Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024

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Resourcing Queensland's future

04 March 2024

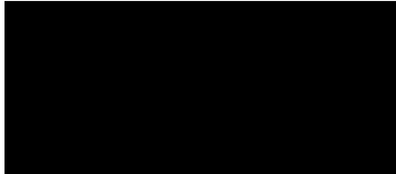
The Committee Secretary
Health, Environment and Agriculture Committee
Parliament House
Cnr George and Alice Streets
Brisbane Qld 4000

Dear Committee Secretary

Please find attached the submission regarding EP Powers and Penalties Bill 2024 from the Queensland Resources Council

Should you wish to discuss this submission further, please contact Mrs Hannah Gardiner t: [redacted] or e: [redacted].

Yours faithfully



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QRC Submission

Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024

4 March 2024

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1 INTRODUCTION

The Queensland Resources Council (QRC) welcomes the opportunity to provide a submission to the Health, Environment and Agriculture Committee (this Committee) on the *Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024* (the Bill) introduced into the Queensland Parliament on 13 February 2024.

1.1 ABOUT THE QUEENSLAND RESOURCES COUNCIL (QRC)

QRC is the peak representative organisation of the Queensland minerals and energy sector. QRC's membership encompasses minerals and energy exploration, production, and processing companies, as well as associated service companies. QRC works on behalf of its members to secure a policy environment conducive to the long-term sustainability of the minerals and energy sectors in Queensland, ensuring the State's resources are developed profitably and competitively, in a socially and environmentally sustainable way.

1.2 CONTEXT FOR THE BILL

Most of the amendments in the Bill arise from recommendations from retired Judge Richard Jones and barrister Susan Hedge's 2022 report, *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties*, which explained the background briefing that had been provided to the authors by the Department of Environment, Science and Innovation (DESI) (at page 8, paragraph 4):

> *'The Background to the Terms of Reference identified complex regulatory challenges which face the Department of Environment and Science (DES) including persistent nuisance, odour issues, illegal dumping (including of tyres) and unlicensed operators. The particular issues relating to odour in the Ipswich area near a number of waste management operations has been the subject of action by DES in recent times.*[1]

Similarly, in her First Reading speech introducing the Bill to Parliament, the Minister stated:

> *'In recent years, environmental impacts from a number of industries have presented increasingly complex regulatory challenges. These are often linked to growing communities resulting in coexistence of housing and industrial areas. Effective regulation is critical to minimise and prevent harm to the community and environment from the increased risks from dust, odour and noise… The review, which looked into the powers and penalties under the Environmental Protection Act, was initiated in part due to the significant odour nuisance issues that have arisen in communities in the vicinity of existing waste management activities, most notably in Ipswich.'*

Importantly, the independent review found that: '*by way of summary, to a very significant extent, our review established that the EPA (Qld) contains adequate powers and penalties to, in most instances, enforce environmental obligations and reduce the risk of environmental harm.*'[2]

The fact that adequate powers are apparently already available to DESI to 'halt odour-producing aspects' and 'bring relief to the local community' (as expressed by DESI's website[3]) is exemplified by the current restraint order proceedings against NuGrow Ipswich Pty Ltd in the Planning and Environment Court. At the date of lodging this submission, we do not yet know whether DESI will ultimately succeed in that application to the Court because this will depend

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[1] 'See, for example, Media Release "*Odour at Ipswich*", 1 April 2022', https://www.des.qld.gov.au/our-department/news-media/mediareleases/2022/odour-at-ipswich

[2] Page 9, paragraph 13.

[3] https://www.des.qld.gov.au/our-department/news-media/mediareleases/decision-reserved-in-nugrow-court-action

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upon the evidence presented to the court about the facts and circumstances. Nevertheless, the existence of the legal proceedings demonstrates that there is already a legal mechanism available for DESI to address alleged serious nuisance issues of this type and it is noted that Condition (1-A1) of the defendant's environmental authority specifically addresses the topic of odour. It is also unclear what specific legislative barriers currently hinder the prosecution of 'illegal dumping and unlicensed operators,' as identified by DESI to the Independent Reviewers, described as 'complex regulatory challenges,' prompting a comprehensive review of the legislation.[4] Section 426 of the *Environmental Protection Act 1994* (Qld) (EP Act) already addresses unlicensed operators. On the topic of illegal dumping, numerous provisions of the Act are available to prosecute or restrain offenders, depending on the seriousness and impacts of the offence, for example, in *R v Moore*,[5] a defendant was sentenced to 18 months' imprisonment for placing material containing Tributyltin adjacent to a sensitive waterway (among other issues).

In part, the Bill is also being presented as the solution to the concerns of 'growing communities' in 'coexistence' with industrial areas.[6] In town planning terms, this is about residential development inappropriately encroaching in the direction of existing industrial areas, particularly waste facilities at Swanbank, where those industrial areas have been lawfully in existence for a period of time and would traditionally have been classed in local planning instruments as inherently 'noxious, offensive or hazardous'. According to longstanding town planning principles, this residential encroachment would have been regarded as incompatible with the existing industrial area without adequate separation distances and buffer areas, based on the principle of 'reverse amenity', for example, *Yulara v Rockhampton City Council;*[7] *Kelly v Moreton Shire Council.*[8] QRC is not the peak industry body representing the Queensland waste industry. However, to the extent that this Bill may partly be considered a response to suboptimal town planning, it is inappropriate for this localised town planning issue to be used as a justification for onerous legislative changes that will undoubtedly significantly impact other industries such as the resources and energy sector.

1.3 SUMMARY

Leaving to one side, the Bill's apparent inadequacy in addressing practical issues at Swanbank, and the likelihood that some or all of the challenges labelled as 'complex regulatory issues' could already be resolved through existing legislative powers, it is more important and practical to evaluate the reforms proposed by the Independent Review based on their individual merits.

QRC supports a wide range of the reforms included in the Bill, or alternatively QRC would have minimal objection, subject to some fine-tuning of the drafting to address apparently unintended consequences. Some of the other reforms, although unsupported by QRC, are unlikely to significantly impact the resources industry. The **Annexure** to this submission addresses these issues. Examples of reforms **supported** by QRC include:

- The general principle of trying to simplify the current complex system of clean-up notices, direction notices, and environmental protection orders into a single 'environmental enforcement order' (subject to QRC's key concerns about expansion of this power by overriding existing conditions, outlined below);
- Decision on proposed amendment – Clause 12 amending Section 219; and

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[4] Page 8, Paragraph 4, Independent Review.
[5] [2003] 1 Qd R 2015.
[6] According to the Minister's First Reading Speech.
[7] [1999] 3 QPELR 296.
[8] (Unrep., P&E Appeal no. 6 of 1993, 5 September 1995).

- The principle of proportionality (although, for all practical purposes relating to penalties, this is already addressed by the DESI Enforcement Guideline).

QRC's **three most significant concerns** about this Bill are:

- New powers for environmental enforcement orders and environmental investigations to be imposed in respect of matters that have already been authorised by environmental authority conditions, enabling DESI to override and retrospectively change those approved conditions. This will create sovereign risk.
- The unintended consequences of changing the 'general environmental duty' from a defence to a vague 'catch-all' offence.
- Both of the above legislative changes (as a minimum) should have been subject to a regulatory impact process in accordance with the *Queensland Government Better Regulation Policy*.

2 OVERRIDING EXISTING CONDITIONS

[Refer to Clause 23 inserting new subsection (3A) in Section 326B, Clause 24 inserting new subsection (4) in Section 326BA and Clause 28 inserting new Section 362(3). For context, also refer to Section 215 of the EP Act.]

2.1 SUMMARY OF THE PROPOSED CHANGES

At three points in the Bill, it is proposed to insert a new provision enabling the administering authority to impose an order or notice '*even if the person is the holder of an environmental authority that authorises, or purportedly authorises, the activity*'.

This applies to:

- An environmental investigation notice where there is alleged to be environmental harm (Section 326B);
- An environmental investigation notice where there is alleged to be contamination of land (Section 326BA); and
- An environmental enforcement order (EEO) (new Section 362).

Once the notice or order has been issued, there are existing powers available under Section 215(2)(i) of the EP Act for the administering authority to impose compulsory changes to the existing conditions.

2.2 THE STATED INTENT

There are various statements in the Explanatory Notes and the Minister's First Reading Speech attempting to give some level of comfort that this would only have limited applicability, but those statements are legally incorrect.

For example, the Explanatory Notes state on page 25 (in relation to overriding conditions when issuing an EEO):

> *'The intent of this provision is to clarify that an environmental authority is not a barrier to issuing an EEO to address environmental harm or the risk of environmental harm where such harm is not clearly authorised or regulated by the environmental authority.*
>
> *Where an operator is carrying out their activity lawfully and in compliance with an environmental authority which clearly provides for the management of the levels and*

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type of environmental harm occurring, the administering authority would not issue an EEO in response to such harm. This clarifying provision also does not preclude the requirement for grounds to be satisfied for an EEO to be issued.

Where an operator was failing to take reasonably practicable measures to prevent or minimise environmental harm as a result of activity that cannot be said to be authorised or regulated by the environmental authority, the administering authority could issue the EEO on the grounds of securing compliance with the general environmental duty.'

Secondly, in the Minister's First Reading Speech, she stated: *'The issuing of the notice also means that the administering authority may initiate an amendment to the environmental authority under the existing provisions of the act. This maintains the status quo for most environmental authority holders, with impacts limited to operators causing unacceptable harm.*'

2.3 CASE STUDY DEMONSTRATING THE EFFECT OF THE CHANGES

The following is a case study demonstrating how the new provisions do not have the limited effect stated in the Explanatory Notes or First Reading Speech.

Existing Section 326B of the EP Act allows an environmental investigation notice to be issued in the following circumstances (bold added):

'*(1) This section applies if the administering authority is satisfied on reasonable grounds that—*

*(a) an event has happened causing **environmental harm** while an activity was being carried out; or*

*(b) an activity or proposed activity is causing, or is likely to cause **environmental harm**.'*

Nowhere is the term 'environmental harm' defined as 'unacceptable harm', as suggested in the Minister's First Reading Speech. The definition of 'environmental harm' is set out in existing Section 14 of the EP Act (bold added):

'14 Environmental harm

*(1) Environmental harm is **any** adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance.*

(2) Environmental harm may be caused by an activity—

(a) whether the harm is a direct or indirect result of the activity; or

(b) whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors.'

If the impact in question is anything above the threshold of 'trivial or negligible in nature, extent or context', it is classed as 'material environmental harm' under existing Section 16(1)(a) of the EP Act. Section 326B does not say that the harm needs to be above the threshold of 'material' environmental harm, just 'any' environmental harm. Nothing is set out expressly in the existing Sections 326B or 326BA stating that an environmental investigation notice could not be issued where the harm is either trivial or already specifically authorised under an environmental authority (or other instrument). However, in the current absence of any express provision overriding existing environmental authority conditions, it could reasonably be inferred from a

purposive interpretation of the Act[9] that it would be absurd for onerous and expensive requirements for environmental investigations to be imposed overriding existing conditions authorising acceptable levels of impacts. Consequently, if an environmental investigation notice was issued in respect of a topic (such as noise) where the recipient was in compliance with existing conditions on the topic, this would logically constitute a 'reasonable excuse' defence under existing Section 326D of the EP Act. Unfortunately, this statutory interpretation inference would be overridden by the new express provision in Clause 23 of the Bill.

For example, if an existing environmental authority authorises noise during weekday daytime hours of background plus 5 dB(A) and DESI decides either to change this to 3dB(A) or to reduce the applicable hours, an environmental investigation could be imposed because 'any' noise would be a type of 'environmental harm'. Not only would the changes proposed by the Bill enable DESI to impose an environmental investigation under Section 326B but potentially also an environmental enforcement order, for example, under new Section 359(a), without regard to the existence of the condition that already authorises this lawful impact. Either an environmental investigation or an EEO would then allow DESI to change the existing relevant environmental authority condition unilaterally under existing Section 215(2)(i) of the EP Act.

2.4 IMPLICATIONS

If DESI's genuine intention was that it must not use this power '*where the operator is carrying out an activity lawfully and in compliance with an environmental authority which clearly provides for the management of the levels and type of environmental harm occurring*' (as stated in the Explanatory Notes) why introduce a new set of provisions explicitly overriding existing environmental authority authorisations '*to remove any doubt*'? If the intent is as stated in the First Reading Speech and Explanatory Notes, there should instead be a provision generally to the effect that: '*To remove any doubt, the administering authority must not issue an environmental investigation notice/environmental enforcement order if the harm is authorised under Section 493A(2)*.' This would be quite close to the opposite of the three new subsections overriding existing environmental authorities.

As noted in QRC's submission to this Committee in 2022 on the *Environmental Protection and Other Legislation Amendment Bill 2022* (EPOLA22), at early stages of the consultation process on that Bill, there had been proposals to include both an environmental investigation process as a trigger for overriding existing conditions and direct amendments to Section 215 enabling existing conditions to be overridden, but this was dropped from EPOLA22. In effect, Clauses 23 and 24 of the current Bill resurrect the environmental investigation mechanism from EPOLA22 to override existing conditions, notwithstanding criticism from numerous stakeholders at the exposure draft stage of EPOLA22. As stated in QRC's submission to this Committee dated October 2022 about EPOLA22:

> *'QRC's key concern about this was that an environmental investigation is a punitive measure and is consequently an inappropriate mechanism for the Department to review older conditions, when the operator is doing nothing wrong. Such a change could also discourage capital investment in Queensland, particularly for significant projects, which can require decades of steady operation in accordance with certain and fixed requirements before they can generate a profit. If the Department is given an ability to step in unilaterally and change conditions that originally set the parameters for expensive plant and equipment, this would be a sovereign risk issue for Queensland. There are existing broad powers for the Department to step in and either negotiate with a holder*

[9] Under the Acts Interpretation Act 1954 (Qld), Section 14A.

or, if necessary, impose updated conditions, if there is actually a serious problem for the environment caused by an operation.'

At the Consultation Paper stage for the current Bill, DESI attempted to justify the need for new provisions overriding existing environmental authorities based on a 'hypothetical example' in DESI's 'Stakeholder FAQs' document at Section 6 (ie, where an activity has been authorised but there was some historic failure to include conditions at all regulating a topic such as noise, dust or odour). QRC explained in our submission in response to the Consultation Paper that this scenario would normally be covered by Section 215(2)(e): '*the authority was issued on the basis of a miscalculation of—*

(i) the environmental values affected or likely to be affected by the relevant activity; or

(ii) the quantity or quality of contaminant permitted to be released into the environment; or

(iii) the effects of the release of a quantity or quality of contaminant permitted to be released into the environment'.

If the Bill had intended such a limitation as suggested by the 'hypothetical example' in the 'Stakeholder FAQs' document (ie, that it would only be applicable where there had been an historic failure to impose conditions about a type of harm relevant to the activity), this should have been explicitly stated. However, the three provisions of the Bill overriding existing authorisations do not impose any such limitation.

In any case, from the time that environmental licences and approvals were first issued under the EP Act, it was normal for topics such as noise, dust, odour, land, air, and water contamination to be addressed in conditions, to the extent relevant to the nature of the activity and the proximity of sensitive places such as residential development. (In some instances, it used to be considered that such conditions did not need to be included if an industrial site was very remote from the nearest sensitive place and that the local planning instrument ensured an adequate separation distance from future residential encroachment, which was a factor that was, and still is, required to be considered under the 'standard criteria' definition in the EP Act.) There appear to be only three possible alternatives to the 'miscalculation' scenario that might have explained an historic failure to include conditions regulating a relevant topic:

- Residential encroachment – There were no sensitive places in the area when the conditions were originally imposed, but there has been a subsequent failure of local government planning, leading to people having voluntarily 'moved to the nuisance'. Regulatory impact assessment would be necessary to examine whether it would be fair and reasonable to introduce powers punishing an existing and compliant industry for a subsequent failure of local and State government planning, or whether government should share in the cost of achieving a reasonable solution.

- Rather than a miscalculation of environmental impacts, those impacts were fully disclosed at the time, but the relevant conditions were omitted due to a demonstrable clerical error. There is an existing power to correct clerical errors.

- Incompetence or bad faith by the regulator. The power to impose appropriate conditions has been available since commencement of the Act.

If the intent of the provisions overriding existing environmental authorities is not just to address situations where a type of impact has been not historically addressed at all, but rather, this is also aimed at overriding specific conditions authorising an acceptable level of impact, this would clearly create an even more unacceptable level of financial risk for companies attempting to

invest in reliance on the approvals they have received. This would be particularly concerning if targeted at individual operators that are compliant with the same standards applicable to other operators in the same type of business, as this would be anti-competitive. Alternatively, if DESI considers that there are impacts that were previously considered acceptable on a State-wide basis, but that there is now some justification for making standards regarding those impacts more stringent on a State-wide basis, there is already a process available under the EP Act to achieve this, which would be to undertake a proper consultation for a new or amended environmental protection policy. This in turn would enable updates to environmental authorities under existing Section 215(2)(g).

The inclusion in the Bill of these three clauses allowing DESI officers to override existing authorisations of compliant activities and imposing punitive measures such as environmental investigations upon those lawful activities would appear to be inconsistent with the following fundamental legislative principles (FLPs) under the *Legislative Standards Act 1992* (Qld):

- Section 3(a) – Making rights and liberties dependent on an administrative power, where the administrative power has not been sufficiently defined. It is noted that the administrative power is subject to review, but that is only part of the FLP in question.

- Arguably, there is a retrospective element of this power – Section 3(g), given that it makes existing lawful operations unlawful after the owners have already relied on the existing approvals.

- Section 3(k) – Sufficiently unambiguous and drafted in a sufficiently clear and precise way. Given that these three new clauses would appear to state roughly the opposite of what the Explanatory Notes state that they say, there seems to be a problem here.

3 GENERAL ENVIRONMENTAL DUTY

[Refer to Clause 13 – Amendment of Section 319 (General environmental duty); Clause 15 inserting new Section 319B – Prosecutions for contravention of general environmental duty); Clause 28 to the extent that it inserts Section 359 (Enforcement Ground) subsection (c); compare with existing Section 493A(3) of the EP Act – general environmental duty is a defence.]

3.1 SUMMARY OF THE PROPOSED CHANGES

The **current** position is that the 'general environmental duty' is a vague 'catch-all' provision, as follows:

> '(1) A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm (the general environmental duty).
>
> Note— See section 24(3) (Effect of Act on other rights, civil remedies etc.).
>
> (2) In deciding the measures required to be taken under subsection (1), regard must be had to, for example—
>
> (a)the nature of the harm or potential harm; and
>
> (b)the sensitivity of the receiving environment; and
>
> (c)the current state of technical knowledge for the activity; and
>
> (d)the likelihood of successful application of the different measures that might be taken; and

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(e)the financial implications of the different measures as they would relate to the type of activity.'

The only proposed change to this definition in the Bill is for the words 'all reasonably practicable measures to be substituted for 'all reasonable and practicable measures', which is a change to which QRC has no objection.

Currently, there is no offence of non-compliance with the 'general environmental duty'. Instead, existing Section 493A(3) makes compliance with the 'general environmental duty' one of the available defences to a charge of either serious/material environmental harm, contravention of a noise standard or deposit of a contaminant:

'(3) However, it is a defence to a charge of unlawfully doing a relevant act to prove—

(a) the relevant act was done while carrying out an activity that is lawful apart from this Act; and

(b) the defendant complied with the general environmental duty.'

The alternative available defence in Section 493A(2) would be compliance with any one of a range of instruments, such as an environmental authority or transitional environmental program (TEP). This demonstrates the original intent that, if a topic is already covered by an instrument such as an environmental authority (eg, if an operation is expressly authorised to release a specified quality and volume of water at a particular release point at particular times), it does not matter what 'reasonably practicable measures' under Section 319 are used to achieve this. The catch-all defence of 'general environmental duty' is simply there in case there is no existing express authorisation (for example, a construction activity that is not an environmentally relevant activity and consequently has no environmental authority conditions and that causes a release of water during a storm).

The changes proposed by the Bill:

(a) Leave in place the existing defence of 'general environmental duty' in Section 493A(3).

(b) However, additionally make a breach of the 'general environmental duty' an offence, subject to the following additional factors:

   (i) The breach 'causes, or is likely to cause, serious or material environmental harm' (under Clause 13, inserting new subsection (2));

   (ii) Either the relevant impact is authorised under a code of practice or it is authorised by one of the instruments mentioned in Section 493A(2) (eg, an environmental authority), but only if that instrument specifically 'provides for reasonably practicable measures to be taken in relation to the doing of the act'.

(c) Inserts a series of additional factors that 'regard may be had to', such as what systems are in place, in new subsection (5) inserted by Clause 13.

(d) Under new Section 359, inserted by Clause 28 of the Bill, the 'general environmental duty' can additionally be a trigger for an environmental enforcement order, notwithstanding that the activity is authorised by an environmental authority.

3.2 BACKGROUND

The context is that the authors of the 2022 report, *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties* had been asked to undertake a comparison with other jurisdictions as part of their review and they noted that the corresponding Victorian legislation makes breach of the 'general environmental duty' an offence, while the corresponding Northern Territory legislation does not make it an offence but allows it as one of the available triggers for a pollution abatement notice. The Independent Review suggested that either it could be made an offence in Queensland or it could be inserted into the potential triggers for a restraint order application.

At the Consultation Paper stage for this Bill, QRC pointed out various unintended consequences of making breach of the 'general environmental duty' an offence. It is pleasing that at least a few of those points appear to have been taken into account in the drafting of the Bill, although this has been done inconsistently, so that the intent has not fully been achieved.

3.3 INCONSISTENCIES AND APPARENT UNINTENDED CONSEQUENCES

(a) Intent that the offence should only be applicable to serious/material environmental harm

QRC welcomes the proviso that has been included in the new offence provision that it is only applicable if 'the contravention causes, or is likely to cause, serious or material environmental harm' (in new subsection (2)(b), inserted by Clause 13 of the Bill). As explained in Section 2.3 of this submission, the term 'environmental harm' by itself (which is the term used in existing Section 319(1) of the EP Act) includes '***any*** *adverse effect, or potential adverse effect',* whereas at least the definition of 'material environmental harm' in existing Section 16 of the EP Act provides a basic threshold that the harm must not be 'trivial or negligible in nature, extent or context', which is still a very low bar. However, a low bar is better than nothing and it is better than was previously proposed at the Consultation Paper stage.

Unfortunately, this limitation has not been carried through to the corresponding trigger for environmental enforcement orders (EEO) in new Section 359(c) inserted by Clause 28 of the Bill. QRC assumes this is a simple drafting error. An EEO in respect of a trivial or negligible type of harm or risk of harm would be a much more onerous and expensive punitive measure than corresponding enforcement against an alleged offence under Section 319 which would most likely only result in a penalty infringement notice (PIN).

(b) Intent that factors such as the seriousness of the harm and the order of occupation should be taken into account if the EEO relates to a nuisance issue

QRC supports in principle the intent of the new Section 364 inserted by Clause 28, which would require a range of criteria to be taken into account when deciding whether or not to issue an EEO if the EEO is triggered by Section 440 (Offence of causing environmental nuisance). Clearly, the intent was that, if the issue relates to noise, dust, odour, lighting or the other matters covered by the definition of 'environmental nuisance', then this range of factors should be taken into account. However, this legislative intent has not been carried through to any limitation on an EEO triggered by the 'general environmental duty' under new Section 359(c) inserted by Clause 28. This would leave a loophole enabling DESI to circumvent a consideration of the factors under new Section 364 by stating that the EEO is triggered by the general environmental duty, even if it relates to the same subject-matter of noise, dust, odour, lighting or the like.

(c) Intent that general environmental duty should not be an offence if the subject-matter is already addressed by environmental authority conditions or a code of practice

In principle, QRC appreciates the apparent intent of new subsection (3)(b) inserted by Clause 13 of the Bill, which provides:

‘(3) However, a person does not commit an offence against subsection (2) for a contravention of the general environmental duty in relation to an activity if—

…

(b) either—

(i) a thing mentioned in section 493A(2) authorises the act to be done and provides for reasonably practicable measures to be taken in relation to the doing of the act; or

(ii) in doing the act, the person complies with a code of practice that applies in relation to the doing of the act.’

This appears intended to address another of the points raised in QRC’s submission at the Consultation Paper stage. The proviso relating to compliance with a code of practice is supported, but the drafting of the proviso relating to an instrument listed under Section 493A(2) would benefit from some fine-tuning.

Typically, most conditions of an environmental authority are ‘outcomes-oriented’ rather than ‘prescriptive’, in accordance with the previous regulatory strategy of the Department (that is no longer in effect). ‘Outcomes-oriented’ means that the conditions set standards but do not prescribe the operational methodology for the operator to achieve those standards, allowing the operator flexibility to achieve the same standards in any way that works. For example, a noise condition typically provides that, when measured at sensitive places, for certain hours, noise must not exceed a specified fixed limit, or must not exceed ‘background plus’ a certain limit. An operator may choose to achieve this outcome in different ways, including by varying those ways over the lifetime of a project depending on day-to-day operations, for example:

- Not operating equipment that causes noise;
- Enclosure of noisy equipment;
- Other physical barriers, such as placing the noisy equipment at the base of a void, erecting a noise bund, fences and the like;
- Separation distances from sensitive places.

In this scenario, the first part of new subsection (3)(b)(i) would be acceptable (‘a thing mentioned in section 493A(2) authorises the act to be done’) but the difficulty is that the drafting of the second part of the subsection mistakenly reflects a prescriptive approach to conditioning, that is, it assumes that the condition would set out the ‘measures’ to be taken, rather than the ‘outcomes’ to be achieved. It is acknowledged that, DESI appears to have recently abandoned the ‘outcomes-oriented’ regulatory strategy, but this does not overcome the fact that the vast majority of environmental authorities in existence today are based on an ‘outcomes-oriented’ conditioning approach, and the drafting of the subsection needs to reflect this.

Additionally, a point made by QRC in previous submissions and that must be made again, is that the list of instruments in Section 493A(2) is incomplete. It should also include temporary emissions licences and emergency directions. There is no apparent reason why Section 493A(2) persistently remains inconsistent with Section 320A(4).

(d) <u>Intent to avoid confusion between general environmental duty as an offence and a defence</u>

At the Consultation Paper stage, QRC raised concerns about circularity and confusion between the general environmental duty as both an offence and defence in the same legislation. QRC appreciates that some attempt has been made to address this concern, as follows:

- The 'general environmental duty' as a defence remains much the same as the current position, but the 'general environmental duty' as an offence is distinguished by having additional qualifications set out in the new subsections (2) and (3) inserted by Clause 13 of the Bill;

- New Section 319B inserted by Clause 15 of the Bill appears to be intended to avoid double-jeopardy involving charges of both the 'general environmental duty' and serious or material environmental harm (for which the general environmental duty is a defence) at the same time, and this section also tries to avoid confusion between the evidence in this situation.

Section 319B inserted by Clause 15 of the Bill (Prosecutions for contravention of general environmental duty') would benefit from some fine-tuning of the drafting. As drafted, it would be unworkable in practical terms as it creates a paradoxical situation.

The relevant subsections of Section 319B (1) and (2) inserted by Clause 15 of the Bill provide as follows:

'(1) This section applies if—

(a) a person engages in conduct that constitutes a relevant act mentioned in section 493A(1)

(the relevant conduct); and

(b) the person is charged with an offence in relation to the relevant conduct (the relevant

offence); and

(c) the person is intending to rely on the defence under section 493A(3) in relation to the relevant offence.[10]

(2) In a proceeding for the relevant offence, the person may not be charged with an alternative offence against section 319(2) in relation to the same, or substantially the same, conduct as the relevant conduct.'

A hypothetical case study that illustrates such a dilemma would be if DESI charges a person with an offence such as unlawful material environmental harm. After the person has been charged, the person seeks legal advice and decides on the general environmental duty defence. At the time of making the charge, DESI does not know whether the person will defend the prosecution and if so, which of the available defences will be selected by the defendant. Consequently, how would DESI know whether or not the charge can be combined with a charge of breaching the general environmental duty at the same time as the first charge? At the point of bringing the

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[10] Section 493A(3) sets out the defence: '(3) However, it is a defence to a charge of unlawfully doing a relevant act to prove—

(a) the relevant act was done while carrying out an activity that is lawful apart from this Act; and
(b) the defendant complied with the general environmental duty.'

charge, DESI cannot predict the defendant's intention 'to rely on the defence *under section 493A(3)'*. Consequently, at the time of bringing the prosecution for material environmental harm, nothing would prevent DESI from combining this with a charge of breach of general environmental duty for the same subject-matter.

In practice, if the defendant has actually caused serious or material environmental harm, why would DESI not simply prosecute for that offence alone? Why would there need to be any additional offence of breach of the general environmental duty that causes the harm?

Based on the Independent Review report, it appears that the original intent of making breach of general environmental duty an offence was not to create a duplicate offence for causing serious or material environmental harm, but to take a 'proactive' or 'preventative' approach. That is, the intended situation in which general environmental duty would be prosecuted would be where DESI forms an opinion that this is 'likely' to cause serious or material environmental harm. There are also dangers with this approach, particularly where the penalties are high. Whether the harm is 'likely' in a situation where it has not actually occurred, is a matter of opinion and people may well have different legitimate opinions depending on which facts and circumstances they are aware of. In a situation where harm is merely hypothetical, a more reasonable approach would be for DESI to issue a warning (in the context of a recalcitrant operator) or simply engage in direct dialogue (in the context of an operator likely to be unaware of an impending risk), rather than the regulator immediately escalating to prosecution.

3.4 OBJECTION TO THE CHANGE IN PRINCIPLE

While correction of the above inconsistencies and apparent unintended consequences of the drafting of these new provisions would mitigate the worst aspects of creating this new offence, QRC is concerned that the creation of this new offence is unnecessary. The definition of the general environmental duty is too vague for either operators or DESI to be able to identify the demarcation between compliance and contravention. A vague definition has always been somewhat problematic, but not unacceptable when used as a defence; however it is significantly more problematic for the creation of a serious new offence. For example, where does DESI draw the line around which measures are reasonably practicable based on the factor of Section 319(2)(e), 'financial implications' of the measures, ie, costs? People can reasonably hold different views about which costs are 'reasonably practicable'.

It is suggested that, when the 'general environmental duty' is treated as an offence, rather than a defence, it offends against fundamental legislative principle Section 4(3)(k) of the *Legislative Standards Act 1992* (Qld), requiring legislation to be 'unambiguous and drafted in a sufficiently clear and precise way'. This is more important for punitive provisions than other provisions.

In passing, QRC members have brought to our attention that DESI has recently been trying to impose parts of the definition of the general environmental duty as conditions in environmental authorities, without the qualifications and defences relating to the general environmental duty set out in either the existing Act or this Bill. This is clearly unacceptable, and QRC strongly advocates for conditions that are decisively outcomes-oriented.

3.5 EFFECTIVENESS IN TARGET JURISDICTION FOR BILL ADOPTION

It is acknowledged that, more recently, there has been a fashionable trend in other legislation to turn a 'due diligence' type of defence into an offence. The DESI Consultation Paper emphasised this point at page 6:

> '*This would be similar to work health and safety and biosecurity legislation, and contemporary approaches adopted in interstate environmental legislation and promote the proactive management of environmental risks.'*

It is also noted that Victoria has recently introduced a version of the general environmental duty as an offence. However, this does not mean that Queensland should uncritically follow Victoria's example. There has already been a case in Victoria (EPA v Vista Estate Pty Ltd) that demonstrates that the intent of copying a workplace health and safety type of duty into environmental legislation does not necessarily mean that the same protections are copied. In this case, the Supreme Court of Victoria has held that analogies cannot be drawn with similarly-worded duties under occupational health and safety legislation (including in relation to the particularisation of criminal and quasi-criminal charges). The Court rejected case law relating to occupational health and safety legislation which had required that authorities must allege "specific details or requirements of the duties alleged to have been breached". This was a case in which the defendant could have been charged with minor offences available under other sections of the legislation, but the Victorian EPA chose to add breach of the general environmental duty. The fact that the Court upheld the Victorian EPA's decision not to particularise how the general environmental duty had been breached is of particular concern, given that a general environmental duty is expressed in broad and ambiguous terms, because it has always been a defence. This is a very recent case, so, when the Independent Reviewers consulted with a limited range of stakeholders such as the Bar Association and the Queensland Law Society at the Review stage, the information would not have been available to them.

4 ABSENCE OF A PROPER REGULATORY IMPACT ASSESSMENT (RIS) PROCESS

4.1 BACKGROUND

The report which led to this Bill, by retired Judge Richard Jones and barrister Susan Hedge, *Independent Review of the Environmental Protection Act 1994 (Qld) Report: Independent review into the adequacy of existing powers and penalties*, 2022, did not include any process of consultation with the peak industry organisations (such as QRC) representing stakeholders impacted by the proposed changes. Nevertheless, the report included some acknowledgement of the serious impacts of the proposed changes, for example:

> *'To amend an EA holder's existing conditions has, of course, the potential to have significant adverse impacts on the economic viability of an activity.'* [11]

In DESI's response to the Independent Review, for recommendation 12 (power to impose mandatory changes of conditions upon a holder that is in compliance with existing conditions), DESI initially supported this recommendation and quoted this point in full. The DESI response specifically stated that (bold added), 'This recommendation [recommendation 12] is supported in principle subject to the outcome of consultation **and regulatory impact assessment.** Consideration of the caveats mentioned in paragraph 223 of the report is also supported.' This was repeated on page 9 of the Paper.

By the time DESI reached the stage of issuing a paper entitled 'Improving the powers and penalties provisions of the Environmental Protection Act 1994: Stakeholder Consultation FAQs' (FAQs) distributed on 7 November 2023, a regulatory impact assessment had gone by the wayside to address such 'significant adverse impacts', based on an assertion that '**by and large'** a regulatory impact assessment was not needed as the amendments are only to existing powers and penalties.

[11] Page 54, paragraph 223.

The fundamental test for whether a regulatory impact assessment process is required should not be whether the proposed changes 'by and large' are minor, but whether there are any individual changes within the overall package that would have a significant adverse impact. As pointed out above, it was expressly acknowledged by both the Independent Reviewers and DESI that at least one legislative change proposal (ie, overriding existing authorisations such as environmental authorities) would have a significant adverse impact. Therefore, this should have been subject to a RIS. In QRC's view, the change for general environmental duty should also have been subject to a RIS.

Even if there had been doubt about the magnitude of the impacts, the Office of Best Practice Regulation's Guidance Note, '*When is a Regulatory Impact Statement (RIS) required?*', states that, '*If there is doubt about the magnitude of an impact it should be assumed to be potentially significant*'. Concerningly, it appears DESI have not adopted this approach.

QRC appreciates that there would be a timeframe involved in undertaking a proper RIS process and DESI has put forward this Bill as a panacea for pressing issues being experienced by the 'growing community' regarding Swanbank. However, as explained in Section 1.2 of this submission, DESI does already have a range of existing powers to address odour issues at Swanbank.

Meanwhile, many of the legislative changes proposed, including new powers to override existing environmental authorities on which a wide range of compliant operators throughout the State have been relying for years, without causing any unacceptable harm to their neighbours or the environment, epitomises unnecessary and overreaching excessive force to solve a more granular issue.

5 CONCLUSION

QRC notes that the DESI Consultation Paper and the Explanatory Notes makes a number of references to the parallel need to update supporting material such as the Enforcement Guidelines for some of the most significant amendments. Unlike QRC's experiences with a number of significant regulatory changes, where updates to guidelines lagged many months behind the corresponding commencement of the legislation, this time, the supporting material should be drafted, negotiated and finalised prior to commencement. This could require amendments that are set to start at a date by proclamation, rather than at assent.

QRC would be pleased to discuss this submission further with the Committee during its consideration of the Bill and to participate in the public hearing.

Should you have any questions in relation to this submission, please contact Hannah Gardiner at [redacted] or [redacted].

Yours sincerely

Janette Hewson
Chief Executive
Queensland Resources Council

Annexure to QRC submission on the Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024 (Qld)

Due to the limited timeframe available for providing written submissions on this Bill, QRC has not attempted to examine and comment on the Bill line-by-line. Silence on an aspect of the Bill does not necessarily imply support.

This annexure is intended to capture:

- Key aspects of the Bill supported by QRC;
- Some comments on aspects of the Bill to which QRC would have no substantive objections, subject to fine-tuning of the drafting;
- Comments on aspects of the Bill not supported by QRC, but which are less likely to have major impacts on the Queensland resources industry than the key issues highlighted in the main body of QRC's submission.

Provisions of the Bill	QRC Comments
Change 'all reasonable and practicable measures' to 'all reasonably practicable measures' [Numerous clauses throughout the Bill, eg, Clause 4]	QRC has no objection to this change.
Principles of environmental protection [Clause 6 inserting new Section 6A]	QRC has no objection in principle to the insertion of the 'principle of proportionality', but considers this to be unnecessary, because this type of principle is already well addressed in DESI's Enforcement Guideline. There does not appear to be any need to set it in stone in legislation. QRC is opposed to the unnecessary expansion of the Act by embedding a range of no doubt well-intentioned but vaguely drafted principles from the Intergovernmental Agreement on the Environment into legislation. As an example, the 'precautionary principle' cherry picks only one part of the definition of ESD and gives it undue prominence over balancing considerations, for example, contrast with current Section 3A of the Environment Protection and Biodiversity Conservation Act 1999 (Cth), which gives prominence to the balancing factor, '(a) decision-making practices should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations'. Similarly, contrast Section 3(2) of the Planning Act 1996 (Qld), which includes the following definition as part of its purpose: (2) Ecological sustainability is a balance that integrates— (a) the protection of ecological processes and natural systems at local, regional, State, and wider levels; and (b) economic development; and (c)the maintenance of the cultural, economic, physical and social wellbeing of people and communities.

Provisions of the Bill	QRC Comments
	For further explanation, refer to Peterson (2006)[1], who argues that the precautionary principle should be addressed within the context of good regulatory practice to ensure 'that decision making is transparent, consistent and accountable; that it utilises all relevant information; that costs, benefits and risks are identified, assessed and compared; and that measures are targeted at, and proportionate to, the problem. This decision-making framework will help to avoid many of the potential problems arising from application of the precautionary principle, including the risk of perverse outcomes, over-reaction to trivial risks, and misuse as a rent-seeking (or protectionist) measure'. It is also unclear how the vague wording 'improved valuation, pricing and incentive mechanisms' is intended to relate or give meaning to any provision of this Act.
Definition of '**Environment'** Clause 7, amending Sections 8(c) and (d)	QRC has no objections to these changes, although they do not appear necessary.
Definition of '**Environmental values'** Clause 8 amending Section 9.	The references to 'harmony' and 'sense of community' appear to be very vague and it is unclear how they would ever relate to the powers under the Act.
Amendments to the definitions of **material and serious environmental harm and environmental nuisance** – Clauses 9-10, amending Sections 16 and 17.	For many years, QRC has been pressing DESI (and its predecessors) to amend the definitions of serious and material environmental harm, environmental nuisance and 'contaminants'. This has always been too hard and has continually been deferred. At last, some adjustment is being made, but without considering the wide range of other issues QRC has repeatedly raised, such as that: the threshold for 'material' harm is set too low (anything that is 'not trivial or negligible in nature, extent or context'), the overlap between 'contamination' under the definition of 'environmental nuisance' and contamination under serious or material environmental harm; and the overlap between air emissions under part (a) of the definition of 'environmental nuisance' and other air emissions. The definitions remain vague and unreflective of the ordinary meanings of the terms. Removal of the words 'other than environmental nuisance' does not fix these problems.
Decision on proposed amendment – Clause 12 amending Section 219	**Supported**.
Duty to restore the environment – Clause 16 inserting new Section 319C	QRC has no objection in principle to this duty, noting that it is qualified by the words 'as far as reasonably practicable' and only applies to serious/material environmental harm that is 'unlawful', ie, not covered by an instrument listed under Section 493A(2). A note or footnote may be useful in Section 319C(1), linking this to Section 493A(2). Note that Section 493A(2) is outdated because it does not include temporary emissions licences or emergency directions, so this should be corrected. The current position is that, if an operator causes unlawful environmental harm, prompt efforts at restoration are already well recognised in DESI's Enforcement Guideline, in mitigation of the offence. Consequently, more sophisticated operators, such as major resource industry operators would already be undertaking proactive restoration as far as reasonably practicable

[1] Peterson, DC, Productivity Commission: Precaution: Principles and practice in Australian environmental and natural resource management, Presidential Address: 50th Annual Australian Agricultural and Resource Economics Society Conference, Manly, New South Wales 8 – 10 February 2006. QRC notes that this concern has also been raised with DESI by other peak industry groups.

Provisions of the Bill	QRC Comments
	and the creation of this offence would not make a significant practical difference. It is more likely to be relevant to small and unsophisticated businesses. It is suggested that Subsection (4) should be expanded so as to address any difficulties with entering impacted land. Preferably, there should be some form of notice procedure for entry onto land for duty to restore purposes, similar to new Section 369G regarding EEOs.
Notifications Clauses 17-22 These clauses expand on the existing requirement for notices to be given once a person becomes aware of an incident, so that the notification duty also applies if a person 'ought reasonably to have become aware'.	QRC has some reservations about this amendment, because, in practical terms, a person cannot lodge a notification about something the person in fact does not know about. QRC understands that the real reason is to reduce the evidentiary burden on DESI to prove the person's state of mind and also understands how this would help in a situation where the defendant is lying. However, there remains a risk of putting people in an impossible situation if they are not lying about the fact that they were unaware of something. As a minimum, it is recommended that the Enforcement Guideline should be expanded, before these new notification provisions take effect, so as to provide examples of where DESI would rely on this new power and examples where this would be inappropriate.
Amendments of transitional environmental programs (TEPs) – Clause 26 inserting new sections 344AA-344AH	QRC **supports** new Section 344AA enabling corrections of clerical or formal errors. QRC **supports** new Section 344AB(1)(b) enabling amendments by agreement. QRC has **no objection in principle** to the concept of DESI being given power to amend TEPs and TEP conditions in limited circumstances but has some **concerns** about the scope of Section 344AB(1)(a). The limited circumstances that would be supported would be where it has become apparent that the path selected under the TEP to achieve compliance with the Act at the end of the TEP is simply not working and it will never succeed in achieving that compliance. In that situation, preferably, DESI and the operator would then try to decide on a different approach by agreement, under Section 344AB(b). QRC has some concerns that the vague drafting of the new provisions may leave open opportunities for DESI to impose unilateral amendments in circumstances where the operator is achieving the nominated milestones under the TEP and there is no reason to doubt that the TEP will eventually achieve compliance with the Act, given DESI's discretion about what is 'desirable' under Section 344AB. A TEP often requires a significant capital investment and it would be a concern if the goal-posts could be moved once this investment was already underway, without good reason. As a minimum, QRC would like to see a Guideline address the limited circumstances in which this power should be exercised.
Environmental Enforcement Orders and relationship with chain of responsibility provisions – Clauses 27-35, Clause 39, consequential provisions such as Clauses 45-47	As noted in the covering submission, QRC **supports in principle** the creation of environmental enforcement orders, combining matters previously addressed by different notices and orders. QRC has **significant concerns** about the use of EEOs (as well as environmental investigations) to override existing environmental authorities (explained in detail in the covering submission). QRC opposed the creation of the chain of responsibility provisions of the EP Act when those provisions were first introduced and remains concerned about many of those provisions. Therefore, it is a concern that the triggers for chain of responsibility have, in effect, been expanded, because chain of responsibility does not currently apply to clean-up notices or direction notices. However, this concern cannot realistically be addressed by changing any of the drafting of this Bill, but rather, QRC's

Provisions of the Bill	QRC Comments
	original concerns with the chain of responsibility provisions will need to be addressed when a suitable opportunity arises in the future. It is noted that Section 363AJ is proposed to be omitted because a review was already carried out for the chain of responsibility provisions. QRC would recommend another review in the future. It was not apparent at the time of the first review that the chain of responsibility provisions, as currently drafted, were delivering a benefit to the State worth the sovereign risk perceptions of having introduced the provisions.
Court may find defendant guilty of causing environmental nuisance if charged with causing serious or material environmental harm – Clause 38 inserting new Section 440A	This change is **supported**.
Evidentiary – Clauses 42-43	QRC has no objection to these changes.
Confidential information – Clause 49 amending Section 579D and Clause 50 inserting new Exchange of Information provisions.	QRC has no objection in principle to the sharing of confidential information between government agencies for the purposes of relevant legislation, or with the consent of the person who provided the confidential information. Section 579D is not appearing in the current reprint of the EP Act (current as at 1 February 2024).
Omitting 'reasonably' – Schedule 1	QRC **opposes** the removal of the term 'reasonably' from a list of sections sect out in Schedule 1.
Delegation – Clause 55 amending Section 130 EP Regulation	QRC has no **objection in principle** to changes in delegation practices involving environmental nuisance. However, the proposed procedure of the chief executive giving notice to a local government removing delegation in relation to a specific operation on the basis that it 'involves serious or material environmental harm' would appear to pre-suppose that the chief executive would succeed on a prosecution or other legal proceeding based on serious or material environmental harm. In the hypothetical scenario that the chief executive removes a local government's delegation because the chief executive believes that serious or material environmental harm is being supposed and then the chief executive is unsuccessful in presenting that evidence to a court, there would be a paradox for the notice withdrawing the delegation.