

FINGERBOARDS MINERAL SANDS PROJECT
INQUIRY AND ADVISORY COMMITTEE
SUBMISSIONS IN REPLY ON VARIATIONS TO THE PROJECT
ON BEHALF OF KALBAR OPERATIONS PTY LTD

I. INTRODUCTION

1. These submissions are made in reply to the submissions of Mine Free Glenaladale ('MFG'), dated 5 March 2021, in response to Direction 59.

II. SCOPE OF THE HEARING

2. The first issue raised by the MFG submission is whether, in light of Kalbar's election not to proceed with a tailings storage facility ('TSF') in favour of reliance on centrifuges, the IAC should consider and assess the environmental impacts of the Project with a TSF.
3. Kalbar submits that assessing the proposed TSF in circumstances where Kalbar does not propose to proceed with it would serve no useful purpose:
 - a. First, to the extent it is suggested that it is necessary to assess the TSF because Kalbar might choose to proceed with it at some later date, this is speculation. In any event, as MFG acknowledges, even if Kalbar were to change its mind, that would simply mean that the effect of the TSF had to be the subject of a separate assessment process at that later time. This hearing is not the only forum in which the merits of a TSF could be considered and any failure to assess here does not mean that a TSF could be introduced without an assessment. Further, there is no guarantee that if Kalbar were to change its mind and reintroduce a TSF, that it would necessarily reintroduce a TSF that was designed in the same fashion as the original TSF described in the exhibited EES.
 - b. Second, even if the IAC were to assess the particular TSF set out in the EES and to conclude it was unsatisfactory, this would not mean that Kalbar was forever precluded from seeking to introduce a TSF into the Project. It would simply

mean that any future TSF needed to be designed differently to address the issues identified by the IAC.

4. In absence of any utility, assessing the proposed TSF serves only to prolong the hearing, require the parties to address on matters that are not seriously pursued, complicate the IAC's assessment task, and cause Kalbar and the Council in particular to incur additional costs as a result.
5. In support of its argument, MFG also relies on:
 - a. The Minister's reasons for requiring an EES; and
 - b. Clause 28 of the Terms of Reference.
6. Neither of these matter assist MFG's argument:
 - a. In respect of the Minister's reasons, Kalbar acknowledges that the reasons do identify a TSF as a component of the Project, as they do several other components. Importantly, nothing in those reasons elevates the significance of the TSF as a component over any other component of the Project identified by the Minister, attributes to it any particular impacts or identifies it as the reason why an assessment is required. Further, to treat the Minister's decision to require an EES as defining what must be assessed by the IAC could have potentially perverse effects insofar as it prevented a proponent from removing elements which might have environmental impacts.
 - b. In respect of the Terms of Reference, Kalbar acknowledges that clause 28 does require the IAC to 'review and consider' the exhibited EES. However, the exhibited EES is merely one of several sources of information that the IAC may have regard to in informing itself and nothing in the Terms suggests that the IAC may not, having reviewed the EES, give no weight to those elements of the exhibited EES which are no longer relevant to the Project as actually proposed. In this regard, it is significant that clause 30 – which sets out the matters on the which the IAC must report – requires the IAC to draw conclusions on the

‘environmental effects of the Project’, rather than, for example, the
‘environmental effects of the Project as described in the exhibited EES’.¹

7. In these circumstances, it is submitted that there is no benefits and significant costs associated with the IAC having to consider the TSF as originally proposed and it should decline to do so. The course suggested by MFG would, in effect, penalise Kalbar for proposing changes to the Project in circumstances where the intent of the proposed changes is entirely consistent with one of the aims of the EES, namely, avoiding and minimising environmental impacts.

III. LEGAL ISSUES

8. The second part of the MFG submission responds to Kalbar’s submissions in Document 141 regarding the absence of any legal impediment to consideration of the centrifuges.
9. MFG suggests that three issues potential arise:
 - a. First, MFG submits that the introduction of the centrifuges cannot prevent the IAC from having to consider the Project as described in the exhibited EES;
 - b. Second, MFG submits that the introduction of the centrifuges raises questions about the adequacy of the consideration of alternatives in the EES; and
 - c. Third, MFG submits that the failure to respond to the EPA’s s 22 notice during the pendency of hearing has the potential to interfere with the ‘integrated nature of the assessment’ of the works approval application as part of the EES process.
10. The first point to make is that none of these submissions are to the effect that the IAC is in some way legally prevented from considering the use of centrifuges as part of the Project.
11. Beyond that,
 - a. In respect of the first issue, Kalbar submits that, for the reasons set out above and in circumstances where a proponent has decided not to proceed with some element of a project, the IAC is not required to consider that environmental

¹ To the extent MFG relies on clause 5, this does not alter the analysis described above. Like clause 28, clause 5(a) requires the IAC to ‘review and consider’ the exhibited EES and, like clause 30, clause 5(b) requires the IAC to consider and report on ‘the potential environmental effects of the project’.

effects of that element simply because it was assessed in the exhibited EES. Consequently, the first submission by MFG should not be accepted.

- b. In respect of the second issue, the adequacy of the EES is not something that the IAC is called upon to consider by its Terms of Reference. As MFG states, clause 28 requires the IAC to consider the 'exhibited EES'. To the extent that the exhibited EES may not contain adequate information for an assessment, that is a problem for Kalbar and a matter about which MFG can make submissions in due course. It does not provide a basis for precluding consideration of changes to a project.
- c. In respect of the third issue, it is correct to say that Kalbar has not responded to the EPA's s 22 notice and will not do so before the hearing is completed. Kalbar notes that this is consistent with the position taken by AGL in relation to the assessment of the Crib Point gas import terminal and pipeline. More broadly, however, such an outcome is entirely consistent with the framework established by the *Environment Protection Act 1970* ('the EP Act'):
 - i. In a normal works approval application, third parties are given an opportunity to make written submissions in response to advertising. The effect of joint advertising of a works approval application alongside an EES is that, instead of making written comment, interested persons are invited to make a submission to the EES inquiry.²
 - ii. The power of the EPA to require additional information is conferred by s 22 of the EP Act. Significantly, nothing in s 22 imposes any restriction on the time at which the EPA can require additional information. It is thus inherent in the structure established by the EP Act that the EPA may require additional information either:
 - 1. After the application has been advertised under s 19B in the case of an ordinary works approval application;
 - 2. After the EES hearing has been conducted; or

² See s 19B(3B) and 20AA, *Environment Protection Act 1970*.

