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The Research Director
State Development, Infrastructure and Industry Committee
Parliament House
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Dear Sir/Madam

Submission to the Qld Parliamentary Inquiry into the *Regional Planning Interests Bill 2013*

The Wilderness Society is one of Australia's leading conservation organisations with a long history of working on Cape York, one of the regions which will be directly affected by the proposed Regional Planning Interests legislation and Regulation. Accordingly, the Wilderness Society wishes to make the following submission to the Inquiry into the *Regional Planning Interests Bill 2013*.

Overview comments regarding the significance of the proposed legislation but poor process

For most of 2013, the Wilderness Society tracked the development of the draft Cape York Regional Plan, billed as the document and process through which future conservation of the region's wild rivers and World Heritage quality landscapes would be protected by the Queensland Government. The mapping of Strategic Environmental Areas (SEAs) is a crucial component of the draft Cape York plan (currently open for consultation, and which we will be producing a submission on in March 2014).

While the draft Cape York Regional Plan and the SEAs have been promoted as the mechanism for protecting rivers and landscapes, it has become clear that these lack the necessary legal force ('head of powers') to override legislation such as the *Mineral Resources Act 1989*. This was an issue raised with the Minister for Environment and Heritage Protection by the Wilderness Society some considerable time ago in the context of reining in the power of mining companies should current Wild River Declarations on Cape York be removed.

In theory, the attempt to establish additional mechanisms to prevent mining in sensitive ecological areas in the same way that the *Wild Rivers Act 2005* operated (legislation passed with the support of Nationals, Liberals and Labor), would represent a breakthrough. However, while some recent public statements from the Premier and Deputy Premier about ruling out mining on the Steve Irwin Wildlife Reserve and the Wenlock River[1], it appears that in fact the capacity to do

[1] 'Newman Government protects Steve Irwin Reserve on Cape York' Joint Media Statement, November 20, 2013. See also 'No open slather for mining companies' Media Statement December 3, 2013

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so is arbitrary and open to subsequent change or reversal. There is nothing that presently guarantees the stated outcome of ruling out mining in these areas other than Ministerial or Premierial whim.

With such important planning legislation, it would be incumbent on the government to avoid rushing the process. However, the timeframe for the development and release of the Bill and associated processes has been completely inadequate. The Bill was introduced in the last week of Parliamentary sittings for 2013 with no prior consultation with conservation groups or the general public; an Inquiry was set up including a call for submissions over the Christmas holiday period; a public briefing by Departmental officers to the State Development, Infrastructure and Industry Committee was promoted with less than 24 hours' notice; and a key plank of the proposed legislation – the Regulation – is not even available for examination.

Given that the Central Queensland and the Darling Downs Regional Plans are already completed, and the Cape York Regional Plan is unlikely to be completed before June 2014, it appears the government is acting with undue haste for no obviously good reason. Getting this legislation right is surely more important than getting it rushed, and the fact that the Bill has been tabled and an Inquiry commenced without the Regulation being made available, means that critical parts of how the Regional Planning Interests legislation will operate can't be examined because they have been placed in the Regulation rather than the substantive legislation (the Bill), and thus won't be subject to any public examination until it is already signed off and tabled in Parliament. The Wilderness Society believes this is a breach of the Fundamental Legislative Principles as outlined in the Queensland Cabinet Handbook.

Recommendation: the development of the Regional Planning Interests legislation should be slowed down, to allow for proper examination of critical components of the model intended to be included in the Regulation.

Further, as detailed later in this submission, the mechanics of how the proposed legislation is intended to work come down to a call to be made by the Chief Executive of the Department of State Development, Infrastructure and Planning (DSDIP) on the basis of almost any potential advice or other input. This lacks transparency and is anathema to structured and consistent decision-making. Such sweeping powers of discretion should not be included in critical planning legislation.

Recommendation: sweeping powers of discretion for a Director-General of a Government Department should not be included in critical planning legislation

Concept of mining and environmental protection 'co-existence'

The concept of mining and environmental protection 'co-existence', as referred to in the Bill Explanatory Notes and outlined by officials from DSDIP[2], is deeply disturbing. It appears the Bill is premised on "a philosophy of co-existence" between impacts of resource activities such as mining and *inter alia* environmental values in particular areas of Queensland that are of regional interest. While the concepts of 'ecologically sustainable development' (*Environmental Protection Act 1994*) and 'ecological sustainability' (*Sustainable Planning Act 2009*) have been problematic in attempting to balance competing priorities, they have not explicitly sought to establish formal coexistence in the same place.

[2] Public briefing held on Friday 13 December 2013 in Brisbane.

The notion of coexistence between destructive development such as strip mining on Cape York and protection of the Cape's World Heritage standard environmental values is ludicrous. The tests of irreversible or widespread damage are not adequate as these are subjective and contested impacts, and provide little reassurance that protecting the environment will be put ahead of commercial interests or government's development agendas.

Accordingly, when for example the draft Cape York Regional Plan states:

> *"Strategic Environmental Areas (SEAs) are those areas that contain regionally significant values for biodiversity, water catchments and ecological function. Development in SEAs will be supported where it can be demonstrated that the development outcome does not present risk of irreversible or widespread impacts to the ecological integrity of the areas in supporting the region's significant biodiversity. Activities that risk such impacts will not be allowed."* (page 4 draft CYRP); and
>
> *SEAs allow for development where the proposed uses can co-exist and do not risk irreversible or widespread impacts to the continuation of the area's ecological integrity. Activities that risk irreversible or widespread impacts to the ecological integrity of the attributes detailed in Schedule 1 will not be allowed."* (page 18 draft CYRP),

in practice, this means that being declared a Strategic Environmental Area does not preclude mining or other development. Such activities have to be assessed by the assessing agency as ones that 'risk irreversible or widespread impacts to the ecological integrity' or nominated values, which will be a subjective process, and even then the final decision is made by the CEO of DSDIP who can essentially make whatever call they want.

With a strongly pro-development government, which seeks to remove as many restrictions on mining and major industrial and large scale agricultural projects as possible, this will inevitably lead to development being allowed in areas where ecological values get destroyed. The Wilderness Society therefore would argue the test for whether to allow mining in SEAs is too vague and too weak. The Queensland Government needs to ensure it has the capacity to properly protect areas identified as those having important ecological significance, not starting with an assumption that mining and high ecological values can somehow co-exist.

Rather than apply "a philosophy of co-existence" between mining and environmentally important areas, the proposed legislation should be using a prohibitive approach to ruling out destructive development in ecologically sensitive areas, and the Precautionary Principle to remove further risks from unforeseen impacts damaging ecological values. Given, for example, the fact that roughly half of Cape York is proposed as 'General Use Areas' in the draft Cape Regional Plan, which automatically allow for any development, ensuring such high levels of protection within SEAs should be uncontroversial.

Paradoxically, it seems the Premier and Deputy Premier have tried to do just this in their recent statements about the future of the Steve Irwin Wildlife Reserve (SIWR) and the Wenlock River on Cape York. Currently, the Wenlock Basin Wild River Declaration (2010) is the only instrument that is preventing mining on the SIWR close to the Coolibah Springs complex connected with the Wenlock River. The Newman Government is going through the process of revoking this Wild River Declaration which would then expose the area to mining threats again.

The Premier, Deputy Premier and Environment Minister stated in a joint media statement on 20 November 2013 that:

> *"This will be the first of many ecologically-sensitive areas across Queensland declared a strategic environmental area. When finalised, this declaration will protect these unique areas from open cut and strip mining, and other activities that risk widespread impacts to their ecological integrity…. By protecting the Steve Irwin Wildlife Reserve* ***in perpetuity****, this government recognises the value of protecting this exceptional piece of biodiversity for Queensland for future generations." (my emphasis).*

The key question is how, exactly, can these intended outcomes be secured "in perpetuity" when the proposed Regional Planning Interests legislation does not clearly allow for the prohibition of certain destructive activities, only time-specific decisions in response to applications?

The intent of the Newman Government in the case of the Wenlock River and the Steve Irwin Wildlife Reserve may be positive from a conservation perspective, but it also highlights the arbitrary and top-down politicised decision making that will necessarily be a feature of future planning decisions under this legislation. It would be far better, and provide far greater certainty, to fully map ecological values, including wild river areas and world heritage standard landscapes on Cape York and wild river values in Western Queensland, and rule them out of bounds to mining and other destructive development.

Recommendation: the proposed legislation should be amended to enable the ruling out of destructive development in ecologically sensitive areas, and should apply the Precautionary Principle to remove further risks to ecological values.

Purposes of the Bill inconsistent with the provisions of the Bill

Clause 3(2) of the Bill states "…this Act provides for a transparent and accountable process for the impact of proposed resource activities on areas of regional interest to be assessed and managed".

However, Clause 41(2) (Assessing agency's assessment of application) of the Bill foreshadows that the assessing agency must consider:

> "(a) the extent of the expected impact of the resource activity or regulated activity on the area of regional interest;
> (b) any criteria for the decision prescribed under a regulation;", and

Clause 43 (Ministerial directions to assessing agency) of the Bill foreshadows Ministerial directions to the assessing agency which appear to give the Minister discretion to override the decision of the assessing agency, and

Clause 49 of the Bill (Criteria for decision) states:

> "(1) In deciding an assessment application, the chief executive must consider all of the following—
> (a) the extent of the expected impact of the resource activity or regulated activity on the area of regional interest;
> (b) any criteria for the decision prescribed under a regulation;
> (c) if the decision is for a notifiable assessment application—all properly made submissions received by the chief executive about the application;

(d) if the decision is for a referable assessment application—any advice about the application included in an assessing agency's response.
(2) Also, the chief executive may consider any other matter the chief executive considers relevant."

As highlighted elsewhere, assessing the 'extent of the expected impact of the resource activity or regulated activity' will be a largely subjective process, and it is not clear what guidelines or assessment criteria will be made available and how objective such criteria will be. The actual criteria for decision-making are not currently available for examination, and it seems will be included in the Regulation, but how detailed and objective these are remains unknown. At this point in time, the claim that the legislation provides "a transparent and accountable process" is rather spurious given the lack of details and criteria.

Recommendation: the Bill be amended to provide for more transparent and accountable processes for assessment and decisions, by making explicit the criteria in the body of the legislation.

Similarly, the capacity for Ministerial intervention in some circumstances would appear at odds with the principles of transparency and accountability. Lastly but most significantly, Clause 49(2) of the Bill effectively gives unfettered discretion to the CEO of DSDIP to take any other view or factor into consideration which she or he (one individual) "considers relevant". By way of example, this could include the decision to allow mining or other development in SEAs or elsewhere because that is what the government of the day wishes, and all without any obvious process of accountability.

This gives extraordinary power to the CEO of DSDIP, and in doing so highlights that far from providing for "a transparent and accountable process", the Bill in fact provides for unfettered discretion and the potential for arbitrary and inconsistent decision-making.

Recommendation: the capacity of unfettered discretion and the potential for arbitrary and inconsistent decision-making be removed by the deletion of Clause 49(2) of the Bill.

Absence of public or Parliamentary transparency about how decisions are intended to be guided

The Bill is littered with references to "... a regulation", including how such subordinate legislation may provide for where SEAs and other mapped areas are, and how decisions by the assessing agency and the CEO of DSDIP.

The Bill therefore relies on material to be included in the Regulation to address key questions, but the Regulation (assuming it has now been written) remains a secret document. This makes it impossible for anyone not privy to the document to know precisely how the legislation will operate, and unless the Inquiry Committee itself has seen the Regulation, it is difficult to see how the Committee can make any final conclusions about the workability or desirability of the Bill.

We also note that as any Regulation produced and/or released now will not, as subordinate legislation, be subject to public examination through the Parliamentary Inquiry process. This makes a mockery of any proper Inquiry into the proposed legislation, and should be cause for the Committee to delay its processes and provide subsequent opportunity for interested parties and the general public to comment on the Regulation prior to the Committee concluding its Inquiry reporting to Parliament.

Recommendation: the Regulation intended to operate as part of this legislation be provided for public examination and submissions as part of the Parliamentary Inquiry process, and that the Committee not report to Parliament until that has been completed.

Exemptions for certain activities

Clause 25 of the Bill (Exemption: small scale mining activity) exempts 'small scale mining Activity' as defined the *Environmental Protection Act 1994*. Schedule 4 of the EP Act defines small scale mining activity as that which "(a) is carried out under a mining claim, for corundum, gemstones or other precious stones,…" and which *inter alia* "(ii) is not, or will not be, carried out in a wild river high preservation area or wild river special floodplain management area…".

With the removal of Wild River Declarations on Cape York and in Western Queensland, such High Preservation Areas and Special Floodplain Management Areas will no longer exist for those regions. This creates a loophole, potentially an unintended one, which will allow for increased mining activity in ecologically sensitive river system areas.

Recommendation: the Bill be amended to ensure no loophole is created around small scale mining activity in previous Wild River High Preservation Areas and Special Floodplain Management Areas should Wild River Declarations on Cape York and in Western Queensland be revoked.

Limited appeal rights which cut out public scrutiny and public interest challenges

The Wilderness Society is extremely concerned about the attempts to limit appeals and the effects this will have on the capacity for interested parties and the general public to challenge planning decisions which may affect them directly or indirectly.

Clause 69 (Appeal to Planning and Environment Court) narrowly restricts who can appeal decisions to just the development applicant, the land owner, and any "affected land owners". The Bill's Schedule 1 (Dictionary) defines 'owner of land' as "the person for the time being entitled to receive the rent for the land or would be entitled to receive the rent for it if it were let to a tenant at a rent."

Meanwhile, Clause 68 (Definitions for pt 5) states:

> "***affected land owner***, for a regional interests decision, means a person who owns land (***affected land***) that may be adversely affected by the resource activity or regulated activity because of—
> (a) the proximity of the affected land to the land the subject of the decision; and
> (b) the impact the activity may have on an area of regional interest.

The definition of 'owner' is very narrow and will not obviously include Traditional Owners who are not freehold title holders, graziers and other leaseholders who cannot sub-lease, and other occupiers of the land. More broadly, Clauses 68 and 69 will rule out anyone else in the community with an interest in protection of relevant areas to challenge decisions, outside of exercising judicial review processes. This is a poor public policy and judicial process, because if the decisions and processes under the proposed legislation are intended to be "transparent and accountable", they should be open to public/third party appeals which might involve broader

public interest matters as well as specific regional interest matters. This is particularly important in relation to SAEs given the nature, purpose of and existing public interest in these areas.

Recommendation: the Bill be amended to allow for public/third party appeals regarding regional interests assessment and decisions.

Undermining of Environmental Authority processes where Regional Interest Authorities can force EA amendments

Clause 100 (Insertion of new s 212A, EP Act) of Bill proposes an amendment to the *Environmental Protection Act 1994*, such that "The administering authority may amend the environmental authority to ensure it is consistent with the regional interests authority" (212A(2) EP Act), where "…an environmental authority for a resource activity or regulated activity is inconsistent with a regional interests authority for the activity under the *Regional Planning Interests Act 2013*" (212A(1) EP Act).

This effectively means that a Regional Interests Authority (RIA) overrides an Environmental Authority (EA) and can effect a change to an EA even if the EA has been through an exhaustive process. Any conditions required to secure an EA may be undone subsequently if they are inconsistent with an RIA. This creates competing processes and the undermining of EA processes.

It also means that the public's right to challenge the EA required for any regional development activity, something still required under the EP Act notwithstanding the proposed RPI legislative provisions, will be reduced in practice. That is because there is no obvious mechanism to come back to the amended EA once it has been changed because of the granting of an inconsistent RIA. To address this problem, either the RIA should have to be consistent with the EA (not the other way round), or parties acting in the public interest involved in an EA which is subsequently amended should be allowed to appeal the amendment.

Recommendation: the Bill be amended to allow for public/third party appeals regarding changes to an Environmental Authority arising from the granting of a Regional Interests Authority.

Overall protection of the natural environment

In assessing the intent of and proposed processes for planning under this Bill, it is clear to the Wilderness Society that this legislation will not adequately protect Queensland's amazing but sensitive and fragile natural environments. We believe as temporary legal custodians of these rivers, landscapes and coastal areas, the government of the day should be aiming high in protecting the environment, rather than facilitating its destruction. This Bill includes many provisions which will place damaging development over ecological protection, and involves processes which lack transparency, accountability and positive environmental certainty. The legislation will favour developers over conservation, and gives extraordinary latitude to the government and officials to facilitate development projects, and limits capacity for public challenges and appeals.

Recommendation: The Bill be amended to explicitly place protection of ecological values, including Wild River values and World Heritage standard landscapes, over the interests of mining and destructive development, and provide certainty of such planning outcomes.

We look forward to presenting our main issues concerning the draft legislation at an Inquiry public hearing, and advise we would be available for the Brisbane public hearing on Wednesday, 12 February 2014.

In the meantime, should you wish to discuss any of the matters raised in this submission, please contact me by telephone on 07 3846 1420 or email: tim.seelig@wilderness.org.au.

Yours sincerely

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