



4nature and People for the Plains – case updates

Australian Centre for Climate and Environmental Law

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- Litigation and legal advice
- Policy and law reform
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Recent cases

4nature v Centennial Springvale



People for the Plains v Santos NSW



4nature v Centennial Springvale: background

- Springvale underground coal mine
- Mine water sent to Wallerawang Power Station; closed in 2014-2015
- EPA allowed **interim** discharge limits for salinity (conductivity 1,200 $\mu\text{S}/\text{cm}$) and other pollutants to the Cocks River
- Centennial applied to expand and increase coal mining at Springvale



Sydney Drinking Water Catchment SEPP

*A consent authority must not grant consent to the carrying out of development under Part 4 of the Act on land in the Sydney drinking water catchment **unless it is satisfied that the carrying out of the proposed development would have a neutral or beneficial effect on water quality.***

cl.10(1) State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011



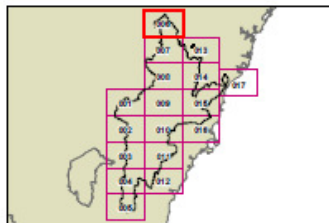
Planning

State Environmental Planning
Policy (Sydney Drinking Water
Catchment) 2011 - Sydney
Drinking Water Catchment Map

SDWC_006

Legend

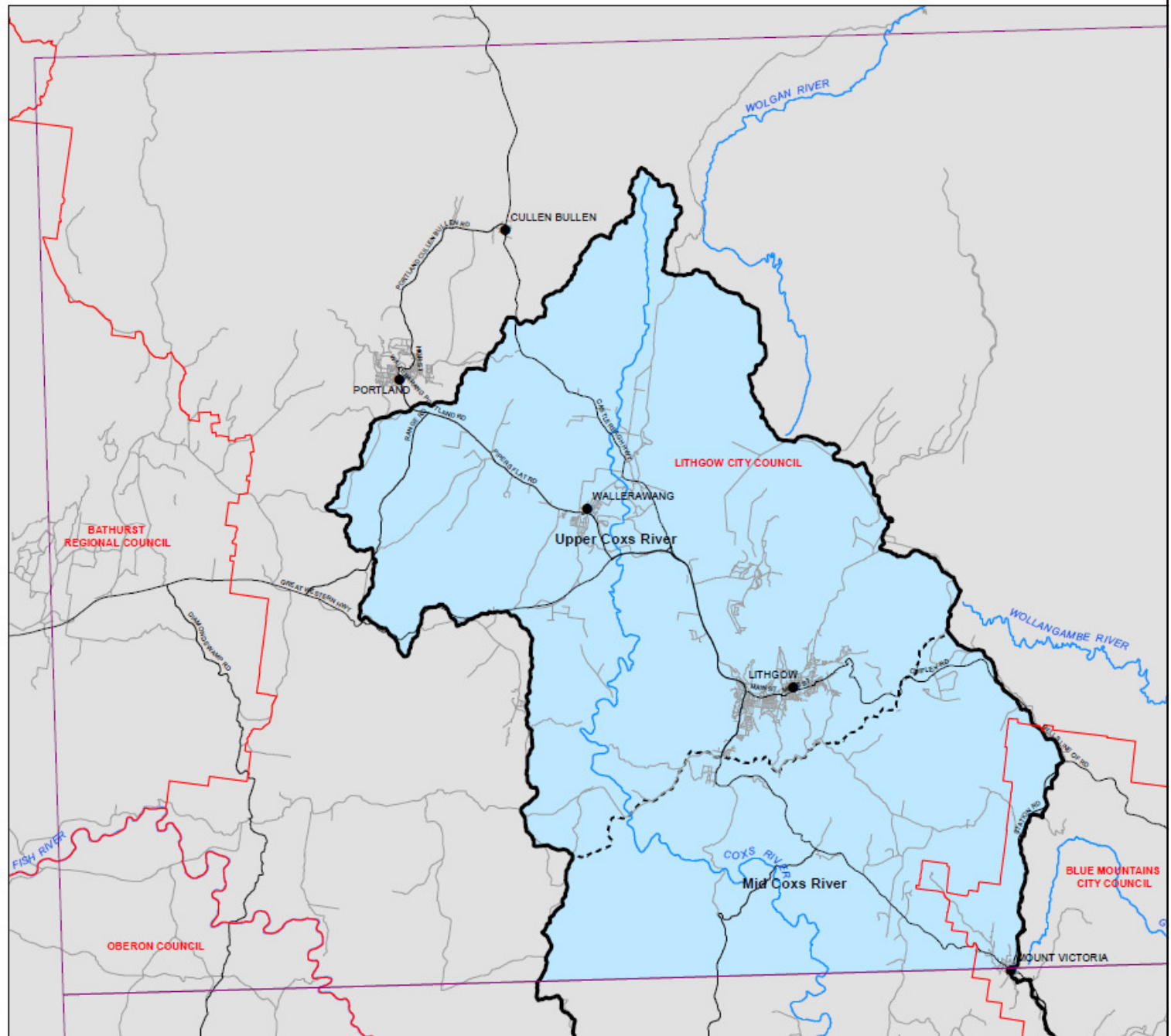
- Subject Land
- Sub-Catchment Boundaries
- Local Government Boundaries
- Major Rivers
- Major Roads
- Roads



Projection: MOA Zone 56
Datum: GDA94

Scale: 1:160,000 @ A3

Map Identification Number
SEPP_SDWC_006_20101215



4nature v Centennial Springvale: new SSD

- Mine water = high salinity, contains nitrates, phosphates, zinc, nickel
- Discharge 19,000,000 L mine water into the Cocks River per day; 5-6% increase in salinity in Lake Burragorang
- Centennial claimed **interim** salinity discharge limits as the status quo of 1,200 $\mu\text{S}/\text{cm}$
- Proposed future minor reductions in salinity



Cocks River. Image: David Noble

“Neutral or beneficial effect on water quality”?

4nature v Centennial Springvale: PAC Approval

- Planning Assessment Commission approved the expansion
- No determination report
- No mention they were satisfied of the 'neutral or beneficial effect on water quality' test
- Modelling indicated increased water pollution



Cocks River. Image: David Noble

4nature v Centennial Springvale: LEC proceedings

- Judicial review
- The PAC:
 - was not satisfied (or could be) of a “neutral or beneficial effect on water quality”
 - misdirected itself
 - failed to consider
- No evidence they could be satisfied
- Test case – first time SEPP tested (introduced in 1998)



Cocks River. Image: David Noble

4nature v Centennial Springvale: LEC judgment

- Letter to Minister ≠ not reasons
- Court said the test can be interpreted flexibly, “fluid construction”
- Consent authority can choose its own baseline
- Summons dismissed
- Decision is being appealed on a question of statutory interpretation



4nature v Centennial Springvale: Outcomes

- Highlights problems with the SEPP – law reform, review of SEPP underway
- PAC to provide reasons, provided in new Planning Bill (Schedule 2.1[2], clause 19(2)(c))
- Proposal to cease discharges to the Cocks River, but implementation is many years away
- Demonstrates community's commitment to protect the Cocks River (*Blue Mountains Conservation Society Inc v Delta Electricity (No 3)* [2011] NSWLEC 145)

People for the Plains v Santos: Background

- Santos' Leewood Produced Water Treatment and Beneficial Reuse Project.
- Will treat up to 1.5 million litres of CSG wastewater per day & irrigate farmland with treated water.
- Approved by Department of Industry utilising Mining SEPP:
 - No need for development consent.
 - No Environmental Impact Statement (EIS).
 - No mandatory public participation / merits appeal.



Leewood Ponds (Santos: Leewood Phase 2 REF)

Leewood Project



Arial

People for the Plains v Santos: The Proceedings

- Civil enforcement:
 - The Project requires development consent.
- Judicial review:
 - The Approval was invalid.
- NSW Land and Environment Court
- NSW Court of Appeal



People for the Plains v Santos: Civil Enforcement

State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)

*“Clause 6 Development permissible **without** consent*

Development for any of the following purposes may be carried out without development consent:

...

(d) petroleum exploration.”

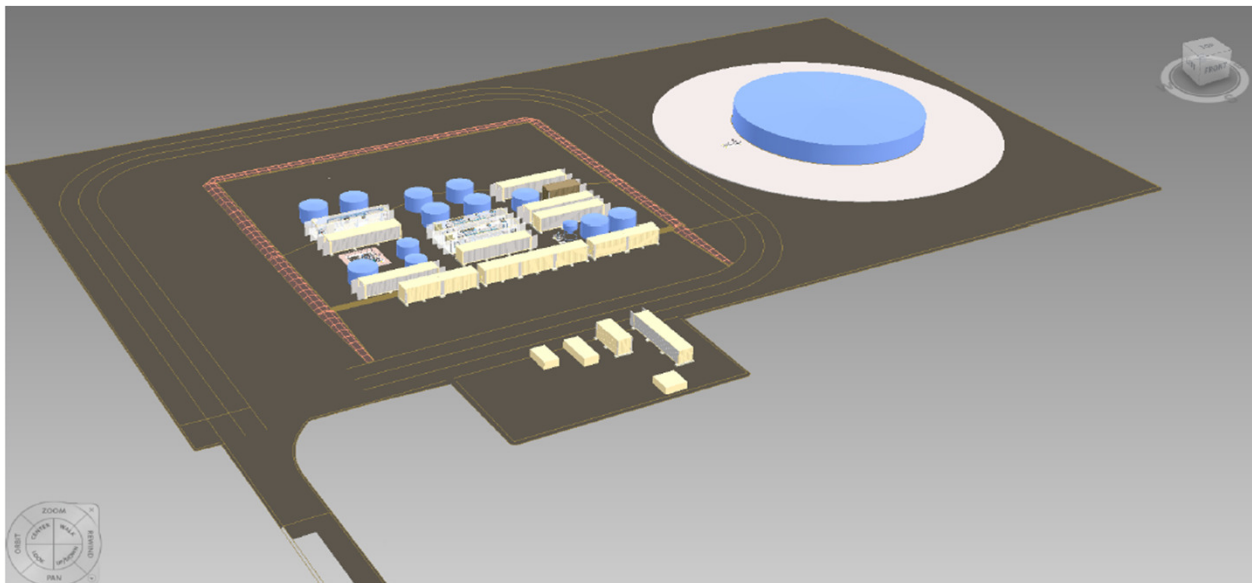
People for the Plains v Santos: Civil Enforcement

- Properly characterised, the Project is:
 - Not “petroleum exploration.”
 - An industrial scale water treatment plant, including commercial irrigation component.
 - Best characterised as a Waste Disposal Facility.
- The Project requires development consent.
 - Designated development:
 - EIS.
 - Public participation.
 - Merits review.



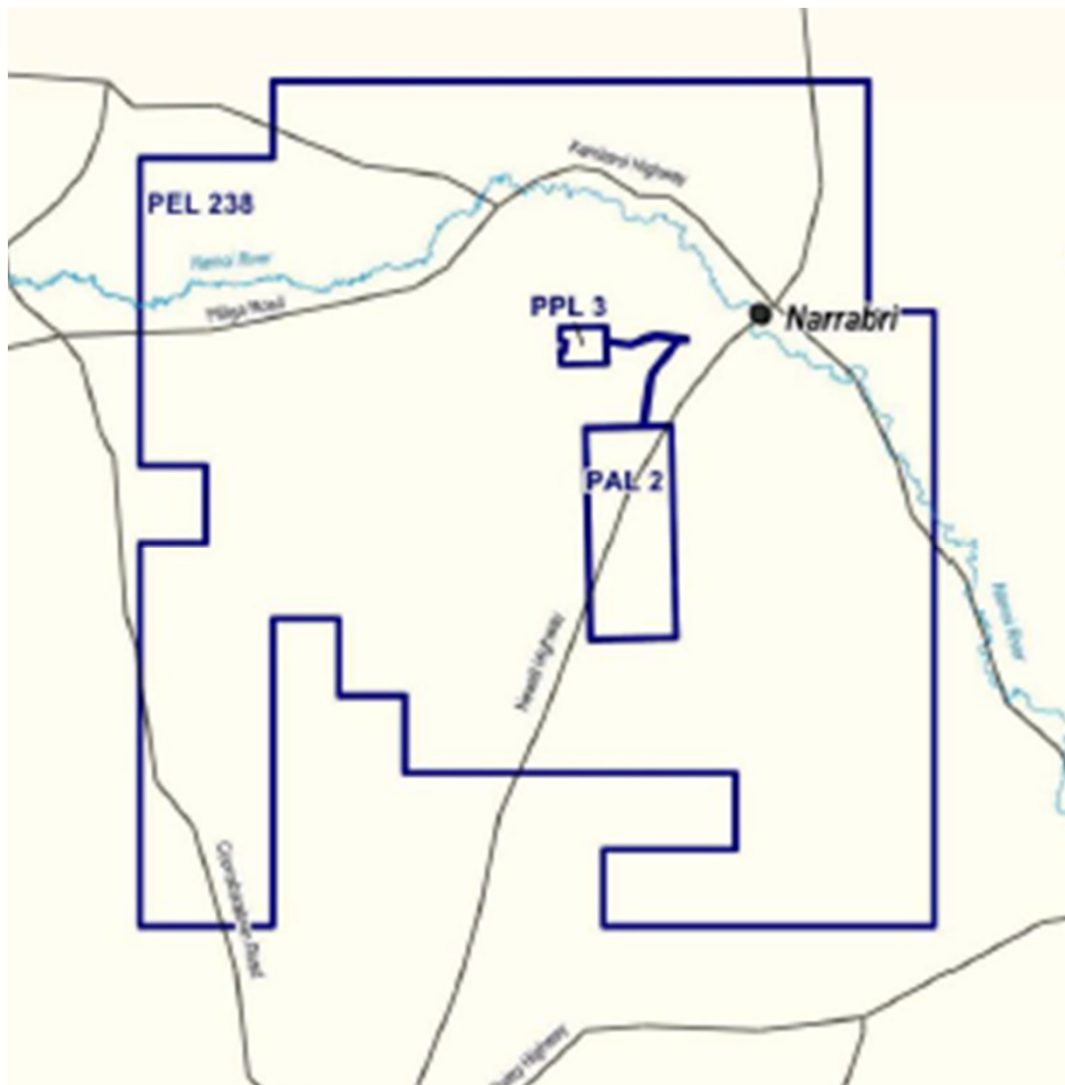
People for the Plains v Santos: Judicial Review

- The Approval of the Project was invalid.
 - The Project is located on PAL 2.
 - However, it is allowed to treat water from PAL 2, PEL 238 and PPL 3.



Leewood WTP (Santos: Phase 2 Water Treatment Plan)

Relative location of petroleum titles



Title Diagram (Santos: Leewood Phase 2 REF)

People for the Plains v Santos: Judicial Review

- Approval granted under *Petroleum (Onshore) Act 1991* (**PO Act**).
 - Amendment to Operating Plan required under PAL 2.
- PO Act limits right to explore to the individual title granted.

“Section 33 Rights of holders of assessment leases

*The holder of an assessment lease has the exclusive right to **prospect** for petroleum and to assess any petroleum deposit **on the land** comprised in the lease.”*

NB. In Mining SEPP, petroleum exploration ≈ prospecting

People for the Plains v Santos: Judicial Review

- Therefore, the Project Approval was invalid:
 - If treatment of water is “exploration” it can only be done on the individual title granted – it cannot treat water produced on other titles.
 - Approval beyond power under PO Act.
 - Plus – constructive failure to exercise jurisdiction:
 - Misapprehension of scope of power – failure to consider that Project required development consent.



People for the Plains v Santos: Santos' Arguments

- Civil enforcement:
 - Treating produced water is a necessary component of exploration.
 - The Project would have not been constructed but for that purpose.
 - Therefore, properly characterised, Project is development for the purpose of “petroleum exploration” under Mining SEPP.
- Judicial review:
 - Project is part of an integrated exploration project.
 - A narrow interpretation of PO Act leads to unreasonable outcome:
 - i.e. water treatment plants would need to be constructed on every title held by Santos.
 - Santos' titles were carved out from PEL 238 – therefore, they are the same “land” for the purposes of s. 33 of the PO Act.
 - Definition of “land” in s. 33 should be read to include “other land” over which a title is held.

People for the Plains v Santos: Judgment

- Civil enforcement:
 - The Project is properly characterised as being for the purpose of petroleum exploration:
 - Produced water is a necessary physical element of prospecting.
 - Required to be dealt with in an environmentally appropriate fashion.
 - Santos was entitled to deal with produced water through the construction of the Project.
 - The purpose served by the Project is to deal with the produced water generated through exploration.
 - This does not extend to commercial irrigation component:
 - Independent use, but permissible without consent under the LEP.
- Therefore, Project permissible without consent under the Mining SEPP.

People for the Plains v Santos: Judgment

- Judicial Review:

- Interpretation of s 33 PO Act - Purposive approach:

“The holder of an assessment lease has the exclusive right to prospect for petroleum on the land comprised in the lease and on the land of any exploration licence from which the lease has been excised ...”

- The Project was permitted to treat water from PEL 238.

NB. Moore J accepted Santos' evidence that no water will be treated from PPL 3 by the Project.

People for the Plains v Santos: Outcomes

- Project cleared to operate.
- Precedent: Expanded definition of petroleum exploration:
 - Permits construction of Leewood style facility on every title as “exploration.”
 - May have implications for access arrangements for exploration on private land.
- Awaiting Court of Appeal decision.

