

Has the approval for the Flyers Creek wind farm lapsed? and other questions

The approval of the Flyers Creek wind farm was due to expire on March 14, 2019.

The Department has apparently ruled that approval did not lapse.

Given the documented history of renewables projects where extensions of approval in perpetuity have been decided by the Department, more particularly the Compliance function, it is incumbent upon IPC Commissioners to independently decide, with legal advice if needed, that the clause of the Conditions of Approval relating to the lapsing of this project has been clearly met.

To assist the Commissioners, I pose the following questions.

1. Have the Commissioners read the relevant approval lapsing clause (C5) in the Conditions of Approval, specifically after Modification 2.¹
2. In Modification 3, Infigen specifically asked for the modification of sections of the Conditions of Approval. No request was made to modify Condition C5. Have the Commissioners read the resulting clause C5?²
3. On what basis did the Department make these unrequested modifications to the Conditions of Approval?
4. Is this another example of departmental decisions advantageous to Infigen documented with the Department and the previous Minister?
5. Why can the Department make multiple significant changes to the original approval coincident with, but not part of, a Modification request when the community is restricted to commenting on the modification itself? (It can't be because of changes to the Act, because that is not what the Act says. In fact the Act is not as lenient as C5 as written by the Department to the benefit of Infigen)
6. To justify the compliance with the lapsing clause, Infigen would have written to the Department, the Department's Compliance function would have evaluated the "works" and documented its findings and the Department would have written back to Infigen with approval. Have Commissioners read all these documents? Will you publish them?

¹ C5. This Approval lapses:

- (a)
- (b) 5 years after the date of this Approval unless the Proponent has confirmed to the satisfaction of the Secretary that orders have been placed for wind turbines, or demonstrated that work subject of this Approval has been completed on the Site before the date on which the Approval would otherwise lapse under this condition. Work, for the purpose of this condition includes at least one of the following:
 - (i) internal track construction;
 - (ii) civil works associated with the construction of the foundations for the wind turbine footings;
 - (iii) control room construction;
 - (iv) electrical substation construction;
 - (v) underground cabling; or
 - (vi) internal overhead transmission line construction.

² After Modification 3, this same clause read:

C5. This project approval shall lapse five years after the date on which it was granted, unless works the subject of this approval have physically commenced before this time.

7. Do you think that Ms Richardson was misleading you by omitting the real reason for the site activities days before the project was due to lapse? ³
8. Why do you think Ms Richardson (and the Department) describe the activities as “preconstruction minor works”?
9. Will you visit the site and familiarize yourself with the “works”?
When did the “works” start and finish? What “works” from those listed as “preconstruction minor works” physically commenced before the lapse date?
10. Could the “works” be conceivably described as a sham? ⁴
11. What is the provenance of the temporary site hut?
12. Have you reviewed the documentation produced by the developer as a result of the “works”?
13. Are Commissioners aware of other potential sham extensions of wind farm approval dates as documented to the previous Minister and available from the Department, including for Infigen’s Capital 2 wind farm. (not mentioned in their meeting with you on July 8, 2019, I notice)
14. Infigen is a public company. Has the Board made a decision to construct the multi million dollar Flyers Creek wind farm? When?
15. Do you think there is consistency between the claim that “works” commenced before March 14, 2019 and Ms Richardsons statement to you on July 8, 2019 that:
“...we anticipate that we’ll start construction, all going to plan, in early 2020, so basically this time next year we’re hoping to be turning that sod and getting the project constructed,” ?
16. Considering the previous two questions suggesting approval and commencement of construction in July 2020 and Ms Richardson’s claim to the community at the May 8, 2019 CCC Meeting:
“MR indicated that commencement of construction is anticipated to occur later this year/early next year and is subject to all project approvals, contracts and finance being in place.”
that activity in February 2019 was only to try and circumvent the lapse clause? A sham?

³ IPC/Infigen Transcript page 5, line 15:

“MS RICHARDSON: Yeah. So 2019, this year, earlier this year in February time, we commenced some preconstruction minor works at the site that involved doing some survey work, some pegging out.”

⁴ Justice Kunc in the Supreme Court of NSW in 2016, on a matter solely concerned with the lapsing of a project wrote:

“ 58. It was submitted that, jointly and severally, the Relevant Works related to the subject matter of the Consent. The Relevant Works had been “physically commenced” because, applying Hunter Developments at [86] (see paragraph [82] below), they involved physical activity on the land to which the Consent applied **that involved an appearance of reality and were not merely a sham.**” (bolding added)
(Macquarie International Health Clinic Pty Ltd v Sydney Local Health District; Sydney Local Health District v Macquarie Health Corporation Ltd; Macquarie International Health Clinic Pty Ltd v City of Sydney Council (No 9))

17. Do you believe that the Department's statement in its Assessment (Page 2) is correct?:

“In February 2019, Infigen commenced the construction of the wind farm under the approval.”

Or is it a gaffe?

Those of us who are familiar with other possible sham decisions made by the Department under either variant of C5, strongly recommend that the Commissioners investigate the “works” that were physically commenced thus allowing the Department to claim on Page 2 of the Assessment that:

“the approval is no longer subject to the lapsing requirements in condition C5 of the project approval”

If you don't investigate, predictably others will.

I have little doubt that Infigen, if lawfully allowed, would eventually construct the Flyers Creek wind farm. Unfortunately, I believe they have left it too late having missed a key deadline.

Answering the above questions and others may cause the Commissioners to question whether the project has lapsed, which will make your current activity academic.