

Environmental Defender's Office of North Queensland Inc.



Monthly Newsletter: January 2011

*Current matters of public interest environmental law and how they affect
the community in North Queensland*

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Gasland—to screen in Cairns on 21 January

EDO-NQ is partnering with the Australian Conservation Foundation (ACF) and Cairns and Far North Environmental Centre (CAFNEC) to screen "GasLand" in Cairns on Friday, 21 January 2011 (with kind assistance from End Credits film club).



"GasLand" is a 2010 documentary, written and directed by Josh Fox, focusing on American communities impacted by natural gas drilling (particularly a production process by hydraulic fracturing or "fracking"). "Fracking" involves pumping a slurry of sand, water and a mix of chemicals under high pressure to fracture rock and free the gas. The problem is that in many places the toxic, methane-rich mix has seeped into aquifers and surface waters, producing undrinkable water for locals and a range of health effects attributed to the pollution. "Fracking" has left residents able to ignite their tap water, resulted in nearby residents experiencing a variety of chronic health problems, contaminated water wells or surface water, and led gas companies to replace affected water supplies with potable water or water purification kits.

For those thinking GasLand depicts a purely American phenomenon, think again. "Fracking" is the method currently being used or proposed to extract large quantities of coal seam gas (CSG) from rock formations in Queensland and other parts of Australia and, in some ways, the environmental and health-related risks associated with "fracking" in Australia may be even greater.

"GasLand" has received critical acclaim, having won the 2010 Sundance Film Festival's Special Juried Prize.

- "One of the most effective and expressive environmental films of recent years . . . 'GasLand' may become to the dangers of natural gas drilling what 'Silent Spring' was to DDT." (Robert Koehler, Variety (25/01/2010))
- "Gasland . . . just might take you from outrage right into the fire of action." (Stewart Nusbaumer, Huffington Post (18/02/2010))
- "The paragon of first person activist filmmaking done right . . . a remarkably urgent diary of national concerns." (Eric Kohn, IndieWire (30/01/2010))
- "An explosive and timely film . . . a horror movie, and a wake-up call." (Julie Riggs, ABC Radio National (19/11/2010))

"GasLand" will be shown at the JUTE Theatre (located in the CoCA; phone: 07 4050 9444), 96 Abbott Street, Cairns, beginning at 7:00 pm. A short Q&A with Patricia Julien of the Mackay Conservation Council and EDO-NQ's Principal Solicitor, Patrick Pearlman, follows the 1-hour 45-minute film. Tickets are \$12 at the door (\$10 concession) and refreshments will be available.

EDO-NQ in court for much of December

EDO-NQ solicitors were in court for much of the first half of December, participating in four proceedings being heard by the Planning & Environment ("P&E") Court in Cairns last month. The proceedings were:



- ***Garners Habitat Action Group Inc. v Cassowary Coast Regional Council, P&E Appeal***

No. 74/2010 (EDO-NQ represented appellants challenging council's approval of a high-density residential development in a rural conservation zone labeled as critical habitat.)

- ***Mark & Katrina Moore v Cairns Regional Council, P&E Appeal No. 120/2010*** (EDO-NQ represents local residents who have challenged council's approval of a residential development in a rural area located adjacent to the Wet Tropics World Heritage Area.)

- ***R Angelini v Cairns Regional Council, P&E Application 202/2010*** (In a case related to the Moores' appeal above, EDO-NQ assisted the Moores in opposing the developers' efforts to obtain a declaration that preliminary approval of a material change of use overriding the planning scheme—the action that was the basis for the Moores' appeal—was unnecessary.)

- ***Robert Prettejohn v Cairns Regional Council, P&E Appeal 159/2010*** (Here, EDO-NQ represents Save Our Slopes, a community action group, which has elected to participate in this proceeding in order to support council's refusal to approve a residential development that would have been located on top of scenic Taylor Point.)

Procedural schedules were established in the *Prettejohn* and *Moore* appeals and the cases are presently slated to go to hearing in May 2011. As discussed below, the P&E Court ruled on the merits of the cases in *Garners Habitat* and *Angelini*. Unfortunately, after a trial that spanned four days, the P&E Court ruled against the appellants in *Garners Habitat* and approved the proposed development. On a brighter note, the P&E Court rejected the developers' application for a declaration in *Angelini* after a half day hearing.

Planning and Environment Court rejects Garners Beach appeal

EDONQ represented Garners Habitat Action Group Inc. (GHAG) in its appeal of the Cassowary Coast Regional Council's (CCRC) January 2010 approval of a development application that sought a material change of use to community title residential and a reconfiguration of lot.

The appeal was on fairly narrow grounds, namely that the proposed development conflicted with Planning Scheme Policy 4 of the CCRC's planning scheme and that sufficient grounds did not exist to justify approval notwithstanding the conflict. In addition, at the outset of the trial a preliminary point was made by developers that there was no justiciable conflict with the planning scheme since, under *the Integrated Planning Act* (IPA) a planning scheme policy is subordinate to and technically not part of the planning scheme. EDO-NQ argued that the CCRC had "adopted, incorporated or applied" the policy per IPA s 2.1.18, and that the policy thereby became part of the actual planning scheme.

Unfortunately, in a decision issued 16 December 2010, the Court (per Judge Everson), the Court ruled against GHAG on all points in dispute, concluding that the planning scheme policy in question was not part of the planning scheme itself, that there was no conflict with the planning scheme in any event because the policy was merely a guide, and that there were sufficient grounds to justify approval of the development regardless of any possible conflict. However, despite these determinations, the Court allowed the appeal in part in order to impose additional conditions on the development as approved. A full decision and order is expected to be issued by 17 January 2011.

While EDO-NQ and GHAG are very disappointed with the outcome of the case, it does provide some helpful lessons for community groups interested in running an appeal in the P&E Court.

- ***Start drafting your closing submissions at the earliest possible moment (when you lodge the notice of appeal, if not earlier).*** Drafting your closing submissions (*i.e.*, the final written argument based on the facts/law) from the moment you lodge the notice of appeal (or even before) gives you an outline of the elements of the case you're trying to make and a roadmap for evidence that you need to develop - either in your case-in-chief or through cross examination.
- ***Cast as wide a net as possible in your initial pleading in terms of planning instruments that a development is alleged to be in conflict with - and amend your pleading as soon as possible if you find additional grounds for challenging the development.***
- ***Get your experts on board and briefed as soon as possible.***
- ***Don't panic if new documents or evidence are disclosed shortly before trial.*** While you might be able to seek an adjournment if substantially prejudiced, you should be aware of your main arguments and this extra material may not be relevant or worth getting excited over.
- ***Be prepared for last minute objections and preliminary points arguments - and more importantly, insist on the Judge declaring whether such objections and points will be addressed prior to putting on evidence or in submissions.***
- ***Try to get an order of presentation of witnesses agreed to among the parties prior to the commencement of the hearing.***
- ***Be prepared for missed deadlines.***

Successful outcome in Angelini

A much better outcome was obtained in connection with the *Moore* and *Angelini* matters. In *Angelini*, the developers asked the P&E Court to declare that the preliminary approval of a material change of use overriding the planning scheme - which the developers themselves applied for - was unnecessary and should be refused.

The effect of this would have been to deny the Moores standing to appeal Cairns Regional Council's development approval in the *Moore* case because the preliminary approval for a material change of use was the part of the developers' application that the Moores were entitled to appeal. Under IPA, a material change of use is an impact assessable development subject to merits review; the other component of the developers' application - a reconfiguration of lot to subdivide the property - is a code assessable development that is not subject to merits review under IPA. Had the developers convinced the Court that the preliminary approval of a material change of use should be refused, only the reconfiguration of lot would remain and the Moores would have been unable to appeal that particular decision.

Happily, the P&E Court (per Judge Everson) rejected the developers' argument and ruled that a material change of use was being sought, and consequently the Council was right in insisting upon such an application. Accordingly, the appeal in *Moore* was allowed to go forward.

Happy New Year from EDO-NQ



EDO-NQ wishes all its valued members and supporters a very happy new year, and all the best for 2011. Both of EDO-NQ's solicitors have now returned from holidays, fully rested and settled into their roles. May 2011 bring victories for the environment and the public interest.

You need more than money to litigate

Running a merits appeal in the Planning and Environment Court takes more than money - it also requires substantial time and expertise. EDO-NQ can help reduce costs by providing free legal advice to clients and in some cases representing clients in court if the case matches our case guidelines.

However, it's not enough to simply have a solicitor nor will you avoid substantial costs simply by getting free legal representation. Even with free legal counsel, litigation remains a costly and expensive process and generally requires additional resources such as:

Experts. The P&E Court relies heavily on expert evidence. Appeal rights against a decision to approve a development generally comes by way of merits review, which requires the Court to consider the original development application anew and substitute a new decision in place of the local council's decision. It would be rare to achieve success running an argument on purely technical or legal grounds.

As such, you should compile an exhaustive list of experts likely to be critical in proving your case (or disproving the opponents' case) as soon as possible. Common examples of experts you may need are:

- An economist to establish need for a development, or lack of it.
- A town planner to speak on the proper interpretation and application of the relevant planning scheme and other planning instruments.
- An ecologist to address impacts on flora or fauna.
- An agronomist if the development will impact good quality agricultural land.
- A hydrologist if there will be impacts on water resources.

The important point is that if you wish to argue a point in court, it will need to be supported by evidence. Any arguments you wish to run on expert evidence will need to be in your Notice of Appeal, so you should hire experts as soon as possible.

Barristers. Barristers specialise in making arguments to the court. It may be worth hiring a barrister early in the proceedings to review your Notice of Appeal to ensure you are making the most persuasive arguments possible. Although solicitors can give accurate advice, a barrister may know more about persuading the court. Your solicitor can advise you if a barrister is needed.

Time. Running a case will take a substantial time commitment, especially if you're not paying for full legal representation. You will need to ensure all court deadlines are complied with and that requests from the other parties are replied to promptly. Failure to do this may result in costs awarded against you.

Contact us

To become a member of EDO-NQ, or to receive legal advice on matters of public interest environmental law, please contact us:

Suite 1, Level 1, 96-98 Lake Street
 CAIRNS QLD 4870
 Ph : 07 4031 4766; Fax: 07 4041 4535
 Email: edonq@edo.org.au