EDO Qld.
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Using the law to protect our environment.

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Research Director
Agriculture, Resources and Environment Committee
PARLIAMENT HOUSE, QLD 4000

By email only: arec@parliament.qld.gov.au

Dear Sir/Madam,

SUBMISSION ON NORTH STRADBROKE ISLAND PROTECTION AND SUSTAINABILITY AND ANOTHER ACT AMENDMENT BILL 2013

Who we are

The Environmental Defenders Office Queensland (**EDO Qld**) is not-for-profit, non-government, community legal centre specialising in public interest environmental law. We provide legal representation, advice and information to individuals and communities, in both urban and rural areas, regarding environmental law matters of public interest. We also use our experience to deliver community legal education and inform law reform.

Summary

Thank you for the opportunity to make a submission on the North Stradbroke Island Protection and Sustainability and Another Act Amendment Bill 2013 (**the Bill**). We raise the following **<u>key points:</u>**

1. No public consultation has taken place. The 'election commitment' was vague and therefore gave no mandate. A comprehensive consultation process should be introduced starting with a public policy discussion paper from the relevant government department;

2. The Bill removes opportunities for public scrutiny of the new Environmental Authority (**EA**) conditions. We are dealing with a major mining project. A draft EA with new conditions should be publicly notified as would normally be required under the *Environmental Protection Act 1994* (Qld);

3. The Bill removes key review and appeal rights regarding the renewal of mining leases reducing transparency and accountability of Government decisions.

We have **attached** our detailed submissions and suggested solutions. Unfortunately, given the short time frame, we haven't had time to look into specific issues which also concern us including: the removal of buffer zones for national park and Ramsar wetlands, and increased disturbance of previously protected areas on the island. This submission was prepared by Evan Hamman of EDO Qld, please contact Evan with any questions on the submission - 3211 4466.

Yours faithfully,

Jo-Anne Bragg.

Jo-Anne Bragg
Principal Solicitor
Environmental Defenders Office (Qld) Inc.

1. No public consultation has taken place on this Bill

It is distressing that a new law which significantly extends mining on the world's second largest sand island to 2035, perilously close to internationally recognised wetlands,[1] has not undergone public consultation.[2]

In responding to the Committee's request to provide a list of all external stakeholders consulted in the drafting of the Bill to ensure that the process has included a range of views, the Department of Natural Resources and Mines (**DNRM**) replied:

> *"Although no consultation was undertaken during the development of the Bill, targeted and limited discussions were undertaken early in the policy development phase with Sibelco and the QYAC. The Bill reflects all known concerns raised during these discussions."*[3]

In the Explanatory Notes to the Bill, an attempt is made to justify the lack of wider public consultation:

> *"No public consultation has occurred on the Bill. However, during the election campaign in 2012, the then Opposition Leader, gave a commitment that if elected his government would –*
>
> > *'Deliver a framework for the orderly ending of the mining leases on North Stradbroke Island, which requires the mining company to remediate to the highest environmental standards and allows the island proper time to transition to a new economy."*[4] (Quote not referenced)

It is clear that consultation only occurred with one group who wasn't the miner. There are likely to be many concerned stakeholders on both NSI and the mainland who have an active interest and future on NSI. Why weren't those people consulted on this Bill?

It is wrong to suggest that the current Government has a 'mandate' to legislate on the basis of broad 'election commitments' without any broader public consultation on the details. The election commitment (above) does not address any of the policy details such as:

1. what an 'orderly ending' and 'proper time to transition' might be;
2. what the 'new economy' might involve; and
3. what is meant by the 'highest environmental standards'.

These are all important policy questions which need to be addressed in a thorough public consultation with key interested stakeholders.

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[1] Map available from Map from Wetland's International Ramsar Sites Information Service reproduced: http://savestraddie.com/site/wp-content/woo_uploads/2010/12/Ramsar_map.jpg
[2] Explanatory Notes to the Bill, page 9.
[3] Questions on Notice to DNRM: http://www.parliament.qld.gov.au/documents/committees/AREC/2013/16-NorthStradrokeIsland/que-23Oct2013.pdf at page 1
[4] Explanatory Notes to the Bill, pages 9-10.

Solution:

The Bill should not be passed. A comprehensive consultation process should be introduced starting with a public policy discussion paper from the relevant government department. That detailed discussion should include, amongst other things:

1. What constitutes an 'orderly end' to mining on NSI;
2. Any future possible 'ecologically sustainable' uses of the island;
3. Prospects and plans for rehabilitation; and
4. Impact upon Native Title and indigenous cultural heritage.

2. The Bill removes opportunity for public scrutiny of the new Environmental Authority.

Clause 12 of the Bill provides for the replacement of Sibelco's Environmental Authority (**EA**). In an unprecedented move, the EA has been included in a schedule to the Bill. As a result, the new EA conditions will not have to go through a public notification process[5] which is usually required for all EAs relating to mining leases in Queensland.[6]

In response to a Committee question about the procedure of attaching an EA to amending legislation, DNRM said:

> *"This is the first example of where an Environmental Authority (EA) has been made into legislation. This was deemed to be the most practical approach to making the amendment to the EA and in line with current government policy designed to reduce red tape and unnecessary regulatory burden."*[7]

This 'fast-tracked' method of providing a new set of environmental conditions denies the public an opportunity to properly scrutinise the new conditions of the EA. This is a throw-back to 'special legislation' to fast-track mining projects such as Mount Isa and is not democratic.

The Government defends its approach by stating that:

- The changes in the new EA are not of "sufficient magnitude" to necessitate a public consultation process;
- The environmental assessments originally carried out were based upon a larger mining area; and
- The inclusion of the entire EA as a schedule to the Bill is "a transparent way of making the EA."[8]

In our view, these are unsatisfactory justifications for not subjecting the EA conditions to the regular public notification and Land Court objection process.

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[5] Explanatory Notes to Bill, page 8.
[6] *Environmental Protection Act 1994* (Qld) s 149(a)
[7] Questions on Notice to DNRM: http://www.parliament.qld.gov.au/documents/committees/AREC/2013/16-NorthStradrokeIsland/que-23Oct2013.pdf at page 3
[8] Explanatory Notes to Bill, page 8.

Public notification under the EP Act

Firstly, what is meant by the words 'sufficient magnitude' in the Explanatory Notes? The phrase is not relevant under the *Environmental Protection Act* 1994 (Qld) (**EP Act**) as to whether an EA application needs to go through public notification. How has it been determined? By whom? And on what basis?

Currently, every application for an EA associated with a mining lease application must go through a public notification stage.[9] As the Minister for Natural Resources and Mines said in his explanatory speech on the Bill:

> *"Protection of the environment is a matter for the Environmental Protection Act 1994—an act which is specifically designed for that purpose."*[10]

If protection of the environment is a matter for the EP Act, and NSI mining is to be no different, then the new EA should go through the same process as all other resource EAs under that Act.

Furthermore, the Explanatory Notes to the Bill state that Sibelco's EA is being replaced to 'contemporise' it including adding in current model conditions that were introduced following 'greentape' reforms in 2012.[11]

The Department of Environment and Heritage Protection (**DEHP**) has released a 'Guideline to Model Mining Conditions'[12] in which it states:

> *"If public notification has been completed on the basis of different draft conditions from the model conditions, the model conditions cannot be used* ***unless the applicant wishes to re-notify."***

On this basis, shouldn't the new EA provided for in the Bill be publicly notified so the public can comment on any newly raised issues?

Original Environmental Assessment

It appears no Environmental Impact Statement (**EIS**) was conducted for the mine before it was approved. The Minister noted this in his explanatory reading speech:

> *"Whilst there was no legislative requirement for an environmental impact statement to be completed at the time of the original approval, the applicant did undertake an*

[9] *Environmental Protection Act 1994* (Qld) s 149(a)
[10] Hon. AP Cripps, Minister for Natural Resources and Mines, Explanatory Speech to Legislative Assembly on Bill (17 Oct 2013) at 3420
[11] Explanatory Notes to Bill, page 8. The 'greentape reforms' were introduced by the Environmental Protection (Greentape Reduction) and Other Legislation Amendment Bill 2012
[12] http://www.ehp.qld.gov.au/land/mining/guidelines.html (EM944). The purpose of the guideline is to "provide a set of model conditions to form general environmental protection commitments given for mining activities, and environmental authority conditions for resource activities - mining activities imposed by the administering authority under the *Environmental Protection Act 1994* (Qld)."

> *environmental studies report; therefore, environmentally sensitive areas on the island are well protected without the unnecessary introduction of duplicate legislation."*[13]

A question arises whether the 2004 *Environmental Studies Report* can be used to inform new EA conditions (in 2013) such as those attached to this Bill?

A transparent way of making an EA?

The justification that inclusion of the entire EA as a schedule to the Bill is "a transparent way of making the EA,"[14] is problematic for three main reasons:

1. All applications for mining EAs are currently made available online during the public submission stage anyway.[15] In addition, all finalised EAs are made available online anyway under the public register under the EP Act.[16] There is therefore no additional transparency benefit;

2. Although the public can raise issues concerning the Bill in submissions to the Committee (and presumably conditions of the proposed EA), the Committee will generally only consider whether the Bill complies with fundamental legislative principles rather than be able to recommend any substantive changes to conditions of the EA, as DEHP/the Land Court might under the normal EA application process;

3. The public only have seven days to raise submissions about this Bill (EA conditions) compared to the longer public notification period (20 business days) available under the EP Act.

Solution:

If changes to the EA are proposed, Sibelco should apply under the *Environmental Protection Act 1994* (Qld) for an amendment to its EA through the proper processes. Alternatively, the Government should publicly notify the new draft EA and subject it to the Land Court statutory review process as required under the EP Act/*Mineral Resources Act 1989* (Qld).

3. Removal of review and appeal rights concerning lease extensions

A new section 11F to be introduced by the Bill specifically excludes any challenge, appeal, or review of the decision of the Minister to grant a renewal of the mining lease. Section 11F(2) provides:

> *(2) Unless the Supreme Court decides that the decision is affected by jurisdictional error, the decision—*

[13] Hon. AP Cripps, Minister for Natural Resources and Mines, Explanatory Speech to Legislative Assembly on Bill (17 Oct 2013) at 3420
[14] Explanatory Notes to Bill, page 8.
[15] See DEHP's website: http://www.ehp.qld.gov.au/management/non-mining/current-environmental-authorities.html
[16] EP Act, s 540

(a) is final and conclusive; and

(b) can not be challenged, appealed against, reviewed, or called in question in any other way, under the Environmental Protection Act or any other Act or law (whether by the Supreme Court, or another court, a tribunal or another entity); and

(c) is not subject to any declaratory, injunctive or other order of the Supreme Court, another court, a tribunal or another entity on any ground.

This provision is inconsistent with fundamental principles and the operation of the rule of law in a free and fair democracy.

Under section 4(3)(a) of the *Legislative Standards Act 1992* (Qld), whether legislation has sufficient regard to rights and liberties of individuals depends on whether the legislation makes rights and liberties, or obligations, dependent on administrative power [but] only if the **power is sufficiently defined and subject to appropriate review.**

In an attempt to give certainty to Sibelco and reduce 'sovereign risk' the Government has eroded fundamental checks and balances on administrative power.

The Government's response to removing these key checks and balances is that:

"The amendments are justified by the need to balance the rights of an individual against the rights of the NSI community and region as a whole. The early cessation of mining on NSI will have a severe effect on NSI and regional economies. To ensure that does not occur, it is essential to provide Sibelco with sufficient certainty now…"[17]

Three points need to raised here.

Firstly, the Government has not consulted with the NSI community and region and a whole on this Bill (see above) so it is difficult to see how it has adopted this approach on the Bill.

Secondly, it is clear from the Bill that the Government is seeking to provide Sibelco with certainty and potentially putting the interests of an individual (corporation) above those of the broader community.

Thirdly, the administrative power of the Minister is not sufficiently defined. The proposed Section 11D provides that the Minister **must** approve a renewal application if it is properly made and can include any conditions the Minister wants:

11D Decision on application

(1) If the Minister considers that an application under section 11C has been properly made the Minister must renew the relevant mining lease.

(2) The renewed lease is subject to—

[17] Explanatory Notes to the Bill, page 9.

(a) the conditions stated in section 11E; and

(b) any conditions prescribed under a regulation; and

(c) any conditions decided by the Minister.
…"

Solution:

The Bill should not proceed as proposed. Effective appeal rights must be available to ensure fundamental individual rights are maintained. Government decisions should always be accountable and transparent in a functioning democracy.

Conclusion

This Bill is a step backwards for accountability and transparency and in securing environmental outcomes. It should not be passed in its current form. Whilst it might provide Sibelco with financial certainty, it significantly extends mining activities on NSI and introduces new operating conditions without being subject to public scrutiny or challenge. We strongly urge the Committee to implement our preliminary recommendations above.