Esso Australian Resources Pty Ltd v Southern Pacific Petroleum NL[2] that commercial contracts are not a class of contract that have an implied obligation of good faith. In view of the express term that XMO will not act unreasonably in clause 5, it was concluded that to imply an additional obligation of good faith in clause 5 is unwarranted.

However, in respect of clause 3 of the Deed, the judge indicated that XMO is obliged to act reasonably and in good faith in ensuring that MMC has the benefit of the promise that XMO, its contractors and or agents will abide by any conditions imposed on the use of the rail line. XMO is under an obligation to act in good faith in ensuring that its agents and contractors and the accredited operator of the rail line is aware of this clause and also in making arrangements with those persons so that the conditions imposed on the use of the rail line are complied with.

MMC also sought other declarations in respect of breaches of clause 3 and 4 of the Deed but they were not granted as the court was not satisfied that there were breaches. A number of issues were raised including the following:

1. The court considered whether a condition in the subsidence management plan which requires MMC to prepare a rail line subsidence management plan and obtain the Director-General approval for it before any longwall mining may commence was a condition on the use of the rail line. It was concluded that it was not. It was regarded as a condition on MMC's entitlement to mine under the rail line.

2. The Mine Subsidence Board granted approval for the construction of the rail line on condition that certain drawings were lodged with it before construction commenced. But they were not lodged. MMC claimed this was a breach of clause 3. The court held that it was not because it was not a condition on the use of the rail line. Rather, it was a condition related to construction of the rail line.

NSW STATE ENVIRONMENTAL PLANNING POLICY (MINING, PETROLEUM PRODUCTION AND EXTRACTIVE INDUSTRIES) 2007*

Introduction

The State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP) was gazetted on 16 February 2007. The Mining SEPP applies to the whole of New South Wales, and consolidates and updates many existing planning provisions related to mining, petroleum production and extractive industries, as well as introducing a number of new considerations which must be taken into account in the decision making process under the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act). The Mining SEPP will bring welcome consistency in the application of certain aspects of planning law to these industries across New South Wales, but may be of more limited assistance for proponents of coal and mineral sands mining projects, and other mining and petroleum development carried out on a significant scale. It also increases the likelihood of duplication in assessment and reporting responsibilities imposed by the Department of Planning and the Department of Primary Industries.

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2 [2005] VSCA 228.

* Felicity Rourke, Senior Associate, Allens Arthur Robinson.

Consistency in Identifying Permissible Development

A welcome feature of the Mining SEPP is the articulation of the categories of mining, petroleum production and extractive industries activities which are permissible with and without development consent.[1] These provisions, together with a clause which overrides the effect of certain provisions of local environmental plans,[2] will ensure consistency across all local government areas as to when development consent is and is not required. These provisions will also overcome the "permissibility performance criteria" which some councils have sought to introduce in local environmental plans in recent years.

The Mining SEPP also includes a mechanism for the Minister to prohibit outright certain mining, petroleum production and extractive industries, by listing such developments in schedule 1 to the SEPP.[3] At the time of publication, open cut mining within the local government area of Lake Macquarie (with the exception of an existing mine identified on the relevant map) was identified as prohibited development.

Exempt and Complying Development

The EP&A Act allows each council to identify in their local environmental plan classes of development known as "exempt development" (which does not require any form of approval under the EP&A Act) and "complying development" (which is authorised by obtaining a complying development certificate, which can be issued by an accredited certifier as well as by councils).[4] However, despite the existence of this power to categorise development which can take the benefit of a simpler approval mechanism (or which can avoid completely the requirement to obtain approval), the majority of exempt and complying development categories which have been established throughout New South Wales concern residential development, with the result that the mining, petroleum and extractive industries have not been able to take the benefit of these simpler approval mechanisms.

The Mining SEPP seeks to address this deficiency by establishing categories of exempt development and complying development relevant to those industries.

For example, development for the following purposes is exempt development if it is of minimal environmental impact and is not on land within an environmentally sensitive area of state significance:

- construction, maintenance or use of monitoring stations for weather, noise, air or ground water associated with an approved development;
- low intensity activities associated with mineral exploration or petroleum exploration;
- certain minor construction and maintenance activities on the site of an approved mine, petroleum production facility or extractive industry (such as car parking facilities, paving, landscaping, flagpoles, fences and gates);

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1 Clause 6 of the Mining SEPP specifies development which is permissible without development consent, and clause 7 addresses development permissible with development consent.

2 The consequence of clause 8 of the Mining SEPP is that provisions of a local environmental plan which define relevant development as permissible only if certain provisions or the plan are satisfied, or only if the consent authority is satisfied as to certain specified matters, have no effect.

3 Clause 9 of the Mining SEPP.

4 Division 3 of Part 4 EP&A Act sets out the special procedures which apply to complying development.

- demolition of certain buildings or structures carried out in accordance with the relevant Australian standard;
- non-structural alterations to the interior or exterior of certain buildings; and
- the installation of additions to existing infrastructure for the drainage of gas from an approved mine.[5]

New Matters for Consideration

Legal drafting issues

An important element of the Mining SEPP is the introduction of new matters for consideration in the grant of consent for development for the purposes of mining, petroleum production or extractive industries. In reviewing these provisions, it is relevant to note the limitations on the drafting employed in the Mining SEPP. The provisions of the Mining SEPP requiring specified matters to be taken into account have been drafted using the language of Part 4 of the EP&A Act, namely "development" and "development consent". These provisions are mandatory considerations in the assessment of any development application for mining, petroleum production or extractive industries by operation of s 79C of the EP&A Act, which requires a consent authority to take into account, in determining a development application, such matters as are of relevance in any environmental planning instrument (such as a SEPP).

However, the matters for consideration listed in the Mining SEPP do not expressly apply to, nor do they invoke the language of, Part 3A of the EP&A Act which deals with major infrastructure and other projects.

Part 3A, introduced in 2005, provides a separate assessment and approval system for such major projects and makes the Minister the approval authority for these projects. Examples of major projects to which Part 3A of the EP&A Act applies include:

- all coal or mineral sands mining;
- all other mining that is an environmentally sensitive area of State significance, or has a capital investment value of more than $30 million or employs 100 or more people;
- development for the purposes of drilling and operation of petroleum wells that has a capital investment of more than $30 million or employs 100 or more people, or which is in an environmentally sensitive area of State significance, or is located in certain specified local government areas.[6]

Section 75R of the EP&A Act provides that State Environmental Planning Policies (such as the Mining SEPP) relevantly apply to "the carrying out of a project."[7] However, Part 3A contains no equivalent obligation to consider relevant matters contained in any environmental planning instrument in the determination of a project application (that is, prior to the project being approved or carried out).[8] The scope of the matters to be considered in an environmental assessment under

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5 Clause 10 of the Mining SEPP.

6 State Environmental Planning Policy (Major Projects) 2005, Schedule 1.

7 Section 75R(2)(b) EP&A Act.

8 Clause 8B of the *Environmental Planning and Assessment Regulation 2000* sets out mandatory matters to be covered in the Director-General's report to the Minister in relation to a project application. The clause reproduces some but not all of the matters listed in s 79C of the EP&A Act, and relevantly clause 8B does not contain an obligation to consider relevant matters in any environmental planning instrument.

Part 3A remains, therefore, largely a matter for the discretion of the Director-General in the formulation of his requirements for environmental assessment (Director-General's Requirements) under s 75F.

The result is that the Mining SEPP identifies a number of important new matters for consideration during the assessment of development applications, which have limited or no legal effect in the assessment of applications for project approval under Part 3A. Notwithstanding the absence of a legal obligation to consider such matters, however, officers of the Department of Planning stated at a recent AMPLA NSW Branch seminar that the Department's practice would be to take into account all of the matters of consideration set out in the Mining SEPP when assessing Part 3A applications, and that these matters were already being included in Director-General's Requirements for applicable project applications under Part 3A.[9]

Land use compatibility

The Mining SEPP now requires the consent authority to consider the likely impact of new mines, petroleum or quarry proposals on current and future surrounding land uses, and in doing so, to have regard to "land use trends" so as to identify the likely preferred uses of land in the vicinity of the development.[10] As part of this assessment, the consent authority must "evaluate and compare the respective public benefits" of the development with the other land uses in its vicinity.

Significantly, the Mining SEPP also includes a mirror provision which applies to new developments of any kind which are proposed in the vicinity of an existing mine, petroleum production facility or extractive industry. For such developments the consent authority is required to consider whether the proposed development is likely to have a significant impact on current or future extraction or recovery of minerals, petroleum or extractive industries, including by limiting access to, or impeding assessment of, those resources.[11] This new provision establishes a clear basis for incompatible development proposals to be refused if they are likely to jeopardise current or future extraction of resources at nearby mines, petroleum production facilities or extractive industries.

Natural resource and environmental management

The Mining SEPP now requires the consent authority to consider whether conditions should be imposed aimed at ensuring that the development is undertaken in an "environmentally responsible manner". This will include consideration of conditions to ensure that:

- impacts on significant water resources (including surface and groundwater resources) are avoided or are minimised to the greatest extent practicable;
- impacts on threatened species and fire diversity are avoided or minimised to the greatest extent practicable; and
- greenhouse gas emissions are minimised to the greatest extent practicable.[12]

In addition, the Mining SEPP now requires the consent authority to consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development.[13] In making this assessment, the consent authority must do so having regard to any applicable State or national

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9 AMPLA NSW Branch seminar 26 February 2007 at Allens Arthur Robinson, Sydney.
10 Clause 12(a) Mining SEPP
11 Clause 13 Mining SEPP.
12 Clause 14(1) Mining SEPP.
13 Clause 14(2) Mining SEPP.

policies, programs or guidelines concerning greenhouse emissions. Guidelines for greenhouse gas emissions issued by the Department of Planning, which are presently in draft, are expected to be expanded and finalised to clarify the nature of the assessment required.

These provisions are an unsurprising legislative response to recent events, most notably the Anvil Hill decision in the NSW Land and Environment Court,[14] and now mandate the consideration of greenhouse gas emissions in every development application to which the Mining SEPP applies.

Resource Recovery

The Mining SEPP now requires the consent authority to "consider the efficiency or otherwise of the development in terms of resource recovery".[15] This provision will appear to some to be an encroachment by the Department of Planning into an area traditionally regulated by the Department of Primary Industries, although from a planning perspective this issue is arguably implicit in the concept of sustainable development. However it is viewed, this requirement to consider the "efficiency" of a development at the planning approval stage may require additional and more detailed assessment up front of the extent to which proposed mining will optimise recovery of the resource.

Rehabilitation

Finally, the Mining SEPP now requires a consent authority to consider whether or not consent should be issued subject to conditions regulating land rehabilitation.[16] These provisions again provide the potential for significant duplication between the regime established under planning approvals, and the monitoring and reporting regimes separately imposed under relevant mining legislation. Close coordination will be required between the various government agencies to avoid duplication of compliance and reporting obligations, and to avoid consequential cost implications for industry.

Conclusion

While the Mining SEPP contains welcome provisions concerning permissibility of development, its role in relation to the matters for consideration in the assessment of major projects under Part 3A is legally unclear. In practice, however, the Department of Planning is expected to require the new matters for consideration to be addressed in relation to Part 3A project applications.

Further, the new obligation to impose conditions concerning some aspects of environmental management and rehabilitation may lead to duplication of current obligations imposed by mining regulators, which may increase compliance costs for the industry. New provisions of State wide application which identify categories of exempt and complying development will establish a welcome uniform regime across New South Wales.

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14 *Gray v Minister for Planning & Ors* [2006] NSW LEC 720. See below "Is the Judiciary Warming to Global Warming".

15 Clause 15(1) Mining SEPP.

16 Clause 17 Mining SEPP.