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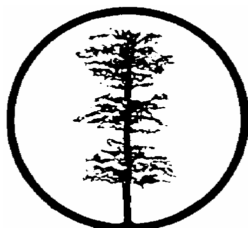
ENVIRONMENTAL DEFENDER'S OFFICE OF NORTHERN QUEENSLAND INC.



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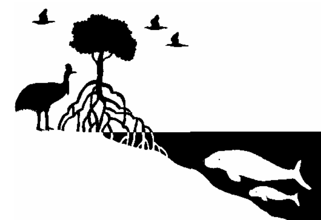

12 March 2010

Strategic Projects Division
Local Government and Planning Group
Department of Infrastructure and Planning
PO Box 15009
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By email planning@dip.qld.gov.au

Dear Colleagues,

EDO SUBMISSION – STRATEGIC CROPPING LANDS FRAMEWORK

1 EXECUTIVE SUMMARY

- The importance of Queensland's cropping lands goes beyond traditional economic accounting. It extends across social and environment factors, particularly food security.
- Food production occurs all across Queensland on rural, peri-urban and urban lands, on small, medium and large parcels. The definition of cropping, and the criteria for assessing the value of different cropping resources, should reflect this. Strategic cropping land should not be limited to dryland or large-scale irrigated agricultural schemes that produce goods only for export.
- Some land uses, like biofuel production, carbon plantations or grain for input into feedlots, also alienate land from food production. These uses should be avoided on the best cropping lands.
  In order to give effect to the policy to protect cropping lands from competing land uses that will permanently alienate its food producing capacities, two statutory instruments are needed: a State planning instrument to guide development assessment decisions for projects assessed under the *Sustainable Planning Act 2009* and, an Environmental Protection Policy (EPP) to guide development assessment decisions for projects assessed under Queensland resource legislation. The EPP should give DERM powers to refuse an application for an environmental authority if the project would permanently alienate the food producing capacity of the relevant land.
- Significant reforms to *State Development Act* are needed to increase its transparency and accountability so it cannot gazump efforts to protect cropping lands. One change needed is that if the Coordinator General declared a project a significant project, DERM must retain its concurrence powers to refuse an application for an environmental authority if the project would permanently alienate the food producing capacity of the relevant land.
- A moratorium on new mining, oil/gas leases and licences must be declared until such a time as the policy and planning framework to protect Queensland cropping land is in place.

In terms of assessment criteria:

- The assessment criteria for mining and oil/gas projects should be the same.

- The final planning framework must provide for buffer zones around best cropping lands and extend to protect the underground and surface waters on which those lands depends. As an example, storage ponds for wastewater from coal seam gas production should be prohibited on and around good quality agricultural land.
- There should be no loopholes in the final planning framework that would allow a project to avoid assessment against the relevant criteria, even a project that is said to be "in the overwhelming public interest".
- Rehabilitation of cropping land should not be an option. There is no objective and independent evidence that sterilization of cropping land can be reversed in human timeframes, given a range of realities including, the complex ecology of good fertile soil.
- Offsetting should be avoided.

2 INTRODUCTION

The Department of Infrastructure and Planning has invited public feedback on the policy and planning framework for conserving and managing Queensland's strategic cropping land. We welcome the Department's recognition of the need for law and policy reforms to protect food producing lands from competing land uses, such as extractive industries and urban expansion. There can be no doubt that such activities sterilize the food producing potential of land – with significant economic, social and environmental costs to Queensland today, and in the future. There is, furthermore, no objective and independent evidence that this sterilization can be reversed, given a range of realities including, the extremely complex ecology of soils. We express our support for this initiative.

We take this opportunity, at the first opportunity for stakeholder consultation, to highlight key omissions in the proposed policy and planning framework, and make recommendations for strengthening it. Following three preliminary matters, our comments are grouped around the four elements of the framework as identified in the discussion paper.

3 PRELIMINARY COMMENTS

The Environmental Defenders Office (Qld) Inc. and Environmental Defender's Office of Northern Queensland Inc. (the EDOs) are community legal centres which specialise in public interest environmental law in Queensland. We advise individuals, community groups and conservation groups on how to use the law to protect our environment. We regularly provide law reform comments on draft policy and legislation to the Government. On a weekly basis, we provide legal advice to community groups interested in development proposals, including mining and gas projects, making submissions on planning schemes and conducting appeals in the Planning and Environment Court. We have long advocated for planning and development assessment frameworks that are transparent, accountable to the public and, are based on objective criteria that takes equal account of environmental, social and economic considerations[1]. We welcome this opportunity to make early comments on the draft framework and look forward to ongoing dialogue with the Department and others in relation to these issues.

First and foremost, the Department appears to consider the importance of Queensland agriculture only in terms of its economic contribution. The health and prosperity of Queensland is not simply a question of economics. The importance of Queensland's cropping lands goes beyond traditional accounting and extends across social and environment factors – factors which we accept are extremely difficult to value in traditional economic terms. When we look at the broad contribution agriculture and cropping makes to Queensland's health and prosperity, and factor in that its importance will grow

[1] Copies of our law reform submissions can be accessed www.edo.org.au/edoqld/edoqld/lawreform/lawreform.htm

exponentially in our natural resource constrained future, we find very strong support for taking decisive action to protect what cropping land remains.

Prioritising the economic contribution of agriculture over an above all other factors fails, specifically, to consider the food security[2] implications for Queensland. Our health and prosperity will erode should we become dependent on food imports to feed our growing population. Incorporating food security implications into this framework has two important effects:

- When the Department talks of alienation of Queensland's cropping lands it means alienation from its capacity to produce food for human populations; and
- Food production occurs all across Queensland on rural, peri-urban and urban lands, on small, medium or large parcels

We ask the Department to incorporate these two matters into the next iteration of this policy and planning framework.

The apparent unwillingness by the Department to recognise Queensland agriculture's broader contribution to our health and prosperity may explain why the draft policy position on strategic cropping land, articulated in the discussion paper at page 3, is ambiguous. The draft policy position is defined in this way:

> "The government considers that the best cropping land, defined as strategic cropping land, is a finite resource that must be conserved and managed for the longer term. <u>As a general aim, planning and approval powers should be used</u> to protect such land from those developments that lead to its permanent alienation or diminished productivity"[3] (emphasis added)

On the one hand the Department recognises that our best cropping lands are finite resources, and therefore are non-renewable resources, that *must* be conserved and managed for the future[4]. On the other hand, the use of the words, "As a general aim, planing and approval powers should be used to protect …" appears to contradict the otherwise clear objective. The words "As a general aim" are, in the context of a policy document, embarrassing. It requires only lip service to be paid to the need to protect cropping lands, rather than supporting the strong commitment for protection. The second sentence should be rephrased to read: "Planning and approval powers <u>are exercised</u> to protect such land from those developments that lead to its permanent alienation or diminished productivity." The Department is either committed to conserving and managing agricultural land for the future or it is not. Clear policy guidance is needed not ambiguity.

Further, we note that there is nothing in the discussion paper that considers the impact of this proposed regime on Aboriginal land rights. Recommendations in relation to these issues are beyond the expertise of lawyers in this office; however we remind the Department to respect Aboriginal peoples rights' to self-determination.

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[2] Food security refers to "the ability of individuals, households and communities to acquire appropriate and nutritious food on a regular and reliable basis, and using socially acceptable means", New South Wales Department of Health (2003) *Food Security Options Paper: A planning framework and menu of options for policy and practice interventions*, NSW Centre for Public Health Nutrition, Gladesville NSW.

[3] Queensland Government (2010) "Strategic Cropping Land: policy and planning framework discussion paper", Department of Infrastructure and Planning

[4] The use in this sentence of the words "longer term" is misleading, and is inconsistent with the principles of ecological sustainability, accepted by the Queensland government, which incorporates the principle of intergenerational equity. The finite capacity for land in Queensland to produce food requires that the remaining pockets must be conserved in perpetuity.

4 DEFINITION OF STRATEGIC CROPPING LAND

We definition of strategic cropping land can be improved. We raise three issues.

First, the policy does not set out a clear, objective, and scientific basis for limiting strategic cropping lands to areas occupying between 1.5-2.2% of Queensland's land area. Up-to-date scientific data must form the basis of determining the food producing potential of Queensland soils. It is incomprehensible that the best agricultural and soil data available to the Department is from 1993 – data that is nearly 20 years old[5]. Consistent with the Queensland government's recognition of climate change, this data must take account of the increased (and unexpected) variability in rainfall patterns, and similar factors.

Second, the term "cropping", which is referred to in the environmental attributes upon which Map 1 is based, is undefined. It appears to be limited to broad-scale cropping and irrigated agricultural schemes that produce goods for export only. We recommend cropping be given a broad meaning consistent with the real contribution that agriculture has for Queensland now, and in the future.[6] We reiterate that it should incorporate food security as recommended above. We note also that distinguishing between cropping for food for human consumption, and cropping for other uses, is critical. Certain cropping uses, such as biofuel cropping, carbon plantations or cropping for feedlot inputs also pose serious threats to Queensland's food security. The final planning framework must also provide for buffer zones around best cropping lands and, extend to protect the underground and surface waters on which agriculture depends. As an example, storage ponds for wastewater from coal seam gas production should be prohibited on and around good quality agricultural land.

Third, although we support a tiered approach to development assessment over different classes of cropping land what the Department has proposed is a tiered system that is confusing and which omits consideration of the social and environmental significance of the cropping lands. This omission, particularly when the proposed classification makes clear reference to matters of economic production, is in direct conflict with well recognised principles of ecological sustainable development – principles which are championed by the Queensland government and which find legislative support in our planning and development laws[7].

5 A NEW STATUTORY PLANNING INSTRUMENT

In order to give effect to the policy position to protect cropping lands from competing land uses that will permanently alienate its food producing capacities, two statutory instruments are needed:

- A State planning instrument to guide development assessment decisions for projects assessed under the *Sustainable Planning Act 2009*; and
- An Environmental Protection Policy (EPP) to guide development assessment decisions for projects assessed under Queensland resource legislation

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[5] I refer to footnote 1 in the discussion paper

[6] Crop is defined in the *Agricultural Chemicals Distribution Control Act 1966 (Qld)* as standing cultivated plants, trees or pastures, and also includes any vegetable growth prescribed to be a crop for the purposes of the Act. No vegetable growth has been prescribed under the regulation.

[7] For example, see *Sustainable Planning At 2009*, s8; *Petroleum & Gas (Production and Safety) Act 2004*, s3(1)(a); *Environmental Protection Act 1994*, s3. I note that ecologically sustainable development, or a derivative of it, is not part of the objects of the *Mineral Resources Act 1989* or the *State Development and Public Works Organisation Act 1971*.

5.1 State planning Instrument

Firstly we support the Department's decision to develop a new State planning instrument that defines the levels of assessment for strategic cropping lands.

In our opinion the appropriate instrument would be a state planning regulatory provision, followed by a state planning policy. Under the *Sustainable Planning Act*, a state planning regulatory provision is the most powerful state planning instrument which can regulate development in key ways, including[8]:

- Declaring development to be self assessable, requiring compliance assessment, assessable or prohibited development;
- Require code or impact assessment for assessable development;
- Include a code for IDAS, or other criteria for the assessment of development applications.

A state planning policy simply cannot regulate development in this way. *SPP 1/92 Protection of Good Quality Agricultural Land* demonstrates the lack of enforceability in respect of state planning policies – *SPP 1/92* has just not worked to protect good quality agricultural land from competing developments.

The power to make a state planning regulatory provision is available where there is a significant risk of serious environmental harm or serious adverse cultural, economic or social conditions occurring in a planning scheme area. The Department acknowledges these conditions are satisfied in relation to cropping lands in Queensland. Like State planning policies state planning regulatory provisions are required to be incorporated into local planning instruments – therefore they have the advantage of sharing responsibility for achieving the outcomes between local Councils and State departments.

We understand the proposed assessment criteria, which will give effect to the draft policy position, have not been drafted. We look forward to the opportunity to contribute to the drafting process. In the interim we urge the Department to consider the following questions when developing the draft criteria:

- What objective, scientifically based criteria are used to assess the ecological attributes of Queensland cropping lands? This ecological data would inform the production of a cadastral map, identifying different classes of cropping land.[9]
- What is the risk of permanent alienation? Risk assessment considers the consequences of an action against its likelihood.
- Do any other factors mitigate the risk of permanent alienation?
- Do any other factors work to support protection of the cropping land? Grounds in favour might include current and proposed farm/land management approaches, proximity to/within population centres.

We strongly object to any loopholes in a planning framework that would allow any project to avoid assessment against the relevant criteria. This objection extends to those projects that are said to be "in the overwhelming public interest". The term public interest is undefined. The term "overwhelming" is apt to mislead. The policy decision to protect agricultural lands from competing land uses is itself, a product of public interest evaluation. A second bite at this particular fruit is inappropriate.

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[8] See *Sustainable Planning Act*, s21

[9] We would strongly support a process whereby landholders, who challenge the cropping classification assigned to their land, can apply to have an independent land assessment (akin to the 'ground-truthing' process under the *Vegetation Management Act* for a property map of assessable vegetation PMAV).

Similarly, we are cautious to support promises of rehabilitation in this context. There is no objective and independent evidence that we have seen that sterilization of cropping land can be reversed in human timeframes, given a range of realities including, the complex ecology of soils.

5.2 Environmental Protection Policy

We must be careful not to ignore that state planning instruments, in any of its guises, has no legal weight in decisions made under Queensland resources legislation (in other words, mining, petroleum and gas projects, projects that are exempt development under *Sustainable Planning Act*, or projects declared 'state significant' under the *State Development and Public Works Organisation Act 1971*). State planning instruments are not included within the standard criteria under the *Environmental Protection Act 1994*, and are not then mandatory considerations in assessing the merits of an application for an environmental authority.

For development projects that are regulated by the mining and petroleum/gas laws and which impact Queensland cropping lands we recommend the development of an Environmental Protection Policy (EPP) for agricultural land under the *Environmental Protection Act 1994*. The Department of Environment and Resource Management (DERM) would be responsible for the EPP.

An EPP for protecting agricultural land is the most appropriate instrument for statutory protection for agricultural land. It would apply across Queensland. An EPP may be made about the environment or anything that affects or may affect the environment[10]. Protecting the productivity/fertility of Queensland soils is within the legislative parameters of an EPP. It can be sufficiently broad in scope to identify a tiered approach to protecting different classes of cropping land. The EPP should give DERM powers to refuse an application for an environmental authority if the project would permanently alienate the food producing capacity of the relevant land.

We do not support the use of offsets in all but the most limited circumstances. We advocate for offset rules that contain clear, defensible, scientifically based method for quantifying the relevant value to be offset (here it relates to food production), and require an available, ecologically equivalent and enduring offset (one that minimises the risks of the offset failing as a consequence of climate change, pest and disease threats and natural disasters). Again, we strongly oppose a clause in an EPP that permits financial contributions being paid in lieu of an approved cropping offset[11].

Compliance with an EPP is a mandatory requirement (by virtue of being included within the definition of standard criteria[12]) for decisions to grant environmental authorities under the *Environmental Protection Act*. Accordingly a new EPP would relevantly apply to decisions to grant:

- Environmental authorities (mining activities); and
- Environmental authorities (Chapter 5 activities).

A new EPP could also apply to other environmental authorities assessed under the *Sustainable Planning Act* framework (Chapter 4 activities), with minor amendments to the planning law.

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[10] *Environmental Protection Act 1994*, s27(1)
[11] See our past submissions on this topic, www.edo.org.au/edoqld/edoqld/lawreform/lawreform.htm
[12] Standard criteria is defined in the *Environmental Protection Act 1994*, Schedule 4 (Dictionary)

6 AMENDMENTS TO THE RESOURCES SECTOR LEGISLATION

In order to support the development of an EPP agricultural protection, the following amendments to the resources legislation would be necessary (they are not exclusive):

- Including protection and preservation of agricultural lands within the objects of the various Acts
- Requiring applicants to identify, as part of the application, whether all, or part of, the proposed tenure or its associated infrastructure, includes mapped cropping land
- Expand opportunities for landowners and third parties to participate in the assessment and determination of tenure/environmental authorities (currently third party rights exist only for mining lease applications). Third party participation enhances accountability and transparency.

We disagree that any distinction should be made between the levels of assessment for mining and oil/gas projects. Clearly the footprint of the oil/gas well is a relevant factor in assessing risk, which distinguishes its impact on cropping lands from the impacts of an open-cut mine. However, the infrastructure associated with oil/gas production can have equally permanent impacts. As an example, saline wastewater from coal-seam gas projects can impact surrounding farmlands, farmlands that are outside the footprint of the well. This example is the subject of ongoing dispute in the Surat basin. Furthermore, the impact of one oil/gas well may be minimal, but many hundreds of small oil/gas wells may permanently alienate vast tracts of food producing lands.

A major omission in the proposed framework is a discussion of the *State Development & Public Works Organisation Act 1971*. At present this Act operates to concentrate decision making power in the Coordinator General of the Department where matters of 'State significance' are involved. State significance is determined according to the economic contribution of the project to Queensland. It does not contain any mandatory requirements to avoid environmental or social impacts.

This Act can (and has) gazump any policy initiative to protect agricultural land. We remain deeply concerned that any positive efforts by the Department to protect Queensland's agricultural lands will be difficult to implement without substantial changes to the State Development Act. Changes are needed to increase its transparency, its accountability and align it with best practice environmental governance. One of several changes needed is if the Coordinator General declared a project a significant project, DERM must retain its concurrence powers to refuse an application for an environmental authority if the project would permanently alienate the food producing capacity of the relevant land.

7 DEVELOPMENT ASSESSMENT GUIDELINES

We reiterate our comments in relation to the preparation of State planning instruments, an EPP and the relevant assessment criteria. Again, we object to any loopholes in the policy that would allow a project to avoid assessment against the relevant criteria, even a project that is said to be "in the overwhelming public interest".

We reiterate our concerns towards the use of offsets as a policy instrument.

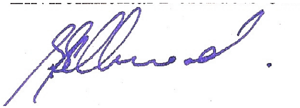
We look forward to the opportunity to contribute to the drafting process.

8 CONCLUSION

A moratorium on new mining, oil/gas leases and licences must be declared until such a time as the policy and planning framework to protect Queensland cropping land is in place.

EDO is available to answer any questions the Department has regarding the comments and recommendations in this submission. We ask the Department to maintain open dialogue with our organisation, as one of many interested stakeholders. Lawyers at our office are in a position to assist your Department in drafting the proposed State planning regulatory provisions, SPP or EPP.

Yours faithfully



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