



Climate Law Bulletin

The monthly climate update from the Environmental Defender's Office

Issue 13 – December/January 2012

1. COP17 Durban

National update

Law

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

3. EDO Case Update: *Barrington-Gloucester-Stroud Preservation Alliance Incorporated v Planning Assessment Commission and AGL Upstream Infrastructure Investments Pty Limited*

4. EDO Case Update: *Haughton v Minister for Planning and Macquarie Generation; Haughton v Minister for Planning and TRUenergy*

5. Case Report: *Lester v Minister for Planning & Ashton Coal Operations Pty Ltd*

Policy

6. Draft Energy White Paper released

7. Development of light vehicle CO2 emissions standards

International update

Law

8. European Court of Justice backs emissions trading scheme

9. US judge blocks fuel carbon emissions regulations

10. New carbon trading schemes: Rio de Janeiro state, Quebec, and California.

Policy



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11. Climate investment delays will increase costs fourfold
Media, reports and other news

12. Two new UNEP reports: *Bridging the Emissions Gap* and
Actions for Controlling Short-Term Climate Forcers

Media, reports and other news

13. China set to introduce carbon tax before 2015

14. Strong support for windfarms obscured, says CSIRO report

15. Invitation to Join the EDO's Scientific Expert Register

16. EDO's Coastal Law and Climate Change project

1. COP17 Durban

The Conference of the Parties (COP 17) to the UN Framework Convention on Climate Change (UNFCCC) took place in Durban during December 2011. The conference was widely hailed as a success as over 190 nations, including some the world's biggest greenhouse gas emitters in the US and China, agreed to develop a global pact for reducing emissions by 2015. But the scale of work to still be carried out is significant. There were high hopes that a comprehensive agreement tackling climate change (which was not reached in Copenhagen in 2009), could be reached but instead what was reached was a deal to do another deal.

Why do we need a new agreement?

The Kyoto Protocol only applies to developed countries (excepting the US which was never a signatory) and stipulates cuts in greenhouse gas emissions for those all parties to the protocol. The current targets expire in 2012, and among the major developed countries, only the EU has agreed to a continuation of the targets – Japan, Russia and Canada have all vowed to discontinue.

It is an accepted position of 99% of climate change scientists that a temperature rise of 2 degrees celcius above pre-industrial levels is estimated to be the limit beyond which climate change becomes catastrophic and irreversible. In order to have even a 50:50 chance of staying within that limit, the Intergovernmental Panel on Climate Change (IPCC) calculates that emissions must peak by 2020 at the latest and fall rapidly thereafter. Carbon output must be roughly halved by mid-century, compared with 1990 levels. For this reason, a binding and global deal is vital to arrest the onset of irreversible climate change.

What was achieved in Durban?

The Durban round table concluded with a deal whereby both developed and developing countries will, for the first time, work towards a legally binding agreement, to be written by 2015 and to come into force after 2020. This agreement will replace the Kyoto Protocol which is due to expire later this year. There had been concerns that the possible lapsing of the Kyoto Protocol could remove the legal foundations for the Clean Development Mechanism (CDM) and other carbon trading schemes around the world. However many commentators, including the UK's

climate change secretary, Chris Huhne, said the Durban deal sent a strong signal to businesses and investors about moving to a low-carbon economy.

Also for the first time, both developing and developed nations agreed to insert an ongoing mechanism into the agreement. The mechanism will commit countries to review how to close the gap between current targets for emissions cuts and what the science dictates is required to avoid dangerous climate change. It is still unclear what form the agreement will take but it is expected that the agreement will be legally enforceable.

Difficulties ahead

The difficulty of arriving at a legal agreement between the developed and developing countries involving China, India, Europe and America cannot be understated. Climate talks have been underway for twenty years and so far no agreement has been reached that all parties can agree to. Reaching such an agreement is the principle challenge ahead, as the Durban deal did not decide any of the detail which will go into the future agreement.

On the final day of the Durban talks, the Indian Environmental Minister spoke about equity. It is expected that governments will have to agree to country-by-country targets on emissions cuts, taking into consideration the historic emissions each is responsible for, the efforts on emissions each have made, their populations and how countries can continue to develop. Developing such a formula is likely to be complex and contentious.

Furthermore, economic issues continue to pose a problem. Developing countries have been demanding financial assistance from developed nations to help them cut emissions and cope with the effects of climate change. Working out where this financial assistance will come from is likely to be problematic.

The classical argument is that since developed countries started burning fossil fuels earlier than developing countries (with industrialisation) they are to blame for most of the CO₂ already in the atmosphere. Complicating matters is the fact that some countries have worked harder to reduce emissions than others. Balancing each country's capabilities and responsibilities will prove a significant challenge prior to the achievement of a global deal.

Another uphill battle is the US electoral cycle. Should a Republican candidate win through at the next US election, such a candidate would not have signed up to the Durban platform. The flipside is that if Barack Obama wins another term, 2015 will be towards the end of his presidency and that may encourage him to ensure a global climate agreement forms part of his legacy.

Finally, Canada's withdrawal from the Kyoto Protocol is an important reminder that, although countries have agreed to cut a legally binding deal and enforce it by 2020, there is no guarantee countries won't walk away from their commitments later down the line.

In conclusion, the Durban talks were an encouraging step forward from Copenhagen but by no means did they provide the world with any silver bullet to combat climate change. All the hard work is still yet to be done.

[Back to index](#)

National Update

Law

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

On behalf of the Hunter Environment Lobby, the EDO commenced proceedings challenging the Minister for Planning's approval a new open cut mining operation and expansion of existing longwall mining operations at the Ulan Coal Mine, 40 kilometres north of Mudgee.

The Hunter Environment Lobby challenged the approvals on their merits, arguing that the approvals would see a doubling of Ulan's existing approved production rate to up to 20 million tonnes of coal per year and unacceptable environmental impacts on groundwater, biodiversity and greenhouse gas emissions.

A three week hearing took place in the NSW Land and Environment Court during June 2011 and judgment was handed down on 24 November 2011. The Court overturned the Minister's approval but granted its own approval subject to more stringent conditions. Importantly, the Court indicated that the mine will be required to offset its scope 1 carbon emissions. Scope 1 emissions are direct emissions and include fugitive emissions from the mining operations.

At this stage, the requirement to offset the scope 1 emissions is a draft condition only and the parties will need to make further submissions to the Court before it becomes final. However, this is the first time that an Australian Court has required a carbon offset as a condition of consent.

The EDO thanks Philip Clay of counsel, who appeared on behalf of Hunter Environment Lobby Inc, for his hard work and excellent advocacy in this matter.

We will keep you updated on this matter in future Climate Bulletins.

[Back to index](#)

3. EDO Case Update: *Barrington-Gloucester-Stroud Preservation Alliance Incorporated v Planning Assessment Commission and AGL Upstream Infrastructure Investments Pty Limited*

The EDO is acting on behalf of Barrington-Gloucester-Stroud Preservation Alliance Inc. in judicial review proceedings challenging two decisions of the Planning Assessment Commission (PAC) to approve a concept plan and stage one of the Gloucester Gas Project. This is the first legal challenge to a coal seam gas project in NSW.

The concept plan involves extraction of coal seam gas within a 210km area between Barrington and Great Lakes, transporting the gas from the processing facility to the existing gas supply network via a 95-100 km pipeline traversing several LG areas, a gas delivery station at Hexham.

The stage one project approval is for 110 gas wells and gas and water pipelines between Gloucester and Stratford, a central processing facility, gas transmission pipeline 95-100 km in length and the Hexham gas delivery station.

The Barrington-Gloucester-Stroud Preservation Alliance is concerned about the risks the project poses to surface and groundwater, especially the risk of contamination as a result of the fracking process used to extract the gas from the coal seam. The Alliance is also concerned about the lack of data about possible groundwater impacts in the region which contains numerous cracks and fissures in the coals seams.

The Alliance is arguing that certain the conditions of approval relating to groundwater leave open the possibility of a significantly different development with significantly different impacts from that which was approved. The Alliance is also arguing that the PAC made an error when determining the application because it was only supplied with preliminary groundwater studies and has allowed the proponent to do more detailed studies after the approval was granted. It also delegated certain decisions about groundwater to the Director-General of Planning at a future time when more studies have been completed. Given the risk of irreversible environmental damage and the scientific uncertainty about the impacts of the development on the region's water, it was argued that the PAC failed to consider the precautionary principle as it was required to do as part of its duty to consider the public interest.

The hearing took place on 17, 19 and 20 October 2011 in the Land and Environment Court.

The Court has reserved its decision which may take some months to be handed down.

[Back to index](#)

4. EDO Case Update: *Haughton v Minister for Planning and Macquarie Generation; Haughton v Minister for Planning and TRUenergy* [2001] NSWLEC 217

The EDO acted for Ned Haughton - a student and environmental activist challenging the Minister for Planning's approvals of two new coal or gas fired power stations - Bayswater B Power Station and the Mount Piper Power Station Extension.

Both proposals were declared to be 'critical infrastructure' projects under the *Environmental Planning and Assessment Act 1979* (the EP&A Act), which means that the approvals could not be challenged by third party objectors without the Minister's permission.

Mr Haughton challenged the validity of the approvals on several grounds but, most significantly, on the ground that the Minister failed to consider the impact of the projects (both alone and together) on climate change. Mr Haughton argued that the Minister was required to do so as part of his duty to consider the public interest. Similarly, Mr Haughton sought to establish that the Minister failed to consider the principles of ecologically sustainable development (ESD), particularly the precautionary principle and the principle of intergenerational equity, as he was also required to do as part of his duty to consider the public interest.

Importantly, Mr Haughton also challenged the privative clause in the EP&A Act which sought to prevent judicial review of breaches of the EP&A Act in respect of critical infrastructure projects. On this issue, Mr Haughton was successful. The Court found that the privative clause in the EP&A Act could not remove the jurisdiction of the Court and that any person can bring proceedings to address alleged breaches of the Act.

However, Mr Haughton was unsuccessful on the remaining grounds. The Court found that although the Minister is required to consider the public interest, that requirement is general in terms of what it encompasses. Therefore, the Minister was not bound to consider any specific element of the public interest such as the principles of ESD or the impacts of the development on climate change. Rather, these are issues that can be balanced with other issues relevant to the public interest, including the need to secure the supply of electricity for the State. A failure to consider any one of these issues will not invalidate the decision. The Minister was not required to refer specifically to the principles of ESD in his decision.

To view the judgment, [please click](#).

[Back to index](#)

5. Case Report: *Lester v Minister for Planning & Ashton Coal Operations Pty Ltd* [2011] NSWLEC 213

Robert Lester challenged a decision by the Minister for Planning (Minister) to approve a modification to the Ashton Coal Project being undertaken in the Upper Hunter Valley of NSW. The modification involves the construction of 15 ventilation shafts that will be used to vent excess methane into the atmosphere.

Mr Lester argued that the approval was invalid because some of the documents comprising the application had not been made publicly available on the Department of Planning's website. He also argued that the Minister had incorrectly considered the greenhouse gas (GHG) emissions of the project amounted to 328,000 tonnes when, in fact, the project's GHG emissions actually amount to 328,000 tonnes *per year*.

The Court found that, while some of the documents were not available on the Department of Planning's website, this did not constitute a failure to make them publicly available. This is because the public could have obtained the missing documents by contacting the planner, whose contact details were provided on the website.

The Court also found that the Minister had not failed to consider the GHG emissions of the project. While the figure representing the expected emissions in the Director-General's report was misleading, other documents before the Minister clearly stated that 328,000 tonnes would be the annual GHG output.

The decision demonstrates that the requirement to make documents publicly available is satisfied if the public has at least one method of obtaining the information, even if other methods are ineffectual. It also establishes that errors of fact in documents will not invalidate a decision, provided that the correct facts are stated in other documents before the decision-maker.

To read the judgement, [please click](#).

[Back to index](#)

Policy

6. Draft Energy White Paper released

On 13 December 2011, the Federal Government released the draft Energy White Paper for public consultation, alongside the release of the 2011 National Energy Security Assessment and the Strategic Framework for Alternative Transport Fuels.

The draft Energy White Paper sets out a series of proposed Commonwealth Government priorities to address challenges confronting Australia's energy sector, identifying four priority areas for further action:

- Strengthening the resilience of Australia's energy-policy framework;
 - Re-invigorating the energy market reform agenda;
-

- Developing Australia’s critical energy resources – particularly gas; and
- Accelerating clean energy outcomes.

Written submissions are invited on the draft Energy White Paper by 16 March 2012. The Department of Resources, Energy and Tourism will also hold information sessions in every state and territory capital city as part of the consultation period.

To read more about the draft Energy White Paper, [please click](#).

[Back to index](#)

7. Development of light vehicle CO2 emissions standards

The Minister for Infrastructure and Transport, the Hon Anthony Albanese MP, has released a discussion paper that examines how to implement carbon dioxide emissions standards for new light vehicles, starting in 2015. The CO2 standards will complement the Government’s carbon price and help to reduce carbon emissions from light vehicles. The paper does not set targets, but asks industry and the community to help shape the new standards by presenting possible approaches for consideration and debate.

The Australian Network of Environmental Defender’s Offices (ANEDO) made a submission to the Department following the release of the discussion paper in September 2011.

To read the discussion paper and submissions, including ANEDO’s submission, [please click](#).

[Back to index](#)

International update

Law

8. European Court of Justice backs emissions trading scheme

On 21 December 2011, the ECJ ruled that plans to include airlines from outside the European Union in the European emissions trading scheme are valid. This means that, as of 1 January 2011, all airlines will purchase permits under the scheme.

Initially, airlines will be required to pay for 15% of their carbon emissions under the scheme, and will be allocated free allowances to cover the other 85%. The European Commission has estimated that costs per passenger could rise between €2 and €12, depending on how much airlines decide to pass on to customers. A penalty of €100 per allowance applies to airlines that do not comply with the scheme. As the law provides for “equivalent measures”, incoming flights to Europe would be exempt if the country the flight departed from had measures in place to offset the international emissions for that flight.

The case was initially brought to the High Court of Justice in London by the Air Transport Association of America, American Airlines and United Continental. The case was referred to the European Court of Justice for a ruling on the validity of the EU law, as discussed in [Climate Bulletin Issue 11](#).

The full text of the judgment and associated documents are available [here](#). For the Court of

Justice's press release, [please click](#). For media coverage, [please click](#).

[Back to index](#)

9. US judge blocks fuel carbon emissions regulations

On 22 December 2011, US District Judge Larence O'Neill blocked a regulation adopted by the California Air Resources Board in 2010 to lower California's greenhouse gas emissions. The regulation aimed to do this by rewarding biofuel producers that consume less energy in their businesses, including transportation to customers. Interstate producers who ship fuels over long distances would be at a disadvantage to California refiners.

The decision was welcomed by interstate ethanol producers and refiners. California's air quality board has said it will appeal the decision.

The case is Rocky Mountain Farmers Union et al v. Goldstene et al, U.S. District Court, Eastern District of California, No. 09-02234.

For more information, [please click](#).

[Back to index](#)

10. New carbon trading schemes: Rio de Janeiro state, Quebec, and California.

In Brazil, Rio de Janeiro state established Brazil's first carbon exchange on 20 December 2011.

The exchange will create a trading platform which will allow businesses to trade credits to comply with mandatory pollution limits Rio plans to introduce in 2012 as part of the "Bolsa Verde" or "Green Exchange", before the UN Rio+20 environment conference to be held in the capital in June. The main focus of the exchange will be carbon credits, but it will also trade credits for industrial effluents and mandatory forest coverage in rural areas. Trading is expected to start in 2013.

For more information on Rio de Janeiro state's carbon exchange, [please click](#).

In the US, on 20 October 2011 California adopted a cap-and-trade program, the Air Resources Board Emissions Trading Program, effective as of 1 January 2012. The state-based and administered program is the first of its kind in the US and is hoped to not only reduce greenhouse gas emissions but also to encourage investment in clean energy technologies.

Under the program, an annual emissions cap is set which will cover the sources responsible for approximately 85% of California's greenhouse gas emissions. The program has two stages of implementation. First, an emissions cap will be set in 2013 for electric utilities and industrial facilities. Then, in 2015 a cap will be set for distributors of transportation, natural gas and other fuels. The emissions cap will be set between two and three per cent lower each year between 2013 and 2020. At the commencement of the scheme, allowances will be distributed for free to cover 90% of average emissions. Further allowances must be bought at quarterly auctions or on the market.

The first allowance auctions will be held in August and November, 2012.

For more information on California's cap-and-trade program, [please click](#).

In Canada, on 14 December 2011 the Government of Québec adopted a cap and trade system, the *Regulation respecting the cap-and-trade system for greenhouse gas emission allowances*, which came into force on 1 January 2012. After a transition year in 2012, capping and reduction of greenhouse gas emissions will start officially on 1 January 2013, largely in the industrial and electrical sectors. In 2015, operators of businesses that distribute fuel in Québec or import fuel for their own consumption, and whose annual greenhouse gas emissions reach or exceed an annual set threshold, will also be subject to capping and reduction. Only one other province in Canada, British Columbia, has taken similar steps towards emissions reduction, having enacted a carbon tax in 2009.

For more information on Quebec's cap-and-trade system, [please click](#).

[Back to index](#)

Policy

11. Climate investment delays will increase costs fourfold

The ability to limit the effects of irreversible climate change is under threat if action is not taken urgently, a report unveiled by International Energy Agency (IEA) on November 9 2011 said. In a gloomy account of global moves to a low-carbon economy, the report said there were "few signs the urgently needed change in direction in global energy trends is under way".

World Energy Outlook 2011 said "global energy intensity worsened for the second straight year", which with the Fukushima nuclear disaster and continuing conflict in the Middle East and North Africa, "have cast doubts on the reliability of energy supply". Meanwhile, the Euro zone sovereign debt crisis had "shifted government attention from energy policy ... boding ill for agreed global climate change objectives". The cost of limiting global warming to no more than 2°C was forecast to be four times higher than expected if "stringent new action is not forthcoming by 2017", the report said. Worse, investment delays to date had created a global temperature increase "trajectory" of 6°C "or more". "Growth, prosperity and rising population will inevitably push up energy needs over the coming decades. But we cannot continue to rely on insecure and environmentally unsustainable uses of energy," IEA executive director Maria van der Hoeven said. She advocated governments "introduce stronger measures to drive [low carbon] investment". Modelling "cautious" implementation of government commitments, IEA said, by 2035, 90% of energy growth would come from non-OECD countries, with India, Indonesia, Brazil and the Middle East growing at a rate faster than China. It argued clean energy investment needed to rise more than 500%, with most coming from the private sector. But until governments adopted "strong governance and regulatory frameworks" and increased energy capacity, the private sector would continue to view low-carbon economies as "marginal" investment destinations. "As each year passes without clear signals to drive investment in clean energy, the 'lock-in' of high-carbon infrastructure is making it harder and more expensive to meet our energy security and climate goals," IEA chief economist Dr Fatih Birol said.

[Back to index](#)

12. Two new UNEP reports: *Bridging the Emissions Gap and Actions for Controlling Short-Term*

Climate Forcers

The most recent *Bridging the Emissions Gap* report, released by the United Nations Environment Programme (UNEP) on 23 November 2011, has found that it is still technologically and economically possible to reduce emissions by 2020 to a level that could keep global temperature rise under 2 degrees Celsius.

The report, intended for use by policymakers, says that accelerated uptake of renewable energy, fuel switching and improved energy efficiency can deliver a large proportion of the necessary cuts. Other measures to reduce emissions examined in the report include sectoral improvements ranging from increased penetration of public transport and more fuel efficient vehicles to improvements in areas such as agriculture and waste management. The report cites aviation and shipping as a special but important case, as currently these 'international emissions' fall outside the Kyoto Protocol and together account for around 5% of global carbon dioxide emissions.

The report outlines ideas on bridging the 'emissions gap' – the difference between the level of emissions which will result from pledged actions, and the level of emissions needed to hold temperature rise to at or below 2 degrees. Under the most optimistic scenarios, the emissions gap is now estimated, under the most optimistic scenarios, to be 6 gigatonnes of carbon dioxide. The report also sets out far more pessimistic scenarios. For example, if the commitments and pledges of developed countries and the intentions of developing countries are not fully realised, by 2020 the gap could rise to as high as 11 gigatonnes of carbon dioxide. Under business-as-usual conditions, it could even be 12 gigatonnes of carbon dioxide.

To read more about and to download the Bridging the Emissions Gap report, [please click](#).

Another recent report released by UNEP, *Actions for Controlling Short-Term Climate Forcers*, sets out a package of 16 measures that could, if fully implemented across the globe, save close to 2.5 million lives a year; avoid crop losses amounting to 32 million tonnes annually and deliver near-term climate protection of about half a degree by 2040.

The report examines the impacts of short-term climate forcers – gases, such as atmospheric soot, methane and ground-level ozone, which have a short lifetime in the atmosphere but have short-term impacts on climate, as well as other areas such as public health and agriculture. Ways of reducing these gases include methane capture, and improving technologies to reduce levels of black carbon, which is produced through the incomplete combustion of fossil fuels, mostly through diesel engines and biomass burning - including in cook stoves and brick kilns.

To read more about and to download the *Actions for Controlling Short-Term Climate Forcers* report, [please click](#).

[Back to index](#)

Media, reports and other news

13. China set to introduce carbon tax before 2015

China's biggest energy-consuming companies are likely to face a direct tax on carbon dioxide

emissions by 2015, according to Xinhua-backed Economic Information Daily.

It said proposals for a new environmental taxation system had already been submitted for review to the Ministry of Finance and were expected to be implemented before the end of the 2011-2015 five-year plan.

For more information, [please click](#).

[Back to index](#)

14. Strong support for windfarms obscured, says CSIRO report

There is much stronger public support for wind farms than media coverage of the issue would suggest, because a "vocal minority" who oppose wind farms secure the majority of media and political attention, according to new CSIRO research.

To access the Report, [please click](#).

To read the entire article, [please click](#).

[Back to index](#)

15. Invitation to Join the EDO's Scientific Expert Register

The 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.

[Back to index](#)

16. EDO's Coastal Law and Climate Change project

The 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.

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.

[Back to index](#)
