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27 June 2007

Ms Teresa Wilkie
Tannum Sands
By email: HHIPG@hotmail.com

Dear Teresa,

Assessment process and legal options to challenge the proposed Hummock Hill Development

We refer to your email of 30 April 2007 regarding the proposed Hummock Hill Development and your conservation with our volunteer Leilani Kuhn on 18 June 2007. We apologise for the delay in responding to you.

Please find below an outline of the assessment process being followed for the Hummock Hill development, including opportunities for public participation in that process, and potential avenues of legal challenge. Unfortunately, as with most major infrastructure, the legal avenues discussed are limited.

1. Summary

- At the state level, the Hummock Hill Development has been declared a "significant project" and is being assessed by an EIS under the *State Development and Public Works Organisation Act*. The two opportunities to participate in the process are to comment on the draft terms of reference for the EIS (**comments were due on 18 December 2006**) and to comment on the EIS itself once prepared (**Coordinator General's office has advised that the EIS is expected in August 2007**). There are extremely limited avenues of legal challenge against approval of declared "significant projects" in Queensland. Lobbying and pressure on the State Government has a greater chance of ultimately stopping the development than legal action.
- At the federal level, the state EIS will be relied on by the federal government in deciding whether to approve the Hummock Hill Development under the *Environment Protection and Biodiversity Conservation Act 1999* ("EPBC Act"). Federal approval for the development is necessary because of its likely impacts on World Heritage, threatened species and migratory species. There are criteria which the federal Minister must consider and abide by before being able to approve the development, which could provide grounds for the Minister to refuse the development. However, there is a level of Ministerial discretion and the track record of refusals under the EPBC Act is miniscule (only three out of thousands). Once an approval decision has been made, the merits of that decision can't be challenged in Court. Only a fault in the decision making process (such as a failure to consider a relevant consideration) is able to be taken to Court, by someone with legal standing, but this is costly and you would need to get a formal advice from a barrister on your prospects of success for such a challenge before so proceeding. In the short term, concerted lobbying and public pressure on the Minister to use his powers to refuse the Hummock Hill development will be needed to increase the chances of him doing so.

2. State options to challenge the Hummock Hill Island Development

2.1 State Development and Public Works Organisation Act ("State Development Act")

The *State Development Act* sets up a process for assessing and approving major infrastructure and other projects which the state government decides are "significant projects". The Act gives power to the Coordinator-General (an unelected senior bureaucrat) to declare a project a "significant project", which means the project is removed from other assessment processes and brought in under the State Development Act for assessment and approval, often involving preparation of an EIS.

On 25 October 2006, the Coordinator-General declared the Hummock Hill Island Development project (Hummock Hill Development) to be a significant project under the State Development Act, requiring an EIS. The public has the right to make comments on the draft terms of reference for the EIS, comments which must be considered by the Coordinator-General when finalising the terms of reference. The draft terms of reference were open for public comment until **18 December 2006**. The Coordinator-General is currently preparing the final terms of reference, which are expected to be released by the **end of June 2007**. The final terms of reference are not open for public comment.

The EIS will then be prepared by the proponent in accordance with the terms of reference. Once the EIS is prepared, the public again has the right to comment on the EIS and those comments must be considered by the Coordinator-General. Currently, the Coordinator-General expects that the EIS will be released sometime in **August 2007**. The Coordinator-General will review the EIS and the public comments and write a report evaluating the EIS, which may (not "must") evaluate the environmental effects of the project and may impose conditions. This report must be publicly notified, and effectively functions as the approval for the project. That report can state:

- conditions which must attach to the development approval,
- that the approval must only be for part of the development,
- that the approval must be a preliminary approval only,
- that there are no conditions or requirements for the project, or
- that the project must be refused (a refusal recommendation can only be made if the Co-ordinator General is satisfied that there are environmental effects in relation to the development that cannot be addressed adequately).

All powers of other government agencies (including the EPA) to impose conditions on the project or require its refusal evaporate, and the government is obliged to implement the recommendations in the Co-ordinator General's report, so effectively that report becomes the final decision.

Judicial review of decisions leading up to approval under the *State Development Act* process is theoretically possible in some instances (such as if the EIS produced did not sufficiently address the terms of reference), but the Act is so non-prescriptive of process that it would be extremely difficult to be able to mount a case that a ground of judicial review existed.

There are no rights to appeal the actual approval decision made on its merits, nor to judicially review that final approval decision by the Coordinator General, nor to seek a declaration as to the legality of the decision (section 54G *State Development Act* removes these declaration rights).

2.2 Other state approvals

The Hummock Hill Development may require approvals under other Queensland Acts to proceed. These will include the *Queensland Marine Parks Act*, *Vegetation Management Act*, *Water Act*, *Aboriginal Cultural Heritage Act*, *Transport Infrastructure Act*, *Environmental Protection Act*, *Coastal Management and Protection Act*, *State Planning Policy 2/02*, *State Coastal Management Plan* and *Regional Growth Management Frameworks*. You may have submission rights (rights to

comment on whether a permit or approval should be given, where such comments must be taken into account by the deciding government body) under these Acts and policies, however, we do not have enough detail at this stage to identify whether you would also have appeal rights to challenge those decisions (to grant permits or approvals) in Court**.** We would suspect that most of the permits and development applications applicable to this development would be code assessable. This means that the applications for those permits will not be advertised for public comment, and there will be no public appeal rights against an approval.

One *possibility* of an appeal right is against the grant of a permit to disturb a Fish Habitat Area for construction works. A person whose interests would be adversely affected by the grant of such a permit has the right to appeal the grant of the permit to the Fisheries Tribunal under the *Fisheries Act 1994*. However, to have your "interests affected" usually means that your property or your financial interests are affected, which may not apply to your situation.

There are also planning laws which may be relevant. It appears that the Hummock Hill Development would require a change of land use from its current zoning under Council's planning scheme as "rural" to a zone which permitted the style of residential and tourism development proposed. This change of use is called a "Material Change of Use" and it appears under the current Miriam Vale Shire Council Planning Scheme to be considered "impact assessable development". This means that public notification of an application for a material change of use would (normally) be required under the planning laws. Such public notification normally gives rise to public submission rights, which then allow a submitter to appeal Council's decision to the Planning and Environment Court. ***However*, because the development has been declared a "significant project" under the State Development Act described above, it will follow a different approval pathway, which binds Council to implement the Coordinator General's decision and which excludes any public rights of appeal**.

As you can see, there are many different Acts which are potentially triggered in order to develop Hummock Hill. Keep your eye on the local paper, Council's website and the Coordinator General's website for any notifications of rights to comment on applications for various permits that may be required. Contact us if you want further information about whether any of those submissions give you appeal rights to challenge the development in Court.

3. Federal process and options to challenge the Hummock Hill Development – the EPBC Act

3.1 EPBC process that applies to assessing Hummock Hill Island Development

The federal Environment Minister decided on 3 January 2007 that the Hummock Hill Development needed federal approval under the EPBC Act (was a "controlled action") because it was likely to have a significant impact on federally listed threatened species and communities (some "matters of national environmental significance" or "matters of NES").

Because of the bilateral agreement between Queensland and the Commonwealth, the environmental assessment of the project will be carried out under the accredited Queensland process – an EIS under the Qld *State Development and Public Works Organisation Act* ("State Development Act"). This means the EIS will have to address matters protected by the EPBC Act as well as matters it is required to address under state legislation, all in the one document.

Once the EIS has been prepared, it is summarised by federal Environment Department into an 'assessment report' which the federal Minister considers, and then must decide whether to approve the action, approve it but impose conditions to protect or mitigate damage to matters of NES, or

refuse the action. So the federal Minister still retains the right and obligation to decide whether to approve the development based on the criteria in the EPBC Act.

3.2 What things must the Minister consider before deciding whether to approve the action?

When deciding whether to approve an action, the Minister must **only** consider matters relevant to a controlling provision (information about impacts on matters of NES), and economic and social matters. In considering those things, the Minister must take into account **only**:

- the principles of ecologically sustainable development, which are defined by the Act to be:
    - decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
    - if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
    - the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
    - the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
    - improved valuation, pricing and incentive mechanisms should be promoted.
- the assessment report relating to the action;
- the EIS;
- any other information the Minister has on the relevant impacts of the action; and
- any relevant comments given to the Minister by another Minister in accordance with a mandatory invitation to comment before the federal Minister makes the approval decision.
- The Minister may also (but is not required to) take into account whether the person is a suitable person to be granted an approval, having regard to the person's history in relation to environmental matters.

In addition:

- the Minister must not act inconsistently with Australia's obligations under the relevant international conventions, relevantly the Convention on Biodiversity (but the obligations are very broad and in my view do not compel the Minister to refuse the development); and
- in the exercise of discretion whether to approve the action, general principles of statutory interpretation say that the Minister's exercise of discretion should **further the objects of the Act**, which relevantly include:
    - to **protect matters of NES**;
    - to promote the conservation of biodiversity; and
    - to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources.

  The recent case by Senator Bob Brown against logging in Wielangta coupe in Tasmania established the importance of the objects of the EPBC Act, so there is some room for argument that an approval which does not protect matters of national environmental significance is invalid – but that would be a matter for the Court to decide (see below).

In the history of the EPBC Act there has only been three refusals, out of thousands of referrals[1].

Concerted advocacy as well as excellent evidence of impacts on threatened species would be needed to influence the federal Minister to refuse the Hummock Hill Island Development proposal.

3.3 Can you challenge a bad decision by the Minister, such as approving the development?

If the federal Minister does approve the Hummock Hill Development, or approve it with conditions, the options to challenge that decision are limited. There is no entitlement to a review of the merits of that decision in Court, only a right for the process followed to be reviewed by a Court to determine if there were any failures in the decision making process which may impugn the decision (called "judicial review").

For example, the Minister's decision can be judicially reviewed for a *failure to take into account a relevant consideration* when making the approval decision. This literally means the Minister ignored something he was meant to consider – which is different from considering impacts on a species then deciding to approve the development anyway. Another ground of challenge is the Minister *taking into account an irrelevant consideration*, or making a decision that the Act does not empower the decision maker to make (such as the argument about the objects of the EPBC Act needing to be applied).

In order to go to Court for a judicial review of the Minister's approval decision, you need to meet the legal requirements to have the right to go to Court ("legal standing"). For individuals, these requirements are:

- being an Australian citizen or resident; and
- having been engaged in a series of activities in Australia in the past two years, for protection or conservation of, or research into, the environment.

For organisations, there is an additional requirement that the objects or purposes of the organisation included protection or conservation of, or research into, the environment.

Court action to judicially review the Minister's decision is taken in the Federal Court, which has rules that say an unsuccessful party must pay the legal costs of the winner – so it is a potentially large financial risk. The developers would be entitled to be involved, and either they or the Minister could get a Court order for "security for costs", requiring you to lodge a bond with the Court as insurance in case you lose and have to pay their costs. If such a bond cannot be met, the substance of the case cannot proceed. This is a tactic often used to keep the legitimate issues raised by community litigants out of Court.

If you are successful in getting the Court to judicially review the Minister's decision, the outcome is that the Minister is directed by the Court to re-make the decision but this time following the proper decision making processes. Conceivably, the Minister could reach exactly the same decision.

Before considering legal action to challenge any part of the process under the EPBC Act, EDO strongly advises you to seek a formal Advice on Prospects of Success, including an estimate of risks of adverse costs if you are unsuccessful, from a Barrister.

[1] The first refusal was of electric grids to electrocute Spectacled Flying-foxes, the second was of urban and commercial development on Norfolk Island (reputedly on aesthetic, landscape grounds), the third was of urban and commercial development on Kangaroo Island (seemingly on the grounds of impacts on the Glossy Black Cockatoo) and the fourth refusal was of the recent Victorian wind farm proposal due to impacts on the now critically endangered Orange Bellied Parrot – which was later approved after court action and a fresh referral.

Please do not hesitate to contact us for clarification of anything in this letter or further questions about Hummock Hill or any other public interest environmental matter.

Yours faithfully
Environmental Defenders Office (Qld) Inc.

Jo Bragg

Jo-Anne Bragg
Principal Solicitor

To provide feedback on EDO services, write to us at the above address.