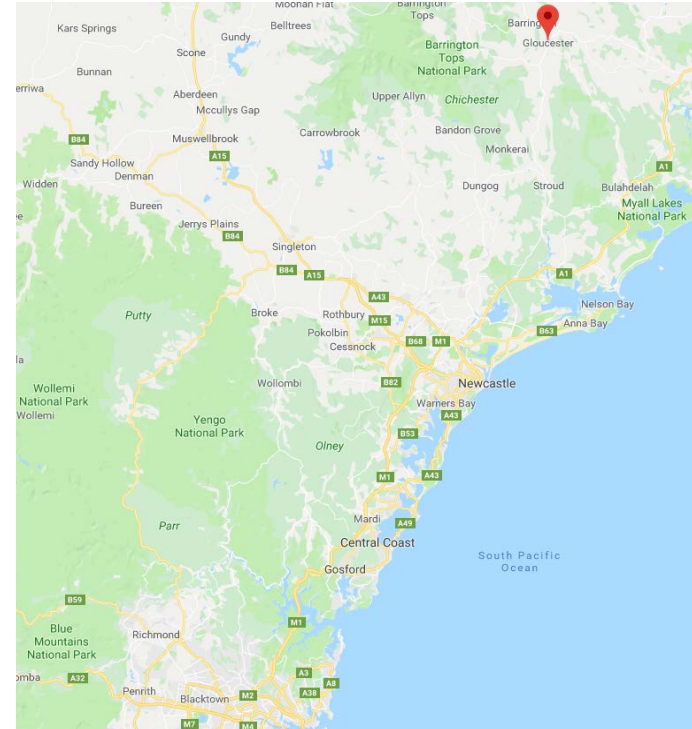
The case of Rocky Hill

- New South Wales Land and Environment Court
- *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7
- <https://www.caselaw.nsw.gov.au/decision/5c59012ce4b02a5a800be47f>
- Class 1 merits jurisdiction - Appeal
- Preston CJ
- 8 February 2019

There is a valley



Where?

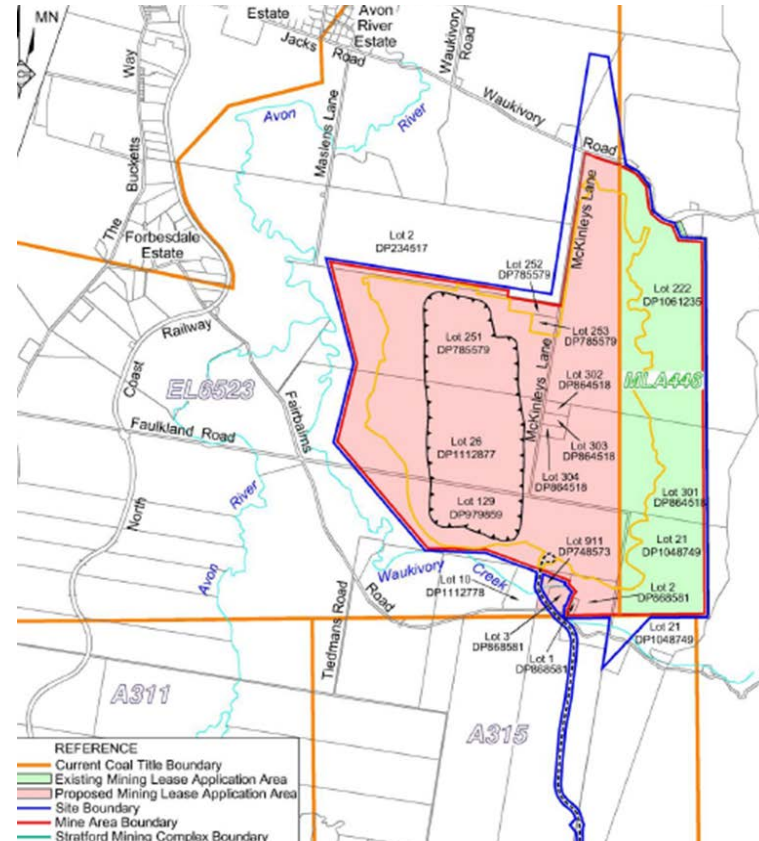


Merit Appeals

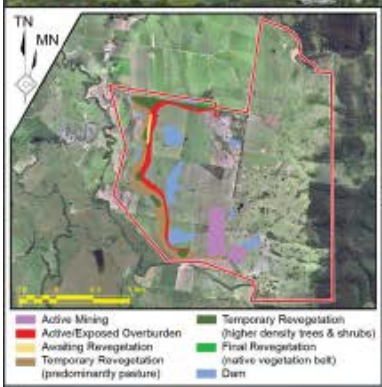
- Statutory rights
- Court's role
- Based on the facts and law applying at the time
- Not setting precedent

Rocky Hill coal mine proposal

- Rocky Hill Coal Mine – open cut
- State Significant Development 5156







Year 0.5 Composite Photorealistic Photomontage

Year 3 Composite Analytical Photomontage



Year 3 Composite Photorealistic Photomontage

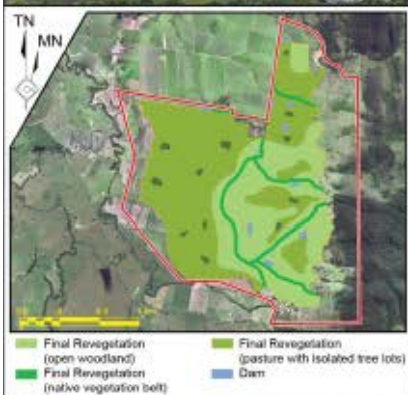
Year 7 Composite Analytical Photomontage



- Active Mining
- Active/Exposed Overburden
- Awaiting Revegetation
- Temporary Revegetation (predominantly pasture)
- Temporary Revegetation (higher density trees & shrubs)
- Final Revegetation (open woodland)
- Final Revegetation (native vegetation belt)
- Final Revegetation (pasture with isolated tree lots)
- Dam

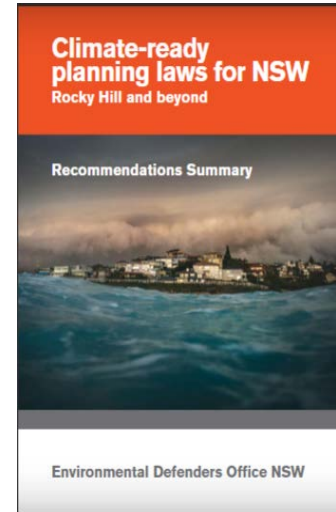


Year 7 Composite Photorealistic Photomontage



Groundswell Gloucester Inc.

- Joinder application
 - Represented by Environmental Defenders Office NSW
 - Section 8.15(2):
 - (2) On an appeal under this Division, the Court may, at any time on the application of a person or of its own motion, order the joinder of a person as a party to the appeal if the Court is of the opinion:
 - (a) that the person is able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party, or
 - (b) that:
 - (i) it is in the interests of justice, or
 - (ii) it is in the public interest,
- that the person be joined as a party to the appeal.



Experts Briefed by Parties

Gloucester Resources Limited	Minister	Groundswell Gloucester
Town Planning	Town Planning	
Visual Impact	Visual Impact	
Economic Impact	Economic Impact	
Social Impact	Social Impact	Social Impact
Coal and Energy Economics		Coal and Energy Economics
Climate Change Impact		Climate Change Impact
Noise Impact		Noise Impact

Objectors

- Public exhibition – 2,581 submissions
- Letters to objectors – notification of appeal and rights
- EOI to give evidence at hearing
- Court Site inspection policy

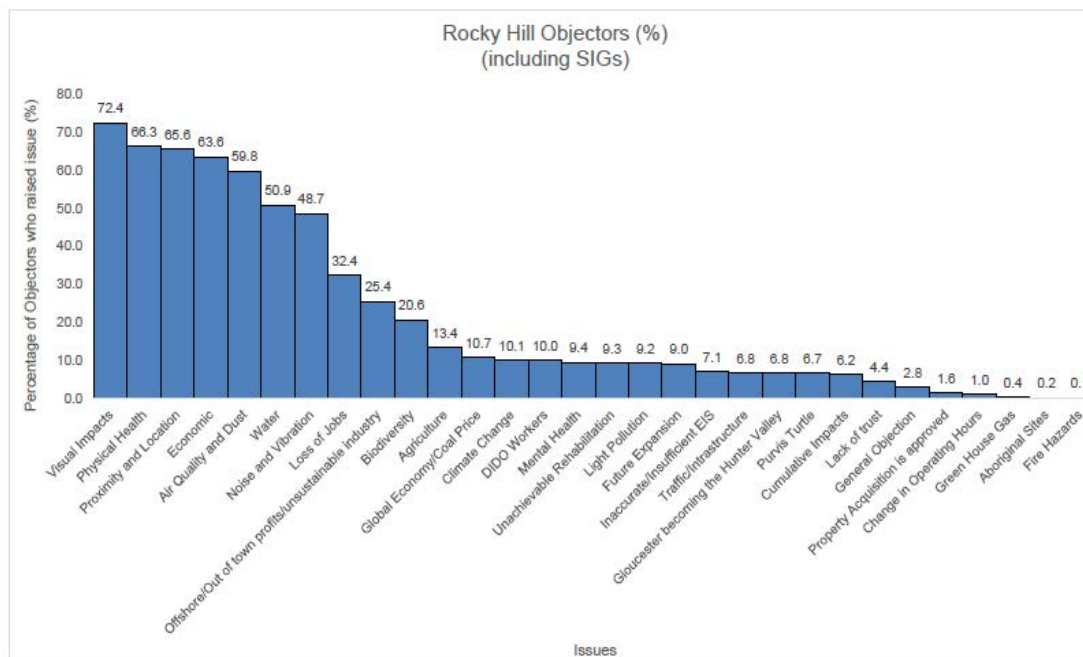


Figure 6: Concerns raised in objections to the amended project

Decision

- Appeal dismissed
- impacts on existing, approved and likely preferred uses of land in the vicinity
- high visual impact
- negative social impacts
- impacts of the mine on climate change
- economic and public benefits of the mine and other land uses
- impacts and costs of mine outweigh benefits of mine
- development consent refused

Findings on Climate Change – 1

Already required to consider downstream greenhouse gas emissions under the Mining SEPP.

There has been a line of cases which have considered greenhouse gas emissions in a planning context.

The Court did not have sufficient evidence to rule on many of GRL's submissions.

Findings on Climate Change – 2

The consent authority is required to consider greenhouse gas impacts under the Mining SEPP. Further, section 4.15 of the *Environmental Planning and Assessment Act 1979* (EPA Act) requires a consent authority to take into consideration the likely impacts of the development and the public interest. The public interest has been held to include the principles of ecologically sustainable development (ESD). In turn, the principles of ESD, particularly the precautionary principle and principle of inter-generational equity, require consideration of the impact of a development on climate change and the impact of climate change on a development.

Both the direct and indirect emissions emitted by the Project are relevant considerations.

Findings on Climate Change – 3

In considering the merits of this Project the Court found that:

1. direct and indirect GHG emissions of the Project will impact on the environment (despite their relative minimal contribution to global climate change).

2. there was no evidence before the Court that GRL was going to take any specific action to mitigate and offset the environmental impact of the development by removing GHGs in the atmosphere.

3. the fact that greater emissions reductions could be achieved at lower cost through other sources (that are not related to the development) is not a “rational” reason for approval.

4. there was no evidence before the Court that GHG emissions will occur regardless of whether the project was approved, due to market substitution and carbon leakage.

5. the GHG emissions cannot be justified on the basis that the project is needed to supply the demand for coking coal (as opposed to thermal coal).

Decision

- 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. [699]
- No Appeal – decision stands

Subsequent matters

- [United Wambo Open Cut Coal Mine Project](#) (SSD 7142) and associated modifications (DA 305-7-2003 MOD 16 and DA 177-8-2004 MOD 3)
 - Approved by the NSW Independent Planning Commission
 - Subject to conditions including a condition requiring the sale of extracted product coal for export to countries that are parties to the Paris Agreement or that otherwise have equivalent domestic policies for reducing greenhouse gas emissions at the date of sale.
- Bylong Coal [Project](#)
 - Consent refused by the NSW Independent Planning Commission on grounds including (at 6.14.9):
 - Failure to minimise GHGE to greatest extent practicable (required by Mining SEPP)
 - No proposed offset measures
 - Cumulative environmental impact, citing Preston CJ in Rocky Hill.



Kate Robinson

Director Environment and Energy, Legal Services

NSW Department of Planning, Industry and Environment

Kate.Robinson@planning.nsw.gov.au