



Appeals Convenor
Environmental Protection Act 1986

**REPORT TO THE
MINISTER FOR ENVIRONMENT**

**APPEAL IN OBJECTION TO THE DECISION OF THE ENVIRONMENTAL
PROTECTION AUTHORITY NOT TO ASSESS A PROPOSAL**
KIMBERLEY MARINE OFFLOADING FACILITY, PORT OF BROOME

PROPONENT: KIMBERLEY MARINE SUPPORT BASE PTY LTD

Appeal Number 044 of 2020

October 2020

Appeal Summary

This is a report in relation to an appeal against the decision of the Environmental Protection Authority (EPA) not to assess a proposal by Kimberley Marine Support Base Pty Ltd (proponent) to develop the Kimberley Marine Offloading Facility at the Port of Broome (the proposal), in the Shire of Broome.

The proposal includes construction and operation of a deep-water floating wharf, along with associated onshore hardstand and terminal facilities suitable for container and general cargo stevedoring for coastal trading vessels, berthing and mooring for cruise vessels, and roll on/roll off ships.

Broadly the appellant contends that potential impacts from the proposal on marine fauna are significant and warrant formal assessment under Part IV of the *Environmental Protection Act 1986* (EP Act). The appellant also contends that potential cumulative impacts from the proposal, along with two other proposed developments in the vicinity have not been assessed, and that the public has not been given the opportunity to provide comment on several management plans prepared by the proponent.

In responding to the appeal, the EPA acknowledged the ecological and heritage values present in the area. The EPA advised however that it considered the design of the proposal is sensitive to those values, is unlikely to have a significant impact on the environment and does not warrant formal assessment. The EPA was of the view that the potential impacts of the proposal can be adequately managed through implementation of the proposal in accordance with the referral documentation, the proponent's management and mitigation measures, and other statutory decision-making processes.

Having regard for the information presented during the appeal investigation, it is considered that the EPA was justified in determining that the proposal does not warrant formal assessment under Part IV of the EP Act.

Recommendation

It is recommended that the appeal be dismissed.

INTRODUCTION

This report addresses an appeal lodged by Environs Kimberley in objection to the decision of the Environmental Protection Authority (EPA) not to assess a proposal by Kimberley Marine Support Base Pty Ltd (proponent) to develop the Kimberley Marine Offloading Facility at the Port of Broome (the proposal), in the Shire of Broome.

The proposal includes construction and operation of a deep-water floating wharf located approximately 200 metres (m) south of the existing Broome wharf (see Figure 1). It also includes associated onshore hardstand and terminal facilities. The proposal will be suitable for container and general cargo stevedoring for coastal trading vessels, berthing and mooring for cruise vessels, and roll on/roll off ships¹.

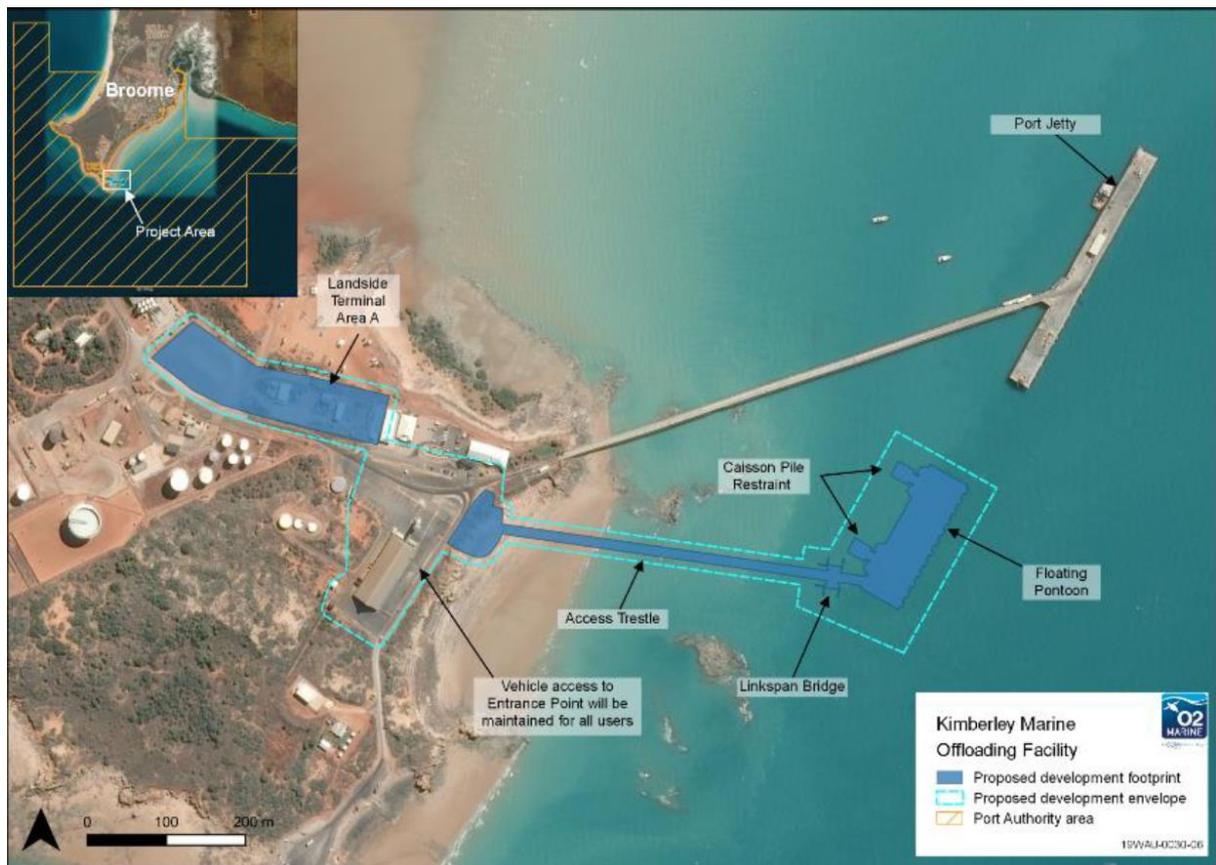


Figure 1 – Proposal location and layout

(Source: Kimberley Marine Offloading Facility Environmental Review Document, August 2020)

In July 2020 the proposal was referred to the EPA to determine whether or not the proposal required environmental impact assessment and, if so, what level of assessment would be applied.

The proposal was advertised for seven-day public comment as part of the referral process and 58 public comments were received.

The EPA considered that the likely environmental effects of the proposal were not so significant as to warrant formal assessment under Part IV of the *Environmental Protection Act 1986* (EP Act). Central to the EPA's decision was the scale, extent, severity, and duration of

¹ O2 Marine, *Kimberley Marine Offloading Facility Environmental Review Document*, August 2020

potential impacts. The EPA was of the view that the potential impacts of the proposal could be adequately managed through implementation of the proposal in accordance with the referral documentation, the proponent's management and mitigation measures, and according to existing or improved Kimberley Port Authority controls and standards.

In August 2020, the EPA released its decision not to assess the proposal and provided Public Advice on the environmental aspects of the proposal, and it was against this decision the appeal was received.

Context

The area within which the proposal is located is under the jurisdiction of the Kimberley Port Authority (KPA) and is zoned 'Port' in the Shire of Broome's Town Planning Scheme. The KPA Masterplan for the Port of Broome identifies the area as 'Port operational terminal'.

The proponent has legal agreements with the KPA to secure tenure and lease the area for construction and operation of the proposal. These agreements set out how the proposal will be managed and operated. The proponent is required to develop and submit environmental management plans, for KPA's approval, for both construction and operation of the proposal. The proponent is also required to undertake baseline environmental assessments which will inform ongoing monitoring and reporting to the KPA over the lifetime of the lease agreement.

The proposal's development envelope is surrounded by the Yawuru Nagulagun / Roebuck Bay Marine Park, which is jointly managed by the Department of Biodiversity Conservation and Attractions and the Yawuru traditional owners.

OVERVIEW OF APPEAL PROCESS

In accordance with the EP Act, for an appeal against a decision of the EPA not to assess a proposal, two reports relating to the matters raised on appeal are required for the Minister for Environment to determine the outcome of an appeal:

- a report from the Appeals Convenor, as required by section 109(3) of the EP Act
- a report from the EPA on the appeal, as required by section 106(1).

This document is the Appeals Convenor's report to the Minister.

In order to properly advise the Minister, the Appeals Convenor conducted an investigation into the matters raised on appeal. The investigation included:

- review of the matters raised in the appeal submitted by the appellant
- review of the report from the EPA provided under section 106 of the EP Act
- discussions with the proponent on 22 September 2020 in relation to issues raised in the appeal
- review of the response to the appeal provided by the proponent on 29 September 2020
- a video meeting with the appellant in relation to issues raised in the appeal on 22 October 2020
- review of relevant information, policy and guidance as considered necessary.

The environmental appeals process is a merits-based process. For appeals in relation to an EPA decision not to assess, the Appeals Convenor normally considers questions of environmental significance, relevance of factors, additional information not considered by the EPA, and whether other approvals processes can adequately address the relevant

environmental factors without the need for formal assessment by the EPA. The level of public interest may also be relevant.

OUTCOME SOUGHT BY APPELLANT

The appellant requested that the Minister remit the proposal to the EPA for formal assessment, and that the level of assessment be set at Public Environmental Review.

GROUNDINGS OF APPEAL

The appellant raised several concerns, which have been broadly summarised under the following grounds:

- marine fauna.
- cumulative impacts.
- public input into management plans.

GROUND 1: MARINE FAUNA

The appellant submitted that the area is inhabited by conservation significant species such as the Australian Snubfin Dolphin, as well as migrating Humpback whales. The appellant raised concerns that the proposal and corresponding increase in shipping movement would result in increased noise and boat strikes on marine fauna. The appellant contends that there is not enough information available to understand the potential impacts on the Snubfin dolphin and that the proposal should be remitted for a Public Environmental Review so that expert advice can be sought from cetacean experts.

Consideration

Information available

The EPA advised that extensive surveys and monitoring within and adjacent to the proposal area have identified that the marine waters support a variety of marine fauna, including several of conservation significance. The relevant marine fauna studies are listed in the proponent's Environmental Review Document (ERD)². The proponent advised that it also commissioned a Marine Fauna Desktop Assessment Report which was provided to the EPA with its referral documents.

Snubfin dolphin

The ERD acknowledges that the Australian Snubfin dolphin (*Orcaella heinsohni* - Migratory (EPBC Act), Priority 4 (BC Act), Vulnerable (IUCN)) is vulnerable due to its life history, fragmented distribution, and low numbers in the region.

The EPA advised that the Snubfin dolphin occurs mostly in shallow waters and forages in a variety of habitats including mangrove communities, seagrass beds, sandy bottom communities, open coastal areas with rocky shores and coral reefs. Previous surveys have identified populations commonly foraging and feeding over shallow mudflats such as those of north eastern Roebuck Bay, which provide a greater extent of available food than is found within the proposal area.

² Page 47-48 O2 Marine, Kimberley Marine Offloading Facility Environmental Review Document, August 2020

Humpback whale

The ERD notes that Humpback whales (*Megaptera novaeangliae* - Migratory (EPBC Act), Conservation Dependent (BC Act), Least Concern (IUCN)) occur in the vicinity of the proposal during their annual migration between July and September each year.

The EPA advised that the Humpback whale has not been recorded by previous surveys within the proposal area, however they have been sighted within 10 kilometres, in deeper waters and are known to move through the vicinity during their annual migration.

In response to the appeal, the EPA advised that it considered that there was sufficient and adequate information available to assess the potential environmental impacts from the proposal on marine fauna.

Potential impacts on marine fauna resulting from the proposal

The ERD identifies potential impacts to marine fauna which include (among other things):

- underwater noise emissions from piling operation.
- increase risk of marine fauna vessel strike from construction vessels (construction phase).
- increase vessel movement resulting in greater risk of vessel strike on marine fauna (operational phase).

Underwater noise

The proponent advised that in recognition of the potential noise impacts resulting from construction, particularly from piling of pylons, it commissioned an Underwater Noise Assessment (noise study) to understand the underwater noise impacts on conservation significant marine fauna. The noise study was provided to the EPA. The noise study advised that piling in shallow water attenuates noise faster than deep water piling. The study suggested that to mitigate the effects of piling on marine fauna, works should be scheduled during times when the water depth is less than 5m. To mitigate the impact of deep-water piles, management zones based on the distance from the piling, should be employed for individual species.

The EPA advised that the proponent's referral information provides comprehensive detail on the mitigation and management measures proposed for marine fauna. It advised that to address the potential impacts to marine fauna, and in line with the recommendations of the proponent's surveys and studies, the proponent has committed to the following mitigation and management measures:

- minimising underwater noise emissions from piling through targeting shallow depths wherever possible.
- avoiding deep water piling between July to September when humpback whales are migrating.
- engaging trained marine fauna observers prior to and throughout piling operations.
- lighting sensitive to marine and terrestrial fauna will be utilised and piling limited to daylight hours.
- trained marine fauna observers will be used prior to and throughout piling.

The proponent advised that it would adopt further measures in design and construction to minimise noise transfer in the marine environment. These include reducing the number of pylons, constructing the pylons in a way that optimises techniques of drilling and vibing rather than piling, and constructing during low tide. The proponent also advised that the lease agreement with KPA requires it to align with industry best practise environmental management for construction.

The EPA considered that noise impacts from construction would be localised and temporary. The EPA advised that it recommended in its Public Advice that the proponent continue to evaluate alternative methods and techniques to avoid and minimise underwater noise impacts during the temporary construction period (for example, marine screw piling).

Boat strike

The proponent's ERD acknowledges that marine fauna may be impacted by vessel strikes during construction. It considered that due to the mobility of dolphins there was minimal risk of injury for this species. The ERD states that the proposed development envelope does not contain important foraging habitat for marine fauna.

In its response to the appeal, the EPA advised:

The likelihood of vessel strikes during construction and operation is expected to be low to dolphins due to their high mobility and low for other marine fauna, such as whales, dugongs and turtles, due to the small scale of movements expected and the implementation of vessel speed controls of no more than 8 knots. Important foraging habitats for marine fauna including dolphins, whales, dugongs and turtles are not found within the proposal development envelope, and therefore, it is less likely these species will be in the direct path of vessel movements.

In response to the appeal, the proponent advised that the number of vessels serviced by the Port of Broome (at the existing wharf facility) has ranged from 800 to 1400 (according the KPA annual reports). The proposal will result in the Port of Broome servicing between 1000 and 1200 vessels annually.

The proponent's ERD states that vessels transiting through the Port of Broome to the proposal will be managed by the KPA in accordance with their existing policies and procedures. The proponent also advised that during the operational phase speed restrictions will be in place and the Port of Broome will limit the number of vessels using the facilities.

Prior to commencing operations, the proponent's TEMP will be required to be reviewed and approved by the KPA. The proponent advised that this would mitigate potential boat strikes by stipulating that maximum vessel speeds within all operational areas of the proposal will be five knots. Any incidents of marine vessel strike occurring within operational areas will be reported to the harbour master.

In coming to its decision to not assess the proposal the EPA advised:

Given the proposal activities do not include dredging, the proposed timing of construction activities to avoid and minimise impacts to key marine fauna species, and the proponent's ongoing monitoring and management of any potential impacts to marine fauna, the EPA considers that the proposal, as implemented consistent with the [ERD], is not likely to have a significant impact on Marine Fauna.

Conclusion

It is acknowledged that Roebuck Bay is home to conservation significant marine fauna, including the Snubfin dolphin, and that the Snubfin dolphin is significant and vulnerable and may be impacted by development in the area. Taking into account the existing body of research on the species and the proponent's commissioned studies, it is considered that proponent and EPA had adequate information to understand the presence of marine fauna and potential impacts resulting from the proposal.

Having regard for the measures adopted by the proponent to mitigate potential impacts of the proposal on the Snubfin dolphin and Humpback whale, including:

- construction during low tide
- construction outside of humpback whale season
- reducing the number of pylons
- utilising alternative methods of construction where possible
- monitoring through marine observers,

And acknowledging that vessels will have to comply with maximum speeds as stipulated by the KPA, it is considered that the EPA's decision that the potential impacts on marine fauna from the proposal would not be significant enough to warrant formal assessment, is appropriate.

GROUND 2: CUMULATIVE IMPACTS

The appellant submitted that there are two other proposals currently under consideration by the EPA – the Department of Transport's proposed Broome Boating Facility and the Shire of Broome's Town Beach Jetty. They contend that the potential cumulative impacts arising from the three proposals have not been assessed.

Consideration

The EPA advised that the Broome Town Beach Groyne Upgrade and Jetty Proposal (Town Beach Jetty) was referred to the EPA by the Shire of Broome in August 2019. The Town Beach Jetty included an upgrade to the existing groyne and construction of a new concrete jetty within Roebuck Bay adjacent to the main townsite and part of the Town Beach Masterplan. The proposed Town Beach Jetty is located approximately three kilometres north of the proposal.

The EPA advised that in September 2019, following a seven-day public comment period during which no comments were received, it determined that the likely environmental effects of the Town Beach Jetty were not so significant as to warrant formal assessment. The EPA advised that it considered the extent and consequence of the proposed impacts were predicted to be small.

In its response to the appeal, the EPA advised:

Given the small scale and temporary disturbance area, and distance of the Broome Town Beach Groyne Upgrade/Jetty Proposal from the proposal, a detailed assessment of cumulative impacts was not considered necessary.

The EPA advised that it has not received a referral for the Department of Transport's Broome Boating Facility, but understands that the Broome Boating Facility is a small public recreational boat harbour and boat ramp, located in an area that has already been disturbed and utilised for recreational boating activities.

The proponent advised that as part of its preliminary technical investigations, it commissioned a multicriteria analysis jointly with the Department of Transport and Yawuru Prescribed Body Corporate (PBC) to identify potential environment and heritage constraints for the proposal and the Broome Boating Facility, so that they could be evaluated concurrently. The study made recommendations regarding the siting of both facilities to minimise impacts to environmental and heritage values. The proponent advised that in response to the multicriteria analysis, the design of the proposal was amended, and the location of the Broome Boating Facility moved to another beach. The multicriteria analysis was provided to the EPA.

The proponent advised that it identified impacts to coastal processes as a potential cumulative impact related to its proposal and other's in the vicinity. The proponent advised that the proposal has been designed to avoid dredging and minimise altering of water flow and

sediment trapping to minimise disruption to coastal processes. As a result, the proposal's impact on coastal processes is minimal. It is understood that coastal processes modelling undertaken for the Broome Boating Facility includes the presence of future proposals such as this one.

In response to the appeal, the EPA advised:

In the event the Department of Transport's Broome Boating Facility is referred to the EPA, the [EPA] will ensure there is sufficient information in the referral about the combined impacts of the referred proposal with other nearby proposals in the vicinity.

Conclusion

While there are several proposed developments within the vicinity, the following is noted:

- the likely environmental impacts of this proposal are small in extent and localised in nature,
- there is no dredging and spoil disposal required,
- the proposal has been designed to minimise restrictions to water flow and prevent sediment trapping,
- the EPA has advised that it can consider the combined effects of multiple developments if other proposals in the vicinity are referred.

GROUND 3: PUBLIC INPUT INTO MANAGEMENT PLANS

The appellant raised concerns about the lack of opportunity for public comment on the following plans:

- the KPA's *Oil Spill Contingency Plan or Tactical Response Plan*
- the proponent's *Construction Environmental Management Plan*.

The appellant contends that there is no opportunity for public input into the effectiveness of these management plans in protecting the environment, and requested they be made available for comment as part of a Public Environmental Review comment period.

Consideration

Regarding the risk of oil spills, the EPA advised that it recognised that increased vessel traffic within the Port of Broome and surrounding waters may increase the risk of accidental hydrocarbon spill.

The EPA advised that the *Oil Spill Contingency Plan or Tactical Response Plan* is a document prepared by KPA rather than the proponent. The KPA enforces standard operational management practices including comprehensive vessel planning controls which considers all vessel traffic, tides and shipping movements. The EPA advised that because of the proposal, the KPA intend to update this document to address any additional risk.

The EPA advised that the proponent is committed to working with the KPA to ensure all levels of potential risk posed from an increase in vessel movements are adequately covered, including ensuring an adequate level of first response oil spill equipment is procured and maintained.

Under the lease arrangement with the KPA, the proponent is required to develop, submit for approval, and implement both a *Construction Environmental Management Plan (CEMP)* for the construction phase, and *Tenancy (operational) Environment Management Plan* for the operational phase. The proponent advised that all mitigation and management measures, as

well as the proposed monitoring outlined in its ERD and referral documentation will be included in the CEMP or TEMP. The EPA advised that it considered this information and that this information was published for public comment consistent with the *Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2016*.

The EPA advised that it considered that consultation on matters such as management plans can occur as a part of the proponent's and KPA's ongoing engagement with the local community (including the appellant).

Regarding stakeholder consultation, the proponent advised that there has been ongoing consultation with the community since 2016. The design and location of the proposal has been refined on multiple occasions in response to community concerns about cultural and environmental impacts. In addition to the proponent's engagement, the EPA advertised the proposal for seven-days as part of the referral process, receiving 58 submissions.

The proponent advised that they have committed to ongoing consultation with the public throughout the construction phase in accordance with their Stakeholder Management Plan. The proponent advised that their community engagement will consist of regular meetings with the KPA's Community Consultative Committee which includes representatives from the community, Yawuru traditional owners, and the Shire of Broome; a Marine Park Working Group; the Yawuru PBC; and others.

The EPA also advised that the KPA are currently in consultation with Yawuru PBC and the Department of Biodiversity, Conservation and Attractions with a view to expand the KPA Ongoing Marine Monitoring Program to be part of an Integrated Marine Environmental Quality Management Plan for the marine waters within the Port and the adjacent Marine Park.

Having regard for the existing opportunities for ongoing engagement between the community and the proponent and KPA, the EPA considered that a formal level of assessment was not considered necessary to achieve engagement.

Conclusion

It is acknowledged that Roebuck bay represents significant environmental and cultural value to the Broome community and that there is community interest in the development of the area.

Having regard for:

- the proponent's efforts to undertake community consultation for the proposal to date
- the opportunity to provide input during the EPA's seven-day public consultation period
- the option to provide further information on appeal
- and the ongoing engagement committed to by the proponent and KPA,

It is considered that there is not a need for a Public Environmental Review to allow further public consultation.

CONCLUSION AND RECOMMENDATION

Roebuck Bay represents significant environmental and cultural values to the community of Broome and beyond. The presence of conservation significant species such as the Snubfin dolphin is recognised in an extensive body of literature. The proponent has designed and will construct the proposal in such a way that impacts will be minimised. The following measures, and the legal agreement between the proponent and the KPA to implement them, have been considered in this report:

- minimising underwater noise emissions from piling through targeting shallow depths wherever possible

- avoiding deep water piling between July to September when humpback whales are migrating
- engaging trained marine fauna observers prior to and throughout piling operations
- lighting sensitive to marine and terrestrial fauna will be utilised and piling limited to daylight hours
- ongoing monitoring.

Having regard for the measures above, the EPA's finding that the potential impacts on marine fauna from the proposal can be adequately managed, is considered appropriate.

While it is acknowledged that there are several potential developments in the vicinity, the conclusion that the impacts of this proposal will be minor, along with the EPA's advice that cumulative impacts can be considered if the Department of Transport submits the Broome Boating Facility, suggest that further assessment of this proposal is not warranted.

It is noted that there have been previous opportunities for the community to provide input and the proponent and KPA have committed to ongoing engagement with the community.

Taking the above into consideration, the EPA's decision to not assess the proposal is appropriate. It follows that it is recommended that the appeal be dismissed.

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APPEALS CONVENOR

Investigating Officer:
Nikki Pursell, A/ Senior Appeals Officer