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An Update on the Paradise Dam Case:

23 March 2009

Quick background...

You may recall the earlier updates on this case. This case is a public interest enforcement action in the Federal Court for breach of a Commonwealth condition of approval requiring that a fish transfer device suitable for lungfish be installed and operated at the Paradise Dam on the Burnett River. On one side is the Applicant and EDO's client, the Wide Bay Burnett Conservation Council ("WBCC"). WBCC wants the law upheld and deficiencies in the design and operation of the fishways rectified. On the other side is the owner and operator of the dam, Burnett Water Pty Ltd, a subsidiary of public company SunWater Limited, which itself is a corporation owned by the Queensland Government.

Burnett Water argues that it has complied with its conditions of approval, and blames the drought for the downstream fishway failing to work for over 3 years.

Site Visit and Discovery of Documents

Our understanding of the operation of the Dam was assisted by a site visit to the Paradise Dam in December, lead by barrister Dr. McGrath and accompanied by expert Mr. Jim Tait, Ms. Jo Bragg of EDO Qld and Mr. Roger Currie of WBCC. During that visit we observed the upstream fishway in operation but the downstream fishway was high and dry, so no lungfish could travel downstream using the downstream fishway at that time.

In December 2008 Burnett Water sought to have the case stayed pending the outcomes of an investigation by the Commonwealth Department of Environment into the problems in operating the fishways on the Paradise Dam and a potential criminal prosecution by the Commonwealth. WBCC was successful in having that application dismissed by Justice Logan.¹

On 12 December 2008 on behalf of WBCC, barrister Dr Chris McGrath and EDO were successful in gaining an order from Justice Logan for discovery of documents from Burnett Water Pty Ltd. Since that date EDO staff and supporters have reviewed and classified nearly 5000 relevant documents about lungfish and hydrology and fishways supplied by Burnett Water. This has been a major undertaking as we search for documents helping or harming our claim. The documents are not available to the general public at this stage but will be public if tabled in open Court.

Timetable Set for September Hearing and Expert Evidence

On 18 March 2009 Justice Logan gave directions, including for filing of experts reports and other witness statements, in anticipation of a four week hearing in the Federal Court beginning 7 September 2009. Dr McGrath sought orders for "joint expert reports", whereby the fish experts for WBCC and Burnett Water prepare joint reports and only do separate reports on areas of disagreement. Justice Logan however preferred the more conventional approach of separate expert reports. Justice Logan also did not agree with the application on behalf of WBCC that Burnett Water provide discovery of water quality documents, as he considered that was outside the scope of the Statement of Claim starting the proceedings.

¹ *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd* [2008] FCA 1900.

Fresh Statement of Claim and Rewriting Proposed Injunction

Barristers for Burnett Water argued on 10 March 2009 that WBBCC had not provided sufficient particulars (i.e. details of the alleged facts) of how Burnett Water was said to have been “reckless” in breaching the condition of Commonwealth approval of the Paradise Dam requiring a fish transfer device suitable for the lungfish. Justice Logan agreed with Burnett Water’s argument. His Honour thought the Statement of Claim would be best reformulated and on 18 March 2009 ordered the Statement of Claim to be struck out, with leave for WBBCC to refile the Statement of Claim by 3 April 2009.²

Another application by Burnett Water was unsuccessful. Burnett Water argued in effect that WBBCC be ordered to state how the fishway needed to be fixed so as to be suitable for lungfish. However his Honour accepted Dr. McGrath’s argument that it would be enough that WBBCC showed the current fishway was not suitable. WBBCC was not obliged to specify how the fishway needed to be fixed, though possibilities might emerge as the evidence is presented. This is a significant strategic and tactical win because WBBCC does not want to give a formula to Burnett Water or SunWater, or the proponent of the Traveston Crossing Dam, for a fishway that it says is “suitable for lungfish”. WBBCC’s position is that the Paradise Dam has caused serious impacts on lungfish in the Burnett River and that the fishways fall a long way short of fixing those impacts.

It has become apparent that Burnett Water and SunWater are devoting effectively unlimited resources to this case, retaining a leading Queen’s Council, Mr Danny Gore QC, to argue its case. WBBCC’s resources are very modest in comparison but it has a dedicated team of lawyers and expert witnesses and a strong factual basis for its claims. The Court’s order to reformulate the Statement of Claim presents an opportunity to incorporate many details obtained from the documents disclosed by Burnett Water that were previously not known by WBBCC. The case presented by WBBCC will ultimately be stronger because of this step in the litigation.

Stay Tuned

This is a landmark case where a regional conservation council is challenging a dam operator which is owned by a well resourced publicly listed company. Stay tuned! The public interest issues are many: corporate accountability; enforcement of development conditions and the survival of the vulnerable lungfish species.

If you’d like to donate tax deductible funds to help Wide Bay Burnett Conservation Council with this case, contact Emma-Kate Currie at the Wide Bay Burnett Conservation Council at wbbconservationc@bigpond.com or call 41 2333 61

Contact Jo Bragg at EDO Qld ph 32114466 for more information

² *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 2)* [2009] FCA 237.