



# Planning Panels Victoria

Department of Environment, Land, Water and Planning

23 March 2021

As addressed

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Dear Parties,

## **Fingerboards Mineral Sands Project: Ruling on the Consideration of Tailings Storage Facilities**

In January 2021, Kalbar Operations Pty Ltd (the Proponent) advised parties that it was proposing to use centrifuges to dewater tailings from mining operations rather than the use of Tailings Storage Facilities (TSF).

Since then, there have been questions around whether the assessment by the Inquiry and Advisory Committee (IAC) should consider the Tailings Storage Facility (TSF) (as exhibited in the Environment Effects Statement (EES)), the TSF and centrifuges, or just the centrifuge proposal.

After consideration the IAC has concluded that only the centrifuges now put forward as part of the Project should be assessed.

The attached document sets out the Panel's reasons for its decisions in relation to those requests as foreshadowed in Direction 61 of Document 144.

If you have questions, please contact Amy Selvaraj at Planning Panels Victoria at [Fingerboards.IAC@delwp.vic.gov.au](mailto:Fingerboards.IAC@delwp.vic.gov.au).

Yours sincerely

**Nick Wimbush**

Chair, Inquiry and Advisory Committee

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## **Background**

1. An Environment Effects Statement (EES) for the Fingerboards Mineral Sand Project (the Project) was exhibited for 40 business days in late 2020 (3 September – 29 October 2020).
2. A 90 hectare temporary Tailings Storage Facility (TSF) was proposed in the EES. This facility was proposed to be used to store fines tailings for the first five years of production. After this initial period tailings would be placed in cells (TSFs) in the mine void and the temporary facility decommissioned (TSF option).
3. Over time coarse and fine tailings in the mine voids would be covered and progressively rehabilitated to final end use.
4. On 18 January 2021, Kalbar Operations Pty Ltd (the Proponent), wrote to the Inquiry and Advisory Committee (IAC)<sup>1</sup> advising of changes to the Project, including the introduction of centrifuges to treat (dewater) tailings.
5. The Proponent said centrifuges were being considered to address the concerns of some submitters and would offer the following advantages:
  1. *Centrifuges would provide certainty about water recovery from the fine tailings that is independent of climatic and soil conditions.*
  2. *There is no need to construct the temporary tailings storage facility (TSF) or the in-pit fines TSFs if centrifuges are used, as they create a dry cake from fine tailings.*
  3. *Centrifuges allow the continuous backfilling of the mined voids without the need to rip and remove in-pit fine TSFs before the commencement of rehabilitation operations, which means that the disturbed mining area is smaller, and rehabilitation can occur sooner after the completion of mining in any particular area.*
  4. *The continuous mining and backfilling operation significantly reduces overburden haul distance, which in turn reduces noise and dust generation.*
  5. *Any risk of seepage from fine tailings is removed as this material is fully dewatered to a state that will only retain capillary moisture that cannot seep to the environment.*
6. At this time the Proponent provided the IAC with Technical Note 1 (TN 001)<sup>2</sup> that provided further detail on the centrifuges and how they could be incorporated into the Project.
7. Following the proposal to introduce centrifuges, the IAC made Directions to facilitate the assessment of this new element of the Project including:
  - a. Providing leave for the circulation of supplementary and/or new expert evidence by the Proponent, East Gippsland Shire Council (Council) and Mine Free Glenaladale (MFG)
  - b. Adjourning the Hearing to allow consideration of the new material
  - c. *Providing the opportunity for further submissions on the centrifuge proposal to all existing submitters.*
8. Through Directions<sup>3</sup>, the IAC sought advice from the Proponent as to whether they considered the centrifuges as an option in the Project or whether it is now the only treatment for fines tailings being proposed.

<sup>1</sup> Document 42.

<sup>2</sup> Document 43.

<sup>3</sup> Document 144, Direction 58.

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9. The Proponent replied on 26 February 2021 submitting:<sup>4</sup>

*We are instructed that Kalbar wants to proceed with the project as modified by technical note TN 01 – in other words, with centrifuges in place of the TSF.*

### Issues

10. The following issues flow from the chain of events above:

- a. Can or should the IAC assess the proposal with just centrifuges or should/must the assessment consider the TSF option as exhibited in the EES as well.
- b. Are there specific legal impediments to the consideration of the introduction of centrifuges in the Project post exhibition of the EES.

11. A separate but related issue relates to the Environment Protection Authority's (EPA) request under section 22 of the *Environment Protection Act 1970* for further information regarding the Works Approval Application (WAA).

### Centrifuges

#### **Submissions**

12. The Proponent outlined its position in principle in submissions on 12 February 2021.<sup>5</sup> They submitted that:

*The submission of additional information to the IAC regarding the environmental effects of proposed works, including potential alterations to those works to achieve superior environmental outcomes, is not only consistent with the various legislative frameworks in which the IAC operates, but also expressly contemplated by the IAC's Terms [of Reference].*

13. The Proponent drew the IAC's attention to Clauses 5(c) and 34 of the IAC's Terms of Reference which countenance feasible modifications leading to 'more appropriate environmental outcomes'. It submitted that if a modification diminishes environmental effects it is relevant and must be considered.<sup>6</sup>

14. The Proponent further submitted that:<sup>7</sup>

*The nature of the proposed modification here is to one part of the mining process. The Project remains a mining proposal of the same resource.*

15. In relation to the specific question around 'transformation' put by the IAC, they observed that one element of the Project (the TSF option), has been substituted for a different, and submitted, better element.<sup>8</sup>

16. The Proponent also submitted there is no specific statutory impediment to the replacement of the TSF option with centrifuges and that the Acts (*Environment Effects Act 1978*, *Environment Protection and Biodiversity Conservation Act 1999* and *Environment Protection Act 1970*) provide opportunities for proponents to provide further information to decision makers.<sup>9</sup>

<sup>4</sup> Document 151.

<sup>5</sup> Document 141.

<sup>6</sup> Document 141, para 7.

<sup>7</sup> Document 141, para 8.

<sup>8</sup> Document 141, para 23.

<sup>9</sup> Document 141, para 10.

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17. MFG submitted that the exhibited EES (with the TSF option) and the centrifuge proposal should both be assessed because:<sup>10</sup>
- a. *the Minister's decision to require an EES under section 8B(3) of the Environment Effects Act 1978 (EE Act) makes specific reference to the tailings storage facility;*
  - b. *the IAC's Terms of Reference (the Terms) require the IAC to consider the project in its original form in the first instance; and*
  - c. *there are practical and prudent reasons for considering both the tailings storage facility and the use of centrifuges.*
18. MFG submitted in relation to (a) that as the Minister explicitly mentioned the TSF in calling up the Environment Effects Act, the IAC is required to assess that element.
19. MFG submitted in relation to (b) that the IAC is required to review and consider the exhibited EES because Clauses 5 (Purpose) and 28 (Public hearing) of the Terms of Reference require the IAC to consider the exhibited EES. Clause 28 reads in part:
- The IAC may inform itself in any way it sees fit, but must review and consider:*
- a) *the exhibited EES, draft PSA and WAA;*
  - b).....
20. The practical and prudent reasons for considering both the TSF option and centrifuges proposal submitted by MFG are essentially:
- a. **There is the possibility, for financial or other reasons, the Proponent may wish to abandon centrifuges and revert to the TSF option in future after the Minister's Assessment.**
  - b. If the environment effects of TSF option are not assessed through this process it may require a future assessment process.
  - c. A future assessment process might require an EES or decision makers might be making decisions in the absence of such assessment, leading to a denial of natural justice to MFG and others.
21. MFG submitted there are several legal impediments to the introduction of centrifuges going to:
- a. The Terms of Reference issues raised above
  - b. **Lack of evaluation of alternatives in the EES (including centrifuges)**
  - c. Questions around the adequacy of the EES itself
  - d. The amount and adequacy of information to adequately assess the centrifuges
  - e. Questions around the Section 22 Notice by EPA (discussed below).
22. Council submitted<sup>11</sup> that they did not wish to respond to the submissions of the Proponent in Document 141, but this was not an endorsement of the Proponent's position. They submitted: *As is the case in respect of the evolution of the Project from its 'as exhibited' form, the currently proposed change to the Project has consequences and implications in respect of the environmental effects of the Project, the adequacy of the EES, and the information available for the purposes of assessing those environmental effects. Whether the nature and extent of those consequences and implications can be understood by the IAC, and ultimately the Minister, will depend on the information and evidence before the IAC at the conclusion of the hearing. It is possible that such*

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<sup>10</sup> Document 175, para 4.

<sup>11</sup> Document 177.

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*consequences and or implications will include legal issues of which the IAC should or must be aware. Council will endeavour to identify and inform the IAC of any such issue at the earliest possible opportunity.*

23. Submissions on these issues were also received from Ms Hildebrandt, Ms Johnson and Gas Free Bairnsdale.<sup>12</sup> These submissions expressed concern about notice, procedural issues and the adequacy of the information brought forward to support consideration of the centrifuges.
24. After the submission of Document 141, the Proponent advised<sup>13</sup> that it is proposed that the Project will proceed with centrifuges only, and not with the TSF and centrifuges as alternative options for assessment.
25. In its reply submission,<sup>14</sup> the Proponent submitted that there is no useful purpose in assessing the TSF option when it is no longer part of the Project. It submitted, in summary:
- It is speculation as to whether a TSF might be reconsidered in future and this would be subject to a separate assessment at that time
  - If the IAC assessed the TSF and found it unsatisfactory, this does not mean a revised or differently designed TSF could not be reintroduced in future
  - Assessing the TSF would prolong the hearing, require parties to address matters not being pursued, complicate the assessment and result in additional costs.
26. The Proponent submitted that in relation to the Minister's reference to a TSF in reasons requiring an EES, this was just one element in the Project, and requiring its assessment:<sup>15</sup>
- ....could have potentially perverse effects insofar as it prevented a proponent from removing elements which might have environmental impacts.*
27. The Proponent acknowledged that the Terms of Reference include consideration of the exhibited EES but submitted that the EES is only one source of information and the IAC does not need to give weight to elements in the EES no longer part of the Project as proposed.
28. The Proponent concluded there is no benefit and significant cost in assessing the TSF option and this would amount to penalising the Proponent for trying to avoid and minimise environmental impacts.
29. In relation to legal impediments, the Proponent submitted<sup>16</sup> that there is nothing legally which prevents the IAC from considering the centrifuges. It further submitted that the IAC is not required to assess the TSF option in the exhibited EES (and should not) and that the adequacy of the EES is not something that the IAC is required to consider under its Terms of Reference.

### Ruling

30. From the date of this ruling, the IAC's assessment of environment effects and recommendations to the Minister with respect to the Project, in the context of the exhibited EES, and subsequent technical and other submissions, will only consider the centrifuges as described in Technical Note 1 in relation to fines tailings treatment and management.

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<sup>12</sup> Documents 143, 174 and 176.

<sup>13</sup> Document 151.

<sup>14</sup> Document 196.

<sup>15</sup> Document 196, para 6(a).

<sup>16</sup> Document 196, para 8 onwards.

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31. It logically follows that expert witnesses called to address relevant issues such as water management and tailings management who are to meet in accordance with IAC Direction 8<sup>17</sup> should confine their discussion around tailings management to the use of centrifuges.<sup>18</sup>

### Reasons

32. The primary role of the IAC is “to hold an inquiry into the environmental effects of the project”.<sup>19</sup> Clause 7 of the Terms of Reference describes “the project”. One “element” of the Project is a “tailings storage facility”. The TSF option is no longer part of the Project and has been replaced by centrifuges.
33. The IAC is persuaded that the change to one element of the Project does not result in a ‘new’ or ‘transformed’ Project; it is still a mineral sands mine based on the identified resource. The mechanism for one aspect of the mining process has been changed. The IAC considers this to be a variation within the overall scope of a mineral sands project.
34. The IAC acknowledges that the introduction of centrifuges to the Project following exhibition and submissions has caused difficulties for the IAC and parties in attempting to understand the change (if any) to environment effects of the Project.
35. This difficulty of itself, however, does not make the Project change automatically undesirable or ‘illegal’. The environmental impact assessment process, by its nature, is an iterative approach to project development and assessment. The opportunity for a proponent to make changes to ameliorate potential environmental effects of a proposed project is inherent in that process.
36. The IAC considers that introducing the centrifuges into the Project has required the provision of additional time to review the material associated with that change and has addressed this by delaying the Hearing and allowing the calling of new or supplementary evidence in relation to the centrifuges.
37. With respect to the question of whether the centrifuges should be assessed alongside the TSF option, the IAC is not aware of any statutory requirement to consider both in a situation where the Proponent has explicitly rejected the one element of an exhibited EES and replaced it with another. Any such requirement must then come from the Terms of Reference.
38. As pointed out by submitters, the Terms of Reference require the IAC to consider the exhibited EES. As a starting point this is clear, and the IAC has reviewed and considered the EES as exhibited. But as Clause 28 indicates, the Terms of Reference also require the IAC to consider an extensive range of materials, including submissions. Those submissions have included clear advice from the Proponent that the TSF option is no longer being proposed as an element of the Project. The exclusion of the TSF option is a matter that the IAC must consider.
39. It is less clear what the expectation is in a situation where a project element in the exhibited EES becomes irrelevant or redundant.
40. As noted above, the Terms of Reference are clear that the primary purpose of the IAC is to provide an assessment of the environment effects of the Project. The exhibited Project has been modified, said by the Proponent to be in response to submissions. To make a detailed assessment of an element that no longer forms part of the Project would seem unnecessary and not helpful in assessing the environment effects of what is now before the IAC.

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<sup>17</sup> Document 144.

<sup>18</sup> See Documents 206-208 in relation to questions around this issue.

<sup>19</sup> Terms of Reference, Clause 5.

41. It also seems illogical to the IAC to proceed in the assessment as if nothing has changed (in effect ignoring the Proponent's submissions to the contrary) and do a 'just in case' assessment of the TSF option, particularly given the time and cost involved for all parties. The IAC considers it also verges on penalising the Proponent for making changes said to be environmental improvements; a position to be tested through the Hearing.
42. The IAC is conscious of the submissions, particularly from MFG, that the TSFs may 'reappear' at a later date in the Project development and either somehow escape appropriate scrutiny or require another costly, disruptive process for the community and stakeholders.
43. This concern is acknowledged by the IAC, but the IAC's view is that it cannot assess something not proposed. The Proponent is 'on the record' stating that centrifuges will be used in place of the TSF option, and therefore the potential that the TSF option may be reintroduced at some future time is not something that should directly influence the decision as to whether to assess the exhibited TSF option at this time.
44. If the TSF option is assessed now this will add to costs and time, as opposed to some possible future occurrence.
45. Some submissions suggest the material available to assess the environment effects of the centrifuges is deficient. The merits of the centrifuges will be explored through the Hearing. The IAC will then make recommendations on their, and the Project's, environment effects. Part of the exploration by the IAC will be the adequacy of such material and its robustness and the capacity to therefore draw sound findings on environment effects.

## **Section 22 Notice**

### **Submissions**

46. MFG submitted<sup>20</sup> that as the response to the Section 22 of the Environment Protection Act 1970 request by the EPA will not be available until after the Hearing, this may have legal ramifications for the integrated assessment of the Works Approval Application (WAA).
47. The Proponent submitted that such an approach is consistent with that taken recently in the AGL/APA Crib Point Gas Import Facility EES. It submitted that the production of material under Section 22 for the EPA is not constrained in time or made subject to third party involvement.

### **Ruling – Section 22 Notice**

48. The IAC concludes that the provision of material to the EPA under Section 22 of the *Environment Protection Act 1970* is not a matter that is within the scope of its deliberations; that process will occur independently of the IAC's assessment.

### **Reasons – Section 22 Notice**

49. The statutory scheme established under the *Environment Protection Act 1970* provides for joint advertising of the EES and WAA, and for submissions to the WAA to be made through the EES process for efficiency.
50. The IAC will provide advice to the EPA about the draft WAA. That advice must be considered by the EPA in making its decision under the *Environment Protection Act 1970*. In making that decision the EPA may seek additional information under Section 22 independently of the IAC process.

51. If the Section 22 advice becomes available in the timelines the IAC is working to, then this information may also be considered by the IAC as occurred in recent projects such as the North East Link Project. However, the absence of the Section 22 material does not mean the IAC should or must delay its own processes.