

INQUIRY AND ADVISORY COMMITTEE

FINGERBOARDS MINERAL SANDS PROJECT

IN THE MATTER OF THE FINGERBOARDS MINERAL SANDS PROJECT

ENVIRONMENTAL EFFECTS STATEMENT

IN THE MATTER OF THE DRAFT PLANNING SCHEME AMENDMENT C156 TO THE EAST

GIPPSLAND PLANNING SCHEME

OPENING SUBMISSIONS

ON BEHALF OF EAST GIPPSLAND SHIRE COUNCIL

A INTRODUCTION

- 1 These opening submissions to the Inquiry and Advisory Committee (**IAC**) are made pursuant to Direction 56¹ on behalf of East Gippsland Shire Council (**Council**).
- 2 The Council participates in this IAC process in fulfilment of two important roles.
 - (a) First, it is the local government with the role of providing good governance, for the benefit and wellbeing of its municipal community, in respect of the municipal district within which the Fingerboards Mineral Sands Project (**Project**) is proposed.²
 - (b) Second, it is the intended responsible authority in respect of the provisions proposed to be included in its Planning Scheme by means of the proposed planning scheme amendment (**PSA**).

¹ Consolidated Directions (Tabled Document (**TD**) 144).

² *Local Government Act 2020 (LGA)*, s 8 (Role of a Council).

- 3 In fulfilling these roles, the Council must:
- (a) give priority to achieving the best outcomes for its municipal community, including future generations;³ and
 - (b) promote the economic, social and environmental sustainability of the municipal district, including mitigation and planning for climate change risks.⁴
- 4 In the course of its engagement with the exhibited EES, and with this IAC process, the Council has approached its obligations by starting from a position of gathering for itself the most reliable, and robust, information it practicably can. To that end, it engaged:
- (a) SLR Consulting (and various sub-consultancies), to conduct a ‘Targeted Technical Review’ of the exhibited EES;⁵ and
 - (b) later, Ausenco, to review the Proponent’s proposal to utilise centrifuges in the course of tailings management.⁶
- 5 The SLR Targeted Technical Review predated the Council’s decision as to whether to make a submission, and was undertaken to ensure the Council’s decision was informed by the best possible understanding of the exhibited material.
- 6 When the Council did form a view, it did so by a resolution⁷ – that, on the basis of the deficiencies in the EES identified by the SLR Targeted Technical Review, and on the basis of further concerns in terms of human health and climate change which were outside the scope of the SLR Targeted Technical Review, the Project should be opposed.
- 7 That is an unusually comprehensive and objective process for any stakeholder to undertake in the course of forming a position in respect of an EES.

³ LGA, s 9(2)(b).

⁴ LGA, s 9(2)(c).

⁵ Dated November 2020, and filed as comprising part of the Council’s submission to the exhibited EES (TD14).

⁶ Filed 30 March 2021 in support of the Council’s supplementary submissions in respect of the centrifuge proposal.

⁷ See TD14.

- 8 It is an unusually apolitical process to be adopted by a local Council.
- 9 And it is a process which offers an unusual opportunity for a proponent inclined to respond to submissions in the course of an inquiry under the *Environment Effects Act 1978 (EE Act)*, by explicitly identifying gaps, deficiencies and uncertainties which may be filled, explained, or resolved.
- 10 But this is an unusual case in that the proposal comes before an Inquiry in a notably uncertain form and without a clear sense of what the impacts and the asserted benefits of the Project.
- 11 Notwithstanding the Council's efforts to obtain information of detail proportionate to the importance of the land on which the Project is proposed to be situated, and the environmental matters on which the Project may have an effect, there remains insufficient information to:
- (a) assess or consider the existence, significance or acceptability of the environmental effects of the Project; or
 - (b) to conclude that those impacts are, or could be managed to be, acceptable.
- 12 The Council submits that the evidentiary onus in each respect rests on the Proponent. The Proponent must demonstrate that, in every respect required by the scoping requirements, the Project's impacts are acceptable and can be adequately managed. The approach, objectives and principles underpinning the EES process are set out in the Ministerial guidelines for assessment of environmental effects under the Environment Effects Act 1978 (2006) ("**Guidelines**")⁸. Consistent with the Guidelines the IAC will be conscious of the need to conduct the inquiry by conducting an integrated assessment of the impacts of the proposal rather than an assessment of each element or impact in isolation.

⁸ Extract in part in attachment 1 for reference.

- 13 In every such case, it is necessary that the Proponent establishes acceptability “having regard to legislation, policy, best practice, and the principles and objectives of ecologically sustainable development”.⁹
- 14 Unless and until the onus on the proponent is satisfied, the IAC cannot conclude that the Project should proceed.

B THE PROPOSED MINE SITE

- 15 The Project is proposed to involve 1,675 hectares of land within the Lindenow district, which comprises some of Victoria’s most productive agricultural land, along the Mitchell River floodplain, valleys and flats (known as the Lindenow Flats). The district produces clean, top quality vegetables, meat, fine wool and dairy products.
- 16 It is proposed to mine land just south of the Mitchell River, the largest unregulated river in Victoria and one of Victoria’s 18 heritage rivers under the *Heritage Rivers Act 1992*.¹⁰ The Project land includes a number of minor tributaries of the Mitchell. These tributaries can be seen in the broader landscape as the distinctive “finger-like” pattern incised along the flow paths of permanent and ephemeral waterways. The Mitchell flows to Lake King, one of the three Gippsland Lakes – and a part of the Gippsland Lakes Ramsar Site.
- 17 South of the Mitchell, tributaries of the Perry River characterise the landscape within and outside the Project area in a similar way. To the west and the south, Providence Ponds and the Perry River provide a unique example of Chain of Ponds systems which, in sections, remain intact – as well as sections recovering from historical impacts of native vegetation clearing and altered hydrological regimes. The Perry River drains into the Gippsland Lakes’ Lake Wellington.
- 18 As well as that downstream Ramsar site, the Project land and its surrounds are home to matters of national environmental significance protected under the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, namely listed threatened

⁹ Terms of Reference, 34(b) and (c).

¹⁰ *Heritage Rivers Act 1992*, Schedule 1 Part 12.

species and communities of flora and fauna, including the Gippsland Red Gum Grassy Woodland within the Project area and the Swamp Everlasting within the Saplings Morass Flora and Fauna Reserve (which is within the area identified for infrastructure provision and adjacent to the proposed Fernbank Rail siding), and listed migratory species,¹¹ as well as State-significant flora, fauna, and ecological communities.

- 19 It is also located across the river from and adjacent to important farming communities and includes native trees hundreds of years old and roadside vegetation which the Planning Scheme affords special protection – and which defines the journey of locals and tourists to destinations such as the Den of Nargun in the Mitchell State Forrest.
- 20 It is country of deep ancestral, spiritual and cultural importance to the Brabralung People of the Gunaikurnai Nation.¹²
- 21 It is country of quality and identity of which it is apparent that its residents and custodians are proud.
- 22 On first blush, one might think that a mine located as this one would be – surrounded by a Heritage River and national park, wetlands and watercourses historically supporting critically endangered species, a rare example of a largely intact Chain of Ponds system, cheek by jowl with a food bowl, on top of a complex aquifer system and with a complicated soil profile and involving the loss of a very significant amount of native vegetation – would always be a difficult proposition.
- 23 And the IAC should be open to the idea that the mere presence of a resource which is financially worth extracting does not render a location an appropriate one for a mine.
- 24 The fact that a mine can produce a financial return does not mean that, on balance, its effects will resolve to benefit the community or to acceptably resolve the environmental issues it poses.

¹¹ See generally EES, Chapter 10, Section 10.6. The Project also has a significant effect on MNES as it involves ‘nuclear actions’ within the meaning of s 22(1) *EPBC Act*.

¹² As submission 662 makes plain.

25 In the process of answering key questions before the IAC, it is necessary to ask what benefit this mine, in this location, will bring. An understanding of that benefit is needed to appropriately assess:

- (a) the question of whether the Project contributes to ecologically sustainable development and provides a net community benefit over the short and long-term;¹³ and
- (b) the environmental effects of the Project, in terms of both their significance and acceptability.¹⁴

26 It is circumstances of this precise sort which demonstrate the profundity of the precautionary principle. As the *Environment Protection Act 1970*¹⁵ and the *EPBC Act*¹⁶ define it:

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.

27 If the mine were to go ahead, the protection of the environment and the community from ongoing negative impacts during and after mining would be of critical importance. It is for the proponent to demonstrate the measures it proposes can deliver real certainty as to the outcome of approval – any promises or commitments relied upon to secure a positive EES must be capable of being guaranteed in the form of unconditional binding and enforceable commitments and rather than aspirational suggested outcomes to be delivered if convenient, economically justified or practicable or specified at some later date by reference to another process.

¹³ Scoping Requirements, p 12.

¹⁴ Terms of Reference, 5(b).

¹⁵ In section 1C(1). On the coming into force of the *Environment Protection Amendment Act 2018* on 1 July 2021, section 20 of the amended *Environment Protection Act 2017* will describe the precautionary principle as follows:

If there exist threats of serious or irreversible harm to human health or the environment, lack of full scientific certainty should not be used as a reason for postponing measures to prevent or minimise those threats.

¹⁶ Section 3A(b).

C THE EES ASSESSMENT, FURTHER DECISIONS AND CONSEQUENCES OF APPROVAL

- 28 The Part A Submissions made on behalf of Kalbar describe some of the further approval processes necessary for this proposal. It correctly indicates that the purpose of an EES assessment is “not a statutory approval but is used to inform approvals and assessments required under other legislation”.¹⁷
- 29 While this is correct, it is important not to underestimate the importance of an assessment under the EE Act to future decision-making processes to which a proposal like the Project will be subject.
- 30 The Minister’s assessment in respect of the recent Crib Point Gas Import Jetty and Crib Point – Pakenham Gas Pipeline Project¹⁸ describes the purpose and import of an assessment under the EE Act as follows:

This document constitutes my assessment of the environmental effects of the project. It represents the final step in the EES process and provides authoritative advice to decision-makers on the likely environmental effects of the project and their acceptability. My assessment is informed by the report of the inquiry and advisory committee (IAC) that I appointed, together with the EES and the submissions and evidence provided to, and presented before, the IAC.

*This assessment will inform decisions required under Victorian law about the statutory approvals required if the project proceeds. As the EES process has also been accredited for the assessment purposes of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), it will also inform the Commonwealth Minister for the Environment in making decisions about approvals required for the discrete elements of the project as controlled actions under that Act.*¹⁹

- 31 In this case, the IAC is positively tasked to:
- (a) advise on how measures necessary to avoid, mitigate or manage the environmental effects of the Project within acceptable limits, including any

¹⁷ Part A Submissions on behalf of Kalbar.

¹⁸ *Crib Point Gas Import Jetty and Crib Point – Pakenham Gas Pipeline Project: Minister’s Assessment under Environment Effects Act 1978*, Minister for Planning, March 2021 (**Crib Point Assessment**).

¹⁹ *Ibid*, 6 [1.1].

necessary project modifications, relates to relevant conditions, controls and requirements that could form part of the necessary approvals and consent for the project;²⁰ and

- (b) in particular, review the works approval application and provide advice that can be used to inform the EPA's consideration of that application,²¹ and in its capacity as an advisory committee, review the draft PSA and make recommendations as to the appropriateness of the provisions and controls it contains.²²

32 Further, as discussed below, the assessment of an EES is intended not only to inform further decisions, but to establish circumstances in which further discretions are removed (such as the need for planning permit where a work plan has been approved under the *Mineral Resources (Sustainable Development) Act 1990 (MRSD Act)*).

33 It will affect the need for planning permission to be obtained and fundamentally guide and inform decisions around allocation of water, of acceptability of the loss of vegetation and impacts on the environment.

C.1 EPBC Act considerations

34 As noted above, the Project has been determined to be likely to have a significant effect on:

- (a) Ramsar wetlands;
- (b) EPBC Act listed threatened species and communities;
- (c) EPBC Act listed migratory species; and
- (d) nuclear actions.

35 In the context of the EPBC Act, it is the IAC's role to come to and report to the Minister:

specific findings and recommendations about the predicted impacts and residual risks for matters of national environmental significance

²⁰ Terms of Reference, 5(d).

²¹ Terms of Reference, 5(f).

²² Terms of Reference, 6(c).

*and their acceptability, including appropriate controls and environmental management.*²³

36 Ultimately, the Minister’s role is defined by the Assessment Bilateral Agreement between the Commonwealth and Victoria.²⁴ The IAC should note two critical aspects of that Bilateral Agreement.

37 First, Clause 4 of Schedule 1 to the Bilateral Agreement illustrates an expectation that an assessment comprising an EES process will be conducted in circumstances of transparency – with an EES required to be made available to the public, released for public comment. While a proponent is contemplated to have a meaningful opportunity *to respond to submissions made by the public*,²⁵ there is no contemplation of wholesale changes being made at a proponent’s election following the transparent public process established by the Bilateral Agreement.

38 Second, insofar as Clause 4.2(iii) of Schedule 1 requires EES scoping requirements to be designed to ensure that an EES addresses the matters outlined in Schedule 4 of the *Environment Protection and Biodiversity Conservation Regulations 2000 (EPBC Regulations)*, it calls for an EES to:

- (a) describe all the components of the action,²⁶ and “the precise location of any works to be undertaken, structures to be built or elements of the action that may have relevant impacts”²⁷;
- (b) describe “how the works are to be undertaken and design parameters for those aspects of the structures or elements of the action that may have relevant impacts”;²⁸

²³ Terms of Reference, 34(i).

²⁴ *Bilateral Agreement made under section 45 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) relating to environmental assessment, Commonwealth of Australia and The State of Victoria*, made 27 October 2014.

²⁵ Schedule 1, Clause 4.3(d) and (e)(ii).

²⁶ EPBC Regulations, Schedule 4, 2.01(a).

²⁷ EPBC Regulations, Schedule 4, 2.01(b).

²⁸ EPBC Regulations, Schedule 4, 2.01(c).

(c) describe, to the extent reasonably practicable, any feasible alternatives to the action.²⁹

39 The Bilateral Agreement therefore clearly contemplates a situation of an EES which is precise and clear, and which is assessed on the basis of its exhibited form.

40 Departing from that model would be a departure from the requirements of the assessment required by the Bilateral Agreement.

41 The Council will address the nature of the findings to be reached, and recommendations to be made, by the IAC in this context in its submissions.

C.2 The Planning Scheme Amendment

42 The Planning Scheme Amendment (**PSA**) relates to the 'Project Infrastructure Area' (**Amendment Land**) – the land outside the mining licence area which is required to provide infrastructure comprising part of the Project. It is apparent from the scoping requirements that the IAC's role extends to considering the impacts not just of the mining operation but those created by the associated infrastructure, traffic movements and related impacts.

43 As exhibited, the Incorporated Document leaves significant uncertainty regarding activities with the real potential to have significant deleterious effects.

44 It proposes to supersede important provisions of the Planning Scheme – including those relating to native vegetation, and works in areas subject to the Environmental Significance Overlay and the Vegetation Protection Overlay – for the sake of allowing the use and development of the Amendment Land for very broad purposes, including the construction of infrastructure in locations at the Proponent's option, and the creation of easements over, and subdivision of, private land.

²⁹ EPBC Regulations, Schedule 4, 2.01(g).

- 45 It proposes to allow the use and development of the Amendment Land for roads, described in the most general of terms, with little to no detail about what is proposed or, particularly, what is proposed for the land around them.³⁰
- 46 The Council does not accept that it is possible to conclude what the effects of the Project or the use or development of the Amendment Land would be, how significant they would be, or whether they would be acceptable. Nor is it possible to come to any conclusion as to the benefits that the Project or its associated infrastructure might realise. If the IAC considers otherwise, it will be necessary to ensure that the PSA represents a Project which avoids those effects to the greatest practicable extent, and realises those benefits. This importance of this area, and of the controls which apply to it, should not be underestimated given the inclusion of the Saplings Morass within the Amendment Land.
- 47 The Council has provided a ‘track changes’ iteration of the proposed Incorporated Document – in two revisions, given the manner in which the Project has changed following exhibition of the EES³¹ – which, amongst important drafting changes, provides for the Incorporated Document to specify what it is that is allowed, and on what conditions.
- 48 Support for natural resources management found in the Planning Scheme, at the State level, is conditioned on environmental considerations:

14 NATURAL RESOURCE MANAGEMENT

Planning is to assist in the conservation and wise use of natural resources including energy, water, land, stone and minerals to support both environmental quality and sustainable development.

...

14.03-1S Resource exploration and extraction

Objective

³⁰ Nor is it clear by what process the proponent proposes to achieve approval for the movement of roads under the ownership and control of the State and Council both inside and outside the licenced area. The proponent has not provided its updated response to the Council’s without prejudice changes to the project area.

³¹ TD69 and TD227.

To encourage exploration of natural resources in accordance with acceptable environmental standards.

Strategies

Protect the opportunity for exploration and extraction of natural resources where this is consistent with overall planning considerations and acceptable environmental practice.

49 Locally, clause 21.06-4 focuses on encouraging exploration for and development of mineral resources in appropriate areas.

50 To the extent that the Proponent suggests that the Project is worthy of support (in part) because the Project:

(a) provides for certain economic benefits; and

(b) enjoys the benefit of planning policy encouraging natural resource extraction;

neither the Planning Scheme, nor the structure of the PSA as exhibited, support such conclusion.

51 It is also unclear how it is said that the Planning Scheme favours a mine in this location over farming or agricultural uses. That decision must be informed by a detailed environmental assessment of a sufficiently well-designed project to allow that analysis to occur.

C.3 MRSD Approval

52 The proponent of an EES is in a very significantly improved position under this the MRDA Act. In particular, in this case, approval of a mining licence and a work plan would allow the Proponent to exploit someone's land by mining it for 20 years. This process is a little different to other EES processes, which become an input into another process; in effect, this would deprive rights subject only to further refinement by DEDJTR.

53 The approval of a work plan and fulfillment of other preconditions under section 42 of the MRSD Act enable mining work to commence. It is important to observe that while the Proponent has indicated that it will not compulsorily acquire public land, the MRSD

Act operates such that work may commence in circumstances of compensation being paid for land owners but without their consent.³²

54 It follows that a successful EES is the first step in a process that will fundamentally affect rights of landowners by allowing use of their land subject to compensation but not necessarily agreement. It is unclear to what extent purchases and agreements are in place at present to satisfy that precondition.

C.4 Role of further approval processes

55 The Minister's assessment, as informed by the IAC's recommendations and advice, is also intended to inform:

- (a) the necessary works approval under the *Environment Protection Act 1970*;
- (b) works and licence requirements of the *Water Act 1989*, in respect of the construction of works on waterways and the taking and use of water from the Mitchell River and groundwater;
- (c) a cultural heritage management plan under the *Aboriginal Heritage Act 2006*; and
- (d) a management licence under the *Radiation Act 2005*.

56 In each respect, it is critical to proceed on the basis of a clear proposal, with clearly understood impacts and risks.

57 While it is not uncommon for some projects to determine finer details of a project at the detailed design stage, the extent to which this is acceptable depends upon the interdependency and relationship between different parts of the proposal. Ill-defined components which have the potential to affect other assessments should not be deferred to further plans or consideration lest it becomes impossible to either define what is approved or for the EES to adequately assess the impacts of the proposal.

³² MRSD Act, s 42(1)(h).

C.5 The necessary rigour of the EES process and this IAC process

58 Having regard to all of the above matters, it can be seen that the IAC is entrusted with a task of great significance and consequence. Its recommendations and advice will inform not only the Minister's assessment under the EE Act, but also decisions under Victorian and Commonwealth law with substantial and effectively final effect on the same basis.

59 It follows that the EES process must be clear, transparent and based on a rigorously considered and documented proposal backed up by clearly defined and enforceable mitigation measures.

60 The extensive time and resources devoted to the process by the Council and its fellow submitters, and by all authorities and persons involved in this Inquiry process, reflects a reasonable expectation that what is proposed in the exhibited EES reflects what is proposed to occur should the necessary approvals be granted.

61 As the Minister said in his assessment in respect of the Crib Point EES:

Proponents, DELWP and the other authorities on the technical reference group convened by DELWP all invest heavily in the process by which the EES is prepared. The EES is the primary source of information about the project and its potential environmental effects available to interested parties to inform their decisions about whether and in what terms to make submissions. Accordingly, the EES ought to be central to the consideration of the IAC and other parties at the hearing stage. ...³³

62 Yet in this case, the Project has changed shape significantly, and continues to evolve in material ways, after exhibition.

63 The proposal remains ill-defined in many important respects such that a large number of important matters are not decided, or in flux³⁴, or subject to mitigation measures which lack certainty or enforceability. For example, it is unclear where the water

³³ Crib Point Assessment, 15-16.

³⁴ See for example the numerous traffic options presented without clarity as to the mitigation measures proposed.

proposed to be used for the project will be sourced from or which entities stand to lose from any proposed allocation.

- 64 It is unclear what is proposed in terms of traffic and transport 'options', or what works will be carried out by way of mitigation.
- 65 It is important that the adequacy of the EES is judged not by reference to the amount of work done assessed by time or dollar value, but by the certainty achieved and the level of faith the community can place in the certainty of the outcome of placing a mine in the proposed location for 20 years.³⁵

D INADEQUATE ASSESSMENT OF IMPACT

- 66 It is apparent that the project is proposed to be located in a highly sensitive location. The onus is on the proponent to clearly demonstrate that the impacts of this proposal can be properly managed. This requires both a strong evidentiary basis which establishes the current situation and clear evidence of the likely effects of the Project on this environment.
- 67 If the IAC is not satisfied that this can and will be done in a satisfactory manner then it should recommend that the proposal be refused.
- 68 While engaging with the detail would be beyond the scope of these opening submissions – and would require more than the space or time available – by way of examples identified in the Council's submissions, the Council has substantial concerns in respect of:
- (a) economic benefits to the communities of local municipalities and to Victoria;
 - (b) climate change;
 - (c) water availability;
 - (d) native vegetation removal and offsets;

³⁵ Assuming that certainty as to timing can be achieved.

- (e) traffic;
 - (f) Aboriginal cultural heritage;
 - (g) human health –
- and other matters.

69 Despite some of these significant gaps having been identified by the Council and various submitters, the Proponent has elected to not call any evidence in respect of certain critical matters, squarely raised by the Scoping Requirements and the Draft Evaluation Objectives, including:

- (a) cultural (including Aboriginal cultural) heritage;
- (b) social impact;
- (c) acid sulfate soils; and
- (d) economics.

70 Each of these matters will be engaged with in the course of the hearing and addressed in closing submissions.

E CONCLUSION

71 The Council looks forward to exploring the many issues raised by this proposal during the course of the hearing.

Dated: 29 April 2021

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What objectives and principles underpin the EES process?³⁶

The general **objective** of the assessment process is:

To provide for the transparent, integrated and timely assessment of the environmental effects of projects capable of having a significant effect on the environment.

Specific objectives are:

- to provide for the transparent assessment of potential environmental effects of proposed projects, in the context of applicable legislation and policy, including principles and objectives of ecologically sustainable development
- to provide timely and integrated assessments of proposed projects to inform relevant decisions, in the context of coordinated statutory processes
- to ensure proponents are accountable for investigating potential environmental and related effects of proposed projects, as well as for implementing effective environmental management measures
- to provide public access to information regarding potential environmental effects as well as fair opportunities for participation in assessment processes by stakeholders and the public
- to provide a basis for monitoring and evaluating the effects of works to inform environmental management of the works and improve environmental knowledge.
These Guidelines incorporate the following specific principles of best practice:
- a systems approach to identifying, assessing and managing potential environmental effects to ensure that relevant effects and responses are considered
- a risk-based approach to ensure that required assessment, including the extent of investigations, is proportionate to the risk of adverse effects

³⁶ Extract from Guidelines at page 3.

- an integrated perspective of the relationship between and significance of different effects to inform decision-making
- the need to assess the consistency of proposed works with principles and objectives of ecologically sustainable development.